COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1973 **Cir. Ct. No. 2005CV2903**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LUKE E. SIMS,

PLAINTIFF-RESPONDENT,

V.

STAPLETON REALTY, LTD.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Vergeront and Bridge, JJ.

¶1 VERGERONT, J. This action concerns a dispute over a real estate broker's commission. The seller, Luke Sims, seeks recovery of $20,000 in earnest money retained by Stapleton Realty, Ltd. following the sale of his residence. Stapleton Realty counterclaimed asserting that the $20,000 is a portion of the

commission owed to it by Sims and seeking the full commission. The circuit court granted summary judgment in favor of Sims, concluding that the listing contract was void because of noncompliance with WIS. STAT. § 240.10(1) (2005-06)[1] and that Stapleton Realty had not fulfilled the contract term of obtaining an offer from the listed parties.

¶2 We conclude that, applying ***Buckman v. E.H. Schaefer & Associates***, 50 Wis. 2d 755, 185 N.W.2d 328 (1971), to the properly integrated documents, the contract is not void because of noncompliance with WIS. STAT. § 240.10(1). We also conclude that, even if the contract were construed to entitle Stapleton to a commission only if the offer came from the listed parties, based on the undisputed facts Sims has waived that condition. Accordingly, we reverse and remand.

BACKGROUND

¶3 The following facts are undisputed. On May 17, 2004, Luke Sims and Mary Jo Sims entered into a residential listing contract with Maureen Stapleton (Stapleton) of Stapleton Realty to sell their Oconomowoc, Wisconsin residence.[2] The contract gave Stapleton Realty the exclusive right to sell the property for the price of $899,000; the term of the contract was from May 17 to

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Mary Jo Sims and Luke Sims were married at the time they entered into the listing contract. However, they are no longer married and Mary Jo is not a party to this action. We refer to Luke Sims as "Sims." We do not recount separately the date on which Mary Jo Sims executed documents if that differs from the date on which Sims did, as that is not relevant to the issues on this appeal.

We refer to Maureen Stapleton as "Stapleton" and to the business as "Stapleton Realty."

May 31, 2004. The contract provided that the commission was 5% and, as relevant to this case, that the commission "shall be earned if, during the term of this Listing" the seller either sells or accepts an offer for the sale of the property or a purchaser is procured "at the price and on the same terms set forth in this Listing and in the standard provisions of the current WB-11 residential offer to purchase form even if Seller does not accept this purchaser's offer." The contract also provided that it was a "'one-party' listing for Andrew and Maria Stone Stein."

¶4 On May 24, 2004, Mary Stein, the mother of Andrew Stein submitted an offer to purchase the property for $885,000. Sims responded in a signed writing to Stapleton the next day with a list of changes to be made in the terms of the offer, including that the price difference should be split, resulting in a price of $892,000. On May 28, Mary Stein submitted a revised offer to purchase based on Sims' comments, including a purchase price of $892,000. Sims responded on June 1, 2004, to the revised offer with additional changes. That same day, Mary Stein replied through counsel to each of those changes, stating those that she was willing to agree to.

¶5 The next day Sims initiated negotiations by email with Stapleton to reduce her commission. Specifically, Sims wanted the percentage reduced to 4.25% so that he would net what he would have done had the price been that in the listing contract; and he wanted this change reflected in a signed amendment to the listing contract before he signed any offer to purchase. If Stapleton would do that, he wrote, he would respond to the buyer's June 1 communication and he anticipated that the remaining problems could be worked out. While Sims' emails to Stapleton during these negotiations criticized her performance, he also stated in a June 2 email, "Yes, you found a potential buyer and are entitled to be compensated for that," and again in a June 3 email, "You did identify a potential

buyer and are entitled to a reasonable compensation for that." This June 3 email from Sims was in response to Stapleton's email that stated:

> Just to recap where we are. You asked that the Nokomo Drive property be listed at $899,000. We have a willing and able buyer who has made a cash offer for the price you countered at which is $892,000, which will close in 3 weeks. Are you willing to sell the house and, if so, please define the amount you think the commission should be.

¶6 On June 3, Sims and Stapleton signed an amendment to the initial contract lowering the commission from 5% to $37,950 (approximately 4.25% of $892,000,000). The amendment made no other changes to the initial listing contract. In particular, it did not extend the time period of the initial contract, although there was a line on the form amendment indicating this as a potential item for amendment.

¶7 Later in the day, after he and Stapleton had signed the amendment, Sims emailed Mary Stein's attorney stating changes he wanted in the offer to purchase in addition to those she had agreed to in the June 1 communication. After receipt of that email, Mary Stein informed Sims on June 4, through counsel, that she no longer wished to purchase the property.

¶8 Ten days later Sims emailed Mary Stein's counsel stating that he and his wife were willing to sell the property on the terms outlined in the June 1 communication. Sims and his wife accepted this offer to purchase on June 15 and, at Sims' direction, the $20,000 in earnest money was wire-transferred into the Stapleton Realty trust account.

¶9 The closing took place on July 14, 2004. By this time a dispute had developed between Sims and Stapleton over the payment of the commission. Sims asserted that Stapleton had breached various duties under the listing contract

and was entitled to no commission; he demanded that she turn over the $20,000 to him. Stapleton refused, asserting that she was entitled to the amount agreed to in the amendment to the listing contract.

¶10 Sims initiated this action alleging that Stapleton Realty was not entitled to any commission because it had not procured an acceptable offer from Andrew and Maria Stone Stein by midnight of May 31, 2004, as provided in the listing contract. Sims did not pursue any of the other assertions of a breach of contract that he had previously made. The complaint sought the return of the $20,000 and attorney fees as provided in the listing contract. Stapleton Realty answered and counterclaimed for the full commission of $37,950, alleging that it had complied with the requirements of the listing contract when considered together with the related notes and memoranda.

¶11 Both parties moved for summary judgment. The circuit court concluded that the material facts were undisputed and that, based on the plain language of the initial listing contract, Stapleton Realty was not entitled to a commission because there was not an offer to purchase from Andrew and Maria Stone Stein by May 31, 2004. The court also addressed the parties' dispute whether the listing contract complied with the requirements of WIS. STAT. § 240.10(1), which governs contracts to pay commissions to real estate agents or brokers. The court concluded that the initial listing contract did comply but the amendment did not, because it did not alter the deadline for obtaining an offer. The court rejected Stapleton Realty's argument that it should look to documents besides the initial listing contract and the amendment. The court held that Sims was entitled to return of the $20,000, plus interest, and reasonable attorneys fees under the terms of the listing contract. Accordingly, the circuit court granted

summary judgment to Sims on his claim and dismissed Stapleton Realty's counterclaim.

DISCUSSION

¶12 On appeal, Stapleton Realty argues that the circuit court erred in granting summary judgment to Sims rather than to it because the court failed to consider the notes and memoranda, along with the initial listing contract and the amendment. If that is done, Stapleton Realty contends, the requirements of WIS. STAT. § 240.10(1) are met and it fulfilled the terms of its agreement with Sims.[3] Sims responds that the court correctly declined to consider any document outside the initial listing contract and the amendment, but, even if the court had done so, no document extended the period of time during which a buyer could be procured, and that is required by § 240.10(1). Sims also argues that the listing contract requires an offer from Andrew and Maria Stone Stein and that did not occur because the offer was from Mary Stein.

¶13 Summary judgment is appropriate when there are no issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We review the circuit court's entry of summary judgment de novo, employing the same methodology as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). The particular issue of the proper construction and application of a statute to a given set of facts presents a question of law, which we review de novo. ***Hempel v. City of Baraboo***,

[3] Stapleton Realty makes an alternative argument that, even if the requirements of WIS. STAT. § 240.10(1) are not met, Sims voluntarily agreed to pay a commission. However, because we conclude the requirements have been met, we do not address this issue.

2003 WI App 254, ¶10, 268 Wis. 2d 534, 674 N.W.2d 38. Similarly, the interpretation of a contract when the facts are undisputed is a question of law. *See* ***Farm Credit Services v. Wysocki***, 2001 WI 51, ¶8, 243 Wis. 2d 305, 627 N.W.2d 444.

I. Compliance with WIS. STAT. § 240.10(1)

¶14 WISCONSIN STAT. § 240.10(1) provides:

> Every contract to pay a commission to a real estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or note or memorandum thereof describes that real estate; expresses the price for which the same may be sold or purchased, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller; is in writing; and is subscribed by the person agreeing to pay such commission, except that a contract to pay a commission to a person for locating a type of property need not describe the property.

¶15 "The principal purpose of WIS. STAT. § 240.10(1) is to prevent fraud [and injuries] arising from parol testimony as to the terms and conditions of a brokerage contract." ***Buckman***, 50 Wis. 2d at 775 (citations omitted).

¶16 It is well established that multiple documents can be integrated to satisfy the requirements of WIS. STAT. § 240.10(1). ***Mitler v. Associated Contractors***, 4 Wis. 2d 568, 573, 91 N.W.2d 367 (1958); *see also* ***Buckman***, 50 Wis. 2d at 772-76. Integrated documents must have either internal references to the initial contract or a "clear and certain" reference to the transaction at issue. ***Buckman***, 50 Wis. 2d at 776. When construed together, integrated documents must satisfy § 240.10(1). ***Mitler***, 4 Wis. 2d at 573. However, other than these general principles, "[a]n absolute standard concerning integration of documents to satisfy the statute has not been established. The facts of each case and the conduct

of the parties controls." ***Rollie Winter Agency v. First Cent. Mortgage, Inc.***, 75 Wis. 2d 4, 9, 248 N.W.2d 487 (1977) (citing ***Buckman***, 50 Wis. 2d at 773).

¶17 Another well-established principle relevant to this appeal is that parties to a valid listing contract are free to agree to amend the terms, "and if they do so in writing … there is no violation of [WIS. STAT. § 240.10(1)]." ***Jessup v. La Pin***, 35 Wis. 2d 186, 192, 150 N.W.2d 342 (1967).

¶18 There is no dispute in this case that the initial listing contract complied with WIS. STAT. § 240.10(1). The dispute arises because the amendment to the listing contract, which reduced the commission, did not contain an extension of the time period in the initial contract during which the broker was to procure a buyer. Stapleton Realty relies primarily on ***Buckman*** in arguing that the lack of a time period in the amendment does not render the contract void under § 240.10(1) if we consider Sims' emails to Stapleton that led up to the execution of the amendment.[4]

¶19 Sims presents no argument that the reasoning in ***Buckman*** is not applicable in this case; indeed, he does not even respond to Stapleton Realty's argument based on ***Buckman***. Although we could treat this as a concession and could on this ground alone conclude that Stapleton Realty is correct, *see* ***Charolais***

[4] Stapleton asserts that emails constitute a signed written document under Wisconsin's Uniform Electronic Transactions Act, WIS. STAT. § 137.11 *et seq.*, provided the email is electronically signed. Section 137.11 defines "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." The emails on this record from Luke Sims to Maureen Stapleton are from his private work email account and are either signed "Luke" or "Luke Sims." Sims does not argue that his emails are not writings signed by him for purposes of WIS. STAT. § 240.10(1). We take this as a concession that they are. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Breeding Ranches, Ltd. v. FPC Securities Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979), we choose to undertake our own analysis.

¶20 In ***Buckman***, the buyer for whom a real estate agent had obtained a seller argued that his letter to the agent did not satisfy WIS. STAT. § 240.10(1) because, although it stated the amount of the commission for "services rendered in having obtained … [the property]," it did not state the purchase price of the land or the time period within which a seller was to be obtained. ***Buckman***, 50 Wis. 2d at 760, 766. The court concluded that the offer to purchase, which had been accepted by the seller at the time the letter was written, supplied the purchase price. ***Id.*** at 772.

¶21 With respect to the time within which a seller had to be procured, the court stated that

> [w]here the contract or memorandum does state that all services have been completed and is signed by the person promising to pay, there is little reason for finding the contract void because is does not state a time period during which the services had to be performed. In effect, the time period is designated by the promisor as being the time period prior to his signing.

Id. at 771. The court distinguished the situation in ***Elbinger Co. v. Meyer Manufacturing Co.***, 3 Wis. 2d 202, 205, 87 N.W.2d 807 (1958), where the contract was held void under WIS. STAT. § 240.10(1) because no document specified a time period and there was "also a lack of any written promise to pay or statement that all of the contemplated services had been performed signed by the principal." ***Buckman***, 50 Wis. 2d at 770-71. Although the court in ***Buckman*** found the letter ambiguous on whether future services by the agent were contemplated, it resolved that ambiguity by considering the offer to purchase and the acceptance. ***Id.*** at 770, 772-73. It concluded that those documents in

combination with the letter satisfied the statute. ***Id.*** The court reasoned that "[i]t is difficult to believe that a principal would execute such a promise if in fact the broker had not performed what [s]he agreed to do." ***Id.*** at 776. In these circumstances, the court concluded, "it does not defeat the purpose of § 240.10(1) to allow the integration of [the sales contract] into the [defective] commission agreement…." ***Id.***

¶22 From ***Buckman*** we derive this principle: the statutory requirement of the time period within which the broker must procure a buyer or seller may, depending on the circumstances, be satisfied by a writing, signed by the person agreeing to pay, that states that the broker has performed the services he or she agreed to perform.

¶23 In this case, Sims wrote two emails to Stapleton stating that she was entitled to a commission. He did this one and two days after receiving from Mary Stein's attorney a list of revisions she was willing to make to the second offer to purchase, provided in response to Sims' criticisms of the second offer. It is plain from Sims' emails that his statements that Stapeleton was entitled to a commission refer to her services in obtaining the second offer from Stein for the property identified in the listing contract at the price of $892,000, with the revisions Stein had agreed to make to that offer in the June 1 communication. The only reasonable inference from Sims' emails following the June 1 communication from Mary Stein's attorney is that Sims considered the second offer, with the revisions agreed to in that communication, to be acceptable, but he did not want to accept any offer until Stapleton had agreed to reduce her commission. Had he not obtained an agreement to a reduced commission before accepting an offer, the initial listing contract would have obligated him to pay a 5% commission.

¶24 As in ***Buckman***, there is little reason in this case for concluding that the amended agreement to pay a reduced commission for services already performed is void because it does not contain a time period for performing those services. *See* ***id.*** at 771. In effect, the time period is designated by Sims as the time period prior to his signing. *See* ***id.*** That is, Sims designated the time period as prior to his June 2 email in which he first stated that Stapleton was entitled to a commission. In effect, Sims, in a signed writing, extended the time period in the initial listing contract from May 31 to June 2, 2004. As was the case in ***Buckman***, it is difficult to believe that Sims would have written to Stapleton that she was entitled to a commission if she had not performed the services she had agreed to perform in order to obtain a commission. *See* ***id.*** at 776.

¶25 These conclusions are not altered by Sims' unsuccessful attempt, immediately upon the execution of the amendment, to obtain additional revisions to the second offer to purchase. The only reasonable inference from the record is that he did not consider the additional revisions he hoped for to be critical to the sale. Indeed, the offer he accepted on June 15, 2004, was precisely the one that was on the table when he wrote Stapleton that she was entitled to a commission—the second offer with the revisions Mary Stein agreed to on June 1.

¶26 Following the reasoning in ***Buckman***, we conclude that the listing contract is not void because the amendment reducing the commission does not contain an extension of the time period. Rather, Sims' June 2 and June 3 emails stating that Stapleton was entitled to a commission, when considered with the initial listing contract, the June 3 amendment, and the other emails between Sims and Stapleton on June 2 and 3, satisfy that statutory requirement.

II. One Party Listing

¶27 We next address whether Stapleton Realty is entitled to a commission even though the accepted offer was from Mary Stein, not Andrew and Maria Stone Stein.

¶28 Stapleton Realty argues that, even though the listing contract provided that it was a "'one-party' listing to Andrew and Maria Stone Stein," the submissions show that all parties, including Sims, were aware throughout the transaction that the offers were not from Andrew and Maria but from Mary Stein. Sims does not dispute this but instead responds that we may not look at any documents outside the initial listing contract and the amendment to determine if the parties agreed to modify the one-party listing. Sims cites no authority for this proposition.

¶29 We observe at the outset that Sims' argument is premised on interpreting the listing contract to mean that Stapleton Realty would receive a commission *only if* one of the listed parties produced an offer that he accepted. This interpretation is by no means clear. First, the "one-party listing" statement is inserted in the "Marketing" provision, immediately following this form language: "Broker agrees to use reasonable efforts to procure a purchaser for the Property, including, but not limited to, the following: _____" This suggests that the broker need not undertake other marketing efforts, not that the broker does not earn a commission if he or she produces another buyer. Second, the broker earns a commission if the seller during the term of the listing "sells or accepts an offer … for the sale of the property …" regardless of the terms of the offer. Thus, even if the proper reading of the contract is that the seller does not have to pay a commission if he or she refuses to accept an offer from a buyer who is not one of

the listed parties, it appears evident that, if the seller does accept, the broker earns a commission.

¶30 However, even if we assume for purposes of argument that the proper construction of the listing contract is that the broker earns a commission *only if* the offer comes from the listed parties, Sims remains free to waive that limitation. *See* ***C.G. Schmidt, Inc. v. Tiedke***, 181 Wis. 2d 316, 321, 510 N.W.2d 756 (Ct. App. 1993) (a party to a contract may waive a contract condition that is for that party's benefit). Based on the undisputed facts here, we conclude that Sims did waive the condition that Andrew and Maria Stone Stein were the only purchasers allowed under the contract. The offers to purchase were all made by Mary Stein. The only reasonable inference from the record is that Sims knew this when he emailed Stapleton on June 2 and June 3, 2004, stating that she was entitled to a commission and knew this when he accepted the offer on June 15.

¶31 We conclude that, based on the undisputed facts, Stapleton Realty is entitled to a commission even though the offer Sims accepted was from Mary Stein and not from Andrew and Maria Stone Stein.

CONCLUSION

¶32 We conclude that the trial court erred in granting summary judgment in favor of Sims rather than Stapleton Realty on Sims' claim and Stapleton Realty's counterclaim. Applying ***Buckman*** to the properly integrated documents, the listing contract is not void because of noncompliance with WIS. STAT. § 240.10. Even if the contract were construed to entitle Stapleton to a commission only if the offer came from the listed parties, based on the undisputed facts Sims has waived that condition. Accordingly, we reverse and remand with directions to the circuit court to deny Sims' motion for summary judgment; grant Stapleton

Realty's motion for summary judgment; dismiss Sims' complaint seeking the $20,000 currently retained in Stapleton Realty's trust account; enter a judgment in favor of Stapleton Realty on its counterclaim for the remaining amount due it as a commission; and grant such further relief to which Stapleton Realty is entitled.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.