

RENDERED: MAY 18, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-002245-MR

JIM HUFF REALTY, INC.; SUSAN  
HUFF SCHILLING, PRINCIPAL BROKER  
FOR JIM HUFF REALTY, INC.

APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE ANTHONY W. FROHLICH, JUDGE  
ACTION NO. 04-CI-00610

TOMLIN PROPERTIES, LTD.; AND  
ROBERT MARTIN

APPELLEES

NO. 2005-CA-002379-MR

TOMLIN PROPERTIES, LTD.

CROSS-APPELLANT

v. CROSS-APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE ANTHONY W. FROHLICH, JUDGE  
ACTION NO. 04-CI-00610

JIM HUFF REALTY, INC.; SUSAN  
HUFF SCHILLING, PRINCIPAL BROKER  
FOR JIM HUFF REALTY, INC.; AND  
ROBERT MARTIN

CROSS-APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: LAMBERT, NICKELL, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Jim Huff Realty appeals the denial of summary judgment against Tomlin Properties and, in alternative, the giving of a purportedly improper jury instruction at trial. Tomlin Properties cross-appeals seeking to reserve its claim against Robert S. Martin to indemnify it against Huff Realty's claims. Because we affirm the circuit court's denial of Huff Realty's summary claim against Tomlin Properties and reject Huff Realty's jury instruction claim, we affirm the judgment below and find the cross-appeal to be moot.

**Background**

Huff Realty brought an action against Tomlin Properties and others seeking a commission on a real estate transaction. Huff Realty claimed breach of contract and unjust enrichment against Tomlin Properties but claimed only unjust enrichment against the other defendants. Before trial, the circuit court dismissed all of Huff Realty's claims, save those against Tomlin Properties. Tomlin Properties interpleaded Robert S. Martin for indemnity against Huff Realty's claims. Following the trial, the jury returned a verdict rejecting Huff Realty's claims for a commission from Tomlin Properties, thereby rendering moot Tomlin Properties' indemnity claim against Martin.

## **Issues and Legal Standards**

For Huff Realty to prevail on a summary judgment claim against Tomlin Properties, it must demonstrate that no material questions of fact are in issue and that, as a matter of law, it is entitled to a commission on the real estate transaction that is the subject matter of this case. *See* CR 56.03. Particularly, to prevail under its contract theory, Huff Realty must show that Tomlin Properties breached the terms of its exclusive real estate listing contract with Huff Realty. *E.g., MFA Mut. Ins. Co. v. Black*, 441 S.W.2d 134, 136 (Ky. 1969). Alternatively, to prevail on its unjust enrichment claim, Huff Realty must show that Tomlin Properties inequitably withheld a commission from Huff Realty by acting in bad faith regardless of any strict reading of the underlying contract. *E.g. Union Central Life Ins. Co. v. Glasscock*, 270 Ky. 750, 110 S.W.2d 681, 686 (1937); *Heaberle v. St. Paul Fire & Marine Ins. Co.*, 769 S.W.2d 64, 67 (Ky.App. 1989).

## **Material Facts**

Here, the material facts are a matter of record and are not in dispute. In the summer of 2000 Tomlin Properties' predecessor in interest engaged Huff Realty as its exclusive real estate listing agent for a certain 100 acre tract of land. By the terms of the written agreement, the Huff Realty's exclusive agency was to expire at the end of 2000 unless Huff Realty procured a purchase agreement for the tract within that period. In the event that Huff Realty procured a contract to purchase within the stated time, its exclusive agency would automatically be extended until closing or final disposition of the purchase contract. Also, the terms of the listing agreement indicate that the subject-

matter real estate comprises only one 100 acre tract of land, though it notes that this tract adjoins another 100 acre tract that is also “available” for sale. The terms of the agreement, however, do not reflect any conveyance of an exclusive listing right to Huff Realty for the “available” second tract of land.

In November of 2000 Huff Realty procured a contract with Blevins Bowlin to purchase the listed, 100 acre tract of land. As part of that contract, Tomlin Properties' predecessor in interest also gave Bowlin an option to purchase an additional tract of land from Tomlin. Subsequently, parties arguably having privity with Bowlin purchased the second 100 acre tract from Tomlin Properties. However, Tomlin Properties employed another realtor, Robert S. Martin, for that transaction and refused to pay any commission to Huff Realty despite the fact the sale of the second tract was on the same terms and conditions as the option contract that Huff Realty had negotiated with Bowlin.

## **Analysis**

### **I. Contract**

We find that, under the terms of the written agreements between Huff Realty and Tomlin Properties and its predecessors in interest, the circuit court did not err in denying Huff Realty summary judgment on its contract claim. Here, Huff Realty's exclusive listing agreement expired by its own terms once Blevins Bowlin purchased and closed on the listed 100 acre tract of land. And despite the fact that Bowlin obtained an option contract to purchase the adjacent 100 acre tract at the same time as he purchased the first 100 acre tract, the option agreement contained no term amending or expanding the subject-matter of the original listing agreement between Tomlin Properties'

predecessor and Huff Realty. Thus, even though (1) the completion of sale of the second 100 acre tract occurred under the terms and conditions of the option agreement negotiated under Huff Realty's auspices; and (2) the second tract was sold to a party arguably in privity with Blevins Bowlin, because the sale occurred outside the time period, and involved land not subject to the original listing agreement, Huff Realty has no contractual claim to a commission on that sale. *See MFA Mut. Ins. Co. v. Black*, 441 S.W.2d 134, 136 (Ky. 1969) (holding that a party may not claim a commission under a listing contract for a real estate transaction when transaction occurs outside the contract's own terms).

Huff Realty's contention that the second sale did occur within the contracted time period because it reached an agreement with Tomlin Properties' predecessor in interest amending the original listing agreement to extend its effective period to include the time of the second sale is of no merit. We have examined the amendment carefully and note that, by its own terms, it relates back to the original listing agreement, the subject matter of which is only the first 100 acre tract of land, not the second 100 acre tract. This is so because no term of the amendment indicates an expansion of the subject matter of the original listing agreement to include the second 100 tract, but rather only extended the original exclusive-listing period. And, the fact that the second sale occurred within the effective time period of the amended listing agreement is of no relevance to Huff Realty's contract claim because the original agreement, as amended, still does not cover the sale of the second tract.

In reaching our decision, we also reject Huff Realty's contention that paragraph three of the original listing agreement incorporated by operation of law the

second 100 acre tract as well as extended the time period of its exclusive listing agency. To the contrary, by its terms, paragraph three only purports to extend the time period of Huff Realty's exclusive listing agency for the subject-matter 100 acre tract from the time of the procurement of a purchase contract to its final disposition. It does not purport to extend the subject-matter real estate by incorporating any additional properties that happen to be sold along with the listed 100 acre tract. Thus, under paragraph three, the option agreement, even though negotiated under the auspices of Huff Realty, did not give it a contractual claim to a commission upon the exercise of that option. At most, the option agreement for the second 100 acre tract that Huff Realty gratuitously negotiated for Tomlin Properties' benefit gave it an equitable claim for *quantum meruit*.

## **II. Unjust Enrichment**

We find that the circuit court did not err in denying Huff Realty summary judgment against Tomlin under an unjust enrichment theory. Indeed, unjust enrichment is an equitable, quasi-contract claim that requires proof of bad faith by the defendant and *quantum meruit* due to the claimant. *E.g., Heaberle v. St. Paul Fire & Marine Ins. Co.*, 769 S.W.2d 64, 67 (Ky.App. 1989). Such proof requires adducing evidence upon which the finder of fact could reasonably infer that the defendant did not act in good conscience in its dealings with the plaintiff and that the plaintiff was unfairly enriched thereby. Here, Huff Realty made a *prima facie* case for bad faith and *quantum meruit* by offering proof indicating that Tomlin Properties may have taken advantage of Huff Realty's efforts in negotiating an option contract for the purchase of its second 100 tract of land for the benefit of Tomlin Properties' predecessor in interest without fairly compensating

Huff Realty for the fruits of this labor. But, as the actual factual determinations about these matters, including Tomlin Properties' motives, is inherently a question of fact, the trial court correctly refused to give Huff Realty summary judgment prior to trial. *See CR 56.03*. Indeed, only the jury was entitled to determine whether Tomlin Properties took bad-faith advantage of a loophole in the exclusive-listing agreement. Neither the trial court nor this court is entitled to substitute its view of the question.

### **III. Jury Instructions**

Finally, we find that Huff Realty has failed to preserve its claim of jury instruction error. *See CR 51*. Indeed, we have carefully reviewed the record of the jury instructions hearing and the final proposed instructions tendered to the circuit court by the parties. And as a result of our scrutiny, we note that Question No. 2 for the jury—of which Huff now complains—is substantially the same, if not absolutely identical to, the one tendered to the circuit court by Huff Realty below. We further note that the instruction that Huff has attached to its brief as its purportedly tendered instruction on Question No. 2 is not in fact the instruction it tendered. To the contrary, the record contains instead the actual, hand-written instruction tendered by counsel. And moreover, the video record confirms that the hand-written proposed instruction in the record, not the type-written instruction in Huff Realty's Appendix to its Brief, is the one actually tendered below. Thus, in sum, Huff cannot now be heard to complain on appeal about a jury instruction that is substantially identical to the one it affirmatively requested in writing below. *See CR 51*.

**Conclusion**

For the foregoing reasons, we affirm the judgment below in all respects.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark G. Arnzen  
Robert L. Raper  
Covington, Kentucky

BRIEF FOR APPELLEE/  
CROSS-APPELLANT TOMLIN  
PROPERTIES, LTD.:

Arnold Taylor  
Covington, Kentucky

BRIEF FOR CROSS-APPELLEE  
ROBERT MARTIN:

Robert S. Martin, *Pro Se*  
Walton, Kentucky