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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000292-MR

GARY WRENN d/b/a WRENN REALTY — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 06-CI-00195

SOUTHERN STATES LEXINGTON
COOPERATIVE, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Gary Wrenn appeals the January 5, 2007, opinion and order of the Bourbon Circuit Court awarding summary judgment in favor of Southern States Lexington Cooperative (hereinafter "SSLC") in a civil action brought by Wrenn against SSLC. We affirm.

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On August 2, 2000, SSLC, acting through an authorized agent, engaged Wrenn as a real estate broker. The parties executed an agreement titled "Exclusive Right to Sell" (hereinafter "agreement"). The agreement listed for sale approximately ten acres of land in Bourbon County, Kentucky, for $200,000.00. In consideration of his services, Wrenn was to be paid six percent commission if he located a buyer who was "ready, willing, and able to complete the purchase on the terms."

Over the next five years, the agreement was extended a total of seven times. In 2005 SWS Land and Cattle, LLC (hereinafter "SWS") made an offer on the property. At this time, Wrenn disclosed to SSLC that he would soon become a partner or member of SWS. SSLC rejected the offer from SWS. SWS made several more offers, including a final offer of $200,000.00, and all were rejected by SSLC. Wrenn sought his brokerage fees, as outlined in the agreement, and SSLC refused to pay.

On July 19, 2005, Wrenn filed a broker's lien in the office of the Bourbon County Clerk. Soon thereafter SSLC had the property reappraised at a value of $300,000.00. On July 17, 2006, Wrenn filed a complaint against SSLC in Bourbon Circuit Court and moved for summary judgment on August 25, 2006. That motion was denied in an order entered September 12, 2006. Wrenn moved to alter, amend or vacate and on October 10, 2006, the September 12, 2006, order was vacated. Both parties filed memorandum of law and on January 5, 2007, the court entered an opinion and order awarding summary judgment to SSLC. This appeal followed.

The standard of review of a trial court's grant of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins.* Co., 814 S.W.2d 273, 276 (Ky.1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

Wrenn believes that the court erred in awarding summary judgment and argues that he is entitled to a commission for several reasons. Those reasons are: 1) because he fulfilled his duties under the plainly stated and unambiguous terms of the agreement; 2) because the terms of the agreement must be given their plain meaning; and 3) because the broker's lien should be enforced.

It has long been held in Kentucky that a broker may make offers and purchase property that he or she has listed to sell. *Phillips v. Riedinger*, 197 Ky. 255, 246 S.W. 791 Ky.App. 1922). However, it has also been held that such a transaction may only take place after the full disclosure of facts from the broker to the owner as well as the owner's consent to the transaction. *Id.* Wrenn argues that the case before us does not require consent by the owner, because consent was not contemplated by the terms of the agreement. He further argues that by agreeing to a listing price and by agreeing to compensate Wrenn if the listing price was offered, regardless of whether it was accepted or rejected, that SSLC eliminated the necessity of further consent to payment. We do not agree.

It is a universal understanding that agents may not serve multiple principals with conflicting interests and the law in Kentucky is no different. *Maxwell v. Bates*, 40 S.W.2d 304 (Ky.App. 1931). Wrenn was hired by SSLC to sell its property and in the interim protect its interests. It would not be possible for Wrenn to look out for the best interests of SSLC if he was also concerned with the best interests of SWS and coincidentally, himself. While principal-agent relationships are sometimes created in which such a conflict could be overlooked, or even agreed to, by some parties, this is not the case here. SSLC made it clear, by their refusal to sell the property, that they felt the conflict was above any level of agreement and/or trust between the parties.

In *Maxwell*, the Appeals Court of Kentucky stated:

> [an agent's] relationship to his principal as the owner of the involved property was that of confidence and trust, and to permit the agent, in either character of sale, to purchase the property from himself as such agent, would, not only be a violation of that trust, but would create an incentive on his part to disregard the duties that he owes to his principal, in order that he himself might reap a profit through such violation.

40 S.W.2d at 305. The facts in *Maxwell* involved an agent who wished to purchase his principal's property, not for another company, but for himself. While we recognize that the facts are not identical, we feel that the law is still applicable. In the case at hand, Wrenn is seeking to secure the property for a company of which he has an interest. The incentive of Wrenn to secure the property for a good price is clear. There is no proof that SSLC has refused the sale for the sake of refusing Wrenn a commission. Rather, a clear conflict of interest exists. We do not find Wrenn's argument that the agreement did not require an actual sale to be made in good faith. In every contract, there is an implied covenant of good faith and fair dealing. It is implicit in such contracts that the agent,

who is hired to sell the property, does not take on the dual role as buyer of the property, without acknowledgment and acquiescence of the property owner. It is our belief that any acts to the contrary are outside the realm of good faith and fair dealing.

The waters are further muddied by the fact that there is no evidence that Wrenn ever encouraged SSLC to reappraise their property's value after five years. While we are not accusing Wrenn of any wrong doing, it is our belief that Wrenn, as a real estate professional, should have recognized the need to reappraise the property over such a long period of time, especially when such a discrepancy was produced. While this does not serve as direct proof that Wrenn was unconcerned with SSLC's best interests, it is problematic.

Wrenn argues that the trial court erred by failing to use the plain meaning of the term “able.” Traditionally, the term “able” in sales contracts refers to financial ability. The trial court held that no offer was made by one “able” to purchase, based on the offer coming from an unauthorized agent acting as buyer. Either way, the point is moot. The conflict of interest in this case, of Wrenn as both the seller and potential buyer, makes an analysis of the meaning of the term “able” irrelevant. Therefore, any error of the trial court, in its interpretation of the term is harmless and immaterial to our holding.

Wrenn makes additional arguments regarding the validity of the broker's lien. Specifically, he counter's SSLC's legal memorandum argument that the lien was not perfected. This issue is irrelevant, in that it has no bearing on whether the lien is legitimate or binding. Furthermore, the issue was not addressed by the circuit court in its

order and therefore appears to have had no bearing on it. Therefore, we do not find it necessary to address the status of the lien as perfected or not in our holding.

The overall argument that Wrenn presents is rather simple: the agreement was fulfilled by Wrenn finding a ready, willing and able buyer, and thus the commission is due. There is nothing in the agreement stating the sale must be completed for the commission to be paid and the general rule established in Kentucky is that in a contract which "simply requires the broker to find a customer who is able, ready, and willing to enter into a transaction on the terms prescribed by the principal, the broker is entitled to his commission whether or not the principal completes the transaction." *Odem Realty Co. v.* Dyer, 242 Ky. 58, 45 S.W.2d 838, 839 (Ky.App. 1932). Under almost any other circumstance, we would be prone to agree with Wrenn that his commission was due. To find otherwise would create a situation in which property owners would no longer be bound by their contractual obligations. The circumstances of this case, however, are in such great conflict with public policy and contractual dealings in general that we believe this is an exception. To follow the general rule under these circumstances would create a slippery slope of real estate brokers who may easily take advantage of their clients to their own benefit.

There is nothing to show specifically that Wrenn's actions were underhanded or disingenuous. However, absent the agreement of both buyer and seller, the very act of an agent attempting to play a dual role of buyer and seller is in and of itself, for lack of a better word, wrong. We believe the case law has relayed as much and more, going even further to determine that it is not only against public policy, but also the law. As previously discussed, agents acting as buyers in any capacity, is prohibited

without full disclosure and consent of the land owner. Therefore, we do not believe that Wrenn found a ready, willing and able buyer. For the foregoing reasons, the January 5, 2007, opinion and order of the Bourbon Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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