STATE OF MICHIGAN

COURT OF APPEALS

PAUL MOON d/b/a PAUL MOON & ASSOCIATES,

Plaintiff-Appellee,

v

ROBERT M. WILSON,

Defendant,

and

MARGARET E. WILSON,

Defendant-Appellant,

and

LANDAMERICA TRANSNATION TITLE INSURANCE COMPANY,

Defendants.

UNPUBLISHED
January 30, 2007

No. 271245
Ottawa Circuit Court
LC No. 05-051404-CK

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting summary disposition in favor of plaintiff in this contract action involving a real estate transaction. We affirm.

I

This appeal arises from an action filed by plaintiff, a real estate broker, to collect the balance due on a $42,000 brokerage commission that defendant allegedly owed plaintiff after the

sale of two parcels of real estate owned by defendant and her husband.[1] On October 10, 2001, defendant entered into an exclusive listing agreement[2] with plaintiff for the sale of her residence and adjacent dog kennel and grooming facility in Nunica for the period October 10, 2001 to April 1, 2002. The Agreement listed the business parcel at $395,000, with a ten percent broker's commission, and the residential parcel at $298,500, with a seven percent broker's commission.[3] The parcels were subject to two mortgages: a junior mortgage on both parcels in the original amount of $60,000 and a senior mortgage on the residence and two acres in the original amount of $143,000. Plaintiff did not locate a buyer for the property during the initial listing period, and the agreement expired.

Sometime subsequently, plaintiff located a prospective buyer, Ronald Hayton, who was interested in purchasing the two parcels. On December 16, 2002, defendant entered into a purchase agreement with Hayton for the purchase of both parcels at a combined price of $595,000. Hayton apparently anticipated receipt of a trust distribution, which he planned to use for the purchase. On March 13, 2003, defendant and Hayton amended their agreement by executing a Cirrix Addendum, in which they agreed that the transaction would close pursuant to land contract, for a sale price of $600,000, with a down payment of $75,000, and monthly payments of $4,076. Defendant and Hayton also signed an addendum to the purchase agreement, effective April 1, 2003, reflecting the land contract down payment of $75,000, of which $8,000 would be paid at closing and $67,000 would be paid by July 1, 2003.

At some point during the sale negotiations, plaintiff and defendant executed a written addendum[4] amending the initial listing agreement. The addendum, which is dated "04-01-2003" at the top on a line provided for the selling office's phone number, states:

> All parties agree to close sale 04-01-2003
> Sellers and Broker agree the brokers fee to be paid as follows, $42,000 to be paid to Paul Moon and Associates at such time as the note is sold. If not paid in full the remaing [sic] ballance [sic] shall acrue interst [sic] at a rate of 7.0 percent per anum [sic] and is due upon the final balloon payment or sooner as funds may be available.

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[1] Although defendant's husband is a named defendant in this action, he is not a party to this appeal. For ease of reference, this opinion will refer to defendant in the singular, although various references to the facts and lower court proceedings apply jointly to defendant and her husband. Plaintiff's action also included a claim against LandAmerica Transnation Title Insurance Company on the basis of an escrow agreement; however, the motion for summary disposition did not involve this latter claim.

[2] The agreement signed was entitled "Grand Rapids Association of Realtors® Cirrix Sales Agency Agreement (MLS) For Business Opportunities."

[3] There appears to be no dispute that the commission was later reduced to seven percent when the two parcels were sold for $600,000, thus equaling $42,000.

[4] The addendum was entitled, "West Michigan Regional Addendum to Purchase Agreement."

On April 1, 2003, defendant and Hayton's company, Pink Poodle, Inc.,[5] closed on the real estate sale pursuant to a land contract. As indicated above, the terms of the contract noted a down payment of $8,000 already received, a payment of $67,000 due July 1, 2003, and the balance to be paid within 60 months, subject to interest at 8.5 percent. Hayton was to make monthly payments of $4,076.

Subsequently, on June 19, 2003, however, the land contract was revised, apparently because of concern over Hayton's ability to make the payments. Plaintiff was not involved in the restructuring of the land contract. Under new agreements prepared by defendant's attorney and signed by defendant and Hayton, the business parcel was sold on a land contract, but the residential parcel was structured as a lease with an option to purchase. The revised sale price of the business parcel was $300,000, with an initial payment of $4,077 and monthly payments thereafter of $1,800. Likewise, the option to purchase established a purchase price of $300,000 for the residential parcel. The terms of the revised land contract for the business parcel provided that Hayton would make a lump sum payment of $67,000 within three business days of his distribution from the Trust of Georgeine M. Gayman, but no later than August 1, 2003.

Pursuant to the land contracts, Hayton paid defendant a down payment of $8,000 at closing and $67,000 on July 1, 2003. Hayton also made monthly payments from April 2003 through October 2003. However, Hayton subsequently filed bankruptcy and the lease of the residential parcel was abandoned. Defendant later sold both parcels to another buyer for $400,000, receiving $98,000 in cash, which defendant used to pay off the residential mortgage. Defendant made no further payments to defendant for the brokerage commission.

Plaintiff thereafter filed this action seeking recovery for the $32,000 balance due on the agreed-upon commission of $42,000. The trial court granted plaintiff's motion for summary disposition, finding that plaintiff and defendant had a valid and binding contract for the payment of plaintiff's commission, which became due on July 1, 2003 when funds "became available" by Hayton's payment of $67,000 to defendant. The court concluded that defendant's failure to pay the $32,000 balance due constituted a material breach of the parties' agreement.

II

Defendant argues that the trial court erred in granting summary disposition in favor of plaintiff on the basis that funds "became available" to defendant to pay plaintiff his brokerage commission when those funds were used to pay an existing mortgage against the property that was the subject of the transaction. We disagree.

[5] For purposes of this appeal, we do not distinguish whether particular actions were taken by Hayton or the corporation, and therefore, will simply refer to Hayton individually or to the corporation as "Hayton."

A

This court reviews de novo the trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions, admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. *Id*.; *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

B

Defendant argues that the trial court erred in determining that funds became "available" by any common sense meaning of the word "available" because the sale proceeds were used to pay the residential mortgage.

Plaintiff responds that the word "available" simply means "can be obtained or used," "suitable or ready for use," or "readily obtainable" or "accessible."[6] Plaintiff asserts that it is undisputed that defendant received $8,000 on April 1, 2003 from Hayton as a down payment; an additional down payment of $67,000 on July 1, 2003, and $28,532 in monthly payments. Moreover, defendant received $98,000 in cash when the properties were sold to Weipert. Plaintiff argues that these monies were all "available" in that they could "be obtained or used," or were "suitable or ready for use," or "readily obtainable" or "accessible."

The trial court agreed with plaintiff and concluded that on July 1, 2003, monies became "available" to defendant to pay plaintiff's commission. Defendant has failed to persuade us that the trial court erred in its conclusion. Disregarding the specific dates on which various payments were received, we conclude that funds "became available" to pay plaintiff's commission given that defendant received more than $200,000 in payments from the sale of the properties at issue.

C

Defendant further argues that plaintiff's claim to a commission is barred by the illegality of the underlying contract. Defendant contends that it is well settled that the sale of property subject to a mortgage by way of a land contract violates the due-on-sale provisions of a

[6] Plaintiff relies on dictionary definitions of the word "available," citing *Webster's English Dictionary, New Edition* (1972); and *The Random House Dictionary of the English Language, Unabridged Edition* (1996).

mortgage. Further, under MCL 445.1622[7] and MCL 445.1628(2),[8] it is illegal for a person to assist in evading an enforceable due-on-sale clause. Therefore, as a matter of public policy, plaintiff should not be entitled to a commission from a transaction that he was prohibited from participating in pursuant to statute.

We find this argument unpersuasive.[9] Defendant has failed to show that the cited statutory provisions apply under the circumstances at issue. Defendant concedes that she is aware of no case law addressing the statutory provisions in question. The fact that a mortgage lender is entitled to enforce a due-on-sale clause, MCL 445.1622, does not relieve defendant of the particular contractual obligation entered into in this case to pay the commission. In any event, defendant has failed to present evidence that plaintiff conspired with his counsel and defendant's attorney to evade the enforcement of a due-on-sale clause in violation of MCL 445.1628(2).

D

Defendant argues that the commission owed to plaintiff was reduced by the novation of the underlying contracts, i.e., when the April 1, 2003 agreement was replaced by the combination land contract and lease purchase option. Accordingly, plaintiff is not entitled to a commission on the residential parcel, but rather only on the sale of the business parcel, which would result in a balance due of $11,000.

This argument likewise is unpersuasive. Defendant cites no authority to support her contention that a novation occurred. An appellant may not merely announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Defendant has failed to show that plaintiff was a party to the restructured agreement executed between defendant and Hayton, or that the addendum agreement between defendant and plaintiff was of no effect as a result of the restructured agreement.

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[7] MCL 445.1622 provides: "Except for a residential window period loan, a lender may enforce a due-on-sale clause in a real property loan in accordance with the terms of the loan contract. A lender shall enforce a due-on-sale clause in a residential window period loan only in accordance with sections 3 to 5" (footnote omitted).

[8] MCL 445.1628(2) provides: "Any person licensed to do business in this state who, while carrying on that business, knowingly advises a person selling or transferring property securing a residential window period loan not to notify a lender as required by section 3 or who knowingly otherwise aids or assists a person in evading the enforcement of a due-on-sale clause enforceable under this act shall be liable for a civil fine not to exceed $5,000.00 for each offense and shall be subject to revocation of his or her license" (footnote omitted).

[9] Plaintiff contends that defendant waived this argument by failing to properly raise it as an affirmative defense in the trial court. However, the issue of waiver was not addressed by the trial court, and therefore, we decline to consider it.

Plaintiff points out that he had no involvement in the restructured agreement, and he did not agree to waive or otherwise reduce the agreed upon commission. Citing various authority, plaintiff argues that generally, a broker is deemed to have earned the commission when the buyer and seller enter into a binding agreement, and that Hayton's default under the land contract does not defeat plaintiff's right to his commissions. Defendant cites no authority to the contrary. We therefore reject any claim that plaintiff is entitled to only a partial commission.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff

I concur in result only.

/s/ Helene N. White