

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-3128

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**RICHARD F. SALEWSKE, D/B/A COLDWELL BANKER
LAKE-LAND REALTY,**

PLAINTIFF-APPELLANT,

v.

LEROY W. DEPIES AND JUNE DEPIES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Lincoln County:
J. MICHAEL NOLAN, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Richard F. Salewske, d/b/a Coldwell Banker Lake-Land Realty, appeals a judgment dismissing his claim for a real estate commission. He argues that the trial court erroneously interpreted his listing

contract with LeRoy and June Depies. We agree. We therefore reverse the judgment and remand for further proceedings.

Background

¶2 The parties do not dispute the essential facts. In 1996, the Depieses contracted with Coldwell Banker Lake-Land Realty to sell their lake front home. The parties entered into an exclusive residential listing contract.¹ The list price was \$289,000 and the listing term extended from May 27, 1996, to August 31, 1996.

¶3 The contract contained an “extension of listing” clause, the interpretation of which gives rise to this appeal. It reads:

EXTENSION OF LISTING: This Listing may be extended by agreement of the Parties. The Listing term is extended for a period of one year as to any buyer who personally or through any person acting for such buyer either negotiated to acquire an interest in the Property or submitted a written offer to purchase, exchange or option during the term of this Listing. If the extension is based on negotiation, the extension shall only be effective if the buyer’s name is delivered to Seller, in writing, no later than three days after the expiration of the Listing, *unless Seller was directly involved in the negotiations. “Negotiated” for the purpose of this paragraph means to discuss the potential terms upon which buyer might acquire an interest in the Property or to attend an individual showing of the Property.* (Emphasis added.)

¶4 On August 14, 1996, broker Bernice Wundrow, acting pursuant to a multiple listing agreement, showed the Depieses’ property to Thomas and Judy

¹ The parties used form WB-1 (2-1-94), drafted by the state Department of Regulation and Licensing.

Bauman. LeRoy met the broker and the Baumans in the driveway. He shook hands with Thomas, explained that the house was open and directed them inside.

¶5 Later that day, Fred Collins, a salesperson for Coldwell Banker Lake-Land Realty, telephoned LeRoy and advised that the Baumans wanted to see the property again with their in-laws. He asked LeRoy to attend the showing because the Baumans had some questions that the realtor could not answer.

¶6 Wundrow showed the property to the Baumans again on August 15. The Baumans had brought along their in-laws Ernest and Viola Schulze. LeRoy was waiting outside and was again introduced to the Baumans and the Schulzes. He shook hands with Ernest. After they entered the home, June was introduced to Judy and Viola.

¶7 June left the house, but LeRoy proceeded through the home with Wundrow, the Baumans and the Schulzes. He addressed numerous questions, including the location of lot lines, ceiling boards, insulation and septic tank. There is no challenge to the court's finding that the parties did not discuss terms of the sale. LeRoy attended the showing for approximately twenty minutes.

¶8 The Baumans contacted Wundrow the next day and informed her that they intended to make an offer. They did not, however, make an offer before August 31 when the listing contract expired. Salewske does not challenge the trial court's finding that he did not provide a list of potential buyers to the Depieses as contemplated in the extension clause.

¶9 In September 1996, Thomas called Leroy and asked to visit the property. Thomas stopped by the next day. Although LeRoy advised that the house was off the market, Thomas requested an opportunity to purchase the

property when LeRoy was ready to sell. LeRoy expressed concern over potential liability for a broker's commission.

¶10 By letter from their attorney on October 30, 1996, the Schulzes submitted an offer to purchase the Depies home for \$250,000. After LeRoy visited his attorney and Salewske at Coldwell Banker Lake-Land Realty, the Depieses did not accept the offer. Correspondence from their attorney to the Schulzes' attorney advised: "As I told you, Mr. and Mrs. Depies are concerned about the brokers. Therefore, they will only accept an offer on the place which will hold them harmless from any claim by the brokers." The Baumans and the Schulzes eventually purchased the Depieses' property by warranty deed dated June 20, 1997, for the price of \$250,000.²

¶11 Salewske brought this action to recover his commission under the listing contract. There is no challenge to the court's finding that Salewske did not provide a list of buyers, but rather, relied on the "involvement in negotiations" language. The court concluded that the listing contract was poorly drafted and confusing. It ruled that to be considered involved in negotiations within the meaning of the contract, "there has to have been some actual discussion about the terms" of an offer. The court found that the contract was not extended and the Depieses had no obligation to pay a commission. The court dismissed Salewske's claim. This appeal followed.³

² The Baumans purchased a 75% interest and the Schulzes purchased a 25% interest.

³ We commend the attorneys for their careful compliance with the appellate rules of procedure, especially WIS. STAT. RULE 809.19(1) concerning record citation. Too often, appellate briefs neglect this important requirement. This court cannot overstate the significance of compliance with the rules of appellate procedure, which are designed to facilitate review of cases on appeal. These well-constructed briefs are appreciated.

Discussion

¶12 This appeal involves a question of contract interpretation. As a result, it presents a question of law that we review de novo. See *Wausau Underwriters Ins. Co. v. Dane County*, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). The object of contract interpretation is to determine the intent of the contracting parties, and we begin with the plain language used to express their agreement. See *Bank of Barron v. Gieseke*, 169 Wis. 2d 437, 455, 485 N.W.2d 426 (Ct. App. 1992). When the terms of a contract are unambiguous, they should be applied according to their everyday meaning, except where the contract itself provides an applicable definition. See *Meyer v. U.S. Fire Ins. Co.*, 218 Wis. 2d 499, 504, 582 N.W.2d 40 (Ct. App. 1998).

¶13 We conclude that the extension clause of the listing contract is unambiguous. We start with the definition the contract supplies: “‘Negotiated’ for the purpose of this paragraph, means to discuss the potential terms upon which buyer might acquire an interest in the Property or to attend an individual showing of the Property.” The words “upon which a buyer may acquire an interest” modifies “the potential terms.” The second phrase, “to attend an individual showing,” is separated from the first clause by the conjunction “or.” Consequently, these two phrases provide independent alternative definitions to the term “negotiated.” The first is consistent with a standard dictionary definition.⁴ The second “to attend an individual showing” is unique to the extension paragraph. Because the phrase does not limit itself to the buyer, it may be applied to either party.

⁴ See WEBSTER’S THIRD NEW INT’L DICTIONARY, 1514 (Unabr. 1998): “1. To communicate or confer ... to come to terms.”

¶14 Next, we apply this definition to the preceding sentence. This sentence provides that if the extension is based on negotiation, it is effective only if the buyer's name is delivered to the Seller, "unless the Seller is directly involved in negotiations." Using the definition supplied in the contract, this sentence dispenses with the notice requirement when the Sellers attend an individualized showing of their property with the buyer. Thus, if the buyer and the seller attend the showing, they are deemed to have "negotiated" under the terms of the contract. As a result, the listing term is extended as to that buyer for a period of one year.

¶15 The Depieses contend, however, that the definition of "negotiated" should not also apply to the term "negotiations," because one is a verb and one is a noun. We reject the notion that the contract, within the same paragraph, would use two inconsistent definitions for terms with the same root word. The second sentence of the paragraph begins: "If the extension is based on negotiation." This clause refers to the sentence before it, which uses the term "negotiated." Because these terms refer to one another in successive sentences within the same paragraph, it would be illogical to accord them inconsistent definitions.

¶16 The plain language of the paragraph imports the intent to obligate the seller to pay a commission when the broker brings the parties together and a sale is transacted within one year of the expiration of the contract. No discussion of terms is necessary under the contract's definition. Here, it is undisputed that LeRoy attended an individual showing with the Baumans and the Schulzes. Accordingly, the plain language of the contract extends the listing for one year as to those buyers.

¶17 We conclude, therefore, that the trial court erroneously interpreted the contract to require that the seller and the buyer discuss the terms of purchase in

order to have “negotiated” within the meaning of the extension provision. Although the trial court’s interpretation is consistent with a dictionary definition, it ignores the contract’s applicable definition. We conclude that the trial court erroneously determined that the dictionary definition prevailed over the definition supplied in the contract and to which the parties agreed to be bound. *See Meyer*, 218 Wis. 2d at 504.

¶18 The Depieses contend, however, that because there is more than one reasonable interpretation, the extension clause is ambiguous and should be construed against Salewske. We disagree. “A term or phrase is ambiguous if it is susceptible to more than one reasonable construction.” *See Peabody v. American Family Mut. Ins. Co.*, 220 Wis. 2d 340, 346-47, 582 N.W.2d 753 (Ct. App. 1998). “A term is not ambiguous, however, just because persons may reach different conclusions regarding the meaning or may interpret the term differently.” *Id.* The Depieses’ interpretation does not withstand careful scrutiny and therefore creates no ambiguity.⁵

¶19 The Depieses argue, nonetheless, that an ambiguity results when the extension clause is read in conjunction with the cooperation clause. They claim that the cooperation clause requires that they attend showings and therefore conflicts with their right not to trigger the extension.⁶ We disagree. The

⁵ Also, the Depieses’ proposition is illogical. If the phrase “involved in the negotiations” requires the seller to discuss terms, but the term “negotiated” means to attend an individualized showing, the extension clause would require the seller to discuss terms, but not, apparently, the buyer. Under this scenario, the buyer would only need to attend the showing, and the seller would have to “discuss” terms with the mute buyer. The Depieses’ interpretation produces an absurd result, which courts must avoid when construing contracts. *See Capital Invs. v. Whitehall Packing Co.*, 91 Wis. 2d 178, 193, 280 N.W.2d 254 (1979).

⁶ Line 90 of the contract is entitled “**SELLER COOPERATION WITH MARKETING EFFORTS**” and provides:

(continued)

cooperation clause makes no mention of attending showings and fails to support the Depieses' claim of ambiguity.⁷

¶20 Finally, the Depieses contend that the trial court never ruled on its claim that Salewske failed to comply with regulations concerning agency disclosure forms, but that this issue would provide a separate basis for dismissing his claim. We decline to address issues not ruled upon by the trial court. *See Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). Our conclusion that the listing contract is extended as to the Baumans and Schulzes

Seller agrees to cooperate with Broker in Broker's marketing efforts and to provide Broker with all records, documents and other material in Seller's possession or control which are required in connection with the sale. Seller authorizes Broker to do those acts reasonably necessary to effect a sale and Seller agrees to cooperate fully with these efforts which may include use of a multiple listing service or a key lockbox system on Property. Seller shall promptly notify Broker in writing of any potential purchasers with whom Seller negotiates during the term of this Listing and shall promptly refer all persons making inquiries concerning the Property to Broker.

⁷ Because we conclude that the contract is unambiguous, we do not address the arguments concerning evidence outside the four corners of the document. *See Sambs v. City of Brookfield*, 66 Wis. 2d 296, 317, 224 N.W.2d 582 (1975).

may not dispose of all the issues that were before the trial court. Accordingly, we remand to the trial court to determine whether the parties preserved additional issues that require further proceedings.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

