

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 2009

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. 2008AP2606-FT

Cir. Ct. No. 2005CV107

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

GALLAGHER REAL ESTATE, LLC AND JERRY A. GALLAGHER,

PLAINTIFFS-APPELLANTS,

V.

BARIAN, INC. D/B/A ERA ADVANTAGE REALTY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Juneau County:
JOHN P. ROEMER, JR., Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Gallagher Real Estate LLC appeals a money judgment. We affirm.

¶2 This case arose from a real estate listing contract between Barian, Inc., doing business as ERA Advantage Realty, and Jerry Gallagher, apparently signing on behalf of Gallagher Real Estate. The listing contract covered property of 29 acres. An offer to purchase a portion of the property was obtained from potential buyer Michael Hanna. The sale was to be of 3.57 acres. The purchase price shown at the top of the form was \$325,000. However, there was a handwritten additional provision stating that the offer is contingent “upon a corporation being formed and the parties accepting the terms and conditions of the corporation” before closing. It also provided: “Michael Hanna to pay 50% of purchase price (\$162,500) with the buyer + seller forming a corporation as per” the provision above.

¶3 Before that transaction closed, a dispute arose between Gallagher and Barian over the commission that would be due on this sale. Gallagher and Hanna then released each other from the offer to purchase.

¶4 Eventually this matter went into litigation because Barian placed a lien for the commission on the property. Gallagher commenced this action to resolve the dispute. After trial, the circuit court found that Gallagher wanted to dissolve the original purchase transaction for the purpose of avoiding Barian’s commission. It found that Gallagher and Hanna agreed at that time to a different transaction that would achieve the same result without involving Barian. The court held that by acting in this manner to deliberately avoid a real estate commission that would otherwise be due, Gallagher breached the duty to act in good faith that is implied in the real estate listing contract. The court awarded monetary damages to Barian, including attorney fees.

¶5 On appeal, Gallagher makes several arguments. Under the terms of the real estate listing contract, Barian was due a commission if there was an “enforceable” purchase contract. Gallagher first argues that the original real estate purchase agreement with Hanna did not rise to the level of an enforceable contract for two reasons. The first reason is that no contract was formed, because the contingency about the parties later creating a corporation was such that control over whether it would be satisfied was entirely up to the parties themselves. According to Gallagher, this makes the agreement too indefinite to satisfy the meeting of the minds standard for contract formation. The second reason Gallagher claims the contract is unenforceable is that the corporation-formation contingency was not satisfied.

¶6 The circuit court concluded that it was unnecessary to address these arguments because of its ruling based on good faith. If we agree with that conclusion, it is also unnecessary for us to address those arguments. Therefore, we turn to Gallagher’s arguments about good faith.

¶7 Gallagher argues that the circuit court erred by concluding that its decision as to good faith made it unnecessary to consider his arguments about enforceability. He relies on a passage from *Gerruth Realty Co. v. Pire*, 17 Wis. 2d 89, 94, 115 N.W.2d 557 (1962). The dispute in *Gerruth* was between a seller and intended buyer over whether a contract was formed even though the financing contingency contained the arguably indefinite provision that the deal was “contingent upon the purchaser obtaining the proper amount of financing.” *Id.* at 90. In the passage Gallagher relies on, the court stated that it would “not reach the question of good faith on the part of the defendants ... because we believe the contract cannot be made certain by the surrounding circumstances. In our view, the good-faith issue arises only after the determination of the meaning of

the ambiguous phrase.” *Id.* at 94. In Gallagher’s view, this passage means the court in his case erred by considering good faith first.

¶8 This argument is not persuasive because the good faith issue under discussion in *Gerruth* did not concern relations between the seller and the listing agent, but between the seller and the intended buyer. The facts of *Gerruth* did not at all concern good faith in the context of a listing agency contract.

¶9 Gallagher’s other arguments about good faith are essentially challenges to the court’s factual findings. We accept those findings unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2007-08).¹ We are to give “due regard” to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* Without attempting to detail all the evidence here, we are satisfied that the court’s findings are not clearly erroneous as to the historical facts and Gallagher’s reason for voiding the original purchase agreement with Hanna. These findings are amply supported by the testimony of Hanna and a well-developed record of correspondence between the various parties and their attorneys. To the extent this record differed with the testimony of Gallagher or others, we defer to the circuit court’s credibility determination.

¶10 Gallagher has not convinced us that the circuit court erred by relying on the good faith theory without addressing Gallagher’s arguments about the enforceability of the real estate purchase contract. Therefore, we do not address the enforceability issues.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

By the Court.—Judgment affirmed.

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

