

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 97-2458-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**CENTURY 21 GOLD AWARD HOMES, PETERSON &
MOELTER, INC. D/B/A CENTURY 21
PETERSON-MOELTER, AND MCCLAIN REALTY, INC.,**

PLAINTIFFS-RESPONDENTS,

v.

STEVE CAMDEN AND REBECCA CAMDEN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Monroe County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Steve and Rebecca Camden appeal from a judgment directing them to pay the realtors' sales commission. The issue is whether the buyer's failure to strictly comply with the terms of a letter of commitment for financing absolves the sellers (the Camdens) of liability for the

brokerage commission. We conclude that the buyer's timely notification of substantial compliance with the financing condition, followed by a letter of commitment, when coupled with the failure of the buyer or seller to invoke the financing unavailability clause, renders the contract enforceable and obligates the Camdens to pay the commission of the respondent realtors. Therefore, we affirm.¹

The Camdens listed their house for sale with respondent realtor, Century 21, pursuant to a standard Residential Listing Contract. In that contract, the parties agreed that Century 21 was entitled to its commission from the Camdens if they "accept[] an offer which creates an enforceable contract for the sale of ... the Property." The contract included a financing contingency. The contract also provided that if "financing is not available on the terms stated, Buyer shall promptly deliver written notice to Seller of same including ... evidence of unavailability.... Seller shall then have 5 days to give Buyer written notice of Seller's decision to finance this transaction on the same terms set forth herein" The parties' contract required the buyer to present the seller with a "LETTER OF COMMITMENT (sic) from buyers lender within 15 days of acceptance of this offer stating Buyer is in fact approved for the desired loan amount." The fifteen-day deadline was August 30, 1995 and closing was scheduled for October 9, 1995.

On August 30, 1995, Century 21 notified the Camdens that the buyer's mortgage company "sees no problems" with the buyer satisfying the financing contingency. On August 31, 1995, the buyer's mortgage company notified the buyer's realtor (also a plaintiff-respondent) that the buyer has "pre-qualif[ied] for the purchase of [the] property." However, that correspondence

¹ This is an expedited appeal under RULE 809.17, STATS.

expressly stated that it is “a credit pre-qualification,” not “a commitment letter.” On that same date, the buyer’s mortgage company notified the buyer’s realtor in separate correspondence that he “hope[d] these two letters [would] assure your seller of [the buyer’s] ability to secure a mortgage and his committment (sic) to buy the [specified] home” On September 1, 1995, Camden allegedly telefaxed correspondence to Century 21 to void the contract because the buyer had not met the financing commitment. However, Century 21 denies receipt of that facsimile. On September 25, 1995, the buyer’s mortgage company notified the buyer’s realtor that “the financing contingency per the purchase agreement dated August 14, 1995 [can be removed].” On September 29, 1995, Camden notified Century 21 that “we *are terminating* our interest in this agreement” because “[the buyer was unable] to remove the contractual contingencies as outlined” (Emphasis supplied).² Although the buyer was ready, willing and able to close on October 9, 1995, the Camdens refused.

Century 21 and the other realtors involved sued the Camdens for their commission. The parties moved for summary judgment. The trial court granted the realtors’ summary judgment motion and ruled that the Camdens were liable for the brokerage commission. The trial court characterized the contractual condition of the fifteen-day letter of commitment as a “proof of eligibility for financing,” rather than a “subject to financing” clause, and concluded that the

² The use of the present tense by Camden does not support their position that they terminated the contract by facsimile on September 1, 1995. Although their counsel reiterated their position on October 5, 1995, that correspondence does not validate delivery of the September 1, 1995 facsimile. The financing contingency could have been removed as of September 25, 1995.

buyer substantially complied in spirit and intent with that condition.³ The Camdens appeal.

Construction and application of a contract when the facts are undisputed present a question of law which is appropriate for summary judgment. *Fore Way Express, Inc. v. Bast*, 178 Wis.2d 693, 701, 505 N.W.2d 408, 412 (Ct. App. 1993) (citation omitted). Reciprocal motions for summary judgment which explicitly assert that the parties are satisfied that the material facts are undisputed may be resolved on motions for summary judgment. *See id.* (citation omitted).

“[C]onstruction [of a contract] which gives reasonable meaning to every provision . . . is preferable to one leaving part of the language useless or meaningless.” *Stanhope v. Brown County*, 90 Wis.2d 823, 848-49, 280 N.W.2d 711, 722 (1979) (citation omitted). A real estate broker is entitled to a commission when he or she produces a buyer who is ready, willing and able to purchase the property specified by the seller in the listing contract. *See Mansfield v. Smith*, 88 Wis.2d 575, 585-86, 277 N.W.2d 740, 745 (1979). The court need not analyze the buyer’s readiness, willingness and financial ability if it concludes that the buyer and seller entered a valid contract for the sale of the property. *See id.* at 586, 277 N.W.2d at 745.

Although the buyer did not present the Camdens with a letter of commitment within fifteen days, he consistently provided assurances that he was

³ The Camdens rely on *Woodland Realty, Inc. v. Winzenried*, 82 Wis.2d 218, 223-24, 262 N.W.2d 106, 108-09 (1978), which held that failure to satisfy a “subject to financing clause” renders the contract unenforceable. The trial court distinguished *Woodland Realty* because: (1) its “subject to financing clause,” differed from the “proof of eligibility for financing” clause in this case; and (2) that buyer materially deviated from the financing conditions, unlike the buyer in this case. We agree that *Woodland Realty* is distinguishable.

satisfying the financing conditions and intended to close on October 9, 1995.⁴ It is undisputed that the financing unavailability clause was never invoked.⁵ We conclude that because the financing unavailability clause was never invoked, the buyer's substantial compliance with the contractual amendment requiring a letter of commitment within fifteen days was sufficient under these circumstances to enforce the contract. *See Davis v. Allstate Ins. Co.*, 101 Wis.2d 1, 7, 303 N.W.2d 596, 599 (1981) (where party has met essential purpose of contract, substantial performance has occurred). Because we conclude that the contract was enforceable against this buyer, the Camdens are liable to the respondent realtors for their sales commission.

By the Court.—Judgment affirmed.

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

⁴ The Camdens claim that they voided the contract in their September 1, 1995 facsimile. However, Century 21 denies receipt of this facsimile. We conclude that this disputed issue of fact is immaterial because the buyer did not invoke the financing unavailability clause. We also note that the parties did not consider this factual dispute material, or they would have withdrawn their reciprocal summary judgment motions. *See Fore Way Express, Inc. v. Bast*, 178 Wis.2d 693, 701, 505 N.W.2d 408, 412 (Ct. App. 1993) (citation omitted).

⁵ The Camdens contend that the financing unavailability clause was inapplicable because they were unwilling to finance the sale for the buyer. However, its inclusion in the contract refutes their contention. *See Stanhope v. Brown County*, 90 Wis.2d 823, 848-49, 280 N.W.2d 711, 722 (1979).

