COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3166

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CLAUDIA M. BOURASSA,

PLAINTIFF-RESPONDENT,

v.

HALLMARK GROUP REALTORS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed.*

HOOVER, J. Hallmark Group Realtors appeals a small claims judgment denying Hallmark's summary judgment motion, granting Claudia Bourassa's motion and dismissing Hallmark's claim for return of commissions it paid Bourassa in 1991. Hallmark contends that the court erroneously denied its summary judgment motion because once Bourassa terminated her relationship with Hallmark, her 100% commission agreement ended and any commissions

payable after that date were controlled by an earlier agreement that entitled Bourassa to only 50% commission. Alternatively, it asserts that Bourassa failed to comply with Hallmark's policy manual provisions governing her obligations upon termination and that this entitled Hallmark to half of Bourassa's commissions. Hallmark also argues that the court erred by dismissing its counterclaim against Bourassa for alleged overpayment of commissions in 1991 on waiver and estoppel grounds.

This court rejects Hallmark's arguments and affirms the judgment because: (1) Bourassa generated the commissions before terminating her relationship with Hallmark; (2) Hallmark failed to specify or pay an associate to complete Bourassa's duties and permitted her designated associate to do so; and (3) Hallmark's counterclaim is time barred.

Sometime before June 1, 1991, the parties entered into an agreement whereby Bourassa would provide broker services in association with Hallmark. Under that agreement, Bourassa was entitled to 50% of all commissions she generated. On June 1, 1991, the parties entered into a new agreement; Bourassa agreed to pay Hallmark a $1,500 monthly fee along with certain other costs and receive 100% of the gross commissions she generated. The agreement also provided that the "100% commission structure shall end on the date [she] leaves Hallmark …."

When the June 1 agreement took effect, Bourassa had several sales in which offers to purchase had been accepted, but closings had not yet occurred. Those sales were subsequently closed, and Hallmark paid Bourassa 100% commission on those transactions.

The June 1 agreement's term ran from July, 1991, to May 31, 1992. The parties acted as though the agreement was in full force and effect, however, until Bourassa terminated her relationship with Hallmark on August 31, 1996. In addition to the commission agreement, Hallmark's policy manual defined its relationship with sales associates. The manual provided that upon termination, associates would receive all commissions on outstanding sales if they made arrangements for another Hallmark associate to perform their duties and provided Hallmark a copy of the agreement.

When Bourassa terminated her relationship with Hallmark, she had two accepted offers that had not yet closed. She designated another associate to complete the closings, but did not provide Hallmark with a copy of their agreement. The closings occurred without change to the accepted offers' terms or conditions. Hallmark paid Bourassa 50% of the gross commissions and retained the remainder. Bourassa believed she was entitled to the full commission, sued Hallmark in small claims court, and the court commissioner rendered a decision dismissing her claim. She then demanded a trial.[1] Hallmark filed a counterclaim seeking reimbursement of 50% of Bourassa's commissions for 1991.

The parties filed cross-motions for summary judgment. The circuit court initially ruled that summary judgment procedure was appropriate only on the motions relating to Hallmark's counterclaim and ruled in favor of Bourassa. The court determined that waiver and estoppel barred Hallmark's claim for commissions it claimed were erroneously paid in 1991. Subsequently, the court

[1] The record is devoid of any indication how the case came to be before Judge Dilweg after the court commissioner's decision. This court infers that Bourassa demanded a trial. *See* § 799.207, STATS.

determined that summary judgment procedure was appropriate on Bourassa's claim against Hallmark and ruled in her favor. It concluded that both the 1991 agreement and the earlier one had been terminated. It decided that the signed offer to purchase was a binding contract and that the commission was earned at the time the offer was accepted. Finally, the court determined that the policy manual provisions controlled and, because Hallmark had not designated or paid the associate closing on Bourassa's behalf, the commission belonged to Bourassa.

Whether the circuit court properly granted Bourassa's motion for summary judgment is a question of law we review without deference to the trial court. *See* ***Gaertner v. Holcka***, 219 Wis.2d 436, 445-46, 580 N.W.2d 271, 275 (1998). This court nonetheless values a trial court's analysis. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt.***, 195 Wis.2d 485, 497, 536 N.W.2d 175, 182 (Ct. App. 1995). In determining if the trial court properly granted summary judgment, we apply the same methodology as the trial court. ***Id***. at 496, 536 N.W.2d at 182. Because summary judgment methodology is well known, we need not repeat it except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id***. at 496-97, 536 N.W.2d at 182 (citing § 802.08(2), STATS.). If Bourassa demonstrates that there is no genuine issue as to any material fact and that she is entitled to judgment as a matter of law, Hallmark, to avoid summary judgment, must set forth specific facts showing that there is a genuine issue of material fact for trial. *See* § 802.08(3), STATS.; ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 291, 507 N.W.2d 136, 140 (Ct. App. 1993)

The construction of a written contract is normally a question of law for the court. ***Ondrasek v. Tenneson***, 158 Wis.2d 690, 694, 462 N.W.2d 915, 917

(Ct. App. 1990). We owe no deference to the trial court's construction of a contract. ***Id***. When its terms are plain and unambiguous, this court will construe the contract as it stands. ***Borchardt v. Wilk***, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). The ultimate aim of all contract interpretation is to ascertain the parties' intent. ***Patti v. Western Machine Co.***, 72 Wis.2d 348, 351, 241 N.W.2d 158, 160 (1976). If this intent can be determined with reasonable certainty from the contract itself, there is no need to resort to extrinsic evidence. ***Id***.

The first issue this court addresses is whether the circuit court erred by determining that the 100% commission agreement governed the sales that closed after Bourassa left Hallmark. The parties' contentions rest upon their differing interpretations of the contract. Hallmark contends that the agreement is unambiguous and that once Bourassa terminated her relationship with Hallmark, the 100% commission structure ended. It claims that the commission arrangement reverted to 50% as set forth in Hallmark and Bourassa's pre-1991 agreement. Hallmark alternatively argues that if the commission earned was ambiguous under the contracts, then summary judgment was inappropriate because the parties' intent, a question of fact, would arise. Bourassa claims that she earned the commissions and that Hallmark's policy manual clearly provided that she should be paid. She alternatively argues that the contract is ambiguous and that the court should construe it against the drafter, Hallmark.

The 100% commission agreement states that the commission shall be paid at "100% of the gross commission generated [and this] structure shall end on the date [Bourassa] leaves Hallmark …." This court therefore needs to determine when a commission is "generated." Although neither the agreement nor the policy manual define "generated," the term is unambiguous. A real estate

broker is entitled to a commission when he or she has procured a purchaser who is ready, willing, and able to buy according to the listing contract's terms. ***Mansfield v. Smith***, 88 Wis.2d 575, 585-86, 277 N.W.2d 740, 745 (1979). Unless specifically required, the listing contract final consummation of the sale is not required. ***Winston v. Minkin***, 63 Wis.2d 46, 51, 216 N.W.2d 38, 41 (1974). A commission is therefore generated when an offer is accepted. *See* ***Mansfield***, 88 Wis.2d at 585-86, 277 N.W.2d at 745. No one disputes that Bourassa had accepted offers before she terminated her relationship with Hallmark. Therefore, the commissions were generated before her termination, and the 100% commission agreement applies.

The next issue is whether the policy manual modifies the amount Bourassa is entitled to receive. Hallmark contends that because Bourassa failed to comply with the policy manual procedures upon termination, she is entitled to only half the commission she would otherwise receive. Specifically, Hallmark argues that she failed to notify it of the commission to be paid her designated associate. Bourassa maintains that she complied with all of the manual's requirements to entitle her to her full commission.

This is once again a question of contract interpretation. The policy manual provides that:

> [T]he Associate shall make arrangements with another associate of The Hallmark Group, Ltd., to perform the duties and responsibilities he otherwise would have customarily performed in bringing his pending offers to closing. Such arrangement shall be in writing and include an agreement with his replacement associate on how the terminated Associate's commission will be divided. The Hallmark Group, Ltd.'s *must be notified of such arrangement and all of the particulars thereof* …. In the event the terminated Associate fails to make such arrangement or to notify the Associates Manager … the

> *Associates Manager shall select an associate … to perform the terminated Associate's duties, and in such case the terminated Associate shall be entitled to 50% of the commission he otherwise would have received* had his relationship … not been terminated. (Emphasis added.)

This court must determine whether Hallmark may withhold half of Bourassa's commission. Bourassa designated another associate to handle the closings. She did not, however, have a written agreement with that associate or inform Hallmark what commission the associate would be paid. Nevertheless, Hallmark never appointed an associate to handle the closings or paid an associate a commission in connection with those closings.

This court agrees with the circuit court that under the contract's plain and unambiguous terms, Hallmark must select an associate to complete Bourassa's duties before it may withhold half the commission. Hallmark was entitled to withhold half of Bourassa's commission if it selected an associate to complete her duties. Because Hallmark failed to do so and permitted Bourassa's designee to complete her duties, it is not entitled to half of Bourassa's commission.

The final issue is whether the circuit court properly dismissed Hallmark's counterclaim for alleged overpayment of commissions for offers accepted before June 1, 1991. Hallmark contends that the circuit court did not properly consider the necessary elements of waiver or estoppel. It asserts that whether these doctrines apply is ordinarily a question of fact and that there is no evidence that each and every element exists. Bourassa responds that Hallmark's delay of over seven years, entry into the 100% commission agreement and payment of the 1991 commissions constitutes adequate evidence of waiver, estoppel or laches to dismiss the claim. This court agrees the claim should be dismissed, but for a different reason.

An appellate court may uphold a trial court ruling on a theory or reasoning not presented in the trial court. *See* ***State v. Holt***, 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985). It is well established that if a trial court reaches the proper result for the wrong reason, it will be affirmed. *See* ***State v. King***, 120 Wis.2d 285, 292, 354 N.W.2d 742, 745 (Ct. App. 1984). On appeal, this court is concerned with whether the circuit court's decision, not its reasoning, is correct. ***Liberty Trucking Co. v. DILHR***, 57 Wis.2d 331, 342, 204 N.W.2d 457, 463-64 (1973). If the holding is correct, it should be sustained. ***Id***.

The statute of limitations had run on Hallmark's counterclaim, which was more than six years old when made. Section 893.43, STATS., provides, in pertinent part: "An action upon any contract, obligation or liability, express or implied … shall be commenced within 6 years after the cause of action accrues or be barred." Hallmark first filed its counterclaim sometime after November 6, 1997.[2] Bourassa's brief repeatedly asserts that Hallmark paid excess commissions more than seven years ago. Additionally, in its July 1, 1998, decision, the circuit court found that Hallmark paid Bourassa the commissions approximately seven years ago. Hallmark does not dispute the court's finding or Bourassa's contentions regarding when Hallmark paid the commissions. This court therefore concludes that Hallmark's counterclaim was filed more than six years after Hallmark made the alleged overpayments and is therefore barred by § 893.43, STATS.

[2] The appellate record does not contain Hallmark's counterclaim. It also does not contain a transcript of the hearing before the court commissioner. Hallmark is reminded that it has the burden to ensure the record is adequate for the appeal. *See* § 809.15, STATS. In the absence of the record, we will assume that the record supports every fact essential to sustain the circuit court's findings. *See* ***Dunhame v. Dunhame***, 154 Wis.2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989).

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.