IN THE SUPREME COURT OF FLORIDA

RICHLAND GROVE & CATTLE COMPANY, INC., a Florida corporation,

Petitioner,

vs.

TOM EASTERLING,

Respondent.
_____/

CASE NO. 70,523
(2d District - No. 86-833)

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

CHARLIE LUCKIE, JR., ESQUIRE
McGEE, LUCKIE & TYNER,
a division of
DAYTON, SUMNER, LUCKIE
& McKNIGHT, P.A.
Post Office Box 907
Brooksville, Florida 34298-0907
(904) 796-3564
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Circuit Court of the Sixth Judicial Circuit of Florida, in and for Pasco County, Florida, will be referred to as the Trial Court. The District Court of Appeal of Florida, Second District, will be referred to as the Lower Court.

Respondent, TOM EASTERLING, was the Plaintiff in the Trial Court. While this was on appeal in the Lower Court, TOM EASTERLING died. Respondent filed a Notice of Substitution of Parties, substituting JUDY JAY EASTERLING as Personal Representative of the Estate of TOM EASTERLING in place of TOM EASTERLING. In this Brief, Respondent will be referred to as "Respondent" and "Easterling" or "Mr. Easterling." The Defendant in the Trial Court, RICHLAND GROVE & CATTLE COMPANY, INC., a Florida corporation, will be referred to as the "Petitioner."

Reference to the record on appeal in the Lower Court will be referred to by the Letter "R", followed by the appropriate page number. Reference to the Appendix (to Petitioner's Initial Brief on the Merits) will be referred to by the Letter "A", followed by the appropriate page number.

STATEMENT OF THE CASE

Plaintiff/Respondent filed a Complaint against Defendant/Petitioner to recover a real estate broker's commission (R. 1). The Trial Court entered a Summary and Final Judgment in favor of the Respondent (R. 13). Petitioner appealed to the Lower Court which reversed the summary judgment and remanded. (R. 26-28). Richland Grove & Cattle Company, Inc., v. Easterling, 460 So.2d 591 (Fla. 2d DCA 1984). On remand, the jury found that Respondent was entitled to a real estate broker's commission (R. 66). Final Judgment in favor of Respondent was entered on the jury verdict (R. 67). Petitioner again appealed to the Lower Court. The Lower Court affirmed the Trial Court's decision in favor of Respondent and entered its opinion. (A. 1-11). The case is before this Court on certified question.

STATEMENT OF FACTS

Before his death, TOM EASTERLING was a real estate broker for approximately 25 years (R. 293-A). The Petitioner, RICHLAND GROVE & CATTLE COMPANY, is a Florida Corporation owned and operated by C. WYNN O'BERRY and his family (R. 170). In 1979, the Petitioner listed the property which is the subject of this appeal with the Respondent (R. 172). The listing was an open, verbal listing (R. 172). The Respondent produced a prospective purchaser named Rankin in 1980 who offered to purchase the property (R. 247). This deal fell through because the parties disagreed over the interest rate (R. 178).

After the Rankin deal fell through, Easterling continued to make efforts to sell the property (R. 247). Respondent showed the property to other real estate offices and salesmen. Respondent advertised the property. (R. 247). Respondent contacted Mr. O'Berry to see if Petitioner was interested in selling one-half of the property to a prospect, but Petitioner was not interested (R. 248). Mr. Easterling testified that in frequent social meetings, he told Mr. O'Berry what was or was not happening regarding the property (R. 249). In contrast, Mr. O'Berry testified that Mr. Easterling never told him about showing the property although they saw each other about once a month on a social basis (R. 309). However, at no point during their frequent social meetings did Mr. O'Berry ever tell him to quit trying to sell the property (R. 248).

In 1983, in his continuing effort to sell the property, Easterling showed the property to his part-time salesperson and full-time schoolteacher, YVONNE SICKLER, to acquaint her with the tract of land (R. 197-198). Soon thereafter, Mrs. Sickler discussed the property with a fellow schoolteacher, TIM PHILMON, who had asked her to be on the lookout for grove property for him and his father (R. 198). Mrs. Sickler offered to show the property to TIM PHILMON and told him where it was located, etc. (R. 198). Subsequently, TIM PHILMON advised his father, FLOYD PHILMON about the property. TIM PHILMON acted as a go-between between Mrs. Sickler and FLOYD PHILMON. (R. 199-201). Soon thereafter (less than two months), FLOYD PHILMON and RUTH PHILMON purchased the property from Petitioner (R. 171). Although the title to the property was placed in his mother's and father's names, TIM PHILMON has an interest in the property (R. 238).

Prior to closing the deal with the Philmons, Petitioner learned that the Philmons found out that the property was for sale through Mrs. Sickler who Petitioner knew was a salesperson for Easterling (R. 180). TIM PHILMON was not aware that the property involved was for sale until he learned about it from MRS. YVONNE SICKLER. Likewise, his father was not aware that the property was for sale until his son Tim advised him about the property after discussions with Mrs. Sickler. Additionally, Mrs. Sickler advised TIM PHILMON of the terms and the amount for which the property was listed. As a result of the conversation with Mrs. Sickler and Mrs. Sickler's advising him where the property was located, TIM PHILMON and his father went out and looked at the property. (R.

229-231). Mrs. Sickler had contact with TIM PHILMON on six different occasions about the property in question before the sale was finally made to FLOYD and RUTH PHILMON (R. 205-206). The Philmons knew that Respondent expected a commission from the sale (R. 237). The property was sold by Petitioner to the Philmons for $5,000.00 per surveyed acre, in cash, the exact listing price and listing terms (R. 173).

SUMMARY OF ARGUMENT

Even if this Court answers the certified question as Petitioner contends it should be, i.e., that whether or not a real estate listing contract has been abandoned by a broker is a question of law, the Lower Court's decision should be affirmed because there was disputed testimony and other evidence as to whether or not the open, verbal listing had been abandoned by Respondent, Easterling. The Trial Court certainly had the discretion to decide the issue, legal or factual, in favor of Respondent where the testimony was in conflict. The Statute of Limitations had not run on the verbal listing agreement, and there is no law or case decision which specifies how long such a contract is viable other than the Statute of Limitations.

Regardless, the certified question should be answered to the effect that whether or not an open listing agreement has been abandoned is generally a question of fact. When time of performance is not specified in a contract, reasonable time for performance is a factual issue. It could only be a legal issue when the facts are clearly undisputed. The testimony of Mr. Easterling was sufficient to show his continuing efforts to find a buyer for Petitioner's property. In fact, he did find a buyer to whom the property was sold and the sale consummated less than two months after contact was made by Easterling's office with the buyer, at the exact price and upon the exact terms specified by Petitioner.

The Trial Court correctly submitted the case to the jury, upon appropriate legal instruction, and the Lower Court correctly affirmed the

Judgment for Easterling. It would have been error for the Lower Court to rule for Petitioner as a matter of law in view of these disputed issues of fact.

ARGUMENT

POINT I

WHEN A REAL ESTATE BROKER'S CONTRACT DOES NOT PROVIDE A TIME WITHIN WHICH IT IS TO BE PERFORMED AND THE LAW IMPLIES PERFORMANCE WITHIN A REASONABLE TIME, THE QUESTION OF WHETHER PERFORMANCE OCCURRED WITHIN A REASONABLE TIME IS ONE OF FACT.

What is a reasonable time for a contract to be performed when time is not specified is ordinarily a jury question. Jenkins v. Lykes, 19 Fla. 148 (1882). It is only where facts are undisputed and only one inference is susceptible from the facts that reasonable time is a question of law for the court to determine. Mizell v. Watson, 57 Fla. 111, 49 So. 149 (1909). The propriety of the Lower Court in certifying the question stated in the majority opinion was, of course, within the court's discretion, but the facts in this case were disputed, and, therefore, the case was properly decided by the jury. This issue will be further discussed in argument of Point II.

The Lower Court, citing Shuler v. Allen, 76 So.2d 879 (Fla. 1955), correctly recognized that where a contract of employment does not contain a time within which the service is to be performed, a reasonable time will be implied (A. 4). Additionally, the Shuler Court correctly expressed that where facts are undisputed, reasonable time is a question of law. The Lower Court recognized, however, that Shuler cited to a case which involved an exclusive right to sell. Erswell v. Ford, 205 Ala. 494, 88 So. 429 (Ala. 1921) (A. 5). The instant case involves an open, verbal listing.

The Lower Court expressed concern about the distinction between an exclusive right to sell and a non-exclusive, open, verbal contract when considering whether or not there has been an abandonment of the listing (A. 5). Seemingly, this is the reason the Lower Court certified the question stated in the majority opinion (A. 6-7).

Petitioner states that an exception to the rule announced in Shuler v. Allen, supra, for open, verbal listings gives preferential treatment to such listings. Petitioner argues that there is no reason to make a distinction between an exclusive listing and an open, verbal listing. Petitioner is wrong. Exclusive listings should be scrutinized in favor of the owner because the broker who has an exclusive listing is the only one attempting to sell the property. If a broker with an exclusive listing is not actively trying to sell the property, the owner of the property is at a disadvantage because he will not be able to sell the property himself or employ another broker to try to sell the property. Therefore, an exclusive brokerage contract should be declared abandoned if the broker is not working to try to sell the owner's property, so that the owner can either sell the property himself or employ other brokers. Although the facts are disputed regarding whether Respondent, TOM EASTERLING, actively tried to sell the property for a period of time, Petitioner certainly was not at a disadvantage in having an open listing with the Respondent. If it had wanted, Petitioner could have listed the property with other brokers or sold it itself.

Petitioner places undue significance on Shuler v. Allen, supra, under the facts in this case. Petitioner misconstrues the holding in Shuler. The

Supreme Court in Shuler held, as a matter of law, that the broker in that case had abandoned his efforts to sell the owner's property to a particular customer and, therefore, was not entitled to a commission when the owner sold his property directly to the same customer. Id. at 883. The Court in Shuler did not hold that the listing contract had been abandoned by the broker but held that the broker had abandoned efforts to sell to that particular customer and, therefore, the broker was not the procuring cause of the sale. Id. at 882.

In Shuler, sixteen months passed from the time the broker first met with the ultimate purchasers until the time those same purchasers bought the property from the seller. Id. The broker made no contact with the purchasers during that sixteen-month period. In the instant case, it is not disputed that the sale to the Philmons was complete within two months of the initial procurement by Respondent and his salesperson, MRS. YVONNE SICKLER (R. 171, 198). Thus, Shuler is easily distinguishable from the instant case.

The non-exclusivity of the contract in the instant case and Mrs. Sickler's procurement of the Philmons shortly before the purchase of the property distinguish the instant case from Shuler. There is no doubt that Easterling was the procuring cause of the sale. Under these circumstances, in order to deny Easterling's commission claim, the court would have to find that he was no more than a volunteer when he obtained a purchaser for Petitioner's property.

What is a reasonable time is ordinarily a jury question. Therefore, this case was properly submitted to the jury. Even if the Court answered

the certified question as Petitioner contends it should be, this Court should affirm the Lower Court's decision because there were disputed facts on the abandonment issue as recognized by the Trial Court and the Lower Court.

POINT II

THE FACTS IN THE CASE ARE DISPUTED SO AS TO PROHIBIT A RULING AS A MATTER OF LAW THAT THE BROKER HAD ABANDONED HIS CONTRACT.

The Lower Court recognized that there was support for the trial judge's findings that there were disputed facts concerning Respondent's efforts to sell Petitioner's property (A. 6). Therefore, the issue of whether or not Easterling produced a buyer within a reasonable time was properly submitted to the jury (A. 6). The Petitioner again raises the issue to this Court. This case, however, is not a case of abandonment of a listing contract by a broker. This case involves an attempt by the seller of a piece of property to beat a real estate broker out of his rightful commission. The trial judge recognized that the facts were disputed, and the jury did not allow the owner of the property to get away without paying Mr. Easterling his rightful commission.

In hindsight, Petitioner argues that the testimony of Respondent, TOM EASTERLING, is "fuzzy", while the testimony of WYNN O'BERRY is "unequivocal." However, Mr. Easterling testified that he approached Mr. O'Berry several different times to explain what was going on during the period of time between the Rankin deal and the date when the Philmons purchased the property (R. 249). Mr. Easterling was certain that he had met with someone about purchasing one-half of the property (R. 296). Mr. Easterling was also certain that he had advertised the property and that he had shown the property to other real estate offices (R. 247).

At monthly meetings, Mr. Easterling testified that he sometimes discussed the piece of property with Mr. O'Berry (R. 260). Mr.

Easterling and Mr. O'Berry were personal friends, and Mr. Easterling "unequivocally" testified that he spoke to Mr. O'Berry concerning the property on an informal basis (R. 261). Mr. Easterling testified that Mr. O'Berry "knew that I was doing the best I could with that piece of property" (R. 261). The two men were personal friends, and it could not be expected that for Mr. Easterling to collect a broker's commission, he was required to have "formal" office meetings with his friend and client about efforts to sell the property.

Additionally, other evidence supports Respondent's argument that he did not abandon the contract. In April, 1983, he and MRS. YVONNE SICKLER went out to inspect the property to acquaint Mrs. Sickler with the property (R. 197). If Mr. Easterling was not actively attempting to sell the property for Petitioner, he would not have acquainted Mrs. Sickler with that particular piece of property. TOM EASTERLING familiarized Mrs. Sickler with the property so that she might find a buyer for Petitioner's land, which she ultimately did. The Lower Court recognized that Mrs. Sickler and Respondent were the procuring cause of the sale. (A. 3).

The testimony of MR. TOM EASTERLING, therefore, cannot be considered "fuzzy," except in the mind of Petitioner. Rather, the testimony of Mr. Easterling was in direct conflict with Mr. O'Berry's testimony that there was no contact between the two men between late 1980 and mid-1983 (R. 308). The trial judge recognized the disputed facts and submitted the issue to the jury (R. 338). The jury weighed the evidence and concluded from the facts that Mr. Easterling's testimony was credible,

and, therefore, he was entitled to a commission on the sale of the land to the Philmons.

The Petitioner cites case law in its Brief which is irrelevant to the facts of this case. The Petitioner relies on both Shuler v. Allen, supra, and Wilkins v. W. B. Tilton Real Estate and Insurance, Inc., 257 So.2d 573 (Fla. 4th DCA 1971). Like the Shuler Court, the Wilkins Court held that "the seller had a right to assume that the broker had abandoned his efforts in connection with the sale of this property to the ultimate buyer." Id. at 575. Neither the Shuler Court nor the Wilkins Court held that the brokers had abandoned their listing contracts. In Wilkins, the issue was whether the broker was the procuring cause of the sale. Id. at 574. Again, in the instant case, less than two months passed from the time Mrs. Sickler first discussed the property with TIM PHILMON and the time the Philmons purchased the property. Thus, Petitioner's reliance on Shuler and Wilkins is misplaced.

In this case, the Petitioner's claim of abandonment is in no way related to what happened after the Philmons became interested in Petitioner's property through the efforts of the Respondent. The Petitioner's claim is that the listing contract was at an end before the Philmons came into the picture. In his testimony, WYNN O'BERRY used the word "abandon" to try to convince the jury that there was no contract. He had never used the word before, and at trial said, "I started using it today." (R. 317). The word "abandon" which he used was a conclusory term but failed completely to comport with the balance of his testimony, wherein he admitted that he listed the property with the

Respondent, he never abandoned his intention to sell the property, he never told Mr. Easterling not to find a buyer for his property, he had no objection to Mr. Easterling showing the property to prospects, he was pleased to sell the property, and if he sold the property to a customer of Mr. Easterling, he expected to pay him a commission. (R. 318-319). Lastly, the property was sold by Petitioner to Respondent's prospect according to Petitioner's own testimony (R. 321).

POINT III

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE LAW APPLICABLE TO THE CASE.

The law of abandonment is correctly stated in the Trial Court's instructions to the jury in a positive fashion where, among other things, the Trial Court told the jury:

> "Now, generally, a broker must show that a sold property listed with him by the owner was brought about through continuous negotiations inaugurated by him, in order to be entitled to his commission; but that is not the case where the seller and the buyer have purposely excluded the broker from these negotiations by dealing with one another directly."
>
> (R. 383-384);

and additionally:

> "You are further instructed that where a contract of employment between a seller and the broker does not contain a time within which the service is to be performed, the parties intended that such service should be accomplished within a reasonable period of time."
>
> (R. 384).

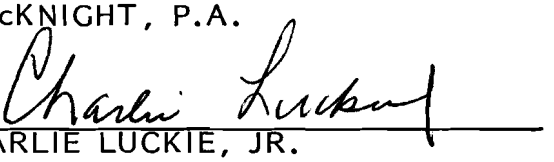
The instruction which Petitioner requested contains proper argument to be made to a jury, but it was not error for the court to deny the instruction where the court covered the applicable law completely in the instructions as a whole. If the Trial Court's charges to the jury are fair taken as a whole, it is not error if the court fails to give a specific charge requested or the court gives a specific charge to which the party objects. See Saporito v. Bone, 195 So.2d 244, 245 (Fla. 2d DCA 1967).

CONCLUSION

Ordinarily, when time for a contract to be performed is not specified, whether reasonable time has passed is a question for the jury to determine. It would, therefore, be proper for this Court to determine that when dealing with open, verbal listings, whether performance occurred within a reasonable time is a factual issue. Additionally, the facts of this case are disputed on the question of whether Respondent abandoned the listing agreement. It would, therefore, have been improper for the Trial Court to have ruled as a matter of law that the broker had abandoned his contract.

Furthermore, the Trial Court completely and accurately instructed the jury on the law to be applied to the facts of the case. The Trial Court did not err in refusing Petitioner's requested jury instruction on "abandonment", because the instructions as a whole covered that issue. This Court should, therefore, affirm the decision of the Lower Court in its entirety, regardless of how the certified question is answered.

McGEE, LUCKIE & TYNER,
a division of
DAYTON, SUMNER, LUCKIE
& McKNIGHT, P.A.

By 
CHARLIE LUCKIE, JR.
P. O. Box 907
Brooksville, Florida 34298-0907
(904) 796-3564
ATTORNEYS FOR RESPONDENT