IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

TOM EASTERLING,

Respondent.

CASE NO. 70,523

FILED
SID J. WHITE
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Deputy Clerk

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE FACTS

In this Brief, the Petitioner, RICHLAND GROVE & CATTLE COMPANY, INC., a Florida corporation, will continue to refer to the parties as it did in it's Initial Brief on the Merits, and the Petitioner will be referred to as the Owner, and the Respondent, JUDY J. EASTERLING, will be referred to as the Broker.

Owner would respectfully submit that the Broker's recitation of facts contained in Respondent's Brief on the Merits is creative to the point of being misleading. In an effort to create a dispute of facts where none exist, the Broker recites on page 3 that after the Rankin deal fell through, the Broker continued to make efforts to sell the property by showing the same to other real estate offices and salesmen and advertising the property. These facts are not in dispute, but are not relevant to the issue of abandonment because the Broker admitted that he never notified the Owner of his continuing efforts to sell the property because he felt there was no reason to contact him unless he had something going (R-297).

The Broker recites as a fact that he contacted O'Berry to see if he was interested in selling one-half of the property to a prospective buyer . The Broker simply cannot use this testimony to create a dispute of fact because the Broker admitted at trial that this contact could have been before the Rankin deal (R-262). The Broker's earlier deposition testimony which was read into the

record at the trial indicated that the Broker's memory about this alleged contact was indeed fuzzy since he couldn't remember the man's name nor when the conversation took place (R-296), or for that matter what year it took place (R-296). In his deposition testimony, he was asked if there was any other contact, and he answered truthfully "no, not really" (R-297).

Next the Broker attempts to create a dispute of facts by reciting that the parties had frequent social meetings. When pressed on the question about whether there had been any contact on these social occasions about the property, the Broker responded "I might or might not have" (R-260), but that any such contact was not "on a formal basis" (R-261).

The Broker further recites the non-fact that at the social meetings, Mr. O'Berry never told him to quit trying to sell the property. This non-fact simply supports Mr. O'Berry's testimony that the question of the property was never brought up in any of the conversations at the social meetings or any other time, either formally or informally (R-310, R-311). Additionally, Owner would point out that the Owner has no duty to contact the Broker. The duty is clearly on the Broker to keep the Owner informed.

The Broker goes into a further recitation of facts, all of which are irrelevant, regarding contact between Yvonne Sickler, a saleslady for the Broker, and Tim Philmon, who was the ultimate purchaser's son. Again, these facts are not disputed but are simply not relevant because they do not bear on the issue of

whether the Broker abandoned his contract of employment. The Owner, Mr. O'Berry, had no contact with either Sickler (R-206) or Tim Philmon (R-239). Since the Owner was never made aware of any dealings between Sickler and Tim Philmon, these alleged dealings cannot offset the fact of abandonment by the Broker of his contract of employment.

Owner would respectfully submit that the Broker has failed to recite a single fact in the record which would demonstrate that there was any contact whatsoever between the Broker and the Owner for a 2½ year period of time from when the Rankin deal fell through until the Broker and the Owner met at the barn meeting.

SUMMARY OF ARGUMENT

The law set forth in Shuler v. Allen, 76 So.2d 879, (Fla. 1955), is that when a contract of employment fails to specify a time for performance, it will be implied that the services should be performed within a reasonable time, and where the facts are undisputed, it is a question of law for the courts to decide. There is no reason in the law or public policy to create an exception to this rule for open, verbal listings. In fact, there is probably more reason for the rule of law as it applies to open, verbal listings than to exclusive listings, since open, verbal listings have proven to be more troublesome in the case law.

In the case at bar, there is no dispute of fact as to the issue of abandonment. Both the Lower Court in its opinion and Judge Grimes in his dissent concluded that there were no contacts specifically regarding the property from the period of time when the Rankin deal fell through in November of 1980 until the barn meeting in May of 1983.

The Broker attempts to create an issue of fact by pointing to equivocal and fuzzy testimony in the record where he testified regarding contacts with the Owner during this period of time that he "might or might not have" but "not on a formal basis". This testimony taken with his own previous testimony that there was no contact clearly demonstrates that there was no dispute of fact regarding the lack of contact by the Broker with the Owner for

the 2½ year period of time in question. That issue is so clear as to mandate a ruling as a matter of law that the Broker had abandoned his contract of employment.

The jury instructions given by the Trial Court did not mention the issue of abandonment, which was the focal point of the trial. The instructions did tell the jury that the Broker was entitled to his commission where the seller and the buyer have purposely excluded the Broker from negotiations by dealing with one another directly. This instruction taken as a whole was misleading and not fair to the Owner.

ARGUMENT

ISSUE ONE: 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, IS THE QUESTION OF WHETHER PERFORMANCE OCCURED WITHIN A REASONABLE TIME NORMALLY ONE OF LAW OR FACT?

Where the facts are undisputed as in the case sub judice, clearly it should be a question of law.

Respondent/Broker argues in his Summary of Argument, but no where else, that there is no law or case decisions which specify how long a contract is viable other than the Statute of Limitations. Owner submits that this is simply not so, and that there is a plethora of Florida cases reciting the reasonable time standard for performance where no time is stated in any contract. Indeed, the Broker goes on to cite in Point One the Florida case of Mizell v. Watson, 57 Fla. 111, 49 So. 149 (1909), which stands for the proposition of law that

> "Where the facts are not disputed, however, the question of what is a reasonable time in which to rescind a contract is a question for the court to decide, and the time may be such that the court will declare it to be reasonable or unreasonable as a matter of law." at page 151.

Although this case involved a contract for sale as opposed to a contract of employment, the same principle would seem to apply in either case. This was the specific holding of the case of

Shuler v. Allen supra.

Next under Point One, the Broker argues that there is a justification for making a distinction between an exclusive listing and an open, verbal listing, because in an exclusive situation, the Owner will not be able to sell the property himself or employ another broker. Owner submits that this distinction is of no great import. In the case at bar, the Owner never listed the property with any other broker, although it was an open, verbal listing. The danger comes not from the Owner being unable to list his property, but from misunderstandings that arise from a verbal listing where the terms are not specified or certain, and the courts are called upon to construe what is a reasonable period of time for performance.

Exclusive listings are normally written, which reduces the chance of a misunderstanding, particularly about the question of time for performance. Should the court create an exception to Shuler v. Allen for open, verbal listings, the court would be compounding a problem which already exists for open, verbal listings. The large number of cases in the Southern Reporter regarding open, verbal listings stands as a testament to the fact that the opportunity for misunderstandings is greater for such listings.

The Broker's final argument under Point One is that there was only two months of negotiations with Philmon before the sale to Philmon. Owner would respectfully submit that this is a slight of the hand argument since the time involved with the Philmons

has no relevance to the issue of whether Easterling abandoned his contract of employment and since it was admitted by all parties that the Owner, O'Berry, was never made aware of any of the negotiations regarding the Philmons. This "two months" argument by the Broker is an attempt to divert the court's attention from the real issue of abandonment relating to the 2½ year period of time in which there was no contact by the Broker with the Owner regarding the property in question.

ISSUE TWO: ARE THE FACTS IN THE CASE SUB JUDICE UNDISPUTED SO AS TO REQUIRE A RULING AS A MATTER OF LAW THAT THE BROKER, EASTERLING, HAD ABANDONED HIS CONTRACT?

Judge Grimes concluded in his dissenting opinion that there is no dispute over the fact that the Broker did not specifically contact the Owner concerning the property from November of 1980 until May of 1983 (A-10, A-11). In spite of this conclusion by Judge Grimes, the Broker underscores his argument under his Point Two that this case involves an attempt by a seller to beat a real estate broker out of his rightful commission. Owner would respecfully submit that such an argument is out of place in the highest court of this state, and that this case should not be decided on emotional outbursts or namecalling. What this case is about is whether the Broker abandoned his contract of employment. If anyone has a right to get emotional, it should be the Owner

who heard nothing from his Broker for a period of 2½ years. Even the Lower Court in its majority opinion concluded that there had been no contact "specifically regarding the property" during this 2½ year period of time.

The Broker, Easterling, was asked in his deposition testimony, which was read into the record at the trial of this cause, whether there was any other contact during this 2½ year period of time, and he answered "no, not really." He now argues is his Brief that he had contacted O'Berry several different times to explain what was going on, but he admits that these contacts were "nothing formal" (R-249). Owner submits that this wishy-washy testimony of the Broker is insufficient to carry the day or to carry the burden of proving that there was some contact which would defeat the issue of abandonment. He cannot testify that there was no contact and then later create an issue of fact by saying that there was contact but not on a formal basis or that he "might or might not have" (R-260) contacted O'Berry. The Broker had the burden of proof in this case and had the burden of demonstrating that he had a contract of employment.

The Broker argues under his Point Two that he had continued showing the property to other salespeople and had continued to advertise the property. He admitted, however, that he never told the Owner about any of this because he saw no reason to. The fact that a Broker advertises a property for sale and continues to show the property to prospective purchasers does not negate an abandonment of his contract where the Broker fails to inform the

Owner of these facts. Wilkins v. W. B. Tilton Real Estate and Insurance, Inc., 257 So.2d 573, (Fla. 4th DCA 1971). The Broker admitted in his testimony that he never informed O'Berry that he was advertising the property or continuing to show the property (R-261).

The testimony of the Owner, O'Berry, was unequivocal that there was no contact about the property either on a formal or informal basis for the 2½ year period of time in question (R-310, R-311). The Broker has failed to point out in his brief any testimony in the record which would clearly contradict the Owner's testimony. The best he can do is point to the record where the Broker gave such equivocal and fuzzy testimony as "I might or might not have" (R-260), but that such contacts were not "on a formal basis" (R-261). This testimony coupled with his previous testimony that there was no contact (R-297) clearly demonstrates that there is no dispute of facts, at least on the issue of abandonment, and the trial court should have decided the issue as a matter of law.

The inescapable conclusion from the undisputed facts in the case sub judice is that there was no contact between the Broker and the Owner regarding the property in question for a period of 2½ years, which undisputed facts mandate the conclusion as a matter of law that the Broker had abandoned his contract of employment.

ISSUE THREE: WAS THE OWNER ENTITLED TO A JURY INSTRUCTION REGARDING ABANDONMENT OF THE BROKER'S CONTRACT?

The Owner's requested jury instruction regarding abandonment was not given by the Trial Court. The central issue and the focal point of the trial was the issue of abandonment, yet the jury instructions were totally devoid of any instruction on abandonment.

The problem was compounded by the Trial Court giving an instruction that

> " * * * 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-384).

These instructions as a whole were not fair to the Owner when viewed as a whole, and at a minimum the Trial Court should be reversed with instructions to give an appropriate jury instruction regarding the issue of abandonment.

CONCLUSION

The Lower Court should be reversed with instructions to enter its order directing the Trial Court to enter judgment for the Owner, or in the alternative, to grant Owner a new trial with proper jury instructions regarding the issue of abandonment.

RESPECTFULLY SUBMITTED,

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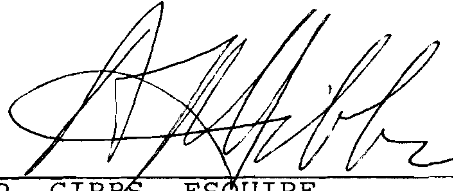
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. regular mail to: CHARLIE LUCKIE, JR., ESQUIRE, P. O. Box 907, Brooksville, Florida 34298-0907, this 16th day of July, A.D., 1987.



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