2013 IL App (2d) 110523-U
No. 2-11-0523
Order filed November 25, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

VC&M, LTD., d/b/a Re/Max Elite,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-AR-3951
	)	
CINDY ANDREWS and	)	
ROBERT ANDREWS,	)	Honorable
	)	Bruce R. Kelsey,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: After husband transferred his interest in marital residence to wife, a real estate brokerage firm sued for a commission under its listing agreement with the couple. The trial court properly dismissed the firm's claims because (1) the terms of a third-party purchaser's offer differed from those in the listing agreement and (2) the transfer of husband's interest to wife was not a "sale" under the listing agreement.

¶ 2 Defendants, Robert and Cindy Andrews, entered into a real estate listing agreement with plaintiff, VC&M, Ltd., to list their marital residence for sale. Plaintiff procured a potential buyer who submitted an offer for less than the asking price. Defendants, who were in the process of dissolving their marriage, rejected the offer, instead arranging for Cindy to purchase Robert's interest

in the home and continue residing there. Robert transferred his interest to Cindy as part of a marital settlement agreement, and defendants refused to pay plaintiff a commission.

¶ 3 Plaintiff filed an amended complaint alleging claims of breach of contract and for an account stated. The trial court dismissed the amended complaint with prejudice, and plaintiff appealed. We dismissed the appeal for lack of jurisdiction on the ground that plaintiff violated the circuit court's local rule prohibiting the electronic filing (e-filing) of certain motions and all notices of appeal. *VC&M, Ltd. v. Andrews*, 2012 IL App (2d) 110523. Our supreme court reversed our decision and directed us to consider plaintiff's appeal. *VC&M, Ltd. v. Andrews*, 2013 IL 114445. We hold that plaintiff's claims for a brokerage commission were properly dismissed because (1) plaintiff admits that the terms of the offer differ from those in the listing agreement and (2) the transfer of Robert's interest to Cindy was not a "sale" under the terms of the listing agreement.

¶ 4 FACTS

¶ 5 On December 15, 2010, plaintiff filed a two-count amended complaint alleging claims of breach of contract and for an account stated. Plaintiff alleged that, on November 24, 2009, it entered into a contract with defendants to list their home for sale for $1,350,000. Through plaintiff's efforts, a couple submitted an offer of $1,126,000 on March 31, 2010. The prospective buyers allegedly were ready, willing, and able to close on their offer. However, the offer was $224,000 less than the asking price specified in the listing agreement.

¶ 6 Defendants rejected the bid and did not make a counteroffer. Specifically, Cindy informed Susan Mitch, the listing agent employed by plaintiff, that defendants would not pursue the bid because Cindy intended to "buy out" Robert's interest in the home and remain living there herself.

Defendants did not pursue negotiations with the prospective buyers, and no further offers were made by any prospective buyer. The listing agreement expired on April 6, 2010.

¶ 7 On August 4, 2010, in the unrelated divorce proceedings, the circuit court entered a judgment for dissolution of marriage, which incorporated a settlement agreement. The settlement provided that Cindy would buy out Robert's share of the marital home. For purposes of determining the parties' interests in the property, Cindy and Robert stipulated that the fair market value of the home was $1,126,005, which was $5 more than the offer that defendants had rejected.

¶ 8 Based on the transfer of Robert's interest to Cindy, plaintiff asserted that it had earned a commission under the listing agreement. Plaintiff alleged that it complied with all terms and conditions of the agreement and made a timely demand for payment of the commission. Plaintiff sought the commission and prejudgment interest (see 815 ILCS 205/2 (West 2010)) accruing since March 31, 2010, when the prospective buyers submitted their offer. Plaintiff also alleged that defendants and their real estate attorney sent e-mail correspondence acknowledging that defendants owed plaintiff the commission.

¶ 9 Cindy and Robert filed motions to dismiss the amended complaint on December 29, 2010, and January 5, 2011, respectively. Defendants argued that the amended complaint must be dismissed with prejudice for failure to state a claim. See 735 ILCS 5/2-615 (West 2010). On February 23, 2011, the trial court dismissed with prejudice the amended complaint. Plaintiff appealed the dismissal, and our supreme court determined that we have jurisdiction over the appeal. *VC&M*, 2013 IL 114445, ¶ 36.

¶ 10 ANALYSIS

¶ 11 Plaintiff alleges claims of breach of contract and for an account stated. The construction, interpretation, or legal effect of a contract is a matter to be determined by the court as a question of law (*Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005)), which we review *de novo* (*Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007)). The elements of a breach of contract claim are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24. An account stated is a method of proving damages for the breach of a promise to pay on a contract. *Patrick Engineering, Inc. v. City of Naperville*, 2011 IL App (2d) 100695, ¶ 52. A claim for an account stated must allege that the parties had an agreement under which one party was regularly billed for services provided by the other party, the party providing the services billed the other (or provided other statements of the amounts due on the account), and the party owing the money did not dispute the correctness of the bills but also did not pay. *Patrick Engineering Inc.*, 2011 IL App (2d) 100695, ¶ 54.

¶ 12 Cindy and Robert each moved to dismiss the amended complaint under section 2-615(a) of the Code of Civil Procedure (Code) (see 735 ILCS 5/2-615 (West 2010)), which tests the legal sufficiency of the complaint. The decision to grant or deny a motion to dismiss under section 2-615 is subject to *de novo* review. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Cindy and Robert each argue that both of plaintiff's claims fail because plaintiff is not owed a commission under the listing agreement.

¶ 13 Plaintiff argues that the amended complaint can not be dismissed under section 2-615 because the complaint alleges facts sufficient to state a cause of action against defendants. In the context of a section 2-615 motion to dismiss, "[t]he proper inquiry is whether the well-pleaded facts

of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). "In ruling on a section 2-615 motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *K. Miller Construction Co., v. McGinnis*, 238 Ill. 2d 284, 291 (2010). "[A] cause of action should not be dismissed, pursuant to a section 2-615 motion, unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). "However, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action." *Tedrick*, 235 Ill. 2d at 161.

¶ 14 We conclude that plaintiff's amended complaint must be dismissed with prejudice for failure to state a claim. Paragraph 11 of the listing agreement provides as follows:

> "11. Brokerage Fee: In consideration of the obligation of the Broker, the Seller agrees:
>
> (a) To pay Broker, at the time of closing of the sale of the property and from the disbursement of the proceeds of said sale, compensation in the amount of 3½% of the sale price (to be distributed 1% to the listing office and 2½% to the selling office) for the Broker's services in effecting the sale by finding a Buyer ready, willing, and able to purchase the property. If the transaction shall not be closed because of refusal, failure, or inability of Seller to perform, the Seller shall pay the sales commission in full to Broker upon demand. Should a sale be in pending or

> contingent status at the expiration of this Agreement, Seller shall pay Broker the full commission set forth upon closing of said sale.[1]
>
> (b) To pay Broker the commission specified above if Broker procures a buyer, if the Property is sold within said time by Seller or any other person, or if the property is sold within 60 days from the expiration date herein to any prospect to whom the said listing information was submitted during the term of this exclusive agreement. However, Seller shall not be obligated to pay said commission if a valid, written listing agreement is entered into during the term of said protection period with another broker and the sale of the Property is made during the term of the subsequent listing agreement."

¶ 15 The listing agreement reflects the well-settled general rule governing a broker's right to receive a commission. If an owner employs a broker to sell property, the broker produces a purchaser within the time limit of the broker's authority, and the purchaser is ready, willing, and able to purchase the property on the terms prescribed by the seller, the broker is entitled to a commission even if the seller refuses to perform the contract. *Hallmark & Johnson Properties, Ltd. v. Gadea*, 218 Ill. App. 3d 921, 926 (1991). However, the broker must prove that the purchaser he or she produced was ready, willing and able to purchase the property on the terms proposed. *Hallmark & Johnson Properties*, 218 Ill. App. 3d at 926 (citing *Solomon v. Baron*, 123 Ill. App. 3d 255 (1984)).

¶ 16 Ordinarily, whether a broker has procured a purchaser ready, willing, and able to purchase the property upon the specified terms and conditions is a question of fact. However, the appellate

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[1]Section 11 of the listing agreement contains a hand-written modification that states "3% if listed and sold by Karen or Sue[;] clients to buy through agents."

court has not hesitated to affirm the dismissal of a cause of action where, from the complaint and exhibits attached thereto, it has appeared that the terms of the offer made by the prospective purchaser differed from the terms set forth in the listing agreement. *Solomon*, 123 Ill. App. 3d at 259. The complaint is dismissed under those circumstances because, even if every allegation were proved, the plaintiff would not be entitled to judgment as a matter of law. *Solomon*, 123 Ill. App. 3d at 259.

¶ 17 Here, plaintiff did not procure a ready, willing, and able buyer under the terms of the listing agreement. The agreement stated a selling price of $1,350,000, but the prospective buyers submitted a bid of $1,126,000, which was $224,000, or 16.5%, less than the asking price. Plaintiff's claims for a brokerage commission are properly dismissed where the record shows that the terms of the offer differ from those in the listing agreement. See *Solomon*, 123 Ill. App. 3d at 259.

¶ 18 Furthermore, the listing agreement provided that the commission would be earned for services in effecting the "sale" of the marital residence, but no "sale" occurred in this case. Where one seller transfers his interest in the property to another seller there is no sale of the entire property. *Foxfield Realty Inc. v. Kubala*, 287 Ill. App. 3d 519, 525-26 (1997). In *Foxfield Realty*, the appellate court affirmed the dismissal of the broker's claim for a commission, because the broker failed to state a cause of action. The court held there was not a "sale" where the property was quitclaimed from one spouse to the other as part of a marital settlement agreement in a dissolution proceeding. Under *Foxfield Realty*, the transfer of Robert's interest to Cindy was not a sale, and plaintiff has offered no reason for us to depart from our holding in that case.

¶ 19 Plaintiff argues that, because defendants' marital settlement agreement refers to a brokerage fee for selling the marital residence, the doctrine of judicial estoppel bars defendants from denying

plaintiff a commission. The marital settlement agreement contains a stipulation that the residence at the time of dissolution had a fair market value of $1,126,005. The agreement provides that, to calculate the amount Cindy would pay Robert for his interest in the property, defendants "stipulated to the net equity after subtracting the outstanding first mortgage balance from the stipulated fair market value, *less real estate broker's fee in the amount of $11,260*, and tax prorations of $10,500 through July 31, 2010." (Emphasis added.)

¶ 20 Plaintiff contends that the stipulation should cause defendants to be judicially estopped from denying plaintiff at least $11,260 as a commission. We disagree. The doctrine of judicial estoppel promotes the truth and protects the integrity of the court system by preventing litigants from deliberately shifting positions to suit the exigencies of the moment. *United Auto. Ins. Co. v. Buckley*, 2011 IL App (1st) 103666, ¶ 35. Judicial estoppel is flexible but five elements generally are necessary: (1) the two positions must be taken by the same party; (2) the positions must be taken in judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position and received some benefit; and (5) the two positions must be totally inconsistent. *United Auto. Ins. Co.*, 2011 IL App (1st) 103666, ¶ 35. Judicial estoppel applies to statements of fact and not to legal opinions or conclusions. *United Auto. Ins. Co.*, 2011 IL App (1st) 103666, ¶ 35.

¶ 21 Here, defendants stipulated to a broker's fee for the sole purpose of establishing the value of the marital residence. Neither Cindy nor Robert "received some benefit" from the stipulation. One could argue that the property distribution portion of the martial settlement agreement undervalued the residence because no broker's fee is owed. Accounting for a broker's fee in distributing the marital property would have caused Cindy to pay Robert too little for his share in

the residence. Thus, Robert agreed to the stipulation to his detriment, not his benefit. Regardless, the undervaluation of the residence is an issue between Cindy and Robert. Stipulating to the broker's fee to calculate the value of the home did not result in Cindy and Robert receiving some benefit in relation to plaintiff or any other third party. Defendants' challenge to plaintiff's claims after agreeing to the broker's fee stipulation is not a deliberate shift of positions to suit the exigencies of the moment. Rather, the stipulation in the marital settlement agreement is an accounting error that is unrelated to plaintiff's claim. The judicial estoppel doctrine is designed to prevent a party from abusing the judicial process, which did not occur in this case.

¶ 22 CONCLUSION

¶ 23 We conclude that plaintiff's amended complaint was properly dismissed with prejudice. For the reasons stated, the dismissal is affirmed.

¶ 24 Affirmed.