2014 IL App (3d) 130368-U

Order filed June 20, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

LOREN GILLUM, d/b/a Agriland Midwest Real Estate,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-13-0368
	)	Circuit No. 10-L-40
MICHAEL L. TAROCHIONE and LINDA J. TAROCHIONE,	)	
Defendants-Appellees.	)	Honorable Scott Shipplett, Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Lytton and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's finding that plaintiff-broker was not the procuring cause of a sale was not against the manifest weight of the evidence.

¶ 2 Real estate broker filed a complaint against sellers for payment of a 7% brokerage commission, asserting the broker's efforts were the procuring cause of the sale of the property. The trial court granted the sellers' motion for a directed finding and the broker appeals. We affirm.

¶ 3 FACTS

¶ 4 On September 10, 2010, plaintiff, Loren Gillum d/b/a Agriland Midwest Real Estate, a real estate broker, filed a one-count complaint against the sellers, Michael and Linda Tarochione, seeking $56,000, which represented 7% commission from the sale of the sellers' property in December 2006 for $810,000. The following facts were elicited during the bench trial conducted on May 2, 2013. The sellers signed a listing agreement with plaintiff's real estate agent, Marshall Griswold, on May 13, 2005. The listing agreement provided that the "gross price of the property" would be no less than $742,000, unless a lower price was accepted by the sellers. The listing agreement covered the period from May 13, 2005 through September 13, 2005. If the real estate agent obtained a sale during this time period, sellers agreed to pay 7% commission on the purchase price. The language of the agreement also provided as follows:

> "[Sellers] understand that if you sell or exchange this property, or if this property is sold by you, by me, by a cooperating broker or by anyone else, or exchanged during the term of this listing agreement, or within 180 days thereafter to a buyer to whom you have introduced this property, [sellers] agree to pay in cash to you a broker's sales commission based upon 7% of the actual sales price."

After both parties signed the contract, plaintiff's real estate agent posted a description and photographs of the sellers' property on the "buyillinois.com" website with an advertised sales price of $775,000.

¶ 5 James Zimmerman (the buyer) first learned the sellers' property was available for purchase through the "buyillinoisland.com" website. The buyer visited the property with plaintiff's real estate agent near the end of May or early June 2005 before making two offers to

purchase the property. The buyer made an offer on June 22, 2005, to purchase sellers' property for $704,340 ($70,660 below the advertised price of 775,000). The sellers also rejected buyer's second offer for $728,488, again well below the advertised price, in mid-July 2005.

¶ 6 In September 2005, the buyer made an unannounced visit to the sellers' property while on business in the area. This visit occurred without prior notice to plaintiff, plaintiff's real estate agent, or the sellers. During this casual visit, the buyer spoke to Michael and told him he previously communicated two separate offers to Michael's real estate agent. Michael said he had not been told about the buyer's prior offers.

¶ 7 Michael told buyer the property remained subject to the listing agreement for the next seven or eight hours and would expire at midnight. That same day, Michael told the buyer to contact his real estate agent and explained he would not negotiate any sale during the 180-day "cooling-off" period. The buyer requested Michael to contact him if he wanted to sell the property after six months. Michael stated he had no intention of calling the buyer and told the buyer to call him if the buyer was still interested in the property after six months passed.

¶ 8 Shortly thereafter, plaintiff's agent contacted buyer and stated the sellers would accept an offer of $728,000. By that time, the buyer was already considering another piece of property and did not make a third offer on the property. After the listing agreement expired in September 2005, plaintiff's real estate agent did not speak to the sellers again.

¶ 9 Ultimately, buyer was unable to secure the other property and once again became interested in the sellers' property. Six months later, the buyer contacted the sellers and the two discussed the current land values, rising interest rates, and the buyer's need for financial assistance before he could make a higher offer on the property. Since Michael was not interested in financing the transaction, the buyer did not make an offer to purchase the land.

¶ 10 Later, in June 2006, the buyer met with Michael to determine if Michael would help finance a sale by holding a note against the property. During August and September 2006, the men engaged in "periodic" contact about financing a potential sale. Ultimately, the buyer and the sellers agreed to a purchase price of $810,000, approximately $82,000 more than the buyer's highest previous offer, and $35,000 above the advertised price of $775,000, posted on the "buyillinoisland.com" website. After the sellers agreed to provide financial assistance, the parties completed a sale in December 2006, with a purchase price of $810,000.

¶ 11 At the close of plaintiff's case, the sellers moved for a directed finding[1] in their favor. After arguments and a short recess to consider the case law, the trial court returned and announced it reviewed the exhibits, trial evidence, and case law, and made the following findings for purposes of the motion for a directed finding. The trial court determined the sellers insisted on clearing $690,000 after the sale of the property and, "[n]ot coincidentally," the $742,000 agreed price set out in the listing agreement would allow the sellers to receive $690,060, after payment of the 7% commission. After commenting on the sellers' rejections of the buyer's initial offers below $742,000, the court stated, "the reason the property didn't sell at the time was precisely because of that seven percent commission."

¶ 12 The court also found, based on the evidence, the buyer "casually" stopped by the sellers' property on the last date of the active listing agreement. Although Michael told the buyer the property remained for sale through his agent for a few more hours, Michael clearly indicated he

[1] The trial court granted the sellers' motion for a "directed verdict." However, in a bench trial, a party moves for a directed finding, rather than a directed verdict. *Barnes v. Michalski*, 399 Ill. App. 3d 254, 262 (2010). For clarity, we will refer to defendant's motion for a "directed verdict" as a motion for a "directed finding."

would not consider selling the property to anyone for the next six months to avoid paying the 7% commission required by the listing agreement. The court noted Michael remained open to offers only if the *buyer* initiated contact with the seller after the six month "cooling off" period ended. Based on these facts, the court concluded there "was no agreement other than the invitation to call back after six months." According to the court, the buyer reopened the discussions at a later date without plaintiff's assistance and engaged in "off-again-on-again" discussions with the sellers over the next eight months.

¶ 13 The court concluded Michael's refusal to consider any offers for the next six months did not constitute bad faith. The court specifically noted Michael drew a "bright line" for his desired net sales proceeds, refused to step over this line, and refused the buyer's prior multiple offers below the listed price in good faith.

¶ 14 The court also discussed the "ongoing negotiation exception," but concluded there were "no real negotiations to begin with. There were two offers. They were rejected. There was no counteroffers [*sic*]. There was no back and forth. Those negotiations between [the buyer] and [Michael] were abandoned." The court also specifically noted the buyer denied any collusion to avoid paying plaintiff's fee and found the buyer's assertion was supported by the facts. The court noted the final purchase price of $810,000 suggested there was not collusion because the buyer would have saved money if he purchased the property for $742,000 and paid a 7% commission on that amount during the period contained in the listing agreement. The court concluded the evidence "does not establish the kinds of principal interference and purposeful frustration" to merit an equitable recovery under a procuring cause theory. On May 10, 2013, the court entered a written order granting the sellers' motion for a directed finding. Plaintiff appeals.

¶ 15 ANALYSIS

¶ 16 On appeal, plaintiff contends the trial court erred when it granted the sellers' motion for a directed finding at the close of plaintiff's case. Specifically, plaintiff argues the evidence established plaintiff was the procuring cause of the sale. Plaintiff argues the sellers acted in bad faith by delaying negotiations until after the expiration of the "cooling off" period provided in the listing agreement. Therefore, based on a theory of equity, plaintiff contends he should receive his 7% commission on the ultimate purchase price of $810,000.

¶ 17 The sellers respond that the evidence established plaintiff did not procure the sale between the sellers and the buyer and the sellers did not act in bad faith. Consequently, sellers submit the trial court's findings were not contrary to the manifest weight of the evidence.

¶ 18 In a bench trial, section 2-1110 of the Code of Civil Procedure allows a defendant, at the close of plaintiff's case-in-chief, to move for a directed finding in his or her favor. 735 ILCS 5/2-1110 (West 2012). When ruling on such a motion, a court must engage in a two-step analysis. *527 S. Clinton, LLC v. Westloop Equities, LLC*, 403 Ill. App. 3d 42, 52 (2010). The first step is to determine whether, as a matter of law, plaintiff presented a *prima facie* case by presenting evidence on every element of the cause of action. *Id.* If plaintiff presented some evidence on each element, the court must then consider and weigh the totality of the evidence presented, including evidence which is favorable to defendant. *Id.* After weighing the evidence, the court should determine, whether sufficient evidence remains to establish plaintiff's *prima facie* case. *Id.* If the trial court finds plaintiff failed to present a *prima facie* case as a matter of law, the standard of review is *de novo*. *Id.* If, however, the trial court considers the weight and quality of the evidence and finds that no *prima facie* case remains, the trial court's decision will not be disturbed unless it is against the manifest weight of the evidence. *Id.* at 53.

¶ 19 The parties disagree as to the proper standard of review to be applied in this case. Plaintiff argues the standard of review is *de novo* because the trial court's ruling did not turn on the credibility of the witnesses. The sellers submit the trial court granted the motion for directed finding after the trial court weighed the credibility of the witnesses and determined plaintiff could not carry its burden of proof, and therefore, the standard of review is manifest weight of the evidence.

¶ 20 Where, as in this case, the trial court stated it considered the evidence and testimony, the trial court has engaged in the second step of its analysis and has necessarily found plaintiff has met the first step of the analysis by presenting a *prima facie* case. *Prodromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 170 (2009); see *Baker v. Jewel Food Stores, Inc.*, 355 Ill. App. 3d 62, 67 (2005). Therefore, we will review the trial court's ruling to determine whether it was against the manifest weight of the evidence. *Prodromos*, 389 Ill. App. 3d at 170. A ruling is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the determination is unreasonable, arbitrary, or without basis in the evidence presented. *Id.* at 170-71. We note, however, that our result would be the same under either standard of review.

¶ 21 A broker is entitled to a commission if he procures a prospective buyer who is ready, able, and willing to buy on terms acceptable to the seller *or* if the sale was procured through his efforts, regardless of whether the owner made the sale himself or through another broker. *Lyons v. Shane*, 133 Ill. App. 3d 820, 824 (1985). A broker is considered the procuring cause if he brings together the parties who ultimately consummate the transaction *or* is instrumental in the consummation. *Id.* However, the broker must also show that his efforts were the proximate cause of the ultimate sale. *Schaller v. Weier*, 319 Ill. App. 3d 172, 178 (2001). The case law provides that, when there is some intervening instrumentality, such as new or independent

negotiations, a broker is not entitled to the commission merely because of his introduction of the ultimate purchaser to the property. *Wilmette Real Estate and Management Co. v. Luvisi*, 172 Ill. App. 3d 232, 237 (1988).

¶ 22 Relying on *Lyons v. Shane*, 133 Ill. App. 3d 820 (1985), plaintiff asserts that Michael's instruction for the buyer to contact him when the six-month "cooling off" period expired, demonstrated the sellers' intent to continue negotiations with the buyer that plaintiff introduced to the sellers. The *Lyons* court held that although the listing agreement expired, the broker was the procuring cause of the sale because the buyers and sellers continued negotiations that began during the listing agreement. *Id.* In *Lyons*, the court specifically noted the buyer and seller testified they desired to complete the transaction at all times, and continued the negotiations after the listing agreement expired, in order to find an alternative method of financing for the final contract. *Id.* At 825. The final contract "bore little economic difference" from the original price negotiated by the broker during the listing agreement. *Id.*

¶ 23 Unlike *Lyons*, in this case, the sellers *rejected* the buyer's offers during the listing agreement and ended all negotiations. In this case, the evidence established the buyer made two separate offers, both below the advertised price of $775,000. Neither offer allowed the sellers to receive a net profit of $690,000. Thereafter, plaintiff's agent did not suggest the buyer should offer more than the advertised price of $775,000.

¶ 24 Although plaintiff, through his real estate agent, introduced the buyer and sellers, unlike the circumstances in *Lyons*, the final purchase price of $810,000 far exceeded any price the buyer and sellers discussed, with the assistance of plaintiff's real estate agent, during the listing agreement. Here, the buyer and sellers ultimately designed a completely new agreement, more than one year later, for a purchase price in excess of $728,000, the last amount communicated by

the agent to this prospective buyer. Further, the buyer and sellers did not reach any agreement on the final purchase price until more than one year after the expiration of the listing agreement and long after plaintiff's real estate agent abandoned all communication with the sellers and buyers in September 2005.

¶ 25 After carefully reviewing the record, we conclude the trial court's finding that plaintiff was not the procuring cause of the sale that concluded in December 2006, without any assistance from plaintiff or plaintiff's real estate agent, was not contrary to the manifest weight of the evidence. Therefore, we conclude the trial court properly granted the sellers' motion for a directed finding.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Knox County is affirmed.

¶ 28 Affirmed.