

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

<p>FILED</p> <p>July 16, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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GARY E. KOONTZ and VOLUNTEER REALTY, INC.,

Plaintiffs-Appellees,

v.

CLARENCE E. BAYLESS and MAVA L. HILL,

Defendants-Appellants.

) C/A NO. 03A01-9603-CV-00077

) KNOX LAW

) HON. DALE C. WORKMAN,

) JUDGE

) AFFIRMED

) AND

) REMANDED

ROBERT H. WATSON, JR., and ARTHUR F. KNIGHT, III, WATSON, HOLLOW & REEVES, P.L.C., Knoxville, for Plaintiffs-Appellees.

RON CUNNINGHAM, FINKELSTEIN, KERN, STEINBERG & CUNNINGHAM, Knoxville, for Defendants-Appellants.

O P I N I O N

Franks. J.

In this action a jury returned a verdict in favor of plaintiff real estate agent for a commission against defendant owners on the ground that plaintiff was a third party beneficiary to a real estate listing agreement entered between the owners and Tallent Realty Company. The owners have appealed.

Plaintiff was approached on behalf of the ultimate purchaser of the property to determine the ownership of the

property and the feasibility of using the property for business purposes. Plaintiff ascertained the necessary information and contacted the owner who agreed to meet with plaintiff, along with the owner's real estate agent, William C. Tallent of Tallent Realty Company, who had represented the owner on all of his real estate transactions. Owner agreed that Tallent would list the property, and a commission of 10% was agreed upon and plaintiff and Tallent agreed to equally split whatever commission was earned on the sale of the property. After offers and demands ranging from \$250,000.00 to \$500,000.00, negotiations broke down when an offer of \$333,000.00 was rejected. E. Oscar Robertson, CEO of Commercial Bank, the ultimate purchaser, then asked that his earnest money check be returned and plaintiff complied, sending the check and a note advising that he was sorry the deal did not go through and he hoped to work with Robertson and his bank in the future. He testified that at that point, he had not given up on a sale but I felt like we were at a standstill between the buyer and seller.

Within approximately one month, the President of Commercial Bank was contacted by a business partner of the owner's son. The buyer and seller resumed negotiations without contacting Koontz, and an agreement was reached to buy and sell the property for \$325,000.00. The owner's agent, Tallent, was not given a commission based on the terms of the listing agreement but the owner presented Tallent with a check for \$10,000.00 because Tallent had done so much work for him. Tallent offered to split the check with plaintiff, who refused to accept it, whereupon Tallent returned the check

to the owner and plaintiff filed this action.

Plaintiff filed *inter alia* for one-half of a real estate commission called for in Tallent's contract on the sale which the jury found was due him in the amount of \$16,250.00.

The owners on appeal insist the Trial Judge should have directed a verdict on their behalf, and there is no material evidence to support the jury's verdict.

When reviewing a jury's verdict approved by the Trial Court, we determine whether there is material evidence to support the verdict. T.R.A.P. Rule 13(d). In considering whether there is material evidence to support the verdict, we must take the strongest legitimate view of all evidence in favor of the verdict, to assume the truth of the evidence in support, and to disregard all evidence to the contrary. *Black v. Quinn*, 646 S.W.2d 437 (Tenn.App. 1982).

A third party beneficiary may maintain an action on a contract if recognition of the beneficiary's rights is appropriate to effectuate intention of parties and if there is . . . proof that promisor's performance will otherwise discharge a duty owed to third party by the promisee. *Moore Construction v. Clarksville Dept. of Electricity*, 707 S.W.2d 1, 9 (Tenn.App. 1985).

There is material evidence to support the jury's verdict that plaintiff was a third party beneficiary of the listing agreement between Tallent and the owners. Tallent's testimony detailed how plaintiff contacted him with a potential buyer for the owner's property, how he and plaintiff agreed to split the commission that would result from the completed sale of the property, and of his attempt to split

the check that was given to him by the owner. Both Tallent and plaintiff testified as to the custom in the real estate industry. This testimony, taken in the strongest view in favor of the verdict, constitutes material evidence supporting the jury verdict.

There is material evidence to support the jury's verdict that plaintiff was the procuring cause of the sale of the property and therefore was entitled to the real estate commission. See T.R.A.P. 13(d). A real estate broker is entitled to collect a commission when his efforts are the procuring cause of the sale. *Pacesetter Properties, Inc. V. Hardaway*, 635 S.W.2d 382 (Tenn. App. 1981). If a broker abandons the listing or fails to find a purchaser within the time frame who will purchase, the broker is not entitled to a commission and the owner may sell the realty to a prospect who was first produced by the broker. *Miller v. Jones*, 387 S.W.2d 637 (Tenn. 1964).

The record contains ample evidence which, if believed by the finder of fact, supports the verdict that plaintiff was entitled to a commission. Plaintiff testified to the work he put into making the sale happen. He conducted negotiations for the sale until the stalemate was reached, and he testified that he had not completely abandon hope for the sale. Shortly after the break in negotiations, the buyer and seller restarted their talks and agreed to a price and terms that were substantially what had been offered, except no commission was paid.

The fact finder could determine that these circumstances demonstrated that plaintiff was the procuring

cause of the sale. Accordingly, we affirm the Trial Court's judgment.

Plaintiff argues that he is also entitled to an award of attorney's fees. The real estate listing agreement entered between Tallent and the owner provided that if any action is instituted to enforce this agreement, each party shall pay reasonable attorney's fees and costs as fixed by the Court. After the Trial Court entered the judgment on the jury's verdict, the plaintiff filed a petition for an award of attorney's fees.

Plaintiffs in their complaint sued for the real estate commission, plus pre-judgment interest and costs. They did not sue for attorney's fees. They did not assert they were entitled to attorney's fees as a third-party beneficiary to the contract, and only after the jury's verdict and judgment entered thereon did they petition for attorney's fees, which essentially sought to amend their complaint. The Trial Judge's refusal to award attorney's fees as a part of the judgment was within his sound discretion. We affirm the judgment, with costs of the appeal assessed to appellants.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P. J.

Charles D. Susano, Jr., J.