IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

April 28, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

EVELYN OGLE, DeWITT R. SHELTON,	)	C/A NO. 03A01-9610-CH-00336
	)	
	)	SEVIER CHANCERY
Plaintiffs-Appellees,	)	
	)	HON. CHESTER S. RAINWATER, JR.
v.	)	CHANCELLOR
	)	
REALTY WORLD-BARNES REAL ESTATE COMPANY and DOTTIE WOOD,	)	
	)	
	)	AFFIRMED IN PART,
	)	MODIFIED IN PART,
Defendants-Appellants.	)	AND REMANDED

DOUGLAS S. YATES, BRABSON, YATES AND HAMILTON, P.L.C., Sevierville, for Plaintiffs-Appellees.

JEFF D. RADER, OGLE, WYNN & RADER, Sevierville, for Defendant-Appellant, Realty World-Barnes.

STEVEN E. MARSHALL, Sevierville, for Defendant-Appellant, Dottie Wood.

OPINION

Franks. J.

In this action the dispute is between plaintiff owners of property and the defendant real estate agents who held earnest money in escrow for the sale of plaintiffs' property, which the buyer, Wayne Connelly, did not purchase as agreed.

The Trial Judge determined the escrow funds should be paid to the plaintiffs, and defendants have appealed. We adopt in part the Chancellor's finding of fact as our review has determined the evidence does not preponderate against these findings. T.R.A.P. Rule 13(d):

> [i]n June of 1993, Mr. Connelly again showed an interest in plaintiffs' property and this eventually led to a sale and purchase contract prepared by the defendants as plaintiffs' broker and agent whereby plaintiffs agreed to sell and Connelly agreed to buy the subject property for the sum of two million six hundred thousand dollars.
>
> . . .
>
> This contract made reference to an attached and incorporated document setting forth the, ?Standards for Real Estate Transactions,? and being the same as contained in the former June 24, 1992 contract which we have heretofore referred to. Plaintiffs deny that such standards were attached to or presented at the execution of said contract. The defendants insist the same was stapled to a specially prepared contract used for this purpose and as to distinguished [sic] from the usual and ordinary form where all is contained on the front and the back pages, as was the case with the 1992 contract.
>
> By an attachment to said contract, being page three, the broker was to receive from sellers; that is, plaintiffs, a commission of ten percent of the gross sales price. At this point the sum of $27,500 was paid by the buyer to the broker and placed in the escrow account by the broker. By addendum number one, undated, entitled, ?For Sale of Property,? states as follows: ?Sellers, Mr. R. DeWitt Shelton and Lela Evelyn Ogle and buyer, Mr. Wayne L. Connelly, agree with this sale close-out by 8-1-93 the sellers would allow the hundred thousand dollars to be credited to the purchase price, at this time making a price of two point six million dollars sale price to Mr. Wayne Connelly and the following will

apply:

> 'A.' sellers to owner finance the balance of a million six hundred thousand for a period of three years at the interest rate of ten percent with interest only payments made semi annually in the amount of $80,000 every six months. Then whereas the principle will balloon at the end of the third year.
>
> 'B.' with this agreement seller will release eight acres with deed at closing.
>
> 'C.' Wayne L. Connelly would be responsible for commission to Realty World Barnes of ten percent of purchase price due when closed.

Addendum number two to the contract, again undated, generally provided for a possible alternative to sale and purchase by means of establishing a lease purchase agreement and earnest money made part; that is, earnest money that had been paid in, would be made part of the first lease payment.

Addendum number three to this contact of June 21 -- June 15, 1993, and dated June 21, 1993, provided for referral of the contract matters; that is, the dealing with the transaction of the sale and purchase by the broker to an attorney or title company to prepare the necessary closing documents and agreed to by all the parties. On August 1st of 1993, by way of a, ?Extension of Sales and/or Lease Contract,? the parties further entered into, in addition to or [sic] amendment their original contract and which provided as follows. The court quotes. ?This is to be an extension of the sales contract and/or lease contract dated June 19, 1993 which was to close August 1, 1993. All parties to this contract agrees [sic] to extend the contract to August 12, 1993. One, providing Mr. Wayne L. Connelly agrees to wire-transfer an additional $75,000 additional earnest money to Realty World Barnes' escrow account to make the total money in escrow for this transaction a hundred and two thousand five hundred dollars non-refundable by 8-8-92. Two, this sale and/or lease is to close by five p.m. August 12, 1993. Three, if Mr. Wayne Connelly completes the lease as of August 12, 1993 then he will have from 8-13-93 until September 10, 1993 at five p.m., which is 28 days to convert to the sale, with a credit of a hundred thousand dollars of the lease transaction to apply towards his down payment of the one million dollars needed for the owner financing of the sale at two million six hundred thousand dollars. Any time after this period is and will be considered the lease contract.

> All commissions due to Realty World Barnes after August 12, 1993 on the sale transaction, or the lease to sale transaction, will be paid by the buyer, Mr. Wayne Connelly, as per the sale/lease contract dated June 19, 1993, without any compensation being paid by the sellers after that date,?.

The Court then determined that Item K of the Standards for Real Estate Transactions had not been attached to this contract. The Chancellor held that assuming that Item K was included as a part of the contract, the later-executed addendums contradicted the boiler-plate language of Item K in the standards and said:

> By the final document of these transactions, being the August 1, 1993 agreement entitled, ?Extension of Sale and/or Lease Contract,? and as added to this document after it was originally prepared by the defendant, is the following statement: ?all commissions due to Realty Barnes after August 12, 1993 on the sale transaction or the lease to sales transaction will be paid by the buyer, Mr. Wayne Connelly, as per the sale/lease contract dated June 19, 1993. Without any compensation being paid by sellers after that date.?

Appellant Realty World Barnes' first issue on appeal is that the Chancellor improperly shifted the burden to defendants to establish that Standards for Real Estate Transaction was a part of the contract. We pretermit that issue, because the Chancellor's decision was based on an assumption that contrary to his finding, Item K was a part of the contract. The Chancellor determined that the parties under all the circumstances did not intend for the money held in escrow to be paid pursuant to Item K to defendants as their commission. Indeed, the construction placed upon this agreement and the parties' prior agreement by the parties themselves supports his determination. The first agreement between the same parties, without question contained the standards, yet the

defendants did not insist on its application to the monies held in escrow when Connelly did not close. In this subsequent transaction before the Court, the defendants did not, through their words and deeds, initially place the construction on the contracts as hereinafter discussed, which they now insist upon. Relating to the second attempt to sell the property, Lela Ogle testified as follows:

> Q. How much money did you tell Mrs. Wood that you wanted as earnest money?
>
> A. $25,000.
>
> Q. And why were you asking for $25,000?
>
> A. Because we were taking our property off the market for Mr. Connelly again. And that's just typical. Nobody does that for nothing hardly.
>
> Q. How much money actually did she get a check for in reality?
>
> A. Twenty-seven five.
>
> Q. Did she tell you how that number came about?
>
> A. She said she went ahead and included her commission on top of the twenty-five thousand. She was to get ten percent.

It is a well-settled law in this jurisdiction that the interpretation given to a contract by the parties themselves as shown by their acts, will be the construction adopted by the courts. *See Hamblen County v. City of Morristown*, 656 S.W.2d 331 (Tenn. 1983); *Robertson v. Lyons*, 553 S.W.2d 754 (Tenn. App. 1977).

Next, this appellant argues that there was an accord and satisfaction reached between the parties by virtue of an agreement dated September 20, 1993, wherein plaintiffs were to receive $20,000.00, which agreement provided:

It is agreed that the Escrow Realty World Barnes has

in escrow of Wayne Connelly $102,500.00 has been forfeited. With costs being paid to Guaranty Land Title Company. And the balance split 50/50 with Realty World-Barnes. For time, expenses and commissions.

I, Evelyn Ogle, ?Lela E. Ogle? am requesting a draw on the escrow in the amount of Twenty Thousand ($20,000.00) Dollars, as of today. As for R. DeWitt Shelton also in this transaction. But being out of town, I Evelyn Ogle will handle this release on his behalf.

This agreement was initially signed by Lela E. Ogle. At Trial, Ogle acknowledges that she had requested a draw from defendant, but was told by Wood that the document she signed was a receipt to show that she had received the disbursement, but when plaintiff Shelton later arrived to sign the document, Shelton discovered that the defendants' desired 50% of the earnest money and Ogle voided the check and struck through her signature on the document and left the documents at the attorney's office which defendants had left with the attorney for execution.

The record establishes as determined by the Trial Judge, there was no accord and no delivery of an executed agreement, but demonstrates that defendants' were acting contra to their present position on the efficacy of Item K.

Defendant Dottie Wood's other issue on appeal is that she has no personal liability to the plaintiffs under the terms of the Contract. The record shows that after the dispute arose, the defendants split amongst themselves in

excess of $50,000.00 of the earnest money. The record also establishes that defendant Wood was plaintiff's agent in all of the transactions. *See Wyner v. Athens Utility Board,* 821 S.W.2d 597 (Tenn. App. 1991), and thus was in a fiduciary relationship with the plaintiffs.[1] Wood conceded at trial that she had encroached on the escrow account and otherwise breached her fiduciary responsibilities to plaintiffs, and an agent who breaches her fiduciary duties to her principals is liable for any pecuniary loss caused by the breach. *See Youngblood v. Wall*, 815 S.W.2d 512 (Tenn. App. 1991).

Throughout the first transaction, the defendants, through their deeds and actions, construed the contract to provide them with a ten percent commission on the money held. It was the plaintiffs in the first transaction who initiated and agreed to pay twenty percent, due to what the plaintiffs considered an extraordinary amount of work done by defendants. From the outset of the second transaction, the evidence establishes that the defendants also treated this contract with identical provisions to the first contract, as if they would be entitled to ten percent of the earnest money. It was only at the time the plaintiffs attempted to obtain a withdrawal, did defendants change their position as to their interpretation of the contract. We believe the parties should be bound to the construction they both placed upon the contract at the outset of its execution, which is ten percent of all the monies collected from the purchaser as earnest

[1]Contrary to defendant's accusations, the complaint charges a breach of the fiduciary relationship created by the agency relationship.

money. Accordingly, we modify the Trial Court's judgment to provide for the defendants to receive ten percent of the earnest money as their commission in the second transaction.

Finally, plaintiffs argue that the Chancellor erred in failing to award the statutory maximum ten percent pre-judgment interest. The defendants withdrew $50,000.00 from the escrow account. Under our holding the defendants were entitled to ten percent of the total escrow account. As to the excess of the withdrawal over that ten percent that the $50,000.00 represents, we believe it is appropriate to award ten percent pre-judgment interest from the date of withdrawal on the excess over their ten percent. *See* T.C.A. §47-14-143. Accordingly, the cause is remanded for the entry of a judgment consistent with this opinion, and the cost of the appeal is assessed one-half to each party.

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Herschel P. Franks, J.

CONCUR:

_____
Don T. McMurray, J.

_____
Charles D. Susano, Jr., J.