[Cite as *Michalski v. Vance,* 2010-Ohio-97.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SEAN MICHALSKI

Plaintiff-Appellant

-vs-

SHAWN D. VANCE, ET AL.

Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CAE 07 0062

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from Delaware County Court of Common Pleas, Case No. 07 CV H 09 1037
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	January 14, 2010

APPEARANCES:

For Plaintiff-Appellant

DANIEL N. ABRAHAM
DAVID I. SHROYER
Colley Shroyer & Abraham, LPA
536 South High Street
Columbus, Ohio 43215

For Defendants-Appellees

DOUGLAS A. FUNKHOUSER
Douglas A. Funkhouser, Co., LPA
729 South Third Street
Columbus, Ohio 43206

Hoffman, P.J.

{¶1} Plaintiff-appellant Sean Michalski appeals the April 15, 2009 Judgment Entry of the Delaware County Court of Common Pleas entering summary judgment in favor of Defendant-appellees Shawn D. Vance and ASV Properties, LLC.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 26, 2007, Appellee Shawn D. Vance (hereinafter "Vance") entered into an Exclusive Confidentiality/Registration Agreement with Marcus & Millichap with regard to the potential purchase of property known as Century City Apartments. On April 2, 2007, Vance signed a letter of intent to purchase the subject Century City Apartments property.

{¶3} On May 15, 2007, Vance entered into a Client Representation Agreement with Appellant Sean Michalski d/b/a Midwest Real Estate.

{¶4} On May 17, 2007, Vance signed a second letter of intent to purchase Century City Apartments. On June 18, 2007, Vance entered into a real estate purchase contract with Century City, L.P. to purchase Century City Apartments. Appellant did not participate in the negotiations.

{¶5} On August 1, 2007, the Client Representation Agreement between the parties to this appeal expired.

{¶6} On August 10, 2007, Vance closed on the purchase of Century City Apartments.

{¶7} Appellant contacted Vance demanding the payment of a commission on the purchase of the Century City Apartments pursuant to the parties' Client Representation Agreement. Vance refused to pay the commission and Appellant filed

the within action for breach of contract. Appellees filed counterclaims for fraud, breach of contract, breach of fiduciary duty and frivolous lawsuit.

{¶8} On September 10, 2008, Appellees moved the trial court for summary judgment. On September 24, 2008, Appellant filed a motion for summary judgment.

{¶9} Via Judgment Entry of April 15, 2009, the trial court granted Appellees' motion for summary judgment finding Appellant was not entitled to a commission under the parties' Client Representation Agreement executed on May 15, 2007. On June 3, 2009, Appellees voluntarily dismissed their counterclaims terminating all pending claims.

{¶10} Appellant now appeals, assigning his sole error:

{¶11} "I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEES SHAWN D. VANCE, ET AL."

{¶12} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶13} Civ.R. 56(C) provides, in pertinent part:

{¶14} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the

party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * ”

{¶15} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-207.

{¶16} The parties’ May 15, 2007 Client Representation Agreement reads, in pertinent part,

{¶17} “Client hereby appoints Midwest Real Estate (“Broker”) as its exclusive agent with the exclusive right to select property and negotiate for its purchase on behalf of Client, subject to the following provisions:

{¶18} “1. Time. The period of this agency shall commence on date below, and terminate at Six (6) PM Eastern Time on August 1, 2007.

{¶19} “2. Property and Authority. Broker is authorized only: (a) to select properties that substantially meet the requirements set forth below, as modified from time to time in writing by Client; (b) to present those properties to Client; and (c) on

Client's approval negotiate for their purchase, but not to commit Client to the Purchase of any premises or to sign any instruments on behalf of Client without Client's express written consent.

{¶20} "***

{¶21} "4. Compensation.

{¶22} "***

{¶23} "b. Purchase, Lease or Exchange: It is very common and a frequently accepted practice for the Seller of real estate to pay a sales or leasing commission through a listing real estate company or directly to real estate Broker representing a Buyer. *However, if the Seller fails or refuses to pay a commission which is acceptable to Broker, but a sale-lease contract of a property is signed by Client during the term of this Agreement, Client will pay broker a fee of at least three percent (3%) of the aggregate sale value upon closing.*

{¶24} "5. If within one hundred eighty (180) days after the expiration of the period of the agency described above or any extension of it, Client shall enter into an agreement to lease-purchase property from any person with whom Broker has communicated in pursuit of the objectives of the agency before its expiration, Client shall pay compensation as though the transaction were procured during the agency period provided Broker notifies Client of the communication in writing during the agency period or within ten (10) days after the expiration thereof, identifying the Owner and the property." (Emphasis added.)

{¶25} Appellant asserts the Client Representation Agreement at issue is an "exclusive purchaser agency agreement" as defined in O.R.C. Section 4735.01(W). We agree.

{¶26} The statute reads,

{¶27} "(W) 'Exclusive purchaser agency agreement' means an agency agreement between a purchaser and broker that meets the requirements of section 4735.55 of the Revised Code and does both of the following:

{¶28} "(1) Grants the broker the exclusive right to represent the purchaser in the purchase or lease of property;

{¶29} "(2) Provides the broker will be compensated in accordance with the terms specified in the exclusive agency agreement or if a property is purchased or leased by the purchaser during the term of the agency agreement unless the property is specifically exempted in the agency agreement.

{¶30} "The agreement may authorize the broker to receive compensation from the seller or the seller's agent and may provide that the purchaser is not obligated to compensate the broker if the property is purchased or leased solely through the efforts of the purchaser."

{¶31} Section 4735.55 reads:

{¶32} "(A) Each written agency agreement shall contain all of the following:

{¶33} "(1) An expiration date;

{¶34} "(2) A statement that it is illegal, pursuant to the Ohio fair housing law, division (H) of section 4112.02 of the Revised Code, and the federal fair housing law, 42 U.S.C.A. 3601, to refuse to sell, transfer, assign, rent, lease, sublease, or finance

housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, familial status as defined in section 4112.01 of the Revised Code, ancestry, military status as defined in that section, disability as defined in that section, or national origin or to so discriminate in advertising the sale or rental of housing, in the financing of housing, or in the provision of real estate brokerage services;

{¶35} "(3) A statement defining the practice known as "blockbusting" and stating that it is illegal;

{¶36} "(4) A copy of the United States department of housing and urban development equal housing opportunity logotype, as set forth in 24 C.F.R. 109.30.

{¶37} "(B) Each written agency agreement shall contain a place for the licensee and the client to sign and date the agreement.

{¶38} "(C) A licensee shall furnish a copy of any written agency agreement to a client in a timely manner after the licensee and the client have signed and dated it."

{¶39} It is undisputed in this matter the parties' agreement complies with the language of Section 4735.55 but for the absence of the HUD logotype required in subsection (A)(4) of the statute. Upon review of the record, Appellant's reply to Appellee's memorandum contra Appellant's motion for summary judgment filed with the trial court indicates other documents were signed contemporaneously to the signing of the agreement at issue. These documents were the "Agency Disclosure Statement" and the "Consumer Guide to Agency Relationships." Both documents contained the requisite HUD logo. A review of the Client Representation Agreement at issue

demonstrates the parties' agreement incorporates the Agency Disclosure Statement by reference. Accordingly, we are persuaded the parties' agreement substantially complies with the statutory requirements of R.C. 4735.55 and Appellee suffered no prejudice from failure to strictly comply with R.C. 4735.55(A)(4). We also find the agreement meets the requirements for an exclusive purchaser agency agreement under R.C. 4735.01.

{¶40} Pursuant to the terms of the parties' May 15, 2007 Client Representation Agreement, Appellant is the exclusive agent of Appellees with the exclusive right to select property and negotiate for its purchase on behalf of Appellee. The agreement provides for a commission to be paid to Appellant should the Seller fail or refuse to do so.

{¶41} On June 18, 2007, Vance entered into the real estate purchase contract with Century City, L.P. to purchase Century City Apartments, a sale-lease contract of a property under the terms of the parties' agreement. Therefore, according to the terms of the Client Representation Agreement, Vance would be required to pay Appellant a fee of at least three percent (3%) of the aggregate sale value upon closing. As set forth in the statutory law above, Appellees could have specifically exempted the Century City Apartments property from the terms of the agreement at the time of execution, as negotiations had occurred prior to the date. However, Appellees failed to do so. The fact, Appellees' closing on the property took place on August 10, 2007 after the expiration of the parties' agreement is irrelevant as the material date at issue is the date on which Appellee executed the purchase agreement for the property.

{¶42} Based upon the above, Appellant's sole assignment of error is sustained. The April 15, 2009 Judgment Entry of the Delaware County Court of Common Pleas is reversed, and the matter remanded to the trial court for further proceedings in accordance with the law and this opinion.

By: Hoffman, P.J.

Edwards, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SEAN MICHALSKI	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
SHAWN D. VANCE, ET AL.	:	
	:	
Defendants-Appellees	:	Case No. 09 CAE 07 0062

For the reasons stated in our accompanying Opinion, Appellant's sole assignment of error is sustained. The April 15, 2009 Judgment Entry of the Delaware County Court of Common Pleas is reversed, and the matter remanded to the trial court for further proceedings in accordance with the law and our opinion. Costs to Appellees.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY