

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

UNION SQUARE REALTY, INC.

Appellee/Cross-Appellant

-vs-

GOLFERS & HACKERS, INC.

Appellant/Cross-Appellee

-vs-

MARILYN SCHOPP

Appellee-Cross-Appellant

JUDGES:

Hon. Julie A. Edwards, P. J.

Hon. W. Scott Gwin, J.

Hon. John W. Wise, J.

Case No. 2010 CA 00005

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 2008 CV 02514

JUDGMENT:

Vacated and Remanded

DATE OF JUDGMENT ENTRY:

November 15, 2010

APPEARANCES:

For Appellees/Cross Appellants

For Appellant/Cross-Appellee

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Wise, J.

{¶1} Defendant-Appellant Golfers & Hackers, Inc. appeals the December 29, 2009, decision of the Stark County Court of Common Pleas awarding Defendant-Appellee Union Square Realty, Inc. \$17,500 on their Complaint and awarding Golfers & Hackers \$12,000 on its Third-Part Complaint against Marilyn Schopp.

STATEMENT OF THE CASE AND FACTS

{¶2} Union Square Realty, Inc., doing business as Re-Max Home Center, ("Union Square") is a real estate brokerage owned by Marilyn Schopp ("Schopp"). (T. at 31). Golfers & Hackers, Inc. ("Golfers & Hackers") is a corporation owned by four shareholders, including Lane Witte, Eric Kerzan and Chris Kerzan. (T. at 133).

{¶3} Union Square filed a complaint seeking unpaid commissions from Golfers & Hackers. Golfers & Hackers, in turn, filed a counterclaim against Union Square, and a third-party complaint against Marilyn Schopp, the owner of Re/Max, setting forth claims for tortious interference with a contract and breach of fiduciary duty, among others, arising out of the filing of a broker's lien by Union Square.

{¶4} The case proceeded to a bench trial on November 3rd and 4th of 2009.

{¶5} At trial, the following relevant facts were presented:

{¶6} On September 23, 2004, Appellant/Cross-Appellee, Golfers & Hackers, Inc., entered into an exclusive Listing Agreement with Union Square Realty for the sale of 30 acres of real estate located at Schubert Avenue in Alliance, Ohio. The Listing Agreement, which contained an expiration date of March 23, 2005, contained a listing price of \$750,000.00. Pursuant to the Listing Agreement, Union Square was to receive a commission of 5.5% of the sale price of the Property.

{¶7} During the term of the Listing Agreement period, there were no purchase offers made on the Property. (Tr. p. 251).

{¶8} On April 1, 2005, Appellee Re/Max obtained an offer from a prospective buyer, Newton Square, in the amount of \$600,000.00. Thereafter, Appellee Marilyn Schopp contacted Golfers & Hackers and informed Lane Witte, one of Appellant's shareholders, that she had a party interested in the real estate. The identity of the interested party was not disclosed during the initial telephone conversation between Appellee Schopp and Mr. Witte. (T. at 210). According to Appellant, during this telephone conversation, discussion was had regarding the expiration of the listing agreement and Appellee Schopp was advised that the new sale terms would be "net \$675,000 to the seller." Mr. Witte's testimony regarding this telephone conversation was as follows:

{¶9} "Q. Was there mention during that initial telephone call as to what the sales terms were from that point forward?

{¶10} "A. Yes.

{¶11} "Q. What did you tell Ms. Schopp regarding the sales terms from that point forward?

{¶12} "A. Net \$675,000.

{¶13} "Q. By net 675 what did you mean?

{¶14} "A. Net in our pocket.

{¶15} "Q. Her real estate commission was to be above that?

{¶16} "A. Yes.

{¶17} "Q. Did she say she understood that?

{¶18} “A. Yes.” (T. at 252).

{¶19} Following this telephone conversation, Mr. Witte sent a letter to Appellee Schopp dated April 12, 2005, which stated that Appellee's listing had expired and that the shareholders of Golfers & Hackers were attempting to market the property themselves. This correspondence also stated that the terms of sale were "net \$675,000" to the Seller. (T. at 41-42, 252).

{¶20} On April 15, 2005, a meeting was held at the Re/Max office in Alliance, Ohio, during which two of the shareholders of Golfers & Hackers were introduced to the prospective buyer, Newton Square. Mr. Witte, who was present at the meeting provided the following account of what took place:

{¶21} “Q. At some later point did you have a meeting in Marilyn Schopp's office?

{¶22} “A. Yes.

{¶23} “Q. You were introduced to somebody from Newton Square at that meeting?

{¶24} “A. Yes, we were.

{¶25} “Q. Do you remember what was said at the meeting concerning Ms. Schopp's listing and the purchase price?

{¶26} “A. Purchase price was net 675.

{¶27} “Q. Was that voiced to Marilyn Schopp at the meeting?

{¶28} “A. Yes.”

{¶29} “Q. Was it also voiced to her that her contract listing contract had expired?

{¶30} “A. Correct.” (T. at 253-254).

{¶31} It is unclear from the record whether Appellee Schopp had any further involvement in the subject real estate transaction after the April 15, 2005, meeting. Ms. Schopp and Joe Bennett, a real estate broker previously working for Re/Max, testified that she was present at two meetings involving Newton Square. Mr. Witte, however, testified that after the initial meeting on April 15, 2005, Appellant dealt directly with Newton Square and Appellee Schopp was not involved in any subsequent proceedings involving the sale.

{¶32} As a result of the negotiations at the April 15th meeting, Golfers & Hackers made a counter-offer to Newton Square to sell for \$675,000.

{¶33} A second meeting occurred in early May, 2005. This meeting was also at Union Square's office with Schopp present. (T. at 43, 148). As a result of this meeting, Newton Square made an additional counter-offer to purchase the property for \$675,000, but on different payment terms from those requested by Golfers & Hackers.

{¶34} Subsequently, Golfers & Hackers and Newton Square continued to negotiate over the sale of the Property, and eventually entered into a purchase contract on June 15, 2005 for \$650,000. (T. at 185-86). Appellee Schopp admits that she was not involved in this stage of the negotiations.

{¶35} Upon discovering the June 15th purchase contract, Union Square filed a broker's lien on August 15, 2005, pursuant to R.C.1311.88, in the amount of \$33,000, in an attempt to protect its right to a commission arising from the sale. (T. at 49-59). The broker's lien affidavit contained inaccurate information, including the incorrect contract price and date. (T. at 108). Further, the initial offer of \$600,000 was attached

to the lien affidavit, rather than the June 15th purchase agreement, and the listing agreement reflected an expiration date of July 23, 2005.

{¶36} In the meantime, Newton Square decided to back out of the June 15th contract because of a marketing study it conducted on the Property. (T. at 188).

{¶37} As a result of Newton Square's breach of contract, Golfers & Hackers filed a lawsuit against Newton Square seeking specific performance of the June 15th contract. (T. at 221-23).

{¶38} Golfers & Hackers claims that the filing of the broker's lien by Appellee affected its ability to negotiate a settlement of the lawsuit against Newton Square. (T. at 221-23).

{¶39} The lawsuit between Newton Square and Golfers & Hackers eventually settled with Newton Square agreeing to purchase the Property for \$630,000. (T. at 226). This settlement agreement was also breached by Newton Square. (T. at 226).

{¶40} In July, 2006, Newton Square and Golfers & Hackers eventually agreed upon a purchase price for the Property of \$591,000. (T. at 137-138, 225). Under this purchase contract, the closing was to occur on July 26, 2006, however, the parties agreed to extend the closing date until August 16, 2006 in order to wait for Union Square's lien to expire. (T. at 233). The transaction closed on August 25, 2006. Union Square received no commission for this sale. (T. at 57).

{¶41} On December 28, 2009, the trial court issued a final Judgment Entry. In the Judgment Entry, the trial court entered judgment in favor of Union Square in the amount of \$17,500, finding that Union Square was entitled to unpaid commissions under the doctrine of procuring cause. The trial court also found in favor of Golfers &

Hackers in the total amount of \$12,000, on its counterclaim against Union Square and its third-party complaint against Schopp, as to its claims for filing a materially inaccurate broker's lien, tortious interference with a contract, tortious interference with a business relationship and breach of fiduciary duty.

{¶42} Appellant Golfers & Hackers and Appellees Union Square Realty, Inc. and Marilyn Schopp now appeal, assigning the following errors for review:

ASSIGNMENTS OF ERROR

APPEAL

{¶43} "I. THE TRIAL COURT ERRED IN AWARDING A REAL ESTATE COMMISSION TO THE APPELLEE BASED ON THE EQUITABLE DOCTRINE OF PROCURING CAUSE, WHEN THE APPELLEE ENGAGED IN DECEITFUL CONDUCT, BREACHED ITS DUTY OF GOOD FAITH AND LOYALTY TO THE APPELLANT AND TOOK ACTION TO HINDER THE REAL ESTATE TRANSACTION [SIC] DIRECTLY RESULTING IN DAMAGES TO THE APPELLANT.

{¶44} "II. THE TRIAL COURT ERRED IN AWARDING A REAL ESTATE COMMISSION TO THE APPELLEE UNDER THE THEORY OF PROCURING CAUSE WHEN THE APPELLANT EXPRESSLY MADE PAYMENT OF A COMMISSION DEPENDENT ON THE BROKER OBTAINING A MINIMUM SELLING PRICE AND THE BROKER FAILED TO PRODUCE A BUYER AT THE MINIMUM SELLING PRICE.

{¶45} "III. IN AWARDING THE APPELLEE A REAL ESTATE COMMISSION, THE TRIAL COURT FAILED TO CONSIDER ALL OF THE ELEMENTS OF THE DOCTRINE OF PROCURING CAUSE AND THEREBY IMPROPERLY APPLIED THE PROCURING CAUSE DOCTRINE TO THE FACTS OF THIS CASE.

{¶46} “IV. THE TRIAL COURT IMPROPERLY CALCULATED THE DAMAGES TO WHICH APPELLANT WAS ENTITLED PURSUANT TO ITS COUNTERCLAIM AND THIRD-PARTY COMPLAINT.”

CROSS-APPEAL

{¶47} “I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST UNION SQUARE AND SCHOPP AS TO THE COUNTERCLAIM AND THIRD-PARTY COMPLAINT BASED ON THE FILING OF THE BROKER'S LIEN.

{¶48} “II. THE TRIAL COURT ERRED IN CONCLUDING THAT UNION SQUARE AND SCHOPP TORTIOUSLY INTERFERED WITH A CONTRACT BETWEEN GOLFERS & HACKERS AND NEWTON SQUARE WHERE THERE WAS NO EVIDENCE TO SUPPORT THE CONCLUSION THAT UNION SQUARE AND SCHOPP INTENTIONALLY PROCURED THE CONTRACT'S BREACH.

{¶49} “III. THE TRIAL COURT ERRED IN CONCLUDING THAT UNION SQUARE AND SCHOPP TORTIOUSLY INTERFERED WITH A BUSINESS RELATIONSHIP BETWEEN GOLFERS & HACKERS AND NEWTON SQUARE WHERE THERE WAS NO EVIDENCE TO SUPPORT THE CONCLUSION THAT UNION SQUARE AND SCHOPP INTENTIONALLY CAUSED THE TERMINATION OF THE BUSINESS RELATIONSHIP.

{¶50} “IV. THE TRIAL COURT ERRED IN CONCLUDING THAT UNION SQUARE AND SCHOPP BREACHED A FIDUCIARY DUTY TO GOLFERS & HACKERS BECAUSE AT THE TIME UNION SQUARE FILED THE BROKER'S LIEN, UNION SQUARE AND SCHOPP DID NOT HAVE A FIDUCIARY RELATIONSHIP WITH GOLFERS & HACKERS.

{¶51} “V. THE TRIAL COURT ERRED BY FAILING TO AWARD COMMISSION TO UNION SQUARE IN THE AMOUNT PROVIDED FOR BY THE LISTING AGREEMENT.”

{¶52} Upon review of the trial court's December 28, 2009, Judgment Entry, this Court is unable to reconcile the numbers as contained in the trial court's final calculation of damages on both Appellee's Complaint and Appellant's Counter-claim. The trial court, in its Conclusions of Law, states:

{¶53} “... However, the Court does not find that the Plaintiff is entitled to a full commission. The Court finds that under the contract the Plaintiff would be entitled to a commission in the amount of \$35,750. The Court finds that the measurable amount of the Plaintiff's efforts is \$17,000.

{¶54} “***

{¶55} “As a result, the Court finds that Golfers & Hackers suffered injuries proximately caused by the actions of Union Square Realty and/or Marilyn Schopp. The Court finds that this reduces the amount owed by Golfer's & Hackers to Union Square to the sum of \$6,500. In conclusion, the Court hereby finds for Union Square in the sum of \$17,500 on Union Square's complaint. The Court finds for Defendant Golfers & Hackers in its counterclaim against Union Square and Third Party Complaint against Marilyn Schopp in the amount of \$12,000.”

{¶56} We are unable to determine how the trial court arrived at these damage awards. When this Court finds that a trial court's findings are insufficient to allow this court to review the trial court's judgment, we may vacate the order, and remand it to the

trial court for clarification, see *Hochsteteler Builders, Inc. v. Barnett* (September 13, 1991), Licking App. No. CA-3626.

{¶57} We therefore vacate the trial court's Judgment Entry and remand this matter back to the trial court for the sole purpose of setting forth how it arrived at the damage awards set forth in its final paragraph and the calculations it used in arriving at same.

{¶58} Upon the filing of the new Judgment Entry in this matter, the parties herein may file a request to this Court to supplement their briefs as necessary.

{¶59} Based on the foregoing, this matter is remanded to the Stark County Court of Common Pleas for further proceedings consistent with the law and this opinion.

By: Wise, J.

Edwards, P. J., and

Gwin, J., concur.

JUDGES

