

[Cite as *Rudy v. Carter*, 2009-Ohio-2729.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92247

DONALD M. RUDY, ET AL.

PLAINTIFFS-APPELLEES

VS.

MILES CARTER, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-645209

BEFORE: Gallagher, P.J., Rocco, J., and Kilbane, J.

RELEASED: June 11, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendants-appellants, Miles Carter, Catherine Carter, and Carter Properties (collectively “Carter Properties”), appeal the granting of summary judgment in favor of plaintiffs-appellees, Donald M. Rudy, Jr. (“Rudy”) and Pinnacle Real Estate Services, LLC (collectively “Pinnacle”). For the reasons stated below, we affirm.

{¶ 2} Carter Properties owned a commercial office building of approximately 30,000 square feet located at 28605 Ramney Parkway in Westlake, Ohio (“the subject property”). In spring 2004, space within the subject property became available for lease.

{¶ 3} NextHome, Inc., a newly established real estate brokerage firm, was looking to acquire space and retained Pinnacle to assist in obtaining a suitable office location. In May 2004, Rudy showed the subject property to NextHome representatives. Thereafter, the parties engaged in lease negotiations.

{¶ 4} Pinnacle and Carter Properties executed a commission letter agreement, dated May 17, 2004, under which Carter Properties agreed to pay Pinnacle’s commission pursuant to the following terms:

“In the event a lease is consummated between NextHome and 28605 Ramney Parkway, Pinnacle Real Estate Services shall receive a commission of 6% of the total lease value plus a \$10,000 bonus, payable upon tenant occupancy.”

{¶ 5} On September 15, 2004, a lease agreement was signed between

NextHome and Carter Properties for space in the subject property. Part of the lease agreement specified that Rudy was the only broker or finder involved and required Carter Properties to pay any commission due Pinnacle, with the tenant having no such responsibility.

{¶ 6} Following execution of the lease agreement, a dispute arose between Carter Properties and NextHome. As a result thereof, Carter Properties brought a lawsuit against NextHome in the Cuyahoga County Court of Common Pleas on October 29, 2004, *Miles Carter, et al. v. NextHome, Inc.*, Cuyahoga C.P. No. CV-546514 (“*NextHome* litigation”). Carter Properties sought reformation of the lease, based on mutual mistake. NextHome filed a counterclaim asserting anticipatory breach of contract and sought specific performance and, alternatively, damages.

{¶ 7} As the *NextHome* litigation was proceeding, NextHome purchased real property located at 29077 Clemens Road, Westlake, Ohio. NextHome then constructed a new building on the Clemens Road property for its new office space. Pinnacle received a commission upon the purchase of the Clemens Road property.

{¶ 8} NextHome never took possession of the subject property. The subject property was subsequently sold to T&D Westlake Holdings, LLC. Pinnacle Real Estate Services’ agent, Jeffrey Rudy, who is Donald Rudy’s brother, earned a commission on that sale.

{¶ 9} Before trial commenced in the *NextHome* litigation, NextHome dismissed its claim for specific performance and proceeded only on its claim for damages. Following trial in the *NextHome* litigation, the trial court ruled that NextHome was at all times ready, willing, and able to perform under the lease agreement. Also, the court found that NextHome would have moved into the subject property had Carter Properties complied with the “landlord’s work” required by Section 3.1 of the lease agreement. Additionally, the court held that NextHome was not required to renegotiate the terms or cost of the lease agreement as written, and that Carter Properties anticipatorily breached the lease agreement by refusing to perform the landlord’s work and failing to deliver an improved subject property to NextHome.

{¶ 10} On December 20, 2007, Pinnacle filed the current action for breach of contract under the commission letter agreement and Section 8.11 of the lease agreement. The complaint also included a claim for estoppel based on the findings in the *NextHome* litigation.

{¶ 11} On June 16, 2008, the trial court granted Pinnacle’s motion for summary judgment, finding that Carter Properties was estopped from asserting any defenses that denied or contradicted the findings of fact and conclusions of law in the *NextHome* litigation. The trial court further found that because of Carter Properties’ breach of contract in the *NextHome* litigation, Carter Properties had breached the contract with Pinnacle.

{¶ 12} The trial court awarded judgment to Pinnacle. Subsequently, the trial court granted an award of prejudgment interest to Pinnacle. The trial court ordered a final judgment under the contract of \$80,878.00 plus prejudgment interest in the amount of \$20,135.30 for a total award of \$101,013.30, plus postjudgment interest.

{¶ 13} Carter Properties filed this appeal, raising four assignments of error for our review. Its first and fourth assignments of error provide as follows:

{¶ 14} “1. The trial court committed reversible error in granting [Pinnacle’s] motion for summary judgment.”

{¶ 15} “4. The trial court committed reversible error in denying [Carter Properties’] motion for summary judgment.”

{¶ 16} This court reviews a trial court’s grant of summary judgment *de novo*. *Ekstrom v. Cuyahoga Cty. Community College*, 150 Ohio App.3d 169, 2002-Ohio-6228. Before summary judgment may be granted, a court must determine that “(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.” *State ex rel. Dussell v. Lakewood Police Dept.*, 99 Ohio St.3d 299, 300-301, 2003-Ohio-3652, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-

326.

{¶ 17} As an initial matter, Carter Properties argues that collateral estoppel does not apply to this matter since it is not contesting the findings of fact or conclusions of law rendered in the *NextHome* litigation. It states that the issue in this matter involves whether it is contractually obligated to pay Pinnacle's commission and that the *NextHome* litigation is not dispositive of this issue.

{¶ 18} We acknowledge that the *NextHome* litigation did not resolve the contractual obligations under the commission letter agreement between Carter Properties and Pinnacle. However, contrary to Carter Properties' position, several of the findings and conclusions rendered in the *NextHome* litigation are relevant to this matter. In this regard, we find the trial court correctly determined that Carter Properties is collaterally estopped from asserting any defenses in this matter that deny or contradict any findings of fact and conclusions of law rendered in the *NextHome* litigation. See *Boundy v. Kory* (Aug. 30, 1998), Franklin App. No. 88AP-191. This would include, among others, issues involving the enforceability of the lease agreement, Carter Properties' anticipatory breach thereof, and NextHome's ability to perform under the lease. With the above in mind, we proceed to address the central issue in this case involving Carter Properties' contractual obligation to pay Pinnacle's commission.

{¶ 19} The construction of contracts is a matter of law. *Alexander v.*

Buckeye Pipe Line Co. (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. “The role of courts in examining contracts is to ascertain the intent of the parties. Where the terms in a contract are not ambiguous, courts are constrained to apply the plain language of the contract.” (Internal citations omitted.) *City of St. Marys v. Auglaize County Bd. of Commrs.*, 115 Ohio St.3d 387, 390, 2007-Ohio-5026. When the language in a contract is ambiguous, the court must construe the language against the drafting party. See *Central Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 413.

{¶ 20} Carter Properties argues that under the commission letter agreement, payment of the commission was conditioned on the lease being “consummated” and actual “tenant occupancy.” It claims that if Pinnacle desired to make payment of the commission due upon the “execution” of the lease agreement or upon the finding of a “ready, willing and able tenant,” then Pinnacle should have drafted the commission letter agreement using such terms. Upon our review, we do not find that actual tenant occupancy was required for Pinnacle to be entitled to the commission.

{¶ 21} As a general rule, a real estate broker earns his commission when he procures a buyer who is ready, willing, and able to purchase the subject property on terms specified by the owner. See *Boundy*, *supra*; *Bauman v. Worley* (1957), 166 Ohio St. 471, 477; *Scudder v. Wallace* (1946), 79 Ohio App. 48. More specifically, the commission is earned when a real estate broker procures a buyer

who enters into an enforceable contract with the seller. *Boundy*, supra; *Bedritis v. Peirsol* (Dec. 21, 1995), Franklin App. No. 95APE05-652.

{¶ 22} We recognize that the foregoing rule may be varied by agreement of the parties and that the parties may place certain conditions on a broker's entitlement to a commission. See *Harley E. Rouda & Co. v. Springtime Co.* (1975), 49 Ohio App.2d 49. The *Harley* case, relied upon by Carter Properties, involved the sale of real estate and a commission that was conditioned upon the actual closing of the property and the receipt of sufficient money from the buyer to pay the commission. *Id.* The court in *Harley* found that upon such conditions, the risk of the buyer's default was placed upon the broker. *Id.* In this matter, no such conditions were placed upon the earning of the commission and the landlord was determined to have committed an anticipatory breach of the lease agreement.

{¶ 23} The commission letter agreement provides in relevant part as follows: "In the event a lease is consummated * * * Pinnacle Real Estate Services shall receive a commission * * *, payable upon tenant occupancy." The plain and ordinary language of this contract requires that the commission "shall" be received in the event a lease is consummated and allows for payment to be made at a later time, i.e., upon tenant occupancy.

{¶ 24} Also, we do not find that actual occupancy was required in order for Pinnacle to be entitled to the commission. The term "consummated" is defined

as to “finish [or] complete <*consummate* a business deal>.” Merriam-Webster Online Dictionary (2009), <http://www.merriam-webster.com/dictionary/consummated>. As determined by the *NextHome* litigation, the lease agreement was a binding and effective instrument. It appears to this court that the parties intended the lease to be finally consummated upon its execution, and that the term “occupancy” was used only in relation to the timing of payment for the commission owed to Pinnacle.

{¶ 25} Because Pinnacle procured a tenant who was ready, able, and willing to lease upon the proffered terms, and because Pinnacle was effective at consummating the deal by procuring a tenant who entered into an enforceable contract with Carter Properties, Pinnacle was entitled to a commission under the commission letter agreement. The subsequent anticipatory breach of the lease agreement, for reasons unrelated to the broker’s right to a commission, had no effect on Pinnacle’s entitlement to the commission. See *Bedritis*, *supra*; *Scudder*, 79 Ohio App. at 51.

{¶ 26} Assuming *arguendo* that occupancy was a condition precedent for earning the commission, Carter Properties’ own conduct prevented the condition’s occurrence. It was determined in the *NextHome* litigation that Carter Properties had committed an anticipatory breach of the lease agreement by refusing to perform the landlord’s work under the contract, and thereby failed to deliver possession of an improved subject property. It was also determined

that but for the anticipatory breach, NextHome would have occupied the property. “[A seller] may not be heard to deny their duty to pay the agreed commission to the broker, whose complete performance was thus frustrated by the actions of the sellers.” *Drexell's Inc. v. Coup* (May 24, 1976), Warren App. No. 81.

{¶ 27} For the same reason, we are unpersuaded by Carter Properties’ argument that NextHome’s dismissal of its claim for specific performance in the *NextHome* litigation should prevent Pinnacle’s entitlement to a commission. To hold otherwise would be contrary to the fundamental principle that wrongdoers ought not benefit from their own wrongdoing.

{¶ 28} Accordingly, we find the trial court properly granted Pinnacle’s motion for summary judgment, and denied Carter Properties’ motion. Carter Properties’ first and fourth assignments of error are overruled.

{¶ 29} Carter Properties’ second assignment of error provides as follows:

{¶ 30} “2. The trial court committed reversible error in ordering that [Carter Properties] pay [Pinnacle] the amount of \$80,878.00.”

{¶ 31} Carter Properties argues that even if Pinnacle was entitled to summary judgment, the damage award was erroneous. Carter Properties states that Pinnacle’s damages were mitigated or minimized by subsequent moneys earned by Pinnacle, including a commission on NextHome’s purchase of the

Clemens Road Property, a consulting fee received during the construction of NextHome's new office building, and a commission on Carter Properties' subsequent sale of the subject property. Carter Properties claims that Pinnacle would not have had these opportunities if NextHome occupied the subject property.

{¶ 32} Pinnacle argues that the other commissions pertain to different real estate transactions and are unrelated to the commission due in this case. Pinnacle further argues that there was no obligation to mitigate the amount of commission that was earned pursuant to the commission letter agreement.

{¶ 33} Generally, a party to a contract has the duty to make reasonable efforts to mitigate any damages caused by a breach of the contract. *Dennis v. Morgan*, 89 Ohio St.3d 417, 419, 2000-Ohio-211. "Thus, contract law acknowledges that mitigation, otherwise known as the doctrine of avoidable consequences, may justly place an injured party 'in as good a position had the contract not been breached at the least cost to the defaulting party.'" *Frenchtown Square Partnership v. Lemstone, Inc.*, 99 Ohio St.3d 254, 257, 2003-Ohio-3648, quoting *F. Ent., Inc. v. Kentucky Fried Chicken Corp.* (1976), 47 Ohio St.2d 154, 159-160.

{¶ 34} We find that Pinnacle had no duty to mitigate under the circumstances of this case. In this action, Pinnacle sought to recover an earned commission, payment of which has been refused. Because Pinnacle produced a

tenant who was ready, willing, and able to lease the subject property and the lease agreement was enforceable at the price and under the terms agreed upon, Pinnacle's right to a commission became fixed. Pinnacle thereby became entitled to the full commission. See *Kunkle v. Jaffe* (Oct. 7, 1946), Cuyahoga App. No. 20331, 71 N.E.2d 298. This court held in *Kunkle*, a case closely on point: "In an action to recover a commission by a real estate broker who had procured a purchaser for certain real estate upon the terms of the seller thereof, the refusal of the seller to complete the sale entitles such broker to his entire commission although, in fact, he induced the purchaser to buy other premises from which he realized a greater commission than that lost by reason of the refusal of such seller to complete the original sale." *Id.* at syllabus.

{¶ 35} Indeed, there was no way for Pinnacle to minimize a commission fee to which it was entitled for services already rendered and that was already owed under the commission letter agreement. In such case, the broker has earned a commission for his efforts, regardless of whether there was a subsequent breach of the lease. See *Scudder*, 79 Ohio App. at 51. Thus, the damages incurred by Pinnacle in this matter could not be reasonably avoided.

{¶ 36} Further, Carter Properties' obligation to pay the commission was in no way affected by commissions earned by Pinnacle for subsequent services relating to separate real estate transactions, which it was under no compulsion to render.

{¶ 37} As stated in *Kunkle*, supra, “The [broker] was under no obligation whatsoever to mitigate his claim for damages for breach of contract against the defendant by seeking to make sales of other properties.” Carter Properties’ argument that Pinnacle would not have had these opportunities if NextHome occupied the subject property is purely speculative. Finally, we do not find that Pinnacle was placed in a better position because of Carter Properties’ breach of the lease agreement and failure to pay the commission owed to Pinnacle.

{¶ 38} Since there is no duty to mitigate damages under the circumstances of this case, the trial court did not err in awarding Pinnacle the commission due under the commission letter agreement in the amount of \$80,878. Carter Properties’ second assignment of error is overruled.

{¶ 39} Carter Properties’ third assignment of error provides as follows:

{¶ 40} “3. The trial court committed reversible error in granting [Pinnacle’s] motion for prejudgment interest and ordering that [Carter Properties] pay [Pinnacle] prejudgment interest in the amount of \$20,135.30 for a total [award] of \$101,013.30.”

{¶ 41} This argument is premised on Carter Properties’ claim that the trial court erred in granting Pinnacle’s motion for summary judgment. As we have already found that summary judgment was properly granted to Pinnacle and that there was no error in the amount of damages awarded, we find no merit to this assignment of error. We find that prejudgment interest was properly

awarded pursuant to R.C. 1343.03(A). Carter Properties' third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
MARY EILEEN KILBANE, J., CONCUR