

STATE OF OHIO                     )  
  )ss:  
COUNTY OF LORAIN            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

WILLIAM ATHENS

C.A. No.       10CA009799

Appellant

v.

LAND CONCEPTS COMPANY, INC.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.    09CV162539

Appellee

DECISION AND JOURNAL ENTRY

Dated: March 14, 2011

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MOORE, Judge.

{¶1} Appellant, Page One Realty, Inc., appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} Page One Realty, Inc. is a real estate brokerage company seeking to recover a commission on a purchase agreement for land owned by Appellee, Land Concepts Company, Inc. An owner of Page One Realty, William Athens, represented Michael Abdelnour and Steve Sokol (collectively “the Buyers”) in their attempt to purchase the property. Jon Clark is an attorney who represented Land Concepts, the seller. Following several months of negotiations between Page One Realty and Jon Clark, the Buyers and Land Concept entered into a Real Estate Purchase Agreement (“Purchase Agreement”) on August 9, 2005. By the Purchase Agreement, the Buyers and Land Concepts acknowledged that the Buyers were represented by Page One

Realty and that Land Concepts would pay Page One Realty a commission “at closing.” Closing was defined as “the date the deed of conveyance has been recorded.”

{¶3} The Purchase Agreement contained several conditions that could be waived only in writing. One of those conditions was that the Buyers were required to provide Land Concepts with evidence of preliminary loan approval within 30 days following the execution of the agreement. If the Buyers failed to provide such evidence within the allotted time, the Purchase Agreement stated that it would automatically terminate. In the event it terminated, the Buyers would be excused from the contract and their earnest money deposit would be returned.

{¶4} Despite those terms, the Buyers did not provide any evidence of preliminary loan approval to Land Concepts, and they did not seek an extension of the 30-day time limit or a written waiver of the condition. Over the next 11 months, however, Athens, the Buyers, and Clark continued to have discussions and exchange various written documents regarding the closing.

{¶5} Land Concepts subsequently retained another attorney, Todd Hicks, who sent the Buyers a letter dated July 5, 2006. The letter stated that the Purchase Agreement had automatically terminated because the Buyers failed to provide evidence of preliminary loan approval within the stated 30-day period. Land Concepts also issued a check to the Buyers for the amount of their earnest money deposit.

{¶6} The Buyers initially returned the check to Land Concepts and, along with Athens, filed a lawsuit against Land Concepts seeking specific performance of the Purchase Agreement. That case, *Michael Abdelnour v. Land Concepts Company, Inc.*, (July 13, 2006), Lorain C. P. No. 06CV146900, was resolved when the Buyers settled with Land Concepts and Athens dismissed his claim. In the Settlement Agreement, the Buyers stated that they had failed to

provide evidence of preliminary loan approval as required by the Purchase Agreement and that the Purchase Agreement had terminated as a result of their failure to meet the condition precedent. As part of the settlement and in accordance with the terms of the Purchase Agreement, the Buyers received their earnest money deposit.

{¶7} Athens, filed the instant action, *Athens v. Land Concepts Company, Inc.*, (June 10, 2009) Lorain C. P. No. 09CV162539, in his individual capacity on June 10, 2009. Page One Realty was named as the Plaintiff in an Amended Complaint. The trial court subsequently granted summary judgment on behalf of Land Concepts on the basis that the Purchase Agreement expressly required that the commission be paid upon closing and, because there was no closing, that condition could not be met.

{¶8} Page One Realty timely filed a notice of appeal and has raised one assignment of error.

## II.

### **ASSIGNMENT OF ERROR**

“THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO LAND CONCEPTS COMPANY, INC. SINCE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER LAND CONCEPTS COMPANY, INC. WAIVED CONDITIONS OF THE REAL ESTATE CONTRACT AND UNILATERALLY FAILED TO CLOSE THE TRANSACTION.”

{¶9} In its assignment of error, Page One Realty has argued that there were issues of material fact as to whether Land Concepts waived the condition that the Buyers provide preliminary loan approval, making termination of the loan agreement on that basis incorrect and summary judgment improper. We disagree.

{¶10} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court,

viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶11} Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(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 such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶12} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶13} In granting Land Concepts summary judgment, the trial court determined that Land Concepts’ obligation to pay a commission to Page One Realty arose only if the conveyance of the deed had been recorded. In so holding, the trial court relied on the section of the Purchase Agreement that dealt expressly with the payment of the commission, which states:

Real Estate Brokers: Both Parties acknowledge that [Buyers are] represented by ERA Page One Realty \* \* \* and [Land Concepts] shall be solely responsible for the payment of a commission in the amount of ten-percent (10%) of the purchase price to said Agent at closing.

Closing is defined, in relevant part, as follows:

Closing: The term “closing” as used herein shall mean the date the deed of conveyance has been recorded by the escrow agent as provided herein.

{¶14} 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 Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, at ¶18.

{¶15} In this case, the plain language required the “payment of a commission \* \* \* at closing.” By requiring that the seller pay at closing, the closing became a condition that would had to have occurred. Accordingly, although the broker may have had a separate agreement with the Buyers, the seller, Land Concepts, did not become obligated to pay pursuant to the plain language terms of the Purchase Agreement unless and until there was a closing.

{¶16} Additional support that the plain language of the document required payment only upon closing is found in other provisions of the Purchase Agreement which reflect that the parties expressly provided for the failure to close. For example, the Purchase Agreement stated that failure to obtain the proper financing approval would make the agreement terminate automatically, relieving both parties “of any further obligation to the other.” Further, it stated that a failure of any condition precedent would result in termination of the agreement. Neither of these sections, nor any others in the contract, contains terms describing the payment of a commission in the event of a failure to convey. Land Concepts was not obligated to pay the commission in light of the termination of the agreement. Closing on the property was a condition precedent to such a payment.

{¶17} When and how a broker becomes entitled to a commission ultimately depends on his contract. *Duane Stanley and Assoc. Realty v. Skrzynski* (April 13, 1978), 8th Dist. No. 37056. With most brokerage agreements or listing agreements, a real estate broker earns a commission pursuant to an employment contract or a listing agreement when he produces a buyer “ready, willing, and able” to purchase the property for the terms specified by the seller, even if the transaction itself is never consummated. *Harley E. Rouda & Co. v. Springtime Co.* (1975), 49 Ohio App.2d 49, 52-53 (citing *Bauman v. Worley* (1957), 166 Ohio St. 471). That may be changed, however, by agreement of the parties. *Id.* at 53. Specifically, the parties may state that the obligation to pay the commission arises with the closing. *Id.* The effect of tying the commission to the closing is that the parties shift the risk of the default to the broker. *Id.* at 54.

{¶18} It is important to note that there was no employment contract or listing agreement between Page One Realty and Land Concepts. Page One Realty represented the Buyers and the extent to which it can recover pursuant to the terms of the Purchase Agreement between the Buyers and Land Concepts would be if it were a third party beneficiary. As such, it would have no greater rights than the contract in question provides. See *Union Savings & Loan Co. v. Cook* (1932), 127 Ohio St. 26, 35. There is no language in the Purchase Agreement that would make simply meeting the “ready, willing, and able” standard sufficient to create an obligation on the part of Land Concepts and limit the word “closing” to a temporal requirement rather than a condition precedent.

{¶19} Page One Realty has argued that it should be entitled to its commission because the seller, Land Concepts, caused the failure to close. Specifically, it has argued that Land Concepts waived the condition to provide proof of preliminary loan approval and, in so doing,

incorrectly relied upon that provision to claim that the Purchase Agreement had terminated. In support, it cites *Lentz v. Schnippel* (1991), 71 Ohio App.3d 206, and *White v. Nemastil* (1985), 29 Ohio App.3d 1, for the proposition that if a broker procures a buyer and the seller breaches the contract, the seller must pay the commission. As previously noted, however, in those cases there was an agreement between the broker and the seller that gave rise to that obligation to pay commission regardless of the outcome of the conveyance.

{¶20} Moreover, this Court need not determine whether Land Concepts waived the 30-day portion of the provision requiring proof of financing because the Buyers and Land Concepts agreed upon the consequence of such a contingency: the contract would terminate. It follows then that the Purchase Agreement allowed for the termination of the parties' obligations to each other but did not require that the commission be paid in that event. Factually, it is undisputed that the Buyers did not provide the necessary financing information within the required time and that they ultimately received their earnest money deposit. Because the Purchase Agreement did not specify what would happen to the commission in the event the financing provisions were not met and the agreement was terminated, this Court will not add such language. Accordingly, Page One Realty's assignment of error is overruled.

### III.

{¶21} Page One Realty's assignment of error is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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CARLA MOORE  
FOR THE COURT

DICKINSON, P. J.  
WHITMORE, J.  
CONCUR

APPEARANCES:

MICHAEL D. LINN and JAMES J. COSTELLO, Attorneys at Law, for Appellant.

TODD C. HICKS, and J. JAREDD FLYNN, Attorneys at Law, for Appellee.