73737-6

NO. 73737-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MR. 99 & ASSOCIATES, INC.; MARTIN S. ROOD,

Respondents,

v.

8011, LLC, a Washington limited-liability company; WALTER MOSS and JANE DOE MOSS, husband and wife, and their marital community; KARI GRAVES and JOHN DOE GRAVES, husband and wife, and their marital community,

Appellants,

FIRST AMERICAN TITLE COMPANY,

Defendant.

FILED
Jun 27, 2016
Court of Appeals
Division I
State of Washington

REPLY BRIEF

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorney for Appellants

TABLE OF CONTENTS

INTRODUCTION 1

REPLY STATEMENT OF THE CASE 2

A. Owner refused to enter a new agreement after the Agreement expired on January 21, 2012. 2

B. Rood acknowledges that Mazda did not become interested in the Property until April 2012, three months after the Agreement had expired. 2

C. It is undisputed that when the Agreement expired, Rood did not provide Owner a registration list of potential buyers. 4

ARGUMENT 4

A. Rood's procedural bars are meritless. 4

1. Owner addressed Rood's tort claims. 5

2. Graves' declaration 6

3. The supposedly "new" issues are not new. 7

4. This Court reviews orders granting summary judgment *de novo*. 8

5. Owner did not invite error. 9

6. Owner is not "estopped" from arguing that the correct standard or review applies. 10

B. The Statute of Frauds bars any commission. 10

1. Real estate brokers may recover a commission for the sale of real property only upon a written agreement that satisfies the statute of frauds. 10

2. Since the Agreement expired, it is legally defunct, and cannot entitle Rood to a commission. 11

3. There are no equitable exceptions to the statute of frauds..... 15

C. Rood is not entitled to a commission under the procuring cause rule..... 15

1. The procuring cause rule does not apply, where Rood – through no fault of Owner – failed to procure a buyer before the Agreement expired by its own terms. 15

2. Rood's arguments to the contrary are meritless. 16

a. "Working on" procuring a buyer does not satisfy the procuring cause rule. 16

b. The Agreement is not "silent" as to how a commission will be awarded post-expiration. 18

3. The procuring cause rule does not apply, where the Agreement has a tail provision..... 20

D. Even if Rood had been entitled to a commission, his repeated breaches of RCW 18.86.030 & .040 should bar him from obtaining it, but Graves must waive this argument. 22

E. This Court should reverse the fee award to Rood, and order the trial court to grant summary judgment to Owner and award it attorney fees. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Bagley v. Foley,
82 Wash. 222, 144 P. 25 (1914) 17

Bishop v. Hansen,
105 Wn. App. 116, 19 P.3d 448 (2001) 8, 9, 10

Bonanza Real Estate, Inc. v. Crouch,
10 Wn. App. 380, 517 P.2d 1371 (1974) 17, 18

Buckner, Inc. v. Berkey Irrigation,
89 Wn. App. 906, 951 P.2d 338 (1998) 4

Colo. Structures, Inc. v. Ins. Co. of the West,
161 Wn.2d 577, 167 P.3d 1125 (2007)..... 22

Ctr. Invs., Inc. v. Penhallurick,
22 Wn. App. 846, 592 P.2d 685 (1979) 11, 13, 16

Donatelli v. D.R. Strong Consulting Eng'rs, Inc.,
179 Wn.2d 84, 312 P.3d 620 (2013)..... 10

Duncan v. Parker,
81 Wash. 340, 142 P. 657 (1914)..... 16

Engleson v. Port Cresent Shingle Co.,
74 Wash. 424, 133 P. 1030 (1913)..... 11

Farrell v. Mentzer,
102 Wash. 629, 174 P. 482 (1918)..... 15

Forland v. Boyum,
53 Wash. 421, 102 P. 34 (1909)..... 15

Hayden v. Ashley,
86 Wash. 653, 150 P. 1147 (1915)..... 17

Knox v. Parker,
2 Wash. 34, 25 P. 909 (1891)..... 16

Koller v. Flerchinger,
73 Wn.2d 857, 441 P.2d 126 (1968)..... 14

Lawson v. Black Diamond Coal Mining Co.,
53 Wash. 614, 102 P. 759 (1909)..... 16

Merritt v. American Catering Co.,
71 Wash. 425, 128 P. 1074 (1912)..... 16

Norris v. Byrne,
38 Wash. 592, 80 P. 808 (1905)..... 16

Pavey v. Collins,
131 Wn.2d 864 199 P.2d 571 (1948).....11, 13

Professionals 100 v. Prestige,
80 Wn. App. 833, 911 P.2d 1358 (1996) 5

Prostov v. Dep't of Licensing,
186 Wn. App. 795, 349 P.3d 874 (2015) 9

Roger Crane & Assocs. v. Felice,
74 Wn. App. 769, 875 P.2d 705 (1994) 20

Syputa v. Druck, Inc.,
90 Wn. App. 638, 954 P.2d 279, *rev. denied*, 136
Wn.2d 1024 (1998).....16, 18, 20, 21

Thayer v. Damiano,
9 Wn. App. 207, 511 P.2d 84 (1973) 12, 13, 14, 20

Vaughn v. Chung,
119 Wn.2d 273, 830 P.2d 668 (1992)..... 4

Willis v. Champlain Cable Corp.,
109 Wn.2d 747, 748 P.2d 621 (1988)..... *passim*

Zelensky v. Viking Equip. Co.,
70 Wn.2d 78, 422 P.2d 293 (1966)..... 16

Statutes

RCW 18.86.030 22

Other Authorities

Restatement (Second) of Agency §468 (1958) 11

INTRODUCTION

Martin Rood does not dispute that during the term of his Agreement with 8011, LLC ("Owner"), Rood's client Mazda was uninterested in Owner's Property. Rood pursued other properties on Mazda's behalf. Rood's Agreement with Owner expired. Rood did not communicate with Owner for many months.

Three months after the Agreement had expired, Mazda first became interested in Owner's Property, having exhausted other options. One month later, Rood presented Mazda's first written offer, hoping to be a dual agent. Rood agrees that he repeatedly asked Owner to enter a new agreement and that Owner repeatedly refused.

Thus, when Owner and Mazda entered a PSA on their own that did not provide a commission for Rood, Rood's only written agreement with Owner had expired, so was legally defunct. Rood's commission is therefore barred by the statute of frauds.

Rood is not entitled to a commission under the procuring cause rule, where he procured Mazda months after the Agreement expired, and failed to satisfy the Agreement's tail provision. This Court should reverse the summary judgment in Rood's favor, grant summary judgment for Owner, and award Owner attorney fees and costs.

REPLY STATEMENT OF THE CASE

A. Owner refused to enter a new agreement after the Agreement expired on January 21, 2012.

The parties entered a listing Agreement that expired on January 21, 2012. CP 1184, 1475 ¶ 1; BR 6. Rood acknowledges that the Agreement expired without any "serious" offers and that the parties did not enter a new Agreement. CP 1184, 1190-91; BR 7. He attempts to explain that away by claiming that the parties "did not feel it was necessary." BR 7 (citing CP 920). That is completely inconsistent with Rood's admission that he repeatedly asked Owner to sign a new agreement, and Owner refused. CP 1184, 1190-91.

Rood openly acknowledged that "when a listing expires we want to have it extended." CP 1184. Indeed, Rood asserts that the "customary" practice is for an agreement to be "renewed." BA 7. But again, Rood admits that the parties never signed a new agreement despite repeated requests. CP 1184, 1190-91.

B. Rood acknowledges that Mazda did not become interested in the Property until April 2012, three months after the Agreement had expired.

At trial, Rood acknowledged that he did not "procure" Mazda during the Agreement's term. CP 501. Rood now claims that Mazda was a "potential buyer" before Owner contacted him regarding the

Property. BR 3. But while Mazda may have been a "potential buyer" in that they wanted to buy *a property*, they were not interested in *Owner's Property* until months after the parties' listing Agreement had expired. CP 643, 708-11, 1082

Rood first "made Mazda aware of the potential availability of [the Property]" in April 2011. BR 4; CP 643. He admits, however, that Mazda "wasn't interested" in the Property, desiring instead to purchase the building it was leasing. *Id.* Rood represented Mazda in negotiations with its then landlord, from May 2011 to March 2012, when Mazda first learned that its landlord was uninterested in selling. BR 4-5 (citing CP 643). At that point – two months after the parties' Agreement had expired – Mazda asked Rood to locate a property eight miles from Lynwood Mazda, based on a State law requiring an eight-mile separation between dealers. BR 6; CP 643. Rood admits that Mazda "did not consider" the Property, as it was only 7.5 miles from Lynwood Mazda. *Id.*; CP 643.

When Rood and Mazda eliminated other potential properties satisfying the eight-mile rule, Rood "again presented the Property to Mazda" in April 2012, three months after the parties' Agreement had expired. BR 7 (citing CP 1069, 1197, 2326); CP 708-11, 1082. Rood reminded Mazda to make sure it could "get by the 8 mile rule first."

CP 708, 1082. It was not until May 18, 2012, a full four months after the Agreement had expired, that "Mazda told Mr. Rood that it would offer to buy the Property." BR 7 (citing CP 1900-01). Rood then sent a PSA to Owner's lawyer. BR 7; CP 925, 1567, 1900.

C. It is undisputed that when the Agreement expired, Rood did not provide Owner a registration list of potential buyers.

Despite Rood's insistence that Mazda was a "potential buyer," it is undisputed that when the Agreement expired, Rood did not give Owner a registration list disclosing Mazda. BA 34. That is the mechanism for obtaining a commission under the Agreement when no written offer has been extended during its term. CP 161; CP 1476 ¶ 6; BA 5-6. There is no registration list in the record, and Rood does not claim that he provided one.

ARGUMENT

A. Rood's procedural bars are meritless.

Rood begins by asserting six procedural bars designed to prevent this Court from deciding this matter on the merits. BR 24-30. *But see* ***Buckner, Inc. v. Berkey Irrigation***, 89 Wn. App. 906, 914, 951 P.2d 338 (1998) (quoting ***Vaughn v. Chung***, 119 Wn.2d 273, 280, 830 P.2d 668 (1992) ("court rules 'contain a preference for

deciding cases on their merits rather than on procedural technicalities'"). This approach is as unpersuasive as it is telling.

1. Owner addressed Rood's tort claims.

Rood argues that Owner failed to address his tort claims, and that this Court must therefore affirm the judgment, which is based on tort and in contract. BR 24-25. That is incorrect. Owner argued that there are no equitable exceptions to the statute of frauds. BA 20-22. That is, Rood's tort claims are irrelevant, where there was no written agreement that satisfied the statute of frauds. *Id.* This is consistent with Owner's response to Rood's tort claims at trial. *Compare* CP 485-86, 607, 610 *with* CP 1125-29.

As to assignments or error, Owner assigned error to entry of the judgment. BA 2. Owner is not required to assign error to an oral comment or a minute entry on Rood's request for attorney fees. BR 24 (citing CP 26, RP 7/1/15 at 12, 34). Nor is Owner required to make separate assignments of error to the entry of the judgment as to each defendant. BR 25. But in any event, the court will look past a procedural deficiency in the assignments of error, where, as here, it can easily ascertain the challenge on appeal. ***Professionals 100 v. Prestige***, 80 Wn. App. 833, 841, 911 P.2d 1358 (1996).

2. Graves' declaration.

Rood asks this Court to ignore Kari Graves' declaration filed in response to Rood's first motion for summary judgment on the procuring cause rule, arguing that it was not put before Judge Wilson on Rood's second (and duplicative) motion for summary judgment on the procuring cause rule. BR 26. It is undisputed that Graves' declaration is in the court file. CP 1528-1742. When Rood cross-moved for summary judgment on procuring cause in May 2015, he raised precisely the same arguments that were rejected in a prior round of summary judgment motions in May 2014. *Compare* CP 1440-63 *with* 2278-95. Owner responded that Rood was impermissibly "shopping around." CP 601 (citing SCLR 7(b)(2)(D)(6)). Owner's response cited its May 2015 summary judgment motion, declaration in support thereof, and reply, as well as "[t]he court files herein." CP 600. It is, however, accurate that the order granting Rood's second motion for summary judgment does not list Graves' 2014 declaration. CP 436-37.

It is unfortunate that Rood may create an unjust advantage from this matter's unusual procedural posture and his carefully crafted summary judgment order that includes many of his own 2014 declarations, but not Graves'. *Id.* In any event, this reply brief

includes no references to Graves' declaration. As demonstrated above, the crucial facts remain unchallenged: Mazda was not even interested in the Property until months after the Agreement expired; Rood thus did not "procure" Mazda during the Agreement's term; and the parties never entered a new Agreement, despite Rood's repeated requests. *Supra*, Statement of the Case A & B. This is a legal – not a factual – appeal.

3. The supposedly "new" issues are not new.

Rood next asks this Court to "dispose of" several issues he claims Owner raised for the first time on appeal. BR 26. As to the first, Rood incorrectly asserts that Owner argued "that the Listing required Mr. 99 to provide a registration list to 8011." *Id.* Owner did not argue that Rood was "required" to give Owner a registration list, but explained that under the Agreement's tail provision, Rood could recover a commission only if Owner leased the property within six months of the Agreement's expiration to an entity that submitted an offer before the listing Agreement expired, or that was on a registration list Rood provided to Owner. BA 31-34; *infra* Argument § C. 3. Owner raised the tail on summary judgment. CP 605, 612.

Rood next claims that Owner raised Rood's failure to disclose his dual agency for the first time on appeal. BR 26. That too is

inaccurate. Owner plainly stated that dual agency did not "exist[]." CP 1443. Rood never identified himself as the broker for Owner and for Mazda until the May 2012 PSA he drafted on Mazda's behalf. *Id.* At that point, Rood was no longer Owner's agent, as the Agreement had expired four months earlier.

Finally, on this point, Rood frivolously argues that Owner seeks attorney fees for the first time on appeal and that Owner failed to make an assignment of error on this point. BR 26. The trial court awarded Rood attorney fees based on the Agreement's fee provision. CP 31, 38. Owner did not prevail, so was not entitled to fees under that provision. There was no error to assign to the "failure" to award Owner fees. Nor is this issue "new" – the trial court ruled on the fee provision in the Agreement.

4. This Court reviews orders granting summary judgment *de novo*.

It is, of course, beyond dispute that this Court reviews orders granting summary judgment *de novo*. ***Bishop v. Hansen***, 105 Wn. App. 116, 118, 19 P.3d 448 (2001). Rood nonetheless argues that this Court should apply an abuse of discretion standard of review because the trial court "decided this action on 8011's own motion for reconsideration." BR 26-27. The unusual procedural posture of this case does not change the fact that the trial court ruled in Rood's favor

as a matter of law, denying Owner's motion for summary judgment, and granting Rood's cross-motion for summary judgment. CP 438.

When Graves moved for summary judgment on the statute of frauds, Rood cross-moved for summary judgment, largely ignoring the statute of frauds, but re-raising the same procuring-cause arguments that Judge Appel had previously rejected. BA 14-15.; CP 599-601. Judge Wilson initially denied both motions, but after Owner moved for reconsideration, Judge Wilson notified the parties that he was prepared to rule "as a matter of law" if the parties agreed to strike the trial date. CP 1-14. Rood's own correspondence to the court indicated the parties' agreement that "Judge Wilson may decide this action as a matter of law." CP 4. The court then decided "this action as a matter of law," granting Rood's cross-motion for summary judgment. *Id.*; CP 438. Thus, the standard of review is plainly *de novo*. ***Bishop***, 105 Wn. App. at 118.

5. Owner did not invite error.

Rood next argues that Owner invited error by agreeing that the court could decide this matter on summary judgment. BR 29. The invited error doctrine prevents a party from setting up an error at trial, only to complain about it on appeal. ***Prostov v. Dep't of Licensing***, 186 Wn. App. 795, 822, 349 P.3d 874 (2015). Owner agreed that

the court should decide this action as a matter of law, and does not now take a different position on appeal. But Owner did not invite the trial court to rule in Rood's favor, so it did not invite the error challenged on appeal.

6. Owner is not "estopped" from arguing that the correct standard or review applies.

Rood's estoppel argument says it all: "8011 **agreed** with Mr. Rood that the superior court could decide the case as a matter of law . . . ." BR 29 (emphasis Rood's). That is exactly why the standard of review is *de novo*. ***Bishop***, 105 Wn. App. at 118; ***Donatelli v. D.R. Strong Consulting Eng'rs, Inc.***, 179 Wn.2d 84, 90, 312 P.3d 620 (2013) ("We review alleged errors of law de novo"). That the trial court granted summary judgment on reconsideration does not transform a legal question reviewed *de novo* into a discretionary ruling reviewed for an abuse of discretion.

B. The Statute of Frauds bars any commission.

1. Real estate brokers may recover a commission for the sale of real property only upon a written agreement that satisfies the statute of frauds.

Rood does not disagree that the statute of frauds applies, or that a broker typically cannot maintain a suit for compensation absent a valid writing that satisfies the statute of frauds. BA 17-20; RCWs 19.36.010 and 18.86.080(7); ***Ctr. Invs., Inc. v. Penhallurick***, 22 Wn.

App. 846, 849, 592 P.2d 685 (1979) (citing ***Engleson v. Port Cresent Shingle Co.,*** 74 Wash. 424, 133 P. 1030 (1913) "and cases cited therein"). That is because "the statute [of frauds] would not have the effect intended" if a broker could recover a commission absent a written agreement. ***Penhallurick***, 22 Wn. App. at 849-50 (quoting Restatement (Second) of Agency §468, at 399 (1958), Comment on Subsection 2). Brokers are expected to know the law, and can reasonably be deprived compensation if they fail to follow it. *Id.*

Rood's only response on this point is that the Agreement satisfies the statute of frauds even though some terms are omitted. BR 35-36. Owner never argued that the Agreement is lacking. BA 20. The point is that there was no agreement that satisfied the statute of frauds where the Agreement had expired and the parties never entered a new agreement. *Id.*

2. Since the Agreement expired, it is legally defunct, and cannot entitle Rood to a commission.

The Agreement was "legally defunct" after it expired by its own terms on January 21, 2012. CP 1475 ¶ 1; ***Penhallurick***, 22 Wn. App. at 849 (quoting ***Pavey v. Collins***, 131 Wn.2d 864, 870 199 P.2d 571 (1948)); ***Thayer v. Damiano***, 9 Wn. App. 207, 210, 511 P.2d 84 (1973) (same). Rood agrees that the parties never entered a new

written agreement. CP 1184, 1592-93. Thus, there was no valid written agreement satisfying the statute of frauds.

Rood argues that the agreement is not legally defunct, claiming: (1) that "the Listing states that Mr. Rood is entitled to a commission if he procures a buyer, not whether he procures a buyer before the Listing is expired or the Property is sold within a certain time"; and (2) that Owner "conflates" the "terms of this Agreement" in ¶ 6(a), which are left blank, with the Agreement's six-month "term." BA 36. Although Rood does not elaborate on these blanket assertions, he appears to be suggesting that he is entitled to a commission for procuring Mazda months after the Agreement expired. *Id.* To so hold, this Court should have to ignore the Agreement's express duration term and tail provision. See *infra*, Argument § C. 2(b).

Rood's reliance in ***Pennhallurick*** is misplaced. BR 37-38. ***Pennhallurick*** does not, as Rood suggests, allow for a commission just because Mazda was a "potential buyer." *Id.* Rather, ***Pennhallurick*** recognizes that a broker who is the "procuring cause" may recover a commission under an oral agreement, where the PSA provides for a commission. 22 Wn. App. at 850. Owner's PSA with Mazda did not provide for a commission. CP 1723-42. But in any

event, Mazda was not a "potential buyer" until after the Agreement expired, as it was only then that Mazda became interested in the property. *Supra*, Reply Statement of the Case § B.

Rood's attempt to distinguish ***Pavey*** is unavailing. BR 38 (citing 131 Wn.2d at 870). Rood argues that in "***Pavey***, the writing expired before the broker had secured a prospective purchaser." *Id.* The same is true here – the Agreement expired in January 2012, and Rood did not procure Mazda until May. *Supra*, Reply Statement of the Case § B. Rood's persistent claim that he was in the process of procuring Mazda is incredible, where Mazda "wasn't interested" in the Property and was not considering it until May. CP 643, 696. Rood may have been trying to find a different property for Mazda, but he was not procuring Mazda for the purchase of Owner's Property.

Equally unavailing is Rood's attempt to distinguish ***Thayer*** on the ground that "the contract expressly limited when commission would be paid even though the broker procured the buyer." BR 38 (citing 9 Wn. App. at 210-11). Again, the Agreement has a tail – similar to that in ***Thayer*** – providing a commission when the broker placed the seller in contact with a buyer during the agency, and the seller sold the property to that buyer within a specific time after the agency terminated. *Compare* 9 Wn. App. at 710 *with* CP 1476 ¶ 6.

In another attempt to evade the Agreement's express expiration date, Rood argues that "a broker need not negotiate the sale within a fixed time if the delay is due to the fraud or fault of the owner." BR 39 (citing ***Koller v. Flerchinger***, 73 Wn.2d 857, 441 P.2d 126 (1968)). Rood's reliance on ***Koller*** is misplaced. There, the broker brought a buyer to sellers after their original listing Agreement had expired, and sellers then entered a new agreement to pay the broker a commission. ***Koller***, 73 Wn.2d at 859. But that agreement also expired before the sale was complete. 73 Wn.2d at 859. The ***Koller*** Court saw no reason to depart from the "general rule of universal application that "a broker employed for a definite time to effect a sale of property must negotiate the sale within the time fixed to be entitled to his commission." *Id.* Here, there is no question that Rood did not "perform" during the Agreement's term, where Mazda was not even interested in the Property. CP 643, 696.

Finally on this point, Rood claims that "his past services were valid consideration to support later agreements to pay a commission." BR 38. This argument is meritless, where the final PSA does not provide a commission for Rood. CP 1723-42.

3. There are no equitable exceptions to the statute of frauds.

As discussed at length in the opening brief, it has long been the law in Washington that there are no equitable defenses to the statute of frauds. *See, e.g.*, BA 20-22; ***Forland v. Boyum***, 53 Wash. 421, 424, 102 P. 34 (1909). This is so even if the statute of frauds operates to defeat a "just claim." ***Farrell v. Mentzer***, 102 Wash. 629, 632, 174 P. 482 (1918). Rood offers no substantive response.

C. Rood is not entitled to a commission under the procuring cause rule.

1. The procuring cause rule does not apply, where Rood – through no fault of Owner – failed to procure a buyer before the Agreement expired by its own terms.

As addressed at length in the opening brief, the procuring cause rule does not apply where, as here: (1) the brokerage agreement has an express term and the broker did not procure a buyer in that term; or (2) the agreement has a tail provision providing for a commission post-termination or expiration. BA 22-24; ***Willis v. Champlain Cable Corp.***, 109 Wn.2d 747, 754-55, 748 P.2d 621 (1988)); ***Syputa v. Druck, Inc.***, 90 Wn. App. 638, 645-46, 954 P.2d 279, *rev. denied*, 136 Wn.2d 1024 (1998). The procuring cause rule generally applies to oral agreements where the broker procures an eventual sale and the seller memorializes the oral agreement to pay

a commission in a subsequent writing between seller and purchaser. ***Willis***, 109 Wn.2d at 755 (citing ***Ctr. Invs., Inc. v. Penhallurick***, 22 Wn. App. 846, 850, 592 P.2d 685 (1979)). Our courts have also applied the procuring cause rule where the listing agreement does not have a fixed term and the seller terminates the agency in bad faith to deprive the broker of a commission. ***Zelensky v. Viking Equip. Co.***, 70 Wn.2d 78, 82-83, 422 P.2d 293 (1966) (citing ***Knox v. Parker***, 2 Wash. 34, 25 P. 909 (1891); ***Norris v. Byrne***, 38 Wash. 592, 80 P. 808 (1905); ***Lawson v. Black Diamond Coal Mining Co.***, 53 Wash. 614, 102 P. 759 (1909); ***Merritt v. American Catering Co.***, 71 Wash. 425, 128 P. 1074 (1912); ***Duncan v. Parker***, 81 Wash. 340, 142 P. 657 (1914)). But again, where, as here, the Agreement has an express term and/or a tail provision, the procuring cause rule does not apply. ***Willis***, 109 Wn.2d at 754-55; ***Syputa***, 90 Wn. App. at 645-46. Rood does not address this point, or any of these cases. BR 30-31.

2. Rood's arguments to the contrary are meritless.

a. "Working on" procuring a buyer does not satisfy the procuring cause rule.

As addressed in the opening brief, Rood ultimately acknowledged that he did not procure Mazda during the Agreement's term. CP 501. Before that concession, Rood had claimed that he

"procured" Mazda in 2011 before he was even working with Owner. For the reasons discussed in the opening brief and above, that assertion is meritless. BA 27-30; *Supra*, Reply Statement of the Case B. Mazda was not even interested in the Property until months after the Agreement expired. CP 643, 708. Thus, Rood did not "procure" an offer until months after the Agreement expired. CP 643, 1567.

Again shifting tactics, Rood now claims that he is entitled to a commission under the procuring cause rule where he "set in motion the events that culminated in the sale." BR 30. Rood similarly argues that he is entitled to a commission because he "worked to procure Mazda before, during, and after the Listing." BR 31-32. The argument appears to be that Rood is entitled to a commission because he "produced" Mazda, regardless of when he did so. BR 30 (citing ***Bonanza Real Estate, Inc. v. Crouch***, 10 Wn. App. 380, 385, 517 P.2d 1371 (1974) (citing ***Hayden v. Ashley***, 86 Wash. 653, 150 P. 1147 (1915); ***Bagley v. Foley***, 82 Wash. 222, 144 P. 25 (1914))). But ***Bonanza*** involved a listing Agreement with an express term, a tail provision, and a sale within the tail. 10 Wn. App. at 384, 387-88. ***Bonanza*** is consistent with ***Willis***, 109 Wn.2d at 754-55, and ***Syputa***, 90 Wn. App. at 645-46.

Rood's arguments ignore that the procuring cause rule does not apply where, as here: (1) the brokerage agreement has an express term and the broker did not procure a buyer in that term; **or** (2) the agreement has a tail provision providing for a commission post-termination or expiration. BA 22-24; ***Willis***, 109 Wn.2d at 754-55; ***Syputa***, 90 Wn. App. at 645-46. Rood acknowledges that he "procured Mazda after the Listing." BR 33. It is not enough that Rood was "working on" procuring Mazda (or anyone else).

b. The Agreement is not "silent" as to how a commission will be awarded post-expiration.

Rood apparently abandons his argument that the Agreement's express six-month term did not govern his commission on the *sale* of the Property, but only on a lease. BA 29-30; CP 491-92, 1498-99. He now argues that he is entitled to a commission because the Agreement is "silent as to what should happen to the commission in the event that the employment is terminated." BR 32 (citing ***Syputa***, 90 Wn. App. at 645-46 (citing ***Willis***, 109 Wn.2d at 754-55)). The Agreement is not "silent" on this point. It has a 5-point commission provision, entitling Rood to a commission only if: (1) Rood leased, sold, or procured a lease or sale, "on the terms of the Agreement"; (2) Owner leased or sold the Property through someone else during the Agreement's term; (3) Owner leased or sold the

property within 6 months of the Agreement's expiration date to a person who submitted a written offer before the Agreement expired, or who is on registration list Rood provided to Owner; (4) Owner voluntarily made the property unsuitable for lease or sale; or (5) Owner cancelled the Agreement or prevented Rood from leasing or selling the property. BA 4-6; CP 1476 ¶ 6.

Read as a whole, the commission provision plainly states "what should happen to the commission in the event that the employment is terminated." BR 32. To obtain a commission after the Agreement expired, Rood had to lease or sell the property within six months: (a) to an entity who submitted an offer during the Agreement's term, or (b) to an entity on a registration list. BA 4-6; CP 1476 ¶ 6. Neither happened: it is undisputed that Mazda did not make an offer during the Agreement's term and that Rood did not give Owner a registration list.

Rood relatedly argues he was entitled to a commission if he leased or sold the property "on the terms of the Agreement" and that the Agreement does not specify "terms." BR 5-6. That is beside the point. The Agreement's DURATION provisions expressly provides that the term of the Agreement is six months. CP 491-92, 1498-99.

Rood does not dispute that the Agreement indeed expired under that provision. His claims are meritless.

3. The procuring cause rule does not apply, where the Agreement has a tail provision.

As addressed at length in the opening brief, the procuring cause rule does not apply where, as here, the listing agreement provides how a commission will be awarded after the termination or expiration of the agreement. BA 31-34 (discussing ***Willis***, 109 Wn.2d at 754; ***Syputa***, 90 Wn. App. at 645-46; ***Roger Crane & Assocs. v. Felice***, 74 Wn. App. 769, 774, 875 P.2d 705 (1994); ***Thayer***, 9 Wn. App. at 210. These provisions, often referred to as a tail, are strictly construed. ***Roger***, 74 Wn. App. at 774; ***Thayer***, 9 Wn. App. at 710. "The procuring cause doctrine acts as a gap filler," but if there is a tail provision, there is no gap to fill. ***Syputa***, 90 Wn. App. at 645-46.

Since the Agreement plainly provides for how commissions will be awarded in the event of expiration, the procuring cause rule does not apply. CP 1476 ¶6; ***Willis***, 109 Wn.2d at 755; ***Syputa***, 90 Wn. App. at 646. And Rood acknowledges that he did not satisfy the terms of the tail provision. BR 33-34. Thus, Rood is not entitled to a commission under the Agreement or the procuring cause rule.

Rood argues that because "Mazda did not make an offer during the Listing . . . ¶ 6(c) of the Listing does not apply." BR 34.

Rood cannot ignore the tail provision just because he chose not to follow it. Rather, he is not entitled to a commission under the tail provision because Mazda did not make an offer during the Agreement's term. BA 31-34.

Rood also asks this Court to disregard Graves' argument on this point. BR 33-34. As addressed above, however, this is not a new argument. *Supra*, Argument § A.3. And as to Rood's point that Graves "fails to support [this claim] by citation to the record," the whole point is that there is no registration list in the record. BR 34.

Admitting that he did not satisfy the tail, Rood asserts that he is nonetheless entitled to a commission under ¶ 6(a), allowing a commission where a sale is procured "on the terms of the Agreement." BR 33-34. Rood argues that he is entitled to a commission for procuring Mazda, regardless of when he procured them. *Id.* That proffered interpretation of the Agreement reads the tail provision and the duration clause right out of the Agreement.

The tail provision is meaningless if, as Rood suggests, he can obtain a commission for a buyer procured and PSA entered after the Agreement expired without taking the steps expressly required by the tail. The same is true of the duration clause. If, as Rood suggests, he is entitled to a commission for procuring Mazda after the

Agreement expired, then the Agreement effectively has no term, rendering the duration clause superfluous. This Court does not construe contracts in a manner that renders terms superfluous – or absurd. ***Colo. Structures, Inc. v. Ins. Co. of the West***, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007).

D. Even if Rood had been entitled to a commission, his repeated breaches of RCW 18.86.030 & .040 should bar him from obtaining it, but Graves must waive this argument.

As noted above, Rood omitted Graves' declaration from the Summary Judgment Order. *Supra*, Statement of the Case § A.2. Rood is correct that this argument in the opening brief relies on that declaration. Graves therefore waives this argument.

But this waiver should not be taken as a concession of Rood's responding arguments, which are not accurate. Bottom line, Rood was not entitled to a commission as a matter of law for all of the reasons argued above, so there is simply no need to further pursue these arguments.

E. This Court should reverse the fee award to Rood, and order the trial court to grant summary judgment to Owner and award it attorney fees.

As addressed above, Graves' request for fees is not a "new" argument on appeal. *Supra*, Argument § A. 3. The trial court awarded

fees to the prevailing party under the Agreement. CP 38. If Graves prevails, then she is entitled to fees.

CONCLUSION

For the reasons stated, this Court should reverse the summary judgment in Rood's favor, grant summary judgment to Owner, and remand for entry of judgment, including costs and attorney fees to Owner, both in the trial court, and here.

RESPECTFULLY SUBMITTED this 27th day of June, 2016.

MASTERS LAW GROUP, P.L.L.C.

Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be emailed or mailed a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail, on the 27th day of June, 2016, to the following counsel of record at the following addresses:

Co-counsel for Appellants

Erika Danielle Shinpaugh
Peterson Russell Kelly PLLC
10900 NE 4th Street, Suite 1850
Bellevue, WA 98004-8341

___ U.S. Mail
_✓_ E-Mail
___ Facsimile

Counsel for Respondents

Jonathan Joshua Loch
Jeffrey Paul Downer
Lee Smart P.S. Inc.
701 Pike Street Suite 1800
Seattle, WA 98101-3929

___ U.S. Mail
_✓_ E-Mail
___ Facsimile

Kenneth W. Masters, WSBA 22278

RCW 18.86.030

Duties of broker.

(1) Regardless of whether a broker is an agent, the broker owes to all parties to whom the broker renders real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable skill and care;

(b) To deal honestly and in good faith;

(c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;

(d) To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the broker has not agreed to investigate;

(e) To account in a timely manner for all money and property received from or on behalf of either party;

(f) To provide a pamphlet on the law of real estate agency in the form prescribed in RCW 18.86.120 to all parties to whom the broker renders real estate brokerage services, before the party signs an agency agreement with the broker, signs an offer in a real estate transaction handled by the broker, consents to dual agency, or waives any rights, under RCW 18.86.020(1)(e), 18.86.040(1)(e), 18.86.050(1)(e), or 18.86.060(2) (e) or (f), whichever occurs earliest; and

(g) To disclose in writing to all parties to whom the broker renders real estate brokerage services, before the party signs an offer in a real estate transaction handled by the broker, whether the broker represents the buyer, the seller, both parties, or neither party. The disclosure shall be set forth in a separate paragraph entitled "Agency Disclosure" in the agreement between the buyer and seller or in a separate writing entitled "Agency Disclosure."

(2) Unless otherwise agreed, a broker owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.

[2013 c 58 § 3; 1996 c 179 § 3.]