

FILED

DEC 01 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29322-0
COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

WASHINGTON PROFESSIONAL REAL ESTATE, LLC,
d/b/a/ Prudential Almon Realty,

Appellant

vs.

DR. KIPP YOUNG, et ux.

Respondents.

APPELLANT'S REPLY BRIEF

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I. Introduction

Prudential accomplished what it undertook to do under the agreement: Procure a buyer on terms acceptable to the Youngs. (CP 107, ¶8, lines 5&6). The agreement did not require Prudential to have direct discussions with the buyers, to negotiate with the buyers, or to facilitate the closing.

However, once Prudential learned that Dr. Young was negotiating with the Eastmans, Prudential offered to assist with the negotiations. Dr. Young would not allow Prudential to assist with the negotiations. Because Dr. Young would not allow Prudential to assist, Dr. Young may not set up this supposed failure as an excuse for not paying Prudential.

II. Prudential's Response to Dr. Young's Statement of the Case

A. Dr. Pat Eastman was interested in the property once she saw it:

The Youngs claim that Mrs. Eastman was not interested in the property after she saw it, but rather, "this property was

just a fleeting idea.” (RB 9, line 9). This is not true. Mrs.

Eastman testified:

Q: So when you saw that house at 610 Noble Hill, what did you think:

A: You know, at that point we were looking at options. . . . It was very different than the house we moved from, *but [I] wanted to take a look.*

Q: So you were interested in the house?

A: Yea.

(CP 225, lines 9-17). (Emphasis added).

B. Mrs. Rockwell was not “indispensable” to the sale because the Eastmans’ Realtors were able to locate the Youngs’ expired listing:

The Youngs claim that the Eastmans would not have purchased the property but for their chance encounter with Linda Rockwell. (RB 16, line 17-19; and RB 19, line 16). This also is not true. Dr. Pat Eastman explained that her Realtors pulled up the Youngs’ expired listing after they saw the Property. (CP 69, lines 22-23). Therefore, had Mrs. Rockwell not been outside of the café that Saturday morning,

the Eastmans – who wanted to look at the Property – still would have contacted the Youngs.

C. Dr. Young rejected Prudential's request to assist him in negotiating the sale of the Property:

Dr. Young argues at least seven times that Prudential is not entitled to a commission because Prudential did not assist in the negotiations. (RB 1, 4, 11, 15, 17-18, 25, and 26). This is Dr. Young's central argument. As explained below, this argument is disingenuous.

On January 29, 2009, Prudential's broker had a discussion with Dr. Young and his Prudential Realtor. (CP 168, ¶ 2). Dr. Young told them that the Eastmans had learned of the property from his neighbors, the Rockwells, who knew prior to the listing, that the property would be for sale. (CP 169, ¶ 3). Based upon that, Prudential agreed that it was not entitled to a commission. (Id). Prudential's broker offered to assist in the negotiations for a reduced commission. (Id., at ¶4). Dr. Young

said he would consider the offer, but ultimately decided against it. (Id).

Later that day, Prudential's broker learned from one of the buyers' Realtors that Dr. Young's version of events was wrong. The buyers' Realtor explained that her clients had learned of the property prior to talking with the Rockwells. (Id., at ¶5). The buyers' Realtor explained that her clients had learned of the Property through Dr. Tom Place, who directed the Eastmans to the Property after having seen the Prudential sign in the Youngs' yard. (Id). Prudential's broker informed Dr. Young that Prudential was entitled to a commission, based upon that corrected version of events. (Id., at ¶¶'s 6-7).

III. Summary of Argument

Prudential is the procuring cause of the subject sale because Prudential's sign set in motion a series of events that culminated in the sale. Without the sign, Dr. Place would not

have known to show the property to his sister, Dr. Pat Eastman. This led to the sale of the Property.

Moreover, Prudential accomplished what it undertook to do: procure a buyer. Prudential would have negotiated the subject sale had Dr. Young not rejected Prudential's offer to assist with negotiations.

This court should reverse the summary judgment order, and order summary judgment in favor of Prudential. Specifically, this court should award Prudential a 6% commission on the sale, with 12% interest beginning March 20, 2009, together with Prudential's reasonable attorney fees. Prudential, as stated in the complaint, will then split the commission with Creekside, the buyers' Realtor. (CP 5, ¶4.7).

IV. Argument

A. Prudential's efforts were the procuring cause of the sale:

1. Prudential expended much greater efforts than the Realtors in both Lloyd Hammerstad and Roger Crane:

Prudential was the Listing broker. As the listing broker, Prudential's task was to market the property. (CP 106, ¶¶'s 1 & 5). Prudential's efforts are recounted by Meg Irwin in her certified statement. (CP 102-04, ¶7). These efforts resulted in five offers from three potential purchasers, one of which was actually accepted.

Dr. Young argues that all these efforts are irrelevant. (RB 5, under part B.4.). But see Roger Crane & Associates v. Felice, 74 Wn. App. 769, 776, 875 P.2d 705 (1994) (Noting that Mr. Brooks' efforts were minimal, thus implying that the Realtor's efforts were a factor in that decision). Prudential's efforts and expenses, which took place over 7 months, were much greater than the efforts of the Realtors in both *Lloyd Hammerstad* and *Roger Crane*, which extended over a day or two. In this respect, the efforts of Prudential were similar to the efforts of Mr. Erwin in Professionals 100 v. Prestige, 80 Wn. App. 833, 911 P.2d 1358 (1996). It is important to recognize

these efforts, lest Prudential's request to split a \$55,000 commission be falsely portrayed as compensation for placing a sign in the ground.¹

2. Prudential's efforts were the procuring cause of the sale, and Prudential accomplished what it undertook to do: procure a buyer on terms acceptable to the Youngs:

The broker must set in motion the series of events culminating in the sale and in doing so, accomplish what he undertook under the agreement.” Roger Crane & Associates v. Felice, 74 Wn. App. 769, 776, 875 P.2d 705 (1994). There is no dispute of fact but that:

- (1) Prudential's sign made Dr. Place aware of the Property, which caused

¹ In the unlikely event that this court remands for a trial, this court should state that Prudential's efforts are admissible for the limited purpose of showing what Prudential did, so that the jury is not left with the false impression that Prudential is requesting to split a \$55,000 commission for merely placing a sign in the ground.

- (2) Dr. Place to direct his sister to the property, which because of her interest in the property, caused
- (3) The Places, who saw Mrs. Rockwell the next morning, to ask her whether her neighbors' property was still for sale, which caused
- (4) Mrs. Rockwell that day to give the Eastmans' number to Dr. Young, which led to the sale.

Although there are four events in this chain, the chain is clear and unbroken.

This clear and unbroken chain is to be contrasted with the events in Lloyd Hammerstad and Roger Crane. In both of those cases, there was no causal connection – *none whatsoever* – between what the Realtors did and the eventual sales of the properties. (AB, pp. 14-16). Dr. Young's argument that there was "some" connection between what the plaintiff Realtors did in those cases and the sales is simply not supported by a careful reading of those cases.

Dr. Young argues that the subject of the Property might have come up even had Dr. Place not seen the Prudential sign. (RB, at 12, lines 3-10). What *might have* but did not occur is irrelevant for causation. What *did* occur is relevant, and it is

undisputed what *did* occur. What did occur is that the Places asked Mrs. Rockwell whether her neighbors were still interested in selling because Dr. Pat Eastman, the day before, saw the property and was interested in it.

Mrs. Rockwell did not show the property to Dr. Pat Eastman. Mrs. Rockwell did not do anything that made Dr. Pat Eastman interested in the property. Mrs. Rockwell was merely a conduit who made one telephone call to relay a question from the Places to Dr. Young.

Dr. Pat Eastman was interested in the property because her brother, who had seen the Prudential sign, directed her to the property. This is what actually occurred. This is why Prudential is entitled to a commission.

3. Procuring cause exists even if the Prudential sign did not directly cause Mrs. Rockwell to call Dr. Young:

Dr. Young argues that causation is broken because the Prudential sign did not directly cause Mrs. Rockwell to call Dr.

Young. (RB, at 13 & 19). This argument misstates the concept of causation.

For example, if a boy throws a rock at a car and the car crashed into a house, the boy is said to have caused the damage to the house. If the boy argues that the rock did not crash into the house, but the car did, it would not relieve him from liability. That is, an indirect cause is sufficient to prove causation.

Here we have a clear and unbroken chain of four events. The chain begins with the Prudential sign and ends with the sale. Dr. Young's hypothetical of what might-have-but-did-not occur is intellectually interesting. (RB 12). However, what might-have-but-did-not occur is irrelevant for causation.

4. The standard for causation in a procuring cause analysis should be similar to the standard adopted for sales in securities' cases:

There are two general causation standards: "but for" and "substantial factor." *Cf.* WPI 15.01 with 15.02. The first

standard is used in personal injury actions whereas the second standard is used in discrimination and sales of securities cases. Id. This court should adopt the second standard for two reasons. First, it is more consistent with the “set in motion a series of events” standard. Second, the sale of realty is more similar to the sale of securities than a personal injury action. Under the substantial factor test, court’s consider the following factors:

(1) the number of other factors which contribute to the sale and the extent of the effect which they have in producing it; (2) whether the defendant’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the sale . . . ; and (3) lapse of time.

Hines v. Data Line Systems, 114 Wn.2d 127, 148-49, 787 P.2d 8 (1990) (Quoting Habberman v. WPPSS, 109 Wn.2d 107, 131-32, 744 P.2d 1032, 750 P.2d 254 (1987)).

- a. Number of factors, and extent of the effect in their producing the sale:

First, Dr. Place saw the Prudential sign. Second, Dr. Place later directed his sister to the property. Third, the next morning, because his sister was interested in the property, he and his wife asked Mrs. Rockwell whether her neighbors were still interested in selling their property.

The first factor was very important in producing the sale, as was the second factor. The third factor was not: the record shows that the Eastmans' Realtors found the Youngs' expired listing after Dr. Pat Eastman saw the Property. (CP 69, lines 20-23). Therefore, Prudential's sign being seen, and the sign being the reason why a buyer was directed to the property, are the predominate factors which produced the sale.

b. Whether the Prudential sign created or commenced a series of events:

As discussed above, the Prudential sign set in motion a series of events that culminated in the sale.

c. Lapse of time:

The parties agreed that 365 days was the time period when credit for the sale could be received. (CP 107, ¶8a). This time period was separately typed into the agreement, and thus bargained for. (Id). Here, Dr. Place saw the sign in October, November, and December of 2008. (CP 204-05). He directed his sister Dr. Pat Eastman to the Property in January 2009. (CP 223-24). The parties agreed upon the terms of sale in late January 2009. (CP 227-28). Therefore, approximately one month elapsed between when Dr. Place last saw the sign and when the Young's received an acceptable offer. This lapse of time is much less than the 365 days agreed upon between the parties.

In summary, and given the undisputed facts, applying a substantial factor analysis to procuring cause results in Prudential being deemed the procuring cause of the sale.

5. It is irrelevant that Prudential, which represented the sellers, had no contact with the buyers:

Dr. Young argues that the Realtors in *Lloyd Hammerstad* and *Roger Crane* did more than Prudential because those Realtors had contact with the buyers, pointed the houses out to the buyers, and discussed prices with the buyers. (RB, at 17&18).

In those cases, the Realtors did not represent the seller, they represented the buyers. They were requesting a commission not for their efforts of marketing the properties, but for their efforts with the buyers.

Here, Prudential is requesting a commission because its efforts of marketing the property set in motion a series of events that accomplished what it undertook under the listing agreement, *i.e.*, procure a buyer on terms acceptable to the sellers. (CP 107, ¶8, lines 5&6). Prudential will give half of the commission to Creekside, which represented the buyers. (CP 5, at ¶4.7).

B. Prudential is entitled to a commission under the terms of the parties' Agreement:

Dr. Young correctly notes that the “directly or indirectly” language in the tail provision is not contained in the operative phrase relied upon by Prudential. (RB, at 21). The operative phrase relied upon by Prudential states:

8. . . . Seller hereby agrees to pay Broker 6% of the purchase price . . . as compensation for Broker's service, at the time of closing or upon the occurrence of any action provided for in sections “a” or “f” below . . .

a. If the property [is sold] . . . to any person . . . to whose attention the Property was brought *through* the signs, advertising, or any other action or effort of a Broker[.]

(CP 107, ¶8a). (Emphasis added). Prudential argued in its opening brief that “through” means “because of.” (AB, at 10). Prudential also argued that Dr. Young understood that “through” meant directly or indirectly. (AB, at 19-20). Dr. Young does not dispute this definition of “through.” Dr.

Young does not dispute that he understood that “through” meant directly or indirectly.

This court must therefore decide whether a reasonable trier of fact could determine that the Eastmans’ attention was brought to the property “because of” the Prudential sign. Based upon the above, a reasonable trier of fact could conclude only that the Eastmans learned of the Property “through” or “because of” the Prudential sign.

C. Prudential is entitled to recover its reasonable attorney fees pursuant to the Listing Agreement:

As mentioned in its opening brief, the Listing Agreement authorizes an award of reasonable attorney fees to Prudential for its fees incurred both below and on appeal. (AB, at 20).

V. Conclusion

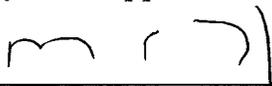
Prudential’s sign set in motion a series of events that culminated in the sale. The series of events is a clear and unbroken chain. Prudential is entitled to a commission based

upon a contractual analysis, which is consistent with a procuring cause analysis.

Dr. Young's version of the facts – suggesting what might have but did not happen, suggesting that Dr. Pat Eastman was not interested in the property, and suggesting that Mrs. Rockwell was indispensable to the sale – are not supported by the record. These unsupported assertions do not create issues of fact.

This court should reverse the lower court's summary judgment order, enter summary judgment in favor of Prudential, authorize Prudential's recovery of reasonable attorney fees below and on appeal, and remand this matter to the lower court for a calculation of damages, interest, attorney fees, and costs.

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AFFIDAVIT OF MAILING

I, JULIE BERRY, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the assistant to Robert E. Lawrence-Berrey, Jr., the attorney for Appellant and am competent to be a witness herein.

On November 30, 2010, I caused to be delivered via Attorney Messenger Service a copy of Appellant's Reply Brief to D.R. (Rob) Case of Larson, Berg & Perkins, LLC, attorneys for Respondent, at 105 North Third Street, Yakima, WA 98901.

On the same date, I caused to be mailed to Clerk, Court of Appeals, by U. S. Mail, postage pre-paid, the original and one copy of Appellant's Reply Brief, at 500 N. Cedar, Spokane, WA 99201.

I have read the within and foregoing affidavit, know the contents thereof, and believe the same to be true.

Signed at Yakima, Washington, this 30 day of November, 2010.



JULIE BERRY