

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY**

**BETTY KENNEDY DBA
COLDWELL BANKER
TOP LAKE REALTORS**

CASE NUMBER 8-2000-01

PLAINTIFF-APPELLEE

OPINION

v.

NORMA R. NAFF

DEFENDANT-APPELLANT

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court.**

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: August 15, 2000.

ATTORNEYS:

**JOHN I. BRICHACEK
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For Appellant.**

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For Appellee.**

BRYANT, J. Defendant-appellant Norma R. Naff takes this appeal from a judgment of the Logan County Court of Common Pleas in favor of plaintiff-appellee Betty Kennedy dba Coldwell Banker Top Lake Realtors.

On November 28, 1998, Appellant entered into an exclusive right to sell contract with Appellee. The contract provided that until May 28, 1999, Appellee would have the exclusive right to sell Appellant's real estate and would receive a commission of seven per cent of the sales price. The contract also provided that a commission would be paid after the termination of the contract if the real estate was sold to a buyer procured by Appellee. However, Appellee's agent left the time period for the extension of commission blank when the contract was signed. Thus, no time period for the commission was stated in the contract.

On January 12, 1999, an offer to purchase Appellant's real estate was made by Robert & Sheila Miller ("Buyers"). A counteroffer was accepted on January 22, 1999, with the sales price being set at \$174,500.00 and Appellee's agent agreeing to accept a reduced commission of \$10,087.16 for the sale. The sale was contingent upon Buyers being able to sell their real estate. This contract expired on April 30, 1999. As of April 30, 1999, the Buyers had not sold their real estate, thus the contract was never completed.

On May 28, 1999, the exclusive right to sell contract between Appellant and Appellee expired. On June 1, 1999, Appellant and Buyers entered into a new

contract to sell the real estate. Appellant sold the real estate to Buyers on June 29, 1999, for \$174,500.00.¹ On July 22, 1999, Appellee filed a complaint for the commission owed. The trial court found for Appellee and entered a judgment against Appellant for \$10,087.16.

Appellant makes the following assignments of error.

The trial court erred by not dismissing the complaint because [Appellee] is not the real party in interest.

The trial court erred in not finding that the “exclusive right to sell contract” had expired and in finding that [Appellee] was entitled to a commission.

Civil Rule 19 provides in pertinent part:

A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest * * *. If he has not been so joined, the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). If the defense is not timely asserted, waiver is applicable as provided in Rule 12(G) and (H).

In this case, Appellant claims that the complaint should have been dismissed because Appellee’s partner was not a named plaintiff. Appellant states

¹ The settlement statement shows a sales price of \$181,000.00. The trial court found that the remaining \$6,500.00 was for the purchase of a pontoon boat and trailer left as personalty.

that without the partner, she could possibly be subject to multiple or inconsistent obligations. However, this ignores the fact that Appellee filed the complaint on behalf of the partnership. As a partner, Appellee has the authority to file suit on behalf of the partnership and to bind all of the partners by the outcome of that suit. Here, the caption on the complaint was “Betty Kennedy, dba Coldwell Banker Top Lake Realtors.” Thus, the partnership and all of the partners were represented by Appellee and were precluded from filing multiple suits. The first assignment of error is overruled.

In the second assignment of error, Appellant claims that by leaving the time period for the extension of commission blank, the contract and the requirement that a commission be paid was terminated on May 28, 1999. The contract provides as follows:

BROKERAGE FEE. When the property is sold during the Listing Period, Seller shall pay Broker a brokerage fee of 7% of gross selling price or \$_____ whichever is greater. This right to a brokerage fee applies to any sale during the Listing Period, whether the Property is sold through Broker, by Seller’s own efforts, or otherwise, regardless of the amount of the sale price accepted by Seller. The property is deemed “sold” when Seller (a) receives a written offer to purchase the Property for the price stated in Paragraph 1, and otherwise upon the terms and conditions set forth in this Contract, from a ready, willing and able Purchaser; or (b) conveys or enters into a contract to convey the Property on any other terms and conditions acceptable to Seller. In addition, Broker shall be entitled to the same brokerage fee if the property is sold within the _____day period following the expiration of the Listing period (the Terminal Period) to any person (or anyone acting on

that person's behalf) with whom Broker has made contact relative to the sale before expiration of the Listing Period.

The commission was set at seven percent, but the time period for the Terminal Period was left blank.

The fact that a contract has some terms left undefined does not necessarily defeat the contract. "If it is found that the parties intended to be bound, the court should not frustrate this intention, if it is reasonably possible to fill in some gaps that the parties have left and reach a fair and just result." *Litsinger Sign Co., Inc. v. The American Sign Co., Inc.* (1967), 11 Ohio St.2d 1, 14, 227 N.E.2d 609, 619.

The only term left blank in this contract was the time period for the Terminal Period. The determination of a reasonable time is a fact to be determined by the trial court. *Noftsgar Real Estate, Inc. v. Berwanger* (1970), 26 Ohio App.2d 90, 269 N.E.2d 616. The trial court made a finding of fact based upon the testimony of Appellee's agent that a reasonable time period for the Terminal Period was 90 days. Since the sale occurred within this time period and Appellee was a procuring cause of the sale, the trial court found that the commission was owed.

A similar issue was decided in *Harden v. Bowling* (1971), 27 Ohio App.2d 163, 273 N.E.2d 322. In *Harden*, the real estate agent signed a listing agreement and procured a buyer for the property. Prior to the conclusion of the sale, the listing agreement expired. The court held that the agent was entitled to his commission if he was the procuring cause of the sale. "The term, 'procuring

cause,' as used in describing a broker's activity, refers to a cause directly originating a series of events which without break in their continuity directly result in the accomplishment of the prime objective of the employment of the broker, namely, the producing of a purchaser ready, willing and able to buy real estate on the owner's terms." *Id.* at 164, 273 N.E.2d at 323. The court determined that since the agent brought the parties together, negotiated a binding contract and the sale was completed for the price negotiated, the fact that a delay not the fault of the agent occurred did not change the fact that he was entitled to his commission. *Id.* at 165, 273 N.E.2d at 323.

Here, the facts are similar. Appellant and Appellee signed a listing agreement. Appellee then negotiated the contract between Appellant and Buyers. Part of this negotiation was that Appellee would reduce the commission in order to finalize the contract. Due to no fault of Appellee, the sale was not consummated before the expiration of the listing agreement. However, within one week of the expiration, Appellant and Buyers had entered a new sales contract with the real estate being sold for the same price. Based upon these facts, Appellee was the procuring cause of the sale and is entitled to a commission for the sale. The second assignment of error is overruled.

The judgment of the Logan County Court of Common Pleas is affirmed.

Judgment affirmed.

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SHAW and WALTERS, JJ., concur.

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