[Cite as *Bergman Group v. OSI Dev., Ltd.*, 2010-Ohio-3259.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

THE BERGMAN GROUP,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-12-080
	:	O P I N I O N
- vs -		7/12/2010
	:	
OSI DEVELOPMENT, LTD, et al.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008CVH609

William H. Blessing, 119 East Court Street, Suite 500, Cincinnati, Ohio 45202, for plaintiff-appellant, The Bergman Group

Strauss & Troy, Philomena S. Ashdown, 150 E. Fourth Street, Cincinnati, Ohio 45202, for defendant-appellee, OSI Development Ltd. and Swami Petroleum Corp.

Walter Reynolds, Tami Hart Kirby, One Dayton Center, One S. Main Street, Suite 1600, Dayton, Ohio 45402, for defendant-appellee, Cemex, Inc.

Keating, Muething & Klekamp PLL, Joseph L. Trauth, Jr., Michael T. Cappel, One East Fourth Street, Suite 1400, Cincinnati, Ohio 45202, for amicus curiae, Cincinnati Area Board of Realtors, Inc.

HENDRICKSON, J.

{¶1} Plaintiff-appellant, The Bergman Group, Inc., appeals a decision of the Clermont County Court of Common Pleas awarding judgment in favor of defendant-appellee, OSI Development, Ltd., in an action to recover a real estate commission. For

the reasons outlined below, we affirm the decision of the trial court as modified.

{¶2} Bergman is a commercial real estate agency and OSI is a land development company. On June 23, 2004, Bergman and OSI entered into a listing contract whereby Bergman acquired the exclusive right to sell certain real estate owned by OSI ("the listing contract"). The subject of the listing contract was an Exxon gas station and convenience store located on Old State Route 74 in Batavia, Ohio ("the Property"). Pursuant to later amendments, the listing contract was to remain in force until November 22, 2005. The amendments also set the sale price for the Property at $1.2 million.

{¶3} OSI was aware that a prospective buyer may be reluctant to purchase the Property outright. The prior tenant of the Exxon store had absconded and neglected to leave behind any records detailing the Property's financial operations. Sometime in 2005, prior to the expiration of the listing contract, Bergman procured a lessee for the Property. The lessee was a New Jersey company by the name of Swami Petroleum Corporation. Swami and OSI executed a two-year lease on August 30, 2005.

{¶4} On November 22, 2005, the listing contract between Bergman and OSI expired. Nearly 18 months later, Bergman submitted an offer to OSI on Swami's behalf to purchase the Property for $675,000. The May 18, 2007 offer included a provision requiring OSI to pay a three percent commission to Bergman. OSI did not formally reply. Instead, OSI's legal counsel sent Swami an unsigned proposal with a purchase price of $1,000,000. In response, Swami sent an unsigned red-lined proposal with a purchase price of $700,000. Again, OSI did not reply.

{¶5} On August 30, 2007, the lease between OSI and Swami terminated under its own terms. Swami continued to rent the Property from OSI as a holdover tenant. On October 3, 2007, 34 days after the lease expired, Swami and OSI entered into a

contract for Swami to purchase the Property directly from OSI for $700,000 ("the purchase agreement"). OSI did not pay Bergman a commission for the sale of the Property to Swami.

{¶6} Upon learning of the purchase agreement, Bergman filed a broker's lien against the Property for sums believed to be due. Specifically, Bergman demanded $10,692 for unpaid leasing commissions and $31,308 for impending sales commissions. OSI conveyed the Property to Swami by general warranty deed dated February 21, 2008.

{¶7} On March 20, 2008, Bergman filed a complaint against OSI and Swami to enforce its broker's lien. This was followed by an amended complaint in which Bergman asserted contractual and equitable claims against OSI for recovering its sales commission.[1] OSI countered with claims against Bergman for slander of title, statutory damages, attorney fees, and costs.

{¶8} The parties filed cross motions for summary judgment. In a decision rendered on October 28, 2008, the trial court denied Bergman's motion and granted OSI's partial summary judgment motion. The decision disposed of Bergman's claims for breach of contract and an equitable lien, leaving open only Bergman's claim for recovering the sales commission based upon the equitable theory of "procuring cause." In a November 17, 2008 amended summary judgment entry, the trial court ruled that Bergman's lien was extinguished.

{¶9} On June 11, 2009, the matter proceeded to a two-day bench trial on Bergman's procuring cause claim and on OSI's counterclaims. In a July 7, 2009 decision, the trial court ruled that Bergman was not the procuring cause of the sale of

1. While Bergman's initial complaint named Swami as a defendant, the amended complaint did not assert any claims against Swami.

the Property to Swami. Following an evidentiary hearing, the court issued a decision granting attorney fees to OSI. Final judgment was entered on November 18, 2009. Bergman timely appeals, raising three assignments of error.

{¶10} Assignment of Error No. 1:

{¶11} "THE COURT BELOW ERRED BY ENTERING SUMMARY JUDGMENT AND DISMISSING BERGMAN'S CLAIM FOR COMMISSIONS UNDER ITS LISTING CONTRACT WITH OSI."

{¶12} Bergman contends that the trial court improperly granted summary judgment to OSI on Bergman's contract claim. According to Bergman, the trial court construed the listing contract in a way that conflicted with the plain and ordinary meaning of the terms in the agreement.

{¶13} Summary judgment is a procedural device employed to end litigation when there are no issues in a case requiring a formal trial. *Nibert v. Columbus/Worthington Heating & Air Conditioning*, Fayette, App. No. CA2009-08-015, 2010-Ohio-1288, ¶13. A trial court's decision on summary judgment is reviewed de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296.

{¶14} Summary judgment is proper when (1) there are no genuine issues of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party meets its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing a genuine issue for trial.

Id.

{¶15} An issue of fact exists when the relevant factual allegations in the pleadings, affidavits, depositions, or interrogatories are in conflict. *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741. A dispute of fact is "material" if it affects the outcome of the case, and "genuine" if demonstrated by substantial evidence going beyond the allegations of the complaint. *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 371.

{¶16} The language relevant to Bergman's contract claim is contained in paragraphs 11, 12, and 13 of the listing contract. Paragraph 11 describes the scenarios under which a sales commission is due to Bergman. The provision begins:

{¶17} "11 **REALTOR'S® FEE:** In consideration of REALTOR'S® efforts and services to procure a Buyer for the Real Estate, Seller agrees to pay REALTOR® at Closing a commission ("Commission") of 6.000% of the gross selling price, regardless of agency relationships, for which the Real Estate may be sold or exchanged by REALTOR®. The Commission shall be deemed earned when a binding contract for sale has been executed and/or when REALTOR® has produced a Buyer, ready, willing and able to buy the Real Estate pursuant to the terms of this Contract * * * ."

{¶18} Next, paragraph 11 prescribes the commission due if OSI leases the Property:

{¶19} "In the event the Seller enters into an agreement to lease the Real Estate during the terms of this Contract, Seller agrees to pay REALTOR® a Commission of six percent (6.000%) of the gross aggregate rent to be paid when a binding lease has been executed. If any renewal/extension/expansion occurs, directly or indirectly, the landlord shall pay REALTOR® a Commission of three percent (3.000%) of the gross aggregate rent under the renewal/extension/expansion, payable at the commencement of each

new term."

{¶20} Finally, paragraph 11 denotes the commission due if OSI sells the Property to a lessee:

{¶21} "If lessee purchases the Real Estate directly or indirectly, the landlord shall pay REALTOR® at Closing a Commission of six percent (6.000%) of the price for which the Real Estate may be sold, less any unearned lease commission. Seller agrees to incorporate the REALTOR®'s entitlement to fees into the lease. * * *"

{¶22} The trial court determined that paragraph 11 was limited by paragraph 12, which provides the following:

{¶23} "12 **TERM OF AGENCY:** Seller agrees that REALTOR® shall have the exclusive right to sell or exchange the Real Estate until Midnight CINCINNATI TIME December 23, 2004, and REALTOR® shall be entitled to its Commission if the Real Estate is sold or exchanged by REALTOR® or by Seller or by any other person at a price acceptable to the Seller during the existence of this Contract." (Emphasis sic.)

{¶24} As stated, the term was extended to November 22, 2005 by agreement of the parties. Also relevant to the term of agency, the listing contract contains a 180-day protection period which follows the expiration date. Paragraph 13 incorporates this term:

{¶25} "13 **PROTECTION PERIOD:** The sale, lease or exchange of the Real Estate to any person(s) to whom REALTOR® offered the same during the term of this Contract, if such contract for the sale, lease or exchange is executed within 180 days from the termination of this Contract, shall be considered a sale/lease effected by REALTOR® and shall entitle REALTOR® to the Commission herein agreed to be paid by Seller provided: (a) REALTOR® has furnished Seller a written list of such persons; (b) REALTOR® submits said list of such persons to Seller no later than 15 days after

expiration of the term; and, (c) REALTOR® continues reasonable written or verbal contact with such person(s) during the Protection Period. * * *"

{¶26} Bergman argues that the trial court erred in construing paragraph 12 as a time restriction on paragraph 11. According to Bergman, the plain language of paragraph 11 dictated that a commission-generating sale was *not* limited to the term of the listing contract. In support, Bergman highlights the provision whereby OSI agreed to pay Bergman a six percent sales commission "regardless of agency relationships." Once again, the portion of paragraph 11 containing that phrase in context is as follows:

{¶27} "In consideration of REALTOR'S® efforts and services to procure a Buyer for the Real Estate, Seller agrees to pay REALTOR® at Closing a commission ("Commission") of 6.000% of the gross selling price, *regardless of agency relationships*, for which the Real Estate may be sold or exchanged by REALTOR®." (Emphasis added.)

{¶28} The phrase "regardless of agency relationships," Bergman insists, denotes that a commission may be due even after the agency relationship between the parties has ended.

{¶29} Bergman goes on to argue that paragraph 12 is a provision that should be viewed separately from, and not as a limitation on, paragraph 11. Paragraph 12, Bergman explains, describes an exclusive right to sell arrangement. Under this provision, a broker earns a commission if the real estate is sold during the term of the listing contract, regardless of whether the broker is instrumental in procuring the buyer.

{¶30} Bergman complains that the trial court's construction of paragraph 12 as a time restriction on paragraph 11 effectively limited any opportunity for the realtor to earn a commission to the scenario found in paragraph 12. Bergman insists that the trial court's ruling renders the post-lease sale language in paragraph 11 meaningless unless

the lease term, renewals, and sale itself are consummated prior to the expiration of the listing contract. This, Bergman insists, is unrealistic.

{¶31} The construction of a written contract is a matter of law for the court. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶9. An appellate court reviews a trial court's interpretation of a contract de novo. Id.

{¶32} The intent of the parties is paramount in guiding judicial construction of contracts and is presumed to lie within the language used in the written agreement. Id. The contract must be read as a whole to ascertain the intent of the parties. Id. at ¶16. Where a contract is clear and unambiguous, a court need not interpret the language and must enforce the agreement by attributing the plain and ordinary meaning to the language as written. Id. at ¶9.

{¶33} After carefully reviewing the listing contract in its entirety, we find that the reading proffered by Bergman does not comport with the plain language of the agreement. First, we note that Bergman's excision of and emphasis upon the phrase "regardless of agency relationships" in paragraph 11 disregards the well-accepted principle that contracts are to be read as a whole. When the provisions are read in conjunction with one another, the plain and ordinary meaning of the terms belies Bergman's arguments.

{¶34} A reasonable analysis of the provisions at issue supports the conclusion that Bergman was entitled to a commission only if the Property was sold or leased *during* the contract term (June 23, 2004 through November 22, 2005) or during the protection period (November 22, 2005 through May 21, 2006). Paragraph 12, entitled "Term of Agency," unambiguously delineated a deadline for Bergman's tenure as OSI's agent. That term was later extended by agreement. Upon the passage of the extended deadline, Bergman was no longer OSI's agent. Furthermore, the clear terms of

paragraph 12 confined Bergman's right to a sales commission to the contract term ("REALTOR® shall be entitled to its commission if the Real Estate is sold * * * *during the existence of this contract*"). It is reasonable to construe this as a limitation on paragraph 11 rather than a separate scenario under which a commission would be due.

{¶35} The inclusion of the 180-day protection period fulfilled the purposes of equity by assuring that Bergman's right to a sales commission was not unduly subverted. But Bergman's entitlement to a sales commission could not continue in perpetuity. Once the protection period ended, the parties were no longer bound by any terms in the listing contract. At that point, OSI and Swami were free to negotiate and transact a sale.

{¶36} As the record indicates, Swami did not purchase the Property or exercise its option to purchase or renew during the listing contract term or the protection period. The May 2007 offer was submitted to OSI by Bergman acting in a capacity as *Swami's* agent, not OSI's. By this time, the listing contract had been expired for nearly 18 months. The protection period terminated 12 months prior to the offer. Thereafter, OSI was no longer contractually bound to pay Bergman a commission.

{¶37} We further note two unexplained discrepancies in Bergman's argument that appear to illuminate the realtor's understanding of the OSI-Swami sale. The first discrepancy involves the agency disclosure statement attached to the May 2007 offer. The third section of this document expressly indicated that Bergman represented *only* the buyer (i.e., Swami) as a client in the transaction. If Bergman believed it still represented OSI at that time, surely the disclosure form would have indicated as such.

{¶38} Another discrepancy involves the percentage of sales commission solicited. The listing contract between OSI and Bergman required OSI to pay a

commission of six percent if the Property sold during the contract term, regardless of whether the Property was sold outright or to a lessee. By contrast, the May 2007 offer submitted by Bergman on Swami's behalf contained a provision requiring OSI to pay a commission of three percent to Bergman should OSI accept the offer. If Bergman assumed the provisions of the listing contract still applied at the time of the May 2007 offer, the realtor would have been expecting to receive a commission of six percent in accordance with paragraph 11 of the listing contract. It is unreasonable to presume that Bergman would reduce its own commission by half if the realtor truly believed the listing contract remained in force at the time of the May 2007 offer.

{¶39} These two discrepancies appear to clarify Bergman's understanding of the circumstances following the expiration of the listing contract. Indeed, we believe that they strongly counter Bergman's argument that it was entitled to a sales commission under the listing contract when OSI sold the property directly to Swami.

{¶40} Finally, the record indicates that OSI paid Bergman a lease commission of $8,352 in February 2008. OSI did not submit this payment until after closing on the sale of the Property. In addition, the payment did not include a disputed sum regarding the sale of goodwill. Bergman did not assign any errors regarding these omissions. Therefore, we note only that Bergman received full payment for the lease commission due in accordance with paragraph 11 of the listing contract. As a result, we find that OSI fulfilled its duties under the agreement. Bergman's contractual claim to a sales commission is without merit.

{¶41} Bergman's first assignment of error is overruled.

{¶42} Assignment of Error No. 2:

{¶43} "THE TRIAL COURT ERRED IN FINDING THE PASSAGE OF TWO YEARS, DURING WHICH SWAMI LEASED THE PROPERTY, BROKE THE CHAIN OF

EVENTS BETWEEN BERGMAN'S PROCUREMENT OF THE BUYER AND THE PURCHASE."

{¶44} Bergman next contends that the trial court misapplied the law in ruling that the realtor was not the procuring cause of OSI's sale of the Property to Swami due to a break in continuity. Bergman also adamantly disagrees with the trial court's finding that Swami was not a "ready, willing, and able" buyer when it submitted an offer to purchase through Bergman due to the fact that the $675,000 offer was significantly lower than the $1.2 million listing price.

{¶45} The procuring cause doctrine is an equitable tool which permits a broker to recover a commission for the sale of property in the absence of a contract. See *Peirce v. J.C. Meyer Co., Inc.*, Richland App. Nos. 2005-CA-125, -114, 2006-Ohio-4237, ¶20. Invoking this doctrine, Bergman maintains its entitlement to a commission as the procuring cause of the sale despite the expiration of the listing contract. In order for this doctrine to apply, certain conditions must be met. The following often-quoted definition for "procuring cause" elucidates these conditions:

{¶46} "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." *Bauman v. Worley* (1957), 166 Ohio St. 471, paragraph two of the syllabus.

{¶47} After reviewing the record, we find the evidence demonstrates that Bergman had no meaningful contact with OSI after Swami entered into the lease in August 2005. David Metz, a real estate broker employed by Bergman, testified at trial. Metz's testimony indicated that he was the chief, if not sole, Bergman agent in contact

with OSI regarding the Property. Metz conceded that he had zero contact with OSI from the time the Swami lease was signed in August 2005 until May 2007, other than sending invoices for past due lease commissions.

{¶48} After the lease was signed, the next contact occurred when Bergman submitted Swami's offer to purchase the Property in May 2007. At that time, however, Bergman was acting in the capacity as Swami's agent. The agency disclosure statement affixed to the May 2007 offer indicated that Bergman only represented the buyer, Swami. In addition, no dual agency agreement had ever been executed between the parties. According to testimony by Jeffery Rosselot, managing partner of OSI, Rosselot neither solicited Metz to draft the May 2007 offer nor worked with Metz on the offer. Metz conceded these points. Rosselot also testified that he did not have any contact with Metz after the May 2007 offer lapsed.

{¶49} The discrepancy regarding sales commission percentages further clarifies Bergman's understanding of its changed role. As stated, the May 2007 offer indicated that the seller would pay Bergman a three percent sales commission. At trial, Metz agreed that OSI would have owed Bergman a three percent commission had OSI accepted the May 2007 offer. Again, if Bergman believed it still retained rights under the listing contract with OSI, the realtor would have believed it was entitled to a six percent commission upon OSI's acceptance of the May 2007 offer.

{¶50} Due to the surrounding circumstances, we find that Bergman's submission of the May 2007 offer demonstrated that the realtor believed it no longer represented OSI and was free to act as Swami's agent. In view of the above facts, we find that there was a break in continuity in the two-year period between the expiration of the listing contract and the signing of the purchase agreement.

{¶51} In addition to this break in continuity, Swami could not properly be

classified as a ready, willing, and able buyer on OSI's terms when Bergman first introduced the New Jersey company to OSI. As stated, Swami entered into a lease rather than purchasing the Property outright. Once Swami did submit an offer to purchase through Bergman, the $675,000 figure was far below the $1.2 million listing price and, hence, not on OSI's terms. Moreover, Metz testified that he was aware Swami did not have all of the financing available to cover the May 2007 offer should it have been accepted by OSI. In fact, the act of obtaining financing seemed to be a persistent bane for Swami. The sale of the Property between OSI and Swami was repeatedly delayed due to Swami's failure to obtain a commitment letter from a lender. In view of these facts, we find that Swami was not a ready, willing, and able buyer on OSI's terms at any point while Bergman was actively involved with the Property.

{¶52} We have considered the case law offered by the parties, and believe the present matter is more akin to the Second Appellate District's decision in *Upper Valley Realty, Inc. v. Hanson*, Miami App. No. 2005-CA-5, 2006-Ohio-314. In that case, a homeowner entered into an exclusive listing contract with a realtor for the sale of a residence. The contract provided for a six percent commission on the gross selling price of the property. The contract was set to terminate one year after its inception, with the addition of a 60-day protection period.

{¶53} After the listing contract expired, the homeowner authorized the realtor to advertise the property for lease or purchase. The realtor procured a renter who agreed to lease the property with an option to purchase for $345,000. The realtor drafted a lease agreement embodying these terms, which the renters signed. Although the listing contract had expired, the realtor signed the acceptance portion of the lease agreement as the homeowner's agent. This section contained a clause providing that the homeowner agreed to pay the realtor a $20,000 commission for selling the property.

{¶54} The homeowner never signed the lease agreement, but accepted the monthly rent payments for 18 months. By the time the lease expired, the renters had not exercised their option to purchase. Thereafter, the homeowner terminated the realtor's services. Approximately four months later, the renters entered into a contract with the homeowner to purchase the property for $325,000.

{¶55} The trial court ruled that no contract existed between the realtor and the homeowner at the time the property was sold. Rather, the listing contract and the protection period expired long before the sale of the property to the renters. The trial court thus concluded that the homeowner was not obligated to pay the realtor a sales commission.

{¶56} On appeal, the Second District affirmed. The appellate court noted that the realtor did not show the property to the renters until after the listing contract expired. The court also noted that the realtor did not produce a ready, willing, and able buyer when it introduced the renters to the homeowner because the renters conveyed their inability to procure the necessary funds to purchase the house at that time. In fact, the renters were unable to procure the necessary funds until two years after the listing contract expired. The appellate court further observed that the homeowner negotiated and worked with the renters for four months to execute the sale without the realtor's assistance.

{¶57} While distinctions do exist, the parallels between the present matter and *Hanson* are manifest. Bergman and OSI executed an exclusive listing contract, as did the parties in *Hanson*. In both cases, the listing contract involved a definite term with a protection period affixed to the end of that term. Both realtors procured a lessee rather than an outright buyer. By the time the leases in both cases expired, the renters had not timely exercised their options to purchase. Additionally, in both *Hanson* and in the

present matter, the purchase agreements were signed around two years after the listing contracts had expired.

{¶58} One distinction is that Bergman introduced Swami to OSI while the listing contract was still in effect. By contrast, the realtor in *Hanson* did not unite the renters with the homeowner until after the listing contract terminated. This distinction does not affect our ultimate conclusion, however. As indicated, our analysis under Bergman's second assignment of error contemplates recovery *outside* of a contract. In both cases, the purchase contracts were not executed until long after the listing contracts and their respective protection periods had expired.

{¶59} Further similarities overshadow this distinction as well. The *Hanson* court found that the realtor did not produce a ready, willing, and able buyer because the renters were unable to procure the necessary funds until two years after the listing contract expired. Similarly, Swami was not a ready, willing, and able buyer due to its failure to command the necessary funds within a similar timeframe. Finally, the evidence in both cases reveals that the respective realtors were not involved in any meaningful way in the final sale negotiations or transactions.

{¶60} With these similarities in mind, we endorse the reasoning of the Second District. We conclude that the lapse of time between the termination of the listing contract and the purchase agreement, along with the fact that the purchase agreement was negotiated and executed without any involvement on Bergman's part, amounted to a sufficient break in continuity to bar Bergman's recovery of a sales commission under the procuring cause doctrine. Furthermore, the deficient May 2007 offer and Swami's lack of financing precluded Swami from being classified as a ready, willing, and able buyer on OSI's terms at the time that offer was submitted, further barring operation of the procuring cause doctrine.

{¶61} Bergman's second assignment of error is overruled.

{¶62} Assignment of Error No. 3:

{¶63} "THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AGAINST BERGMAN."

{¶64} Bergman maintains that the trial court's award of attorney fees was inappropriate because the realtor was entitled to a commission and, accordingly, should have been the prevailing party at the trial court level. Alternatively, Bergman claims that the trial court's award includes legal services which exceed those authorized by the applicable statute.

{¶65} We review trial court's determination regarding attorney fees for an abuse of discretion. *Bittner v. TriCounty Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶66} Bergman's first argument regarding its entitlement to a sales commission has already been disposed of under the realtor's previous assignment of error. We thus begin with Bergman's alternative argument concerning the excessiveness of the award under R.C. 1311.88(C). That provision reads:

{¶67} "In an action based on a broker's lien, a court may assess the nonprevailing parties with costs and reasonable attorney's fees incurred by the prevailing parties. The court shall equitably apportion the assessed costs and attorney's fees among all responsible nonprevailing parties."

{¶68} Regarding the reasonableness of the fee award, the Ohio Supreme Court outlined a two-step process for a trial court to follow when determining the amount of fees to award the prevailing party in *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio

St.3d 143.

{¶69} First, the trial court must calculate the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. See id. at syllabus. The court should exclude any hours which were unreasonably expended. *Gibney v. Toldeo Bd. Of Edn.* (1991), 73 Ohio App.3d 99, 108. "Unreasonably expended hours are generally categorized as those which are excessive in relationship to the work done, are duplicative or redundant, or are simply unnecessary." Id. The resulting figure provides an objective initial estimate of the value of the attorney's services. *Bittner* at 145, quoting *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S.Ct. 1933.

{¶70} Second, the trial court may modify its initial calculation after contemplating the factors set forth in DR 2-106(B), now Professional Conduct Rule 1.5.[2] See *Bittner* at syllabus. It is within the trial court's discretion to decide which factors to apply and what impact those factors have on the court's analysis. Id. at 146.

{¶71} Bergman insists that the attorney fee award handed down by the trial court was not limited to reasonable fees for services rendered in defense of Bergman's action to enforce its broker's lien. According to Bergman, the award included the following unreasonable expenses: (1) charges incurred by OSI pertaining to the sale of the Property to Swami before Bergman filed the lien lawsuit; (2) charges incurred by OSI for legal services rendered after the trial court's October 28, 2008 decision declaring the lien extinguished and ordering escrowed funds released; (3) charges incurred by OSI in defending claims on the escrowed funds asserted by Cemex, an intervening creditor

2. These factors include: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; [and] (8) whether the fee is fixed or contingent."

unrelated to Bergman;[3] and (4) charges incurred by OSI in completing paperwork to pay Bergman commissions under the Swami lease.

{¶72} After reviewing the record and the applicable law, we agree that it was unreasonable to award attorney fees for legal services rendered before Bergman commenced the lien enforcement action. R.C. 1311.88(C) begins with the phrase "*[i]n an action* based on a broker's lien, * * *." (Emphasis added.) The precise wording of the statute cannot properly be construed to permit reimbursement for fees incurred *outside* the action. Such a construction would render the phrase "[i]n an action" meaningless. Instead, we must give effect to the wording of the statute.

{¶73} Legal services performed by OSI's counsel prior to the filing of Bergman's complaint cannot properly be considered "in" the lien enforcement action. The action had not yet come into being when those services were performed. OSI's pre-complaint attorney fees should not be recoverable under the statute simply because they *related* to the lien. We hold that, while R.C. 1311.88(C) authorizes an award of attorney fees in an action based on a broker's lien, the award cannot encompass fees incurred before the complaint was filed. In the present matter, any legal services performed by OSI's counsel that predated Bergman's complaint were not "*in* an action" as contemplated by R.C. 1311.88(C). This holding also disposes of Bergman's argument regarding OSI's fee for the lease commission paperwork, as this charge predated the complaint.

{¶74} We next address the attorney fees relative to the lien that were incurred by OSI after the complaint was filed. We have carefully reviewed the record from which the trial court made its calculations, including OSI's itemization of fees, Bergman's written objections thereto, and hearing testimony offered by Philomena Ashdown, legal counsel

3. After a title search revealed Bergman's broker's lien, OSI had to place sufficient funds in an escrow account to cover the lien in order to move forward with the closing.

for OSI. With respect to the reasonableness of these post-complaint fees, we find that the trial court's decision was thorough and logical.

{¶75} In its October 28, 2008 decision awarding partial summary judgment to OSI, the trial court found that Bergman's actions in pursuing enforcement of its broker's lien had no legal basis. Prior to the hearing on attorney fees, OSI filed a document itemizing the fees that pertained to the invalid broker's lien. Bergman filed written objections to OSI's itemization of fees, supplementing them with additional written objections submitted at the fee hearing. Bergman declined to cross-examine Ashdown at the hearing, instead resting on its written objections.

{¶76} It is indisputable that Bergman's lien was invalid. The lien was not perfected due to Bergman's failure to serve notice upon the proper parties. In addition, Bergman failed to timely commence suit on the lien in accordance with statutory law.

{¶77} Bergman's persistence in pursuing the invalid lien stalled OSI's sale of the Property to Swami. Despite numerous requests by OSI to remove the lien or release the funds placed in escrow to cover the lien, Bergman refused. As a result, OSI incurred attorney fees in defending against Bergman's enforcement of the invalid lien.

{¶78} Contrary to Bergman's assertions, OSI's efforts in challenging the lien action did not end on October 28, 2008, the date the trial court declared the lien extinguished. The trial court indicated that Bergman continued to resist removal of the lien and release of the escrowed funds even after the court's October 2008 decision. As OSI's itemization of hours details, the developer continued to incur attorney fees for work associated with obtaining the release of the lien and escrowed funds. We therefore find no abuse of discretion in including these amounts in the attorney fee award.

{¶79} Finally, we find that attorney fees incurred by OSI in defending claims on

the escrowed funds asserted by Cemex also flowed from Bergman's invalid lien. But for the filing of the lien, OSI would not have had to place funds in escrow to cover the lien. Cemex, a creditor of OSI's, intervened in Bergman's lien enforcement action to assert a claim on the escrowed funds. Although Cemex was unrelated to Bergman, it was Bergman's invalid lien (and the escrow account created as a result) that provided Cemex an avenue to intervene in the action. The trial court thus did not abuse its discretion in including attorney fees incurred by OSI in addressing Cemex's claim over the escrowed funds.

{¶80} In sum, we rule that the trial court abused its discretion in awarding OSI attorney fees for services rendered prior to the filing of Bergman's complaint. Insofar as these amounts were improperly awarded, Bergman's assignment of error is sustained. We uphold the remainder of the trial court's attorney fee award.

{¶81} Bergman's third assignment of error is sustained in part and overruled in part.

{¶82} The judgment of the trial court in favor of OSI on its counterclaim for reasonable attorney fees is modified to omit all fees which predated the lien enforcement complaint filed on March 20, 2008. According to OSI's itemization of fees, these pre-complaint assessments totaled $6,780. Subtracting this amount ($6,780) from the amount of fees awarded by the trial court ($27,965), the judgment shall be modified to reflect a revised award of $21,185 in attorney fees to OSI.

{¶83} Judgment affirmed as modified.

YOUNG, P.J., and BRESSLER, J., concur.