

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1934-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JAMES T. CAREY, JR.,
D/B/A VACATIONLAND
PROPERTIES-EAGLE RIVER,**

Plaintiff-Respondent,

v.

**TED SWIONTEK, SR., AND
HELENE SWIONTEK,
HUSBAND AND WIFE**

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Vilas County:
ROBERT E. KINNEY, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Ted and Helene Swiontek, parties to a listing contract with a real estate broker, Vacationland Properties-Eagle River, naming only George and Deborah Boswell as potential buyers, appeal a summary

judgment granting Vacationland a sales commission.¹ In support of its summary judgment motion, Vacationland made a prima facie showing that its sales agent met with the buyer, Boswell, and negotiated the terms of a sale during the term of the listing contract. However, the Swionteks contend that their affidavits raise a genuine issue of material fact whether negotiations, as defined by the case law, occurred between Vacationland and the buyers. We agree. Because the law requires *the efforts of the broker* must have proceeded to the point where the prospect would be considered a likely purchaser, we reverse and remand for further proceedings to resolve that issue.

We apply the procedures and standards for summary judgment set forth in § 802.08, STATS., in the same manner as does the trial court, and we owe no deference to that court's decision. *Voss v. City of Middleton*, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Section 802.08(2), STATS. Our methodology on summary judgment has been stated many times, including in *Swatek v. County of Dane*, 192 Wis.2d 47, 61-62, 531 N.W.2d 45, 51 (1995), and need not be repeated here.

FACTS OF RECORD

To support its summary judgment motion relating to its claim for the commission, Vacationland submitted the affidavit of its sales associate, Mary Schiesl. She stated that prior to the execution of the listing contract between Vacationland and the Swionteks, she had met with Boswell on two separate occasions in June and early July 1995 to discuss his purchase of several properties, including the Swiontek property. According to her, she then approached Ted Swiontek to advise that she had an interested party and asked for and received a single-party listing. She stated that Swiontek told her he had "never heard of this guy Boswell." The single-party listing contract named only

¹ This is an expedited appeal under RULE 809.17, STATS.

Respondent James T. Carey, Jr., d/b/a Vacationland Properties-Eagle River, is referred to hereafter as "Vacationland."

George and Debbie Boswell, a price of \$440,000 and was dated July 10, 1995, for a term expiring at the end of thirty days. The agreement contained a 7% commission for Vacationland if Vacationland should sell the parcel to the Boswells within the contract period. The agreement also contained an "override" provision as follows:

[I]f, as to the property or any part of it, a purchaser is procured ... within six months after the expiration of this contract to any person or to anyone acting for any person with whom Seller, Broker or any of Broker's agents negotiated or personally exhibited by showing the property prior to the expiration of this contract and in either case whose name Broker has submitted to Seller in writing by personal delivery or by depositing, postage or fees prepaid, in the United States mail or a commercial delivery system, not later than 24 hours after the expiration of this contract, Seller agrees to pay Broker the commission set forth in this contract.

Schiesl says she then met with Boswell "on a number of occasions" during the life of the listing contract, advised him of the \$440,000 listing price as well as specific details concerning the extent and nature of the sale. She also described in detail her showing of the property to Boswell.

Schiesl also stated that, after the execution of the listing contract, she again met with Ted Swiontek on July 22, 1995, "to assure him that Mr. Boswell was still interested in his property." On the same date, Schiesl also personally delivered to Swiontek a written document entitled "Notice of Showing," which provided: "Today we submit to: George and Debbie Boswell ... Your Property" and included a typewritten remark: "Boswell's definitely are interested in property. Will consider writing an offer in August."

In opposition to Vacationland's proofs, the Swionteks included the Boswells' affidavit. The Boswell affidavit presented some dramatic and irreconcilable contrasting assertions. According to George, he approached Schiesl in June 1995 solely to discuss properties other than the Swiontek property. He claimed that he had already conducted direct negotiations with

the Swionteks prior to any contact with Schiesl, and incorporated into his affidavit a letter dated June 5, 1995, purportedly confirming earlier telephone negotiations between the principals. The letter informed the Swionteks that Boswell was "interested in purchasing your property for the agreed price of \$440,000." It inquired of the Swionteks' precise terms and sought a reply.

Boswell also swore that he met with Schiesl later in June 1995 only to discuss adjacent properties other than the Swiontek land. According to Boswell, during the June meeting, "Schiesl began discussing with me, the purchase of the Swiontek property and I informed her that I had already made contact with ... Swiontek ... and that the terms had essentially been discussed and spelled out." Boswell added: "Mary Schiesl informed me that she would make contact for me with ... Swiontek ... and that he would then have to pay a commission, but that I informed her at this point to stay away from Mr. Swiontek, as I preferred to deal with him myself." He alleged that Schiesl never showed him the property, and went so far as to accuse Schiesl of "a habit of informing individuals that she had showed us property" she had, in fact, never shown.

Although the Swionteks also submitted their affidavit confirming the sale negotiations with Boswell prior to the listing contract with Vacationland, their affidavit did not refute Schiesl's assertion that she met with Ted Swiontek on July 22, 1995, "to assure him that Mr. Boswell was still interested in his property," nor did the Swionteks' affidavit refute Schiesl's proof that on the same date she personally delivered the notice of showing, dated July 22, 1995.

It is undisputed that the Boswells ultimately purchased the Swiontek property directly from them at the \$440,000 price within the six-month override period.² This action for the broker's commission followed.

APPLICABLE LAW

² The record reveals that the deed conveying the property listed "George A. Boswell, general partner of Boswell Energy Systems Limited Partnership" as the purchaser. While this issue was raised before the trial court, the parties on appeal do not discuss whether the sale was to the Boswells personally or to the partnership. We therefore do not consider how this issue might affect the resolution of this case.

A broker has negotiated during the life of a listing contract and is entitled to a commission where "*the efforts of the broker to interest a prospect ... have proceeded to the point where the prospect would be considered a likely purchaser.*" *Munson v. Furrer*, 261 Wis. 634, 639, 53 N.W.2d 697, 699 (1952) (emphasis added). "[I]t does not embrace the broker's mere offer to sell which is met with a prompt refusal and which has no effect on the subsequent sale. *Id.* at 637, 53 N.W.2d at 698 (quoting C.J.S. *Brokers* § 88, at 203 n.43). Whether this standard was met is ordinarily a question of fact to be resolved by a jury. *Id.* at 637, 53 N.W.2d at 699. The same requirements apply to a listing contract containing an override provision. *United Farm Agency of Wisconsin, Inc. v. Klasen*, 112 Wis.2d 634, 334 N.W.2d 110 (1983).

The trial court granted Vacationland's motion for summary judgment. Although it acknowledged the conflicting factual assertions in the affidavits of Schiesl and the Boswells, the court relied upon the absence of any contrary proofs from the sellers refuting either Schiesl's delivery of the notice of showing to Swiontek or the assertions made therein. We conclude that the notice of showing is no more than a confirmation of Schiesl's sworn statement that she showed the property to the Boswells and negotiated the purchase. These same allegations are directly challenged by the Boswell affidavit. The Swionteks were personally in no position to refute Schiesl's assertion. The Swionteks' acknowledgement of receipt of a notice of showing on July 22, 1995, and the inference from the language in that notice that Schiesl's efforts caused the Boswells to be an interested party only show what Schiesl represented to the Swionteks. On the other hand, if the Boswells' affidavit is true, then Schiesl's statements, including the inferences raised by the notice, are untrue. Thus, if the Boswells' version is accepted, they were not likely purchasers through the efforts of the broker.

To conclude, there exist genuine issues of material fact whether Schiesl negotiated with or personally exhibited the Swiontek property to the Boswells. Because a trial is required to resolve these disputes, summary judgment was inappropriate. We therefore reverse and remand for proceedings to resolve the factual disputes that remain in this case.

By the Court. — Judgment reversed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.