

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 12, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP2700**

**Cir. Ct. No. 2002CV8584**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**BRW INVESTMENT REALTY Co., LLC,  
A WISCONSIN LIMITED LIABILITY COMPANY,**

**PLAINTIFF-APPELLANT,**

**v.**

**3863 HUMBOLDT, LLC,  
A WISCONSIN LIMITED LIABILITY COMPANY,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. BRW Investment Realty Co., Inc. appeals an order denying its motion for summary judgment; it also appeals a judgment and order dismissing its complaint with prejudice against 3863 Humboldt, LLC. BRW filed a complaint seeking payment of a commission allegedly due and owing by Humboldt on a failed real estate transaction. BRW argues that the trial court erred by denying its motion for summary judgment because there are no material facts in dispute and that it was entitled to judgment as a matter of law; BRW also argues that the trial court erred by granting Humboldt's motion to dismiss at the close of BRW's evidence. Humboldt counters that the requirements of WIS. STAT. § 240.10(1) (2001-02)<sup>1</sup> for a valid real estate brokerage listing contract were not met and therefore the trial court correctly dismissed BRW's action seeking to enforce the listing contract.

¶2 We conclude that the trial court erred by denying BRW's motion for summary judgment because there are no material facts in dispute and because BRW is entitled to judgment as a matter of law, since the counteroffer satisfies the requirements of WIS. STAT. § 240.10(1). Accordingly, we reverse and remand for judgment to be entered in BRW's favor, awarding BRW the \$30,000 commission.

## BACKGROUND

¶3 The parties to this dispute are Humboldt, which owns the property at issue, and BRW, the real estate brokerage firm which is claiming a commission. The parties first came into contact when Bell Property Management, Inc.'s principal Ralph Gorenstein sent a mailing soliciting offers for Humboldt's

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

properties, and BRW's principal Beth Wronski sent a letter to Gorenstein in response, expressing interest in being the realtor for the property at issue.

¶4 Wronski sent Gorenstein a nonexclusive listing contract for Gorenstein to sign on Humboldt's behalf, but Gorenstein never signed it even after Wronski followed up numerous times requesting that he do so. In an affidavit submitted to the trial court, Gorenstein averred that he "intentionally did not sign the listing agreement because it contained language that might create liability for a commission even if the transaction did not close." Despite the lack of a signed listing contract, BRW proceeded to act as Humboldt's realtor and found potential buyers, the Skowronskis, who subsequently submitted to Gorenstein an offer to purchase the property.

¶5 Humboldt responded with a signed counteroffer which incorporated by reference all terms of the offer to purchase not expressly changed in the counteroffer. The counteroffer also contained a line stating, "Commission to be 2.5%, or \$30,000, whichever is greater." The Skowronskis accepted the counteroffer by signing it and returning it to Gorenstein in a timely manner.

¶6 On the scheduled day of the closing, Gorenstein arrived at the bank on time, but Wronski and the Skowronskis did not appear at the appointed time. According to Gorenstein's deposition testimony, a bank employee conveyed a message to Gorenstein that Wronski and the buyers were going to be an hour late. Gorenstein then left and refused to close the transaction, later testifying that he refused to close the transaction because of "seller's remorse" and because "I took umbrage of the fact that nobody bothered to call me and have the courtesy to call me and tell me they were going to be late." Gorenstein also testified that had the

buyers shown up on time, he would have closed the transaction and paid the \$30,000 commission to BRW.

### PROCEDURAL HISTORY

¶7 After commencing this action, Humboldt moved for summary judgment, arguing that the counteroffer failed to meet the requirements of WIS. STAT. § 240.10(1) for a legally enforceable listing contract. BRW also moved for summary judgment, arguing that the signed counteroffer constituted a binding listing contract in compliance with § 240.10(1), under which Humboldt owed BRW a \$30,000 commission. The trial court initially granted BRW's motion and denied Humboldt's motion because the counteroffer constituted a memorandum that satisfied the requirements under § 240.10(1). Humboldt moved for reconsideration; the court also asked the parties to determine whether a material fact existed as to the terms under which the commission was to be paid. Following additional briefing, the court denied Humboldt's motion to reconsider. But the court also reversed its previous order granting BRW's motion for summary judgment after determining that a material factual dispute did exist as to the terms under which the commission was to be paid. The case proceeded to trial on that issue.

¶8 At the beginning of the trial, the court clarified its initial decision granting BRW's motion for summary judgment, explaining that it intended to state that the counteroffer could satisfy the requirements of WIS. STAT. § 240.10(1) if certain facts were proved. At the close of BRW's evidence, Humboldt moved to dismiss. The court granted Humboldt's motion, and BRW appeals.

## STANDARD OF REVIEW

¶9 Whether or not a purported agreement to pay a real estate commission sufficiently satisfies the requirements of WIS. STAT. § 240.10(1) is a question of law. *Buckman v. E.H. Schaefer & Assoc., Inc.*, 50 Wis. 2d 755, 764-65, 185 N.W.2d 328 (1971). We review de novo questions of law involving the application of a statute to a particular set of facts. *Guertin v. Harbour Assurance Co.*, 141 Wis. 2d 622, 627-28, 415 N.W.2d 831 (1987).

## ANALYSIS

¶10 WISCONSIN STAT. § 240.10(1) sets forth the following requirements for contracts to pay commissions to real estate brokers or agents:

Every contract to pay a commission to a real estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or note or memorandum thereof describes that real estate; expresses the price for which the same may be sold or purchased, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller; is in writing; and is subscribed by the person agreeing to pay such commission, except that a contract to pay a commission to a person for locating a type of property need not describe the property.

Section § 240.10 was originally enacted by the legislature “to curb the tendency of real estate brokers to impose upon their clients and to prevent frauds and injuries [frequently resulting from] such transactions ....” *Garvey v. Wenzel*, 272 Wis. 606, 609, 76 N.W.2d 291 (1956).

¶11 The Wisconsin Supreme Court has stated that WIS. STAT. § 240.10 “means just what it says” and that the statute does not allow recoveries of real estate brokers’ commissions based on *quantum meruit* or implied contract. *Gilbert v. Ludtke*, 1 Wis. 2d 228, 232-33, 83 N.W.2d 669 (1957) (citations omitted).

Section 240.10(1) renders unenforceable a broker's claim for compensation where the broker has no current written contract complying with the terms of the statute. *Gies v. McKenna*, 10 Wis. 2d 16, 19-20, 102 N.W.2d 101 (1960); *see also Hale v. Kreisel*, 194 Wis. 271, 272, 215 N.W. 227 (1927) (“[t]his statute clearly expresses the legislative intent that there shall be no recovery for such services in the absence of such a written contract”).

¶12 It is consequently well established that every contract to pay a real estate broker or agent a commission on a real estate transaction is subject to the requirements of WIS. STAT. § 240.10(1), *i.e.*, that

a contract to pay a commission to a real estate broker for selling real estate must: (1) Describe the real estate, (2) describe the price for which it may be sold, (3) state the commission to be paid, (4) state the period during which the broker shall procure a buyer or seller, (5) be in writing, and (6) be subscribed by the person agreeing to pay the commission.

*Rollie Winter Agency v. First Cent. Mortgage, Inc.*, 75 Wis. 2d 4, 7, 248 N.W.2d 487 (1977). The absence of one or more of these requirements can render a contract for a commission under the statute void. *See Elbinger v. George J. Meyer Mfg. Co.*, 3 Wis. 2d 202, 205-06, 87 N.W.2d 807 (1958). Consequently, each of these requirements must be present in the counteroffer or purchase offer for BRW to be entitled to a commission.

¶13 BRW argues that: (1) the trial court erred by denying its motion for summary judgment because there are no material facts in dispute and that it was entitled to judgment as a matter of law; and (2) the trial court erred by granting Humboldt's motion to dismiss at the close of BRW's evidence at the bench trial. We conclude that the trial court erred by denying BRW's motion for summary judgment because there are no material facts in dispute and because the

counteroffer satisfies the requirements of WIS. STAT. § 240.10(1); BRW is therefore entitled to judgment as a matter of law. Consequently, we do not address BRW's second argument. *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible grounds).

¶14 We begin our analysis of whether the counteroffer in this case meets the requirements of WIS. STAT. § 240.10(1) by noting that the counteroffer, by its own terms, incorporates the terms of the original offer to purchase except as noted. We therefore look at both the offer to purchase and the counteroffer to determine if the statutory requirements have been met.

¶15 This dispute centers on whether the language in the counteroffer relating to the commission to be paid satisfies the requirements of WIS. STAT. § 240.10. Humboldt does not argue that the counteroffer fails to satisfy the other requirements of § 240.10(1).<sup>2</sup> We conclude that the other requirements of § 240.10(1) have been satisfied.<sup>3</sup> Thus, our review is limited to determining

---

<sup>2</sup> Humboldt does contend that BRW seeks to “lift” Gorenstein’s signature from the counteroffer to the unsigned listing contract in order to satisfy the requirement under WIS. STAT. § 240.10(1) that an enforceable listing contract contain the signature of the person paying the commission. Humboldt misconstrues BRW’s argument. BRW expressly argued in its summary judgment motion brief, at trial, and on appeal that its “entitlement to a commission does not depend on the unsigned listing agreement: rather, the entitlement arises [solely] from the signed Counteroffer.” We do not address this argument any further.

<sup>3</sup> A possible argument Humboldt might have made, but did not, was that the counteroffer failed to state the period during which the broker shall procure a buyer. We conclude, however, that “where an otherwise sufficient written memorandum is executed after the broker has performed his services, the fact that [the memorandum] states that all services have been completed and it is signed by the principal should be deemed substantial compliance with the requirement of sec. 240.10(1), Stats., that a time period be stated.” *Buckman v. E.H. Schaefer & Assoc., Inc.*, 50 Wis. 2d 755, 772, 185 N.W.2d 328 (1971). Here, the counteroffer, which was signed by Gorenstein, essentially stated that BRW’s services had been completed through her procurement of a ready, willing and able buyer. We conclude that the counteroffer complies with the time period requirement for procuring a buyer under WIS. STAT. § 240.10(1).

whether the counteroffer satisfies the requirement that it state “the commission to be paid” to BRW.

¶16 Regarding a commission, the counteroffer provides: “Commission to be 2.5% or \$30,000, whichever is greater.” The counteroffer was signed by Gorenstein on behalf of Humboldt. BRW asserts that no other terms are required to satisfy the commission requirement of WIS. STAT. § 240.10(1). We agree.

¶17 The plain language of WIS. STAT. § 240.10(1) supports our conclusion. As we noted, § 240.10(1) provides in relevant part that to be entitled to a commission, a listing contract must express “the commission to be paid....” Applying this language to the counteroffer, the counteroffer plainly reads that the commission is to be 2.5% or \$30,000, whichever is greater. Thus, we easily conclude that this language in the counteroffer satisfies the requirement under § 240.10(1) that the listing contract express “the commission to be paid.”

¶18 Humboldt contends that the counteroffer is insufficient because it does not identify who is to pay the commission, who is to receive the commission, or the conditions under which the commission is to be paid. More specifically as to the last point, Humboldt contends that it did not intend to pay the commission unless the deal was closed. Humboldt’s argument is without merit.

¶19 Humboldt appears to presume, without explaining why, that the text of WIS. STAT. § 240.10(1) requires that a listing contract contain this information. Humboldt points to no case law supporting this construction of § 240.10(1), and we are unaware of any. Apparently, the trial court also believed that the terms under which the commission is to be paid is a required element under § 240.10(1) for a listing contract to be enforceable. We see no such requirement in the statute.



We therefore conclude that the language in the counteroffer relating to the commission satisfies the requirements under § 240.10(1).<sup>4</sup>

¶20 By resolving the above question, another question arises: recognizing that WIS. STAT. § 240.10(1) does not require that a listing contract, to be enforceable for a commission, contain the terms under which that commission is to be paid, is there a genuine issue of material fact as to whether the parties agreed to those terms, and if so, what are the terms? We conclude, based on *Buckman*, 50 Wis. 2d at 771-72, that it is immaterial that the counteroffer does not express the terms under which the commission was to be paid. Under *Buckman*, a broker earns his or her commission when the broker timely procures a ready, willing and able buyer for the property. *Id.* There is no dispute that BRW procured a ready, willing and able buyer in the persons of the Skowronskis. Accordingly, we conclude that BRW earned its commission when it procured a purchaser for the subject property.

¶21 The court also noted in *Buckman* that, when, as in this case, a principal signs a writing in which he or she agrees to pay a commission for a transaction that the principal is already bound to complete, the purposes of the statute are served, even if the writing does not fully describe the terms under which a commission is to be paid:

---

<sup>4</sup> We note that Humboldt also argued to the trial court that BRW was not entitled to a commission because it was not a party to the counteroffer, and therefore the counteroffer was a binding contract only between Humboldt and the buyers. Humboldt begins to touch on that topic, albeit briefly, in its brief on appeal. However, to the extent Humboldt intended to argue this point, its argument is undeveloped. We therefore do not address it. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (issues raised but inadequately briefed need not be considered).

[WISCONSIN STAT. § 240.10(1)] is meant to bar a broker's suit for a commission in circumstances where it is uncertain that he has performed the services for which his principal has agreed to pay.... [W]here the principal executes a written promise to pay the broker, though deficient under sec. 240.10(1), for services rendered concerning a transaction in which he has already entered a legally binding contract[, i]t is difficult to believe that a principal would execute a promise if in fact the broker had not performed what he agreed to do.

*Buckman*, 50 Wis. 2d at 775-76. As in *Buckman*, “it is difficult to believe that [Humboldt] would execute” a counteroffer agreeing to pay a commission on the transaction at hand “if in fact the broker had not performed” so as to have earned the commission.<sup>5</sup>

*By the Court.*—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

---

<sup>5</sup> We note in this regard that the record reflects that the counteroffer containing the commission provision was drafted by Humboldt's attorney, and BRW had no hand in preparing it. Thus, Humboldt cannot claim it was unaware of the provision or that it was “slipped in” to the document by BRW without Humboldt's consent.

