

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP2334

Cir. Ct. No. 2007CV3949

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RESTAINO BUNBURY & ASSOCIATES, INC.,

PLAINTIFF-APPELLANT,

V.

ASSISTED LIVING CONCEPTS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Restaino Bunbury & Associates appeals from a summary judgment decision that dismissed its breach of contract and conversion action against Assisted Living Concepts. As we will explain below, we agree with

the trial court that the contract and conversion claims were barred by recent precedent from this court. Accordingly, we affirm.

¶2 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. *Id.*, ¶24.

¶3 We view summary judgment materials in the light most favorable to the party opposing the motion. *Id.*, ¶23. For the purposes of this appeal then, we accept the following facts. Restaino Bunbury & Associates is a real estate brokerage company licensed in Wisconsin. Assisted Living Concepts entered into a buyer agency agreement with Restaino Bunbury & Associates for the purpose of purchasing a specific property in Iowa. Both parties were represented by counsel, and the buyer knew that the broker was not licensed in Iowa. Under the agreement, which used a standard WB-36 form approved by the Wisconsin Department of Regulation and Licensing, the buyer was to pay the broker a commission of 1% of the sale price.

¶4 The broker conducted all negotiations for the purchase of the property from its Wisconsin offices, with the exception of one short trip to view the property in Iowa. During the negotiations, the seller of the property asked the buyer to prepare a listing contract under which the broker would receive a \$10,000 finder's fee. The broker refused to engage in any dual representation, however, and never signed any contract with the seller. The buyer subsequently asked the

broker to cut its commission in half because the buyer and seller were having difficulty agreeing on a price. After the broker refused to reduce its commission so drastically, the buyer took the position that it was not obligated to pay the broker any commission due to an alleged conflict of interest arising from dual representation by the broker.

¶5 The buyer ultimately purchased the property for \$24 million and refused to pay the \$240,000 commission which would have been due under the buyer agency agreement. Instead, the title company sent the broker a check for \$10,000 as the purported agent for the seller.

¶6 The broker instituted this lawsuit against the buyer to recover its commission. The trial court determined that the parties' contract was unenforceable, however, under *Kadlec v. Kadlec*, 2004 WI App 84, 272 Wis. 2d 373, 697 N.W.2d 914. We agree.

¶7 In *Kadlec*, this court determined that an arbitration award requiring the sellers of a property located in Iowa to pay a commission to a Wisconsin real estate broker who was not licensed in Iowa violated strong public policy. We pointed out that the laws of both states prohibited unlicensed persons from performing and collecting commissions for real estate brokerage services within their state. *Id.*, ¶¶9-11; WIS. STAT. §§ 452.03 and 452.20 (2007-08);¹ IOWA CODE §§ 543B.1 and 543B.30. Such laws help to ensure that the brokers rendering services in a particular state are knowledgeable of the applicable regulations. *Id.*, ¶13. We reasoned that allowing a licensed broker from one state to provide

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

services in another state notwithstanding the other state's requirements would render the other state's regulations meaningless. *Id.*, ¶14.

¶8 Restaino Bunbury & Associates attempts to distinguish *Kadlec* from the present situation in several ways. First, it asserts that the Wisconsin statutes actually permit a broker to perform services within this state to facilitate the purchase of a property located in another state because they define brokerage services in relation to activities rather than the location of the property. Whether that assertion is true, however, is irrelevant because we look to Iowa law to determine whether Restaino Bunbury & Associates was improperly operating as a broker in that state without a license.

¶9 The Iowa definition of a real estate broker includes one who directly or indirectly purchases, negotiates the purchase, or directs any transaction intending to result in the purchase of real estate on behalf of another for a fee. IOWA CODE § 543B.3. Restaino Bunbury & Associates points out that IOWA CODE § 543B.4 defines real estate to include property "wherever situated." From there, it argues that the focus of Iowa law is only on whether the broker performed services such as negotiations within the state, not whether the property was located within the state. However, we do not see how the actual purchase of real estate within Iowa does not fall within Iowa's definition of brokerage services, even if additional brokerage services such as negotiations may have occurred in another state. Ultimately, the real estate transaction would need to be conducted in accordance with Iowa law and recorded there, and facilitating it would thus require familiarity with Iowa laws. In other words, the fact that Restaino Bunbury & Associates may have been performing brokerage services in Wisconsin by conducting negotiations here does not preclude the possibility that it was also performing brokerage services in Iowa by directly or indirectly arranging the

purchase of real estate there, including arranging an inspection of the property to facilitate the sale.

¶10 We see nothing in the Iowa law presented to us by the parties that would relieve a broker from the requirement of having an Iowa real estate license to purchase real estate located in that state even if the broker were also performing negotiation services in another state for which it might need a separate license. We also see nothing in the *Kadlec* decision to suggest that its holding was dependent upon where negotiations in that case took place, or whether the broker was representing the buyer or seller. We conclude that, under *Kadlec*, the buyer agency agreement at issue here is unenforceable as against public policy because it purports to have a broker unlicensed in Iowa undertake to arrange a real estate purchase there.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

