COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1856 **Cir. Ct. No. 02CV002083**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

THE BOERKE COMPANY, INC.,

PLAINTIFF-RESPONDENT,

V.

PROTEIN GENETICS, INC., ACATT HOLDING CORP. AND ICATT, LLC,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: DIANE M. NICKS, Judge. *Reversed and cause remanded with directions*.

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

¶1 DYKMAN, J. Protein Genetics, Inc. appeals from a judgment awarding The Boerke Company, Inc. (Boerke) $427,092.20. The parties dispute: (1) the meaning of "sold" in their real estate listing agreement, (2) whether Boerke materially breached the contract, and (3) whether the sale closed within six months

after the termination of the agreement. Because the sale closed after six months from the termination of the agreement, we reverse and remand for a trial to determine the meaning of "sold" in the agreement and to resolve the factual dispute regarding Boerke's alleged breach.

BACKGROUND

¶2 Protein Genetics owned real property that it wished to sell. On March 31, 2000, it negotiated and executed a non-standard form Exclusive Listing Agreement with Boerke, a commercial real estate brokerage firm. Prior to signing a listing contract with Boerke, Protein Genetics had received offers to purchase that were withdrawn prior to closing. It explained to Boerke that it was important that any sale Boerke brokered would close within the term of the agreement, which was one year beginning March 31, 2000. The parties agreed to list the property at $11,800,000.

¶3 Dissatisfied with Boerke's efforts, Protein Genetics terminated the agreement by notifying Boerke on March 20, 2001, that termination was effective as of March 31, 2001. Boerke provided Protein Genetics with a list of the purchasers with whom it had been negotiating. The list included Park Towne Corp. On April 27, Protein Genetics entered into a purchase agreement with Park Towne Corp. On October 31, 2001, Protein Genetics closed on the sale of the property for $6,590,000.

¶4 Boerke sued Protein Genetics to recover a brokerage fee for the sale to Park Towne Corp. Protein Genetics moved to dismiss. The trial court found that Boerke "sold" the property on April 27, 2001, because it procured the buyer on that date. It also found that the closing occurred within six months of the termination of the agreement. It denied Protein Genetic's motion to dismiss.

Boerke then moved for summary judgment and prevailed. Protein Genetics appeals.

THE EXCLUSIVE LISTING AGREEMENT

¶5 Several provisions in the agreement are pertinent to this appeal. In particular, the parties dispute whether Boerke satisfied its duties under the agreement. The provision entitled "Agent's Duties" identifies seven categories of obligations, including developing a marketing plan and providing Protein Genetics with a written monthly report identifying prospective purchasers.

¶6 The parties also dispute whether Protein Genetics is liable to Boerke for a brokerage fee. The provision entitled "Brokerage Fees" provides:

> Owner shall pay Agent brokerage fees (as defined below) for all Land sold (except to Owner or its affiliated companies) during the term of this Agreement and for Land sold (except to Owner or its affiliated companies) within six (6) months after the termination of this Agreement to any buyer with whom the Agent engaged in "bona fide purchase negotiations" prior to termination of this Agreement and whose name Agent has submitted to owner in writing not later than seven (7) days after termination of this Agreement. For purposes of this Agreement, Agent shall be deemed to have commenced "bona fide purchase negotiations" with any prospective purchaser if the Agent has met the prospective purchaser for the purpose of discussing the potential sale of the Land, and has listed the prospective purchaser on its reports submitted to owner within said seven (7) day period. The brokerage fee for each sale shall be considered earned by, and payable to, Agent at closing.

¶7 The term of the agreement is also an issue. The provision entitled "Term" provides:

> This Agreement shall be effective on the date hereof and shall continue to be in full force and effect for one (1) year. However, either party may terminate this Agreement for any reason upon thirty (30) day's advance written

> notice. This Agreement shall continue to be in effect on a month to month basis on and after the termination date, unless either Owner or Agent terminates this Agreement and their respective obligations (except for the payment of brokerage's fees as set forth herein) upon thirty (30) days prior written notice to the non-terminating party.

DISCUSSION

¶8 We review a trial court's decision on a motion for summary judgment de novo, applying the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2001-02).[1]

Listing Agreement Is Ambiguous

¶9 The parties dispute whether the brokerage fee provision in the listing agreement is ambiguous. Protein Genetics contends that "sold" could refer to either an accepted purchase offer or the closing of the sale, citing ***Walter Kassuba, Inc. v. Bauch***, 38 Wis. 2d 648, 158 N.W.2d 387 (1968). Boerke distinguishes ***Bauch*** and asserts that the agreement is unambiguous because "sold" is synonymous with "procure a purchaser."

¶10 Whether the brokerage fee provision in the agreement is ambiguous presents a question of law we review independent of the trial court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). An agreement is ambiguous if it is susceptible to more than one

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

reasonable construction. ***Id.*** If an ambiguity exists, the intent of the parties is a question of fact. ***Id.***

¶11 We turn to ***Bauch*** for guidance on this issue. In that case, the court considered the meaning of "sold" in the same context as here, a non-form listing agreement negotiated by both parties. ***Id.*** at 654. The court recognized that ordinarily, a broker earns a commission when the broker procures a ready, willing, and able buyer. ***Id.*** at 653-54 (citations omitted). However, when the parties negotiate a non-form listing agreement, the parties' intent controls. ***Id.*** The non-form agreement granted the broker a commission "[i]n the event that the property ... is Sold by WALTER KASSUBA, INC., or Sold to any prospects who were shown the property by WALTER KASSUBA, INC. OR any Salesman employed by WALTER KASSUBA, INC...." ***Id.*** at 650. The court was "not persuaded that as a matter of law 'Sold' means anything different from 'sell' or 'sale'" in the standard form. ***Id.*** at 653. It concluded that the "contract is ambiguous as to when the [broker] is entitled to a commission." ***Id.*** at 654. It ordered a trial to determine the intent of the parties when they entered into the contract. ***Id.***

¶12 Boerke maintains that the trial court was correct in holding that ***Bauch*** does not control this case. It argues that ***Bauch*** dealt with facts very different than those here. It notes that the parties here are much more sophisticated and the Listing Agreement was more comprehensive than in ***Bauch***. Primarily, though, Boerke asserts that its listing agreement is unambiguous because it specified that Protein Genetics would pay the fee at closing. Therefore, it argues that the ambiguity in ***Bauch*** does not exist here.

¶13 We are not persuaded by Boerke's attempts to distinguish ***Bauch***. Under ***Bauch***, we ascertain the parties' intent when they executed the non-

standard listing agreement. The language of the agreement is capable of multiple, reasonable interpretations because "sold" could reasonably refer to when Boerke procured a purchaser or when Protein Genetics closed the sale. Protein Genetics has offered extrinsic evidence that it intended the agreement to require a sale to close before Boerke would receive its fee. Boerke has offered affidavits to the contrary. Because both of these interpretations are reasonable, the brokerage fee provision is ambiguous, as in ***Bauch***. The intent of the parties is a question of fact that precludes summary judgment. ***Id.*** at 654.

Sale Did Not Close Within Six Months

¶14 Boerke contends that, regardless of how we construe "sold," the sale closed within six months of the termination of the agreement. The agreement required thirty days advance notice of termination. The initial term of the agreement expired on March 30, 2001, but continued on a "month-to-month" term unless terminated. Both parties agree that Protein Genetics provided notice of termination to Boerke on March 20, 2001. Boerke argues that this notice of termination was governed by the month-to-month provision because Protein Genetics did not give notice of termination thirty days prior to March 30. It asserts that a month-to-month provision can only be terminated at the end of the month. It claims that the earliest date on which the agreement could terminate was April 30, 2001. It is undisputed that Protein Genetics closed the sale on October 31, 2001. Boerke argues that the closing occurred within six months of when the agreement terminated because "[i]t does not matter that April has 30 days and October has 31 days.... If the parties had intended something other than a full six months ... they would have specified a certain number of days ...."

¶15 Protein Genetics asserts that its notice of termination was effective on April 20, 2001, which is thirty days after March 20, 2001. It contends that termination is not contingent on calendar months. It argues that a month-to-month term does not necessarily have to end at the conclusion of a calendar month, citing ***State ex rel. Milwaukee Electrical Tool Corp. v. River Realty Co.***, 248 Wis. 589, 592, 22 N.W.2d 593 (1946). Finally, it asserts that even if notice was effective on April 30, the six months expire on October 30, rather than at the conclusion of October.

¶16 We conclude that the agreement unambiguously permits a party to terminate the agreement with thirty days notice. Protein Genetics gave notice on March 20, which is before the initial term of the contract expired. Therefore, the term of the agreement never became month-to-month. Because termination became effective April 20, 2001, the sale did not close within six months of the expiration of the agreement.

Material Breach Defense

¶17 Protein Genetics contends that a genuine dispute of material facts precludes summary judgment. It asserts that it does not owe Boerke its fee because Boerke materially breached its obligations under the agreement. It alleges that Boerke failed to develop a marketing plan, to provide monthly written reports, to communicate adequately with potential buyers, and to find a buyer who would pay $11,800,000. Boerke denies all of these allegations and disputes whether they would constitute a material breach.

¶18 When we review a summary judgment, we construe the facts in the manner most favorable to the non-moving party. ***Strasser v. Transtech Mobile Fleet Serv., Inc.***, 2000 WI 87, ¶32, 236 Wis. 2d 435, 613 N.W.2d 142. Affidavits

from Doug Porter and James Babiasz offer contrary evidence about who drafted the agreement and the extent to which Boerke fulfilled its obligations under the agreement. Thus, the record establishes a genuine dispute of material fact. Whether Boerke's alleged breaches constitute material breaches is a question of fact that precludes summary judgment. ***Mgmt Computer Servs., Inc., v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 184, 557 N.W.2d 67 (1996).

CONCLUSION

¶19 We have concluded that the term "sold" in the parties' agreement is ambiguous. We reject Boerke's contention that the sale closed within six months of the termination of the agreement. Finally, the record establishes a genuine issue of material fact as to whether Boerke satisfied its obligations under the agreement.

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

Not recommended for publication in the official reports.