COURT OF APPEALS DECISION DATED AND RELEASED

July 16, 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, 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. 95-1943

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

THE HERITAGE GROUP,

Plaintiff-Respondent,

v.

GERALD R. JONAS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Gerald R. Jonas appeals from a judgment entered after a trial to the court, where the trial court ruled that The Heritage Group was entitled to a real estate sales commission. He also appeals from an order denying his motion for reconsideration. Jonas claims the trial court erred in its determination because Heritage did not procure a "ready, willing and able"

purchaser. Because the trial court's finding that Heritage procured a ready, willing and able purchaser was not clearly erroneous, we affirm.

I. BACKGROUND

On September 15, 1988, Jonas signed an exclusive one-party listing contract with Heritage to sell certain property to a potential purchaser, Darrell Harding. The listing contract gave Heritage the exclusive right to negotiate the sale of the property to Harding for thirty days. The asking sales price of the property was $2.5 million. The contract stated that the broker would receive a sales commission pursuant to the following terms:

> Seller gives Broker the sole and exclusive right to procure a purchaser for the property described below at the price and upon the terms set forth in this contract. If a purchaser is procured for the property by Broker, by Seller, or by any other person, at the price and upon the terms set forth in this contract, or at any other price or upon any other terms accepted by Seller during the term of this contract, ... Seller agrees to pay Broker a commission as set forth in this contract regardless when the transaction closes.

The contract also contained a standard override clause which stated:

> If, 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 ... Seller agrees to pay Broker the commission set forth in this contract.

The listing period expired with no agreement reached between Jonas and Harding. On March 21, 1989, Harding offered to purchase the property for $2.5 million as "a cash offer." This offer was made within the override period under the September 15, 1988, listing contract. Jonas counteroffered for $3.5 million, based on improvements he had made on the property during the interim. Harding rejected the counteroffer, and no agreement was reached for the sale of the property.

Heritage filed suit against Jonas seeking to obtain payment of a commission. Heritage asserted that Harding's March 21, 1989, offer to purchase demonstrated that it had procured a purchaser and, therefore, was entitled to a commission. The trial court granted summary judgment in favor of Jonas. Heritage appealed to this court. We reversed the grant of summary judgment and remanded for a trial because there were genuine issues of fact in dispute.

The case was tried to the court in March 1995. The trial court ruled in favor of Heritage, specifically finding that Harding was a ready, willing and able buyer. The trial court concluded, therefore, that Heritage had procured a purchaser and, under the terms of the contract, was entitled to its commission. Judgment was entered. Jonas moved for reconsideration, which was denied by order of the trial court. Jonas now appeals.

II. DISCUSSION

Jonas claims the trial court erred in finding that Heritage had procured a purchaser. He claims that Harding was not "able" to purchase the property because he did not have the $2.5 million cash in hand. The trial court disagreed, finding that Harding was, in fact, an able purchaser because he had the ability to secure the funds necessary for the purchase. Findings of fact by a trial court shall not be set aside on appeal unless clearly erroneous. Section 805.17(2), STATS. Based on our review of the record, we cannot conclude that the trial court's finding in this regard was clearly erroneous. In making this finding, the trial court reasoned:

> We got testimony from Mr. Harding, number one, that he was, in fact, a ready, willing and able buyer,

> that he had worked with several lenders and he normally had no difficulty in getting financing especially in this case with the extremely high cash flow that would be more than enough to service the debt.
>
> In addition, a year or two before; and that is, at the end of '86 he had a net worth of 2.4 million if you believe his figures.
>
> He's also indicated that he had met with Mr. Scott Wilson at the TriCity Bank. And while he never got any written commitment -- that is not abnormal.
>
> It would be abnormal for somebody who's a sophisticated investor such as Mr. Harding was to give somebody a cash offer, offer to purchase without a strong inference that he would get financing for this property.
>
> Nobody who's got a net worth of two and a half million dollars is going to go out and give a cash offer and risk losing some of that equity he has in other buildings because of any lawsuit that might accrue because of this failure to buy a building for two and a half million dollars assuming that Jonas agreed to it unless he had some strong belief that he was going, in fact, to get the financing.
>
> In addition, there was discussions with Terry Cleary (phonetic) at Hopkins Savings & Loan. So I don't think there's any question in my mind that Mr. Harding was, in fact, a ready, willing and able buyer based on what I heard here in the last day-and-a-half.

The trial court made this finding after listening to all the testimony, including Harding's attestations, which were supported by his net worth, his credit rating and his sophistication with real estate purchases. This evidence is sufficient to support the trial court's finding that Harding was financially "able" to purchase the property. Based on the foregoing, we cannot conclude that the trial court's

finding that Harding was a ready, willing and able purchaser was clearly erroneous.

Further, we are not persuaded by Jonas's contention that Harding could only be considered an able purchaser if he had shown that he had the $2.5 million purchase price as cash in hand. Jonas cites ***Chalik & Associates v. Hermes***, 56 Wis.2d 151, 201 N.W.2d 514 (1972) in support of this proposition. Our reading of ***Chalik*** differs from Jonas's interpretation. On a cash sale, the ***Chalik*** case merely requires that the buyer have sufficient assets, which in part may consist of the property to be purchased, and a credit rating that enables the purchaser with reasonable certainty to command the requisite funds at the required time. ***Id.*** at 162, 201 N.W.2d at 520. Moreover, the facts in the instant case are distinguishable from those present in ***Chalik***. The purchaser in ***Chalik***, who was found not to be "able," was in a different financial position than Harding. The ***Chalik*** purchaser had only $37,000 in liquid assets on a $95,000 offer to purchase and intended to accomplish the purchase via a land contract. ***Id.*** at 155, 160, 201 N.W.2d 516-17, 519. The evidence in the instant case shows that Harding had a net worth of $2.4 million and intended the transfer to be a cash purchase. Accordingly, we are not persuaded by Jonas's claim that the ***Chalik*** case requires a reversal of the judgment in the instant case.

Jonas's remaining contention, that the trial court relied on erroneous factors in reaching its finding of fact, is not supported by citation to authority. Accordingly, we decline to address it. ***W.H. Pugh Coal Co. v. State***, 157 Wis.2d 620, 634, 460 N.W.2d 787, 792 (Ct. App. 1990).[1]

By the Court.—Judgment and order affirmed.

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

[1] Because we are affirming the trial court on the basis that its finding of fact is not clearly erroneous, we need not address Heritage's claims of estoppel. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).