COURT OF APPEALS
DECISION
DATED AND RELEASED

April 4, 1996

NOTICE

No. 95-2378

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

PREFERRED REALTY,

Plaintiff-Respondent,

v.

PAT WEBER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

VERGERONT, J.[1] Pat Weber appeals from a judgment awarding Preferred Realty, a real estate sales company, a $1,950 commission for finding a buyer for her house. Weber contends the trial court erred in awarding a commission when a sale between her and the buyers, Lisa and Dennis Knight, was never completed. We conclude that the trial court correctly interpreted the residential listing contract, and we affirm.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

BACKGROUND

On April 16, 1994, Weber entered into a written residential listing contract with Preferred Realty to sell her house. The contract provided that Weber would pay Preferred Realty a commission of five percent based either on the sale price or the list price, depending on how the commission was earned. Carole Cook, an agent of Preferred Realty, located buyers Lisa and Dennis Knight. On April 18, 1994, the Knights extended a written offer to purchase for $39,000 and Weber accepted. The offer entitled the Knights to cancel the deal if the house sustained damage exceeding five percent of its selling price between acceptance and closing of the offer. The offer also entitled the Knights to any insurance proceeds resulting from such damage if they decided to carry out the offer in spite of the damage.

The house caught fire several days after the offer to purchase was signed, and before closing. The property was declared a total loss by Weber's insurance company. The insurance company sent Weber a check for insurance proceeds in the amount of $50,000. Weber used approximately $28,000 to pay off the remaining mortgage on the house. The remaining proceeds were placed in a special account.

The Knights were still interested in closing the deal until they learned of Weber's use of the insurance proceeds and a pending suit involving the insurance company. They then cancelled the deal. Because the sale did not close, Weber asserted that Preferred Realty was not entitled to its five percent commission. Preferred Realty sued in small claims court for $1,950, five percent of $39,000. The trial court awarded the commission, plus costs and fees.

The interpretation of a contract is a question of law, which we decide de novo. ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis.2d 206, 212, 341 N.W.2d 689, 691 (1984).

DISCUSSION

The residential listing contract is a standard form contract approved by the Wisconsin Department of Regulation and Licensing. The contract states that a broker earns a commission in four instances: (1) if a seller accepts an offer which creates an enforceable contract for the sale of all or any part of a property; (2) if a seller grants an option to purchase all or any part of a property which is subsequently exercised; (3) if a seller enters into a binding exchange agreement on all or any part of a property; or (4) if a purchaser is procured by a broker, a seller or any other person at the price and on substantially the terms set forth in the listing contract and the offer to purchase, even if the seller does not accept the purchaser's offer. Weber contends that only the first instance is applicable and that no enforceable contract existed. We disagree and conclude that the fourth instance is applicable and requires payment of the commission.

"[A] broker, employed to `procure a purchaser' for real estate, has earned his commission when he produces a person ready, willing and able to purchase upon the terms specified by the owner in the listing contract." ***Winston v. Minkin***, 63 Wis.2d 46, 51, 216 N.W.2d 38, 41 (1974) (footnote omitted). Final consummation of the sale is not required. ***Id.***

No dispute exists that Preferred Realty procured a purchaser for Weber's house as defined by the contract terms. The contract defines "procure" as: "A purchaser is procured when a valid and binding contract of sale is entered into between the Seller and the purchaser or when a ready, willing and able purchaser submits a written offer at the price and on substantially the terms specified in this Listing." The contract also states: "A purchaser is ready, willing and able when the purchaser submitting the written offer has the ability to complete the purchaser's obligations under the written offer."

Based on the plain terms of the contract, Preferred Realty earned its commission on April 18, 1994, when the offer to purchase was signed by the buyer and seller. When the Knights extended the offer, they were "ready, willing and able" to purchase upon substantially the terms specified by Weber in the listing contract. Preferred Realty therefore "procured" a buyer and earned its commission.

Even if we were to apply the first instance, as urged by Weber, Preferred Realty has earned the commission. Weber contends that no enforceable contract existed because the Knights chose to exercise the option of cancelling the deal since damages exceeded five percent of the property's selling price. Weber asserts that the Knights' contractual right to back out of the deal was a condition precedent, similar to a "subject to financing clause." We do not agree.

A condition precedent is "[a]n event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." RESTATEMENT (SECOND) OF CONTRACTS § 224 (1979). A "subject to financing clause" is a common provision in listing contracts which conditions sale of property on the buyer's ability to obtain financing at a specified rate. If the buyer is unable to obtain financing, the contract may be terminated. Such clauses are bargained-for elements which shift risk to the seller. *See* John M. Payne, *Mortgage Contingency Clauses*, 19 REAL EST. L.J. 249 (1991).

The contract provision at issue is not a condition precedent because no "event" exists in the contract which must occur before performance is due. The contract clause reads in relevant part:

> If, prior to the earlier of closing or occupancy of Buyer, the Property is damaged in an amount of not more than five percent (5%) of the selling price, Seller shall be obligated to repair the Property and restore it to the same condition that it was on the day of this Offer. If the damage shall exceed such sum, Seller shall promptly notify Buyer in writing of the damage and this Offer may be cancelled at option of Buyer. Should Buyer elect to carry out this Offer despite such damage, Buyer shall be entitled to the insurance proceeds relating to the damage to the Property, plus a credit towards the purchase price equal to the amount of Seller's deductible on such policy. However, if this sale is financed by a land contract or a mortgage to Seller, the insurance proceeds shall be

> held in trust for the sole purpose of restoring the Property.

Delivery of the property in an undamaged condition was not a condition precedent because in the event of damage exceeding five percent of the property's value, the Buyer could either cancel the deal, or take the insurance proceeds. The contract clause provides options by which performance may be carried out, but no "event ... must occur ... before performance ... becomes due." RESTATEMENT (SECOND) OF CONTRACTS § 224 (1979). The exercise of the option to cancel the deal does not render the contract unenforceable.

For the foregoing reasons, Preferred Realty was entitled to its commission.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.