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IN THE COURT OF APPEALS OF INDIANA

THE JANET BARKES TRUST, CURT BARKES, AND CATHERINE BOWIE,	)	
Appellants-Petitioners,	)	
vs.	)	No. 36A01-1011-PL-612
MONICA STUCKWISCH AND HERITAGE DEVELOPMENT AND REAL ESTATE, INC.,[1]	)	
Appellees-Respondents.	)	

APPEAL FROM THE JACKSON SUPERIOR COURT
The Honorable Bruce Markel, III, Judge
Cause No. 36D01-0905-PL-7

July 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

[1] The Janet Barkes Trust, Curt Barkes, and Catherine Bowie do not appeal as to Heritage Development and Real Estate, Inc. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

VAIDIK, Judge

Case Summary

The real estate agent for the sellers of certain commercial property in Seymour, Indiana, pressured the sellers to accept a $900,000 offer from a buyer. The real estate agent did not disclose that her husband was the buyer's business partner. The day after the sellers accepted the buyer's offer, a different buyer informed the real estate agent that he wished to purchase only a portion of the property for $1,017,484. The real estate agent directed the offer to the initial buyer, who accepted the offer the same day. The sellers brought an action against the real estate agent for fraud. The real estate agent moved for summary judgment, which the trial court granted.

The sellers now appeal. They argue that the trial court erred by granting summary judgment for the real estate agent because genuine issues of material fact exist as to whether the real estate agent violated her duty to disclose to the sellers (1) her interest in the transaction between the sellers and the initial buyer and (2) the new offer. We conclude that there are genuine issues of material fact as to whether the real estate agent had an interest in the transaction between the sellers and the initial buyer and violated her duty to disclose that interest. We further conclude that there is a genuine issue of material fact as to whether the real estate agent knew, at the time the sellers accepted the initial buyer's offer, that the new buyer was interested in the property and was going to make a much more favorable offer. Because the trial court erred by granting summary judgment for the real estate agent, we reverse and remand for further proceedings.

Facts and Procedural History

In October 2006, The Janet Barkes Trust, Curt Barkes, and Catherine Bowie ("the Barkeses") entered into a Listing Contract with broker Heritage Development and Real Estate, Inc., and real estate agent Monica Stuckwisch to sell certain commercial property in Seymour, Indiana. The Listing Contract includes a Limited Agency Authorization clause providing that Stuckwisch may act as a limited agent to both the Barkeses and a buyer, Stuckwisch cannot disclose without written informed consent that the buyer will pay more than the offered purchase price, and the Barkeses waive any claims against Stuckwisch arising from her role as a limited agent:

> Licensee or the principal or managing broker may represent Buyer as a buyer agent. If such a Buyer wishes to see the Property, Licensee has agency duties to both Seller and Buyer, and those duties may be different or even adverse. Seller knowingly consents to Licensee acting as a limited agent for such showings. If limited agency arises, Licensee **shall not disclose** the following without the informed consent, in writing, of both Seller and Buyer:
>
> * * * * *
>
> > (b) That a Buyer will pay more than the offered purchase price for the Property.
>
> * * * * *
>
> Seller acknowledges that Limited Agency Authorization has been read and understood. Seller understands that Seller does not have to consent to Licensee(s) acting as limited agent(s), but gives informed consent voluntarily to limited agency and waives any claim[]s, damages, losses, expenses, including attorneys' fees and costs, against Licensee(s) arising from Licensee's(s') role of limited agent(s).

Appellants' App. p. 51.

Darren Royalty was interested in purchasing the property. On June 22, 2007, the Barkeses and Royalty entered into a Limited Agency Agreement similar in all relevant respects to the Listing Contract's Limited Agency Authorization, providing that Stuckwisch would act as a limited agent. That day, Royalty offered to purchase the

property for $760,000, but the Barkeses declined the offer. Five days later on June 27, Royalty increased his offer to $900,000. Stuckwisch assured the Barkeses that the offer was appropriate and pressured the Barkeses to accept it. *Id.* at 127. The Barkeses accepted the offer. Stuckwisch met the Barkeses that night to obtain their signatures on the purchase agreement.

The next day on June 28, Robert Metts of Seemore Properties walked into Stuckwisch's office and offered $1,017,484 for only a portion of the property. Stuckwisch told Metts that because the Barkeses had already contracted to sell the property to Royalty, she would direct the offer to Royalty. Royalty accepted the offer the same day. *Id.* at 42. Stuckwisch did not inform the Barkeses of Metts's offer.

At some point, Stuckwisch contacted land surveyor Daniel Blann to conduct a boundary survey and a replat of the property. The replat was titled, "Self-Made Men, LLC replat." *Id.* at 142. Self-Made Men is a business in which Royalty and Stuckwisch's husband Kyle Stuckwisch are partners. *Id.* at 143 (Blann's deposition testimony stating that Royalty and Kyle are the partners of Self-Made Men). The replat was approved by the Barkeses on August 3, 2007, and approved by the city of Seymour one week later on August 10.

Closing also occurred on August 10, and the Barkeses conveyed the property to Royalty by warranty deed. One month later on September 11, Royalty's sale of the property to Metts closed. *Id.* at 20-21.

In May 2009, the Barkeses filed a complaint against Stuckwisch alleging fraud and requesting treble damages pursuant to the Crime Victim's Relief Act. Stuckwisch

filed an Indiana Trial Rule 12(B)(6) motion to dismiss. The trial court granted the motion.

The Barkeses filed an amended complaint and a second amended complaint. The second amended complaint also alleged fraud and requested treble damages pursuant to the Crime Victim's Relief Act. It claimed that Stuckwisch, for her own personal and financial gain and to the detriment of the Barkeses, failed to disclose (1) her interest in the transaction between the Barkeses and Royalty and (2) Metts's offer. Stuckwisch filed an Indiana Trial Rule 12(B)(6) motion to dismiss. The trial court granted the motion as to the Crime Victim's Relief Act claim but denied the motion as to the fraud claim.

Stuckwisch moved for summary judgment on the Barkeses' fraud claim. The Barkeses responded, and Stuckwisch replied. The trial court granted Stuckwisch's summary judgment motion.

The Barkeses now appeal.

Discussion and Decision

The Barkeses contend that the trial court erred by entering summary judgment for Stuckwisch.

When reviewing the entry or denial of summary judgment, our standard of review is the same as that of the trial court: summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1269-70 (Ind. 2009). All facts established by the designated evidence and

reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Naugle v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007).

To prevail in a cause of action for constructive fraud, the Barkeses must demonstrate: (1) Stuckwisch owed a duty to the Barkeses due to their relationship; (2) Stuckwisch violated that duty by making deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists; (3) reliance thereon by the Barkeses; (4) injury to the Barkeses as a proximate result thereof; and (5) the gaining of an advantage by Stuckwisch at the expense of the Barkeses. *See Rice v. Strunk*, 670 N.E.2d 1280, 1284 (Ind. 1996).

The Barkeses argue that the trial court erred by granting summary judgment for Stuckwisch because genuine issues of material fact exist as to whether Stuckwisch violated her duty to disclose (1) her interest in the transaction between the Barkeses and Royalty and (2) Metts's offer.

I. Stuckwisch's Interest in the Transaction

The Barkeses argue that the trial court erred by granting summary judgment for Stuckwisch because genuine issues of material fact exist as to whether Stuckwisch violated her duty to disclose her interest in the transaction between the Barkeses and Royalty.

As an initial matter, we note that Stuckwisch inaccurately frames the Barkeses' claim as whether Self-Made Men and not Royalty purchased the property. Stuckwisch then points to the purchase agreement and the warranty deed, both of which identify Royalty as the purchaser, and further points to the Barkeses' response to Stuckwisch's

request for admissions, in which the Barkeses admit that Self-Made Men did not purchase the property. The relevant inquiry, however, is not whether Self-Made Men was listed on various documents as the purchaser of the property; instead, the Barkeses claim that Stuckwisch failed to disclose her interest in the transaction between the Barkeses and Royalty. Essentially, the Barkeses argue that Stuckwisch, acting in her own interest, compelled the Barkeses to sell the property to Royalty to enable Royalty and Stuckwisch's husband Kyle to make a profit by selling a portion of that property to Metts. The Barkeses claim that Stuckwisch benefitted not only as Kyle's wife but also as the real estate agent for the transaction between Royalty and Metts.

A real estate agent representing a seller has a duty to disclose to the seller adverse material facts or risks actually known by the agent concerning the real estate transaction. I.C. § 25-34.1-10-10(a)(3)(C); *see Nichols v. Minnick*, 885 N.E.2d 1, 3-4 (Ind. 2008) (real estate broker representing seller violated duty to disclose adverse material facts where he failed to disclose to seller that he loaned the buyer $15,000 of the $25,000 down payment), *reh'g denied*.

If Stuckwisch had an interest in the transaction between the Barkeses and Royalty, she had a duty to disclose it. The designated evidence reveals genuine issues of material fact as to whether Royalty was purchasing the property for the benefit of Self-Made Men and whether Stuckwisch knew Metts was interested in the property before the Barkeses signed the purchase agreement with Royalty. Specifically, the designated evidence shows that Stuckwisch did not disclose to the Barkeses that her husband Kyle was Royalty's business partner, the replat was named after Self-Made Men, Stuckwisch

pressured the Barkeses to accept Royalty's offer of $900,000 on June 27 and obtained their signatures that night, Metts's offer of $1,017,484 for only a portion of the property came the next day on June 28, and Stuckwisch did not disclose this offer to the Barkeses but instead directed it to Royalty, who accepted Metts's offer the same day.[2]

We conclude that genuine issues of material fact exist as to whether Stuckwisch had an interest in the transaction between the Barkeses and Royalty and violated her duty to disclose that interest.

II. Metts's Offer

The Barkeses also argue that the trial court erred by granting summary judgment for Stuckwisch because genuine issues of material fact exist as to whether Stuckwisch violated her duty to disclose Metts's offer.

Stuckwisch counters that she had no duty to disclose Metts's offer. She directs us to Indiana Code section 25-34.1-10-10(a)(3)(B), which states that a licensee representing a seller has a duty to promote the seller's interests by "presenting all offers to purchase or lease to and from the seller or landlord immediately upon receipt of the offers regardless of whether an offer to purchase or lease has been accepted, unless otherwise directed by the seller or landlord." Stuckwisch then points to Indiana Code section 25-34.1-10-12, which deals with limited agency. Under that section, a licensee acting as a limited agent may not disclose without written informed consent of the parties that a buyer will pay

[2] The Barkeses state on appeal that Stuckwisch informed them at the closing between the Barkeses and Royalty that her husband was in business with Royalty. Appellants' Br. p. 5. However, the Barkeses provide no citation and we find nothing in the designated evidence supporting such fact. Even if Stuckwisch had informed the Barkeses of her husband's relationship with Royalty and Self-Made Men at closing, she did not disclose this interest at the time the Barkeses signed the purchase agreement nor did she disclose the much higher offer by Metts that apparently came just one day after she pressured the Barkeses to accept Royalty's offer.

more than the offered purchase price for the property. *See* Ind. Code § 25-34.1-10-12(a)(3)(B). The statute further provides, "A cause of action does not arise against a licensee for disclosing or failing to disclose information in compliance with this section . . . ." *Id.* § 25-34.1-10-12(c).

Here, Stuckwisch argues, the Barkeses twice contracted to prohibit Stuckwisch from disclosing another buyer's willingness to pay an amount higher than Royalty's offered purchase price, first in the Listing Contract's Limited Agency Authorization clause and then again in the Limited Agency Agreement between the Barkeses and Royalty. Therefore, Stuckwisch continues, the Barkeses cannot bring a cause of action against her for failing to disclose Metts's willingness to pay an amount higher than Royalty's purchase price.

Stuckwisch's reading of the limited agency provisions misunderstands the nature of limited agency. A limited agent is "a licensee who, with the written and informed consent of all parties to a real estate transaction, represents both the seller and buyer." *Id.* § 25-34.1-10-7. Here, the limited agency provisions provide that, as a limited agent of a seller and a buyer, Stuckwisch may not disclose without written informed consent that a buyer will pay more than the offered purchase price for the property. Because these provisions deal with limited agency, the "buyer" in these provisions refers to the buyer for whom Stuckwisch is acting as a limited agent, not any other buyer. *See id.*; *see also* Appellants' App. p. 51 (Listing Contract: "Licensee has agency duties to both Seller and Buyer, and those duties may be different or even adverse."), 23 (Limited Agency Agreement: "The Licensee is authorized by Seller and Buyer to represent both of them in

this transaction. Seller and Buyer understand that this limited agency relationship may create certain conflicts of interest, and that Licensee is representing two parties whose interests are different or even adverse."). That is, because Stuckwisch was representing both the Barkeses and Royalty as a limited agent, Stuckwisch was prohibited from disclosing that Royalty would pay more than the offered purchase price for the property. The limited agency provisions do not prevent Stuckwisch from disclosing offers from other interested buyers.

In a related argument, Stuckwisch claims that the Barkeses waived their right to sue her by executing the Listing Contract with Stuckwisch and the Limited Agency Agreement with Royalty. In those documents, the Barkeses waived any claims against Stuckwisch arising from her role as a limited agent.[3] As we have already determined that Stuckwisch's role as a limited agent did not preclude her from disclosing Metts's offer, her waiver claim fails.

Finally, Stuckwisch claims that because Metts did not make his offer until the day after the Barkeses accepted Royalty's offer, the Barkeses could not accept Metts's offer had they known of it without breaching their purchase agreement with Royalty. As noted above, Section 25-34.1-10-10(a)(3)(B) requires a licensee to present to the seller all offers to purchase immediately upon receipt of the offers regardless of whether an offer to purchase has been accepted. Stuckwisch therefore had a duty to disclose Metts's offer to the Barkeses regardless of the fact that the Barkeses signed a purchase agreement with Royalty just the night before.

[3] Although Stuckwisch presents this waiver argument as an independent ground for affirming the trial court's summary judgment order, we find it is only applicable here, where Stuckwisch has argued that her role as limited agent precludes any liability for failing to disclose Metts's offer.

More importantly, however, the relevant question is whether Stuckwisch knew at the time the Barkeses accepted Royalty's offer – the offer she assured them was appropriate and pressured them to accept – that Metts was interested in the property and was going to make a much more favorable offer. On this point, the same designated evidence as to Stuckwisch's interest in the transaction also shows a genuine issue of material fact as to whether she knew Metts's offer was pending at the time the Barkeses accepted Royalty's offer: Stuckwisch failed to disclose that her husband was Royalty's business partner, the replat was named after Self-Made Men, Stuckwisch pressured the Barkeses to accept Royalty's offer on June 27, Metts's offer for only a portion of the property for a much higher price came the next day on June 28, and Stuckwisch did not disclose this offer to the Barkeses but instead directed it to Royalty, who accepted Metts's offer the same day.

We conclude that the trial court erred by granting summary judgment for Stuckwisch. We reverse and remand for further proceedings.

Reversed and remanded.

KIRSCH, J., and MATHIAS, J., concur.