

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 4th day of October, 2018.

Present: All the Justices

J&R Enterprises, et al., Appellants,

against Record No. 170854
 Circuit Court No. CL13-122

Ware Creek Real Estate Corp., Appellee.

Upon an appeal from a judgment
rendered by the Circuit Court of New Kent
County.

Appellants J&R Enterprises (“J&R”) and its sole surviving partner, John Filichko, challenge the circuit court’s judgment following a bench trial in favor of appellee Ware Creek Real Estate Corp. (“Ware Creek”) and against appellants, in the sum of \$30,000. This award was based on Ware Creek’s claim in its amended complaint that appellants owed this sum to Ware Creek as a brokerage commission under an exclusive listing agreement to sell real estate, entered into between J&R, as the listing owner of the subject parcel of improved property (the “Property”), and Ware Creek, as the broker (the “Listing Agreement”). We conclude that the Property was not “sold” during the Listing Agreement’s operative period so as to trigger the commission obligation. Accordingly, we will reverse the judgment of the circuit court and remand this matter for consideration of J&R’s claim for attorney’s fees as the “prevailing party” under the express terms of the Listing Agreement.

Under the Listing Agreement, Ware Creek received from J&R an exclusive listing to sell the Property for a period of six and a half months, terminating on May 1, 2008 (the “initial period”). If the Property was “sold or exchanged” during the initial period, Ware Creek was entitled to a commission of ten percent of the sales price (referred to as the “Fee”) regardless of whether Ware Creek initiated the sale. The listing agreement also provided for what is commonly known as a “protection period,” which in this instance covered a period of 90 days. Specifically, the Listing Agreement states in paragraph four: “If within 90 days after the

expiration of the initial period of time or any extension thereof, the Property is sold or exchanged by the Broker, by Owner, or by any other person, to a purchaser or purchasers to whom the Property was shown, offered, or introduced by the Broker, or by any licensed broker or salesperson employed by or affiliated with the Broker, Owner agrees to pay Broker the Fee.”

On June 2, 2008, during the 90-day period, J&R entered into a written “Contract of Purchase” for the Property with a purchaser identified as Jackass Flats, LLC (“Jackass Flats”) (the “2008 Contract”). Monte Brown and George Allen signed the contract on behalf of Jackass Flats, and there is no dispute that Ware Creek introduced the Property to Allen and Brown. Under the contract, Jackass Flats agreed to pay \$300,000 to J&R for the Property. While the contract did not contain a “time is of the essence” clause or an expiration date, it did provide for the transaction to close “on or about September 2008.” The contract was contingent, however, on the purchaser obtaining “adequate and suitable financing.” Over the next few months, Brown and Allen contacted several local banks and attempted to obtain financing, but were ultimately unsuccessful. Although the circuit court found that the 2008 Contract was “not voided and/or abandoned,” it is undisputed that the parties to the contract did not close on it.

More than a year after executing the 2008 Contract, J&R and Jackass Flats entered into a new contract for the sale of the Property, dated June 29, 2009, containing materially different terms (the “2009 Contract”). The 2009 Contract provided for 90 percent owner financing of the \$300,000 purchase price, with a \$30,000 down payment. Furthermore, in order to raise the proceeds for the down payment, Allen and Brown secured one Christopher Brockwell as an additional investor in Jackass Flats in the week before executing the 2009 Contract. Under their newly formed arrangement, Allen, Brown and Brockwell each invested \$10,000.00 for Jackass Flats’ purchase of the Property. On August, 13, 2009, the transaction set forth in the 2009 Contract closed, and the Property was transferred by deed of conveyance from J&R to Jackass Flats.

“The interpretation of a contract presents a question of law subject to de novo review.” *Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 178 (2016) (quoting *School Bd. of Newport News v. Commonwealth*, 279 Va. 460, 467 (2010)). Based on our interpretation of the Listing Agreement, the 2008 Contract and the 2009 Contract, along with our application of the undisputed facts recited above to the terms of these instruments, we conclude that the Property was not “sold or exchanged” under the 2008 Contract pursuant to the terms of the Listing

Agreement. Rather, J&R sold the Property under a new and materially different contract executed more than a year later, the 2009 Contract, which was not covered by the Listing Agreement. *See Ford v. Gibson*, 191 Va. 96, 104 (1950) (“To be the procuring cause of a sale the broker must have originated or caused a series of events which, without break in their continuity, result in the accomplishment of the prime object of his employment, which is, usually, to procure a purchaser ready, willing and able to buy on the owner’s terms. If his employment is to *sell*, he is not entitled to compensation until he procures a sale or a valid and enforceable contract of sale.” (citation omitted)). Therefore, as a matter of law, Ware Creek was not entitled to the commission under the Listing Agreement that the circuit court awarded to it.

Finally, in defending against this action, J&R requested in its responsive pleading to the amended complaint that it be awarded the attorney’s fees it would expend in this action pursuant to the terms of the Listing Agreement—that is, to the extent it would become the “prevailing party,” as it now is, under the terms of the fee-shifting provision in paragraph E of the “Standard Provisions” incorporated into the Listing Agreement. *See RECP IV WG Land Investors LLC v. Capital One Bank USA, N.A.*, 295 Va. 268, 291 (2018) (affirming award of attorney’s fees to defendant who became “prevailing party” under fee-shifting provision of contract upon successfully defending action against it).

Accordingly, we reverse the circuit court’s judgment awarding the commission to Ware Creek and remand the case for consideration of J&R’s request for attorney’s fees incurred below and on appeal.

This order shall be certified to the Circuit Court of New Kent County.

A Copy,

Teste:



Clerk