



**In the
Missouri Court of Appeals
Western District**

WHIRLWIND PROPERTIES, LLC,

Respondent,

v.

**JOHN JOHN AND BOONE GROUP,
LTD, D/B/A RE/MAX BOONE REALTY,**

Appellants.

WD80654

OPINION FILED:

October 17, 2017

**Appeal from the Circuit Court of Boone County, Missouri
The Honorable Kevin Crane, Judge**

Before Division One:

Mark D. Pfeiffer, Chief Judge Presiding, James Edward Welsh, and Cynthia L. Martin, JJ.

Appellants John John ("John") and Boone Group, Ltd, d/b/a Re/Max Boone Realty ("ReMax") (collectively, the "Appellants") appeal the judgment of the Circuit Court of Boone County in favor of Respondent Whirlwind Properties, LLC ("Whirlwind") declaring that Appellants were not entitled to any portion of the damages received by Whirlwind from a third-party arising out of the third-party's failure to close on the sale of property and damages therefrom. Appellants raise two points on appeal.

Factual Background¹

John works as a real estate agent for his broker ReMax. John and Whirlwind entered into a contract entitled "Authorization to Show Property" that allowed John to show property that Whirlwind wished to sell, consisting of two mobile home parks with ninety-three occupied mobile homes (the "Property"), for a period of no more than thirty days after the effective date of the agreement (the "Authorization"). The Authorization became effective on March 3, 2015, and expired thirty days thereafter (the "Authorization Period"). The Authorization was a form contract provided by John for Whirlwind's representative to sign. The Authorization further provided that

if [Whirlwind] sells or leases the Property during the Authorization Period or within 180 days after expiration thereof (the "Protection Period") to a prospect introduced to the Property by [John] [. . .] then Whirlwind will pay John compensation of [4%] to be paid in cash at closing, unless otherwise provided herein.

The Protection Period extended to September 29, 2015.

Within the Authorization Period, John introduced Whirlwind to a prospective buyer, Fulton Medical Center, LLC ("Fulton Medical"). On March 23, 2015, Whirlwind and Fulton Medical executed a Real Estate Purchase and Sale Contract (the "Sale Contract"), in which Fulton Medical agreed to purchase the Property for four million dollars. The closing was set by Whirlwind and Fulton Medical to occur on January 21, 2016, which was subsequently extended by two additional months to March 21, 2016, which fell outside of the Protection Period.

The Authorization included a liquidated damages clause in the event that the sale of the Property failed to close. The provision states:

¹ The parties filed stipulated facts with the circuit court.

If the transaction shall not close due to fault of [Fulton Medical], any net damages received by [Whirlwind] from [Fulton Medical] shall be divided equally between [Whirlwind] and [John] as liquidated damages and in lieu of further compensation provided, however, [John] shall in no event receive more money in lieu of compensation than the amount agreed to herein as compensation for brokerage services.

The Sale Contract between Whirlwind and Fulton Medical also contained a liquidated damages clause in the event Fulton Medical failed to fulfill its obligations under the Sale Contract, which provided that

[Whirlwind] shall be entitled, as its sole and exclusive remedy, to retain the Earnest Money Deposit as liquidated damages, [FULTON MEDICAL] AND [WHIRLWIND] HEREBY ACKNOWLEDGE AND AGREE THAT [WHIRLWIND'S] DAMAGES IN THE EVENT OF SUCH A BREACH OF THIS CONTRACT BY [FULTON MEDICAL] WOULD BE DIFFICULT OR IMPOSSIBLE TO DETERMINE, THAT THE AMOUNT OF THE EARNEST MONEY DEPOSIT, TOGETHER WITH ALL INTEREST EARNED THEREON IS THE PARTIES' BEST AND MOST ACCURATE ESTIMATE OF THE DAMAGES [WHIRLWIND] WOULD SUFFER IN THE EVENT THE TRANSACTION PROVIDED FOR IN THIS CONTRACT FAILS TO CLOSE, AND THAT SUCH ESTIMATE IS REASONABLE UNDER THE CIRCUMSTANCES EXISTING ON THE EFFECTIVE DATE. [FULTON MEDICAL] AND [WHIRLWIND] AGREE THAT [WHIRLWIND'S] RIGHT TO THE EARNEST MONEY DEPOSIT AND ALL INTEREST EARNED THEREON SHALL BE THE SOLE REMEDY OF [WHIRLWIND] AT LAW OR IN EQUITY IN THE EVENT OF A BREACH OF THE CONTRACT BY [FULTON MEDICAL]; AND [WHIRLWIND] HEREBY WAIVES ALL OTHER CLAIMS FOR DAMAGES OR FOR SPECIFIC PERFORMANCE.

("Sale Contract Liquidated Damages Clause")

Fulton Medical breached the Sale Contract by failing to close by the agreed date, and Fulton Medical released its \$100,000.00 earnest money deposit from escrow to Whirlwind on March 21, 2016, as provided by the Sale Contract Liquidated Damages Clause. John, however, filed a realtor lien on the funds held in escrow and refused to release the entirety of the funds claiming he was entitled to an equal share of the damages.

Whirlwind filed suit against the Appellants, which asserted seven counts, including one count for a declaratory judgment that sought a judgment by the circuit court declaring that because the Property did not sell during the Protection Period and "never sold", John was not entitled to any compensation under the Authorization. A bench trial was conducted by the circuit court with the facts stipulated by the parties. The parties' stipulation included that Whirlwind had suffered \$496,159.90 in damages as a result of Fulton Medical's breach of the Sale Contract.

The circuit court's judgment dismissed all of Whirlwind's claims except for its request for a declaratory judgment. The circuit court's judgment held that the Authorization expired without a sale within the Protection Period, which extinguished John's right to compensation. The circuit court also found that the term "net damages" used in the Authorization's Liquidated Damages Clause was ambiguous, and the circuit court interpreted it to mean that John was only entitled to an equal share of any damages received by Whirlwind in excess of its actual damages. Thus, the circuit court subtracted the \$100,000.00 in escrow due to Whirlwind from its actual damages of \$469,159.90, finding that Whirlwind had a loss of \$369,159.90 and no positive net damages from which John could recover. Appellants now raise two points on appeal.

Standard of Review

Our review of this judge-tried case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). We will affirm the circuit court's judgment unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012). We view the evidence and inferences in the light most favorable to the circuit court's judgment and disregard all contrary evidence and inferences. *Essex Contracting, Inc. v. Jefferson Cty.*, 277 S.W.3d 647, 652 (Mo. banc 2009). Where the issue is strictly a question of law, we apply *de novo* review. *Pearson*,

367 S.W.3d at 43. We give no deference to the circuit court's rulings on questions of law. *Id.* at 43–44.

Analysis

Point One

In Point One on Appeal, Appellants argue the circuit court erred in entering judgment for Whirlwind on the grounds that John's right to compensation under the Authorization expired when the sale of Whirlwind's Property did not close within the Protection Period in that the circuit court misinterpreted and misapplied the commission clause in the Authorization because Missouri law clearly holds that the agent or broker's commission is earned when the buyer and seller execute an enforceable contract, which in this case occurred on March 23, 2015, well within the time period covered by the Authorization.

Appellants' claim requires that this Court review and construe the terms of the Authorization, a contract between John and Whirlwind. "The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties and to give effect to that intention." *J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo. banc 1973) (citation omitted).

The terms of a contract are read as a whole to determine the intention of the parties and are given their plain, ordinary, and usual meaning. [*Butler v. Mitchell–Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. banc 1995)]; *City of Harrisonville v. Public Water Supply Dist. No. 9 of Cass County*, 49 S.W.3d 225, 231 (Mo. App. 2001). Additionally, each term of a contract is construed to avoid rendering other terms meaningless. *City of Harrisonville*, 49 S.W.3d at 231. A construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense. *Id.*

Dunn Indus. Grp., Inc. v. City of Sugar Creek, 112 S.W.3d 421, 428 (Mo. banc 2003). "The 'intent of the parties ... is determined based on the contract alone unless the contract is

ambiguous.'" *Ethridge v. TierOne Bank*, 226 S.W.3d 127, 131 (Mo. banc 2007) (quoting *Trimble v. Pracna*, 167 S.W.3d 706, 714 (Mo. banc 2005)).

The question presented is straightforward. Under the terms of the Authorization, did Fulton Medical's failure to close and complete the purchase of the Property within the Authorization or Protection Periods cause the Authorization to expire so that John had no right to compensation under the terms of the Authorization?

The Authorization provides as follows:

if [Whirlwind] sells or leases the Property during the Authorization Period or within 180 days after expiration thereof (the "Protection Period") to a prospect introduced to the Property by [John] [. . .] then Whirlwind will pay John compensation of [4%] to be paid in cash at closing, unless otherwise provided herein.

Later in the same paragraph, the Authorization provides that

if the transaction shall not close due to fault of [Fulton Medical], any net damages received by [Whirlwind] from [Fulton Medical] shall be divided equally between [Whirlwind] and [John] as liquidated damages and in lieu of further compensation provided, however, [John] shall in no event receive more money in lieu of compensation than the amount agreed to herein as compensation for brokerage services.

So, was the Property sold during the Authorization or Protection Periods? John argues that the Property was sold during the Authorization Period, as Whirlwind and Fulton Medical executed the Sale Contract for the Property on March 23, 2015. According to John, the fact that the Property was not scheduled to close within the Authorization or Protection Periods has no affect on his right to compensation under the terms of the Authorization. As the closing failed due to the fault of Fulton Medical, John argues he is entitled to one-half of the net damages received by Whirlwind in compensation. Whirlwind makes two arguments. First, Whirlwind argues that because the sale of the Property was not scheduled to close and in fact did not close before the

Authorization expired, John has no right to compensation under the Authorization. Second, Whirlwind claims John never procured a "ready, willing, and able buyer" and, therefore, is not entitled to compensation under the Authorization. We will take each argument in turn.

First, did the Property "sell" during the Authorization for Protection periods? "Sell" is not explicitly defined in the Authorization. Black's law dictionary defines "sell" as "[t]o transfer (property) by sale." *Sell*, BLACK'S LAW DICTIONARY (10th ed. 2014). While it is true that the sale never was completed and the property never transferred to Fulton Medical, we must not stop there as the contract must be construed as a whole. *Dunn Indus. Grp. Inc.*, 112 S.W.3d at 428. The same paragraph that sets forth John's commission also explains what happens if the sale of the property does not "close". It provides "[i]f the transaction shall not close" due to the fault of the buyer, John is entitled to an alternative compensation structure "in lieu of further compensation provided." If John is entitled to *no compensation whatsoever* unless the Property sold *and closed*, this alternative compensation provision would be superfluous. The reasonable construction of the Authorization is that John earns his commission upon the execution of a sale contract for the Property.

This interpretation is in accord with the general principle under Missouri law that a broker generally earns his commission "when he produces a purchaser ready, willing and able to purchase upon the terms specified by the owner, whether the transaction be closed or not, or upon terms satisfactory to the owner." *Meridian Interests, Inc. v. J.A. Peterson Enters., Inc.*, 693 S.W.2d 179, 184 (Mo. App. 1985); *accord Dark v. MRO Mid-Atlantic Corp.*, 876 S.W.2d 714, 716 (Mo. App. 1994) ("In general, a broker earns his commission from the seller when he produces a buyer ready, willing and able to buy on terms specified by the seller, whether or not the sale is completed"). The contract interpreted as a whole and in context supports John's

interpretation that the parties intended that John earned his commission upon the execution of a sale contract with the commission to be paid at closing.

Whirlwind also argues that John is not entitled to any compensation because he never provided a "ready, willing, and able" buyer because the Sale Contract with Fulton Medical contained "conditions precedent" which were never fulfilled. Whirlwind cites to two pages of the Sale Contract to support this claim, apparently referring to the "Conditions Precedent to Closing" section, which also contains a provision allowing the closing date to be extended for a reasonable period by Fulton Medical in order to have additional time to satisfy the conditions. Because the closing date was extended and closing never occurred, Whirlwind argues no "ready, willing, and able buyer" was procured by John and, thus, there was no sale of the Property. In support of its argument, Whirlwind cites *Dark v. MRO Mid-Atlantic Corporation*, in which a broker sought commission on the sale of real property. 876 S.W.2d at 717. In that case, this Court found that the broker had failed to secure a ready, willing, and able buyer because the sale contract was expressly conditional, as it required the approval of the buyer's senior management *before the contract became enforceable*, and that condition was never met. *Id.* The Sale Contract in this case, however, was not conditional. Rather, it was valid and enforceable against the parties, but certain conditions precedent had to be met prior to closing. As the Court in *Dark* explained, there is a

difference between a contract which is not performed and a contract which never becomes an enforceable obligation. In many instances, the seller and buyer may enter a binding agreement to transfer the property but never perform their respective promises. In such a case, the broker would be entitled to his commission absent any contractual agreement to the contrary. But here, where the buyer makes his commitment to buy contingent on several conditions which are never satisfied, the broker is not entitled to a commission.

Id. Whirlwind has not identified any condition precedent in the Sale Contract that made the contract unenforceable against the parties. There is no indication in the stipulated facts or in the circuit court's judgment that Fulton Medical was not a ready, willing, and able buyer, but only that it breached the contract by failing to close. As stated above, the mere fact that the contract was not performed does not mean that Fulton Medical was not a ready, willing, and able buyer. Whirlwind's argument is unpersuasive.

We have concluded that the "sale" contemplated by the Authorization occurred upon the execution of an enforceable sale contract for the Property by a ready, willing, and able buyer introduced to Whirlwind by John, and this occurred within the Authorization Period. There is no indication in the Authorization that the closing on the Property had to be completed by any date certain in order for John to be entitled to compensation.

We conclude that the circuit court erred in finding that John was not entitled to compensation under the Authorization for the reason that that Property did not sell within the Authorization or Protection Periods, as the Property did "sell" within that timeframe. Pursuant to the Authorization, the failure by Fulton Medical to close on the Property resulted in a change to John's compensation structure from a percentage of the sales price to an equal share in the net damages Whirlwind receives from Fulton Medical as a result of the breach of the Sale Contract.

Point One is well taken.

Point Two

In Point Two on Appeal, Appellants argue the circuit court erred in entering judgment for Whirlwind on the grounds that Whirlwind had no "net damages" to divide with John under the Authorization's Liquidated Damages Clause in that the circuit court misinterpreted and misapplied the term "net damages" because the Sale Contract Liquidated Damages Clause

established Whirlwind's damages to be \$100,000.00 payable from an earnest money deposit by Fulton Medical, which constitutes Whirlwind's net damages received from Fulton Medical, from which amount John is entitled to half.

The same principles set forth in Point One regarding the interpretation of contracts apply to Point Two and will not be repeated here. As contemplated by the Authorization, the closing of the transaction between Whirlwind and Fulton Medical failed to occur, at which time an alternative compensation structure for John became effective. The Authorization provides that

[i]f the transaction shall not close due to fault of [Fulton Medical], ***any net damages received by [Whirlwind] from [Fulton Medical] shall be divided equally between [Whirlwind] and [John] as liquidated damages*** and in lieu of further compensation provided, however, [John] shall in no event receive more money in lieu of compensation than the amount agreed to herein as compensation for brokerage services.

(emphasis added). "Net damages" is not defined in the Authorization.

The Sale Contract between Whirlwind and Fulton Medical also contained a liquidated damages clause. This clause provided that in the event Fulton Medical breached the Sale Contract, which it did, Whirlwind would receive as its sole compensation the money placed by Fulton Medical in escrow, \$100,000.00, and any interest earned thereon, as liquidated damages.

John argues that the phrase "any net damages received by [Whirlwind] from [Fulton Medical]" clearly and unambiguously means that the liquidated damages received by Whirlwind from Fulton Medical's breach of the Sale Contract should be divided equally between the parties. Whirlwind argues that the term "net damages" in the Authorization is unambiguous and according to its plain meaning should be read to mean that John is only entitled to half of whatever remains after subtracting any credits (i.e. the liquidated damages Whirlwind received from Fulton Medical) from its actual damages. Alternatively, Whirlwind argues the term "net

damages" is ambiguous and should be interpreted against the drafter. The circuit court agreed with Whirlwind that the term was ambiguous and interpreted it against the drafter to mean that John was only entitled to half of whatever net positive amount of damages remained after taking into account any credits received by Whirlwind. It was stipulated by the parties that Whirlwind had suffered \$469,159.90 in actual damages. Subtracting the \$100,000.00 forfeited from escrow by Fulton Medical as liquidated damages for its breach of the Sale Contract, the circuit court concluded Whirlwind had a loss of \$369,159.90 and no positive net damages from which John could recover.

"Net damages" is not defined in the Authorization. The term "net damages", as the term is normally used, refers to the final calculation of actual damages sustained by a plaintiff after any benefits received by the plaintiff as a result of the breach, or other action that is the basis for liability, is taken into account. *See e.g., City of St. Louis v. Franklin Bank*, 98 S.W.2d 534 (Mo. 1936) ("The commissioners awarded damages in the sum of \$9,000, to be offset pro tanto by assessed benefits in the sum of \$5,000, leaving a balance of \$4,000 net damages over benefits due respondents"); *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 571 (Mo. App. 2008) (commissioners were instructed by the court to assess " net damages, if any, which the Defendants may sustain by reason of the appropriation, taking into consideration the benefits to be derived by the owners, as well as the damages sustained").

The present case involves the breach of a contract and damages arising therefrom. In cases involving contracts, the injured party is only entitled to damages to compensate the party fairly for loss sustained, and the injured party should recover no more or less than the actual loss caused by the breach. *See 22 AM. JUR. 2D Damages* § 48 (2017). Thus, any evidence of a "benefit" received by the injured party resulting from the breach "is received in evidence, if at

all, to measure the *net damages* for which the defendant will be charged." *Id.* at § 396 (emphasis added). Therefore, the term "net damages", as normally used, refers only to the actual damages sustained by an injured party less any benefit that inured to the party resulting from the breach. The circuit court, and Whirlwind on appeal, have misconstrued the term "net damages" to mean any damage award received by Whirlwind in excess of its actual damages. This is in error. If the legal process has worked the way it ought in awarding damages for a breach of contract, there will never be an award of damages greater than the actual damages sustained by the non-breaching party. Whirlwind's proposed interpretation of the term "net damages" would leave the liquidated damages provision in the Authorization void of meaning and contrary to the clear intent of the parties to provide John monetary *compensation* in lieu of other compensation provided in the Authorization in the event of a breach by the buyer. *See Dunn Indus. Grp., Inc.*, 112 S.W.3d at 428 ("construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense").

There remains the added complexity that, as between Whirlwind and Fulton Medical, no calculation as to actual damages was ever made as between the parties. The Sale Contract contained a liquidated damages clause. Liquidated damages serve as a substitute for the calculation of actual damages because, as stated by the clause in the Sale Contract itself, the parties have agreed that such a calculation is difficult to achieve. *See e.g., Kansas City Live Block 139 Retail, LLC v. Fran's K.C. Ltd.*, 504 S.W.3d 725, 731 (Mo. App. 2016). In addition,

[a]lthough proof of actual damages is required to trigger a liquidated damages clause, "[l]iquidated and actual damages generally may not be awarded as compensation for the same injury." *Warstler v. Cibrian*, 859 S.W.2d 162, 165 (Mo. App. W.D. 1993). "Further, 'where parties especially provide or stipulate for liquidated damages, such liquidated damages take the place of any actual damages suffered and any recovery for breach is limited to the amount so agreed upon.'"

Id. (quoting *Trans World Airlines, Inc. v. Travelers Indem. Co.*, 262 F.2d 321, 325[1] (8th Cir. 1959)).

Id. at 732.

The amount of liquidated damages stipulated in the Sales Contract and forfeited from escrow was ostensibly the parties' most accurate estimate of the actual damages sustained by Whirlwind, and Whirlwind agreed to waive any other claim for damages it may have had. The liquidated damages, for all intents and purposes, are the "net damages received by [Whirlwind] from [Fulton Medical]" resulting from Fulton Medical's failure to close on the transaction between the parties. Accordingly, pursuant to the Authorization, the liquidated damages must be divided equally between Whirlwind and John.

Point Two is also well taken.

Conclusion

We reverse the declaratory judgment of the circuit court and remand this cause with directions to the circuit court to enter its amended declaratory judgment consistent with this opinion.

/s/ *James Edward Welsh*
James Edward Welsh, Judge

All concur.