AFFIRMED; Opinion Filed December 3, 2014.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-13-01596-CV

TFO REALTY, LLC, Appellant
V.
PHILIP S. SMITH, Appellee

On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-13-02584-E

MEMORANDUM OPINION

Before Justices FitzGerald, Fillmore, and Stoddart
Opinion by Justice Stoddart

This is a suit to recover a broker's commission following the sale of a property to the City of Dallas. TFO Realty, LLC appeals from adverse summary judgment rulings. In a single issue, TFO Realty argues the trial court erred by denying its motion for summary judgment and by granting the summary judgment motion filed by Philip S. Smith. We affirm the trial court's judgment.

The facts of the underlying dispute are not contested. TFO Realty owned a 1.3-acre tract of land in downtown Dallas (Premises). In December 2001, TFO Realty and Smith entered into a one-year Exclusive Listing Agreement (Agreement) whereby TFO Realty appointed Smith to be its sole and exclusive agent for the sale of the Premises. The Agreement gave Smith "the exclusive right to sell all or any portion of the Premises." The Agreement was renewed annually for nine years. The final extension of the Agreement expired on December 31, 2010 (Extension).

Paragraph 5 of the Agreement states:

> In the event that: . . . (ii) at any time after the expiration or termination of this agreement a sale of all or any portion of the Premises, upon any terms acceptable to Owner, shall be made with any purchaser to whom the Premises were submitted by Agent, or by Owner, or by any other person during the term of this agreement; then, and in either such event, Owner agrees to pay to Agent one (1) full commission computed and payable in accordance with the applicable annexed Schedule. . . . Periodically during the term of this agreement and immediately upon termination of the agreement, Agent shall furnish Owner with a written listing of all potential purchasers, developers or others to whom Agent has shown the Premises.

In 2010, the City of Dallas determined it needed a portion of the Premises for a public drainage project. On April 16, 2010, Todd Wright, a member of the real estate group for the City of Dallas, contacted Smith about the Premises. Wright contacted Smith because Smith had a for-sale sign on the Premises. Smith reported Wright's inquiry to TFO Realty.

On July 27, 2010, Wright wrote a letter to TFO Realty to notify them about the City's plan to acquire approximately .8101 acres of the Premises (the Land). Wright testified in his deposition that he only mails notice-of-intent letters if he has instructions to acquire a piece of property. On May 31, 2011, the City made an offer to TFO Realty to purchase the Land. Wright testified that after the City offered to buy the Land from TFO Realty, the parties negotiated a purchase price of $3.3 million, which was more than the City originally offered to pay. The City acquired the Land by warranty deed on November 30, 2011. TFO Realty did not pay Smith any commission when it conveyed the Land to the City.

Wright testified if TFO Realty had not agreed to sell the Land to the City, then the City would have taken the steps required to exercise its power of eminent domain. However, Wright stated, he did not believe the Dallas City Council authorized eminent domain proceedings and the City did not pursue such proceedings to acquire the Land.

Smith sued TFO Realty for breach of contract. Smith filed a traditional motion for summary judgment seeking judgment on his breach of contract claim and entitlement to

$166,934 for his commission. TFO Realty also filed a traditional motion for summary judgment arguing that there was no "sale" of the Land and the Premises were not "submitted" as required by Paragraph 5 of the Agreement. Therefore, TFO Realty argued, it was not required to pay a commission and it was entitled to summary judgment. The trial court granted Smith's motion and denied TFO Realty's motion. This appeal followed.

TFO Realty asserts three reasons why the trial court's judgment is erroneous: (1) there was no "sale" of the Premises as required by the Agreement; (2) the Premises were not "submitted" to the City during the term of the Agreement; and (3) there was no evidence that TFO Realty's transfer of the Land to the City occurred within a reasonable time after expiration of the Agreement.

The standard of review for a traditional summary judgment is well known. *See* TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). We review a trial court's decision to grant or deny a motion for summary judgment de novo. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007) (citing standard for appellate review of grant of summary judgment and denial of cross-motion for summary judgment). We must determine whether the movant demonstrated that no genuine issues of material fact existed and it was entitled to judgment as a matter of law. *See Nixon*, 690 S.W.2d at 548–49. Although a denial of summary judgment normally is not reviewable, we may review such a denial when both parties moved for summary judgment and the trial court grants one motion and denies the other. *See Tex. Mun. Power Agency*, 253 S.W.3d at 192. In our review of such cross-motions, we review the summary judgment evidence presented by each party, determine all questions presented, and render the judgment that the trial court should have rendered. *Id.*

TFO Realty argues that in order for Smith to recover a commission on the conveyance, a "sale" of the Premises must have occurred and the sale had to be to a purchaser to whom the Premises were "submitted" during the term of the Agreement. TFO Realty argues the undisputed evidence shows there was no sale of the Land because the Land was taken under the City's power of eminent domain, and the Land was not submitted to the City during the term of the Agreement. Therefore, TFO Realty asserts, the trial court erred by entering judgment for Smith.

Smith argues TFO Realty agreed to pay a commission to him upon the sale of all or any part of the Premises and TFO Realty sold a portion of the Premises to the City; the City did not exercise its power of eminent domain to acquire the Land. Therefore, Smith asserts, the transaction was a sale and his commission was earned under the terms of the Agreement. By refusing to pay him when TFO Realty sold the Land to the City, Smith believes TFO Realty breached the parties' contract.

The parties do not dispute that TFO Realty conveyed the Land to the City after the Agreement and Extension expired: the Agreement and Extension expired on December 31, 2010, and the Land was conveyed on November 30, 2011. They disagree about whether the terms of Paragraph 5 of the Agreement were satisfied. For Smith to be entitled to a commission on the transfer of the Land to the City, there must have been a sale of the Land and the Land must have been submitted by Smith, TFO Realty, or any other person during the term of the Agreement.

A. Meaning of "Sale"

The parties disagree about whether TFO Realty sold the Land to the City or whether the City acquired the Land by eminent domain or under threat of eminent domain such that the Land was not sold. The Agreement does not define the term "sale." Therefore, we use the plain,

ordinary meaning of the word to determine whether a sale occurred when TFO Realty transferred the Land to the City. *See Winston Acquisition Corp. v. Blue Valley Apartments, Inc.*, 436 S.W.3d 423, 427 (Tex. App.—Dallas 2014, no pet.). The dictionary defines "sale" to mean "the act of selling; a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2003 (1981). Based on the evidence in the record, TFO Realty agreed to transfer and did transfer ownership of the Land to the City for approximately $3.3 million. The City did not compel TFO Realty to transfer the Land; TFO Realty did so pursuant to an agreement it negotiated with the City. The evidence shows Wright made an inquiry about the Premises, the parties negotiated a price—a price higher than the City initially offered to pay—and TFO Realty agreed to convey the Land to the City by warranty deed. TFO Realty's conveyance was not pursuant to a judicial order; the conveyance was voluntary and in exchange for an agreed-upon sum of money. Under the terms of the Agreement, TFO Realty sold the Land to the City.

Paragraph 5 of the Agreement requires a sale occur, but does not limit the application or meaning of the term "sale." The Agreement does not exclude a transfer of the Premises to a governmental entity for public use in exchange for monetary compensation from the term sale. If the parties intended Smith would not receive a commission if the Premises were transferred to the City under conditions such as those at issue in this case, the parties could have included a clause to that effect in the Agreement. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008) (parties have right to contract as they see fit if the contract does not violate law or public policy). But they did not. We will not create this exclusion for them. *See El Paso Field Servs., L.P. v. MasTec N. Amer., Inc.*, 389 S.W.3d 802, 810 (Tex. 2012).

We conclude the trial court did not err by concluding the transaction was a sale under the terms of the Agreement.

B. Meaning of "Submitted"

In its second argument, TFO Realty asserts the Premises were never "submitted" to the City, as required by Paragraph 5, before the Extension expired. TFO Realty believes the evidence does not show Smith showed the Premises to the City, provided the City with information about the Premises, provided the City with the asking price for the Premises, or provided any written information such as a brochure to the City. Therefore, TFO Realty argues, the Premises were not submitted and Smith cannot recover a commission.

Because the Agreement does not define the term "submitted," we give it its plain, ordinary, and generally accepted meaning, unless the Agreement shows the parties used it in a technical or different sense. *See Winston Acquisition Corp.*, 436 S.W.3d at 427. The Agreement does not indicate the parties intended to use the term submitted in a technical or different sense. The dictionary defines "submit" to mean "to send or commit for consideration, study, or decision: refer." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2277 (1981).

Reading the Agreement as a whole and considering the ordinary meaning of the term "submit," we conclude the Premises were submitted to the City during the term of the Agreement. The facts presented to the trial court in the motions for summary judgment show the parties entered into an exclusive listing agreement giving Smith the "exclusive right to sell" the Premises, the Agreement expired on December 31, 2010, and before the Agreement expired, Wright contacted Smith about the Premises (an inquiry Smith reported to TFO Realty) and Wright sent a letter to TFO Realty informing TFO Realty about the City's intention to acquire the Land. We need not consider whether Wright's initial contact with Smith was sufficient to satisfy Paragraph 5's requirement that the Premises be submitted to a future buyer before the

Agreement expired because Wright's letter to TFO Realty was sufficient. The Letter to TFO Realty, which was sent before the Agreement expired, clearly informed TFO Realty that the City intended to acquire the Land. TFO Realty subsequently sold the Land to the City after the expiration of the Agreement.

Paragraph 5 does not require Smith to be the procuring cause of the sale; it only required the Premises to be submitted during the term of the Agreement. Paragraph 5 also does not require Smith to have been the person who submitted the Premises before the Agreement expired. Paragraph 5 states the commission shall be paid if a sale is made "with any purchaser to whom the Premises were submitted *by Agent, or by Owner, or by any other person* during the term of this agreement." (emphasis added). There is not any reason why Wright—acting on behalf of the City—could not have been the person who submitted the Premises by contacting Smith about the City's interest in the Premises and by sending TFO Realty the letter of intent to acquire the land. Wright did just that when he presented the City as a potential purchaser of the Land to TFO Realty.

This interpretation is consistent with the other provisions of the Agreement. *See Nexstar Broad., Inc. v. Fidelity Commc'ns Co.*, 376 S.W.3d 377, 381 (Tex. App.—Dallas 2012, no pet.) ("In construing a contract, we must ascertain and give effect to the parties' intentions as expressed in the document."). The Agreement shows the parties intended Smith would earn a commission if some or all of the Premises was sold to a buyer who was considering purchasing the Premises during the term of the Agreement, even though the parties did not execute the sale until after the Agreement expired. Our interpretation of the term submitted gives effect to the parties' intention.

C. Reasonable Time

In its final argument, TFO Realty asserts the sale did not occur within a reasonable time after the expiration of the Agreement and, therefore, Smith cannot recover his commission. TFO Realty conveyed the Land to the City eleven months after the Agreement expired. Smith responds that a "reasonable time" does not apply to the Agreement and, even if it did, the sale closed within a reasonable time considering the nature of the transaction.

When the exact duration of an extension of time is not express, the law will imply a reasonable time. *See Triton Commercial Props., Ltd. v. Norwest Bank Tex., N.A.*, 1 S.W.3d 814, 818 (Tex. App.—Corpus Christi 1999, pet. denied) (citing *Cotten v. Deasey*, 766 S.W.2d 874, 877 (Tex. App.—Dallas 1989, writ denied); *Intermedics, Inc. v. Grady*, 683 S.W.2d 842, 846 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)); *see also Solomon v. Greenblatt*, 812 S.W.2d 7, 15 (Tex. App.—Dallas 1991, no writ) (law implies a reasonable time based on facts and circumstances existing on the date of the contract). A reasonable time is a relative idea; it denotes such promptness as the circumstances will allow for the action called for by the contract. *Heritage Res., Inc. v. Anschutz Corp.*, 689 S.W.2d 952, 955 (Tex. App.—El Paso 1985, writ ref'd n.r.e.); *Leon Ltd. v. Albuquerque Commons P'ship*, 862 S.W.2d 693, 701 (Tex. App.—El Paso 1993, no pet.) ("When no time for performance has been specified in the agreement, a reasonable time will be implied, considering the nature and purpose of the agreement, as determined by the surrounding circumstances, the situation of the parties, and the subject matter of the agreement.").

Although TFO Realty argues a reasonable time limitation, the issue in the case is not with respect to the duration of the Extension of the Agreement. The parties agree the Extension expired on December 31, 2010. The issue being argued is Smith's ability to recover a commission for a sale to a buyer that was submitted before the Extension expired, not whether the Extension terminated after a reasonable time. We have not found any Texas authority stating

an agreement to pay a commission for a sale occurring after the agreement or extension of the agreement has expired must be performed within a reasonable time, and TFO Realty has not directed us to any Texas authority on the issue.

We overrule TFO Realty's sole issue and affirm the trial court's judgment.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TFO REALTY, LLC, Appellant

No. 05-13-01596-CV V.

PHILIP S. SMITH, Appellee

On Appeal from the County Court at Law No. 5, Dallas County, Texas
Trial Court Cause No. CC-13-02584-E.
Opinion delivered by Justice Stoddart.
Justices FitzGerald and Fillmore participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Phillip S. Smith recover his costs of this appeal from appellant TFO Realty, LLC.

Judgment entered this 3rd day of December, 2014.