

STATE OF MICHIGAN
COURT OF APPEALS

BOLTON CONDUCTIVE SYSTEMS, L.L.C.,

Plaintiff/Counter Defendant/Third
Party Defendant-Appellant,

v

JEFF TRAUBEN a/k/a JEFFREY TRAUBIN,

Defendant/Cross Defendant,

and

1164 LADD INC.,

Defendant/Cross Plaintiff/Counter
Plaintiff/Third Party Defendant-
Appellee,

and

FRIEDMAN REAL ESTATE GROUP, INC.,

Third Party Plaintiff-Appellee.

Before: Davis, P.J., and Wilder and Borrello, JJ.

BORRELLO, J. (*concurring in part and dissenting in part*).

I agree with the majority that plaintiff was obligated to pay a brokerage commission to Friedman Real Estate Group, Inc. However, I do not agree with the majority's conclusion that the statute of frauds was not satisfied and that plaintiff therefore was not obligated to pay a commission in a specific dollar amount (\$100,000) to Friedman. In my view, the statute of frauds was satisfied in this case, and plaintiff is obligated to pay Friedman a brokerage commission in the amount of \$100,000. Therefore, I would affirm the decision of the trial court in its entirety.

The statute of frauds states that "[a]n agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate," MCL 566.132(1)(e), "is void unless that agreement, contract, or promise . . . is in writing and signed with an authorized signature by

the party to be charged with the agreement, contract, or promise[.]” Because the statute is in derogation of common law, it must be strictly construed. *Summers v Hoffman*, 341 Mich 686, 694; 69 NW2d 198 (1955). The Legislature’s purpose in adopting a statute of frauds for agreements to pay commission for or upon the sale of real estate was to protect property owners against unfounded or fraudulent claims of brokers. *Id.* at 695. Our Supreme Court has declined to adopt narrow and rigid rules for compliance with the statute of frauds. *Kelly-Stehney & Associates, Inc v MacDonald’s Industrial Products, Inc (On Remand)*, 265 Mich App 105, 111; 693 NW2d 394 (2005). A case-by-case approach is used to determine whether sufficient writings exist to satisfy the statute of frauds. *Forge v Smith*, 458 Mich 198, 206; 580 NW2d 876 (1998). “Some note or memorandum having substantial probative value in establishing the contract must exist; but its sufficiency in attaining the purpose of the statute [of frauds] depends in each case upon the setting in which it is found.” *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 368; 320 NW2d 836 (1982) (citation omitted). The writing requirement of the statute of frauds may be satisfied by several writings made at different times. *Kelly-Stehney, supra* at 114.

The majority concludes that the addendum fails to satisfy the statute of frauds. I would conclude that the addendum, in conjunction with the lease agreement and purchase agreement, was sufficient to satisfy the statute of frauds. Plaintiff signed the lease agreement, in which plaintiff agreed that any exercise of its right of first refusal would be “on the terms and conditions contained in the Third Party Offer.” By exercising its right of first refusal, plaintiff clearly agreed to be bound by the written provision in the purchase agreement between defendants Trauben and Ladd that requires the purchaser to pay the brokerage commission. Defendant Trauben’s signature on the purchase agreement is an “authorized signature” under MCL 566.132(1)(e) because by exercising its right of first refusal, plaintiff agreed to be bound by the purchase agreement that was signed by defendant Trauben. By signing the lease agreement and agreeing to be bound by the terms and conditions in the third party offer if it exercised its right of first refusal, plaintiff essentially contracted away its right to negotiate the purchase price of the property and other contractual terms, including which party would be responsible to pay the brokerage commission, and agreed to be bound by any third party purchaser’s agreements regarding such terms and conditions. One of the terms of the third party purchaser’s offer was that the purchaser would pay the brokerage commission. It was plaintiff’s right to freely arrange its affairs via the lease agreement. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Individuals “shall have the utmost liberty of contracting[.]” *Id.* However, the corollary to this is that plaintiff is then bound by the terms of agreements which it freely entered into with another party. By electing to exercise its right of first refusal, plaintiff explicitly agreed to be bound by the terms and conditions that the third party purchaser agreed to. Because plaintiff exercised its right of first refusal in this case, under the plain language of the lease agreement and the purchase agreement, plaintiff stands in the shoes of defendant Trauben, the third party purchaser, and is bound by the provision in the purchase agreement requiring the purchaser to pay the brokerage commission to Friedman.

The fact that the purchase agreement did not contain the amount of the commission that the purchaser would be required to pay Friedman does not render it in violation of the statute of frauds. As stated above, the writing requirement of the statute of frauds may be satisfied by several writings made at different times. *Kelly-Stehny, supra* at 114. The purchase agreement explicitly stated that “Purchaser shall pay to Friedman Real Estate a brokerage commission as

agreed upon by Purchaser and broker pursuant to a separate agreement.” Thus, plaintiff was on notice of the existence of a separate agreement that contained the amount of commission due to Friedman. Furthermore, in the letter in which it exercised its right of first refusal, plaintiff crossed out the following sentence, which would have conditioned its exercise of its right of first refusal on “its receipt and satisfaction of the exhibits described in but not attached to the Purchase Agreement.” One such exhibit was the addendum, which contained the amount of the brokerage commission. Plaintiff therefore was on notice of the existence of a separate agreement with the amount of commission and elected not to condition its exercise of its right of first refusal on its receipt of documents that would have revealed the specific amount of such commission.

The plain language of MCL 566.132(1)(e) only requires the “agreement, contract, or promise” to be in writing; it does not require each and every term of the agreement, contract, or promise to be in writing. The addendum, by its own terms, was “a part of, and incorporated as though fully set forth within” the purchase agreement. Plaintiff exercised its right of first refusal “on the terms and conditions contained in the Third Party Offer[,]” and the addendum was part of the terms and conditions of defendant Trauben’s third party offer. The fact that the addendum was not signed by defendant Trauben until one day after plaintiff exercised its right of first refusal is of no import because the addendum was executed and existed at the time plaintiff exercised its right of first refusal. The addendum, along with the purchase agreement, established the terms and conditions of defendant Trauben’s third party offer to purchase the property. Because plaintiff agreed to be bound by the terms and conditions of the third party offer if it exercised its right of first refusal, defendant Trauben’s signatures on both the purchase agreement and the addendum are “authorized signature[s]” sufficient to satisfy MCL 566.132(1)(e).

Because I believe that the statute of frauds was satisfied in this case, I would affirm the trial court’s decision ordering plaintiff to pay the \$100,000 brokerage commission to Friedman.

/s/ Stephen L. Borrello