

STATE OF MICHIGAN
COURT OF APPEALS

SCHOSTAK BROTHERS & COMPANY,

Plaintiff-Appellant,

v

DURANT ENTERPRISES and MERIDIAN
MALL ASSOCIATES,

Defendants-Appellees.

UNPUBLISHED

April 19, 2002

No. 223925

Genesee Circuit Court

LC No. 95-035363-CK

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

This matter is before this Court pursuant to our Supreme Court's orders remanding this case for consideration as on leave granted. See 457 Mich 853 (1998) and 461 Mich 928 (1999). Plaintiff challenges the trial court's order granting Durant Enterprises' motion for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiff's motion for summary disposition. We affirm.

The relevant facts are not in dispute. Durant leased approximately 21,000 square feet of space in the Meridian Mall from Meridian Mall Associates. Durant subleased all but 5,100 square feet of its space to AMC Theatres. Durant subsequently entered into a listing agreement with plaintiff (a real estate broker), under which plaintiff agreed to be Durant's exclusive agent to find a tenant to sublease the 5,100 square feet of space. The listing agreement provided for payment of a six percent commission to plaintiff in the event of (1) a sublease of the premises by a third party; or (2) cancellation of the underlying lease. Thereafter, plaintiff began to market the property. After approximately six months, Durant commenced negotiations with its landlord, Meridian Mall Associates, to "buy out of its lease." On January 1, 1995, during the term of the listing agreement, Durant "assigned" its lease and sublease with AMC Theaters to Meridian Mall. The assignment to Meridian Mall covered the 5,100 square feet described in the listing agreement between plaintiff and Durant. The assignment provides, in pertinent part:

This Assignment of Lease ("Assignment") dated as of January 1, 1995 by and between DURANT ENTERPRISES, INC., a Michigan corporation ("Assignor"), and MERIDIAN MALL ASSOCIATES LIMITED, an Ohio limited liability company ("Assignee").

* * *

NOW, THEREFORE, Assignor, for valuable consideration received, does hereby assign, transfer and quit claim the Lease to Assignee, subject to and without terminating the AMC Sublease.

Assignor and Assignee agree that there shall be no merger of estates and that the Lease and the AMC Sublease shall remain in full force and effect.

Assignor also assigns, transfers and quit claims to Assignee all of Assignor's right, title and interest in and to the AMC sublease.

Assignee hereby accepts such assignment. Assignee agrees to be bound by all of the terms and provisions of the Lease and Sublease accruing after the date hereof.

Plaintiff thereafter commenced this action, alleging, *inter alia*, breach of contract by Durant and seeking a commission under the listing agreement. After the parties filed cross motions for summary disposition, the trial court ruled that the assignment was not "a transaction in contemplation of the listing agreement" and granted Durant's motion.

On appeal, although acknowledging that the essential facts are not in dispute and that assignment was not a commissionable event under the listing agreement, plaintiff argues that the trial court should have ruled that Durant's assignment of its lease to Meridian Mall Associates effectively canceled the lease between Durant and Meridian, thereby entitling plaintiff to its commission under the listing agreement. Durant does not deny that it would owe a commission to plaintiff if the underlying lease was canceled. However, Durant claims that the underlying lease was assigned to Meridian, not canceled. Thus, the pivotal question in this case is whether Durant's assignment to Meridian effectively "canceled" the underlying lease, thereby entitling plaintiff to a commission under the listing agreement with Durant.

Where provisions of a contract are clear and unambiguous, the contract language is to be construed according to its plain sense meaning. *Ditzik v Schaffer Lumber Co*, 139 Mich App 81, 89; 360 NW2d 876 (1984). The language of a listing agreement governs the broker's entitlement to a commission. *Id.* at 90. The listing agreement between plaintiff and Durant specifically provides that "*cancellation* of the remaining term of the underlying lease . . . shall constitute a sublease of the property by broker . . . entitling broker to its commission." Thus, the listing agreement provides, on its face, that cancellation of the lease is a commissionable event. The listing agreement, however, does not provide that "assignment" of the lease is a commissionable event. Therefore, the plain language of the listing agreement does not support plaintiff's position that assignment of the underlying lease entitles it to a commission under the listing agreement. Nonetheless, plaintiff contends that the assignment effectively canceled the lease, thus entitling it to a commission. The cases cited by plaintiff do not address the issue presented and do not mandate the result advocated by plaintiff.

Furthermore, although plaintiff claims that the assignment canceled the underlying lease between Durant and Meridian, the plain language of the assignment indicates otherwise. The assignment indicates, on its face, that it does not operate to cancel the lease between Durant and Meridian. Specifically, the assignment provides that there would be "no merger of estates and that the Lease [between Durant and Meridian] and the AMC Sublease shall remain in full force

and effect” and that Meridian agreed “to be bound by all of the terms and provisions of the Lease and Sublease accruing after the date hereof.” This presumably would include the rights and obligations under the listing agreement. Thus, if the vacant portion of the premises were leased by Meridian Mall Associates during the remaining term of the listing agreement, plaintiff could be entitled to a commission. This differs from a cancellation contemplated by the listing agreement, under which plaintiff would have no possibility of earning a commission. Moreover, Meridian’s attorney submitted an affidavit indicating that he prepared the assignment and that it was his “express intent, as counsel acting on behalf of Meridian, that the Lease from Meridian to Durant not be terminated as the termination of that Lease might have caused the termination of the Sub-lease from Durant to AMC.” Plaintiff offered no evidence to contradict the attorney’s assertions that the parties did not intend to cancel or terminate the underlying lease.

Under these circumstances, the trial court properly determined that the assignment was not a cancellation of the lease and, therefore, that plaintiff was not entitled to a commission under the listing agreement.

To the extent plaintiff claims that Durant entered into the “assignment” in an effort to thwart plaintiff’s right to a commission, the undisputed evidence does not support this claim. The attorney for Meridian submitted an affidavit indicating that he drafted the assignment and that he inserted the language that “there shall be no merger of estates and that the Lease and the AMC Sublease shall remain in full force and effect” in the assignment “in order to guard against the Assignment being interpreted as terminating the Sub-lease of Durant to [AMC] as the Sub-lease to AMC was a valuable asset being acquired by Meridian,” not to prevent plaintiff from obtaining a commission. Plaintiff provided no evidence to dispute the attorney’s claims. Thus, no evidence was presented to indicate that Durant entered into the assignment in an attempt to thwart plaintiff’s entitlement to a commission.

Lastly, with regard to plaintiff’s claim that it is entitled to a commission under the listing agreement on a tort theory based on Durant’s alleged interference with plaintiff’s efforts to procure a subtenant for the vacant space, this claim is not properly before this Court. The only issue raised in plaintiff’s motion for summary disposition and during the hearing on the cross motions for summary disposition was whether the assignment of the lease between Durant and Meridian constituted a cancellation of the lease, thereby entitling plaintiff to a commission under the listing agreement. Furthermore, the breach of contract claim was the only claim addressed by the trial court. Additionally, following summary disposition in favor of Durant, the parties stipulated to dismiss plaintiff’s remaining claims against Durant and Meridian, including the tortious interference claim. Because plaintiff stipulated to dismiss the tortious interference claim below, plaintiff may not now raise this claim on appeal. *Farm Credit Services of Michigan’s Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998).¹

¹ Even if this claim were properly before this Court, plaintiff would not be entitled to relief on this basis. It is axiomatic that Durant could not tortiously interfere with its own contract. To maintain a cause of action for tortious interference, the plaintiff must establish that the defendant was a third party to the contract or business relationship. *Reed v Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993); *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 (continued...)

By its clear terms, the assignment of the lease between Durant and Meridian did not cancel the lease. Accordingly, the trial court did not err in granting summary disposition to Durant under MCR 2.116(C)(10) because application of the undisputed facts to the clear terms of the assignment agreement compels judgment in Durant's favor. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Affirmed.

/s/ Kathleen Jansen

/s/ Donald E. Holbrook, Jr.

/s/ Richard Allen Griffin

(...continued)

NW2d 610 (1986). Durant was one of the two principal parties to the listing agreement, not a third party to the agreement.