

[J-14AB-2019]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

BINSWANGER OF PENNSYLVANIA, INC.,	:	No. 30 EAP 2018
	:	
Appellee	:	Appeal from the Judgment of Superior
	:	Court entered on December 26, 2017
	:	at No. 2372 EDA 2015 affirming the
v.	:	Order of the Court of Common Plea of
	:	Philadelphia County, Civil Division,
	:	entered on June 11, 2015 at No.
	:	000901, February Term 2014.
TSG REAL ESTATE LLC,	:	
	:	ARGUED: March 6, 2019
Appellant	:	
BINSWANGER OF PENNSYLVANIA, INC.,	:	No. 31 EAP 2018
	:	
Appellee	:	Appeal from the Judgment of Superior
	:	Court entered on December 26, 2017
	:	at No. 2524 EDA 2015 affirming the
v.	:	Order of the Court of Common Pleas
	:	of Philadelphia County, Civil Division,
	:	entered on June 11, 2015 at No.
	:	000901, February Term 2014.
TSG REAL ESTATE, LLC,	:	
	:	ARGUED: March 6, 2019
Appellant	:	

OPINION

JUSTICE TODD

DECIDED: September 26, 2019

In this appeal by allowance, we consider the entitlement to broker commissions for the sale of commercial property. For the reasons that follow, we affirm the order of the Superior Court.

TSG Real Estate, LLC (“TSG”) is a real estate company that owned a commercial property in Montgomery County at 1400 Welsh Road, North Wales, Pennsylvania (the “Property”). Initially, TSG hired New Hart Corporation d/b/a Hart Corporation (“Hart”) as its broker to market the Property. As TSG’s agreement with Hart was to expire, TSG began considering replacement brokers, one of which was Binswanger of Pennsylvania, Inc. (“Binswanger”). Two days before TSG informed Binswanger of its decision to hire it as its broker, on September 18, 2013, TSG received a written offer from TWA Holdings, LLC (“TWA”) to purchase the Property for \$3.7 million. On September 20, 2013, TSG negotiated an agreement with Binswanger culminating in a September 27, 2013 “Exclusive Right To Sell Or Lease Agreement” (“Broker Agreement”) with Binswanger.

The Broker Agreement permitted TSG to continue using other brokers in connection with any sale to TWA, and provided, *inter alia*, (1) if Binswanger sold the Property, it would be entitled to a 5% commission; (2) all commissions would be considered to be earned and payable “at the time scheduled for closing on a sale;” (3) a “carve-out period” which allowed that if another broker “completed” a sale, exchange, or transfer of the Property to TWA on or before January 5, 2014, Binswanger would earn no commission; (4) if another broker completed a sale of the Property to TWA after January 5, 2014, the other broker and Binswanger would split a 5% commission; and (5) the duration of the agreement was for one year; however, TSG had the right to terminate the agreement after 6 months with 30 days prior written notice to Binswanger.¹

¹ Specifically, the Broker Agreement provides, *inter alia*:

Except with respect to any transaction, sale, or exchange involving the Excluded Entities, [Binswanger] is hereby given the sole and exclusive right to list and offer for sale and lease for [TSG’s] account [the Property], provided that [Binswanger] agrees by listing and otherwise, to use its best efforts to sell

and lease the Property until this Agreement is terminated as herein provided.

EXCEPT WITH RESPECT TO THE EXCLUDED ENTITIES, IF THE PROPERTY, OR ANY PART THEREOF, IS SOLD OR LEASED, OR IF A PURCHASER OR TENANT WILLING TO BUY OR LEASE ON TERMS SATISFACTORY TO [TSG] IS PROCURED PRIOR TO THE TERMINATION OF THIS AGREEMENT (OR AFTER SUCH TERMINATION AS HEREINAFTER SET FORTH), NO MATTER BY WHOMSOEVER THE PROPERTY MAY BE SOLD, TRANSFERRED, CONVEYED, EXCHANGED OR LEASED OR SUCH PURCHASER OR TENANT PROCURED, WHETHER BY [BINSWANGER] OR BY [TSG] DIRECTLY OR BY ANY OTHER ENTITY WHATSOEVER, THEN, IN ANY SUCH EVENT, OWNER AGREES THAT [BINSWANGER] SHALL HAVE EARNED A COMMISSION AND [TSG] AGREES TO PAY TO AGENT A SALE OR LEASE COMMISSION AS FOLLOWS:

SALE-FIVE PERCENT (5%) OF THE GROSS AGGREGATE PURCHASE PRICE;

* * *

All commissions under this Agreement shall be considered earned and shall be due and payable at the time scheduled for closing on a sale. Upon closing of or any transfer or sale of the Property, the party responsible for closing is hereby authorized and directed by [TSG] and [Binswanger] to deduct the commission due from the proceeds of sale or transfer and pay same to [Binswanger]. . . . In the event a purchaser . . . is procured by another broker other than [Binswanger], [Binswanger] agrees to split any sale or lease commission with the other broker.

Notwithstanding anything in this Agreement to the contrary, a commission shall not be earned by, or be payable to, [Binswanger] in connection with: . . . (c) sales, exchanges, or other transfers to Ancillare, Inc., [TWA], Jerry McBride, or any other entity owned by, controlled by, or associated with any of the foregoing (the "Excluded Entities"), to the extent that such sale, exchange or transfer is completed on or before January 5, 2014.

* * *

On January 3, 2014, two days prior to the expiration of the carve-out period contained in the Broker Agreement, TSG, via Hart and another broker, Gelcor Realty (“Gelcor”), entered into an Agreement of Sale with TWA, selling the Property for \$3.4 million. According to the Agreement of Sale, TWA was to deliver to an escrow agent a deposit of \$50,000 upon the execution of the Agreement of Sale and an additional deposit of \$150,000 at the expiration of a “due diligence period” — 60 days from the date of execution of the Agreement of Sale. (Agreement of Sale at 1, 8.) In the event TWA failed to fulfill and perform any of the terms and conditions of the Agreement of Sale, TSG was entitled to retain both the deposit and the additional deposit. TSG retained the right to market the Property during the due diligence period; however, it had no right to terminate the Agreement of Sale. The Agreement of Sale further provided that legal title to the Property was to pass to TWA at closing. The Agreement of Sale contained two conditions to closing: a mortgage contingency that required TWA to obtain a mortgage commitment of no less than \$2 million prior to the expiration of the due diligence period; and a contingency that permitted TWA to terminate the agreement at any time, and for any

This Agreement shall be for a term of one (1) year, beginning from the date set forth above; provided, however, that [TSG] shall have the right to cancel this Agreement after six (6) months with thirty (30) days prior written notice to [Binswanger]. [TSG] may exercise this right in its sole and absolute discretion. After the termination of [Binswanger’s] exclusive right, [Binswanger’s] authority shall continue as to those entities with whom [Binswanger] has communicated the offering of the Property for sale or lease so that if, within sixty (60) days of the termination of this Agreement, the Property is sold or leased to any such entity . . . whether by [Binswanger] or by [TSG] directly or by any other agent, or person whomsoever, a full commission as herein prescribed shall be paid to [Binswanger].

Broker Agreement at 1-2 (alterations added).

reason, during the due diligence period. Finally, the Agreement of Sale identified two brokers, Hart and Gelcor, which would be entitled to commissions at the time of closing; Binswanger was not identified as a broker.

On January 7, 2014, Binswanger communicated to TSG that it was owed a commission on the sale of the Property to TWA. Nine days later, on January 16, 2014, TSG sent a letter of intent to terminate the Broker Agreement with Binswanger, effective March 26, 2014.

Thereafter, on February 10, 2014, Binswanger filed a complaint against TSG, which it subsequently amended, seeking declaratory relief, breach of contract, and breach of the duty of good faith and fair dealing, and, ultimately, seeking a 5% commission on the sale of the Property pursuant to the Broker Agreement. On April 24, 2014, TSG and TWA closed on the Property.

In the ensuing legal proceedings, TSG filed an answer and new matter, arguing that Binswanger was not entitled to a commission because the “sale” of the Property was completed at the execution of the Agreement of Sale pursuant to the equitable conversion doctrine. According to TSG, the equitable conversion doctrine provides that, in an enforceable contract, the legal interest in the property remains with the seller, while the equitable interest transfers to the buyer; this divergence remains until the buyer complies with its obligation to pay and the transaction has been completed, at which time both legal and equitable titles belong to the buyer. Thus, TSG stressed that Binswanger could not obtain a commission because the sale of the Property to TWA — due to the Agreement of Sale being executed on January 3, 2014 — was complete before the expiration of the carve-out period on January 5, 2014.

Binswanger filed preliminary objections to TSG’s counterclaims arguing that the “sale” of the property occurred on April 24, 2014, the date legal title passed to TWA, and,

as such, Binswanger was entitled to a commission. In January 2015, the parties filed cross-motions for summary judgment.

On July 15, 2015, the Philadelphia County Court of Common Pleas granted summary judgment in favor of Binswanger, finding that execution of the Agreement of Sale did not constitute a completed sale. Specifically, the trial court noted that, when an agreement of sale for real estate is executed and delivered, the purchaser is vested with equitable title to the real estate so long as the sale of land is free from conditions which are beyond the control of the parties. According to the trial court, the Agreement of Sale between TSG and TWA contained a mortgage contingency, and, thus, equitable title did not transfer at the time the Agreement of Sale was signed. The trial court also noted that the doctrine of equitable conversion applies only to the parties to the contract and cannot be extended to others. In that regard, the trial court found that the rights and obligations under the Agreement of Sale involved only TSG and TWA, the signatories thereto; accordingly, the issue of equitable title to the Property under the Agreement of Sale was distinct from issues arising under the Broker Agreement. Based upon these findings, the trial court found that the sale was not completed until April 24, 2014, when TWA obtained a mortgage and closed on the Property; thus, Binswanger was entitled to one-third of a 5% commission pursuant to the commission-splitting provision. TSG appealed to the Superior Court, and Binswanger filed a cross-appeal.

A three-judge panel of the Superior Court, in an unpublished memorandum opinion, affirmed. *Binswanger of Pennsylvania, Inc. v. TSG Real Estate LLC*, 2372 EDA 2015 (Pa. Super. 2017). The court noted that, when an unconditional agreement for sale of land is signed, the purchaser becomes the equitable owner under the equitable conversion doctrine. However, the court found that the Agreement of Sale in this case was conditional in that (1) the due diligence period provided TWA with 60 days to

terminate the Agreement of Sale, after which TWA was required to pay a deposit of \$150,000, and (2) TWA was required to exercise good faith in obtaining mortgage financing.

The Superior Court rejected TSG's reliance on *Filsam Corp. v. Dyer*, 422 F. Supp. 1126 (E.D. Pa. 1976), in which a federal district court found the doctrine of equitable conversion to be applicable, even where a buyer's purchase of property in Pennsylvania was conditional upon seller making repairs and alterations to the property, because such conditions were within the control of the parties. The Superior Court reasoned that, federal decisions were not binding on Pennsylvania courts, and that, at any rate, *Filsam* was distinguishable, as that case involved minor formalities that did not amount to a condition precedent, whereas, in this case, the due diligence period and the attendant requirements therein as well as the mortgage requirement were conditions precedent to the contractual relationship. Thus, the Superior Court concluded that, in the instant case, because the Agreement of Sale was conditional, and because the sale of the Property was not completed at the time the Agreement of Sale was executed, but at closing, which was after the carve-out period, Binswanger was entitled to a commission.

We granted allocatur to consider the entitlement of a broker to a commission after an agreement of sale was executed and whether conditions in the agreement preclude the application of the doctrine of equitable conversion.² Our review on an appeal from the grant of a motion for summary judgment is well settled: a reviewing court may reverse the order of the trial court only where it is established that the court committed an error of law or abused its discretion. *Capek v. Devito*, 767 A.2d 1047, 1048 n.1 (Pa. 2001). As

² Specifically, as stated by Appellant, we granted review to consider the following question: “[w]here an agreement of sale for Pennsylvania real estate is final and binding as to the seller, but contains typical and routine buyer-friendly conditions, is the centuries-old doctrine of equitable conversion rendered inapplicable?” *Binswanger of Pennsylvania, Inc. v. TSG Real Estate LLC*, 192 A.3d 1112 (Pa. 2018) (order).

such review raises a question of law, our review is plenary. *Phillips v. A-Best Products Co.*, 665 A.2d 1167, 1170 (Pa. 1995).

TSG focuses exclusively on the equitable conversion doctrine, asserting that it controls Binswanger's entitlement to a commission. TSG initially points out that our Court, in *Bauer v. Hill*, 110 A. 346 (Pa. 1920), defined a "sale" as "a contract between parties, . . . to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." *Id.* at 347. TSG contends that TWA became the equitable owner of the Property upon execution of the Agreement of Sale under the doctrine, despite the mortgage financing and due diligence contingencies; thus, the sale was complete at this time. TSG urges that most, if not all, agreements of sale are conditional, and that deciding otherwise would relieve every seller of real property any specific performance remedy as long as the sales contract contains buyer-friendly contingencies.

TSG further maintains that, pursuant to *Filsam*, equitable conversion is barred where the condition must be accomplished before the contract can become operative; but, where the conditions are within the control of the parties, the doctrine applies. TSG supports its argument with citations to various cases from other jurisdictions, including *SMS Fin., LLC v. CBC Fin. Corp.*, 417 P.3d 70 (Utah 2017), and *Southport Congregational Church--United Church of Christ v. Hadley*, 128 A.3d 478 (Conn. 2016), which held that conditions which could be waived by the buyers did not preclude the application of the equitable conversion doctrine. Finally, TSG contends that public policy requires reversal of the Superior Court, as, in its view, the court's decision creates confusion as to when a sale of property occurs, and, if left to stand, would replace the doctrine of equitable conversion with a factual, case-by-case analysis.

Binswanger responds that the Superior Court decision should be affirmed because the equitable conversion doctrine is inapplicable, given the various conditions in the Agreement of Sale. Binswanger argues that, pursuant to *Bauer*, in order for the doctrine to apply, the agreement must be unconditional, and, here, TWA could not waive the Agreement's conditions. Specifically, Binswanger points out that, pursuant to the Agreement of Sale, TWA "shall" obtain a mortgage commitment during the due diligence period, creating an obligation upon TWA to obtain financing or the Property would not be sold. Binswanger also notes that as TSG was permitted to market the Property during the due diligence period, this condition rendered the sale incomplete at execution.

Binswanger refutes TSG's reliance upon *Filsam*, claiming that decision actually supports Binswanger's argument because the contingency here, a mortgage commitment, unlike the repairs at issue in that case, is not in the control of the parties. Additionally, Binswanger notes that the cases from other jurisdictions relied upon by TSG, where the buyers were free to waive the conditions pursuant to the plain language in the implicated agreements, do not apply in this case, as the plain language of the Agreement of Sale required binding and non-waivable conditions. Binswanger adds that the doctrine of equitable conversion does not extend to third parties and, in this context, if the doctrine extended to third parties, consumers would be required to pay brokerage commissions even if legal title to a property was never transferred. Finally, Binswanger argues that the plain language of the Broker Agreement provided that the "sale" must be completed before January 5, 2014, and that the term "sale" is unambiguous and must be given its commonly accepted meaning. Binswanger further points out that TSG retained title to the Property after signing the Agreement of Sale and that TWA did not seek to eject TSG from the Property after signing the Agreement. Binswanger reiterates that the Agreement

of Sale unambiguously stated that the legal title to the Property would pass to TWA at closing and, thus, that the completed sale of the Property did not occur until that time.

We begin our analysis by reviewing certain foundational principles. This appeal, first and foremost, is one of contract interpretation. The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the parties. *Murphy v. Duquesne University of the Holy Ghost*, 777 A.2d 418, 429 (Pa. 2001). Specifically, the intent of the parties to a contract is to be regarded as embodied in the writing itself, and, as such, the entire agreement must be taken into account in determining contractual intent. *Id.* Indeed, a reviewing court does not assume that contractual language is chosen carelessly, nor does it assume that the parties were ignorant of the meaning of the language they employed; thus, when a writing is clear and unequivocal, its meaning must be determined only by its terms. *Id.* Related thereto, “[b]efore a court will interpret a provision in a statute or in a contract in such a way as to lead to an absurdity or make the statute or contract ineffective to accomplish its purpose, it will endeavor to find an interpretation which will effectuate the reasonable result intended.” *Pocono Manor Association v. Allen*, 12 A.2d 32, 35 (Pa. 1940).

The focal point of our inquiry, therefore, must begin with the Broker Agreement, as Binswanger’s entitlement to a commission is founded on whether there was a “sale” thereunder. Indeed, the Broker Agreement contains a clause limiting the entire agreement between the parties to the terms contained therein. Broker Agreement at 3. Oddly, however, the parties’ positions largely concentrate on the Agreement of Sale, and whether and when the “sale” of the Property was completed under that document. In fact, TSG focuses exclusively on the doctrine of equitable conversion as support for its position that the execution of the Agreement of Sale represented a completed “sale” prior to January 5, 2014, which, in turn, would act to deny Binswanger any commission. While

TSG's and Binswanger's arguments in this regard each carry some force, they are misdirected in our view, as they pass over the essential first step of considering the terms of the Broker Agreement to ascertain the intent of the parties. An examination of the Broker Agreement's provisions is jurisprudentially required; thus, we turn to consideration of the contractual terms in that document.

The Broker Agreement between TSG and Binswanger, provides in relevant part, that "if the Property, or any part thereof, is sold . . . prior to the termination of this agreement . . . [TSG] agrees that [Binswanger] shall have earned a commission and [TSG] agrees to pay to [Binswanger] a sale . . . commission . . . [of] five percent (5%) of the gross aggregate purchase price." *Id.* at 1.³ Importantly, the Broker Agreement goes on to explain that "[a]ll commissions under this Agreement shall be considered earned and shall be due and payable at the time scheduled for closing on a sale." *Id.*

The Broker Agreement continues, however, by defining the carve-out period during which Binswanger would not earn a commission: "Notwithstanding anything in this Agreement to the contrary, a commission shall not be earned by, or be payable to [Binswanger] in connection with: . . (c) sales, exchanges, or other transfers to Ancillare, Inc., [TWA], Jerry McBride, or any other entity owned by, controlled by, or associated with any of the foregoing (the "Excluded Entities"), to the extent that such sale, exchange or transfer is completed on or before January 5, 2014." *Id.* at 2.

Thus, while the Broker Agreement does not expressly define the terms "sold" or "sale," or define when a sale is "completed," we find that the expressions determining when commissions are "earned" informs all other provisions and manifests the intent of

³ The "[g]ross aggregate purchase price" "shall be the full cash consideration plus the principal amount of all mortgage and other liens on the purchased property, whether created by the purchaser in [TSG's] favor, or subject to which the purchaser accepts title to the Property." Broker Agreement at 1.

the parties. Under the plain terms of the Broker Agreement, when the Property is sold, Binswanger earns a commission; however, this mandate is explicated by the immediately following provision which states that commissions are deemed to be earned at the time scheduled for closing. Thus, taking these two provisions together, for commission purposes, the time of the sale (when the Property is “sold”) and the time scheduled for closing are synonymous — the sale takes place at the time of the closing. This interpretation, in turn, gives meaning to the operation of the carve-out period and Binswanger’s earning of (or failure to earn) commissions thereunder. Specifically, the carve-out period provision excludes Binswanger from earning a commission on any “sale” that is “completed” on or before January 5, 2014. Coupling the earning of broker commissions when the property is “sold” with the explanation that commissions are earned at closing, results in the logical and internally consistent understanding that, for purposes of the carve-out period provision, the “sale” of the Property is “completed” only at the time scheduled for closing — when commissions are “earned.”

Indeed, if we were to adopt TSG’s interpretation of the carve-out period — that the signing of the Agreement of Sale constitutes a completed sale — the Broker Agreement would be internally inconsistent, giving the concept of the earning of the commissions two conflicting meanings — one when a sales agreement is executed and one at the closing on the sale. This simply could not be the intent of the parties.

Accordingly, applying the plain and unambiguous language of the Broker Agreement, we find that the sale of the Property was completed at the time of closing, *i.e.*, on April 24, 2014.⁴ As the sale was not completed on or before January 5, 2014, but

⁴ Given our analysis of the plain terms of the Broker Agreement, we need not reach the arguments of the parties regarding *whether* a sale occurred, in a generic sense, at the time of execution of the Agreement of Sale under the doctrine of equitable conversion.

only after the carve-out period had expired, Binswanger was entitled to a commission pursuant to the Broker Agreement fee schedule.⁵

For the foregoing reasons, we affirm the order of the Superior Court.

Jurisdiction relinquished.

Justices Baer, Donohue, Dougherty, Wecht and Mundy join the opinion.

Chief Justice Saylor files a dissenting opinion.

⁵ The Superior Court determined that the plain language of the Broker Agreement required Binswanger to split the commission with Hart and Gelcor.