

IN THE COURT OF APPEALS OF IOWA

No. 2-122 / 11-0214
Filed April 25, 2012

JO ERNST,
Plaintiff-Appellant,

vs.

**BRUCE R. ENGEL and
THE ENGEL AGENCY, INC.,**
Defendants-Appellees.

Appeal from the Iowa District Court for Jackson County, Bobbi M. Alpers,
Judge.

Real estate salesperson appeals the district court's ruling in favor of a real
estate brokerage. **REVERSED AND REMANDED.**

Mark R. Lawson of Mark R. Lawson, P.C., Maquoketa, for appellant.

Steven J. Kahler of Schoenthaler, Roberg, Bartelt & Kahler, Maquoketa,
for appellees.

Heard by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

EISENHAUER, C.J.

Jo Ernst appeals the district court's denial of her claims against her former real estate brokerage firm for unpaid and underpaid real estate commissions. We reverse and remand.

I. Background Facts and Proceedings.

Jo has taught school in Bellevue for over thirty years. Since 1987, she has also worked as a licensed real estate salesperson. In Iowa, licensed real estate salespersons must be affiliated with a broker. First, Jo was affiliated with broker Ken Mozena of Tri-State Realty. In 1990, Jo affiliated with brokers Bill and Connie Caven of The Caven Agency in Bellevue.

In July 2007, The Caven Agency was sold to The Engel Agency, Inc., an Iowa corporation based in Maquoketa. Engel Agency took over Caven Agency's Bellevue offices and phone number. Bruce Engel is the designated broker for Engel Agency. Bruce and Jo discussed Jo's status, and Jo's salesperson's license was transferred to Bruce. Jo continued to work out of the Bellevue office.

It is undisputed: (1) there is no written agreement concerning the commissions Engel Agency would pay to Jo; (2) Bruce, on behalf of Engel Agency, and Jo orally agreed to continue the commission split Caven Agency had been using; and (3) there is no written agreement between Engel Agency and Jo specifying when a commission is earned.

The parties dispute whether they orally agreed to when Jo *earned* her commissions. Jo testified:

Q. And you understood after this negotiation with Mr. Engel that as a licensed real estate salesperson you were going to be

performing services for The Engel Agency, Inc., and not for Bruce individually, correct? A. Yes.

Q. And as part of that agreement, you understood that your commissions were going to be earned when the sale was completed and closed/ isn't that true? A. No.

Q. . . . And prior to this lawsuit, would it be fair to say that you never claimed that you had earned a commission before a sale closed? A. I had earned it, but I hadn't gotten it.

Engel Agency orally agreed to pay, and for two years paid, the following percentages to Jo: (1) Jo both lists and sells property, Jo receives sixty-five percent of Engel Agency's commission; (2) Jo lists property and another agent sells property, Jo receives forty percent of Engel Agency's commission; and (3) Jo procures a buyer for property listed by another agent, Jo receives sixty percent of Engel Agency's commission.

On November 16, 2009, Jo filed suit against Engel Agency¹ seeking payment of real estate commissions under an oral contract.² Jo's claim involves four transactions with closings pending at the time she left Engel Agency. Some of these purchase contracts contained contingencies yet to be met at the time Jo left the brokerage, but eventually all contingencies were met and all four transactions closed.

At the October 2010 bench trial, Jo testified Bruce Engel attended most, if not all, of the closings Jo handled during the two years she worked for Engel Agency. Jo described a broker's responsibilities:

¹ Jo also sued Bruce R. Engel individually. The trial court denied relief and Jo does not appeal this ruling.

² Jo also claimed damages and attorney fees under Iowa Code chapter 91A (2009), Wage Payment Collection. The trial court denied relief. Because we conclude Jo earned her commissions under Iowa common law, we do not address her arguments under chapter 91A.

The four brokers that I have worked with . . . are all similar. After I have done the paperwork and the listing and the selling and made arrangements for any tests that need to be taken or inspections . . . the brokers that I have worked with have then done the closing statement, they have reviewed the title opinion, any paperwork that I have they have reviewed it and then made the closing statement and attended the closings. They have maintained an office that I have been in Paid advertising. Provided . . . an office, telephone, fax machine

In mid-July, Bruce told Jo he was going to close the Bellevue office of Engel Agency. Bruce stated he would be willing to let Jo continue her affiliation, but she would have to work out of Maquoketa. A week later, on July 22, 2009, Jo met with Bruce at his Maquoketa office. Jo told Bruce driving to Maquoketa would not be a viable option for her. Bruce declined Jo's request he continue to rent an office for her in Bellevue. Jo testified:

A. . . . And then I asked him about my current listings and he said that they would stay with him.

Q. Now, those would be properties that you had listed for sale and had not sold? A. Correct.

. . . .
Q. Did you have any problem with that? A. No, I understood that they stay with the broker.

Q. Did you have any other discussions with him about transactions that were pending? A. Yes. [Bruce] said that he . . . would honor any of the transactions—any of the closings that were yet to come, he would honor those.

. . . .
Q. . . . What did you take that to mean? A. I took it to mean that when they closed, I would get paid my commissions as I had been getting paid.

Bruce also testified about the Maquoketa meeting and agreed he told Jo her current unsold listings would stay with Engel Agency.³ However, Bruce denied telling Jo he would honor her four pending closings. Rather, Bruce

³ In this regard, Jo and Engel Agency followed Iowa Administrative Code rule 193E-7.12(4) (stating listings remain the property of the broker or firm).

testified he informed Jo he “would allow her to keep working on [pending] transactions” as long as the Bellevue office was open “to help facilitate those transactions, and if she did that, then I would pay her the commission.”

Also on July 22, Jo put a sign in Engel Agency’s Bellevue office window with her new real estate phone number. Jo was planning to affiliate with broker Norm Nielsen of Associated Real Estate Counselors. Bruce was unhappy when he saw the sign.

On July 23, Bruce asked Jo to come to the Bellevue office, told her he was unhappy with the sign, and asked her to leave the office. Jo turned over the house key for one pending sale’s septic inspection and left. At that time, Jo knew Engel Agency “would be responsible for closing them, because I was no longer affiliated with it.” The Engel Agency’s Bellevue office ended operations on July 31, 2009. Jo’s four pending real estate sales transactions subsequently closed and commissions were paid to Engel Agency.

On August 21, Bruce sent Jo a check for \$3647.50 and a note stating: “Enclosed is a commission check for the Goetz/Clausen closing. This is a 50% split of the total commission. This closed today 8-21-09.” Jo testified her sixty-five percent share under the oral commission schedule is an additional \$1094.25.

Less than a month later, on September 11, Bruce sent Jo another check with a note discussing Jo’s final three Engel Agency real estate transactions:

Enclosed is a check for \$3043.94. This is for your split of commission on the Theisen sale and the Hurley sale. The Theisen sale resulted in a commission of \$3534 to the agency after some adjustment/accommodations at closing. I am paying you 50% (\$1767) of that amount. The Hurley closing resulted in extra work in getting it closed, so I am paying you 35% of that commission (\$1276.94).

You will not be receiving any commission on the Niewerth sale. The whole deal was almost sabotaged by you telling the seller that the deal was dead and you had someone else you wanted show the house to. It took a lot of work on my part to save the deal, get extensions and agreements signed, meet inspectors at the house, follow-up on inspections reports, plus all of the closing arrangements and work involved to get this deal done.

At trial, both parties agreed Jo was neither the listing agent nor the selling agent at the time the four transactions closed because Jo had left Engel Agency. Bruce testified he determined he was not legally obligated to pay a commission to Jo after he talked with the legal division of the Iowa Realtor's Association. Bruce asserted the commission payments to Jo on the sales pending when she left Engel Agency were gratuitously made in the hopes of maintaining a good working relationship with her in the future.

We observe neither note states Jo did not earn the enclosed commissions but was being paid gratuitously. Further, the "you will not be receiving any commission" language in the second note demonstrates Engel Agency's recognition that, as of September 2009, Jo expected to receive a commission split on the Niewerth transaction.

Bruce explained the fifty percent commission payments to Jo were the same amount Engel Agency would have paid a cooperating broker: "We normally split fifty percent. And so on those two transactions I decided I was going to go ahead and have The Engel Agency pay her fifty percent." Bruce also explained his decision to pay Jo thirty-five percent on the Hurley transaction:

The Hurley deal just took a little bit more time, more trips to Bellevue, more expense on my part and so I just decided that I was going to pay her a lesser amount on that one. Or that Engel Agency was going to pay her a lesser amount on that one.

Additionally, Bruce acknowledged these payments were “less than the oral agreement for associates currently associated with my agency.”

Jo testified she was owed forty percent on the Hurley transaction, an additional \$203.06, and sixty-five percent on the Theisen transaction, an additional \$530.10, under the oral commission schedule.

The Niewerth/Putman sale was first scheduled to close by July 27, 2009. After several delays, it closed on August 14, 2009, and Engel Agency received a commission of \$10,800. Jo stated her sixty-five percent share is \$7020. Therefore, Jo’s unpaid and underpaid commissions total \$8847.41.

Jo’s testimony she did not act to “sabotage” the Niewerth transaction was supported by the testimony of Ryan Putman, the purchaser of the Niewerth property, and Ronald Besch, the Niewerths’ attorney, who testified:

Q. . . . Did you see anything in connection with this transaction which would lead you to believe that [Jo] sabotaged this deal by telling the seller the deal was dead? Do you know anything that would support that statement? A. No All along I was preparing for the ultimate closing and did not do anything different.

Q. Then the statement that somehow it sabotaged the deal by Jo telling the sellers she had someone else she wanted to show the house to, that apparently was in accord with your client’s wishes, correct? A. Yes, that’s what they wanted

At trial, Jo and Bruce’s testimony differed on their discussions concerning when a commission was *earned*. Jo testified:

Q. Did you and Bruce ever have a discussion as to when you earned a commission? In other words, was it earned at the time you procured a buyer or was it earned at the time the transaction closed? Did the two of you ever have that discussion? A. No.

. . . .

Q. And in your view when did you complete a sale? A. When the purchase agreement was signed by both parties.

Bruce acknowledged Engel Agency had no written agreement or contract with Jo specifying when a commission was earned and, as the broker, he could have required a written agreement. Bruce testified:

Q. All right. So you would agree, then, with [Jo's] testimony that there was never any discussion between you and her as to when the commission was earned, correct? A. I have to think how that was specifically worded. I mean, that was three years ago But it would have been discussed that—I guess I can't say for certain, but I—I am fairly certain I would have asserted that, you know, we earn our commissions at closing and then after closing you are paid these splits.

. . . .
Q. Why would you have a discussion with an agent on when a commission is earned? . . . [H]ow would that come up? A. Like I said, I don't remember specifically how it was worded . . . my agency earns the commission at closing. We have had closings . . . that met all the contingencies fall through and we have never once tried to assert that we got that commission or gone after that commission.

Bruce also testified he had “training on when a commission is earned under Iowa law” and was aware Iowa law provides “a broker or a salesperson earns their commission when they produce a willing buyer to a willing seller and enter into a purchase agreement.” Bruce recognized an Iowa broker or salesperson would have the right to sue for a commission if a party unilaterally backed out of a signed purchase agreement. Bruce asserted, however, Engel Agency implemented a policy on when commissions are earned and “[w]e never earned a commission until the sale was closed” and “that was the agreement The Engel Agency had with all the people that listed their homes with us.”

In December 2010, the district court ruled in favor of Engel Agency. The court concluded Engel Agency gratuitously paid Jo “certain percentages of the closing funds as commissions in three of four transactions, contrary to its

obligation to do so.” The court rejected Jo’s argument she earned her commissions when a binding contract was effectuated or when she produced a buyer to whom a sale was made, stating:

The Court is persuaded by the argument of the Engel Agency, Inc. that under these circumstances the agency was only legally obligated to pay a commission to [Jo] on any of the real estate transactions if the commission was earned while her professional license was filed with [Bruce] Engel, the broker for The Engel Agency, Inc. The terms of the oral independent contractor agreement between [Jo] and [Engel Agency] established that as long as she was an agent affiliated with [Engel Agency], she earned a commission only once a real [estate] transaction was completed. Since [Jo] was no longer licensed under Mr. Engel or otherwise affiliated with [Engel Agency] as of the dates the four transactions closed, [Engel Agency] had no legal obligation to pay a commission to [Jo] for any of these four transactions. The Court finds a distinction between the use of this rule in bankruptcy court

Jo’s Iowa Rule of Civil Procedure 1.904(2) motion was denied by the court:

[T]he Court now expands its initial ruling to find that in the real estate transactions . . . there were frequently matters within the written offer to purchase document and seller’s written response thereto, that required follow-up by a realtor before the property sale could actually close. From such evidence of the four transactions . . . the Court must now expand its conclusions to include that under the practice of these parties, the realtor’s commission was deemed to be earned at the time the sale actually closed on these properties and not before that time as argued by [Jo].

Jo now appeals.

II. Standard of Review.

We review for correction of errors at law. *Meincke v. N.W. Bank & Trust Co.*, 756 N.W.2d 223, 227 (Iowa 2008). The district court’s findings of fact are upheld if they are supported by substantial evidence. *Id.* “Evidence is substantial when reasonable minds accept the evidence as adequate to reach a

conclusion.” *Id.* However, we “are not bound to a district court’s conclusion of law or that court’s application of legal conclusions.” *Id.*

III. “Earning” a Real Estate Commission.

The question of when a real estate salesperson *earns* a commission split from her broker where there is no written contract between the broker and the salesperson is an issue of first impression in Iowa.⁴ In the context of the buyer and/or seller attempting to avoid paying a real estate commission, the Iowa Supreme Court has ruled:

At least three different methods of earning a commission under an agency contract for sale of real estate are effective: First, by effecting a binding contract of sale under authority given to the agent to make such a contract for the principal; second, by producing a purchaser to whom a sale is in fact made; third, by producing a purchaser ready, willing and able to buy on terms specified in the agency agreement.

Ducommun v. Johnson, 252 Iowa 1192, 1196, 110 N.W.2d 271, 273 (1961) (regarding a verbal agreement for commission); see also *Sergeant v. Leonard*, 312 N.W.2d 541, 545 (Iowa 1981); *Gatton v. Stephen*, 239 N.W.2d 159, 161 (Iowa 1976). Therefore, Iowa law recognizes three instances in which a real estate salesperson *earns* a commission prior to the transaction actually closing.

⁴ In the context of a written agreement, Iowa Administrative Code rule 193E-7.12 provides:

The commission will not and is not authorized by law to consider or conduct hearings involving disputes over fees or commissions between cooperating brokers, salespersons, and other brokers.

7.12(1) A former employing or affiliated broker may pay a commission directly to a . . . salesperson . . . presently assigned to another broker . . . only if the commission was earned while the . . . salesperson was actively licensed or assigned to the former broker. Whether or not a commission was earned while the . . . salesperson was licensed with the former broker depends upon the licensee’s written agreement with the former broker.

Applying Iowa law and citing approvingly to *Ducommun*, the Eighth Circuit ruled the real estate agent/debtor *earned* his commissions pre-petition when the binding contracts of sales were executed, regardless of when the commissions were *paid*. *In re Smith*, 402 B.R. 887, 890 (B.A.P. 8th Cir. 2009). The *Smith* court rejected the agent/debtor's argument he could not have *earned* his commissions until all the contracts' contingencies were satisfied post-petition. *Id.*

When the record is viewed as a whole, substantial evidence does not support the conclusion Jo and Engel Agency reached an oral agreement Jo's commissions were not *earned* until a transaction was completed and closed. While the parties agreed Jo would not be *paid* until closing, substantial evidence does not support a conclusion the parties agreed Jo did not *earn* her commissions on the four pending sales if she left Engel Agency prior to the closings.

Here, both sellers and buyers in four pending transactions had executed contracts prior to the termination of Jo's affiliation with Engel Agency. Under *Ducommun*, Jo had *earned* her commission in all four transactions prior to her departure from the Engel Agency. 252 Iowa at 1196, 110 N.W.2d at 273. Even though the contracts were subject to contingencies, these contingencies were ultimately satisfied and the four sales were closed. The fact some real estate contract contingencies needed to be satisfied is the precise issue addressed by the *Smith* court's discussion of the salesperson's *earning* the commission. See *Smith*, 402 B.R. at 890. We likewise conclude Jo's interest in receiving her split of these commissions from Engel Agency, her earning of these commissions, was not altered by the existence of subsequently-satisfied contingencies.

Accordingly, we reverse and remand for entry of a judgment based on the existing record and in accordance with this opinion.

REVERSED AND REMANDED.