

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-243

APRIL TERM, 2005

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| James Bull | } | APPEALED FROM: |
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| | } | |
| v. | } | Windsor Superior Court |
| | } | |
| Heidiemarie Schneider | } | DOCKET NO. 199-4-03 Wrcv |
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| | } | |
| | } | Trial Judge: Theresa S. DiMauro |

In the above-entitled cause, the Clerk will enter:

Defendant homeowner appeals from a judgment in favor of plaintiff, a realtor, following a bench trial in this contract dispute. Homeowner challenges the court's findings that the parties entered a binding contract, that homeowner breached the contract, and that realtor is entitled to a six percent commission on the sale of homeowner's property. We affirm.

Viewing the fact findings in the light most favorable to the judgment as we must, Landmark Trust (USA), Inc. v. Goodhue, 172 Vt. 515, 520 (2001), the record establishes that realtor is an experienced and licensed real estate agent. Homeowner, who owns a business with her husband selling diamond instruments to dentists, has substantial experience owning and selling homes. She knows the difference between exclusive and open real estate listing agreements, having been a party to both types of arrangements in the past.

In 2002, homeowner sought to sell a home she owned in Barnard, Vermont. She contacted realtor, whom homeowner knew since 2000 when he was employed by Remax, an agency homeowner had contracted with previously to market and sell the property. Realtor went to homeowner's residence on October 10, 2002 to discuss a listing agreement. During their meeting, the parties discussed how the listing would be structured, how the property had been marketed in the past and why it had not sold. Using a form contract, realtor and homeowner entered into an agreement that gave realtor the exclusive right to list and market the property at an asking price of \$499,999. Before signing the agreement, homeowner and realtor read and discussed each provision in the form contract together. The key terms made the agreement binding for twelve months, required homeowner to refer all inquiries about the property to realtor, and required realtor to make efforts to sell the property on homeowner's behalf. In addition, the contract expressly provided that neither party could cancel or modify the contract unless both parties agreed to the change or cancellation in writing.

Approximately two days after signing the contract, homeowner called realtor and told him that she and her husband had decided to cancel the contract because they had come up with a different way to market and sell the property. On October 22, 2002, homeowner faxed realtor a letter stating, "[a]s of October 23, 2002, we are canceling herewith the exclusive sales agreement for our house here in Barnard. We are offering the house now for \$375,000 - and we would be happy to work with you together on an 'open listing' basis. Thank you very much for your efforts." Realtor contacted homeowner after receiving the fax and told her that they would have to meet to discuss her desire to change or cancel the contract. Homeowner responded that she would write him about the matter, which she did. The letter homeowner sent to realtor said the same thing as the fax she sent on October 22. On October 28, homeowner

called realtor and asked him to take the property off of the Multiple Listing Service (MLS), the primary source of information for realtors about listed properties. Homeowner explained that realtor's listing was interfering with her ability to list the property with other real estate brokers. Realtor responded that homeowner had no right to list the property with other brokers because the parties had an exclusive contractual listing arrangement. Homeowner took the position that she had cancelled the contract and was no longer bound by it. Homeowner subsequently faxed realtor a request to remove the listing from the MLS. Eventually, homeowner listed the property with several other brokers, and in February 2003, she sold the property for \$525,000.

After learning that the property had sold, realtor contacted homeowner seeking the six percent commission to which he was entitled under the contract. Homeowner refused payment, sticking to her position that she cancelled their exclusive listing agreement the previous October. Realtor disagreed and filed suit to recover his commission.

The parties' dispute was tried before the Windsor Superior Court. Homeowner contested the existence of the agreement, claimed that even if she had entered an agreement with realtor the agreement was void because she never received a copy of it, and asserted that realtor agreed to cancel the contract. Homeowner also alleged that realtor violated certain ethical rules governing real estate brokers and gave her the right to cancel the contract. The superior court judge rejected all of homeowner's claims, finding that homeowner's testimony was not credible. The court found the agreement to be valid and enforceable, and that realtor had made some efforts to market the property by posting flyers and listing it in the MLS. Accordingly, the court concluded that the contract entitled realtor to a six percent commission, but calculated the amount due by using the contract's asking price of \$499,999 rather than the actual sales price of \$525,000. This appeal followed the court's entry of judgment for realtor.

On appeal, homeowner challenges the court's decision as contrary to the evidence. Citing passages from a business law textbook and various Vermont Real Estate Commission and ethical rules, homeowner contends that: (1) she had a right to cancel the contract; (2) she was not bound by a contract that she did not have a copy of; (3) realtor breached the contract by not marketing the property; (4) realtor misrepresented the asking price the parties agreed to; (5) the form contract the parties used was not a standard real estate contract in Vermont and it lacked an essential element; (6) homeowner did not receive a fair trial. None of homeowner's claims have merit.

This Court has repeatedly stated that in cases like this where the key facts are contested we will not reverse a judgment solely because we might have reached a different result. Landmark (USA), 172 Vt. at 520. Findings will withstand appellate review if they are based on the evidence of record even where substantial contradictory evidence exists. Id. Questions of evidentiary weight and credibility are committed solely to the trial court's discretion, and its resolution of those questions will not be disturbed on appeal. Kasnowski v. Dep't of Employ. Sec., 137 Vt. 380, 381 (1979). With those principles in mind, we turn to homeowner's specific claims of error.

Homeowner first contends that no legally binding contract existed because she cancelled it. As realtor argues and as the trial court found, the contract's terms did not permit unilateral cancellation or modification of the agreement. The contract provided that it could not be cancelled or terminated "unless Owner and Listing Agency mutually agree to such cancellation or termination in writing." The court found that realtor never agreed in writing to cancel the contract, and the evidence in the record supports that finding.

Next, homeowner argues that she is not bound by the contract because realtor did not provide her with a copy of it. Homeowner's argument on this point has evolved during the course of litigation. In her supplemental requests to find, homeowner argued that the agreement, which she describes as an adhesion contract, was unconscionable because she did not have an opportunity to review it. On appeal, homeowner claims that realtor cannot enforce the agreement because he did not give her a copy of it notwithstanding a Vermont Real Estate Commission rule requiring that he do so. Homeowner's failure to argue this point to the trial court precludes appellate review of the claim. See Harrington v. Dep't of Employ. & Training, 152 Vt. 446, 448 (1989) (explaining that arguments not raised at trial may not be raised on appeal). Nevertheless, we observe that the trial court found that the parties reviewed the agreement together in full. It also found that homeowner took the original agreement into her home office after signing it, and that realtor assumed she was making a copy of the contract at that time. Therefore, even if it were true that homeowner never received her own copy of the contract, she indeed had an opportunity to review it and did review it before signing it.

Homeowner argues in the alternative that she owes realtor nothing because he did not fulfill his duty under the contract to market the property. Again, the court's findings, which are based on evidence admitted at trial, establish the contrary. Realtor listed the property in the MLS and posted flyers in various places around town to alert the public that the property was for sale. Realtor was forced to curtail his marketing efforts because homeowner tried to unilaterally cancel the contract and directed him to remove the property from the MLS. Homeowner challenges those findings because they are based on realtor's testimony and not on documentary evidence. Sworn testimony is evidence, and it is up to the trial court to decide which witness to believe and how much weight to accord a witness's testimony. Kasnowski, 137 Vt. at 381. Because the evidence supports the court's findings, we discern no error.

In her next argument, homeowner contends that realtor misrepresented the asking price on the contract, and therefore the contract is not enforceable. As she did at trial, homeowner essentially accuses realtor of producing and offering into evidence a forgery because she claims that the contract she signed had an asking price of \$475,000 and not \$499,999. On this issue, the trial court found homeowner's testimony inconsistent and rendered a decision against her. The court noted that homeowner's testimony changed over the course of the trial. At one point she testified that she did not recall signing the contract, but later recalled that she did. Other than her testimony, which the court discredited because it was not believable, the record contains no evidence that realtor misrepresented the asking price to which the parties had agreed. On this record, we cannot say that the court's findings on the contract's asking price were clearly erroneous.

Homeowner also claims that the contract, which was not a standard listing agreement in Vermont, lacked an essential element and is, therefore, unenforceable. It appears that homeowner believes that her contract with realtor was incomplete because the parties did not sign an "Agency Relationship Disclosure Report." Although she contends that Vermont law makes a signed "Agency Relationship Disclosure Report" a prerequisite to a listing agreement's enforceability, she fails to cite any Vermont statutory or case law supporting her contention. In that respect, the argument is inadequately briefed. See In re Charlotte Farm & Mills, 172 Vt. 607, 609 (2001) (mem.) (stating that assertions not accompanied by law, facts, or reasoning will not be considered on appeal). In any event, homeowner did not raise this argument at trial so we will not address it on appeal. Harrington, 152 Vt. at 448.

Finally, homeowner argues that she did not receive a fair trial. She argues that the court should have granted her motion for a thirty-day continuance so that the county's two assistant judges could be present for the trial. She also argues that her trial was unfair because the court did not conduct any pre-trial hearings. None of these points were presented to the trial court in the first instance and they are therefore waived on appeal. Id.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned