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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1204

Filed: 5 June 2018

Orange County, No. 16 CVD 926

LEANNE SILVER, Plaintiff,

v.

CHASE PROPERTIES, INC., Defendant.

Appeal by defendant from judgment entered 19 May 2017 by Judge Sherri T. Murrell in Orange County District Court. Heard in the Court of Appeals 19 April 2018.

Steffan & Associates, P.C., by Kim K. Steffan, for plaintiff-appellee.

George B. Currin for defendant-appellant.

DAVIS, Judge.

Defendant Chase Properties, Inc. ("Chase Properties") appeals from the trial court's judgment in this breach of contract action awarding damages in the amount of $17,534.49 in favor of Plaintiff Leanne Silver. After a thorough review of the record and applicable law, we affirm.

Factual and Procedural Background

Chase Properties is a real estate company that at all relevant times sold houses in the Forest Ridge Subdivision in Hillsborough, North Carolina. Silver was a licensed real estate broker living in Chapel Hill. In October 2014, Silver wrote a letter to Chase Properties stating her interest in working for the company as an independent contractor in the positions of On-Site Salesperson or Broker in Charge.

In October 2014, Silver met with Michael Hunter, the president of Chase Properties, and he offered her the position of Broker in Charge and a 1% commission for all sales she made for the company. He informed her that he was also planning to hire a second real estate agent and informed Silver that — should she accept the offered position — she and the second agent would have to "split or share the commissions on contracts written (sales made) by both agents." Silver informed Hunter that "she did not want to split or share commissions with anyone on homes she put under contract under any circumstances and 'regardless of [her] status with the company.'" Ultimately, during the meeting with Hunter, Silver accepted the Broker in Charge position.

The following day, Silver called him to say that she had reconsidered and "would be interested in being considered for the second agent's position to be hired later . . . ." Based on Hunter's desire to have her begin working immediately, however, they agreed that she would take the Broker in Charge position. During this phone call, Silver emphasized once more to Hunter that she did not want to split or

share her commissions and wanted to be paid a 1.25% commission "regardless of [her] status."

Between October 2014 and September 2015, Silver wrote a total of 15 contracts selling homes on behalf of Chase Properties. The closings for seven of these 15 contracts occurred before 23 September 2015, and Silver was paid a commission of 1.25% for each of these contracts.

In September 2015, Hunter approached Silver about a plan to "train or assist a new agent by reducing, splitting, and/or sharing [Silver]'s commissions, 'going forward,' based on a formula [Hunter had] developed." Silver told him that "she understood from the beginning that she would not have to split or share commissions on contracts she wrote, and insisted that she be paid as originally agreed." In response, Hunter stated that Chase Properties would be unable to hire a second agent if it had to continue to pay Silver a 1.25% commission. As a result of these discussions, "the parties' working relationship came to an end . . . ."

The closings for the remaining eight contracts that Silver had written while working for Chase Properties occurred after she had stopped working for the company. Based on a formula devised by Hunter in an effort to "be[ ] fair to all parties concerned[,]" Chase Properties paid Silver a full 1.25% commission for three of these contracts (which closed within 90 days after she left the company); partially compensated her for four of these contracts (which closed between 90 and 180 days

after she left the company); and did not compensate her at all for one of the contracts (which closed over 180 days after she left the company).

On 11 July 2016, Silver filed a complaint in Orange County District Court for breach of contract and unjust enrichment. A bench trial was held on 19 April 2017 and 4 May 2017 before the Honorable Sherri T. Murrell. Silver and Hunter were the sole witnesses.

On 19 May 2017, the trial court entered a judgment, finding that the parties "had an oral contract in which [Chase Properties] agreed to pay [Silver] a commission of 1.25% of all contracts she wrote in Forest Ridge, with the commission to be payable at closing." The court determined that Silver "was entitled to be paid her full 1.25% commission on any and all contracts she wrote while working in Forest Ridge, payable at closing, regardless whether the closing occurred before or after the end of her working relationship with [Chase Properties]." The court concluded that Chase Properties had "materially breached the parties' contract by failing to pay the full 1.25% commission on 5 sales" and ordered Chase Properties to pay Silver $17,534.49 as well as interest and costs. Chase Properties filed a timely notice of appeal.

Analysis

On appeal, Chase Properties argues that the trial court erred in entering judgment in favor of Silver. Specifically, it argues that the evidence does not support the court's determination that Silver was entitled to a 1.25% commission on contracts

she wrote but that had not reached closing prior to the end of the parties' working relationship. We disagree.

"When an appellate court reviews the decision of a trial court sitting without a jury, findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them." *In re Foreclosure of a Deed of Tr. Executed by Lucks*, 369 N.C. 222, 230, 794 S.E.2d 501, 508 (2016) (citation, quotation marks, and ellipsis omitted). "[U]nchallenged findings of fact are presumed correct and are binding on appeal." *Dep't of Transp. v. Webster*, 230 N.C. App. 468, 477, 751 S.E.2d 220, 226 (2013) (citation, quotation marks, and brackets omitted), *disc. review denied*, 367 N.C. 332, 755 S.E.2d 618 (2014). The trial court's conclusions of law are reviewed *de novo*. *Id.*

It is well established that in a non-jury trial

> it is the trial court's duty to consider and weigh all the competent evidence before it. The trial court passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, the trial court determines which inferences shall be drawn and which shall be rejected.

Leggett v. AAA Cooper Transp., Inc., 198 N.C. App. 96, 104, 678 S.E.2d 757, 763 (2009) (citation and brackets omitted).

We have held that "[u]nder longstanding North Carolina law, a valid contract requires (1) assent; (2) mutuality of obligation; and (3) definite terms." *Charlotte*

Motor Speedway, LLC v. Cty. of Cabarrus, 230 N.C. App. 1, 7, 748 S.E.2d 171, 176 (2013) (citation omitted), *disc. review improvidently allowed*, 367 N.C. 533, 766 S.E.2d 340 (2014). "It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Id.* (citation and quotation marks omitted); *see MCB, Ltd. v. McGowan*, 86 N.C. App. 607, 608, 359 S.E.2d 50, 51 (1987) ("In North Carolina, one of the essential elements of every contract is mutuality of agreement. . . . [The parties] must assent to the same thing in the same sense, and their minds must meet as to all the terms." (citation, quotation marks, and emphasis omitted)). In order "to be enforceable, the terms of a contract must be sufficiently definite and certain, and a contract that leaves material portions open for future agreement is nugatory and void for indefiniteness." *Charlotte Motor Speedway*, 230 N.C. App. at 7, 748 S.E.2d at 176 (citations, quotation marks, and brackets omitted).

"Parties to a contract may agree to change its terms; but the new agreement, to be effective, must contain the elements necessary to the formation of a contract." *S. Spindle & Flyer Co. v. Milliken & Co.*, 53 N.C. App. 785, 788, 281 S.E.2d 734, 736 (1981) (citation omitted), *disc. review denied*, 304 N.C. 729, 288 S.E.2d 381 (1982). Thus, "[a] modification to a contract occurs if there is mutual assent to the terms of the modification and consideration supporting the modification." *Brumley v.*

Mallard, L.L.C., 154 N.C. App. 563, 567-68, 575 S.E.2d 35, 38 (2002) (citation omitted), *aff'd per curiam*, 357 N.C. 247, 580 S.E.2d 691 (2003).

In the present case, the trial court made the following pertinent findings of fact:

> 3. On or about October 14, 2014, [Silver] wrote a letter to [Chase Properties] about her interest in being hired as an Independent Contractor working as both the On-Site Salesperson and as the Broker in Charge of Chase Properties, Inc. in the Forest Ridge neighborhood located in Hillsborough, North Carolina. About that time, [Silver] and Mr. Hunter ([Chase Properties'] President) met to discuss the position and talked further by phone.
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> 4. Both [Silver] and [Chase Properties] acknowledged in Court that a broker's commission arrangements with a real estate company are subject to whatever contract terms the parties negotiate, and it varies from case to case depending on a number of factors and on the negotiation itself; there is no industry standard for such commission arrangements.
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> 4. During these discussions, it became clear that, at some point in the future, [Chase Properties] planned to hire a second real estate agent to sell homes built by Saussy Burbank.
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> 5. Further, during these discussions, [Hunter] offered [Silver] a 1% commission. Also, [Silver] learned that [Chase Properties'] original plan was for [Silver] and the agent who would be hired in the future to split or share the commissions on contracts written (sales made) by both agents. However, [Silver] was adamant that she did not want to split or share commissions with anyone on homes she put under contract under any circumstances and "regardless of [her] status with

the company."

6. At the meeting, [Silver] initially accepted the broker-in-charge position, but after considering it overnight, [Silver] called [Hunter] to say that she had reconsidered, and would not take the position. Instead, she would be interested in being considered for the second agent's position to be hired later to work with the Saussy Burbank homes. The second agent would not have the responsibility of being a broker-in-charge, and would start work when homes and infrastructure were already in place, making that position easier.

7. The parties discussed the situation further, and [Hunter] indicated a strong desire to have [Silver] start right away in the Salesperson and Broker-in-Charge position. In those discussions, [Silver] made clear that she was not willing to enter an arrangement where she would have to split or share commissions at any time for any reason.

8. The parties had an oral contract in which [Chase Properties] agreed to pay [Silver] a commission of 1.25% of all contracts she wrote in Forest Ridge, with the commission to be payable at closing. As part of their oral contract, [Chase Properties] agreed that [Silver] would not have to split or share her commissions.

10. [Silver]'s duties in Forest Ridge included marketing the development and networking to develop a strong customer base and build relationships intended to benefit [Chase Properties] and the development over time. This initial work laid the foundation for buyers as well as future prospects, not only during the time [Silver] worked for [Chase Properties], but also thereafter.

11. [Silver] understood when she accepted the position of

> Salesperson and Broker-in-Charge in a new development it would be a challenging position under difficult physical circumstances. When [Silver] began work in October of 2014, the development was so new that lacked [sic] all but basic infrastructure, lacked internet service, and had no model home or office to meet with prospective buyers. [Silver]'s work involved showing the development to Realtors and potential buyers in all weather conditions, including, for example, finding cardboard so visitors could walk across muddy ground. From October, 2014 until a model home opened late April or early May, 2015, [Silver] used her car as her office, and had to go to a restaurant or library in town to be able to go to a restroom or to get an internet connection to do computer duties like data entry and preparing contracts. [Chase Properties] forwarded the main phone number of the development to [Silver]'s cell number, and she received calls for Forest Ridge at all hours. These anticipated difficulties of the work and the length of time between starting work and having an inventory of homes, and between starting work and being able to close on a house were reasons that she was adamant that she would not share or split commissions and that she would receive 1.25% commission on all contracts she wrote in Forest Ridge, regardless of her status with the company, and regardless whether there was another agent selling Saussy Burbank homes.
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> . . . .
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> 14. [Silver] began writing contracts for sales, with the first closing occurring on April 28, 2015. There were a total of 15 contracts [Silver] wrote prior to September 23, 2015 (the date [Silver]'s working relationship with [Chase Properties] ended). Seven of those 15 contracts closed before September 23, 2015; for all 7 of those closings, [Chase Properties] paid [Silver] a commission of 1.25%.

15. During August and September of 2015, [Chase Properties] started the process of hiring an agent to sell Saussy Burbank houses at Forest Ridge.

16. During this time period, [Chase Properties] approached [Silver] about a plan to train or assist a new agent by reducing, splitting, and/or sharing [Silver]'s commissions, "going forward," based on a formula [Hunter] developed with respect to Saussy Burbank houses. [Hunter] stated he needed to have a "transition" commission arrangement as a new agent came on board. In so doing, the Court finds that [Chase Properties] sought to modify or amend the parties' original agreement to pay [Silver] 1.25% commission on all contracts she wrote, payable at closing on each sale.

17. In response, [Silver] told [Hunter] she understood from the beginning that she would not have to split or share commissions on contracts she wrote, and insisted that she be paid as originally agreed.

18. [Hunter's] reply to [Silver] was that they could not go forward and bring another agent on board to work with Saussy Burbank while continuing to pay [Silver] 1.25% commission on the transactions [Silver] put under contract. [Silver] did not agree to modify the original commission arrangement. In so doing, the Court finds that [Silver] did not accept [Chase Properties'] offer to modify or amend the parties' original agreement.

19. The parties' working relationship came to an end as a result of those discussions on or about September 23, 2015.

20. After the parties' working relationship ended, eight more closings occurred on contracts [Silver] wrote while working in Forest Ridge.

21. At or after the parties' working relationship ended, [Hunter] used the rejected "transition" formula as a "template" for a formula that reduced [Silver]'s commissions in some of the sales that closed after her employment. [Hunter] unilaterally devised this formula because he thought it would be fair. The formula [Hunter] developed and sought to apply to [Silver]'s commissions was to pay [Silver] the full 1.25% commission on closings that occurred within 90 days of the end of their working relationship (which occurred on 3 closings), partially compensated her for closings that occurred between 90 and 180 days after the end of their working relationship (which occurred on 4 closings), and did not compensate her at all for closings that occurred more than 180 days after the end of the working relationship (which occurred on one closing). For closings occurring between 90 and 180 days after the end of the parties' working relationship, [Hunter] testified that his formula was intended to pay [Silver] half of the 1.25% for writing the contract, and then proportionally for the time between the date of the contract and the end of the parties' working relationship versus the time between the end of the parties' working relationship and closing. Commission payments [Chase Properties] actually made to [Silver] were similar to the formula [Hunter] described, but were not entirely consistent with the formula.

22. Both parties acknowledge that some contracts required work by the broker between signing the contract and closing, while others required no work by the broker during that time, depending on the builder, customer, and circumstances of construction.

23. Both parties acknowledge that [Silver] worked with buyers and/or their Realtors for some period of time before each buyer signed a contract written by [Silver].

> 24. After the working relationship between [Silver] and [Chase Properties] ended, [Silver] was contacted by buyers under contract who wanted to cancel their contract, but she encouraged them to proceed to closing.
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> . . . .
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> 30. When [Chase Properties] underpaid [Silver]'s commission owed pursuant to the contract on these 5 transactions, [it] materially breached the parties' contract.
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> 31. Adding the totals of amounts owed on the five sales listed above, the total amount of [Silver]'s damages is $17,534.49. These damages are proximately caused by [Chase Properties'] breach of the parties' contract, and are owed pursuant to the parties' contract.

Based on these findings of fact, the trial court concluded that "[t]he parties entered into an oral contract that provided for [Chase Properties] to pay [Silver] a commission of 1.25% on each contract she wrote, payable at closing, regardless of [her] status with the company. By the parties' contract, [Silver] was entitled to be paid her full 1.25% commission on any and all contracts she wrote while working in Forest Ridge, payable at closing, regardless whether the closing occurred before or after the end of her working relationship with [Chase Properties]."

Chase Properties first challenges Finding Nos. 5, 8, 11, 16, 30, and 31 to the extent they imply that the parties had agreed that Silver "would be paid her full commission regardless of when the closing occurred after the termination of the oral

independent contractor agreement." Because the remaining findings of fact are unchallenged by Chase Properties, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

At trial, Silver testified as follows:

> [SILVER:] . . . . At that time, he offered me the position, and we hadn't talked about commission. We did talk about commission, and he offered me one percent. I had not worked for commission that low, and I expressed that. And -- and I said, you know, that I wanted to be paid *regardless of my status with his company*. That was very clear from the beginning, that I expected to be paid because I knew there was no model home.
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> . . . .
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> [SILVER:] We never discussed his intent or his -- his desire to reduce commissions up until September. We never talked about, you know, him trying to reduce commissions. *We had agreed that I would be paid 1.25, period, regardless of my status with his company*. We agreed to that in the very beginning and, you know -- and then he's trying to change it at this point in September.
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> . . . .
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> [SILVER:] *I made sure that your client knew that I wanted to be sure to have all the commission[s] that I earned while I worked for him*, and I said -- stated that the day before in his office and I stated that on the phone, that I needed to make sure that I was paid in full for all sales that I made in Forest Ridge.

> . . . .
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> [SILVER:] *Regardless of status with his company, I was to be paid in full on all sales.*

(Emphasis added.)

Hunter stated the following in his testimony at trial:

> [HUNTER:] LeAnne -- LeAnne was adamant that she did not want shared commissions. She used the term "status." I recall the term being "situation." But I absolutely agree out of that that I would not require her to do this, and I would not make her have shared commissions. (Inaudible) that I would keep them split regardless of the situation. *She said regardless of the status. I absolutely agreed to that,* and I also agreed that I said that "I do not want to take money out of your pocket."

(Emphasis added.)

This testimony serves as competent evidence that the parties agreed Silver would receive a 1.25% commission regardless of her status with Chase Properties. Even though Hunter also testified that he did not intend to bind his company in the event that Silver had stopped working for Chase Properties, the trial court — sitting as the trier of fact — possessed the authority to determine the credibility of the witnesses and make reasonable inferences based on the evidence before it. *See Leggett*, 198 N.C. App. at 104, 678 S.E.2d at 763 (citation and brackets omitted). Because the trial court's findings are supported by competent evidence in the present case, they are binding on appeal.

Moreover, we are satisfied that the trial court's findings of fact support its legal conclusions. The court determined that in October 2014 the parties had a meeting of the minds that Silver would receive a 1.25% commission for sales she made in Forest Ridge regardless of her status with Chase Properties. Hunter proposed a modification of the contract, but the modification never took effect because it was rejected by Silver. Between October 2014 and 23 September 2015, Silver made 15 sales in Forest Ridge that eventually reached closing.[1] During this entire time, the October 2014 contract providing that Chase Properties would pay Silver a 1.25% commission for the sales she made in Forest Ridge remained in effect.

Chase Properties contends that the October 2014 contract did not specifically address the issue of whether Silver would be paid the commissions she had earned if the parties' working relationship ended between the dates the contracts were signed and the dates of the closings. However, as discussed above, evidence was presented that the parties agreed Silver would receive a 1.25% commission "regardless of [her] status with the company." Such broad language encompassed the scenario that Silver's working relationship with Chase Properties would have ended. While the parties could have agreed upon a more specific contractual term providing that Chase Properties' duty to pay her commissions would cease once she stopped working for

[1] The record indicates that two of the sales Silver made during this time period did not, in fact, reach closing. However, she does not contend that she was owed any commission for those two sales per her contract with Chase Properties.

the company, they did not do so. Therefore, the trial court's judgment must be affirmed.

Conclusion

For the reasons stated above, we affirm the trial court's 19 May 2017 judgment.

AFFIRMED.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).