UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1787
Summary Calendar

GEORGE M. MYER,

Plaintiff-Appellant,

VERSUS

YUKIO KITANO, ET AL.,

Defendants,

YUKIO KITANO and KENNETH OTA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(No. 3:91-CV-395-P)

(February 23, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

George M. Myer appeals from the district court's grant of summary judgment for defendants, and denial of his motion for summary judgment. We **AFFIRM**.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Myer, a Texas licensed real estate broker, met Yukio Kitano through Kitano's agent, Kenneth Ota, in 1990. Myer acted as an agent for Kitano in connection with Kitano's attempt, in June 1990, to purchase Stonebridge Ranch from the Ranch Development Corporation (RDC) and the FDIC. Myer and Ota discussed Myer's compensation for acting as broker in the transaction; Myer told Ota that he expected a one percent commission. But, Ota did not agree to this; neither he nor Kitano reached any definite agreement with Myer regarding compensation. At the sealed bid auction of Stonebridge, Myer, acting on Kitano's behalf, presented $1,000,000 in earnest money and a bid package he had prepared. The day after the auction, Kitano sent a written confirmation (the confirmation letter) to the FDIC and RDC, stating that Myer was authorized to act as Kitano's agent in the sale. Kitano's bid, for $61,000,000, was accepted; however, the sale later fell through.

In February 1991, after making unsuccessful demands on Ota and Kitano, Myer sued them[2] in an attempt to his claimed commission.[3] After some discovery had taken place, defendants moved for summary judgment. They based the motion on the absence of any written

[2] The suit was brought in Texas state court; the defendants removed it to federal court, based on diversity jurisdiction. 28 U.S.C. § 1332.

[3] Originally, Myer also sued RDC, one of the sellers of the Stonebridge Ranch. RDC was dismissed by stipulation of the parties, as a bankrupt debtor.

agreement -- required by § 20(b) of the Texas Real Estate License Act (TRELA) -- with Myer.[4]

Myer responded with his own summary judgment motion, contending that the Purchase and Sale Agreement (part of the bid package), which he had signed on Kitano's behalf, and the confirmation letter, together satisfied the TRELA's requirements. In the alternative, he contended that he should recover on theories of part performance, quantum meruit, and implied contract. The district court granted Kitano and Ota's summary judgment motion and denied Myer's.

II.

We review a grant of summary judgment *de novo*, *e.g.*, ***Topalian v. Ehrman***, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 82 (1992), considering the same evidence as the district court. ***Id.*** at 1131 & n. 10. Summary judgment is proper where, *inter alia*, the movant demonstrates that there are no disputed issues of material fact, *i.e.*, when the movant "point[s] out to the district court [] that there is an absence of evidence to support the nonmoving party's case". ***Celotex Corp. v. Catrett***,

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[4] Section 20(b) of the TRELA provides:

> An action may not be brought in a court in this state for the recovery of a commission for the sale or purchase of real estate unless the promise or agreement on which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged or signed by a person lawfully authorized by him to sign it.

Tex. Rev. Civ. Stat. Ann. art. 6573a § 20(b) (West 1992). The section is essentially a Statute of Frauds provision. ***Brice v. Eastin***, 691 S.W.2d 54, 57 (Tex. Civ. App. -- San Antonio 1985).

477 U.S. 317, 325 (1986). To avoid summary judgment, the non-movant must "go beyond the pleadings and by her own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial'." ***Id.*** at 324 (quoting Fed. R. App. P. 56(e)). "`[A] dispute about a material fact is `genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 619 (5th Cir. 1993), *petition for cert. filed* (U.S. Jan. 12, 1994) (No. 93-1136) (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986)). Moreover, even if there is no material fact issue, the movant must show that he "is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Myer contends that, taken together, the Purchase and Sale Agreement and the confirmation letter satisfy the requirements of § 20(b) of the TRELA. In the alternative, he contends that he is entitled to recover based on partial performance, or on theories of quantum meruit or implied contract.

A.

As quoted, the TRELA contains a Statute of Frauds provision, preventing the enforcement of unwritten commission agreements. ***Morris v. LTV Corp.***, 725 F.2d 1024, 1027-28 (5th Cir. 1984); ***Brice v. Eastin***, 691 S.W.2d 54, 57 (Tex. Civ. App. -- San Antonio 1985) (stating that purpose of statute of frauds provision in TRELA is to reduce fraudulent claims by brokers for commissions). And as

stated, Myer contends that the Purchase and Sale Agreement[5] and the confirmation letter[6] together satisfy § 20(b). He also maintains that parol evidence is admissible to explain the terms of the commission agreement.

1.

The documents to which Myer refers confirm that Myer acted as Kitano's agent in connection with the Stonebridge sale; and the

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[5] The Purchase and Sale Agreement provided, in part:

> **Section 6.** **Real Estate Commissions. Purchaser** has entered into an agreement with *George M. Myer* [handwritten] (hereinafter called "Purchaser's Agent") with respect to a commission on this transaction, and Purchaser hereby agrees that Purchaser shall be obligated to pay any and all commissions or any other amounts due to Purchaser's Agent under such agreement.... Notwithstanding anything to the contrary contained herein, this paragraph shall survive the Closing or any earlier termination of this Agreement.

[6] The confirmation letter states, in relevant part:

> This letter confirms my intent to complete the purchase of [Stonebridge] pursuant to the sealed bid submitted to [RDC] on June 18, 1990 and signed by my agent-in-fact, George M. Meyer [sic].
>
> Further, under penalty of perjury, I hereby affirm that Mr. George M. Meyer [sic] acted with my consent and as my agent-in-fact in signing the sealed bid for the purchase of [Stonebridge].... Mr. Meyer [sic] acted with my actual knowledge and authority in signing said purchase bid *and I hereby affirm and adopt his actions*.
>
> This should satisfy the [FDIC's] request for verification of my intent to purchase and of Mr. Meyer's [sic] authority to act on my behalf regarding the purchase....
>
> /s/ Yukio Kitano

(Emphasis added.)

Purchase and Sale Agreement states, "[p]urchaser has entered into an agreement with George M. Myer ... with respect to a commission on this transaction". In fact, the argument can be made that Kitano's statement that he "adopt[ed Myer's] actions" is an adoption of the Purchase and Sale Agreement.

By its literal terms, the statute requires only that the commission agreement be in writing and signed by the party to be charged, *see supra*; and the gist of Myer's argument is that the two documents to which he directs our attention satisfy those requirements. In practice, however, Texas courts require additional elements to create an enforceable commission agreement:

> (1) it must be in writing and must be signed by the person to be charged with the commission; (2) *it must promise that a definite commission will be paid, or must refer to a written commission schedule;* (3) it must state the name of the broker to whom the commission is to be paid; and (4) it must, either itself or by reference to some other existing writing, identify with reasonable certainty the land to be conveyed.

Moser Co. v. Awalt Indus. Properties, Inc., 584 S.W.2d 902, 906 (Tex. Civ. App. -- Amarillo 1979), *citing* ***Knight v. Hicks***, 505 S.W.2d 638, 642 (Tex. Civ. App. -- Amarillo 1974) (emphasis added).

Although the two documents Myer relies upon arguably satisfy the first, third and fourth requirements quoted above, they fail to state a definite commission amount, either directly or by reference to another document. Without doing so, the documents cannot satisfy the TRELA's requirements. ***Elmore v. Wiley***, 478 S.W.2d 137, 138-39 (Tex. Civ. App. -- Dallas 1972) (holding contract of sale did not satisfy statute, where it failed to specify the amount of

the commission, although it stated that buyer agreed to pay "any commissions due" to plaintiff); ***Wells v. Bush***, 311 S.W.2d 427 (Tex. Civ. App. -- Texarkana 1958) (same); ***Buratti & Montandon v. Tennant***, 218 S.W.2d 842, 843 (Tex. 1949) (holding contract agreeing to pay "the usual commission" not specific enough to satisfy statute). Myer has not directed us to any case reaching a contrary result; rather, he attempts, unsuccessfully, to distinguish his case from the applicable law.

2.

Myer also attempts to introduce parol evidence that he and Ota agreed on a one per cent commission (the Stonebridge sale price was $61,000,000; thus, Myer claims $610,000). "[T]he essential elements of a contract required to be in writing may never be supplied by parol", however. ***Buratti***, 218 S.W.2d at 843; *see also* ***Boyert v. Tauber***, 834 S.W.2d 60, 63 (Tex. 1992) (citing ***Buratti*** in holding that brokerage commission document referring to "outside brokers" was not specific enough to satisfy statute, and holding that more specific information regarding broker's identity could not be supplied by parol evidence). As the cases cited *supra* indicate, the amount of the commission agreed upon is obviously an "essential element" of a broker's commission agreement under the TRELA, as much as is the specific identity of the broker, *see* ***Boyert***, 834 S.W.2d at 63. Accordingly, that element cannot be supplied by parol evidence.[7] ***Id.*** at 62-63, *citing and quoting*

[7] In any case, the record does not support Myer's contention that defendants "acknowledged" his entitlement to a $610,000 commission. For example, in their responses to his

Buratti, 218 S.W.2d at 842-43. Myer has presented no evidence that an enforceable commission agreement existed, "such that a reasonable jury could return a verdict" for him. ***Anderson***, 477 U.S. at 248. Certainly, he has not demonstrated that, based on the record, he is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Accordingly, Myer cannot enforce his alleged commission agreement under § 20(b) of the TRELA.

B.

We address next the alternative equitable theories under which Myer contends that, the absence of a written agreement notwithstanding, he can recover based on part performance, or on theories of quantum meruit or implied contract. We turn first to part performance.

1.

In general, the doctrine of part performance shields contracts for the sale of real estate from invalidation under the Statute of Frauds, if certain requirements are satisfied. These requirements are that the purchaser must pay the consideration for, then take

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interrogatories, both Kitano and Ota deny that any commission agreement was reached. Myer himself conceded, in his responses to defendants' interrogatories, that Myer and Ota "discussed" the terms of a commission, and that "Ota originally offered a payment [of] $100,000.00 total" of which "$40,000 would be paid to [a third party] and Myer. Myer rejected this proposal and stated that he expected to be paid one percent of the purchase price". Similarly, Myer's affidavit in opposition to summary judgment states: "During discussions between Ota and me concerning my compensation ... prior to the submission of the bid... I identified my expectation that I would be paid a commission of one percent (1%) of the purchase price". Even were we to allow parol evidence of the amount of the commission, a material fact issue exists concerning Myer's contention that the parties agreed to a $610,000 commission.

possession of or make improvements to, the property at issue. ***Boyert***, 834 S.W.2d at 63; ***Brice***, 691 S.W.2d at 57. The applicability of the part performance doctrine to TRELA brokerage commission contracts is doubtful, *see* ***Brice***, 691 S.W.2d at 57 (holding part performance doctrine inapplicable to TRELA contract); *compare*, ***Boyert***, 834 S.W.2d at 63-64 (assuming *arguendo* that part performance doctrine would apply to TRELA case, but holding it inapplicable on facts of case).

When it has been held to apply to brokerage commission cases at all, the doctrine has been used to enforce commission agreements that lacked only a precise identification of the property. ***Collins v. Beste***, 840 S.W.2d 788, 792 (Tex. Civ. App. -- Fort Worth 1992); ***Carmack v. Beltway Dev. Co.***, 701 S.W.2d 37, 41 (Tex. Civ. App. -- Dallas 1985). In both ***Collins*** and ***Carmack***, the broker's commission was specified in the written commission agreement. ***Collins***, 840 S.W.2d at 792; ***Carmack***, 701 S.W.2d at 41. And, in both cases, the court held that part performance could be used to enforce the agreement only where:

> (1) the broker has fully performed, (2) the other party has knowingly accepted the broker's services by completing the transaction arranged by the broker and receiving benefits from that transaction, (3) the other party has acknowledged in writing his obligation for a commission, and (4) documentary evidence establishes the amount of the commission due.

Collins, 840 S.W.2d at 792; ***Carmack***, 701 S.W.2d at 41-42.

We assume *arguendo* that Myer's case can be distinguished from ***Collins*** and ***Carmack***, because in this case the missing term *is* the "documentary evidence establish[ing] the amount of the commission

due", ***Collins***, 840 S.W.2d at 792, but the property is described with sufficient particularity. Nevertheless, for part performance to enforce the alleged agreement, Myer would have to present "affirmative corroboration ... by both parties" of the missing terms. ***Boyert***, 834 S.W.2d at 63; *accord*, ***Carmack***, 701 S.W.2d at 40 (requiring "strong evidence establishing the existence of an agreement *and its terms*" (emphasis added)). Myer has presented no "affirmative corroboration" or other "strong evidence" of the amount he seeks. As noted *supra*, the record demonstrates, at most, his own unilateral suggestion of what the commission should be.

2.

Finally, Myer contends he should recover under theories of quantum meruit or implied contract. This argument is meritless; the cases Myer cites are inapposite. Texas courts have consistently held that "when § 20(b) bars recovery of a commission, the broker cannot recover for the same services on an implied contract or quasi-contract theory or on the basis of quantum meruit". ***Carmack***, 701 S.W.2d at 40; *accord*, *e.g.*, ***Roquemore v. Ford Motor Co.***, 400 F.2d 255, 258 (5th Cir. 1968) (no recovery in quantum meruit without written agreement); ***McKellar v. Marsac***, 778 S.W.2d 573, 575 (Tex. Civ. App. -- Houston [1st Dist.] 1989) (same); ***Campagna v. Lisotta***, 730 S.W.2d 382, 383-84 (Tex. Civ. App. -- Dallas 1987) (same). Indeed, for readily obvious reasons, Texas courts have held specifically that allowing quantum meruit recovery would defeat the Statute of Frauds purpose of § 20(b)'s requirement of a written memorandum. ***Sherman v. Bruton***, 497 S.W.2d 316, 321

(Tex. Civ. App. -- Dallas 1973). This is especially true for the commission element. Given this policy consideration, equitable recovery is unavailable even where the broker is the procuring cause of the sale. *E.g.*, ***Campagna***, 730 S.W.2d at 383-84; ***Struller v. McGree***, 374 S.W.2d 256 (Tex. Civ. App. -- San Antonio 1963).

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.