WISCONSIN COURT OF APPEALS
DISTRICT IV

BUSHMAN FARMS, INC.

Plaintiff-Appellant,

v.

Appeal No: 2014AP002989
Circuit Court Case No: 2013CV000090

DAIRYLAND REAL ESTATE, LLC,

Defendant-Respondent.

REPLY BRIEF

APPEAL FROM THE CIRCUIT COURT FOR WOOD COUNTY,
THE HONORABLE TODD P. WOLF, CIRCUIT COURT JUDGE,
BRANCH III, PRESIDING

FIRST LAW GROUP S.C.
A limited liability service corporation

Gary L. Dreier, Attorneys for Plaintiff-Appellant, Bushman Farms, Inc.
State Bar No: 1016656

MAILING ADDRESS:
2900 Hoover Avenue, Suite A
Stevens Point, WI 54481
715-341-7855
715-341-7255-FAX

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

WISCONSIN STATUTES ii

OTHER AUTHORITIES ii

SUMMARY OF REPLY 1

STANDARD OF REVIEW: *DE NOVO* 1

I. BUSHMAN FARMS DID NOT BREACH ANY DUTY OF GOOD FAITH AND FAIR DEALING 1

II. DAIRYLAND IS DEEMED TO HAVE BREACHED THE FIDUCIARY DUTIES IT OWED TO BUSHMAN FARMS 7

III. THE TRIAL COURT'S DECISION WAS NOT BASED UPON WAIVER OR LACHES, SUCH DOCTRINES ARE NOT IN ISSUE IN THIS APPEAL 7

IV. WAIVER WAS NOT PROVEN 8

V. LACHES WAS NOT PROVEN 9

VI. THE TRIAL COURT'S CONSTRUCTION OF THE LISTING CONTRACT AGREED WITH THAT OF BUSHMAN FARMS; THE BUSHMAN FARMS' CLAIM WAS DISMISSED SOLELY ON THE BASIS OF THE APPLICATION OF THE DOCTRINE OF GOOD FAITH 10

CONCLUSION 11

CERTIFICATION OF FORM AND LENGTH OF REPLY BRIEF 13

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f) (ELECTRONIC BRIEF CERTIFICATION) 14

TABLE OF AUTHORITIES

Foseid v. State of Cross Plains, 197 Wis. 2d 772, 796-797,
541 N.W.2d 203 (Ct. App. 1995) 2

Hoffman v. Economy Preferred Ins. Co., 2000 WI App 22, ¶ 9,
232 Wis. 2d 53, 606 N.W.2d 590 7

Smart v. Dane County Bd. Of Adjustments, 177 Wis.2d 445, 458,
501 N.W.2d 782 (1993) 9

State ex rel. Booker v. Schwarz, 2004 WI App 50, fn. 2,
270 Wis. 2d 745, 678 N.W.2d 361 9

Zenith Ins. Co. v. Employers Ins., 141 F.3d 300, 308 (7th Cir. 1998) 5

WISCONSIN STATUTES

Wis. Stat. § 805.17(2) 7

OTHER AUTHORITIES

Corbin on Contracts § 570 (West Supp. 1993) 4

Wis. Adm. Code REEB 24.08 5

The Plaintiff-Appellant, Bushman Farms, Inc. (herein "Bushman Farms"), by its attorneys, respectfully submits this Reply Brief.

SUMMARY OF REPLY

Respondent's Brief (herein "Dairyland's Brief") in Section I did not show Bushman Farms breached any duty of good faith and fair dealing. Dairyland's Brief presented the Listing Contract as if it were a standard contract under which it would have been entitled to a commission had it simply found a ready, willing and able buyer. Such was not the case.

In Sections II and III Dairyland's Brief improperly referenced waiver and laches, matters which were not addressed by the trial court.

Section IV of Dairyland's Brief misconstrues the trial court's construction of the Listing Contract.

STANDARD OF REVIEW: *DE NOVO*

The first prong of a review of a mixed question of law and fact, (the clearly erroneous standard as to facts) does not have applicability because the facts are undisputed. This court is left with a *de novo* review of the trial court's conclusion of breach of duty of good faith.

I. BUSHMAN FARMS DID NOT BREACH ANY DUTY OF GOOD FAITH AND FAIR DEALING

Dairyland's Brief argues unsuccessfully at pages 3-11 that the doctrine of good faith and fair dealing should bar the Bushman Farms' claim.

The record does not show who owns Greenwood Acres, LLC and the

Dairyland Real Estate Brief does not identify such owner(s). See page 4 of Dairyland's Brief.

Reference to excerpts from the Dennis Bushman and the David Bushman depositions found at pages 4 and 5 of Dairyland's Brief should be disregarded because such depositions were not admitted as trial exhibit or made part of the trial record. See R.25 which does not include such transcripts. Further, David Bushman's deposition excerpt involved objections to the sale apart from Dairyland's involvement.

The absence of a basis for the claim Bushman Farms breached a duty of good faith and fair dealing is highlighted on page 5 of Dairyland's Brief where it suggests such breach occurred after the closing. Dairyland appears to admit that as of the closing there was no breach.

The trial court commented:

> Now, whether I point blank said that Bushman is the one that violated or breached any sort of duty as far as good faith is concerned, I would have thought I tried to avoid that type of comment because I'm not—I don't think I was necessarily saying that Bushman Farms itself was doing anything underhandedly or anything that was in violation of good faith. R. 38, p. 5, l.15-21.

Dairyland at page 5 of its Brief mischaracterizes the absence of a successful closing to one of the two persons named in the Listing Contract as a "pure technicality." Appellant's Brief established at pages 11-20, such successful closing to one of two persons was an express requirement of the Listing Contract, drafted by Dairyland, which must be met to entitle Dairyland to a commission.

The *Foseid v. State of Cross Plains*, 197 Wis. 2d 772, 796-797, 541

N.W.2d 203 (Ct. App. 1995) case referenced on page 6 of Dairyland's Brief does not stand for the proposition, as Dairyland insinuates, that a breach of duty of good faith occurs when an aggrieved party asks for that party's money back after one party to a contract has taken money not earned. The issues in this appeal are whether Dairyland was entitled to a real estate commission as of the time of the closing and whether Bushman Farms had breached the duty of good faith as of such closing. The answer to both questions is "no."

The paraphrase of the Listing Contract on the second paragraph of page 6 of Dairyland's Brief is misleading in failing to mention Addendum B, which provided a commission would be paid only upon *successful closing* to one of two named persons. R.25, Tr. Ex. 1 at l. 277-279. Unlike most listing contracts which entitle a broker to a commission if such broker finds a buyer ready, willing and able to purchase, this Listing Contract required a successful closing to one of two named persons. Such did not take place.

Dairyland at the top of page 7 of its Brief references R.18, Ex. E which was neither a trial exhibit nor part of the trial record. (See R. 25, list of exhibits.)[1] The sale price is not germane because the commission was payable, if at all, on a percentage basis. R.25, Tr. Ex. 1, l. 57.

Contrary to the insinuation in the middle of page 7 of Dairyland's Brief, Bushman Farms did not exact the language that a commission would be payable

[1] R.18, Ex. E, referenced near the top of p. 7 of Dairyland's Brief was the transcript of the deposition of Dennis Bushman not Alan Bushman.

only if there were a successful closing to one of two persons. Joseph Bradley of Dairyland provided the wording for this provision. R.37, pp. 26-27. Persons other than Goedhart Westers and Jerry Gordon had previously expressed to Alan Bushman an interest in buying the Bushman Farms real estate and many such persons were referenced in the Listing Contract. R.37, pp. 138-139, and R.25, Tr. Ex. 2. Dairyland's suggestion it is "absurd" that it not be paid if there was a closing, no matter the specific terms of the Listing Contract, should be rejected. If there is any absurdity, it is that Dairyland is unilaterally attempting to alter the Listing Contract to its benefit after the closing.

Dairyland mistakenly assumed on page 8 of its Brief that *Corbin on Contracts* § 570 (West Supp. 1993) wherein it reads "…that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations." has applicability. The parties here did not assume but instead negotiated and agreed a commission would be payable only upon successful closing to one of two persons:

> It is understood that commission will only be paid upon successful closing and full payment if property is sold to buyer(s) listed in Addendum B. This agreement is an amendment and supersedes any other agreement we have signed in relation to this transaction.

R.25, Tr. Ex. 1, l. 277-279.

In reply to Dairyland's argument on page 8 that "substance" should control, the "substance" is the listing contract provision quoted above.

On page 8 of its Brief, Dairyland invites this court to imagine the precedent if the listing contract were enforced as written. Listing contracts are to express the

exact agreement of the parties. See Wis. Adm. Code REEB 24.08 and Section I, pp. 11-12 of Appellant's Brief. The proper precedent to be established in this case is that listing contracts are to be enforced as written, particularly where specially negotiated provisions expressly amend and supersede common boilerplate terms.

The *Zenith Ins. Co. v. Employers Ins.*, 141 F.3d 300, 308 (7th Cir. 1998) case cited by Dairyland on page 9 of its Brief rejected a stringent duty of "utmost good faith" and instead recited, "Wisconsin courts have not taken this step. Instead, they acknowledge a general duty of good faith and fair dealing between the parties to a contract" and "A party seeking to recover under this theory must show something that can support a conclusion that the party accused of bad faith is actually denied the benefit of the bargain originally intended by the parties." The parties to this appeal explicitly agreed a commission would be payable only if there were a successful closing to one of two individuals, an event which did not occur.

Dairyland's argument on page 9 of its Brief that the assignability of the offer to purchase should influence the outcome of this case must be rejected. The Listing Contract, not the offer to purchase, is the only document which could entitle Dairyland to a commission. It is disingenuous for Dairyland to argue it was victimized by being left out of communications because it requested communications be conducted through legal counsel. (R. 37, pp. 56-58 and R. 25, Tr. Ex. 6), but never bothered to hire its own attorney regarding this transaction. R. 37, pp. 74-75.

Appellant's Brief at pages 23-24 established Bushman Farms had no duty to inform Dairyland that the offer had been assigned and that there was no prohibition which forbad assignment of the offer to purchase. Dairyland has not rebutted those contentions.

In response to the assertion near the bottom of page 9 of Dairyland's Brief, the Farm Offer to Purchase (R. 25, Tr. Ex. 11) drafted by it was not signed by any buyer. R. 37, pp. 41-42. Dairyland Brief at pages 9 and 10 insinuates machinations by the attorney representing Bushman Farms. However, it was not the idea of Bushman Farms' legal counsel, Michael Salm, to sell the real estate to a limited liability company. R.37, p. 131. Instead, it was Attorney Patrick Gill who suggested that the grantee on the deed be Greenwood Acres, LLC. R. 37, pp. 177-182 and R. 25, Tr. Ex. 19 at p. 10, l. 13-18. None of this shows breach by Bushman Farms.

In response to Dairyland's assertions at the top of page 11 of its Brief, the Bushmans did not keep William Baker away from the closing. Rather, it was Harlan Accola, who was part of the closing company, who said William Baker was not to be at the closing and that Mr. Baker should run errands, get lunch, and come back to pick up his check. R.37, p. 17, l. 19-p. 18, l. 14. Such in no way enhances the legal right of Dairyland to take the commission check at closing.

Dairyland seems to concede in the middle of page 11 of its Brief that nothing prohibited Bushman Farms from consenting to an assignment of the Offer to Purchase. Dairyland cannot have it both ways. It cannot simultaneously

concede Bushman Farms could consent to the assignment of an Offer to Purchase and yet argue such permissible action operated *ipso facto* to amend the Listing Contract.

The request to import "harm" into the Listing Contract found at the bottom of page 11 and top of page 12 of Dairyland's Brief misses the point. Such is a disguised request for a judicial rewriting of the Listing Contract after the fact and should be rejected.

II. DAIRYLAND IS DEEMED TO HAVE BREACHED THE FIDUCIARY DUTIES IT OWED TO BUSHMAN FARMS

Section II at pp.13-20 of Appellant's Brief argued and provided support that Dairyland breached the fiduciary duties it owed Bushman Farms. Dairyland offered no response to such contentions, and they should be deemed admitted. *Hoffman v. Economy Preferred Ins. Co.*, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590: "An argument to which no response is made may be deemed conceded for purposes of appeal."

III. THE TRIAL COURT'S DECISION WAS NOT BASED UPON WAIVER OR LACHES, SUCH DOCTRINES ARE NOT IN ISSUE IN THIS APPEAL

The trial court's decision against Bushman Farms was based upon its application of the doctrine of good faith. R.38, p. 7, l. 18-23. Wis. Stat. § 805.17(2) reads in part that in a trial to the court, "The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an

opinion or memorandum of decision filed by the court." The trial court stated its findings and conclusions orally on the record following the close of evidence. R.36 and R.38. The trial court made no findings or conclusions with regard to either waiver referenced in Section II of Dairyland's Brief or with regard to laches referenced in Section III of its Brief. The trial court did not even mention waiver or laches following the trial. R. 36 and 38. Consequently, there are no findings or conclusions with regard to either waiver or laches which this court can review and no waiver or laches issue is before this court.

IV. WAIVER WAS NOT PROVEN

Section II of Dairyland's Brief mentioned waiver. However, the trial court did not mention waiver in its decision or make any findings or conclusions regarding waiver. R.36 and R.38. Waiver is not in issue in this appeal. Even if waiver were properly before this court, it does not apply. First, Dairyland breached the fiduciary duty it owed by failing to inform Bushman Farms of Bushman Farms' rights with regard to the disputed real estate commission. Second, Dairyland did not ensure the closing and other documents were correct as regards the Listing Contract and the real estate commission. Bushman Farms had not knowingly relinquished the right to disclosure and to having correct documents furnished it. Third, an intent to waive is an essential element of waiver. Finally, there never was a duty on the part of Bushman Farms to object to the sale to Greenwood Acres, LLC. Bushman Farms, in failing to object to such did not knowingly and voluntarily relinquish the right it had not to pay a real

estate commission to Dairyland. Bushman Farms, not having been apprised of its rights by Dairyland cannot have intentionally relinquished a known right. The trial court did not find a waiver, and this court should not do so.

V. LACHES WAS NOT PROVEN

Section III of Dairyland's Brief mentioned laches. The trial court did not mention laches in its decision or make any findings or conclusions relating to laches. R.36 and R.38. Laches is not in issue in this appeal.

Even if laches were properly before this court, such doctrine does not apply because its elements were not proven:

> "The elements of laches are:
>
> (1) unreasonable delay,
>
> (2) lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he bases his suit, and
>
> (3) prejudice to the party asserting the defense in the event the action is maintained." (citation omitted)

Smart v. Dane County Bd. Of Adjustments, 177 Wis.2d 445, 458, 501 N.W.2d 782 (1993).

If any of these elements is not proven, laches does not apply. *State ex rel. Booker v. Schwarz*, 2004 WI App 50, fn. 2, 270 Wis. 2d 745, 678 N.W.2d 361. There was no unreasonable delay. The closing took place in March, 2012. Disciplinary action was taken by the Wisconsin Real Estate Examining Board against Dairyland Real Estate in June, 2012 (R. 25 Tr. Ex. 13) and against William Baker in August, 2012. R. 25 Tr. Ex. 8. This lawsuit was promptly commenced in

February, 2013. R. 1 and 2. Witnesses have been deposed. No witness has been shown by Dairyland Real Estate to have been unavailable. Second, the Complaint (R.2) informed Dairyland of the request for return of the real estate commission. Third, Dairyland Real Estate failed to show any prejudice from any alleged delay. Showing prejudice presents an impossible task to Dairyland, given what it knew or should have known at the closing. Dairyland failed to prove any of the three elements of laches.

VI. THE TRIAL COURT'S CONSTRUCTION OF THE LISTING CONTRACT AGREED WITH THAT OF BUSHMAN FARMS; THE BUSHMAN FARMS' CLAIM WAS DISMISSED SOLELY ON THE BASIS OF THE APPLICATION OF THE DOCTRINE OF GOOD FAITH

Dairyland misses the mark in Section IV of its Brief beginning on page 14 when it refers to the trial court's construction of the Listing Contract. The trial court recited:

> "It is understood that commission will only be paid upon successful closing and full payment if property is sold to the buyer, and then in brackets, or buyers listed in addendum B. This agreement is an amendment and supersedes any other agreement we have signed in relationship to this transaction…." R.36, p. 5, l. 4-10.

and:

> "And that's really what this case comes down to is that Bushman Farms wished to get back a commission that it paid to Dairyland or it paid out during the closing because of a strict reading of the contract.
>
> And I said that if, in fact, contracts are read in such a strict method in which Bushman Farms wishes the Court to do it as the trier of fact or even the motion to reconsider, then absolutely Attorney Dreier would be correct. But if I do so, I would have to ignore what I think is the law. And the law does talk about a good faith that's inherent in every contract."

R.38, p. 5, l. 3-14. The trial court's decision was not based upon its construction of the language of the Listing Contract but rather upon its application of the doctrine of good faith, which Bushman Farms asserts was in error.

Dairyland's suggestion that it is "fair and reasonable" that Dairyland Real Estate be paid is based solely on its self-interest. Naked self-interest is no substitute for argumentation based upon the facts or the law. Such suggestion on page 15 of Dairyland's Brief ignores the fact Dairyland did not draft the accepted Offer to Purchase (R. 25 Tr. Ex. 11 which was drafted by Dairyland was not accepted), the fact the record does not show who owns Greenwood Acres, LLC, and the fact many other persons had expressed an interest in buying the Bushman Farms real estate. R.37, pp. 138-139, and R.25, Tr. Ex. 2. Dairyland's suggestion that it be paid, contrary to the terms of the Listing Contract it drafted, should be rejected.

CONCLUSION

Dairyland did not earn a real estate commission under the Listing Contract which its owner, Joseph Bradley, negotiated with Bushman Farms. The trial court committed error in concluding there was a breach of the duty of good faith by Bushman Farms, which was the sole basis for its dismissal of the Bushman Farms' claim. The decision of the trial court should be reversed and judgment entered in favor of Bushman Farms.

Respectfully submitted this 29th day of May, 2015.

FIRST LAW GROUP S.C.
A limited liability service corporation

By: _____/s/_____
Gary L. Dreier, Attorneys for
Plaintiff-Appellant, Bushman Farms, Inc.
State Bar No: 1016656

MAILING ADDRESS:
2900 Hoover Avenue, Suite A
Stevens Point, WI 54481
715-341-7855

CERTIFICATION OF FORM AND LENGTH OF REPLY BRIEF

I certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) for a Brief produced using the following font: Proportional Serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 2958 words.

Dated this 29th day of May, 2015.

FIRST LAW GROUP S.C.
A limited liability service corporation

By: ___/s/_____
Gary L. Dreier, Attorneys for Plaintiff-Appellant, Bushman Farms, Inc.
State Bar No: 1016656

MAILING ADDRESS:
2900 Hoover Avenue, Suite A
Stevens Point, WI 54481
715-341-7855

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f) (ELECTRONIC BRIEF CERTIFICATION)

I certify that:

I have submitted an electronic copy of this Brief, excluding the Appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that:

This electronic Brief is identical in content and format to the printed form of the Brief as filed as of this date.

A copy of the Certificate has been served with the paper copies of this Brief and filed with the court and served on all opposing parties.

Dated this 29th day of May, 2015.

FIRST LAW GROUP S.C.
A limited liability service corporation

By: /s/_____
Gary L. Dreier, Attorneys for Plaintiff-Appellant, Bushman Farms, Inc.
State Bar No: 1016656

MAILING ADDRESS:
2900 Hoover Avenue, Suite A
Stevens Point, WI 54481
715-341-7855