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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

APPEAL NO. 2014AP2989

BUSHMAN FARMS, INC.,
Plaintiff-Appellant,

v.

DAIRYLAND REAL ESTATE, LLC,
Defendant-Respondent.

ON APPEAL FROM THE CIRCUIT COURT FOR WOOD COUNTY,
CASE NO. 2013CV000090,
THE HONORABLE TODD P. WOLF, PRESIDING

**WISCONSIN REALTORS® ASSOCIATION
AMICUS CURIAE BRIEF**

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OVERVIEW

This is a real estate commission case where the seller has paid the commission and now it wants to take it back. The listing contract entered into by the Plaintiff-Appellant, Bushman Farms, Inc. (Bushman), indicated that commission would be due to Defendant-Respondent, Dairyland Real Estate, LLC (Dairyland), if Bushman's 1181 acres of farm property was sold to Goedhart Westers or Jerry Gordon. Goedhart Westers (Westers) entered into a WB-12 Farm Offer to Purchase to purchase the farm property from Bushman, but at closing the property was deeded instead to Wester's limited liability company, Greenwood Acres, LLC. The commission was paid to Dairyland at closing with no objection. A few months later Bushman initiated this action claiming that the commission should be refunded because the specific conditions of the listing contract had not been fulfilled.

On paper that literal conclusion that the property was sold to an LLC instead of one of the individual buyers named in the listing contract cannot be readily disputed. But in this case it is necessary to read between the lines to consider the implied duty of good faith and fair dealing. "Every contract implies good faith and fair dealing between the parties and a duty of cooperation on the part of both

parties.” *Save Elkhart Lake v. Village of Elkhart Lake*, 181 Wis. 2d 778, 787, 512 N.W.2d 202 (Ct. App. 1993) (*quoting* Wis. JI—Civil 3044). Examination of the implied contractual duty of good faith and a real estate broker’s duties under Wisconsin real estate license law are instrumental to resolution of this case.

ARGUMENT

This case is about whether a commission paid in good faith in a closing apparently engineered by the attorneys for the parties should be retracted. The broker, who was essentially excluded from participation in the transaction and the closing table, (R.36 at 8; R.37 at 51, 70-71), cannot be faulted for failing to provide legal advice or provide brokerage services after the agency relationship was concluded.

I. The Role of Real Estate Brokers Is Strictly Regulated

Real estate brokers are regulated by the Wisconsin Department of Safety and Professional Services (DSPS).¹ The Department acts

¹ Wisconsin Department of Regulation and Licensing (DRL) regulated real estate practice and created and approved real estate forms prior to July 1, 2011. Scott C. Minter & Debra Peterson Conrad, *Wisconsin Real Estate Law* §§ 1.01-1.05 (2014 Edition).

through the Real Estate Examining Board (REEB)² which protects Wisconsin property sellers and buyers by ensuring competent practice. The REEB establishes minimum standards of professional conduct, including the requirement that real estate brokers use the state-approved contracts, such as the WB-2 Farm Listing Contract - Exclusive Right to Sell (Mandatory Use Date 1-1-09) (WB-2) and the WB-12 Farm Offer to Purchase (Mandatory Use Date 1-1-00) (WB-12) used in this case. *Sonday v. Dave Kohel Agency, Inc.*, 2006 WI 92, ¶ 24, 293 Wis. 2d 458, 718 N.W.2d 631; (R.25, Ex. 1 and Ex. 4).

In the WB-2 listing contract, such as the one entered into by Bushman and Dairyland on January 4, 2012 (R.36 at 4), the sellers authorize the listing broker to provide brokerage services on their behalf, use reasonable efforts to procure a buyer, and negotiate or offer or attempt to negotiate a sale of that property. Wis. Stat. § 452.01(1m), (2)(a), (3e); Scott C. Minter & Debra Peterson Conrad, *Wisconsin Real Estate Law* § 5.01 (2014 ed.). Brokers provide real estate brokerage services but, absent other credentials, generally

² The Real Estate Examining Board now exercises most of the authority vested in the DRL prior to July 1, 2011, including granting licenses, rule-making and approval of mandatory real estate forms. 2011 Wis. Act 32.

are not authorized to act as attorneys, accountants, or financial analysts.

A. Dairyland Strictly Prohibited From Advising Bushman
Regarding Legal Rights and Contract Interpretation

A broker's duties do not include a duty to provide legal advice to clients, customers or other parties. Wis. Admin. Code § REEB 24.06(1) states: "Unauthorized practice of law prohibited. Licensees shall not engage in activities that constitute the unauthorized practice of law." Wis. Admin. Code § REEB 16.05(1) states: "A licensee may not provide advice or opinions concerning the legal rights or obligations of parties to a transaction, the legal effect of a specific contract or conveyance, or the state of title to real estate." Only an attorney can advise the parties as to their legal rights under the terms of the transaction documents.

Lines 159-161 of the WB-2 state, "A broker or salesperson can answer your questions about brokerage services, but if you need legal advice, tax advice, or a professional home inspection, contact an attorney, tax advisor, or home inspector." (R.25, Ex. 1); Wis. Stat. § 452.135(2)(a). Lines 284-287 of the WB-12 state: "Brokers may provide a general explanation of the provisions of the offer but are prohibited by law from giving advice or opinions concerning

your legal rights under this offer or how title should be taken at closing. An attorney should be consulted if legal advice is needed.” (R.25, Ex. 4).

In *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 206, 109 N.W.2d 685 (1961), the Wisconsin Supreme Court confirmed a real estate licensee’s limited right to practice law in a real estate transaction, holding that a licensee may use state-approved forms to accomplish the intent of the parties. SCR Chapter 23, Regulation of Unauthorized Practice of Law, includes language allowing licensees to draft real estate contracts for parties. But neither permits brokers to give “advice or counsel to others as to their legal rights.” SCR 23.01(1).

Bushman’s assertion that Dairyland had a duty to advise them as to whether commission was due under the listing contract flies in the face of this fundamental prohibition against real estate brokers giving legal advice. That calls for a legal conclusion. (R.37 at 49). Instead it was Bushman’s attorney and tax advisor who did review the listing contract, and reviewed and discussed the closing statement and warranty deed with his clients. (R.37 at 113, 120-123). He discussed the closing expenses and commission with Bushman prior to closing. (R.37 at 122).

B. Broker Duties to Clients End upon Closing

Wis. Stat. § 452.133(1)-(2) lists the duties a broker owes to a “person in a transaction” and to a client to whom the broker is providing brokerage services, respectively. Other than the duty of confidentiality in Wis. Stat. § 452.133(1)(d), these duties end following the closing of the transaction.

“Transaction” is defined as “the sale, exchange, purchase or rental of, or the granting or acceptance of an option to sell, exchange, purchase or rent, an interest in real estate, a business or a business opportunity.” Wis. Stat. § 452.01(10). In Wis. Stat. § 452.01(3m), “client” is defined as “a party to a transaction who has an agency agreement with a broker for brokerage services.”

“Brokerage service” is defined in Wis. Stat. § 452.01(3e) as “any service described under sub. (2) provided by a broker to another person.” Wis. Stat. § 452.01(2) describes those authorized services to include when the broker,

For another person, and for commission, money, or other thing of value, negotiates or offers or attempts to negotiate a sale, exchange, purchase, or rental of, or the granting or acceptance of an option to sell, exchange, purchase, or rent, an interest or estate in real estate, a time share, or a business or its goodwill, inventory, or fixtures, whether or not the business includes real property.

Wis. Stat. § 452.01(2)(a).

Taken all together, the transaction and the broker's duties, other than the duty of confidentiality, end once the transaction closes. The listing contract concludes since there is no more property to sell and purpose of that contract has been fulfilled. The broker's authority as agent terminates once the desired result has been accomplished. See Restatement (Second) of Agency § 106 (1958). The WB-2 in this case on lines 280-283 also alludes to the fact that the listing terminates once the transaction for the sale of the listing property closes. (R.25, Ex.1). Bushman's assertion that Dairyland owed duties to Bushman once the closing had concluded and the parties and attorneys emerged from the closing rooms is seriously misplaced. (R.37 at 17-19, 101-102).

C. Broker Supervision Made Impossible By Exclusion from Transaction

Bushman also points to a broker's obligation to supervise its agents, as described in Wis. Admin. Code § REEB 17.08. A broker is to conduct a reasonable review of contracts and other transaction documents, and is responsible for preparation and correctness on real estate forms and closing statements. However, no Dairyland agent prepared or received the second accepted offer,

the closing statement or deed nor saw them before closing. Those functions were handled by Bushman's attorney. No copies were furnished for the broker to review. (R.37 at 32, 50-51, 117).

In addition, the allegation that Dairyland failed to properly supervise the agent who attended the closing is spurious as it seems he did as he was asked, politely sat in the waiting room and quietly left after the transaction had closed and he received the check he was given. (R.37 at 17-19). There would not seem to be any conduct in the nature of brokerage activities requiring any review or supervision because the parties and their attorneys closed the transaction, and thus concluded the agency relationship and all attendant duties without allowing any Dairyland participation.

Dairyland was never given any opportunity to see the closing documents before the transaction was concluded and all documents and closing statement were signed and all duties had ended. Any suggestion that Dairyland was to have reviewed the closing statements and documents or pointed out any irregularities cannot apply in this situation because it was impossible for them to do so. Performance of any such duties was made impossible by Bushman, the buyer and their attorneys who excluded Dairyland

from any involvement after the first offer was forwarded to the Westers. (R.37 at 70-71).

D. Closing Functions Not Part of the Brokerage Package

Bushman argues that Dairyland paid itself a commission which would seem to be mistaken given that Dairyland did not prepare the closing documentation, cut the checks or hold the closing. (R.37 at 51). Brokers have no obligation to provide such closing services under the terms of the listing contract or pursuant to the statutory broker duties. Minter & Conrad, *supra*, § 5.05C. Furthermore, Dairyland was not allowed to participate in these functions that were handled by legal counsel and others.

Bushman wants to exclude Dairyland from participation in the drafting, implementation and closing of the offer but then points the finger at Dairyland to say they should have completed the broker duties that were impossible to fulfill. Bushman suggests Dairyland should have known what was in the offer, deed and closing statement and provided a legal opinion regarding whether commission was due even though they never were allowed to review the documents or attend the closing. Bushman wants to have its cake and eat it too.

The parties to the WB-12 were assisted by legal counsel in the drafting and implementation of the second offer, and Bushman's attorney had seen the listing contract and reviewed the closing statement and deed. He was the one in the position to provide legal advice regarding the closing and the commission.

II. Bushman's Retraction of the Good Faith Payment of Commission Violates the Implied Duty of Good Faith and Fair Dealing

Every contract carries with it the implied condition of good faith and fair dealing in the performance of its terms. *Estate of Chayka*, 47 Wis. 2d 102, 108, 176 N.W.2d 561 (1970). A party may be liable for breach of the implied contractual covenant of good faith even though all the terms of the written agreement may have been fulfilled. *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 794, 541 N.W.2d 203 (Ct. App. 1995). The good faith covenant guards against "arbitrary or unreasonable conduct" by a party. *Id.* at 796 (referring to Wis. JI-Civil 3044).

Good faith essentially means the opposite of bad faith; bad faith includes behaviors that run counter to "community standards of decency, fairness or reasonableness." *Id.* (quoting the Restatement (Second) of Contracts § 205, cmt. a (1981)). Conduct may violate the covenant of good faith even if the party believes his conduct is

justified, and fair dealing may necessitate more than just honesty. Bad faith has been found by the court instances of “evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.” *Id.* at 797 (quoting Restatement (Second) of Contracts § 205, cmt. d). Bushman’s quest to retract the commission after the fact evades “the spirit of the bargain.”

In *LDC-728 Milwaukee, LLC., v. Raettig*, 2006 WI App 258, 297 Wis. 2d 794, 727 N.W.2d 82, the court found a breach of the duty of good faith when a party exercised the right of first refusal knowing there was no reasonable likelihood that that the party could actually complete the transaction. Here Bushman entered into an offer whereby Westers could take title in the name of an LLC under circumstances where there was no likelihood that Dairyland would learn of this offer provision or have the opportunity to react or seek modification of the listing contract.

When determining whether a party has breached the covenant of good faith and fair dealing, the courts must look at the course of conduct or dealing between the parties. *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶ 36, 291 Wis.2d 393, 717 N.W.2d

58; *Peddie v. Sterling Jewelers, Inc.*, 282 F. Supp. 2d 947, 952 (E.D. Wis. 2003).

Compliance with a contract in form, but not in substance, breaches the covenant of good faith. Every contract implies good faith and fair dealing between the parties and a duty of cooperation on the part of both parties.” *Estate of Chayka*, 47 Wis. 2d at 107, n. 7 (citing 17 Am. Jur. 2d, *Contracts*, § 256). While the payment of commission at closing was consistent with the substance of the listing contract and in the spirit of good faith, Bushman’s subsequent insistence upon strict adherence with form veers abruptly away from good faith and fair dealing. (R.37 at 6-7). Whether a party’s behavior or inaction violates the good faith duty or is inconsistent with such obligation depends upon the facts of the case and ordinarily is a question for the trier of fact. *Peddie*, 282 F. Supp. 2d at 947 (citation omitted). Here the court has found that good faith dictates that the commission be paid. (R.36 at 13-14).

Conduct that does not breach the literal terms of the contract may still violate the duty of good faith. A key inquiry is whether the party truly sought to accomplish the objective of the contract, here to have the property sold and pay commission if that is successful.

Michael B. Apfeld et al., *Contract Law in Wisconsin* § 12.13 (4th ed. 2013). Bushman did not object to the payment of the commission before or at closing which reflects the objective and substance of the successful listing transaction. Whether or not Westers created an LLC for himself, he was still buying the property, he was in the other closing room, and he was the one whose signature was on the closing paperwork. (R.37 at 172-174). That is a good faith stance.

III. Payment of Commission Effectively Waives Any Right to Insist Upon After-the-Fact Strict Reading of the Listing

As an alternate theory, Bushman's sale of the property and payment of commission to Dairyland at closing can be viewed as a waiver of any strict literal reading of the WB-2. Waiver is a voluntary and intentional relinquishment of a known right and the intent to waive is an essential element. *Hanz Trucking, Inc. v. Harris Brothers Co.*, 29 Wis. 2d 254, 264, 138 N.W.2d 238 (1965). Intent to waive is an essential element of waiver. In *Variance, Inc. v. Losinske*, 71 Wis. 2d 31, 38, 237 N.W.2d 22 (1975), the court emphasized that the evidence must show an intent to abandon the right alleged to have been waived, but did indicate that as a matter of law the party's conduct can show the intent to give up the condition precedent. Waivers of a condition precedent can be found

when there is affirmative conduct by the waiving party clearly inconsistent with the condition. *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 681-682, 273 N.W.2d 279 (1979) (citations omitted).

Since Bushman was acting under the guidance of legal counsel Bushman's conduct in paying commission without objection may be interpreted as affirmative conduct waiving the need for Westers to take title in his individual name rather through his LLC as a condition for the payment of commission under the listing contract.

CONCLUSION

Dairyland is entitled to the commission agreed to by Bushman in the WB-2 listing contract because the farm property was successfully sold – mission accomplished. Bushman excluded Dairyland for most of the transaction but proceeded in good faith to pay commission. Bushman cannot be allowed to now retract the commission in bad faith. The WRA respectfully requests that this Court affirm the decision of the circuit court and grant judgment for Dairyland.

Dated in Madison, Wisconsin, this 26th day of June, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,929 words.

/s/
Debra P. Conrad
Wisconsin REALTORS® Association

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 26th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that:

I have caused three true and correct copies of this Amicus Curiae Brief to be served on counsel listed below by placing the same in U.S. mail, first class postage, on this 26th day of June, 2015:

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