

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 1744

STIRLING PROPERTIES, INC.

VERSUS

FBF #1, L.L.C.

Judgment Rendered: September 15, 2006

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Appealed from the  
Twenty-Second Judicial District Court  
In and for the Parish of St. Tammany, Louisiana  
Trial Court Number 2002-14,756

Honorable William J. Burris, Judge

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

This is a suit for the payment of a real estate commission by Stirling Properties, Inc. (Stirling), the real estate agent, against FBF#1, L.L.C. (FBF), the property owner, arising out of the sale of approximately 23 acres of commercial property in St. Tammany Parish. The salient issue on appeal is whether Stirling is entitled to a real estate commission pursuant to an exclusive listing agreement with FBF. Resolving this issue hinges on the factual determination of whether Carey L. “Bucky” Meredith, the designated exclusive broker on behalf of Sterling Properties, submitted the property to the buyers(s) during the effective term of the agreement, thus, activating the extension clause and entitling Stirling a commission.

After a thorough review of the record, we find sufficient support for the trial court’s conclusions. Finding no manifest error, we affirm the judgment of the trial court awarding the commission.

### **BACKGROUND**

On December 16, 2001, Stirling Properties and FBF executed an “Exclusive Listing Contract for Sale of Property”, designating Stirling as the exclusive broker for the sale of 23 acres of commercial property owned by FBF. The agreement provides that Bucky Meredith, on behalf of Stirling, is the “Seller’s Designated Agent.” The agreement was signed by Bucky Meredith, on behalf of Stirling, and by Ray Fontaine, Jr., part-owner of, and on behalf of FBF. The listing agreement provided for an effective date of December 7, 2001, through May 15, 2002, and also contained an extension clause providing as follows:

If a sale is consummated on the Property during the term of this contract *or within 180 days after the expiration of this contract, with any party to whom Broker has submitted said Property* during the term of this contract, ... Owner ... agrees to pay the Broker [five percent (5%)]<sup>1</sup> of the gross sales price.

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<sup>1</sup> The agreement originally provided for a “six percent (6%)” commission, but this was altered by the parties’ handwritten and initialed notation changing it to 5%.

On August 22, 2002, after the expiration of the listing agreement but within 180 days thereafter, the property was sold. A Cash Sale was executed that same date by Raymond G. Fontaine, Jr., on behalf of FBF<sup>2</sup> and by Daniel Stirling Sinclair, Jr., Callan Edward Sinclair, and Cayman Charles Sinclair as buyers.<sup>3</sup> The purchasers are listed as having an undivided 80%, 10%, 10% interest, respectively. Also on August 22, 2002, in conjunction with the Cash Sale, the three brothers, Daniel, Callan, and Cayman Sinclair executed a Multiple Indebtedness Mortgage on the property, securing a note in the principal amount of \$935,000.00 in favor of Central Progressive Bank. The mortgage lists all three brothers as owners of the property, makers of the note, and guarantors of the mortgage indebtedness.

### **THE PARTIES' CONTENTIONS**

By letter dated September 16, 2002, to Ray Fontaine at FBF, Meredith claimed Stirling was entitled to the 5% commission (in the amount of \$59,250.00), because he, as agent, had submitted the property “to the Sinclair brothers on Monday, March 25, 2002 [during the terms of the listing agreement],” and “[o]n August 22, 2002 [during the extension clause provision], the property was sold to the Sinclair brothers for \$1,185,000.00 cash.” In support of its claims, the record contains the Cash Sale and Mortgage Documents as well as the testimony of Bucky Meredith claiming he submitted the property to the Sinclair brothers and explaining his contacts with the purchasers.

FBF rejected the claim and refused to pay the commission, instigating this litigation. FBF does not dispute that the sale of the property occurred within the extended effective period of the listing agreement. FBF also does not deny that

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<sup>2</sup> The Cash Sale contains a “Limited Liability Company Resolution” executed on August 21, 2002, by the owners of FBF, Richard S. Blossman, Jr., Raymond G. Fontaine, Jr., and E. Brandon Faciane, authorizing **any one** of the owners to execute an act of sale and mortgage and any other necessary business contract on behalf of FBF.

<sup>3</sup> The Cash Sale was also signed by Mary Minigutti Sinclair as “spousal intervenor.”

Callan and Cayman Sinclair had some contact with Meredith concerning the property. However, FBF claims that, notwithstanding the documentary evidence listing all three brothers as owners, the sole “true” purchaser of the property, was Daniel Sinclair, to whom Meredith had not submitted the property. According to FBF, Daniel Sinclair had no contact whatsoever with Meredith, either directly or through his brothers; instead, Daniel purchased the property through his own contacts with his longtime friend and part-owner of FBF, Richard Blossman. In support of these assertions, FBF provided both the deposition and trial testimony of the three Sinclair brothers. FBF also asserted and introduced evidence to show that Daniel Sinclair was the only Sinclair brother financially capable of purchasing the property. Finally, FBF introduced an Act of Correction executed May 17, 2004, eight days prior to trial in this matter, in which the Sinclair brothers declare that an error was made in the Cash Sale by listing Callan and Cayman as 10% owners (purchasers) each of the property, when “in truth and fact it was and is the intention of the parties that **DANIEL STIRLING SINCLAIR, JR. be in possession of an undivided 100% interest** in and to the property described therein.”

#### **ACTION OF THE TRIAL COURT**

After trial, the trial court rendered written reasons for judgment, containing the following factual findings:

In this case, Danny Sinclair contacted one of the principals in FBC [*sic*] about commercial real estate investments and was told about the subject property and was shown maps and descriptions of the land. Carey Meredith of Stirling Properties, Inc. met with Cayman and Callon [*sic*] Sinclair, brothers of Danny Sinclair and tried to interest them in the property as well as one other piece of property. There are disputes as to whether all three brothers were involved in a process for obtaining investment property together, whether Danny acted alone, and whether the other two brothers were making separate inquiries from Danny or were acting on his behalf. It is obvious that Danny was the only one of the brothers that could afford the investment. **It is clear that all three of the brothers were named as purchasers and that all three were obligated on the accompanying mortgage.** Just

before trial, the brothers entered into a[n] Act of Correction saying that it was intended that it be in the name of Danny only, **but there was no release or any correction as to the mortgage indebtedness of the other two brothers.** The brothers told very different versions of meetings and their involvement between their depositions and the trial. **The testimony of Carey Meredith is the only account of these matters that makes any sense *when the documentary evidence is considered.*** It is obvious to the Court that Callan and Caymen [*sic*] were acting on behalf of Danny, who was out of the country at the time, and that they were in fact parties to the transaction even though that was more a result of the generosity of Danny than any financial ability they had. **The activities of Carey Meredith as realtor does clearly satisfy the burden of being a cause of creating some minimal interest in the purchasers that contributed to bringing about the eventual sale of the property. Thus, plaintiff is entitled to its commission of the 5% of the sale price.**

(Emphasis added). In accordance with the above cited reasons, the trial court rendered judgment in favor of the plaintiff, Stirling, in the amount of \$59,250.00, attorney fees in the amount of \$8,887.00, plus interest from the date of judicial demand, until paid, and costs.

#### ANALYSIS

Our standard of review of the trial court's factual findings is the manifest error/clearly wrong standard, which requires a two-part inquiry: (1) whether there is a reasonable factual basis in the record for those findings, and (2) whether those findings are not manifestly erroneous. **Stobart v. State through DOTD**, 617 So.2d 880, 882 (La. 1989).

As noted in its reasons, the trial court's judgment depended primarily on credibility determinations based on the inconsistency of the brothers' depositions and trial testimonies, as well as the contradicting testimony given by Carey Meredith. We owe great deference to credibility determinations made by the trier of fact. **Barry v. McDaniel**, 2005-2455 (La. App. 1<sup>st</sup> Cir. 3/24/06), 934 So.2d 69, 79. We have carefully reviewed the entire record in this matter and find the evidence therein wholly supports the trial court's factual and credibility determinations. The trial court's credibility determinations are not only reasonable

in light of the entirety of the testimonial evidence, but they are further bolstered by their consistency with the documentary evidence, which speaks for itself. We also find no abuse of the trial court's great discretion in giving little weight to the Act of Correction, as it was executed eight days prior to trial of this matter and it did nothing to nullify the mortgage indebtedness of all three brothers. Because these factual findings have a reasonable factual base in the record and are not manifestly erroneous, we may not disturb them. Accordingly, we affirm the trial court's judgment finding FBF liable for the payment of the 5% commission.

### **SUBSTITUTION OF CAREY MEREDITH AS PARTY PLAINTIFF**

FBF argues that the trial court erred in granting an *ex parte* Motion to Substitute Carey Meredith as party/plaintiff after the final judgment was rendered. FBF contends this was an unlawful amendment to an otherwise final judgment, citing La. C.C.P. art. 1951. Contrary to FBF's contentions, the final judgment rendered by the trial court in this case has *not* been altered or amended. The trial court's post-appeal action has absolutely no bearing on the final judgment that is before us; therefore, FBF presents no issue for review in this appeal. Accordingly, we pretermitt discussion on this assignment of error.

### **CONCLUSION**

For all of the foregoing reasons, the judgment of the trial court, in favor of Stirling and against FBF, ordering FBF to pay the 5% commission in the amount of \$59,250.00, plus attorney fees, judicial interest and costs is affirmed. Costs of this appeal are assessed to FBF.

**AFFIRMED.**