

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Dale K. Rinker,
Appellant / Cross-Appellee-Defendant,

v.

Casual Lifestyles Realty, Inc.,
Appellee / Cross-Appellant-Plaintiff.

May 17, 2021

Court of Appeals Case No.
20A-PL-2396

Appeal from the Madison Circuit
Court

The Honorable Mark K. Dudley,
Judge

Trial Court Cause No.
48C06-2002-PL-39

Bailey, Judge.

Case Summary

- [1] Dale K. Rinker (“Rinker”) appeals the trial court order granting summary judgment to Casual Lifestyles Realty, Inc. (“Broker”) on its breach-of-contract claim against Rinker for \$42,000 in commission fees, plus costs and interest. Broker cross-appeals the trial court order denying Broker’s claim for attorney fees and costs.
- [2] We affirm in part, reverse in part, and remand for proceedings consistent with this decision.

Issues

- [3] Rinker raises two issues on appeal which we restate as follows:
- I. Whether the trial court erred when it granted summary judgment to Broker on its breach-of-contract claim for \$42,000 in commission fees, plus costs and interest.
 - II. Whether the trial court erred when it granted Broker summary judgment on Ricker’s negligence counter-claim.
- [4] Broker raises the following additional issue on cross-appeal: whether the trial court erred when it denied Broker’s request for attorney fees and interest pursuant to the Listing Contract.

Facts and Procedural History

[5] Rinker owned real estate commonly known as the Yule Golf Course (“the Property”). On October 27, 2015, Rinker entered into a one-year contract with Broker to assist Rinker in selling the Property (“Listing Contract”). The Listing contract, which was prepared by Broker and signed by Broker and Rinker, stated in relevant part as follows:

LISTING CONTRACT (EXCLUSIVE RIGHT TO SELL – UNIMPROVED PROPERTY)

In consideration of services to be performed by Casual Lifestyles Realty, Inc. (...“Broker”) for Dale K. Rinker (“Seller”), Seller appoints Broker as Seller’s broker with irrevocable and exclusive right to sell, exchange, option, or lease the real property ... (the “Property”).

* * *

Terms of Sale: The Property may be sold for cash or any of the following methods indicated below:

Conventional Mortgage Conditional Sales Contract

Insured Conventional Mortgage FHA

Assumption of Existing Mortgage Balance VA

Other _____

* * *

A. EXCLUSIVE LISTING. The parties understand and agree that this is an exclusive right to sell, option, exchange[,] or lease listing, and *Broker shall be entitled to the commission* hereinafter established which shall be *payable upon the occurrence of any of the following events*:

1. at the time the Property is sold, optioned, exchanged[,] or leased by any person, including the Seller, to any person during the term of this contract ...,
2. *at the time Seller, Broker, or any other real estate licensee secures a buyer or lessee ready, willing[,] and able to purchase, option, exchange[,] or lease the Property for such price and terms as specified, or such other price or terms as Seller may accept,*
3. at the time an agreement is entered into to sell, exchange, option[,] or lease during the term of this contract or any renewal or extension thereof, and ultimately completed after the termination of this contract,
4. the Property is sold, optioned, leased, or exchanged by Seller or any other person within 180 days after termination of this Listing Contract to any person procured in whole or in part by the efforts of Broker, any cooperating broker, or Seller ..., or
5. at the time of default by Seller to any valid, fully executed, written agreement to sell, option, exchange, or lease the Property.

Any commission required to be paid under items 1., 3.[,] and 4. above shall be due and payable at the closing of the transaction when title to or any interest in the Property is transferred to a buyer or lessee. *Any commission required to be paid under items 2. and 5. above shall be due and payable upon demand by Broker....*

* * *

B. BROKER'S COMMISSION: The *broker's commission* charged by the listing Broker for services rendered, with respect to any listing, *is solely a matter of negotiation between Broker and Seller and is not fixed, controlled, suggested[,]* recommended[,] *or maintained by ... any person not a party to the contract. ...*

Seller shall pay in cash to Broker for services a total commission as follows:

1. 7.000% of the selling/exchange price or option selling price ...

* * *

C. COMMISSION; ATTORNEY FEES. For purposes of this contract, the parties understand and agree that *Broker's commission is deemed to be a share of the purchase money received by Seller.* If any action is filed in relation to this Listing Contract, the unsuccessful party shall pay to the successful party a reasonable sum for the successful party's attorney's fees and court costs.

* * *

H. AGENCY DISCLOSURES.

* * *

2. Agency Relationship. ... Licensee (Broker) represents the interests of the Seller as Seller's agent to sell the Property. Licensee owes duties of trust, loyalty, confidentiality, accounting, and disclosure to the Seller. ...

* * *

K. ADDITIONAL PROVISIONS.

* * *

2. The parties to this contract agree that it contains the entire agreement of the parties and *cannot be changed except by their written consent.*

* * *

App. at 15-18 (emphasis added).

- [6] Broker listed the Property for sale through multiple means and received an offer to purchase the Property from Yule Golf Course, LLC ("Buyer"). In September of 2016, Rinker entered into a Purchase Agreement with the Buyer, by its Director/Manager, Jeffrey D. Adams ("Adams"). The Purchase Agreement and subsequent counter-offers specified that the sale was contingent upon the parties entering into a conditional sales contract, and that Adams was not personally guaranteeing the Buyer's loan. On October 5, 2016, Rinker and

the Buyer entered into a Contract for Conditional Sale of Real Estate, under which Buyer agreed to pay Rinker \$800,000 for the Property. Payment of the purchase price was to be made in annual payments of \$41,872.08 beginning on May 1, 2017, and continuing every May 1 thereafter until the purchase price was paid in full. The Contract for Conditional Sale also provided that Buyer would make additional payments of \$50,000 on October 1 of years 2018, 2019, and 2020, with the balance of the purchase price paid on or before October 31, 2026.

[7] On the same date, i.e., October 5, 2016, Rinker and Broker entered into a contract entitled “Commission Agreement.” App. at 35. That agreement, which was prepared by Broker and signed by Rinker and Broker, stated in full:

Casual Lifestyles Realty will be paid 7% commission on the purchase price of \$800,000 between Jeff Adams, representing the LLC purchasing the ground previously known as the Yule Golf Course, from [sic] Dale Rinker on contract.

Commission payments will be made in the following manner:

\$14,000 upon signing the contract, October 5, 2016[;]

\$14,000 at the 1 yr anniversary of signing of the contract, October 5, 2017[;]

Final payment, \$28,000, paid at the 2nd yr anniversary of signing of the contract, October 5, 2018[.]

At any time, the balance of commission can be paid in full during those 2 years.

Agreed upon this day, October 5, 2016[.]

Id.

[8] On October 5, 2016, Rinker paid Broker \$14,000 as the first commission payment. Adams paid Rinker \$500 as earnest money and Buyer took possession of the Property. However, neither Adams nor Buyer ever made any future payments to Rinker, and Rinker never made any further commission payments to Broker.

[9] On February 10, 2020, Broker filed a Complaint for Breach of Contract against Rinker. The Complaint alleged that, pursuant to the Listing Contract and the Commission Agreement, Rinker owed Broker an additional \$42,000 in commission fees, plus interest, attorney fees, and costs. On May 18, 2020, Rinker filed a timely Answer which included affirmative defenses, such as “breach of contract by buyer,” *id.* at 36, and a counter-claim against Broker for negligence in recommending that Rinker sell the Property to Buyer, withholding information about Buyer, and failing to properly investigate Buyer’s financial condition.

[10] On July 13, 2020, Broker moved for summary judgment on its claims and Rinker’s negligence counter-claim. On September 14, 2020, Rinker timely filed his response to Broker’s summary judgment motion and filed a cross-motion for summary judgment on Broker’s claims. Following an October 12, 2020,

hearing at which arguments were presented, the trial court issued an order granting Broker's motion for summary judgment for \$42,000 in commission fees, plus costs and post-judgment interest, because Rinker breached the Commission Agreement. The court also granted Broker's motion for summary judgment on Rinker's negligence counter-claim. However, the trial court denied Broker's motion for attorney's fees per the terms of the Listing Contract because it found that the contract did not apply to the conditional sale of the Property.¹ The trial court also denied Rinker's cross-motion for summary judgment.

[11] Rinker timely filed this appeal, and Broker timely filed its cross-appeal.

Discussion and Decision

Standard of Review

[12] We review a grant or denial of a motion for summary judgment under the same standard used by the trial court; that is,

[t]he moving party bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Summary judgment is improper if the movant fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. In determining whether summary judgment is proper, the

¹ Because the trial court denied Broker's request for attorney fees, the amount of attorney fees was rendered irrelevant and the trial court entered a final judgment.

reviewing court considers only the evidentiary matter the parties have specifically designated to the trial court. *See* Ind. Trial R. 56(C), (H). We construe all factual inferences in the non-moving party's favor and resolve all doubts as to the existence of a material issue against the moving party. The fact that the parties have filed cross-motions for summary judgment does not alter our standard for review, as we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law.

Reed v. Reid, 980 N.E.2d 277, 285 (Ind. 2012) (case quotations and citations omitted).²

Broker's Entitlement to Commission

[13] Broker contends, and the trial court determined, that Broker was entitled to its commission under the terms of the Commission Agreement. However, contrary to the trial court's determination, Broker also asserts that it is entitled to its commission under the terms of the Listing Contract—a contention that, on appeal, is mostly relevant to the issue of Broker's claimed entitlement to attorney fees, as only the Listing Contract provided for such fees. Thus, we begin by addressing Broker's breach-of-contract claims. We follow by addressing Rinker's assertion that Broker is also not entitled to its commission as a matter of equity.

² The trial court issued a written order which included factual findings. Such special findings are not required in summary judgment proceedings and are not binding on appeal; however, they offer the Court of Appeals valuable insight into the trial court's rationale and facilitate our appellate review. *E.g.*, *Coulter v. Caviness*, 128 N.E.3d 541, 545 (Ind. Ct. App. 2019).

Breach of Contract

- [14] Broker sued Rinker for breaching the Listing Contract and the Commission Agreement by failing to pay the \$42,000 still owed for Broker's commission. The trial court determined that Broker was entitled to summary judgment for breach of the Commission Agreement, but not for breach of the Listing Contract; it interpreted the latter document as being inapplicable to a conditional sales contract such as that into which Rinker entered with Buyer.
- [15] On appeal, Rinker asserts that Broker is not entitled to its commission under either the Listing Contract or the Commission Agreement. Broker, on the other hand, asserts that it was entitled to its commission under both contracts. Thus, this appeal depends upon interpretations of each of those contracts.

Our goal in contract interpretation is to determine the parties' intent when they entered into their agreements. We start by determining whether the contract's language is ambiguous—and when it isn't, we apply its plain and ordinary meaning in light of the whole agreement, without substitution or addition. Importantly, the parties' disagreement over a term's plain meaning doesn't itself create ambiguity.

Hartman v. BigInch Fabricators & Constr. Holding Co., Inc., 161 N.E.3d 1218, 1223 (Ind. 2021) (citations and quotations omitted). The test to determine whether a written contract is ambiguous is whether “a reasonable person would find the contract subject to more than one interpretation.” *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 813 (Ind. 2012).

Listing Contract

[16] Contrary to the trial court’s conclusion, the language in the Listing Contract is unambiguous. That contract provided that, “in consideration of services to be performed by” Broker, Rinker gave Broker the exclusive right to sell the Property. The contract further provided that Broker was entitled to a commission of seven percent of the selling price of the Property, and the “List Price” was specified as “\$960,000.” App. at 15. The contract then unambiguously specified that the “Terms of Sale” under the Listing Contract were a sale “for cash” or “conventional mortgage” or “insured conventional mortgage.” *Id.*

[17] The contract further provided in section “A” that the commission “shall be payable upon the occurrence of” any of five listed “events.” *Id.* One such event was: “at the time Seller, Broker, or any other real estate licensee secures a buyer or lessee ready, willing[,] and able to purchase,³ ... the Property *for such price and terms as specified, or such other price or terms as Seller may accept.*” *Id.*, § A(2) (emphasis added). The phrase “price and terms as specified” unambiguously referred to the previously specified “Terms of Sale,” i.e., a sale for cash, mortgage, or insured mortgage. *Id.* However, in this case, Rinker accepted an offer to purchase under “*other price or terms,*” i.e., he accepted a conditional sales contract for \$800,000. *Id.*; *see also* App. at 19-29, Contract for

³ There is no contention—much less designated evidence—that Buyer was not “ready, willing[,] and able to purchase” the Property, only that Buyer did not ultimately do so.

Conditional Sale of Real Estate. Thus, in light of the plain and ordinary meaning of all of the terms of the Listing Contract considered as a whole, the commission was “payable” to Broker on October 5, 2016, i.e., at the time Broker secured the Buyer and Rinker accepted the “other price or terms” of the conditional sale for \$800,000. App. at 15, § A(2).⁴ Given that unambiguous language, the trial court erred when it stated that “there is some question as to whether the Listing [Contract] covered the sale to Jeff Adams because the conditional sales contract line was not marked on the Listing [Contract].”
Appealed Order at 3-4.

[18] However, Rinker maintains that the \$42,000 remainder of the commission was only due under the Listing Contract if and when the Buyer paid the full purchase price. That argument is contrary to the plain and ordinary meaning of the words of the contract itself. The Listing Contract states in relevant part in section B that Broker’s commission “is solely a matter of negotiation between Broker and Seller,” and “is not fixed [or] controlled ... by ... any person not a party to the contact.” *Id.* at 15-16. Obviously, the Buyer was not a party to the Listing Contract; therefore, what the Buyer did or did not do is irrelevant to Broker’s entitlement to its commission under the Listing Contract. Moreover,

⁴ Because we hold that Broker was entitled to its commission under the plain terms of section A(2) of the Listing Contract, we do not address Broker’s claims that it is also entitled to its commission under other terms of that contract. However, we note that the “Terms of Sale” would apply to any of the other four “events” listed in section A (i.e., subsections 1 and 3-5), as none of those other subsections specifically modified the “Terms of Sale” by providing for the possibility of a sale under “other price or terms as Seller may accept.” *Id.*

the contract states in section C, entitled “COMMISSION; ATTORNEY FEES[,]” that the commission is only “deemed” to be a share of the purchase money received by Seller. *Id.* at 16. Black’s Law Dictionary defines the word “deem” as follows: “to treat (something) as if (1) it were really something else, or (2) it has qualities that it does not have...” *Deem*, Black’s Law Dictionary (10th ed. 2014). Thus, giving the words of the Listing Contract their plain and ordinary meanings, as we must, it is clear that the parties did not intend that payment of the commission be contingent upon, or otherwise tied to, Rinker’s actual receipt of the purchase price,⁵ and no reasonable person would interpret the above sections of the contract otherwise.

[19] Rinker’s proposed interpretation of the Listing Contract not only contradicts the plain language of that contract, but also clear common law. As the trial court correctly noted, the general rule is that, “absent a specific agreement to the contrary, a broker earns his commission when he secures a buyer on the seller’s terms.” *Abex Corp. v. Vehling*, 443 N.E.2d 1248, 1255 (Ind. Ct. App. 1983) (citations omitted); *see also Panos v. Prentiss*, 460 N.E.2d 1014, 1016 (Ind. Ct. App. 1984) (“Generally, a broker’s right to compensation accrues upon completion of negotiations and upon the meeting of the minds of the principal and the customer procured, but unless otherwise provided, it is not dependent

⁵ Thus, this case is not like *Shook v. Davis-Day Timber Co., Inc.*, cited by Rinker. In *Shook*, the contract governing payment of the commission contained a provision that explicitly stated the contract was “null and void” if the Buyer “failed or refused to complete the terms” of the sales contract. 331 So.2d 667, 669 (Ala. 1976).

on the final consummation of the sale contract.” (citations omitted)). Here, Broker did everything it was required to do under the Listing Contract; it secured a buyer under “such other price or terms” as Rinker accepted. At that point, Broker had “earned [its] commission as a matter of law,”⁶ and was entitled to payment of that commission. *Abex*, 443 N.E.2d at 1255. Rinker has pointed to no provision of the Listing Contract stating otherwise.

Commission Agreement

[20] As noted above, Broker secured a buyer for the Property, not per the “Terms of Sale” in the Listing Contract, but per “such other price or terms as Seller may accept[;]” i.e., a conditional sales contract for the purchase price of \$800,000. App. at 15, § A(2). Therefore, for purposes of the commission due, an additional written instrument was required to clarify the “other” price and terms of sale.⁷ See App. at 18, § K(2) (“The parties to this contact agree that it contains the entire agreement of the parties and cannot be changed *except by their written consent.*” (emphasis added)). The parties’ Commission Agreement was that additional written and signed instrument, and its terms are also unambiguous. It specified that Broker “will be paid 7% commission on the

⁶ Rinker also asserts that Broker did not earn its commission. However, Rinker designates no facts that support his assertion. Rather, as in *Abex*, the uncontested material facts show Broker did everything it was required to do under the Listing Contract, and there was “nothing further for [Broker] to do.” *Abex*, 443 N.E.2d at 1255.

⁷ We note that the Commission Agreement only addressed the “other” price of \$800,000 and the “other term” of the timing of the payment of the commission, per section A(2) of the Listing Contract; it did not modify the Listing Contract in any other ways.

purchase price of \$800,000” rather than the \$960,000 purchase price stated in the Listing Contract. It further clarified that, rather than Rinker owing the entire commission on October 5, 2016 (i.e., the date when Broker secured the Buyer for such other price or terms as Seller may accept) as required in the second-to-last paragraph of section A of the Listing Contract, Rinker would pay the commission in installments on specified dates. It is undisputed that Rinker paid only the first such installment, i.e., \$14,000 paid on October 5, 2016. Therefore, the undisputed facts show that Rinker breached the Listing Contract, as modified by the Commission Agreement, by failing to pay the full commission. There are no genuine issues of material fact, and Broker is entitled to summary judgment as matter of law.

Equity

[21] Rinker contends that Broker is also not entitled to payment of the remainder of its full commission as a matter of equity. However, such an equitable remedy would require that we reform the parties’ unambiguous written contracts. While a court of equity has the power to reform written contracts, *see Carr Dev. Grp., LLC v. Town of N. Webster*, 899 N.E.2d 12, 13 (Ind. Ct. App. 2008), reformation of a contract is appropriate “only when both parties mistakenly execute a document which does not express the true terms of their agreement, or when one party so executes but the other party acts fraudulently or inequitably while having knowledge of the other’s mistake,” *Sharp v. Jones*, 497 N.E.2d 593, 596 (ap 86); *see also S & S Enter. V. Marathon Ashland Petroleum, LLC*, 799 N.E.2d 18, 22 (Ind. Ct. App. 2003) (noting the doctrine of

reformation is “an extreme equitable remedy which allows the trial court to reform a written instrument only in cases of mutual mistake or fraud” (citing *Est. of Reasor v. Putnam Cnty.*, 635 N.E.2d 153, 158 (Ind. 1994))). “The remedy of reformation is extreme because written instruments are presumed to reflect the intentions of the parties to those instruments.” *Est. of Reasor*, 635 N.E.2d at 158.

[22] As discussed above, the Listing Contract and Commission Agreement are unambiguous and reflect the parties’ intent that Rinker was to pay Broker its commission when Broker secured a buyer ready, willing, and able to pay for the Property under such price and terms as specified, or such other price or terms as Rinker may accept. Rinker has designated no evidence showing that the parties intended otherwise. Nor has Rinker designated any evidence of fraud or mistake.

[23] Furthermore, we note that it would be inequitable to deny Broker its full commission, which it clearly earned under the plain terms of the unambiguous contract between the parties. While Rinker may have a claim against Buyer for its breach of the Contract for Conditional Sale of Real Estate and/or the Purchase Agreement, he has no equitable claim against Broker, which did everything required of it under the plain terms of the Listing Contract. Therefore, we decline Rinker’s request that we reform the parties’ unambiguous contracts as a matter of equity.

Negligence

[24] The trial court granted Broker’s motion for summary judgment on Rinker’s negligence counter-claim. That claim was that Broker “committed professional malpractice and breached their [sic] professional and fiduciary duties” to Rinker by “[r]ecommending ... a buyer who they [sic] knew or should have known was not a responsible and appropriate buyer for a property and contract of this magnitude, withholding information about said buyer from [Rinker], [and] failing to properly ... investigate the buyer’s financial condition and history.” App. at 36.

[25] To prevail on his negligence claim, Rinker must show: (1) a duty on the part of Broker owed to Rinker; (2) a breach of that duty; and (3) an injury to Rinker proximately caused by that breach. *E.g., Miami Cnty. Bd. of Comm’rs v. US Specialty Ins. Co.*, 158 N.E.3d 415, 422 (Ind. Ct. App. 2020) (citing *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d 1120, 1123 (Ind. 2010)), *trans. denied*. Negligence cases tend to be fact sensitive and are therefore rarely appropriate for summary judgment, although summary judgment is appropriate as to a negligence claim when the undisputed material evidence negates one element of that claim. *E.g., KMC, LLC v. E. Heights Util., Inc.*, 144 N.E.3d 773, 775 (Ind. Ct. App. 2020).

[26] The trial court found “no statutory, common law, or contractual support” for Rinker’s claim that Broker breached a duty to investigate and counsel Rinker as to Buyer’s financial ability to complete the conditional sales contract. Appealed

Order at 4. However, Rinker asserts that Broker breached its duty to “exercise such skill as is ordinarily possessed and employed by persons engaged in the profession and such diligence as persons of common prudence are accustomed to use in their own affairs and business.” Appellant Br. at 23. “Unless circumstances indicate otherwise, a paid agent represents that he has at least the skill and undertakes to exercise care which is standard for that kind of employment in the community.” Restatement (Second) of Agency: Duty of Care and Skill § 379 cmt. c (Am. L. Inst. 1958); *see also Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N.E. 568, 569 (1891) (same as applicable to broker).

[27] Normally, the existence of a duty is a matter of law. *See, e.g., Kader v. State, Dep’t of Corr.*, 1 N.E.3d 717, 726 (Ind. Ct. App. 2013). However, in this case, whether Broker had an implied duty to investigate buyer’s financial position and counsel Rinker accordingly depends upon whether such investigation and counsel by a broker is “standard in the parties’ community” such that those duties were implied. Restatement (Second) of Agency: Duty of Care and Skill § 379 cmt. c (Am. L. Inst. 1958). The existence of such an implied duty is a material fact and cannot be determined without additional evidence in the record, such as expert testimony about standards to which brokers are held in the parties’ community. Neither party has designated any evidence regarding such community standards. Therefore, summary judgment was not appropriate as to the potential duty of Broker to investigate the buyer’s finances and advise Rinker accordingly.

[28] However, we reach a different conclusion regarding Broker’s actual knowledge of an adverse material fact or risk regarding the buyer. Indiana Code Section 25-34.1-10-10(a) provides in relevant part:

(a) A licensee representing a seller or landlord has the following duties and obligations:

(3) To promote the interests of the seller or landlord by:

* * *

(C) disclosing to the seller or landlord adverse material facts or risks *actually known* by the licensee concerning the real estate transaction; ...

Id. (emphasis added). Further, the Listing Contract provides, in relevant part, that the “Licensee (Broker) represents the interests of the Seller as Seller’s agent to sell the Property. Licensee owes duties of trust, loyalty, confidentiality, accounting, and disclosure to the Seller....” App. at 16, § H(2). Thus, it is clear that Broker owed a duty to Rinker to disclose to Rinker any adverse material facts or risks actually known by Broker.

[29] However, Broker made a prima facie showing that it had no actual knowledge of an adverse material fact or risk about Buyer. *See* App. at 43, 85-91 (designated evidence of Affidavits of Terri Brenner and John Jacobs). “When a motion for summary judgment is made and supported as provided in [Trial Rule 56], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule,

must set forth specific facts showing that there is a genuine issue for trial.” Ind. Trial Rule 56(E). Rinker did not set forth any specific facts showing the existence of an adverse material fact or risk, much less Broker’s actual knowledge of such a fact or risk. See App. at 145, 147 (designated evidence of Rinker’s Affidavit). Nor does he even allege on appeal that Broker actually knew of any such adverse material facts or risks. Rather, Rinker merely points out that the ultimate sale was “an unmitigated financial disaster for Rinker,” as the Buyer failed to pay per the terms of the contract for conditional sale. Appellant’s Br. at 24. Rinker has failed to carry his burden of showing that there is a genuine issue of material fact that precludes summary judgment for Broker on Rinker’s claim that Broker breached its duty to inform him of adverse material facts of which Broker had actual knowledge. The trial court did not err in entering summary judgment for Broker on that claim.

Attorney’s Fees

[30] The Listing Contract specifically provides: “If any action is filed in relation to this Listing Contract, the unsuccessful party shall pay to the successful party a reasonable sum for the successful party’s attorney’s fees and court costs.” App. at 16, § C. The only reason the trial court did not award such fees is because it erroneously found that the Listing Contract was not applicable to the sale in this case. Because we hold that the sale was made per the express terms of section A(2) of the Listing Contract, Broker is the successful party in its suit brought in relation to that contract and is therefore entitled to its reasonable attorney’s fees and court costs.

Conclusion

- [31] The trial court did not err in granting summary judgment to Broker on its breach-of-contract claims. However, the trial court erred to the extent it concluded that the Listing Contract was not applicable to the conditional sale of the Property; the undisputed material facts show that Broker secured the Buyer for the conditional sale of the Property for \$800,000, which was accepted by Rinker as an “other price or terms,” per section A(2) of the Listing Contract. Therefore, per section C of that contract, Broker is entitled to its reasonable attorney’s fees and court costs in this action.
- [32] The trial court also did not err in granting Broker summary judgment as to Rinker’s claim that Broker breached its duty to inform him of an adverse material fact of which Broker had actual knowledge. However, the trial court did err in granting summary judgment to Broker regarding Rinker’s claim that Broker breached a duty to investigate the buyer’s financial condition and counsel Rinker accordingly. Whether such an implied duty existed depends upon the standards for brokers in the parties’ community, and neither party designated any evidence as to that material fact.
- [33] We affirm in part, reverse in part, and remand to the trial court for (1) a determination of Broker’s reasonable attorney’s fees and court costs, and (2) further proceedings on Rinker’s claim that Buyer breached an implied duty to investigate the buyer’s ability to purchase the Property and counsel Rinker accordingly. However, we note that if Rinker is ultimately successful in his

negligence cross-claim, his damages may offset the award to which Broker is entitled under its breach of contract and/or attorney fee claims. Therefore, we order the trial court to stay its entry of summary judgment for Broker on its contract and attorney fee claims, pending final judgment on Rinker's negligence counter-claim.

May, J., and Robb, J., concur.