IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 29, 2007

WAYNE BOYKIN AND ASSOCIATES ET AL. v. HARRY TINSLEY

Appeal from the Circuit Court for Wilson County
No. 13881 Clara Byrd, Judge

No. M2006-02465-COA-R3-CV - Filed March 26, 2008

Listing real estate agent and buyer's agent filed suit against prospective buyer to recover their commissions due under a contract for the sale of real estate. The trial court found that prospective buyer breached the contract and awarded commissions to both agents. On appeal, prospective buyer challenges the trial court's finding that he breached the contract as well as the determination that he was liable to the listing agent for a real estate commission. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

G. Jeff Cherry, Lebanon, Tennessee, for the appellant, Harry Tinsley.

Timothy A. Davis, Lebanon, Tennessee, for the appellees, Wayne Boykin and Associates and Cumberland Real Estate, LLC.

OPINION

This is an action by two real estate agencies, Wayne Boykin and Associates and Cumberland Real Estate, LLC, to recover real estate commissions from a prospective buyer, Harry Tinsley, on a failed contract for the sale of real estate.

On March 30, 2005, Mr. Tinsley entered into a real estate sale contract with Don and Larry Hatcher to purchase commercial property located on Leeville Pike in Lebanon, Tennessee for $605,000.00. Broker Wayne Boykin acted as the buyer's agent in this transaction. John Hill, a broker with Cumberland Real Estate, was the listing agent for the sellers. The real estate sale contract includes a provision stating that the buyer would pay "cash at closing contingent upon buyer[']s ability to secure a loan through bank of their choice." The contract also provides that it is "contingent upon the property appraising for the above sales price or greater." The sale was to close no later than May 30, 2005. Section 16 provides that, "Time is of the essence of this agreement and all items, and where the parties have specified a time, they agree that observance of

such is material and substantial to this agreement." Other relevant provisions of this contract will be discussed below.

According to Mr. Tinsley, he had met Mr. Boykin in early March 2005, and Mr. Boykin had talked to him about the Leeville Pike apartments and the availability of "zero-down" terms. At the time of the real estate contract at issue in this case, Mr. Tinsley had agreed to buy another piece of property on Maple Street on zero-down terms with Mr. Boykin as agent; he was also considering a deal regarding a third piece of property, Triple A Self-Storage. Neil Lampley, a mortgage officer whom Mr. Tinsley met through Mr. Boykin, had arranged the financing for the Maple Street transaction.

Mr. Lampley testified that he received a copy of the Leeville Pike sale contract from Mr. Boykin on April 12, 2005. He dealt with Mr. Tinsley regarding financing of the Leeville Pike property and, within a week of receiving the contract, requested information from him concerning the property's operating history–records of prior income, copies of leases, rent rolls–and the current condition of the property. Mr. Lampley did not think that he and Mr. Tinsley had discussed zero down financing with respect to the Leeville Pike property because, unlike in their first transaction, this property was commercial, not residential. Before he could order an appraisal, Mr. Lampley also needed information from Mr. Tinsley concerning the proposed use of the property as he was seeking a construction loan. Mr. Lampley never received all of the information he needed. Since he never got the information he needed, he never had the property appraised.

Mr. Lampley also testified about interactions he had with Gary Willis, Mr. Tinsley's property manager. Mr. Willis did provide Mr. Lampley with an income estimate, but no actual income history. Mr. Lampley testified that, on a commercial deal, the typical terms would be ten percent of the cost of the deal down; the banks with which he dealt did not do one hundred percent financing on commercial transactions.

Don Hatcher, one of the owners of the Leeville Pike property, testified that Cumberland Real Estate or Mr. Boykin had asked him for financial information, tax returns, and rent rolls shortly after the signing of the contract. He had authorized Mr. Hill, the listing agent, to turn over any financial information concerning the property that Mr. Hill had. Mr. Hatcher also gave tax returns, rent rolls, and other requested documents to Mr. Willis about a week to ten days after the contract was signed. He dealt with Mr. Willis on providing Mr. Tinsley with all of the financial records he needed. Mr. Hatcher did not recall ever being asked for an extension on the closing date. After the sale with Mr. Tinsley fell through, Mr. Hatcher sold the property to another buyer for the same price.

Mr. Boykin testified that he and Mr. Lampley had discussed a construction loan, but it was never zero down. After he faxed Mr. Lampley a copy of the sale contract on the Leeville Pike property, he was not involved in getting the financing on that property. Mr. Boykin testified that the Triple A Storage transaction was going on at the same time as the Leeville Pike transaction and that Mr. Tinsley "was very adamant that Triple A Storage would close, and the apartments–said put them on the back burner 'til we can make sure we had Triple A in place." According to Mr. Boykin, around May 18, 2005, Mr. Tinsley stopped returning his phone calls. Mr. Boykin stated that this made it difficult to close out the transaction. Mr. Boykin also testified that he never told Mr. Tinsley

that he could get the Leeville Pike property for no money down. He did not represent financing terms to Mr. Tinsley; Mr. Tinsley dealt with Mr. Lampley on financing. Mr. Tinsley told Mr. Boykin that he had talked with Mr. Hatcher about an extension. According to information given to Mr. Boykin by Mr. Hill, they had asked about an extension and were told that there would be no extension and that there were other interested buyers. Mr. Boykin further testified, "All I know is Gary Willis told me they weren't going to close, and I'd be sorry if I tried to force them into it." Mr. Boykin admitted telling Mr. Tinsley, toward the end of May, that Mr. Tinsley would either go through with the deal and get the loan or Mr. Boykin would sue him.

Broker John Hill, the listing agent, testified that Mr. Hatcher had talked with him early on in the transaction about the possibility of getting the note holder, Gordon Carroll, to extend the note, and Mr. Hill had talked to Mr. Carroll as to whether he would be willing to extend it. Later, Mr. Hill became concerned about the Leeville Pike property closing because it was "very slow and not much communication" was taking place. He called Mr. Boykin, who also expressed concern and stated that he was no longer getting any information from Mr. Tinsley, who was not returning his phone calls. With Mr. Boykin's permission, Mr. Hill contacted Mr. Tinsley directly. According to Mr. Hill, Mr. Tinsley stated: "John, I have the wherewithal to close this, but I don't want to see Wayne Boykin get a penny." Mr. Hill testified that he never received a written request for an extension and never presented such a request to Mr. Hatcher. He recalled talking with Mr. Tinsley during that period of time, but did not understand that he was being asked for an extension. Mr. Hill had advised Mr. Tinsley that there was other activity concerning the property and not to wait until the final hour to ask for an extension. Mr. Hill stated that, "It was made real clear to me that they had absolutely no intention to close this . . . if Wayne Boykin was involved."

Mr. Tinsley testified that, in mid-May 2005, Mr. Lampley told him that he could do the financing but could not get it done by May 30, 2005. According to Mr. Tinsley, Mr. Boykin had told him that an extension was not possible. Then, Mr. Hill called Mr. Tinsley indicating that something could still be worked out. By that time, however, Mr. Tinsley had been told by Mr. Willis that Mr. Boykin had threatened to sue Mr. Tinsley. Mr. Tinsley testified, "And I said if he's going to sue me, I'm not going to do anything with Boykin, and that's the way I felt about it." Mr. Tinsley later testified that Mr. Boykin did not threaten to sue him until after the contract had expired. The following exchange between the trial judge and Mr. Tinsley then occurred:

> THE COURT: Did you tell Mr. Hill that–
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> THE WITNESS: Yes.
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> THE COURT: –you had the wherewithal to close, but you didn't want Mr. Boykin to get a penny?
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> THE WITNESS: After I heard from hearsay that Mr. Boykin was going to sue me, that I didn't want him to get a penny. If I had to–if I could have–I mean, it's just –it's just nature. I mean, if you're–if you use a buyer's agent and your agent wants to sue you and you still want to give him an $18,000 commission when he made

> another 18 or so on a Triple A or–on a $1.7 million deal–I mean, it's just–you wouldn't use that agent anymore. Well, you might, but I wouldn't.

Mr. Tinsley stated that he and Mr. Willis were trying to close the Triple A deal and the Leeville Pike deal at the same time and that it took about six weeks to get the Triple A property appraised. Under the circumstances, there "didn't seem to be any way" that the Leeville Pike deal was going to be ready by the closing date. Mr. Tinsley stated that they were doing all they could, but there was no way they could have closed by May 30, 2005. He testified that Mr. Willis was the one in charge of delivering the needed documents to Mr. Lampley, but that it was Mr. Tinsley's understanding that Mr. Lampley "had everything he needed to close the deal." Mr. Tinsley admitted that the Triple A deal was more of a priority to him than the Leeville Pike deal; the Triple A deadline had been extended to give him a chance to make it close. Mr. Tinsley did not remember having telephone messages from Mr. Boykin after May 18, 2005. He denied having a conversation with Mr. Hill regarding the possibility of saving the deal with an extension until after the sales contract had expired.

Gary Willis, Mr. Tinsley's property manager, testified that he had talked to Mr. Boykin early on about getting a one hundred percent loan on the Leeville Pike deal. Mr. Tinsley was also present at the meeting. Mr. Tinsley was already dealing with Mr. Lampley regarding financing at that time, too. Mr. Tinsley asked Mr. Willis to step in and help with the transaction because it did not seem to be coming along very well. Mr. Willis's recollection was that his first interaction with Mr. Lampley about the Leeville Pike property was in May 2005. At Mr. Lampley's request, Mr. Willis worked with the seller to develop income and expense projections on the property, which he then sent to Mr. Lampley. Although he had understood that the seller's agent or the buyer's agent was to provide information to Mr. Lampley, that was not happening, so Mr. Willis met directly with Don Hatcher, one of the sellers. According the Mr. Willis, the problem with the Leeville Pike contract was that it was a 60-day contract, "and it just couldn't happen in that time." Mr. Willis asked Mr. Hatcher if they could have more time. Mr. Willis called Mr. Carroll, the note holder, but never got a response. He then talked to Mr. Hill, who said that the note holder would not grant an extension of time and that there were two other buyers. Mr. Willis testified that Mr. Boykin had called him and said that he was going to sue Mr. Tinsley. Mr. Willis could not recall whether this call occurred one or two days before the closing date or a few days after that date. According to Mr. Willis, Mr. Boykin had said, "I don't think that Harry [Tinsley] did everything he could to close this loan, and I'm going to bring him–I'm going to sue him for my commission." Mr. Willis stated that he had been diligent in getting all of the information requested to Mr. Lampley, but no appraisal had been ordered.

Gordon Carroll, the note holder on the Leeville Pike property, testified that, around May 17, 2005, he had been asked by Mr. Hatcher to extend the note because Mr. Hatcher thought that he had the property sold. Mr. Carroll was agreeable to an extension. Mr. Carroll is a part owner of the Cumberland Real Estate.

After Mr. Carroll testified, Mr. Willis was again questioned about his recollections concerning a possible extension on the note. Mr. Willis testified that he had never received a

response from Mr. Carroll regarding an extension. Mr. Hill later told Mr. Willis that, "Mr. Carroll was not interested in extending the note and that there were two other buyers."

At the hearing on May 30, 2006, the trial judge made findings from the bench. In concluding that it was Mr. Tinsley who breached the contract, the court stated:

> [Mr. Tinsley and the Hatchers] clearly had a contract for the $605,000, and there's really no testimony that Mr. Tinsley couldn't obtain the financing. The testimony I heard was that there was just no request to follow through. It wasn't a matter of timing. It wasn't a matter of needing an extension. It was just a matter of Mr. Tinsley got mad and decided he didn't want to go through with the contract, so he didn't follow through what needed–whatever needed to be done to make the closing dates. So technically, in the contract, he is in default, and the contract provides if the buyer is in default, that the agents have the right to sue for damages or specific performance.

Later, the court stated:

> And technically, the testimony I heard that if there had been a good faith request to extend the time, it would have been extended. But specifically, Mr. Hill was told by Mr. Tinsley that he wasn't interested. He could have closed and that statement in itself shows that this was a breach of contract–of bad faith as far as the agents are concerned.

In an order dated June 2, 2006, the court awarded Wayne Boykin and Associates a judgment of $18,150.00, representing 3% of the contract price, and $3,762.50 for attorney fees. The court awarded Cumberland Real Estate a judgment of $18,150.00, representing 3% of the contract price.[1] Mr. Tinsley's motions for a new trial and to alter or amend the judgment were denied on October 13, 2006. This appeal followed.

ANALYSIS

Mr. Tinsley has raised two issues on appeal. First, he argues that the evidence at trial was not sufficient to find that he breached the contract. Second, he argues that the trial court erred in finding that Cumberland Real Estate was entitled to a judgment against him because there was no privity of contract between Cumberland Real Estate and Mr. Tinsley.

Standard of review

The trial court's findings of fact are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). Our consideration of the preponderance of the

[1] Mr. Tinsley's counterclaim, which is not at issue on appeal, was dismissed by the trial court.

evidence "is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal." *Rice v. Rice,* 983 S.W.2d 680, 682 (Tenn. Ct. App. 1999). Review of a question of law is also de novo, but "'with no presumption of correctness afforded to the conclusions of the court below.'" *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002) (quoting *State v. McKnight*, 51 S.W.3d 559, 562 (Tenn. 2001)).

Finding of breach by buyer

Mr. Tinsley asserts that the evidence was not sufficient for the court to find that he breached the contract. We disagree.

Mr. Tinsley emphasizes the fact that the contract contained two conditions: Mr. Tinsley's ability to obtain financing from a lender of his choice and an appraisal at the sale price or above. Because these conditions were not met, Mr. Tinsley argues that he was excused from performing under the contract. However, Tennessee law implies in every contract a duty of good faith:

> Parties to a contract owe each other a duty of good faith and fair dealing as it pertains to the performance of a contract. *Wallace v. National Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996); *Elliott v. Elliott*, 149 S.W.3d 77, 84-85 (Tenn. Ct. App. 2004). Thus, each party to a contract promises to perform its part of the contract in good faith.

Barnes & Robinson Co., Inc. v. OneSource Facility Servs., Inc., 195 S.W.3d 637, 642 (Tenn. Ct. App. 2006). *See also ACG, Inc. v. Southeast Elevator, Inc.*, 912 S.W.2d 163, 167-68 (Tenn. Ct. App. 1995). The contract states that time was of the essence. The trial court's determination that Mr. Tinsley acted in bad faith and breached the contract is consistent with the testimony of Mr. Hatcher, who stated that he gave the relevant information to Mr. Willis within a few weeks of the contract being signed; the testimony of Mr. Hill, who stated that Mr. Tinsley told him, prior to the closing date, that he had the wherewithal to close the deal but did not want to go forward because he did not want Mr. Boykin to get any benefit from it; the testimony of Mr. Lampley, who stated that he requested but did not receive needed documents from Mr. Tinsley and Mr. Willis; and the testimony of Mr. Boykin, who stated that he was told by Mr. Tinsley to put the deal on the back burner, and that Mr. Tinsley stopped returning his phone calls after May 18, 2005. Thus, there is ample evidence to support the trial court's finding that Mr. Tinsley had the ability to obtain financing but simply decided he did not want to go forward because of a conflict with Mr. Boykin.

The evidence does not preponderate against the trial court's determination that Mr. Tinsley defaulted on the contract, particularly in light of the great weight that must be given on appeal to the trial court's credibility determinations.

Buyer's liability to listing agent

Mr. Tinsley also argues that, even if he breached the contract, it was improper for the trial court to find him liable to Cumberland Real Estate for its commission because there was no privity

of contract between Mr. Tinsley and the listing agent. We have concluded that the trial court acted properly.

As Mr. Tinsley points out, Cumberland Real Estate was not a party to the real estate sales contract between Mr. Tinsley and the Hatchers. He, therefore, argues that he should not be liable for Cumberland Real Estate's commission. In support of this position, Mr. Tinsley relies on the case of *Turnure v. Poss*, 12 Tenn. App. 519 (1931). *Turnure* was a suit brought by a seller's real estate agent against a defaulting purchaser for a lost commission and expenses. The purchaser had signed a contract with the seller to buy the property, but later backed out based upon his wife's dissatisfaction with the purchase. *Id.* at 520. Under the contract, the agent earned his commission once he had procured a purchaser who signed a binding contract, and the agent was entitled to collect the commission from the seller even if the purchaser defaulted. *Id.* In reversing the trial court's decision in favor of the agent, the appellate court emphasized the lack of privity of contract between the agent and the buyer. The court stated that, "When the agent has an expressed contract [the listing contract] with the seller for full compensation, the law will not raise an implied contract in a third person, to pay for the same service." *Id.* at 522. In discussing the applicable principles, the court also stated: "There is nothing wrong in the seller contracting with the buyer to pay his (the seller's) brokerage commissions; and a buyer may employ a broker to make a purchase for him with the agreement the seller will pay the commissions." *Id.* The court concluded that "there is no evidence in this record to support a cause of action against the defendant [buyer]." *Id.* at 523.

Turnure has not been overruled, but more recent cases involving similar issues have reached a different result--finding the defaulting party liable to the real estate agent even without privity of contract--based on factual distinctions, including contract terms that expressly address the consequences of default.[2] *See Clark v. Wright*, 699 S.W.2d 174 (Tenn. Ct. App. 1985) (holding a defaulting buyer liable to the buyer's agent for the amount of the real estate commission even though there was no written contract between the agent and the buyer for a commission); *see also French, Clayton, Johnson & Associates v. Coker*, 1993 WL 434712 (Tenn. Ct. App. Oct. 27, 1993), and *Lafferty v. Pate*, No. 01A01-9303-CH-00085, 1993 WL 312682 (Tenn. Ct. App. Aug. 18, 1993) (two cases touching in dicta on liability of defaulting party to agent working on behalf of other party to transaction).

In *Krantz v. Overfelt's Disc. Realty*, No. 01A01-9311-CH-00501, 1994 WL 164091 (Tenn. Ct. App. May 4, 1994), the court dealt squarely with the issue of a breaching buyer's liability to the listing real estate agent for the agent's commission. The facts and issues involved in *Krantz* were similar to those in the present case. The real estate sale contract in *Krantz* contained a provision concerning a breach of contract by the buyer that required the buyer to pay the broker "as damages

[2] *Smith v. Murray*, 311 S.W.2d 59, 593 (Tenn. 1958), includes a reference to *Turnure* but is distinguishable on its facts. In *Smith*, there was no written listing agreement between the agent, Smith, and the seller. The agent sought to recover his commission from Murray, who had purchased the land. The court found no evidence that Murray, by his silence, had agreed to pay the commission.

an amount equal to the commission as set forth below and reasonable attorney fees and costs incurred in the collection thereof, and shall pay to Seller any further damages caused by said breach, including attorney's fees and costs." *Id.* at *2. After rejecting the defaulting buyer's arguments concerning the admission of parol evidence, the court affirmed the chancellor's decision in favor of the listing real estate agent. *Id.* at *5. The court did not mention the *Turnure* precedent, perhaps because the sale contract in *Krantz* expressly covered the liability of the buyer to the broker in the event of buyer breach. In any event, there was no privity of contract between the defaulting buyer and the listing agent in *Krantz*, yet the court found the buyer liable to the agent for his commission.

We have concluded that, as in *Krantz*, the terms of the sale contract in this case determine the appropriate result. Unfortunately, the contract terms at issue here are not as clear as those in *Krantz.* The contract provides that $2,500.00 paid by check is "to be deposited by Cumberland R.E., Broker, as agent of the Seller, within 3 banking days following acceptance of the agreement by all parties as earnest money." Section 10 of the contract, addressing a party's default, contains the following language:

> Should Buyer default hereunder, the earnest money may be forfeited at Seller's option as *partial liquidated damages*, and Seller may sue for additional damages or specific performance of this contract, or both. Should Seller default, Buyer's earnest money shall be refunded and Buyer may sue for damages or specific performance of this contract, or both. The parties agree that Agent is a third party beneficiary of this agreement. On forfeiture of Buyer's earnest money, Agent may apply such earnest money to the specified commission and remit the remainder, *or related to the contract, the prevailing party shall be entitled to recover all costs of such enforcement, including reasonable attorney's fees as determined by the court.*

(Emphasis added).

The term "*partial* liquidated damages" causes some difficulty of interpretation since an agreement for liquidated damages means that the parties have agreed on an amount of damages in the event of a breach. *See V.L. Nicholson v. Transcon Inv.*, 595 S.W.2d 474, 484 (Tenn. 1980). If a party elects the remedy of liquidated damages, he or she cannot generally seek additional damages for the same breach. *See G.H. Swope Bldg. Corp. v. Horton*, 338 S.W.2d 566 (Tenn. 1960). Thus, the terms "partial" and "liquidated damages" do not make sense when used together. We must look at the context in which these terms are used to discern the parties' intent. The provision at issue states that "the earnest money *may* be forfeited at Seller's option as partial liquidated damages" and then allows the seller to sue for additional damages or specific performance. Because of the permissive ("may") language of this provision and the express allowance for additional damages, we find the "partial liquidated damages" phrase to be a nullity. *See Loveday v. Barnes*, No. 03A01-

9201CV0030, 1992 WL 136176 (Tenn. Ct. App. June 19, 1992). The parties did not intend the earnest money, if retained at the election of the seller, to be the full measure of damages.[3]

Another problematic part of section 10 appears in its final sentence. If the buyer's earnest money is forfeited, "Agent may apply such earnest money to the specified commission and remit the remainder, *or related to the contract, the prevailing party shall be entitled to recover all costs of such enforcement, including reasonable attorney's fees as determined by the court.*. . . ." Since the italicized part of this sentence does not seem to relate to the rest of the sentence, it appears that something was left out of this part of the contract. This court cannot discern the meaning of these provisions.

We are left, therefore, to find the intention of the parties from the remaining provisions of section 10. Section 10 further provides that "Agent is a third party beneficiary" of the agreement. Who is "Agent"? There were two real estate agents involved in this transaction, the listing agent, Cumberland Real Estate, and the buyer's agent, Mr. Boykin. Since the contract provides that Cumberland Real Estate is the agent holding the earnest money and authorizes "Agent" to apply the earnest money to the commission, the most reasonable interpretation of "Agent" is that it refers to Cumberland Real Estate. Thus, under section 10, Cumberland Real Estate is specifically classified as a third party beneficiary of the contract.

An intended third party beneficiary of a contract may maintain an action on the contract. *Ferguson v. Nationwide Prop. & Cas. Ins. Co.*, 218 S.W.3d 42, 56 (Tenn. Ct. App. 2006).[4] In *Koontz v. Bayless*, No. 03A01-9603-CV-00077, 1996 WL 393929 (Tenn. Ct. App. July 16, 1996), the court found evidence to support a jury verdict that the buyer's agent was a third party beneficiary of the listing agreement between the seller and the listing agent and affirmed the judgment against the seller for the buyer's agent's commission. In *Lafferty v. Pate*, No. 01A01-9309-CH-00085, 1993 WL 312682 (Tenn. Ct. App. Aug. 18, 1993), an action for breach of a real estate contract, the contract provided that the listing broker was a third party beneficiary to the contract. *Id.* at 4. The court determined that, under the terms of the contract, the breaching buyers were obligated to pay the listing broker's commission. *Id.* at 5. In the present case, the default provisions of the contract indicate that a defaulting buyer will be liable to the seller for damages. The default provisions also expressly state that the seller's agent is a third party beneficiary of the contract. We have determined, therefore, that Cumberland Real Estate, the seller's agent, is entitled to maintain an action against Mr. Tinsley, the breaching buyer, for damages under the contract. While objecting to the award of damages against him in favor of Cumberland Real Estate on the basis of the lack of privity of contract, Mr. Tinsley has not assigned error to the amount of damages awarded.

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[3] Although the record does not definitively indicate what happened to the earnest money, Exhibit 8, a letter from Mr. Hill to Mr. Tinsley dated June 8, 2005, states his intention to retain the earnest money and to seek advice of legal counsel concerning the proper course of action in light of the dispute that had arisen between the parties.

[4] Two factors must be established for one to be considered an intended beneficiary of a sales agreement: "(1) a valid contract made upon sufficient consideration between the principal parties and (2) the clear intent to have the contract operate for the benefit of a third party." *Ferguson*, 218 S.W.2d at 56. Both factors are met here.

The trial court properly found Mr. Tinsley liable for Cumberland Real Estate's commission in this case. Costs of appeal are assessed against the appellant, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE