STATE OF MICHIGAN

COURT OF APPEALS

TONY LECHNER,

Plaintiff-Appellee,

v

WADE SCHWARTZ,

Defendant-Appellant.

UNPUBLISHED
March 11, 2021

No. 353057
Midland Circuit Court
LC No. 19-006387-CK

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant Wade Schwartz appeals by right the trial court's written opinion and verdict that was entered following a bench trial. Plaintiff Tony Lechner, a real estate associate broker, was awarded an $11,000 commission on the sale of Schwartz's home. On the record before us and under the governing law, we are compelled to reverse and remand for entry of judgment of no cause of action in favor of Schwartz.

I. FACTS

This case involves the sale of Schwartz's home and Lechner's demand to be paid a real estate commission on the basis of the sale. A purchase agreement dated June 4, 2019, reflected that the house was being sold to Stephen Sinclair, Jessica Gates, and Janet Finney (the purchasers), jointly, and that the selling agent was Lechner, who had an agency relationship with the purchasers.[1] The purchase agreement further provided that the sales price was $440,000, that the commission on the sale was to be 2.5% of the sales price, that the sale was contingent on the

[1] With respect to the purchasers, Jessica Gates is Stephen Sinclair's wife, and Janet Finney is Sinclair's grandmother. Of the purchasers, Sinclair was the one most involved in the transactions at issue, and he was the only purchaser who testified at trial.

purchasers' closing on their own home scheduled for June 28, 2019,[2] and that Schwartz and the purchasers would "close the sale not later than 7/8/19 *unless mutually agreed, in writing, by both parties*." (Emphasis added.) The purchase agreement called for and the purchasers made a $2,500 good-faith deposit. The $2,500 was escrowed with Superior Title Agency. The purchase agreement also contained the following provision:

> TIME IS OF THE ESSENCE with respect to the performance of this Agreement. All time limits contained in this Agreement shall be strictly enforced *unless waived in writing*. Failure to perform by the exact date or deadline is a breach of contract. Neither party shall have any obligation to extend or change any provision concerning time. [Emphasis added.]

At the time of the sale, Schwartz's home was being sold by owner; he did not have a listing agreement with any realtor. Sinclair had been through the house back in 2018 when it first went on the market, but no offer was made at the time, and Schwartz had no recollection of Sinclair's viewing.[3] Lechner, on behalf of the purchasers, contacted Schwartz in 2019 and negotiated the June 4, 2019 purchase agreement. Although Lechner was identified in the purchase agreement as the selling agent, Lechner did not sign or initial the agreement as a party, and the provision for a 2.5% sales commission did not expressly indicate that the commission was for Lechner. Additionally, the purchase agreement did not identify who was required to pay the real estate commission. Lechner and Sinclair testified that all were in agreement that Schwartz was obligated to pay the commission as based on communications and conversations. Lechner denied that he acted as Schwartz's agent for purposes of the transaction or that he was engaged in a dual agency. Lechner did assist Schwartz in preparing the seller's disclosure statement. Schwartz testified that he would not have signed the purchase agreement without the time-is-of-the-essence clause because he was constructing a new house and needed cash.

Lechner testified that he called Schwartz on June 28, 2019, and told Schwartz that the purchasers were ready to move forward, but that there had been a paperwork-processing delay in regard to the sale of the purchasers' home, making it impossible to close on the sale of Schwartz's home by the July 8, 2019 deadline set forth in the purchase agreement. Lechner claimed that he also informed Schwartz that the purchasers could not close on the sale of their home until August 1, 2019. Lechner, therefore, offered to close on the sale of Schwartz's house on August 2, 2019. Lechner testified that Schwartz did not voice any objections or indicate that the proposed delay in closing was unacceptable.

Schwartz denied that Lechner even called or contacted him on June 28, 2019. Claiming a lack of communication on the status of the deal and having a belief that the purchasers were having

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[2] The contingency provision indicated that the purchasers had sold their home under contract by cash offer. Lechner represented the purchasers under a listing agreement in regard to the sale of their home.

[3] In 2018, Schwartz had unsuccessfully placed his home for sale with Modern Realty.

trouble with their financing, Schwartz testified that he did not have confidence that the transaction was going to be finalized. Because of the alleged uncertainties, Schwartz signed a listing agreement with realtor Badger Beall on June 20, 2019, which provided for a 6% commission and an initial sales price of $459,000 for the home. The listing agreement was dated June 22, 2019. A few days later, according to Beall, Schwartz phoned Beall and stated that the June 4, 2019 purchase agreement was back on, and Schwartz asked whether Beall would allow him to get out of the listing agreement. Beall testified that he informed Schwartz that it was "no problem" letting him off the hook as to the listing agreement. Schwartz, on the other hand, testified that he merely told Beall to put the listing agreement on hold, not to cancel or terminate it outright. Schwartz asserted that while he put the listing agreement with Beall on hold, he did not do so on the basis that the purchase agreement was now going to be honored.

Lechner testified that on either July 6 or 7, 2019, he texted Schwartz about having the purchasers come to Schwartz's home to take measurements for the purpose of fitting their furniture in the house. There is no dispute that on July 9, 2019, Sinclair, his wife, Gates, and Lechner went to Schwartz's home and walked around the premises, inside and outside, guided by Schwartz. Lechner testified that he handed Schwartz a one-page, one-line addendum extending the purchase agreement and asked Schwartz to sign it. According to Lechner, Schwartz refused to execute the extension, stating that he wanted to keep all of his options open. Sinclair confirmed this testimony, indicating that Schwartz chuckled when Lechner asked him to sign the extension and told Lechner that he would not sign it in order to keep his options open. Lechner admitted during his testimony that Schwartz never agreed in writing to extend the purchase agreement. Sinclair acknowledged that the purchasers and Schwartz did not close on the sale of Schwartz's home by or on the deadline date of July 8, 2019, and that there was no written extension.

Schwartz testified that Lechner did not ask him to extend the purchase agreement before the July 8, 2019 closing deadline had expired. Schwartz further testified that at no point on July 9, 2019, did he agree in writing or orally to extend the purchase agreement. Schwartz claimed that Sinclair was adamant that he still wanted to buy Schwartz's house. With respect to the written extension that Lechner asked him to sign, Schwartz asserted that he did not sign it because he did not have a chance to review the extension and because he felt as if Lechner was attempting to bully him into signing it. Schwartz claimed that he did not even know that the document was an addendum to the purchase agreement. Schwartz testified that Lechner left immediately after Schwartz refused to sign the extension, but that Sinclair and his wife stayed there for about another hour looking over the property and talking to Schwartz about going through with a sale. Lechner testified that he left Schwartz's home after Schwartz declined to execute the extension and that Sinclair and Gates remained at the home. But Lechner contended that his departure was not acrimonious and that his conversation with Schwartz had been very civil.

Sinclair testified that on July 11, 2019, Schwartz contacted him about proceeding with the sale under a new agreement to the exclusion of Lechner. Sinclair indicated that he subsequently phoned Lechner and told him about Schwartz's plan. Sinclair explained to Lechner that he needed a place for his family to live, otherwise they would be stuck living in their recreational vehicle. Sympathetic to Sinclair's plight, Lechner advised him to complete the purchase and to do whatever was necessary for the good of his family. Lechner testified in a manner consistent with Sinclair's testimony. Sinclair testified that he was in regular communication with Schwartz about completing a sale of the home. Schwartz contended during his testimony that when he and the

purchasers had discussed on July 9, 2019, and thereafter about going forward with the sale, the first purchase agreement had expired, and a new agreement would have to be executed.

On July 14, 2019, Schwartz and the purchasers executed a second purchase agreement. The sales price was again $440,000. The new purchase agreement, however, made no mention of Lechner or of any selling agent, nor did it provide for any real estate commission. A closing date of not later than August 1, 2019, was set forth in the purchase agreement. The purchase agreement additionally provided that it constituted the "entire agreement between" the parties and that the agreement "supersede[d] all prior understanding[s] and agreements, written or oral." Sinclair testified that when the second purchase agreement was signed, Schwartz told him that the purchasers should pay Lechner a commission, but Sinclair told Schwartz that the purchasers were never supposed to pay the commission—it was always the seller's responsibility. According to Sinclair, Schwartz agreed. Sinclair asserted that Lechner told Sinclair that Schwartz had actually shown the house to a Dow Chemical executive after July 14, 2019. Schwartz testified that Beall contacted him after July 9, 2019, about the executive's interest, but no offer transpired.

Schwartz testified that he proceeded to sign the second purchase agreement after speaking to Academy Mortgage, which was the purchasers' lender for the transaction, and learning that the purchasers would indeed be receiving a mortgage loan and that an underwriter issue had delayed the processing of the loan. Schwartz indicated that Superior Title Agency had supplied him with the second purchase agreement, with blanks to be filled in, as part of a sale-by-owner packet. Schwartz testified that Lechner had no involvement with the second purchase agreement.

Due to the mortgage underwriting delay, a closing could still not be completed by August 1, 2019, but Schwartz was accommodating in working with the purchasers. According to Sinclair, Schwartz told him not to worry about the delay in closing, indicating, "Take as much time as you need." Schwartz explained that having spoken himself to the mortgage company, he was now comfortable that the purchasers were going to obtain their mortgage loan and be able to pay him in full; therefore, he did not mind the delay. Schwartz and the purchasers closed on the sale on August 15, 2019. Lechner claimed that he assisted the purchasers in working with the mortgage company to get the required paperwork in order. Sinclair and Schwartz acknowledged that there was no written extension regarding the closing date in relation to the second purchase agreement. The previously-paid $2,500 deposit, which had remained escrowed with the title company since execution of the first purchase agreement, was credited to the purchasers on the closing or settlement statement. Sinclair testified that Schwartz called him to say that Lechner was asking about his commission and that it might be best if Sinclair stayed out of the matter and did not say anything.

Back on August 1, 2019, Lechner had filed a verified complaint against Schwartz in the instant case, alleging breach of contract, which was predicated on the first purchase agreement, and unjust enrichment. Lechner also sought a preliminary injunction or temporary restraining order to withhold $11,000 from the soon-to-be-closed sale as Lechner's commission and to place the funds in escrow. The parties later stipulated to putting $11,000 into escrow pending the outcome of the litigation.

On October 21, 2019, the trial court conducted a one-day bench trial. The witnesses were Lechner, Schwartz, Sinclair, and Beall. We discussed above the nature of their testimony.

Schwartz moved for a directed verdict, arguing that Lechner's suit seeking a commission was barred by the statute of frauds and that Schwartz had no obligation to extend the first purchase agreement in light of the clause stating that time was of the essence. The trial court took the motion under advisement.[4] On December 5, 2019, the trial court issued its written opinion and verdict. After examining the background of the case, making various factual findings, and discussing its ruling on the motion for directed verdict, the trial court analyzed the breach of contract count. The trial court ruled as follows:

> The first purchase agreement states that time is of the essence and has a closing date of July 8th, 2019. However, as noted previously, Plaintiff informed Defendant on June 28th that the Sinclairs were ready to move forward with the purchase but could not close prior to August 2nd, and there is no evidence that Defendant objected or raised any concern regarding the delay. To the contrary, the evidence shows that, in response to discussions with Plaintiff, Defendant called Badger Beall and cancelled his listing agreement because he intended to complete the deal with Plaintiff. Finally, the last visit [on July 9th] was scheduled by agreement of the Defendant, for the day after the purchase agreement expired. The Court is aware that Defendant's testimony contradicts the testimony of Badger Beall, Plaintiff, and Stephen Sinclair regarding the cancellation of Badger Beall's listing and the scheduling of that final visit as well as the circumstances of his refusal to sign the extension, however the Court finds that the testimony of Badger Beall, Plaintiff and Mr. Sinclair to be more credible than Defendant. Therefore, the Court finds Defendant's course of conduct clearly indicates that Defendant did not view the July 8th deadline as necessary and waived it as a condition of the contract and therefore, the June 4th purchase agreement was still enforceable. The evidence shows that Plaintiff and the Purchasers fulfilled all their obligations under the contract while the Defendant breached that contract by failing to pay Plaintiff's 2.5% commission.

The trial court then moved on to address the statute of frauds, and after quoting the language of MCL 566.132(1)(e), the court ruled:

> As noted above, the Court finds that the first agreement did not expire because the Defendant waived the time is of the essence clause and closing date and the second purchase agreement contained no new contingencies or terms and therefore did not invalidate the first purchase agreement. In the instant case, there is a valid contract that clearly states Plaintiff is to be paid a 2.5% commission and signed by the Defendant which satisfies the writing requirement. Though the

[4] In its subsequent written opinion and verdict, the trial court concluded that Lechner had provided sufficient evidence to create an issue of material fact regarding whether Schwartz waived the time-is-of-the-essence clause by not objecting to the proposed revised closing date of August 2, 2019, and by having Lechner and the purchasers out to visit the home on July 9, 2019. Therefore, according to the court, the original purchase agreement with its commission provision could still be applicable.

> contract does not state who is to pay that commission, the evidence before the Court shows that Defendant knew the commission would be his responsibility and in fact, negotiated with Plaintiff to reduce his commission to 2.5% as part of the first purchase agreement which Defendant signed. The Court need not consider Plaintiff's argument in the alternative that there was an oral contract for a commission under a part performance theory.

The trial court awarded Lechner $11,000 for breach of contract plus court costs and statutory attorney fees. The court ordered the release of the $11,000 in escrow to Lechner "as his duly owed 2.5% commission under the Purchase Agreement." In light of the trial court's ruling, it did not reach Lechner's claim of unjust enrichment.

Schwartz moved for relief from judgment and filed a supporting brief challenging the trial court's ruling. Schwartz sought relief from judgment pursuant to MCR 2.612(C)(1)(a), which pertains to "[m]istake, inadvertence, surprise, or excusable neglect." Schwartz argued that he did not relinquish the right to strictly enforce the time-is-of-the-essence clause found in the first purchase agreement. He further maintained that when the second purchase agreement was executed on July 14, 2019, he no longer had any obligations or rights under the first purchase agreement, which had expired by its own terms on July 8, 2019. Schwartz additionally contended that he had nothing to do with the failure of the contingency in the first purchase agreement regarding the scheduled June 28, 2019 closing on the sale of the purchasers' home. Finally, Schwartz argued that the requirement that an agreement to pay a real estate commission be in writing is strictly enforced, that a verbal agreement to pay a commission is absolutely void, that caselaw established that a commission cannot be recovered in the absence of a written agreement based on an unjust enrichment theory, and that the part-performance exception to the statute of frauds does not apply to the recovery of real estate commissions.

The trial court held a hearing on Schwartz's motion for relief from judgment. The court reaffirmed its position that Schwartz had waived the enforceability of the time-is-of-the-essence clause and that Schwartz breached the first purchase agreement. The trial court did remark that it agreed with Schwartz that once the second purchase agreement was signed, it superseded the first agreement. But the court concluded that the second purchase agreement contained nothing contrary to the first purchase agreement—the terms were the same, including the price, and the same $2,500 deposit was used. The trial court denied the motion for relief from judgment, determining that it had not made a mistake of law or fact. Subsequently, the court entered an order to that effect, and Schwartz now appeals.

II. ANALYSIS

A. STANDARDS OF REVIEW

This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to

support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake was made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Questions of law, in general, are reviewed de novo. *Richards v Tibaldi*, 272 Mich App 522, 528; 726 NW2d 770 (2006). We also review de novo the interpretation and application of contracts. *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009). This Court further reviews de novo the construction of a statute. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). "And this Court reviews for an abuse of discretion a trial court's ruling on a motion for relief from judgment." *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 364; 760 NW2d 856 (2008).

B. GENERAL GOVERNING PRINCIPLES

With respect to the interpretation of a contract such as a purchase agreement, the following principles set forth by this Court in *Highfield Beach at Lake Mich v Sanderson*, __ Mich App __, __; __ NW2d __ (2020), slip op at 8, apply:

> The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties; to this rule all others are subordinate. In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. Unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. If the language of a contract is ambiguous, testimony may be taken to explain the ambiguity. [Quotation marks, citations, and alteration brackets omitted.]

With respect to "[a]n agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate," it "is void unless that agreement, contract, or promise . . . is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise[.]" MCL 566.132(1)(e). In *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 633-634; 928 NW2d 709 (2018), this Court recited the well-established rules of statutory interpretation:

> The primary task in construing a statute is to discern and give effect to the Legislature's intent, and in doing so, we start with an examination of the language of the statute, which constitutes the most reliable evidence of legislative intent. When the language of a statutory provision is unambiguous, we must conclude that the Legislature intended the meaning that was clearly expressed, requiring enforcement of the statute as written, without any additional judicial construction. Only when an ambiguity in a statute exists may a court go beyond the statute's words to ascertain legislative intent. We must give effect to every word, phrase, and clause in a statute, avoiding a construction that would render any part of the statute nugatory or surplusage. [Citations omitted.]

C. APPELLATE ARGUMENTS

Schwartz first argues that an oral modification of an unambiguous written agreement to pay a commission on the sale of an interest in real estate cannot be enforced under the statute of frauds. Schwartz contends that an agreement to pay a real estate commission must be in writing to be enforceable. He further maintains that the two purchase agreements were clear and unambiguous; therefore, no extrinsic evidence could be used to contradict the terms of the written agreements. Schwartz additionally argues that a real estate commission cannot be recovered on the basis of an unjust enrichment or an implied contract theory. Finally, Schwartz asserts that the trial court erred by concluding that he waived the time-is-of-the-essence clause contained in the first purchase agreement considering that the second purchase agreement expressly superseded the first agreement and did not provide for the payment of any real estate commission. Lechner maintains that the trial court did not err by finding that the first purchase agreement was a valid and enforceable contract because Schwartz waived the time-is-of-the-essence clause. Lechner reasons that Schwartz's course of conduct plainly revealed that he wished to proceed with the sale under the first purchase agreement after July 8, 2019, even though the closing deadline had elapsed.

D. DISCUSSION

We shall analyze this case by working in chronological order of the events that transpired. The June 4, 2019 purchase agreement constituted, in part, a contract to pay a real estate commission that was in writing and signed by a party charged with a duty to comply with the contract, i.e., Schwartz. See MCL 566.132(1)(e). We recognize that the purchase agreement did not specifically identify Schwartz as the party tasked with paying the commission. This ambiguity regarding who was charged with having to pay the commission was resolvable by considering testimonial extrinsic evidence, which established without dispute that Schwartz, as the seller, was to pay the 2.5% commission. Additionally, Lechner was not a party to the purchase agreement; therefore, any recovery to which Lechner was entitled under the agreement was, technically, as a third-party beneficiary. See MCL 600.1405 ("Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee."); *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422; 670 NW2d 651 (2003).

The first purchase agreement required a closing by no later than July 8, 2019, unless there was an agreement in writing signed by the parties providing for a different closing date. The first purchase agreement also indicated that time was of the essence, meaning that the time limits were to be strictly enforced unless waived in writing and that any failure to comply with a deadline amounted to a breach of contract. There is no dispute that there was no closing on or before July 8, 2019, as required by the first purchase agreement, that there was no writing extending the closing date, and that there was no express oral agreement with respect to a later closing date.[5] Faced with

[5] We also note, as indicated earlier, that the first purchase agreement had a provision making the agreement or offer contingent on a closing in regard to the sale of the purchasers' property, which had a prospective closing date of June 28, 2019. There is no dispute that this contingency did not occur before the first purchase agreement expired under its terms.

these circumstances, which were accepted by the trial court, the court determined that Schwartz waived enforcement of the time-is-of-the-essence clause and the closing-date provision by his course of conduct. That is, he did so by not objecting to a proposed revised closing on August 2, 2019, offered by Lechner on June 28, 2019, by contacting Beall and canceling the listing agreement, and by meeting with Lechner, Sinclair, and Gates for a walk-through on July 9, 2019—one day after the July 8, 2019 closing deadline. Although Schwartz provided conflicting testimony, the trial court found Lechner, Beall, and Sinclair to be more credible than Schwartz, and we defer to that credibility assessment. See MCR 2.613(C).

At this point, the legal question becomes whether a waiver based on a course-of-conduct can overcome the plain and unambiguous closing deadline in the purchase agreement and language requiring a writing to extend the deadlines where a written extension was not procured.

"A waiver may be shown by proof of express language of agreement or inferably established by such declarations, acts, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance." *Grand Rapids Asphalt Paving Co v City of Wyoming*, 29 Mich App 474, 483; 185 NW2d 591 (1971) (quotation marks and citation omitted); see also *Miller v Smith*, 276 Mich 372, 375; 267 NW 862 (1936) ("In the case at bar both parties have waived that provision of the contract relating to time as being of the essence, plaintiffs by failing to make payments in accordance with the terms of the contract, and defendants, by accepting payments after the contract should have been paid in full.").

In *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374-375; 666 NW2d 251 (2003), our Supreme Court observed:

> As we have stated in other contexts, a waiver is a voluntary and intentional abandonment of a known right. This waiver principle is analytically relevant to a case in which a course of conduct is asserted as a basis for amendment of an existing contract because it supports the mutuality requirement. Stated otherwise, when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied.
>
> Further, whereas an original contract's written modification or anti-waiver clauses do not serve as barriers to subsequent modification by express mutual agreement, the significance of such clauses regarding the parties' intent to amend is heightened where a party relies on a course of conduct to establish modification. This is because such restrictive amendment clauses are an express mutual statement regarding the parties' expectations regarding amendments.
>
> Accordingly, in assessing the intent of the parties where the intent to modify is not express, such restrictive amendment provisions are not necessarily dispositive, but are highly relevant in assessing a claim of amendment by course of conduct. Any clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statements regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clauses. [Citations omitted.]

We initially observe that the trial court did not employ a "clear and convincing" evidence standard, which is necessary for determining whether a course-of-conduct overcame written modification or waiver clauses in a contract. Undoubtedly, there was evidence based on Schwartz's conduct that he waived the closing deadline and the time-is-of-the-essence clause contained in the first purchase agreement. There was evidence that Schwartz did not object to Lechner's proposal to move the closing date to August 2, 2019, and that Schwartz then terminated his listing agreement with Beall. Further, there was evidence that Schwartz agreed to and guided a walk-through of his property by Lechner, Sinclair, and Gates, which meeting entailed taking measurements for furniture placement, on the day after the closing-date deadline. Apparently, Schwartz remained receptive to the purchasers' continuing desire to buy his home.

On the other hand, there was also significant evidence that Schwartz did not intend to waive the closing deadline. Initially, he testified that he was concerned that the purchasers were not going to be able to timely secure financing, a concern that proved accurate. Furthermore, there was testimony that Schwartz stated that he wanted to keep his options open when refusing to sign the extension or addendum on the day after the closing deadline, which indicated that Schwartz did not want to waive the provision in the first purchase agreement concerning the closing date. Indeed, the fact that Schwartz did not execute the addendum while still working to sell the property to Sinclair and his family suggested that Schwartz wished to sell his house but not under the expired first purchase agreement. Additionally, Schwartz revealed his need to sell in light of the construction of his new home. And, in fact as evidence of his concern, he himself entered into a listing agreement with Beall when it became apparent the house deal with the purchasers would not close by the agreed to deadline. Schwartz's property was shown to another party under his listing agreement with Beall. The dealings with Beall, at least as testified to by Schwartz, were inconsistent with an intent to waive the closing deadline and time-is-of-the-essence clause in the first purchase agreement. So, while the surrounding circumstances might have suggested that Schwartz was waiving strict compliance with the closing deadline in the first purchase agreement and intended to proceed with the agreement, the facts could also equally be interpreted as showing that Schwartz was willing to sell the property to the purchasers *but not under the original agreement* or anyone else who might have come along. Viewing all the evidence, we cannot see clear and convincing evidence establishing Schwartz's waiver of the time requirements contained in the first purchase agreement. But ultimately we need not answer the question because even if there were a waiver as the trial court found, future events nullified the first purchase agreement, including the provision for a 2.5% real estate commission.

Several days after the walk-through on July 9, 2019, Schwartz and the purchasers executed the second purchase agreement. As noted earlier, the second purchase agreement provided that it constituted the "entire agreement between" the parties and that the agreement "supersede[d] all prior understanding[s] and agreements, written or oral." This language is plain and unambiguous and rendered the first purchase agreement null and void and unenforceable. Accordingly, even if there were a waiver of the closing deadline set forth in the first purchase agreement, leaving that agreement in force after July 8, 2019, the agreement's enforceability ended on July 14, 2019, when the second purchase agreement was executed. The second purchase agreement did not provide for a real estate commission for Lechner. Therefore, effectively, there was no surviving agreement, promise, or contract to pay a commission for the sale of an interest in real estate that was in writing. See MCL 566.132(1)(e). The trial court, in speaking from the bench at the hearing on Schwartz's

motion for relief from judgment, acknowledged that the second purchase agreement superseded the first agreement. But the court then indicated that the second agreement contained nothing that conflicted with the first agreement; thus, the commission provision remained enforceable in light of the waiver. This observation and reasoning failed to appreciate that the second purchase agreement eviscerated the entire first purchase agreement, including the real estate commission provision. In sum, the trial court erred by entering judgment in favor of Lechner. Instead, a judgment of no cause of action should have been entered in favor of Schwartz.

We note that the cause of action for unjust enrichment fails as a matter of law. See *Krause v Boraks*, 341 Mich 149, 156-157; 67 NW2d 202 (1954) (theories of unjust enrichment or quantum meruit cannot be used to circumvent the requirement of the statute of frauds that a real estate commission be in writing).[6] We further observe that the "part performance" exception to the statute of frauds, MCL 566.110, did not apply in this case because Schwartz never made a direct oral promise to Lechner, independent of the nullified first purchase agreement, to pay him a commission. See *Empire Shoe Serv, Inc v Gershenson*, 62 Mich App 221, 225; 233 NW2d 237 (1975) ("Before a party may assert that its actions constitute sufficient part performance to remove an oral agreement from the statute of frauds, that party must first show the existence of an oral contract."). Moreover, Lechner has chosen not to argue part performance on appeal, nor has he requested a remand on the issue should we rule against him on the breach of contract claim, which we have now done.

III. CONCLUSION

The trial court erred by ruling that Lechner established his claim of breach of contract entitling him to an $11,000 real estate commission. We conclude that there was no enforceable contract for the payment of a commission to Lechner. Under these facts and circumstances, the law compels entry of a judgment of no cause of action.

We reverse and remand for entry of a judgment of no cause of action in favor of Schwartz. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola

[6] Moreover, Lechner does not pursue on appeal an unjust enrichment argument as an alternative theory to affirm the trial court's ruling. Indeed, Lechner states that he conceded at trial that a real estate commission cannot be recovered on the basis of unjust enrichment.