

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

SKOGMAN REALTY CO. d/b/a SKOGMAN
COMMERCIAL REALTY,

Plaintiff,

vs.

SCOTT A. ANDERSEN, DERS, LLC, DERS
INVESTMENTS, LLC, and
DERS DEVELOPMENT, LLC.

Defendants.

Case No. LACV 085248

JURY INSTRUCTIONS

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CLERK OF DISTRICT COURT
JOHNSON COUNTY, IOWA

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INSTRUCTION NO. 1

Statement Of The Case

Members of the Jury: This case involves claims arising from a commercial real estate listing contract ("Listing Contract"). Plaintiff, Skogman Realty Co., doing business as Skogman Commercial Realty, alleges that Defendants, Ders Investments, LLC; Ders Development, LLC; and Ders LLC, breached a contract or contracts by failing to pay commissions due on real estate transactions that occurred during the listing period and that Defendant, Scott Andersen, committed fraudulent misrepresentation and/or fraudulent nondisclosure in connection with the failure to pay those commissions.

Defendants deny Plaintiff's claims and assert that they are not liable. Defendants deny Skogman had a listing on the property and the commissions claimed by Skogman. In the alternative, Defendants assert the commission would be limited to \$45,394.98.

Do not consider this summary as proof of any claim. Decide the facts from the evidence and apply the law which I will now give you.

INSTRUCTION NO. 2

Duties of Judge and Jury, Instructions as Whole

My duty is to tell you what the law is. Your duty is to accept and apply this law.

You must consider all of the Instructions together because no one Instruction includes all of the applicable law.

The order in which I give these Instructions is not important.

Your duty is to decide all fact questions.

As you consider the evidence, do not be influenced by any personal sympathy, bias, prejudices, or emotions. Because you are making very important decisions in this case, you are to evaluate the evidence carefully and avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these Instructions. As jurors, your sole duty is to find the truth and do justice.

INSTRUCTION NO. 3

Burden of Proof, Preponderance of Evidence

Whenever a party must prove an element of their claim they must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

INSTRUCTION NO. 4

Evidence

You shall base your verdict only upon the evidence and these Instructions.

Evidence is:

1. Testimony in person, remote testimony, or by deposition.
2. Exhibits received by the court.
3. Stipulations which are agreements between the attorneys.
4. Any other matter admitted (e.g., answers to interrogatories, matters which judicial notice was taken, etc.).

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide.

Sometimes, during a trial, references are made to pre-trial statements and reports, witnesses' depositions, or other miscellaneous items. Only those things formally offered and received by the Court are available to you during your deliberations. Documents or items read from or referred to which were not offered and received into evidence, are not available to you.

The following are not evidence:

1. Statements, arguments, questions, and comments by the lawyers.
2. Objections and rulings on objections.
3. Any testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

INSTRUCTION NO. 5

Deposition Testimony

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given in court.

INSTRUCTION NO. 6

Interrogatories

During this trial, you have heard the word “interrogatory.” An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

INSTRUCTION NO. 7

Credibility of Witnesses

You will decide the facts from the evidence. Consider the evidence using your observations, common sense, and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe all, part, or none of any witnesses' testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence you believe;
2. The witnesses' appearance, conduct, age, intelligence, memory, and knowledge of the facts; and
3. The witnesses' interest in the trial, their motive, candor, bias, and prejudice.

INSTRUCTION NO. 8

Opinion Evidence, Expert Witness.

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

INSTRUCTION NO. 9

Hypothetical Question, Expert Testimony

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

INSTRUCTION NO. 10

Contradictory Statement, Non-party, Witness Not Under Oath.

You have heard evidence claiming witnesses made statements before this trial while not under oath which were inconsistent with what the witness said in this trial.

Because the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witness.

Decide if the earlier statements were made and whether they were inconsistent with testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given at trial, but you are not required to do so.

Do not disregard the testimony if other evidence you believe supports it or if you believe it for any other reason.

INSTRUCTION NO. 11

Contradictory Statements, Non-Party, Witness Under Oath.

You have heard evidence claiming witnesses made statements before this trial while under oath which were inconsistent with what witnesses said in this trial. If you find these statements were made and were inconsistent, then you may consider them as part of the evidence, just as if they had been made at this trial.

You may also use these statements to help you decide if you believe the witnesses. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the trial testimony if other evidence you believe supports it, or if you believe it for any other reason.

INSTRUCTION NO. 12

Statements by a Party Opponent

You have heard evidence claiming parties or representatives of the parties made statements before this trial while under oath and while not under oath.

If you find such a statement was made, you may regard the statement as evidence in this case the same as if the party had made it under oath during the trial.

If you find such a statement was made and was inconsistent with the party's testimony during the trial you may also use the statement as a basis for disregarding all or any part of the party's testimony during the trial, but you are not required to do so. You should not disregard the party's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

INSTRUCTION NO. 13

Corporate Party

The fact that any party is a corporation or limited liability company should not affect your decision. All persons are equal before the law, and corporations and limited liability companies, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

INSTRUCTION NO. 14

Breach of Contract – Essentials for Recovery

Skogman has asserted a claim for breach of contract against Defendants, Ders Investments, LLC; Ders Development, LLC; and Ders LLC. Skogman must prove all of the following propositions:

1. The parties were capable of contracting.
2. The existence of a contract.
3. The terms of the contract.
4. That Skogman has done what the contract requires.
5. The Defendants have breached the contract.
6. The amount of any damage Defendants have caused.

If Skogman has failed to prove any of these propositions, Skogman is not entitled to damages. If Skogman has proved all of these propositions, Skogman is entitled to damages in some amount.

INSTRUCTION NO. 15

Existence of a Contract

The existence of a contract requires a meeting of the minds on the material terms. This means the parties must agree upon the same things in the same sense. You are to determine if a contract existed from the words and acts of the parties, together with all reasonable inferences you may draw from the surrounding circumstances

INSTRUCTION NO. 16

Terms – Interpretation

In determining the terms of the contract, you may consider the following:

1. The intent of the parties along with a reasonable application of the surrounding circumstances.
2. The intent expressed in the language used prevails over any secret intention of either party.
3. The intent may be shown by the practical construction of a contract by the parties and by the surrounding circumstances.
4. You must attempt to give meaning to all language of a contract. Because an agreement is to be interpreted as a whole, assume that all of the language is necessary. An interpretation which gives a reasonable, effective meaning to all terms is preferred to an interpretation which leaves a part of the contract unreasonable or meaningless.
5. The meaning of a contract is the interpretation a reasonable person would give it if they were acquainted with the circumstances both before and at the time the contract was made.
6. Ambiguous language in a written contract is interpreted against the party who selected it. Ambiguity exists when a genuine uncertainty exists concerning which of two reasonable constructions is proper.
7. Where general and specific terms in the contract refer to the same subject, the specific terms control.

INSTRUCTION NO. 17

Breach – Definition

A breach of the contract occurs when a party fails to perform a term of the contract.

INSTRUCTION NO. 18

Performance By Plaintiff

When a person agrees to do something for a specified consideration to be received after full performance, they are not entitled to any part of the consideration until they have performed as agreed.

However, a plaintiff who has not fully performed under the terms of the contract may still recover some amount if the failure to render performance due at an earlier time was not material (subject to defendant's claim for partial breach). In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

1. The extent to which defendant will be deprived of the benefit which defendant reasonably expected.
2. The extent to which defendant can be adequately compensated for the part of that benefit of which defendant will be deprived.
3. The extent to which plaintiff will suffer forfeiture.
4. The likelihood that plaintiff will cure the failure, taking account of all the circumstances including any reasonable assurances.
5. The extent to which the behavior of the plaintiff is in line with standards of good faith and fair dealing.

INSTRUCTION NO. 19

Listing Party

A real estate listing contract is enforceable against the listing party regardless of whether the listing party owns the property identified in the listing contract.

INSTRUCTION NO. 20

Document Incorporated by Reference

In determining the terms of a contract, you may consider the Appointed Agency Agreement (Trial Exhibits 6 and 17) is a part of the Listing Contract (Trial Exhibits 7 and 18). Where the signatories execute a contract which refers to another instrument in such a manner as to establish that they intended to make the terms and conditions of that other instrument a part of their understanding, the two may be interpreted together as the agreement of the parties.

INSTRUCTION NO. 21

Good Faith and Fair Dealing

Contracts include an implied duty of good faith and fair dealing. The implied duty is that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. The duty of good faith generally operates upon an express condition of a contract, the occurrence of which is largely or exclusively within the control of one of the parties. The duty of good faith is meant to give the parties what they would have stipulated for at the time of contracting if they could have foreseen all future problems of performance. The implied covenant of good faith and fair dealing does not give rise to new substantive terms, that do not otherwise exist in the contract, and does not support a separate cause of action.

INSTRUCTION NO. 22

Damages for Breach of Contract

The measure of damages for breach of contract is an amount that would place Skogman in as good a position as Skogman would have enjoyed if the Listing Contract had been performed.

The damages you award for breach of contract must be foreseeable or have been reasonably foreseen at the time the parties entered into the contract.

In your consideration of Skogman's damages, you may consider the following:

1. Commissions earned by Skogman under the Listing Contract.

INSTRUCTION NO. 23

Clear, Convincing, and Satisfactory Evidence

You will have to decide whether fraud has been proved by clear, convincing, and satisfactory evidence. Evidence is clear, convincing, and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it.

INSTRUCTION NO. 24

Fraudulent Misrepresentation - Essentials For Recovery

Skogman must prove the following propositions by a preponderance of clear, satisfactory and convincing evidence:

1. Defendant Scott Andersen, on or about the 20th day of May, 2020, and, again, on or about the 17th day of May, 2021, when he signed the Listing Contract, made a representation to Skogman that Ders Investments, LLC, an entity controlled by him, would pay Skogman a commission fee for Lot 23 upon an event triggering payment under the Listing Contract.

2. The representation was false.

3. The representation was material.

4. Defendant Scott Andersen knew the representation was false.

5. Defendant Scott Andersen intended to deceive Skogman.

6. Skogman acted in reliance on the truth of the representation and was justified in relying on the representation.

7. The representation was a cause of Skogman's damage.

8. The amount of damage.

If Skogman has failed to prove any of these propositions, Skogman cannot recover damages. If Skogman has proved all of these propositions, Skogman is entitled to recover damages in some amount.

INSTRUCTION 25

Fraudulent Nondisclosure- Essentials For Recovery

Skogman must prove the following propositions by a preponderance of clear, satisfactory and convincing evidence:

1. Special circumstances existed which gave rise to a duty of disclosure between Skogman and Defendant, Scott Andersen. Skogman claims this duty arose from the Listing Contract between the parties.

2. While such relationship existed, Defendant, Scott Andersen, was aware that he had signed a Listing Contract on behalf of Ders Investments, LLC, to pay a commission fee to Skogman for any sale or lease involving Lot 23 during the listing period.

3. While such relationship existed, Defendant, Scott Andersen, concealed or failed to disclose that he, or any entity he controlled, took the position that no commission fee would be paid to Skogman for the sale or lease of Lot 23 until after event(s) triggering payment of a commission had occurred.

4. The undisclosed information was material to the transaction.

5. Defendant, Scott Andersen, knowingly failed to make the disclosure.

6. Defendant, Scott Andersen, intended to deceive Skogman by withholding such information.

7. Skogman acted in reliance upon Defendant's, Scott Andersen's, failure to disclose and was justified in such reliance.

8. The failure to disclose was a cause of Skogman's damage.

9. The nature and extent of Skogman's damage.

If Skogman has failed to prove any of these propositions, Skogman cannot recover damages. If Skogman has proved all of these propositions, Skogman is entitled to recover damages in some amount.

INSTRUCTION NO. 26

Fraudulent Misrepresentation - Definition of Representation

Concerning proposition No. 1 of Instruction No. 24, "a representation" is any word or conduct asserting the existence of a fact. It may include silence if the Defendant fails to disclose information which the Defendant has a duty to disclose and which the Plaintiff has reason to believe will be disclosed.

A representation also includes an opinion. An opinion is a statement of a person's belief that a fact exists or their judgment as to quality, value, authenticity, or similar matter. A representation of fact implies that the maker has definite knowledge or information supporting their statement; a representation of opinion does not. You must consider all of the surrounding circumstances, including the exact words used, in deciding whether a representation is one of fact or opinion.

INSTRUCTION NO. 27

Fraudulent Misrepresentation - Material - Definition.

Concerning proposition No. 3 of Instruction 24, and No. 4 of Instruction No. 25, a representation is "material" if:

1. A reasonable person would consider it as important in making a decision.
2. The Defendant knows or has reason to know that the Plaintiff considers, or is likely to consider, the representation as important in making a decision.
3. The representation influences a person to enter into a transaction which would not have occurred otherwise.

INSTRUCTION NO. 28

Fraudulent Misrepresentation - Knowledge of Falsity - Definition.

Concerning proposition No. 4 of Instruction No. 24, and No. 5 of Instruction No. 25, Defendant, Scott Andersen, knew the representation was false if any of the following situations existed:

1. Defendant, Scott Andersen, actually knew or believed the representation was false.
2. Defendant, Scott Andersen, made the representation without belief in its truth or in reckless disregard of whether it was true or false.
3. Defendant, Scott Andersen, falsely stated or implied that the representation was based on his personal knowledge or investigation.
4. Defendant, Scott Andersen, made a representation which he knew or believed was materially misleading because it left out unfavorable information.
5. Defendant, Scott Andersen, stated his intention to do or not to do something when he did not actually have that intention.
6. Defendant, Scott Andersen, knew the representation could be understood in both a true and false manner, and made the representation: (a) intending that it be understood in the false sense, (b) having no belief as to how it would be understood, or (c) in reckless disregard of how it would be understood.
7. Defendant's, Scott Andersen's, special source of information made it his duty to know whether the representation was true or false.

INSTRUCTION NO. 29

Fraudulent Misrepresentation - Definition of Intent to Deceive

Concerning proposition No. 5 of Instruction No. 24, and No. 6 of Instruction No. 25, Defendant, Scott Andersen, intended to deceive Skogman if any of the following situations existed when he made a representation:

1. Defendant, Scott Andersen, wanted to deceive Skogman or believed that Skogman would, in all likelihood, be deceived.
2. Defendant, Scott Andersen, had information from which a reasonable person would conclude that Skogman would be deceived.
3. Defendant, Scott Andersen, made the representation without concern for the truth.

INSTRUCTION NO. 30

Fraudulent Misrepresentation - Intent to Deceive - Persons Affected

Concerning proposition No. 5 of Instruction No. 24, and No. 6 of Instruction No. 25, Defendant, Scott Andersen, is liable only to a person or group of persons whom he intended or had reason to expect would act or refrain from acting in reliance on the representation. A person has reason to expect a result if he has information from which a reasonable person would conclude that the result will follow.

Defendant, Scott Andersen, is liable only to those persons who rely on the representation in the type of transaction in which he intends or has reason to expect the conduct of others will be affected.

INSTRUCTION NO. 31

Fraudulent Misrepresentation - Reliance - Generally

Concerning proposition No. 6 of Instruction No. 24, and No. 7 of Instruction No. 25, Skogman must rely on the representation, and the reliance must be justified.

It is not necessary that the representation be the only reason for Skogman's action. It is enough if the representation was a substantial factor in bringing about the action.

Whether reliance is justified depends on what Skogman can reasonably be expected to do in light of their own information and intelligence. Reliance is not justified if the representation is of an unimportant fact or is obviously false.

INSTRUCTION NO. 32

Damages for Fraud

The measure of damages for fraud is an amount that would place Skogman in as good a position as Skogman would have enjoyed if Defendant's, Scott Andersen's, representation had been true or non-disclosures had been timely disclosed.

The damages you award for fraud must be foreseeable or have been reasonably foreseen at the time Defendant's, Scott Andersen's, representation was made or nondisclosure was not made.

In your consideration of Skogman's damages, you may consider the following:

1. Commissions earned by Skogman under the Listing Contract; and
2. Any other damage that was a natural and foreseeable result of Defendant's, Scott Andersen's, conduct.

INSTRUCTION NO. 33

PUNITIVE DAMAGES

If you find that Plaintiffs has proven the claim of Fraudulent Misrepresentation against Scott Andersen, you may consider punitive damages against Scott Anderson.

Punitive damages may be awarded if the Plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence that the Defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the Plaintiff.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the Defendant and others from like conduct in the future. You may award punitive damages only if the Defendant's conduct warrants a penalty in addition to the amount you award to compensate for Plaintiff's actual injuries.

There is no exact rule to determine the amount of punitive damages, if any, you should award. You may consider the following factors:

1. The nature of Scott Andersen's conduct that harmed the Plaintiff.
2. The amount of punitive damages which will punish and discourage like conduct by the Defendant. You may consider the Defendant's financial condition or ability to pay. You may not, however, award punitive damages solely because of the Defendant's wealth or ability to pay.
3. The Plaintiff's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to the Plaintiff. The existence and frequency of prior similar conduct.

INSTRUCTION NO. 34

WILLFUL AND WANTON – DEFINED

Conduct is willful and wanton when a person intentionally does an act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.

INSTRUCTION NO. 35

Duplicate Damages

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage for the same cause of action.

INSTRUCTION NO. 36

Quotient Verdict

In arriving at an item of damage, you cannot arrive at a figure by taking down the estimate of each juror as to an item of damage and agreeing in advance that the average of those estimates shall be your item of damage.

INSTRUCTION NO. 37

Use of Electronic Devices

You may not communicate about this case before reaching your verdict. This includes cell phones, and electronic media such as text messages, Facebook, LinkedIn, YouTube, X (formerly Twitter), email, etc.

Do not do any research or make any investigation about this case on your own. Do not visit or view any place discussed in this case, and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge. This includes using the Internet to research events or people referenced in the trial.

This case will be tried on evidence presented in the courtroom. If you conduct independent research, you will be relying on matters not presented in court. The parties have a right to have this case decided on the evidence they know about and that has been introduced here in court. If you do some research or investigation or experiment that we do not know about, then your verdict may be influenced by inaccurate, incomplete, or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. All of the parties are entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the Rules of this state and you will have done an injustice. It is very important that you abide by these Rules.

INSTRUCTION NO. 38

Cautionary Instruction – Juror's Notes

During the trial, you have been allowed to take notes. You may take these with you to the jury room to use in your deliberations. Remember, these are notes and are not evidence. Generally, they reflect the recollection or impressions of the evidence as viewed by the person taking them and may be inaccurate or incomplete.

Upon reaching a verdict, leave the notes in the jury room and they will be destroyed.

INSTRUCTION NO. 39

Questions from the Jury

Occasionally jurors want to ask a question after they begin deliberating. If that should occur, please consider the following:

1. Words not defined in these instructions should be given their ordinary meaning.
2. There will be no additional evidence and likely no additional instruction of law. These instructions contain all the law you need to decide this case.
3. If you ask me a question during your deliberations, your presiding officer must reduce the question to writing and give it to the court attendant, who will deliver it to me. I cannot communicate with you without first discussing your question and potential answers with the parties and attorneys. This process naturally takes time and deliberation before I can respond.

If, after considering these matters, you still wish to ask me a question, follow the procedure outlined here, then save your written question and any written answer I send you and return them with your verdict form when you have completed your deliberations and returned a verdict.

INSTRUCTION NO. 40

General Instruction to Jury

Upon retiring you shall select a foreman or forewoman. It will be his or her duty to see that discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her views.

Your attitude at the beginning of your deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. If you do this, individual pride may become involved, and you may later hesitate to change an announced position even if shown it may be incorrect. Remember you are not partisans or advocates but are judges - judges of the facts. Your sole interest is to find the truth and do justice.

INSTRUCTION NO. 41

Return of Verdict – Forms of Verdict

I am giving you 10 verdict forms. During the first six hours of deliberations, excluding meals and recesses outside your jury room, your decision must be unanimous. If you all agree, the verdict [and answers to questions] must be signed by your foreman or forewoman.

After deliberating for six hours from ^{5:05}~~2:35~~ o'clock 9.m. excluding meals or recesses outside your jury room, then it is necessary that only seven of you agree upon the answers to the questions. In that case, the verdict must be signed by all seven jurors who agree.

When you have agreed upon the verdict [and answers to questions] and appropriately signed it, tell the Court Attendant.

Rustin Davenport
District Court Judge

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JUDGE: RUSTIN D. DAVENPORT