

1986

## V.R. Utah Limited v. Leroy Griffin : Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. 860317-CA IN THE SUPREME COURT OF THE STATE OF UTAH

V.R. UTAH LIMITED, a Utah  
limited partnership, dba  
V.R. BUSINESS BROKERS,

Plaintiff & Respondent,

-vs-

LEROY GRIFFIN, dba RDK BAKERY  
and RIVERTON BAKERY,

Defendant & Appellant.

Case No. 860142

860317-CA

**BRIEF OF RESPONDENT**

ON APPEAL FROM A JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

HONORABLE DAVID B. DEE

District Judge

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**FILED**  
SEP 29 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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V.R. UTAH LIMITED, a Utah  
limited partnership, dba  
V.R. BUSINESS BROKERS,

Plaintiff & Respondent,

-vs-

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and RIVERTON BAKERY,

Defendant & Appellant.

Case No. 860142

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BRIEF OF RESPONDENT

---

STATEMENT OF FACTS

The plaintiff, a licensed real estate broker, brought this action to recover real estate commissions that were due and owing under the provisions of two real estate Listing Agreements.(Exhibits 2 & 3)

In 1983, defendant LeRoy Griffin was the owner and operator of two established bakery businesses known as R.D.K. Bakery in Sandy, Utah, and Riverton Bakery in Riverton, Utah.(R.152) During that year he decided to sell the bakeries, and he came in contact with representatives of the plaintiff for that purpose.(R.153)

On August 1, 1983, the defendant executed and delivered to the plaintiff a Listing Agreement granting the plaintiff

the sole and exclusive right to sell the business known as R.D.K. Bakery, together with all fixtures, equipment, goodwill, trademarks, trade names, accounts receivable and inventory associated therewith. By its terms, the Listing Agreement had a duration of five months, extending from August 1, 1983, to and until December 31, 1983.(Exhibit 2; R.100; R.169)

On August 17, 1983, the defendant executed and delivered to the plaintiff a second Listing Agreement granting the plaintiff the sole and exclusive right to sell the business known as Riverton Bakery, together with all fixtures, equipment, goodwill, trademarks, trade names, accounts receivable, and inventory associated therewith. By its terms, the Listing Agreement had a duration of six months, extending from August 17, 1983, to and until February 18, 1984.(Exhibit 3; R.100; R.169)

Under the terms of both Listing Agreements, defendant agreed to pay the plaintiff a real estate fee equal to 12% of the purchase price obtained for each property, but in any event not less than \$6,000.00. Both Listing Agreements further provided that the real estate commission shall be immediately due and payable if the seller, directly or indirectly, enters into a Purchase and Sale Agreement (however designated), accepts a deposit, or does any other act tantamount to a sale or contract to sell without the written approval of the broker.(Exhibits 2 & 3)

The plaintiff aggressively marketed the two bakery businesses. Among other things, the plaintiff ran a total of 14 separate ads in the Deseret News and Salt Lake Tribune and handled 49 ad responses. It exposed the businesses to 21 potential buyers and located several interested prospects. (Exhibit 4)

On December 15, 1983, Mr. Larry Huston and Mr. Brian Cook, selling agents for V.R. Limited, went to the R.D.K. Bakery in Sandy, Utah, to meet with the defendant and present an offer that had been made by a prospective buyer. When they arrived, Mr. Griffin was not present, but another gentleman asked them if he could be of assistance to them. Much to their surprise, he introduced himself to them as Andy Souvall, the new owner of the business. He said that he had closed the deal with the defendant on December 10, 1983, and had taken possession the following day. (Tr.110; Exhibit 4)

As they were leaving the premises, Mr. Griffin arrived on the scene. After they found a convenient place to meet, they presented the offer to the defendant. He was not interested in the offer, and he discouraged them from making further efforts to sell the property. During this conversation he denied three times that had listed the businesses with any other real estate company or that he had sold the businesses to anyone. (Exhibit 4; Tr.112-3)



Upon further investigation, plaintiff's agents confirmed that on December 10, 1983, the defendant entered into a Purchase and Sale Agreement with Toula Souvall, thereby agreeing to sell both bakeries to her. Defendant accepted a down payment of \$40,000.00 from the buyer, and the buyer then took possession of both bakeries.(Exhibit 1; R.98-9)

In selling the bakeries, defendant was represented by Mrs. Helen Hooper, who was a real estate broker with a separate and unrelated real estate company. She testified that her involvement in the sale was based upon other Listing Agreements that the defendant had signed with her company. (R.141-2; R.170) This suit followed.

#### SUMMARY OF ARGUMENT

POINT NO. I: Defendant signed two Listing Agreements with the plaintiff that both provided that the real estate commission would be immediately due and payable if the seller, directly or indirectly, sold the property without written approval of the broker. The property was sold to a third party without such approval, and plaintiff is entitled to the real estate fees under the provisions of the two Listing Agreements.

POINT NO. II: Under Utah law, fraud and misrepresentation must be proved by clear and convincing evidence. The trial court properly applied that standard to the evidence of fraud and misrepresentation in this action.

POINT NO. III: Defendant failed to show the elements of fraud by clear and convincing evidence. On the contrary, the evidence shows that the agents of the plaintiff had no knowledge that defendant had previously listed the property with another real estate company, and they had no reason to know that they did not have a sole and exclusive listing on the property, as provided in the Listing Agreements.

POINT NO. IV: The Findings of Fact and Conclusions of Law entered by the court are supported by substantial evidence, and they are binding upon this court on this appeal.

POINT NO. V: The Utah Real Estate Commission Rules and Regulations prohibiting the payment of double commissions does not govern any part of this action. The trial court properly interpreted the language of the Rule and held that the action by the plaintiff did not constitute a violation of the Rule or an attempt to obtain a double commission. On the contrary, the plaintiff is merely enforcing a valid agreement that was signed by the defendant knowingly and voluntarily.

POINT NO. VI: The amount awarded to the plaintiff was the lowest amount stated in the contract, and defendant should not be heard now to complain about the award of the minimum figure stated in the contract. The award was based upon the contract.

ARGUMENT

POINT NO. I

**THE EVIDENCE INTRODUCED AT TRIAL  
SUFFICIENTLY SUPPORTS THE VERDICT  
AND JUDGMENT RENDERED BY THE  
COURT IN THIS ACTION.**

Defendant admitted that he signed the two Listing Agreements that were received in evidence as Exhibits 2 and 3. He further admitted that he sold the properties to a third party while those Listing Agreements were in full force and effect.(R.170-1) A Purchase and Sale Agreement was received in evidence as Exhibit 1.

The two Listing Agreements involved in this action gave the plaintiff an exclusive right to sell the two bakeries that were owned by the plaintiff. The authority to sell the properties was clearly given to the plaintiff with the right to receive a commission therefrom. Paragraph 4 of the contract recites as follows:

Seller agrees that the commission shall be immediately due and payable if the seller, directly or indirectly, enters into a Purchase and Sale Agreement (however designated), accepts a deposit or does any act tantamount to a sale or contract to sale without the written approval of the broker, and the cancellation or rescision of any of the foregoing acts shall not act as a release of seller for such liability.

The Utah Supreme Court upheld and approved a similar paragraph in a real estate listing agreement in the case of Chumney v. Scott, 14 U.2d 202, 381 P.2d 84 (1963). In holding

that the broker was entitled to his commission when the listing seller sold his property to a third party within the period covered by the agreement, the court stated as follows:

Moreover, the type of 'exclusive right to sell' real estate listing involved in this action has been universally upheld. The nature of the real estate business, wherein the broker is paid only if the sale is made, would seem to make the contract provision herein in question a reasonable one.

Mr. Larry Huston, a representative of the plaintiff, testified during the trial that the plaintiff company had never given any approval to the sale of the property to Toula Souvall. The exclusive listings give the plaintiff a right to collect its full commission on both properties. The evidence strongly supports a verdict in favor of the plaintiff.

POINT NO. II

**THE COURT APPLIED THE PROPER  
STANDARD OF PROOF WHEN IT  
REQUIRED A SHOWING OF FRAUD  
AND MISREPRESENTATION BY  
CLEAR AND CONVINCING EVIDENCE.**

Based on a tortured interpretation of the Utah case of Baldwin v. Vantage Corporation, 676 P.2d 413 (1984), the defendant asserts that the court erred in requiring the defendant to prove fraud and misrepresentation on the part of plaintiff's real estate agents by clear and convincing evidence. Defendant claims that such evidence need be proved only by a preponderance of the evidence.

Utah law does not support this assertion. The Utah Supreme Court has had many occasions to define the elements

of actionable fraud. Representative of these declarations is the one found in Cheever v. Schramm, 577 P.2d 951, which summarizes the evidentiary requirements of fraud as follows:

We have in the past stated that one claiming fraud must establish by clear and convincing evidence all of the following: (1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the one making the misrepresentation either (a) knew to be false, or (b) made recklessly knowing he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party acted reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to its injury and damage.

All of the above elements must be shown by clear and convincing evidence, and each of the elements of fraud must be present before actionable fraud can be shown. As noted in the next portion of this Argument, the evidence presented by the defendant on the issue of fraud and misrepresentation fell far short of proving the elements and the degree required by the Cheever case.

POINT NO. III

**DEFENDANT FAILED TO SUSTAIN  
THE BURDEN OF PROOF ON THE ISSUE  
OF FRAUD AND MISREPRESENTATION.**

As an affirmative defense to this action, defendant claimed that he was induced by the fraud and misrepresentation of plaintiff's agent to sign the Listing Agreements. He also claimed that plaintiff's agent, Diane Ossinger, was told that the properties had been listed with another broker and that

no fee would be payable to the plaintiff unless the property was sold through the plaintiff's efforts.

The evidence on the questions of fraud and knowledge are closely related, and that evidence requires careful scrutiny in this case. Both Larry Huston and Brian Cook testified that they had never been informed that defendant had a previous exclusive listing on the property. Huston said the company would not accept a listing from someone who had previously listed with another company. Mr. Douglas Miller gave similar testimony on that point, but the Miller testimony was more important on the question of whether plaintiff was aware of the previous listing. He testified that Diane Ossinger, the lady agent who took the listing, was somewhat new to the real estate business, so he accompanied her to defendant's place of business to train and assist her. He filled out the information on the Listing Agreement himself and then handed it to the defendant for signature. Defendant appeared to read the information on the form and then signed it. He heard the entire conversation that took place at that time, and he testified that nothing was said to him or the other agent about other listings. He stated further that he would have rejected the listing if he had been told that Helen Hooper had also been given authority to sell the property. Mrs. Hooper testified during the trial that she knew nothing of the second listing given to the plaintiff.

Defendant asserted in his testimony that he had revealed information about the Hooper listing to Ms. Ossinger when he listed the properties with the plaintiff. But his own testimony on cross-examination belies this assertion and shows that it never took place.

During the trial Mr. Huston and Mr. Cook testified at length about a meeting that took place in the Pizza Parlor next door to the R.D.K. Bakery in Sandy on December 15, 1983. They both testified that when they arrived at the business to present an offer to the defendant for the purchase of the properties, Mr. Andy Souvall advised them that he was the new owner and that he had just purchased the business. When defendant arrived and the parties went to the Pizza Parlor to discuss the offer, Huston asked him three times if he had listed the business with another real estate company. Each time defendant denied that he had done so. Huston also asked him three times if he had sold the business. Defendant also thrice denied that he had entered into a contract of sale. When counsel for the plaintiff asked him on cross-examination if he had told Huston and Cook at the Pizza Parlor that he had previously advised Diane Ossinger of the Hooper listing, defendant answered, "No, I did not."(R.172)

A simple analysis of the information given or withheld by the parties at the December 15th meeting clearly shows that

defendant was lying about what he told Ms. Ossinger. If he had told her that he had another listing, and if she had told him that he would not have to pay a real estate fee unless the property was sold by the company, as he claims, then he would have had no reason to lie to Huston and Cook. He would have readily admitted both the prior listings and the sale of the properties on the belief that he was in full compliance with his understanding of the Ossinger-Miller conversation. Why deny the Hooper listing and the Souvall sale if he thought that there was no obligation to the plaintiff under the two Listing Agreements? The honest and proper thing would have been to immediately contend that no real estate fee was payable because no sale had been made by the plaintiff company under the Listing Agreements.

The lies told by the defendant at the Pizza Parlor meeting reveal his true understanding of the Listing Agreements. He must have understood that he would be liable for the full real estate commission if he sold to a third party. To do this, he must have read and understood that portion of the contract. The natural thing to do when faced with that situation at the Pizza Parlor was to lie about the arrangement in hopes that the plaintiff would never find out about the sale. As often occurs when untruths are spoken in court, the defendant became entangled in his own web of lies. The evidence clearly



shows that no fraud was committed by any agents of the plaintiff. Defendant has failed to establish even the first element of fraud referred to in the Cheever case.

There are other elements of fraud that defendant has failed to show in this case. There was no evidence to show that defendant relied upon anything that the plaintiff said. What he wanted to do was list the property as many times as possible so that he would have a better chance to sell it. From the outset, he had no intentions of complying with the terms of the Agreements. Defendant did not prove actionable fraud on the part of the plaintiff, and the defense of fraud and misrepresentation was properly rejected by the court.

POINT NO. IV

**THE LISTING AGREEMENTS SIGNED  
BY THE DEFENDANT WERE VALID  
AND ENFORCEABLE CONTRACTS  
UNDER UTAH LAW.**

This court has held that the trial court retains the prerogative to determine the facts in a breach of contract action. See Santi v. R.G.W.R. Co., 21 U.2d 157, 442 P.2d 941.

Defendant asserts in its Appeal Brief that the evidence concerning the statements made by defendant to plaintiff's agent and the converse statements made by plaintiff's agent to the defendant were undisputed at the trial. This assertion is not supported by the evidence in the record. The testimony of Douglas Miller refutes the assertions by the defendant that

such statements were made. He was present when the first of the Listing Agreements was signed, and because of the inexperience of the listing agent, he filled out the form and asked the defendant to sign it. He categorily denied that there was any discussion about previous listings and about payment in the event the property was not sold. The contract clearly states the terms upon which the commission had to be paid.

As to the knowledge of the agent concerning the listing of the property with UBI through Helen Hooper, the evidence is clearly in dispute. As argued earlier in this Brief, defendant's own testimony casts serious doubt on his claims in this regard. If he had told them about the previous listing, why should he be ashamed to tell them about the sale to Souvall family? Why deny both the listing and the sale of the property made through the other real estate company?

When the court entered its Findings of Fact and Conclusions of Law in this action, it accepted the plaintiff's version of the facts, and that version is clearly supported by the evidence in this case.

POINT NO. V

**PLAINTIFF IS NOT SEEKING A  
"SECOND COMMISSION" FOR THE  
SALE OF DEFENDANT'S BAKERIES.**

Defendant asserts on this appeal that the Judgment granted to the plaintiff in this action is prohibited by Rule

11 of the Utah Real Estate Commission Rules and Regulations prohibiting the payment of double commissions. Rule 11 once provided that the real estate commission will not condone acts of brokers who sell listed properties other than through the listing broker. Any practice of the real estate broker that subjects the seller to the liability of paying two commission is prohibited. Defendant reasons that since he paid Helen Hooper a commission to sell the property under a listing given to UBI, the payment of a second commission to the plaintiff would constitute a double commission which is prohibited by the Rule.

A simple analysis of the former Rule belies this assertion. The commission was obviously referring to brokers who list the property and then somehow manipulate the sale in such a manner that the seller is subjected to the payment of two commissions. Such a practice may take place when the property is sold to another real estate company that somehow obtains an advantage through the assessment of a subsequent sales commission.

The drafters of Rule 11 never intended to bar the payment of legal commissions earned under the terms of a valid and enforceable Listing Agreement. In this case, the defendant, by signing several "sole and exclusive" Listing Agreements, has subjected himself to payment of two commissions. There

is no evidence to show that the plaintiff took any steps or did any acts to require the payment of a double commission by the defendant. The plaintiff is merely enforcing a valid agreement that defendant signed freely, voluntarily and knowingly. It is elementary that the law requires a contracting party to carry through on his promises. The courts have always held that people are free to contract as they please, but they are required to live with the consequences of their acts.

Defendant relies very strongly on the language of Rule 11 of the Real Estate Commission Rules and Regulations concerning double commissions. In July, 1985, Rule 11 was amended and is now known as Rule 6.6 of the Commission Rules. The language has been changed significantly, and the new language makes the Real Estate Commission's interpretation of this "double commission" problem much different than what is now proposed by the defendant. The new language is as follows:

Rule 6.6 Double Commissions.

In order to avoid subjecting the seller to paying double commissions, licensees must not sell listed properties other than through the listing broker.

A review of the present language of Rule 6.6, shows that the purpose of the Rule is to restrict real estate brokers from selling listed properties without going through the listing broker. This interpretation does not apply to sellers who knowingly list the property through several brokers. It

certainly wouldn't prevent the collection of a commission for breach of a valid Listing Agreement.

As the Judge noted in his Memorandum Decision and in his comments during the trial, the defendant caused his own grief in this case, and neither of the brokers had anything to do with the problems that arose from defendant's listing the property with more than one company.

POINT NO. VI

**THE AMOUNT AWARDED TO THE  
PLAINTIFF WAS BASED UPON THE  
CONTRACT BETWEEN THE PARTIES.**

When defendant argues that plaintiff failed to introduce any evidence of the "purchase price" of the property, he overlooks the wording of the contract pertaining to the commission to be paid to the real estate broker. Both of the Listing Agreements provide as follows:

2. Seller agrees to pay broker twelve (12 %), but in any event not less than \$ 6,000.00, of the purchase price.

Because there had been no sale, the District Judge chose to award the lesser amount of \$6,000.00 under each contract, or a total of \$12,000.00 for both Listing Agreements. The award was not based upon any purchase price for the property, but was based upon the contractual agreement that plaintiff would receive not less than \$6,000.00. The amount awarded was clearly to the advantage of the defendant and was based upon the lowest amount awardable in this action.

The evidence clearly shows that the property was sold for a total of \$154,500.00 to the Souvall family. If the court had based its Judgment on that selling price, the plaintiff would have been entitled to receive a full 12% of that amount, or over \$18,000.00. Defendant should noting his good fortune rather than attacking the court for assessing the lower minimum figure stated in the contract.

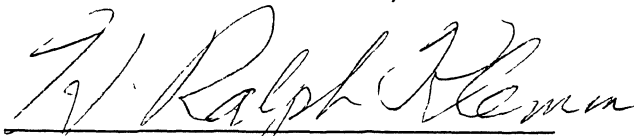
CONCLUSION

Most of the issues raised by the defendant on this appeal involve questions of fact that were resolved by the court on the trial level. In the past, this court has refused to disturb the factual finding of the trial court on appeal. There is no reason to make an exception to that rule in this case.

The legal matters raised on this appeal such as the interpretation of Rule 11 of the Real Estate Commission Rules and Regulations and the standard applied for proof of the elements of fraud and misrepresentation were properly handled by the court at the trial level. There is no reason to reverse the trial court's holding on either the facts or on the law. The court should affirm the judgment of the trial court and award costs to the plaintiff in connection with this appeal.

DATED this 24<sup>th</sup> day of September, 1986.

RESPECTIVE SUBMITTED,

  
H. RALPH KLEMM  
Attorney for Plaintiff-Respondent

NOTICE OF SERVICE

The respondent served the foregoing Brief of Respondent this 29<sup>th</sup> day of September, 1986, by having four true copies thereof delivered by United State Mail, postage prepaid, to defendant's attorney of record as follows:

M. Richard Walker  
4685 Highland Drive, Suite 202,  
Salt Lake City, Utah 84117.

*W. Ralph Jensen*

**ADDENDUM**

The respondent attaches hereto as the Addendum to the Brief of Respondent the following documents:

1. Plaintiff's Exhibit 1 -- Listing Agreement.
2. Plaintiff's Exhibit 2 -- Listing Agreement.
3. Memorandum Decision
4. Amended Findings of Fact and Conclusions of Law.
5. Judgment.





291	056	RAH	8-8-83
Officer	BLSE	Managers Initials	Date

## LISTING AGREEMENT

Business Type ☐ BAKERY  
Address 1341 E 10600 S  
City Sandy UT 84092  
Phone No. 571-7052  
Corp. &/or Firm Name \_\_\_\_\_  
dba RDK BAKERY  
Seller's Name LEROY R. GRIFFIN  
Address 10842 So. Bay Meadows Circle  
City SANDY 84082  
Phone No. 571-8903  
Bldg. Size 2000 ☐ Seats \_\_\_\_\_  
No. Employees 5 F.T. 4 P.T. \_\_\_\_\_  
Payroll \$ 3,000 Per Month employees only  
License Required Business License  
Parking Shopping  
Days Open 6 Closed On Sun  
Hours Open 7 AM till 8 P.M.  
REASON FOR SALE Exercise Illness

Base Mo. Rental 1115.- Lease Exp. Date Nov. 85  
Option 5 Years Security on Lease \$ 1115.-  
Terms and Conditions Tenant pays Uts.  
Misc. Lease Information no. 20, Tax & Ins. Included in  
Landlord Bell Company Ent. Phone 1  
Property Mgr Breg Nelson Phone 1  
Estab. 4 Yrs. Pres. Owner 4 Yrs.  
Furn., Equip. \$ \_\_\_\_\_ incl. in purch. price  
Inventory at Cost \$ 3500.- incl. in purch. price  
Monthly Receipts \$ 15,000.- Seller will prove  
Monthly Net Profit \$ 5000.- Seller will prove  
Purchase Price \$ 135,000 Includes \$ 16,200 Comm.  
Down Payment \$ 40,000 Includes \$ 16,200 Comm.  
Seller will carry balance at \$ none per month incl.  
10 % interest on unpaid balance  
Additional Terms Ten Year Payment

LIENS/ENCUMBRANCES Total \$ -0-

Amount \$ -0- Payments \$ -0- Interest -0- % Holder -0- Phone 1  
Amount \$ -0- Payments \$ -0- Interest -0- % Holder -0- Phone 1

All trade fixtures and equipment included except the following items: \_\_\_\_\_

## REMARKS

PLAINTIFF  
EXHIBIT

## SOLE AND EXCLUSIVE-RIGHT TO SELL

1. The Seller hereby engages the Broker, on a sole and exclusive basis, to sell the above described property, including all fixtures, goodwill, trademarks, trade names and inventory associated therewith.

2. Seller agrees to pay Broker Twelve (12%), but in any event not less than \$ 6,000.- of the purchase price.

3. Seller agrees that if this listing is cancelled or the property withdrawn from sale during the listing term by Seller, the commission shall become immediately due by Seller to Broker. If Seller refuses or is unable to comply with the listing terms for any reason, thereby preventing disposition of the property during the listing term upon the terms set forth above, the commission shall become immediately due by the Seller to the Broker.

4. Seller agrees that the commission shall be immediately due and payable if the Seller, directly or indirectly, enters into a Purchase and Sale Agreement (however designated) accepts a deposit or does any other act tantamount to a sale or contract to sell without the written approval of the Broker, and the cancellation or rescission of any of the foregoing acts shall not act as a release of Seller for such liability.

5. In any case where the deposit and/or down payment have been forfeited, the deposit shall be split 50% to

Seller and 50% to Broker.

6. The Seller acknowledges that it has supplied the listing information above and Seller warrants such information to be true and correct.

7. Seller agrees to pay the full commission set forth in this Agreement to the Broker in the event the property described herein is, within one year after the termination of this Agreement, sold, traded or otherwise conveyed to anyone referred to Seller by the Broker or with whom Seller had negotiations during the term of this Agreement.

8. This Agreement shall commence on the day and year set forth below and continue until Dec 31, 1983

9. Should any suit be commenced to enforce the Broker's rights herein, in the event the Broker is successful the Seller agrees to pay the Broker the expenses connected therewith, including attorney's fees incurred.

10. Seller hereby acknowledges that he has read this agreement and has received a copy of it.

11. If Seller is a partnership, corporation or other entity, the person(s) signing on behalf of such entity hereby represent(s) and warrant(s) that he/she has, or they have the authority to enter into this contract on behalf of said entity.

Employment Accepted by VR Business Brokers

OFFICE NAME VR WTAH, LTD.  
OFFICE ADDRESS 302 W. 5400 So., Murray  
LISTING AGENT Raymond R. Griffin

Corp. Name VR WTAH, LTD.  
Seller LeRoy R. Griffin  
Seller 8-1-83

ALL OFFICES ARE INDEPENDENTLY OWNED AND OPERATED



Office#	BLS#	Manager's Initials	Date
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### LISTING AGREEMENT

Business Type ☐ Bakery  
Address 12662 S. Redwood Road  
City Riverton UT  
Phone No. 254-1539

Corp. &/or Firm Name Riverton Bakery

Seller's Name LeRoy R. Griffin  
Address 10942 S. Bay Meadow Circle  
City Sandy 84092  
Phone No. 571-8903

Bldg. Size 1500 Seats       

No. Employees 1 F.T. 1 P.T.       

Payroll \$ 900 Per Month employees only

License Required Business

Parking Adequate

Days Open Mon-Sat Closed On Sunday

Hours Open 10-7

REASON FOR SALE Extreme Illness

Base Mo. Rental 350 <sup>+75 utilities</sup> Lease Exp. Date         
Option        Years Security on Lease \$ 700

Terms and Conditions open end lease

Misc. Lease Information       

Landlord Bryant E. Hansen Phone 1 SLC

Property Mgr. same Phone 1

Estab. 2 1/2 Yrs. Pres. Owner 2 1/2 Yrs.

Furn., Equip. \$        incl. in purch. price

Inventory at Cost \$ 5000 kg + 2000 9000 incl. in purch. price

Monthly Receipts \$ 5,400 Seller will prove

Monthly Net Profit \$ 1,250 Seller will prove

Purchase Price \$ 26,000 Includes \$ 6,000 comm.

Down Payment \$ 5,200 Includes \$ 6,000 comm. 11,200

Seller will carry balance at \$ 4,000 per month incl.

10 % interest on unpaid balance

Additional Terms       

LIENS/ENCUMBRANCES Total \$ -0-

Amount \$ -0- Payments \$ -0- Interest -0- % Holder -0- Phone 1

Amount \$ -0- Payments \$ -0- Interest -0- % Holder -0- Phone 1

All trade fixtures and equipment included except the following items:       

### REMARKS

### SOLE AND EXCLUSIVE RIGHT TO SELL

1 The Seller hereby engages the Broker, on a sole and exclusive basis, to sell the above described property, including all fixtures, goodwill, trademarks, trade names and inventory associated therewith.

2. Seller agrees to pay Broker Twelve (12%), but in any event not less than \$ 6,000, of the purchase price.

3 Seller agrees that if this listing is cancelled or the property withdrawn from sale during the listing term by Seller, the commission shall become immediately due by Seller to Broker. If Seller refuses or is unable to comply with the listing terms for any reason, thereby preventing disposition of the property during the listing term upon the terms set forth above, the commission shall become immediately due by the Seller to the Broker.

4 Seller agrees that the commission shall be immediately due and payable if the Seller, directly or indirectly, enters into a Purchase and Sale Agreement (however designated) accepts a deposit or does any other act tantamount to a sale or contract to sell without the written approval of the Broker, and the cancellation or rescission of any of the foregoing acts shall not act as a release of Seller for such liability.

5 In any case where the deposit and/or down payment have been forfeited, the deposit shall be split 50% to

Seller and 50% to Broker.

6 The Seller acknowledges that it has supplied the listing information above and Seller warrants such information to be true and correct.

7 Seller agrees to pay the full commission set forth in this Agreement to the Broker in the event the property described herein is, within one year after the termination of this Agreement, sold, traded or otherwise conveyed to anyone referred to Seller by the Broker or with whom Seller had negotiations during the term of this Agreement.

8. This Agreement shall commence on the day and year set forth below and continue until Feb 18 1984

9 Should any suit be commenced to enforce the Broker's rights herein, in the event the Broker is successful the Seller agrees to pay the Broker the expenses connected therewith, including attorney's fees incurred.

10 Seller hereby acknowledges that he has read this agreement and has received a copy of it.

11 If Seller is a partnership, corporation or other entity, the person(s) signing on behalf of such entity hereby represent(s) and warrant(s) that he/she has, or they have the authority to enter into this contract on behalf of said entity.

Employment Accepted by VR Business Brokers

OFFICE NAME VR Utah, LTD

OFFICE ADDRESS 302 W. 5400 S. Murray

LISTING AGENT Ariane Cassing

Corp. Name LeRoy R. Griffin

Seller       

Seller       

DATE 3-17-83

ALL OFFICES ARE INDEPENDENTLY OWNED AND OPERATED

FILMED

SEP 24 1985

*Beaull*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

V R UTAH LIMITED, a Utah  
Limited Partnership, dba  
V R BUSINESS BROKERS,

Plaintiff,

VS.

LEROY GRIFFIN, dba R.D.K  
BAKERY & RIVERTON BAKERY

Defendants.

MEMORANDUM DECISION

CIVIL NO. C 84-367

The above captioned matter came on for trial before this Court at the conclusion of which the Court requested written final arguments be submitted and these were submitted, the last being received by this Court on the 23rd of September, 1985. Plaintiff was represented by H. Ralph Klemm, Esq. and defendant was represented by M. Richard Walker, Esq.

The Court having read the applicable law pertaining to the issues raised and the closing arguments of counsel now makes and enters its Memorandum Decision on the issues raised of (1) the voidability of the contract and (2) the amount of damages, if any, to be awarded.

On the issue of voidability of the contract the defendant's liability turns on whether the contract is voidable for some reason. The fact which might create voidability is Ms. Ossinger's

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knowledge of a prior "sole and exclusive right to sell" agreement. Since there is a controversy over this evidence, both possibilities are to be examined.

On the proposition of no knowledge, if Ms. Ossinger had no knowledge of a prior listing agreement then the contract **is** not voidable. The contract would have been negotiated at arms length and in good faith by V R Limited or its agent. Ms. Ossinger's statement, if she made it, that "no commission would be payable unless V R Limited sold the business" is reasonable under these circumstances --- it would be true, subject to the other terms of the contract.

On the proposition of knowledge, if Ms. Ossinger knew of a prior listing agreement then there may be some doubt as to her competence but the contract is still not voidable. To void or modify the terms of the contract by the oral agreement, if there was one, there must be shown fraud, duress, undue influence, etc. The defendant has claimed that V R Limited or its agent perpetrated a fraud on him. However, the defendant has not proven by clear and convincing evidence the elements of fraud. Specifically, he has not shown the element of intent by V R Limited that he rely to his detriment upon its mis-representations of fact. The defendant bears the burden of proof in this instance and, therefore, the risk of non-persuasion.

JCS-271

Further, looking to the contract itself there is no reference to any outside agreements and it appears to be complete and fully integrated. If this is the case, and it appears to be so, then the intent of the parties is found within the "four corners of the writing". See Stanger v. Sentinel Security Life Insurance Co., 669 P2d 1201 at the page 1205. Here it is obvious that the parties intended no other agreements to be included in the contract. The assurance that no commission be paid except in the event V R Limited sold the business can be inferred from the contract. However, there are several occurrences specified which result in the commission coming due and payable immediately. One of those conditions is a sale or a contract to sell by the defendant without the written approval of V R Limited. V R Limited never agreed to the sale to Souvall. By signing the contract the defendant is presumed to have read and understood it. There is evidence that the defendant did read and understand the contract.

On the question of contract, therefore, this Court finds that the contract is valid and therefore enforceable. There is no fraud or misrepresentation established by V R Limited or its agent and the defendant understood or should have understood the terms of the contract he signed.

On the issue of damages, the Court finds that the damages to be awarded the plaintiff is imprecise if considering only

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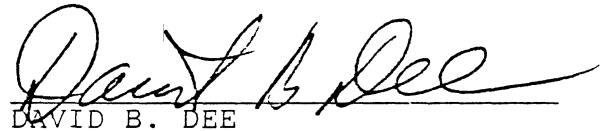
the twelve percent commission provided in the contract. There is merit to the defendant's argument that the Court should not speculate upon how to allocate the purchase price of three bakeries between two of the three bakeries sold inasmuch as the payment was a lump sum. The plaintiff's argument that the listing price be used would probably result in an inequity because the listing price of the two bakeries listed with V R Limited totaled more than the ultimate purchase price for the three bakeries.

Since the contract is valid as heretofore determined by this Court it is appropriate to look to the terms of the contract to assess damages. The contract does specify a minimum commission of \$6,000 for each listing. This amount would undoubtedly be the commission "due and payable" if one of the events occurred other than a sale by V R Limited which are specified in the contract (e.g., seller withdraws property before expiration of term), therefore this Court finds that the minimum commission of \$6,000 is due the plaintiff and that plaintiff may recover attorney's fees as provided in the contract.

Plaintiff's counsel, Mr. Klemm, is instructed to prepare the appropriate Findings of Fact, Conclusions of Law and Decree together with his Affidavit showing hours spent and hourly rate of billing for the assessment of attorney's fees,

submit the same to Mr. Walker as required under Rule 2.9 and then forward to this Court for signature and entry.

Dated this 22nd day of October, 1985.



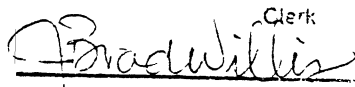
DAVID B. DEE

DISTRICT JUDGE ATTEST

H. DIXON HINDLEY

Clerk

Copies mailed to counsel.

By   
J Deputy Clerk

**FILED**

DEC 30 1985

H. Dixon Hindrev, Clerk 3rd Dist. Court  
By \_\_\_\_\_ Deputy Clerk

## STATE OF UTAH

Civil No. ~~684-376~~  
Judge David B. Dee

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### FINDINGS OF FACT

1. Plaintiff is a limited partnership that is duly licensed to do business as a real estate broker in the State of Utah. Under the terms of that license, the plaintiff is authorized by Utah law to list and sell all kinds of real estate properties, including business opportunities of all kinds.

2. Defendant is a resident of Salt Lake County, State of Utah, and the listing contracts referred to in this action were executed in said County and State.

3. At all times relevant to this action, defendant was the owner and operator of two established bakery businesses known as R.D.K. Bakery and Riverton Bakery.

4. All of plaintiff's agents who participated in the listing and sale of defendant's properties were duly licensed and authorized by the State of Utah to engage in the sale of real estate in this State.

5. On August 1, 1983, the defendant executed and delivered to the plaintiff a Listing Agreement granting the plaintiff the sole and exclusive right to sell the business known as R.D.K. Bakery, together with all fixtures, equipment, goodwill, trademarks, trade names, accounts receivable and inventory associated therewith. By its terms, the Listing Agreement had a duration of five months, extending from August 1, 1983, to and until December 31, 1983.

6. On August 17, 1983, the defendant executed and delivered to the plaintiff a Listing Agreement granting the plaintiff the sole and exclusive right to sell the business known as Riverton Bakery, together with all fixtures, equipment, goodwill, trademarks, trade names, accounts receivable and inventory associated therewith. By its terms, the Agreement had a duration of six months, extending from August 17, 1983, to and until February 18, 1984.

7. Both of the Listing Agreements referred to herein further provided that the agreed real estate commission shall be immediately due and payable if the seller, directly or indirectly, enters into a purchase and sale agreement (however designated), accepts a deposit or does any other act tantamount to a sale or contract of sale without the written approval of the plaintiff.

8. Defendant further agreed in both the Listing Agreements to pay not less than \$6,000.00 as a commission for the sale of the property.

9. After the Listing Agreements were signed, the plaintiff undertook efforts to find a buyer for both of the bakeries. In connection therewith, they placed the properties on the multiple listing board and advertised the properties for sale in newspapers. They showed the properties to potential buyers on several occasions, and they otherwise made a reasonable effort to sell the properties.

10. The R.D.K. Bakery and the Riverton Bakery, together with a third bakery known as R.D.K.-Winegars, were also listed by the defendant, on July 22, 1983, with UBI Business Brokers, and the listing contract also provided that UBI Business Brokers had a sole and exclusive right to sell the property for the defendant. The listing contract ran from July 22, 1983, to and including June 22, 1984.

11. On December 9, 1983, the defendant sold both bakeries to Mrs. Toula Souvall. The sale was made without seeking or obtaining the written approval of the plaintiff. A full real estate commission was paid to UBI Business Brokers by the defendant. The defendant thereby violated the provisions of the two Listing Agreements referred to herein and became immediately liable for payment of the commission under both Listing Agreements.

12. The minimum commission payable under each of the Listing Agreements is the sum of \$6,000.00, and the court finds that this amount is a fair and reasonable commission to be paid to the plaintiff under the terms of each of the Listing Agreements.

13. Under the terms of the Listing Agreements, the defendant further agreed to pay the plaintiff all expenses, including attorney's fees, in connection with any suit that may be commenced to enforce the plaintiff's rights under the contracts. The parties have stipulated and agreed in open court

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that the sum of \$2,000.00 is a reasonable amount to be awarded to the plaintiff for attorney's fees in this action.

14. The listing contracts which form the basis for this suit were negotiated at arms length and in good faith by the plaintiff and its agents. Any statements made by plaintiff's agent in indicating that no real estate commission would be payable unless the plaintiff sold the business were true, subject to the other terms of the contracts.

15. The defendant has failed to show by clear and convincing evidence that the plaintiff perpetrated any fraud upon him. The elements of fraud have not been established in this action. In particular, defendant has failed to show that plaintiff intended to defraud or mislead the defendant to his detriment.

From the foregoing Findings of Fact, the court makes the following

CONCLUSIONS OF LAW

1. The court has jurisdiction over this action and over the parties named herein.

2. The Listing Agreements executed by the parties on August 1, and August 17, 1983, were valid and enforceable contracts which were legally binding upon the parties to those Listing Agreements.

3. The defendant was not fraudulently induced to execute the Listing Agreements, and the Agreements are not voidable for this reason.

4. The Listing Agreements were not voidable by the defendant for any reason, but were fully enforceable by the court.

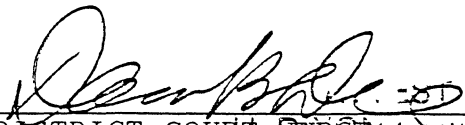
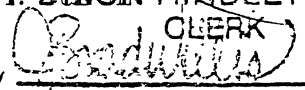
5. Upon the sale of the property to a third party, the defendant became liable, under the terms of both contracts, for payment of the minimum listing fee of \$6,000.00 stated in each of the Listing Agreements.

6. Plaintiff is entitled to judgment against the defendant in the total sum of \$12,000.00, plus interest accruing thereon at the legal rate from and after December 9, 1983, together with an attorney's fee in the sum of \$2,000.00.

7. The payment of the commissions by the defendant to the plaintiff does not constitute the payment of a "double commission" as that term is defined in Rule 11 of the Regulations of the Real Estate Commission. In this instance, the listing broker did not subject the seller to the liability of paying two commissions, as prohibited by the regulation, but the defendant caused his own liability by signing a second exclusive Listing Agreement with the plaintiff.

DATED this 30 day of December, 1985.

BY THE COURT:

  
DISTRICT COURT H. DUGAN HENDLEY  
CLERK  
By   
Deputy Clerk

NOTICE OF SERVICE

Served the foregoing this 25<sup>th</sup> day of December, 1985, by mailing a true copy thereof, by United States Mail, postage prepaid to defendant's attorney, M. Richard Walker, 4685 Highland Drive, Suite 202, Salt Lake City, Utah 84117.

*M. Ralph Walker*

**JUDGMENT**

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

NOV 12 1985

H. Dixon Hindley, Clerk 3rd Dist. Court  
By [Signature] Deputy Clerk

H. RALPH KLEMM  
Attorney for Plaintiff  
Bar No. 1838  
500 Clark Leaming Office Center  
175 South West Temple  
Salt Lake City, Utah 84101  
Telephone: 328-2206

BR 202 NO. 161  
11-15-85 - 8:15 AM

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

V R UTAH LIMITED, a Utah  
limited partnership, dba  
V R BUSINESS BROKERS,

Plaintiff,

-vs-

LEROY GRIFFIN, dba R.D.K.  
BAKERY & RIVERTON BAKERY,

Defendant.

J U D G M E N T

C84-367

Civil No. C84-376

This matter came before the court for trial on August 21, 1985, with the Honorable David B. Dee presiding. Plaintiff and defendant were represented by their respective attorneys of record. The court having received evidence in documentary form and from witnesses called to testify on behalf of the parties, and the court having received arguments of counsel in written form pertaining to the issues of fact and law to be resolved in this action, and the court being fully advised

in the premises, and the court having heretofore entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That plaintiff is awarded judgment against the defendant in the sum of \$12,000.00 as a real estate commission under the terms of the two Listing Agreements that form the basis for this action.


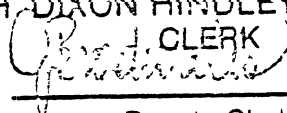
2. Plaintiff is further awarded judgment against the defendant for interest accruing to and until the date of Judgment in the sum of \$1,068.49.

3. Plaintiff is further awarded judgment against the defendant for attorney's fees in the sum of \$2,000.00, plus court costs in the sum of \$183.65.

4. Interest shall run on the Judgment at the rate of 12% per annum, as provided by Utah law, until paid.

DATED this 12 day of November, 1985.

BY THE COURT:

  
\_\_\_\_\_  
DISTRICT COURT JUDGE  
H. DIXON HINDLEY  
CLERK  
By \_\_\_\_\_  
Deputy Clerk



NOTICE OF SERVICE

Served the foregoing this 30<sup>th</sup> day of October,  
1985, by mailing a true copy thereof, by United States Mail,  
postage prepaid to defendant's attorney, Richard Walker, 4685  
South Highland Drive, Salt Lake City, Utah 84117.

N Ralph Klemm