

1988

Machan Hampshire Properties v. WESTERN  
REAL ESTATE & DEVELOPMENT  
COMPANY, a Utah corporation, WESTERN  
MORTGAGE AND LOAN CORPORATION, a  
Utah corporation, K-E ENTERPRISES, a Utah  
general partnership, BIRTCHER  
INVESTMENTS, a California general partnership,  
BIRTCHER AMERICAN PROPERTIES, a  
California association, and CAPITALCORP  
FINANCIAL, INC., a California corporation, :

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## Reply Brief

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MACHAN HAMPSHIRE PROPERTIES,  
INC., a Utah corporation,

Case No. 880229-CA  
(Supreme Court No. 870426)

v.

WESTERN REAL ESTATE &  
DEVELOPMENT COMPANY, a Utah  
corporation, WESTERN MORTGAGE  
AND LOAN CORPORATION, a Utah  
corporation, K-E ENTERPRISES,  
a Utah general partnership,  
BIRTCHER INVESTMENTS, a  
California general partnership,  
BIRTCHER AMERICAN PROPERTIES,  
a California association, and  
CAPITALCORP FINANCIAL, INC.,  
a California corporation,

APPELLANT'S REPLY BRIEF

Appeal from a Non-Final Order Entered  
July 22, 1986, by the Third Judicial  
District Court in and for Salt Lake County,  
Which Became a Final Order Pursuant to the Order Dated  
September 25, 1987, Entered by the Same Court and Judge  
Honorable Leonard Russon, Judge

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## ARGUMENT

### POINT I

#### IDENTIFICATION OF THE PROSPECTIVE PURCHASER IS NOT A NECESSARY ELEMENT OF THE "NOTE OR MEMORANDUM" REQUIREMENT SET FORTH IN THE STATUTE OF FRAUDS

In its brief, Machan identified the policy underlying the Statute of Frauds as follows:

The Statute of Frauds is intended to protect against fraud; it is not intended as an escape route for persons seeking to avoid obligations undertaken by or implied upon them.

Kiersey v. Hirsch, 265 P.2d 346, 352 (N.M. 1953). To fulfill this policy, the statute requires the existence of some "note or memorandum" of the agreement between the parties. See, Utah Code Annotated, §25-5-4(5). There is no specific formula by which one can measure the sufficiency of a particular "note or memorandum," and a memorandum which is sufficient in one case may well be held insufficient in another. 2 A. Corbin, Corbin on Contracts, §498 at 683. In applying the Statute of Frauds, courts are compelled to examine the facts of each case to determine whether the "note or memorandum" at issue is sufficient to remove any significant fear that a fraud is being perpetrated. In such analysis, the court is free to consider more than one "note or memorandum" and to consider the circumstances surrounding the transaction, including parole evidence. Gregerson v. Jensen, 617 P.2d 369 (Utah 1980).

After citing numerous cases which identify the various elements necessary to make a "note or memorandum" sufficient to satisfy the Statute of Frauds, Western argues that there is no written instrument, or combination of written instruments, which contains an agreement by Western to pay Machan a commission upon the sale of the IOmega Park to Birtcher. None of the authorities cited by Western, however, require as an essential element of the "note or memorandum" the specific identification of the purchaser of the property. If examined closely, Western's unsupported argument requires a real estate broker to specifically identify a ready, willing, and able buyer to the seller in the written agreement which calls for the payment of a commission to the broker. Under such circumstances, no commission agreements would be executed because the seller would simply refuse to sign the same and contact the identified person directly.

The issue in this case can be simply stated: did Western agree to pay a 4 percent commission to Machan if Machan procured a buyer for the IOmega Park and, if so, is there some "note or memorandum" which sufficiently identifies such agreement so that the Court is reasonably certain a fraud is not being perpetrated? Western attempts to confuse the Court by arguing that there is no written instrument agreeing to pay Machan a commission upon the sale of the IOmega Park to Birtcher, and that, in fact, Western expressly rejected Machan's attempt to register Birtcher as a prospective client with Western. The registration procedure utilized by

the parties herein was designed, however, to avoid embarrassment respecting the identification of the broker who procured the buyer, not a limitation of the agreement to pay a commission. The use or non-use of such registration procedure is irrelevant to the question of whether or not Western agreed to pay a commission to Machan upon the sale of the IOmega Park, and whether such agreement is satisfactorily identified by one or more writings.

Based upon the facts and circumstances set forth in Machan's opening brief, there is no question that Western agreed to pay Machan a commission of 4 percent if it procured a buyer for the IOmega Park. Arguments that Machan did not procure Birtcher as the buyer or did not properly comply with Western's registration procedure may constitute a defense to Machan's claim for a commission, but such arguments are not relevant to the Statute of Frauds issue presented by this appeal.

## POINT II

THE ISSUE AS TO WHETHER MACHAN  
PROCURED BIRTCHER AS THE BUYER OF THE  
IOMEGA PARK IS NOT PROPERLY BEFORE THIS COURT  
AND, ACCORDINGLY, CANNOT BE UTILIZED  
TO AFFIRM THE RESULT OF THE TRIAL COURT'S  
DECISION RESPECTING THE STATUTE OF FRAUDS

In the second part of its brief, Western argues that Machan was not the procuring cause of the sale of the IOmega Park to Birtcher and, accordingly, this Court may affirm the trial court's dismissal on such grounds. In support of its argument that this Court may affirm the judgment on any



proper ground even if the district court assigned an incorrect reason for its ruling, Western cites two cases, the first of which is Allphin Realty, Inc. v. Sine, 595 P.2d 860 (Utah 1979).

In Allphin, the defendant seller was granted summary judgment against plaintiff real estate agent on the grounds that the writing in question did not satisfy the Statute of Frauds. On appeal, the Supreme Court affirmed the dismissal on the grounds that the commission agreement in question called for the payment of a commission if the property was sold to one of the identified prospective buyers. Since no sale whatsoever in Allphin took place, and since the offer submitted by plaintiff to defendant was from someone other than those identified in the commission agreement, the Supreme Court was confident that plaintiff did not and could not state a cause of action. As a result, the Supreme Court affirmed the district court's dismissal albeit on different grounds.

The second case cited by Western is Berry v. Berry, 738 P.2d 246 (Utah App. 1987). The Berry case is a divorce case wherein one spouse attempted to relitigate issues previously decided by the court. Such subsequent attempt to relitigate was dismissed by the trial court on the grounds that jurisdiction over the subject matter of the lawsuit was vested in a different court. On appeal, the Court of Appeals affirmed the dismissal on the principle of collateral estoppel. "Because this is a threshold issue, we do not reach

the merits of appellant's other points on appeal." Id. at 250. Neither of these cases supports Western's position that, under the facts of this case, this court should affirm the district court's decision on the different grounds that Machan was not the procuring cause of the sale to Birtcher.

To view the inapplicability of the above-cited cases, one need only examine the posture and the facts of the case at bar. In this case, both parties early in the litigation moved for summary judgment. At the conclusion of the arguments on both the merits and the form of the order, the trial court granted Western's motion to dismiss Machan's First Cause of Action on the basis that the Statute of Frauds was not satisfied. The trial court specifically refused to grant Western's motion on the alternative ground that, as a matter of law, Machan had not procured Birtcher as the buyer of the IOmega Park. This refusal is inherently logical in light of the fact that the issue of "procuring cause" is a fact intense issue, very little discovery by the parties had been completed, and both parties had submitted affidavits demonstrating the presence of an issue of fact. Even though it did not raise, by way of cross appeal, the trial court's refusal to grant summary judgment on the issue of "procuring cause," Western now invites the court to affirm the trial court's decision on such grounds.

Though Western recognizes that the issue of "procuring cause" is one of fact, it cites Hiniger v.

Judy, 194 Kan. 155, 398 P.2d 305 (1965), and argues that where there is no competent evidence from which a jury could reasonably grant the broker's claim, the court may resolve the issue of procuring cause as a matter of law. Not surprisingly, Western fails to point out to this Court that the Hiniger appeal was taken from an adverse jury verdict. In other words, both parties had already had the opportunity to fully present their case to the jury. With such record in hand, the court was able to make a determination as to whether there was any evidence to support the jury's verdict. No such opportunity was granted in the case at bar. Furthermore, contrary to the Hiniger case, there is testimony in the record herein, which presents an issue of fact on procuring cause and which, if believed, could result in a verdict for Machan. Without attempting to list all of the conflicting facts and testimony herein, Machan points the Court to the following:

a. In January, 1985, Machan introduced representatives of Birtcher to real estate opportunities along the Wasatch front area. (Polcha aff'd., para. 5.)

b. In late February or early January 1985, Capitalcorp Financial, Inc. ("Capcorp") presented an offer to purchase the IOmega Park from Western. (Slavin depo., p. 11.) Upon inquiring about the property, Machan was informed that its clients who were interested in the property should understand they were in a backup position. (Goddard depo., p. 28, ex. 7.)

c. Polcha had several conversations with Birtcher representatives regarding the property, sent them information as requested and corresponded with them on an on-going basis regarding the property. (Polcha aff'd., para. 9; Trachman depo., pp. 9-19.)

d. In May and June 1985, Polcha had telephone conversations with both Birtcher and Western. Birtcher expressed an interest in the property but was waiting to see what happened with the original offeror. (Polcha aff'd., para. 10.)

e. The Capcorp offer was scheduled to close in April, 1985. Such closing, however, was extended to July 15. (Slavin depo., pp. 14-15.)

f. By July 15, 1985, the date the Capcorp offer was again scheduled to close, Capcorp's financing had fallen through. (Slavin depo., p. 19.)

g. When Capcorp first tied up the property, it mentioned the same to Birtcher to see if there was any interest by Birtcher on doing something with Capcorp on the property. (Slavin depo., p. 24.) At such time, Birtcher responded that they were not interested. (Slavin depo., p. 25.)

h. Capcorp renewed its efforts with Birtcher when its financing fell through on or about the latter part of May or first part of June, 1985. (Slavin depo., p. 26.)

i. At some time in July, 1985, Western telephoned Machan and informed it that Capcorp's deal was foundering and asked if Birtcher had an interest in the property. Machan called Birtcher and informed them that the property might be available. A Birtcher representative said that he would pull the file and get back to Machan. Machan called Western and reported the conversation with Birtcher. (Polcha aff'd., para. 11.)

j. In August, 1985, Machan made several telephone calls to Birtcher which went unreturned. (Polcha aff'd., para. 12.)

k. On September 3, 1985, a Birtcher entity known as Birtcher Investments,

signed a letter of intent to purchase the property. (Goddard depo., ex. 20.)

l. On September 6, 1985, Western wrote Machan a letter purporting to terminate or disavow any obligation to pay Machan a commission for the sale of the property to Birtcher. (Goddard depo., p. 78, ex. 21.)

m. After inquiry from Machan on September 12, 1985, Western claimed that "Capcorp/Birtcher" had "presented their offer on January 30, 1985, as you well know." (Goddard depo., pp. 83-84, ex. 23.)

The foregoing testimony in the record herein clearly demonstrates the presence of an issue of fact respecting whether Machan was a "procuring cause" of the sale to Birtcher. Since the issue of procuring cause has not been fully and finally litigated, the principal of collateral estoppel does not apply. Since a sale of the property at issue has taken place, and since there is testimony in the record which, if believed, would support a favorable finding that Machan was a "procuring cause" of such sale, Machan is entitled to its day in court where it can present, to a jury, its entire case.

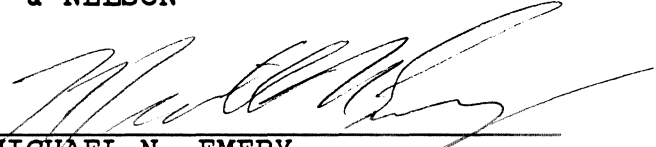
#### CONCLUSION

The facts and circumstances of this case clearly demonstrate the existence of an agreement whereby Western agreed to pay a real estate commission to Machan if Machan procured a buyer for the IOmega Park. Correspondence by and between the parties and the parole evidence respecting the facts and circumstances of this case clearly demonstrate that

Machan is not attempting to perpetrate a fraud. Accordingly,  
Machan is entitled to its day in court.

DATED this 28th day of June, 1988.

RICHARDS, BRANDT, MILLER  
& NELSON

  
\_\_\_\_\_  
MICHAEL N. EMERY  
Attorneys for Appellant  
Machan Hampshire Properties,  
Inc.

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the  
foregoing instrument was mailed, first class, postage prepaid  
on this 28th day of June, 1988, to the following counsel of  
record:

Dan S. Bushnell  
David M. Wahlquist  
Merrill F. Nelson  
KIRTON, McCONKIE & BUSHNELL  
330 South 300 East  
Salt Lake City, Utah 84111

MACH/AB/MNE