

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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Brief of Appellant

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880229-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

MACHAN HAMPSHIRE PROPERTIES,
INC., a Utah corporation,

Appellant,

v.

Case No. 870426

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,

Respondents.

88-0229-CA

BRIEF OF APPELLANT

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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FEB 25 1988

870426

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

MACHAN HAMPSHIRE PROPERTIES, INC., a Utah corporation,	:	
	:	
Appellant,	:	
	:	
v.	:	Case No. 870426
	:	
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,	:	
	:	
Respondents.	:	

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a non-final Order entered in a civil action pursuant to a motion for summary judgment, whereby the Third Judicial District Court, in and for Salt Lake County, the Honorable Leonard Russon presiding, dismissed plaintiff's claim against certain defendants. Such non-final Order became final in accordance with Rule 54, Utah Rules of Civil Procedure, pursuant to a subsequent Order which resolved all remaining issues as to all defendants. This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. §78-2-2 (1987).

ISSUE PRESENTED

Does the correspondence, registration procedures and course of dealing by and between appellant and respondent satisfy the requirement for a "memorandum or note" under Utah Code Annotated §25-5-4(5).

DETERMINATIVE STATUTES

While the issues before the Court are fact intensive, the statute believed to be determinative of such issue is set forth in §25-5-4(5) of the Utah Code Annotated, and reads, in its entirety, as follows:

25-5-4 CERTAIN AGREEMENTS VOID UNLESS WRITTEN AND SUBSCRIBED. In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof.

(2) Every promise to answer for the debt, default or miscarriage of another.

(3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.

(4) Every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, or the testator or intestate out of his own estate.

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

STATEMENT OF THE CASE

I.

Nature of the Case

This is an action brought by Machan Hampshire Properties ("Machan") to recover a 4 percent real estate commission from Western Real Estate and Development Company, a Utah corporation ("Western Real Estate"); Western Mortgage and Loan Corporation ("Western Mortgage"), a Utah corporation; and K-E Enterprises, a Utah general partnership ("K-E"), with respect to the sale of the IOmega Industrial Park ("IOmega Park") which was owned and sold by Western Mortgage and K-E to Birtcher Investments ("Birtcher"), and to recover damages from Birtcher and Capitalcorp Financial, Inc. ("Capitalcorp") for tortious interference with contract and/or prospective economic relations.

After some initial discovery, Machan moved for summary judgment against Western Mortgage, Western Real Estate, and K-E on its contract claim for a 4 percent real estate commission. In addition to opposing Machan's motion, Western Mortgage, Western Real Estate, and K-E filed a motion for summary judgment against Machan seeking a dismissal of Machan's contract claim. Several issues were raised, briefed, and argued in connection with the parties' respective motions for summary judgment. In its Order dated July 22, 1986, the trial court denied Machan's motion and granted the summary judgment motion brought by Western Mortgage, Western Real Estate, and K-E, thereby dismissing Machan's claim for a real estate commission. (R. at 453-55; Appendix 1.) The trial court, however, based its ruling in favor of Western Mortgage, et al., solely on the basis that "plaintiff's claim is barred by the Statute of Frauds set forth in Utah Code Ann. §25-5-4(5) because no writing exists memorializing the claimed agreement to pay a commissions." Id.

The Order dated July 22, 1986, did not resolve the tortious interference claims brought by Machan against Birtcher and Capitalcorp and, accordingly, was not a final Order pursuant to Rule 54(b), Utah Rules of Civil Procedure. After further discovery, and based upon the trial court's prior ruling relative to the Statute of Frauds, the parties stipulated to the entry of a final Order resolving all claims as against all parties. Pursuant to the Stipulation, the trial court entered its Order dated September 25, 1987, resolving all

remaining issues with respect to all remaining parties, thereby constituting the final Order from which Machan brings this appeal. (R. at 553-56; Appendix 2.)

This Order, and the Stipulation on which it was based, recognized plaintiff's inability to pursue its tortious interference of contract claims against Birtcher and Capitalcorp in light of the ruling that any such contract was void due to the Statute of Frauds. Accordingly, the parties preserved Machan's right to pursue this claim if, on appeal, it obtains a reversal of the Order dated July 22, 1986.

Based upon the narrow scope of the trial court's Order dated July 22, 1986, relative to the application of the Statute of Frauds, Machan hereby sets forth only those facts relevant to the issue on appeal.

II.

Statement of the Facts

Machan is a Utah corporation authorized, among other things, to acquire, develop, purchase, and sell real estate. At all times relevant to this case, Mr. Robert Polcha ("Polcha") was a licensed real estate broker and salesman affiliated with Machan. (Polcha Aff'd., R. at 77; Polcha 1985 Depo. pp. 3 and 4*.) Western Mortgage is a Utah corporation which engages in the business of first mortgage lending. Western Real Estate is a Utah corporation engaged in the real estate development business and is a wholly owned subsidiary of Western Mortgage. K-E is a Utah general partnership. Mr. J.

Kelly Goddard ("Goddard"), at all times relevant to this case, was a vice president of Western Mortgage, the president of Western Real Estate, and a general partner in K-E. (Goddard Aff'd., R. at 208; Goddard Depo. pp. 6-11.)

Prior to January 1986, Western Mortgage and K-E were the record owners of approximately 16.61 acres of land located in Roy, Utah, known as the IOmega Industrial Park. (Goddard Aff'd., R. at 208.)

In or about January 1985, Polcha had a telephone conversation with Goddard wherein Polcha inquired about properties Western Real Estate was marketing. Goddard responded by stating that the IOmega Park property was for sale. Polcha requested that Goddard forward a package of information about the IOmega Park for distribution to Polcha's clients. Goddard agreed to send such information to Polcha. (Polcha Aff'd., R. at 77-78; Goddard Aff'd., R. at 210-11; Goddard Depo. p. 28.)

During the course of this or some other earlier conversation, Goddard agreed to allow Polcha to register his clients with Goddard and indicated that he would keep a log entry of the same. (Goddard Depo. p. 62; see also, Polcha Depo. (1986) pp. 18, 19; Polcha Aff'd., R. at 77-78.) In this log, Goddard would record or register the name of the broker together with the clients or investors with whom such broker was working. The purpose of the registration system was to protect the broker's commission, and to avoid the embarrassing duplication which would occur if two or more brokers were

presenting the same client to the seller. (Id.) Polcha claims that, during this conversation, he inquired about the commission to be paid and Goddard agreed to pay a 4 percent commission. (Polcha Aff'd., R. at 78.) Goddard claims that he "did not commit to pay any specific commission amount during that [February 1985] conversation." (Goddard Aff'd., R. at 211.)

By cover letter dated February 21, 1985, Goddard sent Polcha information on IOmega Park. (Goddard Depo. pp. 22-31, 55-56, Exhibits 2 and 7, R. at 262.) Goddard's letter dated February 21, 1985, states, in part, as follows:

As I indicated to you on the phone, we have accepted another offer, and should you have success in obtaining a buyer, be sure they understand it would be a back-up offer.

Id. Polcha supplemented the information he received from Mr. Goddard and began distributing the same to his clients. (Polcha Aff'd., R. at 78.) Thereafter, Polcha requested additional information on the IOmega Park and Goddard provided the same. (Goddard Depo. pp. 59-60, Exhibit 12.) In turn, Polcha forwarded such information to his clients. (See, Polcha Depo. (1986), Exhibit 13.)

By letter dated February 26, 1985, Polcha reiterated the agreement he had with Goddard respecting the payment of a 4 percent commission and, in conjunction therewith, registered with Goddard certain clients. Mr. Polcha's letter dated February 26, 1985, reads, in part, as follows:

Machan Hampshire Properties, Inc./Robert F. Polcha represents the following clients in

connection with the proposed purchase of the subject properties. The purpose of this letter is to register the clients with you and to set forth in our understanding that in the event a transaction is consummated between yourself and these clients, you agree to pay a commission to Machan Hampshire Properties, Inc./Robert F. Polcha. Said commission shall be four percent (4%) on Iomega Park.

Cal-Fed Syndications
Birtcher American Properties
Equitable Life Real Estate Division.

By letters dated March 5, March 12, and March 28, April 12, April 30, and July 16, 1985, Mr. Polcha continued to register clients to whom he was going to introduce the IOmega Park property. All such letters again reiterated the agreement that Western Real Estate would pay to Machan a 4% commission in the event the sale was consummated with Polcha's client.

(Polcha Depo. (1986) and Goddard Depo., Exhibits 9, 10, 11, 14, 16, and 17.)

Sometime in July, August, or September, 1985, Goddard telephoned Mr. Polcha and indicated to him that the previous sale for the IOmega Park property had fallen through and that such property was back on the market. Goddard also requested Mr. Polcha to contact his clients to see if they had any continuing interest in the IOmega Park property. (Polcha Aff'd., R. at 80; see also, Goddard Aff'd., R. at 209, 212.)

Prior to August 7, 1985, Polcha had not received any negative response to his registration letters. (See, Goddard Depo. pp. 56-59, 62-66.) By letter dated August 7, 1985, Mr. Polcha attempted to register with Goddard a client entitled the

Estate of James Campbell. (Goddard Depo., Exhibit 18.) In the August 7, 1985 letter, Mr. Polcha indicated that the commission would be 5% of the gross selling price should the IOmega Park property be sold to the Estate of James Campbell. (Id.) By letter dated August 9, 1985, Mr. Goddard responded to Mr. Polcha's August 7 letter. In his response, Goddard stated as follows:

In response to your letter, we have only agreed to pay 4% commission on the above park. All other terms of your letter are acceptable.

(Goddard Depo., Exhibit 19; Appendix 3.) (Emphasis added.)

On September 3, 1985, Birtcher, known as Birtcher Investments, signed a letter of intent to purchase the IOmega Park property. (Goddard Depo., Exhibit 20.) By letter dated September 6, 1985, Goddard, acting on instructions from John Goddard, informed Polcha that he had been receiving Mr. Polcha's letters of registration of clients, but that he would not honor such registration for certain clients. The letter further states as follows:

Thupgn most are acceptable, the following were contacted prior to receipt of your letters:

1. DeAuza Corporation.
2. August Financial.
3. Birtcher Properties/Cap Corp.

Therefore, we cannot recognize the above. Should you have any questions, please contact me.

(Goddard Depp. pp. 78-80; Goddard Depo., Exhibit 21; Appendix 4.) (Emphas~~i~~s added.)

Shortly after learning of the letter of intent submitted by Birtcher, Goddard informed Mr. Mullins, the president of Western Mortgage, that Machan had registered Birtcher with Western Real Estate. In response to the question "what did Mr. Mullins say to you in response?", Goddard responded as follows:

My comment was I had received a registration from Machan Properties back in the spring from Birtcher, and that, you know, there may a situation there that he might want to look at, and he said, 'Oh, absolutely not. How does he possibly feel he deserves a commission when he didn't bring us the deal, Cap/corp did?' I said I am just telling you there was a registration letter back in the spring. So he says something to the effect, 'well, there is no way he could justify a commission if he didn't do anything.' So that about ended it.

(Goddard Depo. p. 76.) After inquiry from Polcha respecting Goddard's September 6 letter, wherein Goddard indicated that Western Real Estate had prior contact with Birtcher, Goddard, in a letter dated September 12, 1985, claimed that "Capcorp./Birtcher had presented their offer on January 30, 1985, as you well know." (Goddard Depo. pp. 83-84, Exhibit 23.) In a subsequent telephone conversation wherein Polcha asserted he was entitled to a commission, Goddard responded as follows:

Bob (Polcha) was aware we were working with Cap/corp., and it was Cap/corp. that brought us the deal, not Machan Properties. Had Machan walked in with this deal from Machan Properties, then they would have received the commission, but just to arbitrarily mail out a letter with no closing date on the contract, anybody can do that, that's what I told him. 'Had

you brought us the deal, we would have honored your commission. You didn't. Cap/corp. has brought us the deal. We have been working with Cap/corp. since day one, and you're fully aware of it, so whether their investors just happened to be your investors is a personal problem.'

(Goddard Depo. pp. 45-46; Appendix 5.) (Emphasis added.)

An agreement of purchase and sale of real property was made on or about September 27, 1985, naming Birtcher Investments as the buyer at a price of \$7,425,000.00. (Goddard Depo. pp. 23-24, Exhibit 1.)

SUMMARY OF ARGUMENT

The Statute of Frauds is designed to prevent, in certain cases, honest men from being ensnared, by perjury and fraud, in alleged contracts that they never made. In fulfilling this purpose, however, courts have routinely refused to utilize the Statute of Frauds to defeat contractual obligations voluntarily assumed. In order to fulfill the underlying purpose of the statute, courts require the presence of some "note or memorandum" that has substantial probative value in establishing the existence of a contract. Such "note or memorandum" need not be set forth in only one document, and it need not constitute a "formal" written contract. All that is necessary is that such note or memorandum, as explained or corroborated by parole evidence and/or the surrounding circumstances, remove any serious risk that a fraud is being perpetrated.

In the case at bar, Machan and Western Real Estate, by and through their authorized agents, exchanged numerous letters, all of which relate directly to the sale of the IOmega Park property. In two separate letters, both signed by Goddard, Western Real Estate acknowledged the existence of a 4 percent commission agreement with Machan. In a letter dated August 9, 1985, Goddard stated that "we only have agreed to pay a 4% commission on the above park. All other terms of your letter are acceptable." This letter was mailed by Goddard subsequent to his receipt of numerous registration letters sent by Machan, all of which recited the existence of a commission agreement.

In his letter dated September 6, 1985, Goddard informed Machan that, with the exception of 3 specific clients, all prior registration letters reciting the existence of a commission agreement were "acceptable." The basis for excluding the 3 identified clients was not due to the absence of a commission agreement, but rather was due to the fact that such clients had allegedly been contacted prior to the receipt of Machan's registration letters. Thereafter, in his deposition, Goddard confirmed the existence of a commission agreement by testifying that Machan would have been paid its commission, if it had procured the buyer. While Western Real Estate may be able to defeat Machan's claim for a commission based upon non-performance, such testimony constitutes a clear admission of the existence of an agreement.

Accordingly, the trial court erred in dismissing Machan's claim for a real estate commission based upon the application of the Statute of Frauds.

ARGUMENT

THE CORRESPONDENCE BY AND BETWEEN MACHAN AND WESTERN REAL ESTATE, WHEN VIEWED WITH THE CIRCUMSTANCES OF THIS CASE AND MEASURED BY THE PURPOSE OF THE STATUTE, CLEARLY CONSTITUTES A "NOTE OR MEMORANDUM" SUFFICIENT TO COMPLY WITH THE STATUTE OF FRAUDS

A. The Statute: Purpose and Intent.

The statute of frauds as enacted in Utah, reads, in relevant part, as follows:

In the following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

* * *

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

Utah Code Ann. § 25-5-4(5) (1984). Utah's statute, like similar statutes enacted in virtually every jurisdiction, is grounded in over 200 years of common law and the thousands of cases applying the statute have generated, at best, confusing results. See generally, 2 A. Corbin, Corbin on Contracts §275 (1950)

While the case law interpreting the statute may be confusing, the purpose of the statute can be simply stated: " . . . to prevent honest men from being ensnared by perjury and fraud, in alleged contracts that they never made." Id.,

§511 at 743. Specifically, with respect to the case at bar, the statute is designed "for the purpose of protecting the owners of land from fraudulent and fictitious claims for a commission." Fowler v. Taylor, 554 P.2d 205, 208 (Utah 1976). To this end, courts have frequently held that the statute of frauds may be raised as a shield to bar the assertion of fictitious claims.

The same courts, however, have also held that the statute may not be utilized as a sword to sever one's contractual obligations voluntarily assumed. This principle has been set forth in numerous cases. In Keirsev v. Hirsch, 265 P.2d 346 (N.M. 1953), for example, the court stated 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 imposed upon them.

Id. at 352. In Texas Co. v. Sloan, 231 P.2d 255 (Kan. 1951), the court stated this principle as follows:

The statute of frauds was enacted to prevent fraud, not to foster or encourage it . . . the statute should be enforced in its spirit and not merely as to its letter. This doctrine has been adhered to down through the years and further citation of authority is unnecessary. . . . The purpose and intent of the statute of frauds is to prevent fraud, and not to aid in its perpetration, and particularly the courts of equity, will, so far as possible, refuse to allow it to be used as a shield to protect fraud

Id. at 260. See also, 2 A. Corbin, Corbin on Contracts §498 at 681 (1950) (it is not to create a loophole

of escape for dishonest repudiators). Faced with this conflicting concern, courts have attempted to satisfy the spirit and intent of the statute by interpreting the "writing" requirements to reach the right result, or by applying some equitable theory, such as estoppel or part performance, to avoid application of the statute altogether.

B. Note or Memorandum: Elements.

As noted above, there has been a great deal of diversity in the interpretation of the "writing" requirement. See generally 2 A. Corbin, Corbin on Contracts §498 (1950). To interpret such case law, one must "consider court opinions critically in the light of the purpose for which it was adopted" Id., §498 at 680.

By its terms, Utah's statute grants a court latitude in interpreting the "writing" requirement by requiring only the existence of a written "note or memorandum" rather than the existence of a written "formal" contract. Ney v. Harrison, 299 P.2d 1114 (Utah 1956). The formula for a note or memorandum is difficult to verbalize.

We may well start with this one general doctrine: There are few, if any, specific and uniform requirements. The statute itself prescribed none; and a study of the existing thousands of cases does not justify us in asserting their existence. [Footnote omitted.] Some note or memorandum having substantial probative value in establishing the contract must exist; but its sufficiency in attaining the purpose of the statute depends in each case upon the setting in which it is found. A memorandum that is sufficient in one case may well be held insufficient in another. A complete admission in court by the party to be charged should dispense with the

necessity of any writing whatever. With ample explanation and corroboration to be found in undoubted surrounding circumstances or even in the accompanying oral testimony, a writing may be sufficient even though it is cryptic, abbreviated, and incomplete.

2 A. Corbin, Corbin on Contracts, §498 at 683.

The "note or memorandum" need not be set forth in a single document. Rather, the requirement may be fulfilled via a number of letters, telegrams or other writings which, together demonstrate the existence of an agreement. Keirse, supra. at 352. This Court, in Gregerson v. Jensen, 617 P.2d 369 (Utah 1980), has described the utilization of several writings to overcome the statute of frauds as follows:

When more than one writing is used to satisfy the requirements of the statute of frauds, however, some nexus between the writings must be shown. This requirement may be satisfied either by express reference in the signed writing to the unsigned one, or by implied reference gleaned from the contents of the writings and the circumstances surrounding the transaction. In the latter instance, parole evidence may be used to connect an unsigned document to one that has been signed by the person to be charged.

Id. at 373 (citations omitted) (emphasis added).

The "note or memorandum" is sufficient if it describes with reasonable certainty: (1) the parties involved; (2) a general description of the property; and (3) the essential terms and conditions of the contract. Ney, supra. See also, Restatement (Second) of Contracts §131 (1979); Johnson v. Allen, 158 P.2d 134 (Utah 1945). It is well established that parole evidence may be used to explain

otherwise ambiguous writings. Gregerson v. Jensen, supra;
2 A. Corbin, Corbin on Contracts §§498, 499, 515, 527, and
528 (1950). A letter whereby the author repudiates and refuses
to perform due to the breach of the other party may constitute
a "note or memorandum" that evidences the existence of an oral
contract. 2 A. Corbin, Corbin on Contracts §511 (1950).
Likewise, admissions of the existence of a contract in
pleadings or depositions may also constitute a "note or
memorandum." Id. at §519. Once again, the "note or
memorandum" need not be the equivalent of a formal contract.
All that is necessary is a showing of the existence of a
contract sufficient enough to remove any significant fear that
a fraud is being perpetrated.

C. Signature,

As with the "note or memorandum" requirement designed
to validate the existence of the contract, the signature
requirement is designed to authenticate the "note or
memorandum. As noted above, the note or memorandum need not
consist of only one document. So long as the signature appears
on a document which adequately refers to other documents
containing the essential terms of the agreement, the signature
requirement is satisfied. Id. at §516.

D. Compliance With the Statute in the Case at Bar.

In the case at bar, the letters transmitted by and
between Machan and Western Real Estate, the parole evidence
introduced by deposition, and the other circumstances
surrounding the dispute, sufficiently demonstrate the existence

of a commission contract such that there is no significant likelihood that Machan is perpetrating a fraud.

A review of the evidence herein reveals that after a conversation by and between Polcha and Goddard, wherein such individuals discussed the availability of IOmega Park for sale and the registration procedures to be used by Goddard, Goddard forwarded to Polcha, by letter dated February 21, 1986, certain information respecting the IOmega Park, together with the warning that any offer procured by Polcha would have to be in a back-up position. Shortly thereafter, Polcha delivered his letter, dated February 26, 1985, to Goddard wherein Polcha recited that he would be entitled to a 4 percent commission if he procured a buyer. In addition, the letter attempted to register various clients in accordance with Goddard's procedure. Thereafter, Polcha wrote several letters all of which recited the 4 percent commission arrangement and registered additional clients. In addition, from time to time, Goddard provided Polcha with additional information respecting IOmega Park.

At no time prior to August 1, 1985, did Goddard ever object to the terms of the commission agreement, or to the registration procedures utilized by Polcha. By letter dated August 7, 1985, Polcha submitted his registration for his client known as the Estate of James Campbell. In such registration letter, however, Polcha represented that the commission to be paid was 5 percent. In a letter dated August 9, 1985, signed by Goddard, Goddard responded to

Polcha's letter dated August 7, 1985, and stated that "we have only agreed to pay a 4 percent commission on the above park. All other terms of your letter are acceptable." (Goddard Depo., Exhibit 19; Appendix 3.) By this letter, Goddard affirmed the existence of a commission agreement and identified the rate of commission as 4 percent.

By a letter dated September 6, 1985, Goddard disavowed any commission obligation to Machan with respect to 3 clients previously registered by Polcha. Goddard disavowed such obligation not on the basis that there was no commission agreement by and between Western Real Estate and Machan, but rather on the basis that such clients had been contacted with respect to the IOmega Park prior to Polcha's registration of the same. Moreover, other than those clients allegedly contacted prior to Polcha's registration, Goddard stated that all registration letters "are acceptable." (Goddard Depo., Exhibit 21; Appendix 4.) When the letters dated August 9 and September 6, 1985, which are signed by Goddard, are viewed in the totality of circumstances, there is little doubt that there existed an oral commission agreement by and between Machan and Western Real Estate.

To the extent the foregoing correspondence does not adequately eliminate the fear of a fraud, one need only review Mr. Goddard's deposition transcript. In response to a question as to how he explained his belief that Polcha was not entitled to a commission, Goddard responded as follows:

Bob was aware we were working with Cap Corp., and it was Cap Corp. that brought us

the deal, not Machan Properties. Had Machan walked in with this deal from Machan Properties, then they would have received the commission, but just to arbitrarily mail out a letter with no closing date on the contract, anybody can do that. That's what I told him. 'Had you brought us the deal we would have honored your commission.' You didn't. Cap Corp. has brought us the deal. We have been working with Cap Corp. since day one, and you're fully aware of it, so whether their investors just happened to be your investors is a personal problem.'

(Goddard Depo. pp. 45, 46; Appendix 5.) From the above, it is clear that had Machan procured the buyer, i.e., performed under the commission agreement, Western Real Estate would have honored the commission. In other words, Western Real Estate refused to pay because Machan did not perform, not because there was no agreement.

Later in his deposition, Goddard reiterated a conversation he had with Mr. Mullins, president of Western Mortgage. The subject of the conversation concerned Goddard's revelation to Mr. Mullin that Machan previously had registered Birtcher, the ultimate purchaser on the property, with Western Real Estate. In response to the question "and what did Mr. Mullins say to you in response," Goddard answered as follows:

My comment was I had received a registration from Machan Properties back in the spring from Birtcher, and that, you know, there may be a situation there that he might want to look at, and he said, 'Oh, absolutely not. How does he possibly feel he deserves a commission when he didn't bring us the deal, Cap Corp. did?' I said, I'm just telling you there was a registration letter back in the spring, so he said something to the effect, 'well, there's no way he could justify a

commission if he didn't do anything.' So that about ended it.

(Goddard Depo. p. 76.)


The foregoing deposition testimony clearly shows that Western Real Estate's refusal to pay Machan a 4% commission was based on the fact that Machan did not procure the ultimate buyer. At no time during the course of the deposition did Goddard indicate that he did not agree to pay Machan a 4% commission if Machan procured a buyer. The dispute, therefore, resolves around whether or not Machan was the procuring cause of Birtcher's purchase, not whether Western Real Estate agreed to pay Machan a commission of 4% if Machan was such a procuring cause. Under these circumstances, the requirements of the Statute of Frauds have been met.

CONCLUSION

In service of its purpose and intent, the Statute of Frauds must be utilized solely as a shield against the perpetration of fraud, and not as a sword to sever one's contractual obligations voluntarily assumed. In the case at bar, the letters executed by Goddard, when viewed in the totality of the circumstances, clearly demonstrate the existence of a 4 percent commission agreement by and between Machan and Western Real Estate. Goddard's deposition testimony further compels the same conclusion. Accordingly, Machan has met the requirements of the Statute of Frauds and the trial court's contrary ruling must be reversed.

1988. RESPECTFULLY SUBMITTED this 25th day of February,

RICHARDS, BRANDT, MILLER
& NELSON


MICHAEL N. EMERY
Attorney 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 25th day of February, 1988, to the following counsel of record:

Dan S. Bushnell
David M. Wahlquist
James J. Cassity
KIRTON, McCONKIE & BUSHNELL
330 South Third East
Salt Lake City, Utah 84111



MACH/AB/MNE

APPENDIX 1

DAVID M. WAHLQUIST - A3349
ATTORNEYS FOR DEFENDANTS
330 SOUTH THIRD EAST
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 521-3680

IN THE THIRD DISTRICT COURT FOR THE COUNTY OF SALT LAKE
STATE OF UTAH

MACHAN HAMPSHIRE PROPERTIES,)	
INC., a Utah corporation,)	
)	
Plaintiff,)	ORDER
)	
vs.)	
)	
WESTERN REAL ESTATE & DEVELOP-)	Civil No. C85-7387
MENT COMPANY, a Utah corpora-)	
tion; WESTERN MORTGAGE AND)	
LOAN CORPORATION, a Utah)	
corporation; K-E ENTERPRISES,)	
a Utah general partnership;)	
BIRTCHER INVESTMENTS, a)	
California general partnership,)	Judge Leonard Russon
BIRTCHER AMERICAN PROPERTIES,)	
a California association; and)	
CAPITALCORP FINANCIAL, INC.,)	
a California corporation,)	
)	
Defendants.)	

Plaintiff's Motion for Partial Summary Judgment
against defendant Western Real Estate & Development Company and
the Motion of defendants Western Real Estate & Development
Company, Western Mortgage Loan Corporation and K-E Enterprises
for Summary Judgment against plaintiff came on for hearing
before the above-entitled court on April 28, 1986 at the hour of
2:00 p.m. Plaintiff appeared by its counsel of record,

Lewis T. Stevens and Craig W. Anderson of Van Wagoner & Stevens. Defendants appeared by their counsel of record, Dan S. Bushnell and David M. Wahlquist of Kirton, McConkie & Bushnell.

Having heard argument of counsel and read extensive memoranda filed by the parties and being otherwise advised in the premises, THE COURT HEREBY ORDERS:

1. Plaintiff's Motion for Partial Summary Judgment against defendant Western Real Estate & Development Company is denied; and

2. The Motion of defendants Western Real Estate & Development Company, Western Mortgage Loan Corporation and K-E Enterprises for Summary Judgment against plaintiff is granted dismissing plaintiff's action against said defendants because plaintiff's claim is barred by the Statute of Frauds set forth in Utah Code Ann. §25-5-4(5) because no writing exists memorializing the claimed agreement to pay a commission.

Dated this 22nd day of July, 1986.

BY THE COURT:

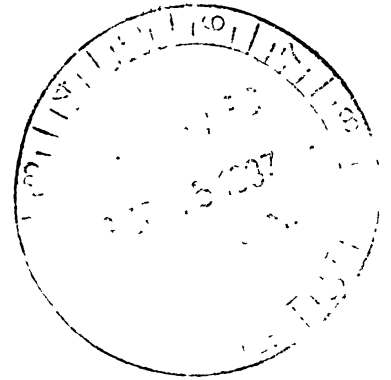
Leonard H. Russon
JUDGE LEONARD RUSSON

ATTEST
H. DIXON HINDLEY
Clerk

By D. Sundberg
Deputy Clerk

APPENDIX 2

Dan S. Bushnell - A522
David M. Wahlquist - A3349
James J. Cassity -A595
KIRTON, McCONKIE & BUSHNELL
Attorneys for Defendants
Birtcher Investments, Birtcher
American Properties and
Capitalcorp Financial, Inc.
330 South Third East
Salt Lake City, Utah 84111-2599
Telephone: (801) 521-3680



IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

MACHAN HAMPSHIRE PROPERTIES, INC., a Utah corporation,	:	
	:	STIPULATION AND ORDER
Plaintiff,	:	
	:	
vs.	:	Civil No. C85-7387
	:	
WESTERN REAL ESTATE & DEVELOP- MENT COMPANY, et al.	:	
	:	Judge Leonard Russon
Defendants.	:	

Plaintiff Machan Hampshire Properties, through its counsel of record, Michael N. Emery, Esq. of Richards, Brandt, Miller and Nelson, and all named defendants through their counsel of record, David M. Wahlquist, of Kirton, McConkie & Bushnell, hereby stipulate as follows:

1. The Motion of defendants Birtcher Investments, Birtcher American Properties and Capitalcorp Financial, Inc. for summary judgment dismissing plaintiff's Second Claim for Relief against them with prejudice may be granted. The parties agree that under the current state of the law in the State of Utah, there can be no

tortious interference with a contract which is unenforceable under U.C.A. §25-5-4(5). On June 23, 1986, the court entered an order dismissing plaintiff's First Claim for Relief because the alleged contract was unenforceable under U.C.A. §25-5-4(5). The parties hereto understand and agree that in the event plaintiff is successful in obtaining a reversal of this Order, then the dismissal of this Second Claim for Relief will also be deemed to be reversed because it is presently based solely on the Court's Order of June 23, 1986.

2. Plaintiff's Third Claim for Relief may be dismissed with prejudice.

3. Plaintiff's time for appeal of the June 23, 1986 order shall begin to run upon entry of the following Order, all issues in this matter having been reduced to judgment.

DATED this 24th day of September, 1987.

RICHARDS, BRANDT, MILLER & NELSON

By 

Michael N. Emery
Attorney for Plaintiff

KIRTON, McCONKIE & BUSHNELL

By 

Dan S. Bushnell
David M. Wahlquist
James J. Cassity
Attorneys for defendants:
Birtcher Investments
Birtcher American Properties,
Machan Hampshire Properties,
Inc.

ORDER

Based on the foregoing Stipulation of counsel for the respective parties and being otherwise advised in the premises, the Court hereby orders as follows:

1. The Motion of defendants Birtcher Investments, Birtcher American Properties and Capitalcorp Financial, Inc. for summary judgment dismissing plaintiff's Second Claim for Relief against them with prejudice is hereby granted on the basis that:

(a) Under the current law of the State of Utah, there can be no tortious interference with a contract which is unenforceable under U.C.A. §25-5-4(5); and

(b) The Court has previously ruled on June 23, 1986 that the alleged contract for a real estate commission in this matter is unenforceable because it does not satisfy the requirements of U.C.A. §25-5-4(5).

2. Plaintiff's Third Claim for Relief is hereby dismissed with prejudice based solely on the foregoing consent and stipulation of the parties.

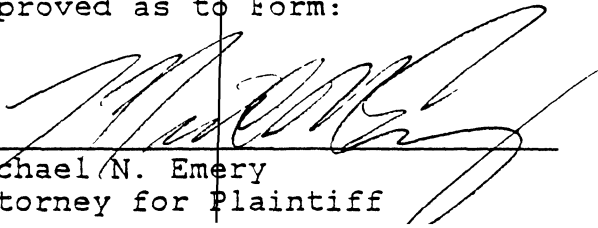
3. Plaintiff's time for appeal of the June 23, 1986 Order shall begin to run upon entry of this Order, all other issues in this matter having been reduced to judgment.

DATED this 12th day of Sept, 1987.

BY THE COURT:

Leonard S. Russon, District Judge

Approved as to Form:



Michael N. Emery
Attorney for Plaintiff

APPENDIX 3

*copy 1 - Iomega
1 - Campbell*



August 9, 1985

Robert F. Polcha
Machan Hampshire Properties
1981 East Murray Holladay Road
Salt Lake City, Utah 84117-5139

Re: Registration of Client
Iomega Park
James Campbell

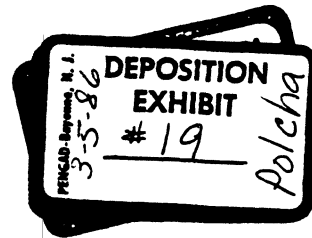
Dear Bob:

In response to your letter, we only have agreed to pay a 4% commission on the above park. All other terms of your letter are acceptable.

Very truly yours,

Kelly Goddard
President

JKG/lh



APPENDIX 4



September 6, 1985

Robert F. Polcha
Machan Hampshire Properties Inc.
1981 E. Murray Holladay Rd.
S.L.C. Utah 84117-5139

Re: Iomega Park Roy Utah

Dear Bob:

I have been receiving your letters of registration of clients. Though most are acceptable the following were contacted prior to receipt of your letters.

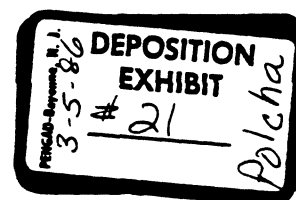
1. DeAuza Corporation
2. August Financial
3. Birtcher Properties/Cap Corp

Therefore we can not recognize the above. Should you have any questions please contact me.

Very truly yours,

Kelly Goddard
President

JKG/ns



APPENDIX 5

1 Birtcher and Polcha had not delivered the deal from Birtcher,
2 I told him I didn't think so.

3 Q. You did not think Mr. Polcha was entitled to the
4 commission?

5 A. No.

6 Q. Am I understanding you correctly?

7 A. That's correct, I did not think he was entitled
8 to it.

9 Q. And how did you explain that to Mr. Polcha, as
10 well as you can recall? How did you explain your belief that
11 you thought he was not entitled to the commission?

12 A. Well --

13 MR. POELMAN: Are you wondering what he said to
14 him?

15 MR. STEVENS: Yes.

16 MR. POELMAN: Okay.

17 A. Bob was aware we were working with Cap/Corp.,
18 and it was Cap/Corp. that brought us the deal, not Machan
19 Properties. Had Machan walked in with this deal from Machan
20 Properties, then they would have received the commission, but
21 just to arbitrarily mail out a letter with no closing date on
22 the contract, anybody can do that, that's what I told him.
23 "Had you brought us the deal, we would have honored your
24 commission. You didn't. Cap/Corp. has brought us the deal.
25 We have been working with Cap/Corp. since day one, and you're

Examination by Mr. Stevens

1 fully aware of it, so whether their investors just happened
2 to be your investors is a personal problem.

3 Q. Okay. How did Mr. Polcha respond?

4 A. He was mad.

5 Q. Do you recall anything he said?

6 A. He indicated that it was a large commission, he
7 was not going to walk away from it. He said he'd file suit;
8 if it killed the deal, it would kill the deal; and pretty
9 much ended it there.

10 Q. After that conversation, did you have any other
11 conversations with Mr. Polcha?

12 A. No.

13 Q. That was your last telephone call with Mr.
14 Polcha?

15 A. Telephone conversation.

16 Q. Have you exchanged correspondence subsequent to
17 that time?

18 A. After that?

19 Q. Yes.

20 A. No.

21 Q. Okay. When did you first have a contact with
22 Birtcher, you personally?

23 A. I had never discussed or talked to Birtcher
24 prior to the offer.

25 Q. That would have been prior to September 27th?