

1990

# Wardley Corporation Better Homes and Gardens, Norma Zampedri, Homestead Realtors, Warren Burbank v. R. David Burgess : Brief of Appellee

Utah Court of Appeals

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Phillip C. Patterson; Patterson and Barking; Attorney for Appellants.

Martin W. Custen; Marquardt, Hasenyager and Custen; Attorney for Appellee.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 900452-CA

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IN THE UTAH COURT OF APPEALS

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WARDLEY CORPORATION BETTER	)	
HOMES AND GARDENS, NORMA	)	Case No. 900452-CA
ZAMPEDRI, HOMESTEAD REALTORS,	)	
AND WARREN BURBANK,	)	
Appellants,	)	
vs.	)	Priority Classification
	)	No. 16
R. DAVID BURGESS,	)	
Appellee.	)	

---

BRIEF OF APPELLEE

---

APPEAL FROM SUMMARY JUDGMENT ENTERED BY  
THE SECOND JUDICIAL DISTRICT COURT OF  
DAVIS COUNTY, STATE OF UTAH, THE  
HONORABLE RODNEY S. PAGE, DISTRICT JUDGE

Phillip C. Patterson  
PATTERSON & BARKING  
Attorney for Appellants  
427 - 27th Street  
Ogden, UT 84401  
Telephone: (801) 394-7704

Martin W. Custen  
MARQUARDT, HASENYAGER & CUSTEN  
Attorney for Appellee  
2661 Washington Blvd., #202  
Ogden, UT 84401  
Telephone: (801) 621-3662

FILED

May 1 1984  
Utah Court  
of Appeals

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Phillip C. Patterson  
PATTERSON & BARKING  
Attorney for Appellants  
427 - 27th Street  
Ogden, UT 84401  
Telephone: (801) 394-7704

Martin W. Custen  
MARQUARDT, HASENYAGER & CUSTEN  
Attorney for Appellee  
2661 Washington Blvd., #202  
Ogden, UT 84401  
Telephone: (801) 621-3662

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IN THE UTAH COURT OF APPEALS

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WARDLEY CORPORATION, BETTER	)	
HOMES AND GARDENS, NORMA	)	
ZAMPEDRI, HOMESTEAD REALTORS,	)	Case No. 900452-CA
WARREN BURBANK,	)	
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R. DAVID BURGESS,	)	
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---

BRIEF OF APPELLEE

---

STATEMENT SHOWING JURISDICTION OF THE COURT OF APPEALS

Section 78-2a-3(j), Utah Code Annotated, as amended, grants appellate jurisdiction to the Court of Appeals over cases transferred from the Utah Supreme Court pursuant to Section 78-2-2(4), Utah Code Annotated, as amended.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW  
AND THE STANDARD OF APPELLATE REVIEW

The issue presented for review is whether the District Court was correct in granting summary judgment to

Appellee Burgess by holding that any modification of a written sales contract between a real estate broker and its seller client had to be in writing and signed by the seller to satisfy the requirement of the Statute of Frauds, Section 25-5-4(5), Utah Code Annotated, as amended.

Because this is an appeal from a granting of summary judgment and presents only questions of law, the standard of review is for correctness, Gaw v. State of Utah, 143 U.A.R. 27 (Utah App. 09/13/90); Transamerica Cash Res., Inc. v. Dixie Power & Water, Inc., 789 P.2d 24 (Utah 1990). The facts and inferences must be analyzed in the light most favorable to the losing party. Provo City Corp. v. State, 137 U.A.R. 8 (Utah 1990).

#### DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Section 25-5-4(5), Utah Code Annotated, as amended. Certain agreements void unless written and signed.

The following agreements are void unless the agreement, or some not or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

. . .

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

#### STATEMENT OF FACTS

Appellee (hereinafter "Mr. Burgess") is the owner of certain real property located at 3175 East Wind River Drive in Layton, Utah (hereinafter "the property").



Complaint, paragraph #3, R at 2. On or about July 26, 1988, Mr. Burgess executed and delivered to Appellants Homestead Realtors and its Realtor, Warren Burbank, (hereinafter "the brokers"), a Sales Agency Contract by which terms Mr. Burgess retained Homestead Realtors for the purpose of listing and selling the property, R, at 85, (hereinafter "the Contract"). The Contract was for six (6) months, with an expiration date of January 25, 1989, and provided for a six (6) percent broker's commission, R at 83.

On January 26, 1989, Burbank telephoned Mr. Burgess and obtained an oral agreement to extend the Contract for an additional three months, until April 26, 1989 (Affidavit of Warren Burbank, R at 76-77). Mr. Burgess did not sign any written extension of the Contract, Plaintiff's Reply to Defendant's First Request for Admissions, number 2, (R, at ).

Subsequent to January 26, 1989, the Property was shown to William and Sandra Roberts, who submitted an Earnest Money Receipt and Offer to Purchase on March 1, 1989 (Affidavit of Warren Burbank, R at 89-90). Mr. Burgess signed the Earnest Money Receipt on March 3, 1989 (Affidavit of Warren Burbank, R, at 89-90). Mr. Burgess was notified by United Savings Bank that the Robertses had tendered the money which was due from them in order to complete their obligations under the Earnest Money Receipt, R, at 82. Mr. Burgess refused to sign and complete the closing, R at 82.

The record does not contain any evidence that Mr. Burgess ever sold the property, and, in fact, the property was not sold.

#### SUMMARY OF THE ARGUMENT

Under existing Utah case law, a listing agreement authorizing or employing a broker to sell real estate for compensation must be in writing, signed by the party to be charged, and so must any modification of such a listing agreement. Mr. Burgess did not sign any modification document, and, therefore, Judge Page correctly granted him summary judgment. The two cases relied upon by the Brokers, one from Illinois and one from Oregon, are inapposite. The Illinois case, Bennett & Kahnweiler Associates v. Ratner, 133 Ill. App.3d 316, 478 N.E.2d 1138 (1985), concerned an oral argument to modify a written extension clause in the agency contract, while in the present case, there was no written extension clause. The Oregon case, Wieneke Properties, Inc. v. Thiessen, 94 Or. App. 306, 765 P.2d 815 (1988) was based upon prior Oregon case law which had held that a written extension of time is not required to satisfy the analogous Oregon statute of frauds, whereas Utah case law has required a modification to be in writing.

Really, what the Brokers are trying to do is recover in quantum meruit, which, in fact, was part of the basis for the Bennett & Kahnweiler decision. Not only does

Utah not permit a broker to recover in quantum meruit, Machan Hampshire Properties v. Western Real Estate and Development Company, 779 P.2d 230 (Utah App. 1989), Young v. Buchanan, 259 P.2d 876 (Utah 1953), but, even if such recovery were permitted, the Brokers in this case were not entitled to it because Mr. Burgess never sold the property and, hence, has not been enriched.

#### ARGUMENT

POINT I. UNDER UTAH LAW, A LISTING AGREEMENT AUTHORIZING OR EMPLOYING AN AGENT OR BROKER TO SELL REAL ESTATE FOR COMPENSATION MUST BE IN WRITING, SIGNED BY THE PARTY SOUGHT TO BE CHARGED, AND SO MUST ANY MODIFICATION THEREOF.

Utah's Statute of Frauds states in pertinent part:

The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

. . .

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

Section 25-5-4(5), Utah Code Annotated, as amended. In the present case, there is no valid agreement in writing that was in effect on March 3, 1989. In the district court the brokers alleged two bases for a written agreement satisfying the statute: (1) The Sales Agency Contract, R at 85, and (2) The Earnest Money Receipt, R at 89-90. However, on

appeal, the brokers apparently have not argued that the Earnest Money Receipt is a written memorandum sufficient to satisfy the statute of frauds, so counsel will address only the Sales Agency Contract.

Under Section 25-5-4(5), *supra*, a broker must allege and prove an "express contract or agreement of authority in which the terms and conditions of employment, if any, and the amount of his commission, etc., are stated," Case v. Ralph, 56 Utah 243, 188 P. 640 (1920) (emphasis added), and that such contract is in writing. C.J. Realty, Inc. v. Willey, 758 P.2d 923 (Utah App. 1988). This particular statute of frauds is part of the entire regulatory scheme applicable to real estate brokerage transactions. C.J. Realty, *supra*.

The contract, by its own terms, had expired prior to the date on which the brokers showed the property to Mr. and Mrs. Roberts, R at 89-90, but for purposes of this Court's review, Mr. Burgess must be held to have extended, verbally, the time of the Contract for 90 days beyond the expiration date, R at 76-77. It has long been the law in Utah that where an original agreement is required to be in writing to satisfy the statute of frauds, any subsequent modification of that agreement must also be in writing in order to be valid. The Utah Supreme Court recognized this rule in Golden Key Realty, Inc. v. Mantas, 699 P.2d 730

(Utah 1985). [See also, SCM Land Co. v. Watkins & Faber, 732 P.2d 105 (Utah 1986); Zions Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975). In Golden Key Realty, supra, the supreme court held:

...The rule is well settled in Utah that if an original agreement is within the statute of frauds, a subsequent agreement which modifies the original written agreement must also satisfy the requirements of the statute of frauds to be enforceable. 699 P.2d 730, at 732.

Thus, the extension of the durational time period of the original Sales Agency Contract must not only have been signed by Mr. Burgess, but must have set forth expressly all of the conditions mentioned in Case v. Ralph, supra, and C.J. Realty, supra. The verbal extension is void under Golden Key Realty because the modification was not in writing.

The brokers cite to two cases, from Illinois and Oregon, in support of their contention that this is a case of first impression in Utah and that this Court should follow the reasoning of the courts of these other states. Appellee disagrees with both of these assertions. First, this is not a case of first impression, as mentioned above. Appellee's position is that an extension of time is a modification of the agreement, and must be in writing, Golden Key Realty, supra, and see discussion, below, of Franke v. Blair Realty Co., 119 Ohio St. 338, 164 N.E. 353

(1928). Secondly, both cases cited by Appellants are distinguishable.

At least one court of another jurisdiction has ruled that time of performance of a listing-type agreement is an essential term, the varying of which is a modification. In Franke v. Blair Realty Co., 119 Ohio St. 338, 164 N.E. 353 (1928), the essential facts were as follows: On February 28, 1926, the owner of real estate listed his property with a broker and agreed in writing to pay the broker a commission for finding a purchaser with the specified period of five days. At the end of the five days, the owner orally promised to extend indefinitely the time of performance. In reliance upon the owner's oral promise, the broker continued its efforts to find a buyer. Meanwhile, the owner, in disregard of his oral promise, hired another broker at a reduced commission, and consummated a sale with a buyer with whom the first broker was also negotiating. The lower court ruled in favor of the first broker's claim for a commission, and the owner appealed.

The Ohio Supreme Court reversed, and remanded for a dismissal of the claim, based upon the owner's motion that the claim was barred by the Ohio statute of frauds (almost identical to Utah's, see 164 N.E. 353, at 354). In determining whether the oral promise was a material change in the terms of the contract, the Ohio Supreme Court held:

The contract attempted to be avoided by oral agreement was a definite contract signed by the defendant that he would pay a commission if the property was sold "before the expiration of this agreement." The oral agreement was a new contract affecting the time of performance, and, by substituting a new time of performance, varied an essential term of the written contract. To hold otherwise would be to nullify the provisions of the statute of frauds with respect to real estate commission contracts. 164 N.E. 353, at 355 (emphasis added).

The Franke case is significant also in that the owner in Franke was the instigator and moving force in procuring the oral extension of time, whereas in the present case, a review of Warren Burbank's affidavit, R, at 89-90, shows that it was the broker who initiated and pushed for the oral extension of time of performance.

In Bennett & Kahnweiler Associates v. Rattner, 133 Ill. App. 3d 316, 478 N.E. 2d 1138 (1985), the original written listing agreement provided that the broker was entitled to a commission if the property was disposed of within 180 days after the termination date, if the lessee was a prospect to whom the property had been submitted during the term of the agreement, provided the prospect's name was submitted to the lessor within ten days following the termination of the agreement. What happened in Bennett & Kahnweiler was that the broker had procured a prospective lessee prior to the expiration of the agreement, had submit-

ted its name to the lessor within ten days of the termination of the agreement, but, due to the lessor's footdragging, and various other negotiations, the lease was not finalized signed until 207 days after the termination date. The lessor, Ratner, refused to pay the broker, Bennett & Kahnweiler, its commission.

The Illinois Appellate Court noted that the original listing agreement contained the extension clause, in writing, and that the written extension clause generated no rights or duties not already present in the listing agreement. Thus, the original written agreement contemplated, in writing, performance after the agreement's termination date. In the present case, the Contract contained no such extension clause, and the oral extension granted by Mr. Burgess was really a modification. In fact, in the district court, the Appellants argued that the rule of law in Wieneke Properties, Inc. v. Thiessen, 96 Or. App. 306, 765 P.2d 815 (Or. App. 1988) and, by implication, Bennett & Kahnweiler, supra, was applied by this court in Hurlburt v. Gullo, 750 P.2d 613 (Utah App. 1988). However, the handwritten lease in Hurlburt read as follows:

April 18, 1983

Don Foote agrees to lease approx. 5 acres with water, located at 1805 W. 400 N., Slaterville, to Don Hurlburt for \$150.00 per year. Don Hurlburt has the option to extend lease for an additional five years at the same terms ... 750 P.2d 613, at 614 (emphasis added).



Thus, Hurlburt and Bennett & Kahnweiler, are distinguishable because in both cases the written contract sought to be extended contemplated extension by its own express terms, with only the notice of election being oral. In the present case, the Sales Agency Contract contains no such express renewal or extension provisions.

Wieneke Properties, Inc. v. Thiessen, supra, appears to be more on point for Appellants, in that it did not concern a written extension-of-time clause. Appellants argue that Wieneke Properties supports their position that a written extension of time is not required to satisfy Utah's relevant Statute of Frauds. In Wieneke, however, the Oregon Appellate Court, relied upon prior Oregon case law that had already established that a written extension of time was not required if the parties expressly agreed, citing Ferris v. Meeker Fertilizer Co., 258 Or. 377, 482 P.2d 523 (1971). As argued above, prior Utah case law is to the contrary, see, e.g., Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985) (modification of original agreement within statute of frauds must also satisfy statute of frauds). Thus, Wieneke Properties is also distinguishable, and this fact situation, involving a modification, is not a case of first impression.

POINT II. APPELLANTS ARE REALLY ATTEMPTING TO  
RECOVER IN QUANTUM MERUIT, WHICH UTAH  
LAW PROHIBITS.

It is submitted that Appellants are really attempting to recover their commission under a quantum meruit

theory. One of the cases cited by them, Bennett & Kahnweiler, supra, was decided partly upon a quantum meruit basis, see 478 N.E.2d 1138 (Ill. App. 1985), at 1141, citing the cases of Arthur Rubloff & Co. v. Comco Corp., 63 Ill. App. 3d 362, 380 N.E.2d 15 (1978) and Dickerson Realtors, Inc. v. Frewert, 16 Ill. App. 3d 1060, 307 N.E.2d 445 (1974), for the rule that it would be inequitable to allow the principal to benefit from a broker's services without meeting the burden of payment of the broker's commission. This would, in fact, appear to contradict Appellants' assertion in their brief, that neither Illinois nor Oregon allows a real estate broker to recover a commission under a quantum meruit theory (Brief of Appellant, p. 12, lines 7-9).

Utah does not allow a real estate broker to recover in quantum meruit. In Young v. Buchanan, 259 P.2d 876 (Utah 1953), the Utah Supreme Court held that a broker or agent may recover only by virtue of a contract, and cannot recover upon the basis of quantum meruit. [See also, Watson v. Odell, 58 Utah 276, 198 P.2d 772 (1924); Case v. Ralph, 56 Utah 243, 188 P.640 (1920)]. In the Young case, the Supreme Court held:

Doubtless plaintiff rendered some measure of services resulting in Mr. King's purchase of defendant's property. It has long been established in this jurisdiction, however, that a broker or agent may recover only by virtue of contract and cannot recover upon the basis of quantum meruit. 259 P. 2d 876, at 877.

Any unfairness or harshness in this rule and its results addressed recently by this Court in Machan Hampshire Properties v. Western Real Estate & Development Company, 779 P.2d 230 (Utah App. 1989). In footnote 8, it was noted:

Although application of the statute may lead to harsh results where a real estate broker's labors go uncompensated, a broker must be presumed to know that an oral contract of employment for rendition of services in negotiating a sale of real estate for a commission is invalid. Gray v. Kohlhase, 18 Ariz. App. 368, 502 P. 2d 169, 172 (1972). A broker who fails to secure written authorization assumes the risk of relying on oral promises and has no cause to complain if efforts go unrewarded. Pacific Southwest Dev. Corp. v. Western Pac. R.R., 47 Cal.2d 62, 301 P.2d 825, 831 (1963).

Judge Orme, concurring in Machan Hampshire Properties, also observed:

While this may seem a harsh result, it does not require our apology. The very adoption of a statute of frauds reflects the Legislature's considered judgment that, with certain kinds of very important arrangements, it is preferable to invalidate a few otherwise legitimate agreements because they were not written than to burden the system and the citizenry with claims premised on bogus, unwritten agreements. 779 P.2d 230, at 237.

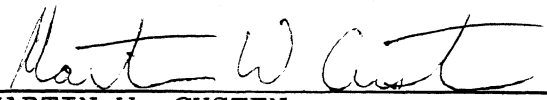
Licensed real estate brokers doubtless are aware of the requirements of the Statute of frauds. It would have been a simple matter to obtain Mr. Burgess's signature on either a new listing agreement or an extension embodying all

material terms. This was not done and the brokers are prohibited from recovering in quantum meruit. Even if they were not, since the property did not sell, Mr. Burgess was not unjustly enriched at the broker's expense.

#### CONCLUSION

Utah statutory and case law requires a listing agreement to be in writing, signed by the party to be charged, and also requires that any modification of such listing agreement also be in writing, in order to satisfy the requirements of Utah's statute of frauds relating to the sale of real estate by a broker. Varying the durational period of such a listing agreement constitutes a modification of an essential term, and it must be in writing as mentioned above. In the present case, the brokers fail to procure any such written extension, and the oral extension granted by Mr. Burgess does not satisfy the statute of frauds. The district court was therefore correct in granting summary judgment to Mr. Burgess and dismissing the Broker's Complaint with prejudice. Mr. Burgess requests that this court affirm in its entirety the decision of the district court and award him his costs on appeal.

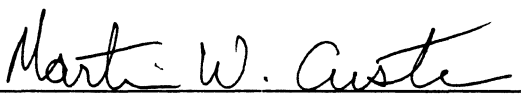
DATED this 15<sup>th</sup> day of October, 1990.

  
MARTIN W. CUSTEN  
Attorney for Appellee

CERTIFICATE OF MAILING

\* \* \* \* \*

I hereby certify that on this 17<sup>th</sup> day of  
October, 1990, I mailed four true and correct copies of the  
above and foregoing Brief of Appellee, postage prepaid, to  
Mr. Phillip C. Patterson of Patterson and Barking, 427 -  
27th Street, Ogden, 84401.

  
\_\_\_\_\_  
MARTIN W. CUSTEN  
Attorney for Appellee

## ADDENDUM

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

\*\*\*\*\*

WARDLEY CORPORATION BETTER )  
HOMES AND GARDENS, ET AL., )

PLAINTIFFS, )

VS. )

R. DAVID BURGESS, )

DEFENDANT. )

BENCH RULING

Civil No. 890745358

\*\*\*\*\*

BE IT REMEMBERED that this matter came on regularly  
for hearing before the Honorable Rodney S. Page, Judge,  
sitting at Farmington, Utah on the 10th day of April 1990.

Whereupon the following proceedings were had, to wit:

\*\*\*\*\*

APPEARANCES:

For the plaintiffs: Philip C. Patterson

For the defendant: Martin W. Custen

\*\*\*\*\*

FARMINGTON, UTAH APRIL 10, 1990 11:30 A.M.

THE COURT: The Court will make the following  
ruling in the matter: First of all, it is clear these  
parties initially entered into a listing agreement which  
they both executed and which expired by its terms on the  
26th of January 1989. The Court finds, and I think the law  
requires, that any agreement for compensation between a

DEAN C. OLSEN, C. S. R.

~~555-XXXXXX-XXXX~~

~~XXXXXX-XXXX-XXXX~~

1 a broker and a seller has to be in writing. And I think  
2 it's clear from the Machan agreement -- or excuse me, Machan  
3 case that our Court of Appeals and the other cases indicate  
4 that the Supreme Court is going to hold brokers and realtors  
5 to a higher degree than they would other people. They've  
6 chosen to do that for whatever reason. I think that's  
7 evidenced by the fact that the theory of part performance  
8 and the theory of quantum meruit are not available in those  
9 kind of cases.

10 In this particular case, there is no other evidence  
11 or writing of any nature which essentially extends the  
12 listing agreement here in question. The only possible  
13 connection would be the earnest money closing -- the earnest  
14 money agreement which makes no reference to either -- any  
15 kind of a listing agreement or any kind of a commission  
16 statement.

17 I think there is no question that in order to avoid  
18 the requirement of statute of frauds, there must be some  
19 kind of writing which would come within the purview of meet-  
20 ing the requirements of the statute of frauds.

21 The Court further finds that the law in the State of  
22 Utah requires that a writing which in fact falls within the  
23 statute of frauds, which does not in and of itself provide  
24 for an exception thereto, requires that any agreement to  
25 modify or change or extend that agreement at least so far



1 as it involves brokerage agreements has to meet the  
2 requirements of the statute of frauds also.

3 The Court finds that in this case, there is no such  
4 evidence. And there is no such writing or agreement or  
5 document signed by the person sought to be charged so as  
6 to comply with that requirement. And for that reason, the  
7 Court would grant the defendant's motion for summary  
8 judgment.

9 The Court will ask, Mr. Custen, that you prepare a  
10 finding and order in accordance with this Court's ruling.  
11 That that should be submitted to Mr. Patterson so he can  
12 make sure whatever he wants is in there in the event he  
13 chooses to have this reviewed by a higher court. But that  
14 will be the order of the Court in this matter.

15 MR. CUSTEN: Thank you. We'd like -- we will order  
16 a transcript of the -- from Mr. Olsen, if that's okay, your  
17 Honor.

18 THE COURT: Sure.

19 MR. CUSTEN: You still have my address, I assume?  
20 Send it to me.

21 THE COURT: Thank you, counsel.

22 MR. CUSTEN: Thank you, your Honor.

23 \*\*\*\*\*  
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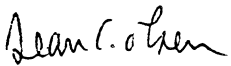
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CERTIFICATE

STATE OF UTAH )  
                  ) ss  
COUNTY OF DAVIS)

THIS IS TO CERTIFY that the foregoing three pages of transcript constitute a true and accurate record of the proceedings to the best of my knowledge and ability as a certified shorthand reporter in and for the State of Utah.

Dated at Farmington, Utah this 10th day of April 1990.

  
\_\_\_\_\_  
Dean C. Olsen

MARTIN W. CUSTEN  
MARQUARDT, HASENYAGER & CUSTEN  
Attorneys for Defendant  
2661 Washington Boulevard, Suite 202  
Ogden, Utah 84401  
Telephone: (801) 621-3662  
Utah State Bar No. 0785

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

WARDLEY CORPORATION BETTER HOMES AND GARDENS, NORMA ZAMPEDRI, HOMESTEAD REALTORS and WARREN BURBANK,  Plaintiffs,  vs.  R. DAVID BURGESS,  Defendant.	FINDING AND ORDER OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANT      Civil No. 45358  Judge: Rodney S. Page
--	---

The above-entitled matter came on regularly for hearing on April 10, 1990 on defendant's Motion for an Order Granting Summary Judgment against plaintiffs and each of them on ground that there is no genuine issue as to any material fact in this action and that defendant is entitled to judgment in his favor as a matter of law. The Motion was based on the file in this case, the pleadings herein, and the Affidavits of Warren Burbank and Norma Zampedri on file herein, and on all of the papers and documents filed in support of the Motion, including Memoranda of Law.

Defendant appeared by his attorney, Martin W.

Custen of Marquardt, Hasenyager & Custen, and the plaintiffs appeared by their attorney, Philip C. Patterson. On due consideration of the records and files in this matter, the original and all other pleadings, the Affidavits of Warren Burbank and Norma Zampedri, all other papers and documents filed by the parties herein, the oral argument of counsel for the respective parties and the Memoranda of Law filed by counsel, and being duly advised in the premises, the Court now enters the following findings in support of its summary judgment ruling:

1. The parties initially entered into a listing agreement which both indicated and which by its terms expired on January 26, 1989.

2. Any agreement for compensation between a real estate broker and a seller has to be in writing pursuant to Section 25-5-4 (5) Utah Code Annotated, as amended.

3. Any broker's agreement required to come within the statute of frauds by the law of the State of Utah, which does not in of itself provide for an exception thereto, can be modified, changed or extended only by another agreement that satisfies the requirements of the statute of frauds.

4. In this case, the undisputed facts reveal that

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Civil No. 45358  
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there is no such document or evidence of any document signed by the defendant, whereby the defendant agreed in writing to extend or modify the terms of the original listing agreement, which original agreement expired on January 26, 1989.

Based upon the above, it is the Court's opinion and IT IS HEREBY ORDERED that the defendant is entitled as a matter of law to a summary judgment dismissing the plaintiff's Complaint.

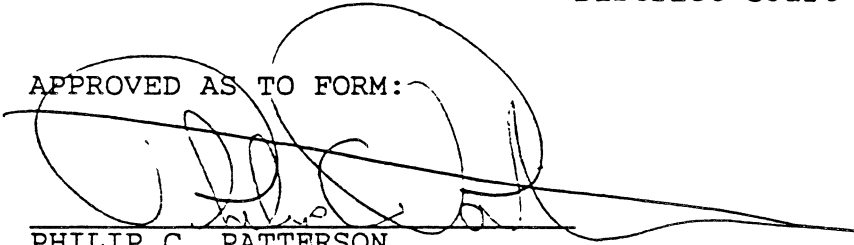
Let a judgment be entered accordingly.

DATED this 17<sup>th</sup> day of April, 1990.

BY THE COURT:

131  
\_\_\_\_\_  
RODNEY S. PAGE  
District Court Judge

APPROVED AS TO FORM:

  
\_\_\_\_\_  
PHILIP C. PATTERSON  
Attorney for Plaintiffs

CERTIFICATE OF MAILING  
\* \* \* \* \*

I hereby certify that on this 18<sup>th</sup> day of April, 1990, I mailed a true and correct original and copy

MARQUARDT, HASENYAGER & CUSTEN

Wardley et al v. Burgess  
Civil No. 45358  
Page 4

of the above and foregoing Finding and Order of Summary  
Judgment, postage prepaid, to Philip C. Patterson, attorney  
for plaintiffs, 427 - 27th Street, Ogden, UT 84401.

  
\_\_\_\_\_  
SECRETARY

MARTIN W. CUSTEN  
MARQUARDT, HASENYAGER & CUSTEN  
Attorneys for Defendant  
2661 Washington Boulevard, Suite 202  
Ogden, Utah 84401  
Telephone: (801) 621-3662  
Utah State Bar No. 0785

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY  
STATE OF UTAH

WARDLEY CORPORATION BETTER HOMES AND GARDENS, NORMA ZAMPEDRI, HOMESTEAD REALTORS and WARREN BURBANK,  Plaintiffs,  vs.  R. DAVID BURGESS,  Defendant.	JUDGMENT DISMISSING COMPLAINT      Civil No. 45358  Judge: Rodney S. Page
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The above-entitled matter having come on for hearing on April 10, 1990 before the Honorable Rodney S. Page, District Court Judge, on defendant's Motion for an Order granting defendant's summary judgment of dismissal of the plaintiff's Complaint against all plaintiffs, and the Court, having already entered its Order granting summary judgment to defendant having therein directed entry of a judgment of dismissal in accordance therewith.

Now, therefore, IT IS HEREBY ORDERED that the plaintiff's Complaint be and the same is hereby dismissed with prejudice.

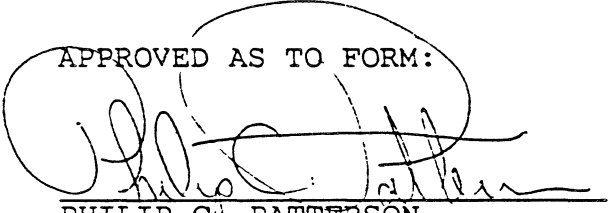
Wardley et al v. Burgess  
Civil No. 45358  
Page 2

DATED this 9<sup>th</sup> day of April, 1990.

BY THE COURT:

151  
RODNEY S. PAGE  
District Court Judge

APPROVED AS TO FORM:

  
PHILIP C. PATTERSON  
Attorney for Plaintiffs

CERTIFICATE OF MAILING  
\* \* \* \* \*

I hereby certify that on this 12<sup>th</sup> day of  
April, 1990, I mailed a true and correct original and copy  
of the above and foregoing Judgment Dismissing Complaint,  
postage prepaid, to Philip C. Patterson, Attorney for  
Plaintiffs, 427 - 27th Street, Ogden, Utah 84401.

Eun Hudson  
SECRETARY