

1990

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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900452-CA

IN THE UTAH SUPREME COURT

WARDLEY CORPORATION BETTER)	
HOMES AND GARDENS, NORMA)	Case No. 900256
ZAMPEDRI, HOMESTEAD REALTORS,)	
AND WARREN BURBANK,)	
)	Oral Argument Priority
Plaintiffs and Appellants,)	(16)
vs.)	
R. DAVID BURGESS,)	
)	90-0452-CA
Defendant and Respondent.)	

BRIEF OF APPELLANTS

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

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FILED

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COURT OF APPEALS

IN THE UTAH SUPREME COURT

WARDLEY CORPORATION BETTER)	
HOMES AND GARDENS, NORMA)	Case No. 900256
ZAMPEDRI, HOMESTEAD REALTORS,)	
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DESIGNATION OF PARTIES TO THIS APPEAL

The parties to this appeal are as follows:

Plaintiffs and Appellants:

Wardley Corporation Better Homes and Gardens
and Homestead Realtors

Defendant and Respondent:

R. David Burgess

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTION STATEMENT	1
ISSUES PRESENTED FOR REVIEW.	1
DETERMINATIVE STATUTES	2
STATEMENT OF THE CASE.	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT.	8
ARGUMENT:	
AN ORAL AGREEMENT BETWEEN A REAL ESTATE BROKER AND ITS CLIENT EXTENDING A WRITTEN SALES AGENCY AGREEMENT FOR AN ADDITIONAL PERIOD OF TIME IS NOT RENDERED VOID BY THE STATUTES OF FRAUD PROVISIONS OF UCA §25-5-4(5) (AS AMENDED, 1989).	9
CONCLUSION	17
ADDENDUM:	
Transcript of District Court's April 10, 1990 Bench Ruling	18a
May 2, 1990 Finding and Order of Summary Judgment in Favor of Defendant.	18b
May 2, 1990 Judgment Dismissing Complaint.	18c

TABLE OF AUTHORITIES

CASES CITED

<u>Alphin Realty, Inc. v. Sine</u> , 595 P.2d 860 (Utah 1979)	16
<u>Bennett and Kahnweiler Associates v. Ratner</u> , 113 Ill.App.3d 316, 478 N.E.2d 1138 (1985). 8, 11, 14, 15, 17	
<u>Case v. Ralph</u> , 56 Utah 243, 188 P. 640, 642 (1920).	10
<u>C.J. Realty, Inc. v. Willey</u> , 758 P.2d 923 (Utah App. 1988). .	16
<u>Creekview Apartments v. State Farm Ins. Co.</u> , 771 P.2d 693 (Utah App. 1989).	4
<u>Ferris v. Meeker Fertilizer Co.</u> , 258 Or. 377, 385, 482 P.2d 523 (1971).	13
<u>Geneva Pipe Co. v. S & H Insurance Co.</u> , 714 P.2d 648 (Utah 1986)	4
<u>Gump & Ayers Real Estate v. Domcoy Investors</u> , 733 P.2d 128 (Utah 1987)	10
<u>Machan v. Western Real Estate</u> , 779 P.2d 230 (Utah App. 1989)	9, 15
<u>OIC, Inc. v. Wilcox</u> , 738 P.2d 630, 631 (Utah 1987)	10
<u>Snyder v. Schram</u> , 274 Or. 539, 542, 547 P.2d 102 (1976) . . .	13
<u>Vandever & Co. v. Black</u> , 645 P.2d 637 (Utah 1982)	15, 16
<u>Wieneke Properties, Inc. v. Thiessen</u> , 765 P.2d 815 (Or.App. 1985).	8, 11, 12, 13, 17

STATUTES CITED

ORS 41.580.	13
UCA §25-5-4(5) (as amended, 1989) . 1 2, 3, 8, 9, 10, 11, 13, 16	
UCA §78-2-2(3)(j) (as amended, 1989).	1

IN THE UTAH SUPREME COURT

WARDLEY CORPORATION BETTER)	
HOMES AND GARDENS, NORMA)	
ZAMPEDRI, HOMESTEAD REALTORS,)	
AND WARREN BURBANK,)	
Plaintiffs and Appellants,)	Case No. 900256
vs.)	Oral Argument Priority
)	(16)
R. DAVID BURGESS,)	
Defendant and Respondent.)	

JURISDICTION STATEMENT

Original appellant jurisdiction is conferred on this Court by UCA §78-2-2(3)(j) (as amended, 1989). The plaintiffs, Wardley Corporation Better Homes and Gardens and Homestead Realtors appeal from a summary judgment order in favor of the defendant, R. David Burgess, holding that an oral extension of a written sales agency agreement was unenforceable under the statute of frauds provision within UCA §25-5-4(5) (as amended, 1989).

ISSUES PRESENTED FOR APPEAL

Was the district court correct in its holding that an oral agreement between a real estate broker and its client to extend a written sales agency agreement for an additional period of time was void because it did not meet the statute of frauds writing and signature requirements of UCA §25-5-4(5) (as amended, 1989.)

DETERMINATIVE STATUTES

UCA §25-5-4(5) (as amended, 1989) Certain agreements void unless written and signed.

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

. . .

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

STATEMENT OF THE CASE

The plaintiffs commenced this action to recover against Burgess an \$8,100.00 real estate commission after having procured a qualified buyer to purchase his home for \$135,000.00 under a dated and signed March 3, 1989 Earnest Money Sales Agreement. Burgess thereafter refused to close the sale. The March 3, 1989 Earnest Money Sales Agreement was signed by Burgess after the six month term had expired within a July 26, 1988 Sales Agency Contract signed by the defendant and the plaintiff Homestead Realtors as broker. The two real estate brokers claimed that Burgess and Homestead Realtors had orally agreed, within the original six month employment term, to extend the sales agency contract for an additional three months to April 26, 1989. The district court entered summary judgment in favor of defendant and against plaintiffs holding that the oral agreement between the defendant and Homestead Realtors was void under UCA §25-5-4(5) (as amended, 1989) because the defendant had not agreed by signed written agreement to extend or modify the original July 26, 1988 Sales Agency Agreement.

STATEMENT OF FACTS

These Statement of Facts are presented with the rule of law governing this Court's review of a summary judgment order that a summary judgment must be supported by all evidence, admissions and inferences establishing the absence of any issue of material fact and that the moving party is entitled to judgment as a matter of law. Creekview Apartments v. State Farm Ins. Co., 771 P.2d 693 (Utah App. 1989). After reviewing the facts in the light most favorable to the party opposing the summary judgment motion, this Court will reverse the trial court's determination if there is a dispute as to a material issue of fact. Geneva Pipe Co. v. S & H Insurance Co., 714 P.2d 648 (Utah 1986). This Statement of Facts applies the cited standard of review and states the facts in the light most favorable to Homestead Realtors ("Homestead") and Wardley Corporation Better Homes & Gardens ("Wardley").

As before the district court, these Statement of Facts derive primarily from the March 29, 1990 Affidavit of Warren Burbank Opposing the defendant's Motion for Summary Judgment. This Affidavit is located within the appeal record ("Rec.") at pages 75 through 82. The Burbank affidavit has attached to it the following documents as exhibits which are located in the appeal record as follows:

- Exhibit 1 - July 26, 1988 Sales Agency Contract
(Rec. at 85)
- Exhibit 2 - July 26, 1988 Residential Contract Form
(Rec. at 87)
- Exhibit 3 - March 1, 1989 Earnest Money Sales
Agreement (Rec. at 89-90)
- Exhibit B - April 3, 1989 United Savings Bank
Closing Documents (Rec. 92-108)

Wardley and Homestead are each licensed real estate brokerages in the State of Utah. Norma Zampedri is a licensed real estate agent associated with Wardley and Warren Burbank is a licensed real estate agent associated with Homestead.

Burbank obtained from Burgess on July 26, 1988 a six month term sales agency contract to list for sale Burgess' home located at 3175 East Windriver Drive, Layton, Utah. (Aff. at 76; Ex.1 at 85). Burbank concurrently completed and Burgess signed a residential contract form allowing for Homestead's listing of the Burgess home to be published in the Ogden Board of Realtors Multiple Listing Service for a six month term ending January 26, 1989. (Aff. - Ex.1 at 85).

Material provisions of the executed July 26, 1988 Sales Agency Contract obligated Burgess as follows:

In consideration of your agreement to list the property described herein and to use reasonable efforts to find a purchaser or tenant therefore, I hereby grant you for the period stated herein, from date hereof, the exclusive right to sell, lease or exchange said property or any part thereof, at the price and terms stated hereon, or as such other price or terms to which I may agree in writing. During the life of this contract, if you find a party who is ready, able and willing to buy, lease or exchange said property or any part thereof, as said price and terms, or any other price or terms to which I may agree in writing, or if said property or any part thereof is sold, leased or exchanged during said term by myself or any other party, I agree to pay you a commission of 6% for said sale, lease or exchange.

. . .

Burbank telephoned Burgess on January 26, 1989, the final contract date for both the July 26, 1988 Sales Agency Contract and concurrently executed Residential Contract Form and obtained from Burgess an oral agreement to extend the sales agency contract for an additional three months to April 26, 1989. (Aff. at 76-77). This oral agreement was made between Burbank and Burgess because of Burgess' stated commitment that he definitely wanted his home sold. (Aff. at 77). With Burgess' knowledge, consent and participation Burbank scheduled his client's home for real estate agent conducted showings on February 1, 1989, February 9, 1989, February 10, 1989, February 27, 1989 and twice on March 1, 1989. (Aff. at 77-79). Burgess was present in the home for some of these showings. (Aff. at 77-79).

William and Sandra Roberts, through their Wardley real estate agent, Zampedri, submitted a March 1, 1989 Earnest Money Offer to purchase the Burgess home. (Aff. - Ex.3 at 89-90). Burbank discussed the Roberts' purchase offer with Burgess by long distance telephone call on March 2, 1989 while Burgess was in the State of Georgia. A second long distance conference telephone call was placed on March 3, 1989 to Georgia by Burbank and Zampedri to further discuss with Burgess the terms and conditions of Roberts' purchase offer. (Aff. at 79-80). Burbank met with Burgess at the later's Layton home on the evening of March 3, 1989 at which time Burgess accepted and signed, without modification, the Roberts' Earnest Money Offer. (Aff. at 80; Ex. 3 at 89-90).

The duly signed March 1, 1989 Earnest Money Sales Agreement provides in material part at paragraph 10:

AGENCY DISCLOSURE. At the signing of this agreement the listing agent, Warren Burbank, represents (X) Seller . . . and selling agent, Norma Zampedri, represents (X) Buyer . . . Buyer and Seller confirmed that prior to signing this Agreement, written disclosure of the agency relationship(s) was provided to him/her. (Buyer's and Seller's initials provided.) (Aff.; Ex.3 at 89-90).

The buyer contingency within the March 1, 1989 Earnest Money Offer was removed on March 16, 1989 with the announced sale closing of the Roberts' California home. (Aff. at 82). Roberts' loan application for their purchase of the Burgess home for the purchase price amount of \$135,000.00 was approved by their lender not later than March 23, 1989. (Aff. at 82). The closing for the Roberts' purchase of the Burgess home was scheduled for April 10, 1989 at United Savings Bank. (Aff. at 82). This closing was attended by the Roberts at which time they received and signed all closing documents requiring their signatures. (Aff. at 80-82). The closing was likewise attended by Burgess, who after reviewing the documents requiring his signature, refused to sign and complete the closing. (Aff. at 82). The six percent (6%) calculated real estate commission fee available to Homestead and Wardley from the gross sales price for the scheduled sale of the Burgess home at \$135,000.00 is \$8,100.00.

SUMMARY OF ARGUMENT

Homestead and Wardley each submit that the oral agreement made between Burgess and Homestead to extend the July 26, 1988 Sales Agency Contract for an additional three month term to April 26, 1989 is not void under the statute of frauds provisions within UCA §25-5-4(5). The stated issue presents a case of first impression within the State of Utah. Homestead and Wardley each urge the Court to adopt the rule of law of both Oregon and Illinois that a written extension of time is not required to satisfy the writing and signature requirements of the statute of frauds if the parties impliedly or expressly agree to the extension. Weineke Properties, Inc. v. Thiessen, 765 P.2d 815 (Or.App. 1985); Bennett and Kahnweiler Associates v. Ratner, 113 Ill.App.3d 316, 478 N.E.2d 1138 (1985). The Oregon and Illinois rule of law provides that the time of performance under a real estate agency contract may be impliedly extended when the principal, after the expiration date, encourages the broker to continue its efforts, and the broker does so with the knowledge and approval of the principal. Neither Homestead or Wardley are aware of any case law authority contrary to the announced rule of law of Oregon and Illinois where the client, after the expiration date in a real estate sales agency contract, encourages the broker to continue its efforts and the broker successfully does so with the knowledge and approval of the client.

If this Court adopts the cited Oregon and Illinois rule, material issues of fact are present in this action that Burgess and Homestead orally agreed to extend the performance time under the July 26, 1988 Sales Agency Contract and that the buyer obtained obtained by the two brokers for the Burgess home under the March 3, 1989 Earnest Money Sales Agreement was obtained with the encouragement, participation and consent of Burgess.

ARGUMENT

UCA §25-5-4(5) (as amended, 1989) provides in material 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; . . .

The cited statute of frauds has been most recently applied to a real estate brokerage by the Utah Court of Appeals in Machan v. Western Real Estate, 779 P.2d 230 (Utah App. 1989). The Court confirmed that the statute's function is to protect property owners from fraudulent and fictitious claims for commissions and applies broadly to agreements requiring compensation for brokering real estate as well as to contracts employing brokers to purchase or sell real estate for a commission. 779 P.2d at 234. The Court expressly approved the existing rule

of law within Case v. Ralph, 56 Utah 243, 188 P. 640, 642 (1920) that a real estate broker's recovery of a real estate commission is dependent upon the broker proving, by one or more writings, an express agreement setting forth the terms and conditions of employment and the amount, if any, of the commission to be paid for professional services successfully rendered. 779 P.2d at 234; see, OIC, Inc. v. Wilcox, 738 P.2d 630, 631 (Utah 1987) (Statute of frauds barred real estate broker's action to recover sales commissions under written listing agreement which was not signed by owner and which owner had not authorized his daughter to sign for him.)

All parties in this action conceded, for purposes of the summary judgment proceeding, that the sales agency contract executed by Burgess with Homestead for a six month term from July 26, 1988 to January 26, 1989 was an enforceable contract meeting the statute of frauds requirements of UCA §25-5-4-(5). The sales agency contract identified that Burgess employed Homestead to list for sale his real property and that he agreed to pay a six percent (6%) commission if a ready, willing and able buyer was obtained for the property by the listing broker or any other party during the six month contract term. Gump & Ayers Real Estate v. Domcoy Investors, 733 P.2d 128 (Utah 1987) (Real estate broker was entitled to commission under exclusive listing agreement even though purchaser was obtained by vendor, even though listing agreement contained no specific price and even

though listing agreement contained no period of duration - vendor admitted that he had signed the agreement and had never revoked the listing agreement). The affidavit of Warren Burbank alleges that Burgess orally agreed to extend the time of performance under the July 26, 1988 Sales Agency Contract for an additional three month term to July 26, 1989.

The legal issue before this Court is whether a written extension of time is required to satisfy the statute of frauds provisions within UCA §25-5-4(5) (as amended, 1989) if the parties implied or expressly agree to the extension. This legal issue presents a case of first impression in the State of Utah. Homestead and Wardley each urge this Court to adopt the Oregon and Illinois rule that a written extension of time under a real estate sales agency agreement is not required to satisfy the writing and signature requirements of the statute of frauds if the parties impliedly or expressly agreed to the extension. Both Oregon and Illinois hold that the time of performance under a written sales agency contract may be impliedly extended when the principal, after the expiration date, encourages the broker to continue its efforts and the broker does so successfully with the knowledge and approval of the principal. Wieneke Properties, Inc. v. Thiessen, 765 P.2d 815 (Or.App.1988); Bennett and Kahnweiler Associates v. Ratner, 133 Ill.App.3d 316, 478 N.E.2d 1138 (1985). Neither Homestead nor Wardley are aware of any case law authority contrary to the

Oregon and Illinois cases. A reading of Wieneke Properties, Inc., supra., and of Bennett and Kahnweiler Associates, supra., will also confirm that both Oregon and Illinois apply the precedent that a real estate broker's recovery of a real estate commission is dependent upon the broker possessing an express written agreement setting forth the terms and conditions of its employment. Neither jurisdiction, like Utah, allows a real estate broker to recover a commission under a quantum meruit theory.

The fact pattern in Wieneke, supra., originated from a real property earnest money agreement which had been accepted and signed by the defendant seller. The agreement identified the plaintiff real estate broker as both the "Listing Realtor" and the "Selling Broker". A separate agreement between the seller and real estate broker obligated the seller to pay a six percent (6%) real estate commission from the designated earnest money sales price of \$795,000.00. The earnest money agreement provided for a sale closing date on or before July 25, 1982. The sale did not close until October 18, 1982. The final sales price was for \$695,000.00. Other terms and conditions of the closing documents also differed from the executed earnest money agreement. The Oregon Court specifically found that the seller had not terminated the listing/employment agreement and that it had encouraged the seller to continue, without interruption, his efforts to close the real estate transaction. The Court concluded that the eventual October 18, 1982 closing was obtained

through the professional work product of the broker. The seller refused to pay a real estate commission fee and argued, in material part, that no agreement had been executed between it and the real estate broker extending the broker's employment agreement from the original scheduled closing date to the actual date of closing. The seller relied upon the controlling Oregon statute of frauds (ORS 41.580) applicable to real estate brokers which is virtually identical in language content to that of UCA §25-5-4(5) (as amended, 1989). The Oregon Court affirmed the trial court judgment awarding the broker a real estate commission fee with the following language:

A written extension of time is not required to satisfy ORS 41.580(7), if the parties impliedly or expressly agree to the extension. Ferris v. Meeker Fertilizer Co., 258 Or. 377, 385, 482 P.2d 523 (1971). Whether there was an agreement is a question of fact . . . The time of performance may be impliedly extended when "the principal, after the expiration date, encourages the broker to continue his efforts, and the broker does so with the knowledge and approval of the principal". Snyder v. Schram, 274 Or. 539, 542, 547 P.2d 102 (1976).

The court found that there was "no termination of the agreement". There was also substantial evidence that defendant, after the expiration date, encouraged plaintiff to continue its efforts to consummate the deal with Baker and that plaintiff continued its efforts with defendant's knowledge and approval. The court must have found, therefore, that defendants and plaintiff impliedly extended the agreement to the date of closing, and there is substantial evidence to support such a finding. 765 P.2d at 817.

The fact pattern before the Illinois Appellate Court in Bennett and Kahnweiler Associates v. Ratner, 133 Ill.App. 3d 316, 472 N.E.2d 1138 (1985) also originated from a six month listing agreement from which the lease for the real property did not close until after the termination date within the real estate listing agreement. The client refused to pay the listing real estate broker a commission upon the basis that the express deadline in the listing agreement precluded the broker from recovering a commission on any transaction finalized after the agreement's termination. The Illinois Appellate Court acknowledged the Illinois rule that the employment agreement determines the broker's compensation for its actions on behalf of its principal and that if the performance term of the listing agreement is expressly limited, the broker can recover a commission only if it fulfills its obligations within the stated term. 478 N.E.2d at 1141. The Illinois Appellate Court, however, refused to apply the cited rule of law to those circumstances where the client both allowed and encouraged a real estate broker to continue to act as its agent after the agency agreement had expired. The Court found that the principal had waived the express term of the listing agreement by continuing to urge the broker to find a purchaser for the property. In awarding the broker a real estate commission, the Court held that the principal's actions in both allowing and encouraging the broker to continue to act as its agent operated

to create an implied agreement on which the broker had relied to successfully procure a purchaser for the property. The Illinois Appellate Court refused to permit the principal to benefit from the broker's effort while depriving it of a commission. 478 N.E.2d at 1141.

Both Homestead and Wardley urge this Court to adopt the rule of law that a written extension of time is not required to satisfy the statute of frauds provisions within UCA §25-5-4(5) (as amended, 1989) if the parties impliedly or expressly agree to the extension. By adopting this precedent, this Court will not undermine the interests protected within UCA §25-5-4(5) nor will it abrogate or otherwise circumscribe the proper scope of the holding in Machan v. Western Real Estate, 779 P.2d 230 (Utah App. 1989).

The averments contained within Warren Burbank's affidavit, the March 1, 1989 Earnest Money Sales Agreement and the March 3, 1989 United Savings Bank Closing Documents to Burbank's affidavit as Exhibit "D" demonstrate that Homestead and Wardley obtained for Burgess a ready, willing and able buyer to purchase his Layton home. (Aff. at 75-82; Ex.3 at 89-90; Ex.B at 92-108). Controlling provisions of the executed July 26, 1988 Sales Agency Contract and of the oral agreement between Burgess and Homestead to extend the sales agency contract for an additional three month term, commit Burgess to pay to Homestead and Wardley a real estate commission. Vandever & Co. v. Black,

645 P.2d 637 (Utah 1982) (A broker is entitled to an agreed commission upon producing a party who is ready, willing and able to perform pursuant to the terms offered by the principal); Alphin Realty, Inc. v. Sine, 595 P.2d 860 (Utah 1979) (Rule approved that real estate broker is entitled to recover a commission where ready, willing and able buyer is obtained pursuant to terms of employment agreement); C.J. Realty, Inc. v. Willey, 758 P.2d 923 (Utah App. 1988) (Generally, a real estate listing agreement requires that real estate broker be procuring cause in bringing about sale of real property, but parties may contract for a lesser performance).

Homestead and Wardley each urge this Court to adopt the Oregon and Illinois rule of law that a written extension of time is not required to satisfy the statute of frauds provisions within UCA §25-5-4(5) if the parties impliedly or expressly agree to the extension and that the time of performance within a real estate agency contract may be impliedly extended when the principal, after the expiration date, encourages the broker to continue his efforts and the broker successfully does so with the knowledge and approval of the principal. Should this Court accept the cited rule of law, material issues of fact are present within this appeal record to allow Homestead and Wardley to proceed to trial on the merits as to whether or not they can recover a real estate commission fee against Burgess under the March 1, 1989 Earnest Money Sales Agreement.

CONCLUSION

Homestead and Wardley ask this Court to adopt the holding in Wieneke Properties, Inc. v. Thiessen, supra. and in Bennett and Kahnweiler Associates v. Ratner, supra. and to accordingly remand this action to the district court for trial on the merits.

DATED this _____ day of August, 1990.

PHILIP C. PATTERSON
Attorney for Plaintiffs and
Appellants

ADDENDUM

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

* * * * *

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

PLAINTIFFS,)

VS.)

BENCH RULING

R. DAVID BURGESS,

Civil No. 890745358

DEFENDANT.)

* * * * *

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

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 *****
24
25

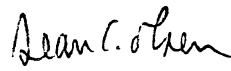
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CERTIFICATE

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
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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.

MARQUARDT, HASENYAGER & CUSTEN

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

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.

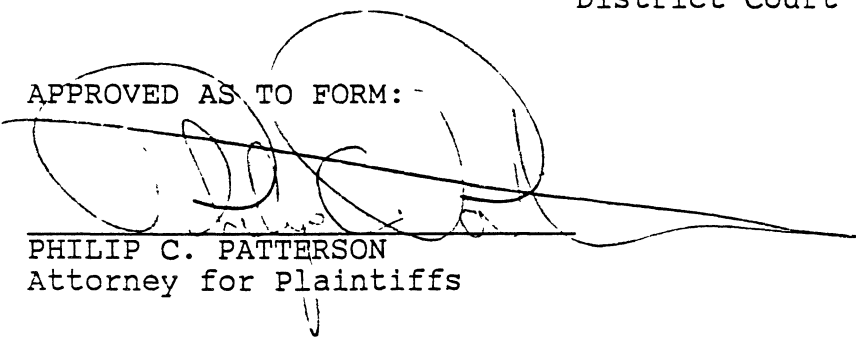
Let a judgment be entered accordingly.

DATED this ____ day of _____, 1990.

BY THE COURT:

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 13th 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.

Edm Hudson

SECRETARY

MARQUARDT, HASENYAGER & CUSTEN

MARTIN W. CUSTEN
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Attorneys for Defendant
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Ogden, Utah 84401
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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.

MARQUARDT, HASENYAGER & CUSTEN

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

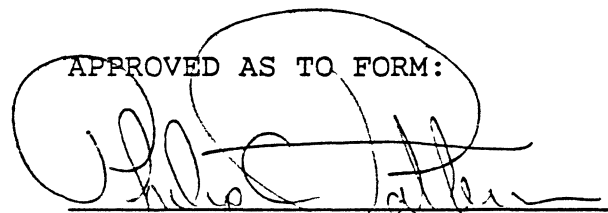
DATED this 27th day of April, 1990.

BY THE COURT:



RODNEY S. PAGE
District Court Judge

APPROVED AS TO FORM:

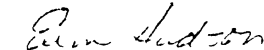


PHILIP C. PATTERSON
Attorney for Plaintiffs

CERTIFICATE OF MAILING

* * * * *

I hereby certify that on this 18th 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.



SECRETARY

PHILIP C. PATTERSON - 2540
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Respondents
427 - 27th Street
Ogden, Utah 84401-4291
Telephone: (801) 394-7704

IN THE UTAH SUPREME COURT

WARDLEY CORPORATION BETTER)	
HOMES AND GARDENS, NORMA)	
ZAMPEDRI, HOMESTEAD REALTORS AND)	CERTIFICATE OF MAILING
WARREN BURBANK,)	
 Plaintiffs and Appellants,)	Case No. 900256
 vs.)	
 R. DAVID BURGESS,)	
 Defendant and Respondent.)	

I, Philip C. Patterson, certify that on Tuesday, August 21, 1990, I served four copies of the attached Appellants' Brief upon Martin W. Custen, counsel for Appellee in this action by personally serving it upon him at the address:

Martin W. Custen
MARQUARDT, HASENYATER & CUSTEN
2661 Washington Blvd. #202
Ogden, Utah 84401

DATED this 21 day of August, 1990.


PHILIP C. PATTERSON
Attorney for Plaintiffs and
Appellants