

2001

Marie Bingham v. Kal Rasekh : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARIE BINGHAM,)	
)	Case No. 20010651-CA
Plaintiff and Appellant)	
)	
vs.)	
)	
KAL RASEKH,)	
)	
Defendant and Appellee)	
)	

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE TIMOTHY R. HANSEN DISTRICT COURT JUDGE

APPELLANT'S MAIN BRIEF

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JURISDICTION

This Appellate Court has jurisdiction over his appeal because the *summary judgment* order constituted a final judgment under section 78-2-2 of the Utah Code.

STATEMENT OF ISSUES ON APPEAL

ISSUE NO. 1. The court erred in granting summary judgment to Rasekh based upon a finding that there was no applicable statutorily created fiduciary duty that would apply to Rasekh based upon the facts of this case.

STANDARD OF REVIEW FOR THIS FIRST ISSUE ON APPEAL:

Summary judgment is granted only when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, this court views "the facts in a light most favorable to the losing party below" and gives "no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989).

ISSUE NO. 2. The court erred in granting summary judgment to Rasekh based upon the finding that there was no evidence in the record that would support a finding of a confidential relationship.

STANDARD OF REVIEW FOR THIS SECOND ISSUE ON APPEAL:

Summary judgment is granted only when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, this court views "the facts in a light most favorable to the losing party below" and gives "no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989).

ISSUE NO. 3. The court erred in granting summary judgment to Rasekh based upon a finding that Bingham's own actions precluded Rasekh from selling the property and therefore an oral promise to sell the property if the purchase did not

work out cannot be enforced as a matter of law.

STANDARD OF REVIEW FOR THIS THIRD ISSUE ON APPEAL:

Summary judgment is granted only when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, this court views "the facts in a light most favorable to the losing party below" and gives "no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." Blue Cross & Blue Shield v. State of Utah, 779 P.2d 634, 636-37 (Utah 1989).

ISSUE NO. 4. The court erred in granting summary judgment to Rasekh based upon a finding that Rasekh did not have a duty to investigate and therefore there is no basis for a finding of negligent misrepresentations.

STANDARD OF REVIEW FOR THIS FOURTH ISSUE ON APPEAL:

Summary judgment is granted only when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, this court views "the facts in a light most favorable to the losing party below" and gives "no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." Blue Cross & Blue Shield v. State of Utah, 779 P.2d 634, 636-37 (Utah 1989).

ISSUE NO. 5. The court erred in granting summary judgment to Rasekh based upon a finding that a promise to repurchase the center if it was unprofitable is unenforceable under the statute of frauds.

STANDARD OF REVIEW FOR THIS FIFTH ISSUE ON APPEAL:

Summary judgment is granted only when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, this court views "the facts in a light most favorable to the losing party below" and gives "no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." Blue Cross & Blue Shield v. State of Utah, 779 P.2d 634, 636-37 (Utah 1989).

STATEMENT OF THE CASE.

1. The Plaintiff filed her amended complaint in May of 1988, claiming,

among other things, causes of action for negligent misrepresentation, breach of fiduciary duty and conflict of interest against Defendants Rasekh and Coldwell Bankers; negligent misrepresentation, breach of contract against Defendants Michael Drury and VRUtah; and causes of negligent misrepresentation and rescission of contract and restitution against the defendants Harvey C. and Lois R. Hirschi ("the Hirschis"). All of the defendants filed counterclaims.

2. All of the defendants filed summary judgment motions. After the trial court granted the motions, the Hirschis and defendants Michael Drury and VRUtah, Inc. settled their disputes with the Appellant.

3. On August 14, 2000, the trial court issued a Minute Entry granting the Motion for Summary Judgment of the Hirschis.

4. On October 10, 2000, the trial court issued its Memorandum Decision in which it granted Rasekh's, Michael Drury and VRUtah's Motions for Summary Judgment.

5. On October 31, 2000, the trial court entered a judgment in which the lower court dismissed all of Appellant's claims against the Hirschis.

6. On November 6, 2000, Appellant filed a Notice of Appeal appealing the lower court's judgments.

7. On November 15, 2000, the Hirschis filed an objection to Appellant's Notice of Appeal on the basis there was no final judgment because the lower court had not determined the amount of attorneys' fees to be awarded in connection with the Hirschis judgment.

8. On December 8, 2000, the Utah Supreme Court entered its Order dismissing the Appeal.

9. On June 4, 2001, the lower court entered its Order dismissing the claims

against Drury and VRUtah, Inc.

10. On June 19, 2001, the lower court entered its Order dismissing Appellant's claims against the Hirschis and the Hirschis counterclaims against Appellant, each party to bear their own costs and attorneys fees.

11. On July 20, 2001, Appellant filed the instant Notice of Appeal challenging the lower court's judgment in favor of defendant Kal Rasech.

STATEMENT OF FACTS

A. Preliminary Statement:

The Appellant's Statement of Facts, relevant to the issues presented for review, are the same Facts as found in Appellant's "Memorandum in Opposition to Defendant Kal Rasekh's Motion for Summary Judgment," as filed in the Court below. See App Exh. pp 172-181. For the Court's convenience, immediately following the number for each of Appellant's Fact Statements, are ellipses () within the ellipse is found the corresponding numbered contested facts as found in the paragraph or paragraphs for the Statement of Fact as found in Appellee's two Memorandum in Support of Motion for Summary Judgment as filed below. See App Exh. pp. 149-157. The references in support of each Fact Statement are to the pages in Appellants Addendum, filed in support of Appellant's Brief on Appeal i.e. App Exh p " " .

B. Statement of Facts:

1.(2) The Appellant, Marie Bingham, at the time she purchased the Hirschi Center was an unsophisticated person who had little if any comprehension of the magnitude of the transaction in which she was induced to enter in by the Defendant Kal Rasekh. (App Ex pg. 18 (dep pp. 65-66); App Ex pg. 20 (dep pp. 77-78); App Ex pg. 40. (dep pp 314-316), App Exh. p. 216.

2. (2) Mrs. Bingham was a divorcee. App Ex. pg 49, 216 (dep pg. 423). Her family consisted of nine children. App Ex pg. 40 (dep p. 314). Her working experience had been that of a sales clerk and substitute teacher. (App Ex. pp 13-14(dep pp. 9-15). Her education beyond high school had consisted of two years of part time schooling to qualify for entrance into a nursing curriculum. (App Ex p. 13 (dep p. 11); App Exh. p. 38a - 38b (dep pp. 292-293).

3. (2, 3) Mr. Rasekh ingratiated himself into Mrs. Bingham's family, learned of her financial circumstances and became her financial advisor. App Exh. pp. 39-40, (dep. p 305-307, 316), App Exh. pp. 211-212. Mr. Rasekh's ingratiation was very clever often referring to her as his "American mom." App Exh pp. 58 (dep pp. 63-64); App. Exh p. 38 (dep p. 254); App Exh pp. 207-209.

4.(2) This relationship of trust and confidence is evidenced by the fact that Mr. Rasekh asked Mrs. Bingham if he could marry either her daughter Jennifer or Brittany as a prerequisite to obtaining U.S. Citizenship. App Exh pp. 54-56, (dep pp. 48-55, 58), App Exh. pp. 208-209.

5.(2) As a result of the relationship he cultivated, Mrs. Bingham trusted him with the care of her daughter Brittany whom Mr. Rasekh took to Egypt to attend the wedding of his sister. (App Exh. pp. 57, (dep pp. 59).

6. (2,3) Mrs. Bingham relied on Mr. Rasekh to make her business decisions. App. Exh pp. 46, (dep pp. 379); App Exh p. 48 (dep pp. 417), App pp. 208-209, 211-212.

7.(2) In July of 1994, Rasekh contacted Bingham and told her he had just left the Hirschi Center, a day care business, and that it was a perfect investment for her. He told her that he had exempted his father from the listing agreement so that Bingham and his sister could purchase and operate the day care. He told her he

would meet her at his office because it would have to be tied up fast. App Exh. pp. 196 (Bingham Aff. ¶¶ 14-16)

8.(2) When Bingham first learned of the \$900,000 price she was overwhelmed and told Rasekh there was no way she could be involved. He told Bingham there was no risk that he had thoroughly investigated the business and property and if Bingham would go in business with his sister and operate the day care there was enough income to support the both of them. App Exh. pp. 196 (Bingham Aff. ¶¶ 14-17)

9. (2,22) He presented Bingham with a document he had prepared which she did not read and which he said was necessary to tie up the property. Bingham was at first skeptical, but, Rasekh had her sign the document and give him \$5,000 to hold the property until his sister could come. At the time Rasekh told Bingham he would later negotiate the actual price and figure out the business relationship between Bingham and his sister. App Exh. pp. 196-197 (Bingham Aff. ¶¶ 14-17)

10.(2) At this time Rasekh told Bingham that if he were not able to negotiate a better price that Bingham would get her \$5,000 back. App Exh. pp. 196-197(Bingham Aff. ¶¶ 14-17)

11.(2) Bingham signed the document Rasekh prepared without reading it because she fully trusted Rasekh because of their confidential relationship and the believe he instilled in her that he would protect her and was looking out for her best interests. App Exh. pp. 196 (Bingham Aff. ¶¶ 14-17)

12. Later he came to Bingham's home and discussed the need to sell her home so as to come up with her share of the money to purchase the Hirschi Center. Rasekh told Bingham his sister was coming from Egypt soon and he would start to look for a buyer for her house. App Exh. pp. 197 (Bingham Aff. ¶ 18)

13.(3) During this time Rasekh presented Bingham with several additional offers and counter offers which he was negotiating she believed for both she and his sister.

14.(5) Shortly thereafter Rasekh told Bingham his sister was not coming and would not be participating in the purchase. At this time Bingham told Rasekh there was no possible way she could be involved because she knew nothing about operating a day care let alone any other kind of business. App Exh. pp. 196 (Bingham Aff. ¶ 19)

15.(2,3,5) At this time Rasekh, put increased pressure on Bingham to proceed with the purchase by assuring me that he had investigated the business and there was nothing that could go wrong. He told Bingham that she could walk into the Hirschi's shoes and would need no further capital. App Exh. p. 30-32, (dep p. 187-190, 192, 196); App Exh p. 44, 45, (dep p. 349, 356.).

16.(6) At this time Bingham consulted her brother David Weston who told her she should not purchase the Center because she was not qualified and not until she determined that the business was profitable and would not require any money beyond the purchase price. App Exh. pp. 197-198 (Bingham Aff. ¶ ¶ 21)

17. Bingham told Rasekh what her brother had said and at this time he told her **"Marie there is no risk, if it doesn't work out I will either buy it from you or sell it for you."** Besides, he said, "why would you not trust my advice over that of your brother or daughters, are they as successful as I am, look at my success Marie, trust me there is no risk and I will not let you down." App Exh. pp. 198-203; 41-42 (dep pp 317-323; also App Exh pp. 35-37 (dep pp 237,244,247).

18.(6) Rasekh told her the Hirschi's had provided him with all of the financial information about the business and that the day care center and the wedding

receptions held there had supported two families for many years. He arranged for her to talk to the Hirschi's about the profitability of their business. The Hirschi's then provided her with financial statements. App Exh. pp. 198 (Bingham Aff. ¶ 23)

19.(6) She did not know how to read a financial statement so Bingham asked her friend Stan to look at the financial statements and He told her the statements were just break even or showed a loss. App Exh. pp. 198 (Bingham Aff. ¶ 23)

20.(6) When she confronted both Rasekh and Mr. Hirschi, they both told her the financial statements were not accurate because the Hirschi' had commingled the living expenses of two families with the operating expenses of the business and that if she subtracted out the living expenses the statements would show a good profit. App Exh. pp. 198 (Bingham Aff. ¶ 24)

21.(7) Rasekh then introduced her to Mr. Tilbey, their accountant, to assure her that he would continue to do the Center's accounting after she took over. Mr. Tilbey told her he could not extract the personal family living expenses from the operating expenses. She was again concerned because of what her brother David had told her. When she expressed her concerns to Rasekh he again persuaded her by telling her that he had analyzed the financial statements and if the business could support two families it could assuredly support one. App Exh. pp. 198-199 (Bingham Aff. ¶ 25)

22.(7) At this time, Rasekh again reassured her, "Marie there is no risk, just trust me, if anything goes wrong I will get you out." App Exh. pp. 198-199 (Bingham Aff. ¶ 25)

23.(8,9) Rasekh then traveled to Egypt and while he was gone Bingham went to the Hirschi Center on her own and came away with the feeling that something was just not right. When Rasekh returned Bingham told him she could not go

through with buying the Center. Rasekh got very upset and intimidating and again accused her of not trusting him and that she was harming the Hirschi's. He made her feel terrible and she then told him that in the very beginning he had at least promised a lower price. App Exh. pp. 199 (Bingham Aff. ¶ 27)

24.(9) Rasekh then met with the Hirschi's alone and then later included Bingham in the discussions. Rasekh told her the Hirschi's had agreed to reduce the price and to delay the monthly payments to assure her success. At this time Bingham looked to Mrs. Hirschi, for reassurance and asked her "knowing my lack of experience do you think I could really handle this and could I really do this." App Exh. pp. 199 (Bingham Aff. ¶ 28)

25.(9) Mrs. Hirschi's response led her to believe that the Hirschi Center day care business would support her family without the requirement for any money beyond the down payment. App Exh pp. 21-22, (dep pp. 92,93); see also App Exh. p. 60, (dep p. 102).

26.(9) Rasekh also told Bingham that the Hirschi's had agreed that their daughter, would continue to manage the Center and would train Bingham for six months. He also told Bingham that that all of the trained staff would continue and that all of the day to day lesson and activity programs for the children were fully developed and available for her use. He said "Marie all you have to do is work hard and the Center will take care of all your needs." App Exh. pp. 197 (Bingham Aff. ¶ 20)

27.(10, 6) Because of Rasekh's assurance, among others, that her investment was completely safe because if anything went wrong he would either purchase the property from her or sell it for her such that she would not suffer any financial loss, in early October, 1994, Bingham purchased the Hirschi Center. App Exh pp. 41,42

(dep pp. 318, 322); App Exh p. 25 (dep p. 122). Prior to October of 1994, she had never worked in a day care center or operated a day care center. App Exh. pp. 199-200 (Bingham Aff. ¶ 29)

28.(10,6) At the time of the Hirschi Center purchase her sole assets consisted of time certificates of deposit accumulated from some income savings (App Ex p 47-49, ((dep pp. 389-391, 418-421)) and some limited capital received from her father and the equity in her home. App Ex. pg. 20 (dep pp. 77-79); App Ex. pg 15 (dep pp. 49-51).

29.(10,6) The \$181,000, Mr Rasekh had Ms. Bingham pay in down payment depleted all of her assets and left her with no operating or emergency capital. (App Exh. p. 21, (dep p. 89); App Exh p. 33, (dep pp. 201-202).

30.(10,6) At the time of closing Mr. Rasekh did require of Mrs. Bingham that she would have to pay more money than her \$181,000 she had for the down payment, contrary to his prior representations, by surprising her with a \$19,000 note the need for which prior thereto she was unaware. App Exh. p. 42 (dep pp. 323-324); App Exh. p. 200 Bingham Aff. ¶ ¶ 30-31)

31.(11,7) Following closing she soon discovered that Mr. Rasekh had misrepresented the Hirschi Center (App Exh. p. 24, ((dep p. 117)); App Exh. p. 31, ((dep pp. 189-190)), and in order to stay in business she would have to meet costly permitting and safety requirements for which she was unprepared with no means to meet these costs. App Exh. pp. 27-28 (dep pp. 147-152); App Exh p. 43 (dep p. 336); App Exh. pp. 200-201 (Bingham Aff. ¶ 32),

32.(11,7) Following closing It also became apparent to her that the amount of income being received from child day care was insufficient to meet the licensing requirements, mortgage payments and operating expenses and she would be

operating at a loss. App Exh. p. 33, (dep pp. 201-202); App Exh. p. 43 (dep pp. 333-335); App Exh. p 201 (Bingham Aff. ¶ 33).

33.(11,7) The last minute \$19,000 note and the Hirschi Center misrepresentations caused her to believe that she could no longer trust Rasekh. A friend, she hired to repair the smoke detectors and to install exit signs advised her to immediately sell the Hirschi Center and recover her savings. App Exh. pp. 201 (Bingham Aff. ¶ 33-34)

34.(11,12,7,8,) As a result of her friends advice and certain misrepresentations as made by Mr. Michael Drury, a representative of VR Utah, business brokers, she entered into an agreement with Mr. Michael Drury and VR Utah, to sell the Hirschi Center within three months which failed and she made a demand upon VR Utah to release her from the listing agreement. App Exh. pp. 107-113, 33-34 (dep p. 201, 207); App Exh. pp. 201 (Bingham Aff. ¶ ¶ 34-36, 39-42); App Exh. pp. 2-3, 12, 49(b), 34 (dep pp. 206-208, 449-450, 462); App Exh. 50.

35.(20,21) In desperation, the Appellant contacted Rasekh and told him she would not be able to make the monthly payments then due. She insisted he make good his promise to sell the property or buy her out. Defendant Rasekh told the Appellant that he would do nothing so long as the property was listed with VRUtah Business Brokers. App Exh. pp. 203(Bingham Aff. ¶ ¶ 43-44); App Exh. p 35, (dep pp. 237-238).

36.(14-16,19, 11,13) On or about March 2, 1995, Mr. Randall Roberts, a neighbor to the Hirschi's, had Steve Tate of Consolidated Realty Group present an offer to purchase the Hirschi property. (App. Exh. pg 62; App Exh. pp. 201 (Bingham Aff. ¶ 45).

37.(14-16, 11-13,16) Mr. Roberts was never screened as a potential buyer.

(App Exh p. 11) The only way Mr. Roberts could complete a purchase was through the qualification of a prospectus with the governmental agencies regulating securities offerings in the hope of attracting investors. (App Exh. pg. 11; App Exh. pp. 203-204 (Bingham Aff. ¶ 46). Mr. Roberts had no means available to him at the time to purchase the property. App Exh. pp. 203-204, (Bingham Aff. ¶¶ 45-46, 50); App Exh. pp. 212-213, (Weston Aff. ¶¶ 9-10); App. Exh pp. 4-5, 11, 62 and Roberts prospectus App Exh. pp. 124-145)

38. (14-16,19,11-13) Lacking the sophistication to evaluate Mr. Roberts offers, Mrs. Bingham engaged her brother as her agent. App Exh. pg 49(c) Mr. Weston then attended a meeting conducted by Mr. Roberts in Mr. Drury's office. After reviewing Mr. Roberts prospectus, (App Exh. pp 124-145) her brother advised her that Mr. Roberts did not have the means to fund his offer. App Exh. pp. 212-214, (Weston Aff. ¶¶ 9-10,13); App Exh. pp. 203-204 (Bingham Aff. ¶¶ 45-46)

39. (20-22, 18-19) The Appellant finally obtained a release from VR Utah in June 1995. She then contacted Rasekh and told him VRUtah Brokers had released and that he need to either buy the Hirschi Center or sell it immediately as I she would lose her life's savings. App Exh. pp. 205 (Bingham Aff. ¶ 52-53)

40. (20-22, 18-19) Mr. Rasekh did nothing and she in fact lost her savings as a result of the Hirschi's foreclosure. App Exh. pp. 205 (Bingham Aff. ¶ 52-53)

41. (23) Rasekh thereafter entered into an agreement with the Hirschis and again sold the Hirschi Center property to relatives and friends for \$750,000, for which he aided in obtaining the financing utilizing his own credit. (App. Exh. pp 226-229).

SUMMARY OF ARGUMENTS.

I. As a real estate agent Rasekh had a statutorily imposed fiduciary duty. He was also a limited agent and by statute any fiduciary duties that would create a conflict of interest with his duties to the seller were eliminated. Even as a limited agent though he retained the fiduciary duties of putting the interests of Bingham above his own and reasonable care and diligence, which duties he breached.

II. There were sufficient summary judgment facts to create an issue of fact concerning the existence of a confidential relationship. The existence of a confidential relationship creates fiduciary duties, which duties Rasekh breached.

III. The existence of a confidential relationship or fiduciary duties creates an exception to the statute of fraud barring the enforcement of oral promises made by the fiduciary. Rasekh's promise to repurchase the center was enforceable.

IV. There is not sufficient summary judgment evidence in the record to base a finding that as a matter of law Bingham made it impossible for Rasekh to sell the center by listing the center with VR Utah.

V. Since a fiduciary relationship existed Bingham had the right to rely on the representations made by Rasekh unless such reliance was unrational and she cannot be charged with lack of diligence in determining whether the representations are true. The court did not apply the correct standard and there was not sufficient summary judgment evidence to find the reliance was unrational.

VI. There was not sufficient summary judgment evidence to form the basis for a finding that Rasekh made no negligent misrepresentations. Rasekh made representations that could be found to be misleading or erroneous. Any such responses about a sale amounts to misrepresentation.

VII. The court made no specific finding that Bingham failed to mitigate her

damages, but even so there is not sufficient summary judgment evidence to support a finding of failure to mitigate

ARGUMENT

I.

THE COURT ERRED IN FINDING THAT RASEKH OWED BINGHAM NO STATUTORILY IMPOSED FIDUCIARY DUTY THAT COULD BE BREACHED.

In addressing Bingham's claim that Rasekh breached a statutorily imposed fiduciary duty the court simply stated in the memorandum decision page 4, , "The duty is created by law for real estate agent, and a fiduciary obligation, to the extent that the plaintiff would have this Court define the same, is not required of a real estate agent." The court found that no statutorily imposed fiduciary obligation applied to the facts of this case.

Rasekh was a licensed real estate agent and acted as Bingham's real estate agent in purchasing the Hirshi Center. Rasekh also represented the seller in this transaction and as such by law he was a limited agent. Since in this case Rasekh was a limited agent, appellant gave up certain fiduciary duties. *Wardley v. Welsh*, 962 P.2d 86, 346, footnote 4.(Utah 1998). The question that must be answered is whether by hiring appellee as a limited agent Bingham gave up the fiduciary duty, that appellee would otherwise owe by statute, of not putting Rasekh's interests above those of Bingham. In other words, because appellee was only a limited agent did he not have a fiduciary duty that would allow him to place his own interests above those of appellant? Could the legislature have intended to relieve a dual agent of this most basic of all fiduciary duties of avoiding self interest, while retaining other fiduciary duties?

The court was in error when it found no statutory fiduciary duty to appellant. A licensed real estate agent or broker owes certain fiduciary duties as imposed by the

Utah Administrative Rules. Among these duties is the duty of loyalty. Utah Administrative Rules R162- 6.2.16.2(a), and the duty of reasonable care and diligence, Utah Administrative Rules R162- 6.2.16.2(a).

Because in this case appellee was a limited agent he was relieved of certain fiduciary duties in those areas where a fiduciary duty to buyer would conflict with a fiduciary duty to seller and visa versa. Utah Administrative Rules R162- 6.2.16.2(a); *Wardley v. Welsh*, 962 P.2d 86, 346, footnote 4.(Utah 1998). On the other hand, even though appellee is a limited agent he still owed appellant certain fiduciary duties, and, "...The agent, acting in this neutral capacity, shall advance the interest of each party so long as it does not conflict with the interest of the other party ." Utah Administrative Rules R162- 6.2.16.3.1(a). Only those fiduciary duties where such duties would create a conflict between the duties owed to both the buyer and seller are eliminated. Utah Administrative Rules R162- § 6.2.16.3.1(a), and the agent is held to the standard of neutrality only in the event of conflicting interests. Utah Administrative Rules R162- 6.2.16.3.1(a). The fiduciary duty of Reasonable care and diligence specifically survives a dual agent status Utah Administrative Rules R162- 6.2.16.3.1(b). It should be obvious that the duty of loyalty, as far as it is defined as the obligation to act in the interest of the buyer instead of his own interest, also survives the dual agency because the agent "... acting in this neutral capacity, shall advance the interest of each party so long as it does not conflict with the interest of the other party ." Utah Administrative Rules R162- 6.2.16.3.1(a). This duty of loyalty is basic to a fiduciary relationship and as long as the agent can remain neutral he must not put his interests above those of the buyer.

None of the breaches of fiduciary duty claimed by appellant involve those fiduciary duties that would be eliminated because appellee was a limited agent. Her claims are that appellee convinced appellant to purchase the property so that he

could earn a large commission, that he mislead her when he told her the property was a good investment, that she had no risk, that she should rely on him and not others, and that he would buy back the property if it wasn't profitable for appellant.

Even though the legislature did not specifically state that the duty of loyalty was retained by a limited agent, it is clear that the regulations only intended to eliminate those duties owed to the buyer and seller by a limited agent are inherently contradictory, (Utah Administrative Rules R162- 6.2.16.2(a)). It should be assumed that the legislature intended to eliminate all fiduciary duties that would fit within that inherently contradictory category and retain the rest.

In construing a statute the purpose is to give effect to the legislative intent and the purpose lying behind it. *In the matter of the estate of Greenwood*, 326 P.2d 400, 7 Utah 2d 405. When applying this principle the intention will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. *In the matter of the estate of Greenwood*, Id. In order to give the statute the implementation which will fulfill its purpose, reason and intention sometimes prevail over technically applied literalness. *Andrus v. Allred*, 404 P.2d 972, 17 Utah 2d 106.

This statute should be interpreted so as to not eliminate the fiduciary duty of loyalty as long as under the facts present there is no actual conflict with the other party and the duty to not engage in self dealing should never be eliminated because self dealing never creates a conflict of interest with the other party and always creates a conflict of interest with whom the agent is self dealing. The statute specifically requires the agent to advance the interests of appellant as long as it does not conflict with the interest of the seller. Utah Administrative Rules R162- 6.2.16.3.1(a). The duty of loyalty to appellant above loyalty to seller may not survive because appellee was a limited agent, but the duty of loyalty to appellant over appellee's own

interests certainly did survive. The court failed to recognize this statutorily imposed fiduciary duty and this finding should be reversed.

II.

THE COURT ERRED WHEN IT DETERMINED THAT NO CONFIDENTIAL RELATIONSHIP EXISTED

Whether a confidential relationship exists is a question of fact. *Rhoads v. Harvey Publications, Inc.*, 145 Ariz. 142, 148, 700 P.2d 840, 846 (App. 1984). If a confidential relationship exists it gives rise to fiduciary duties because Confidential and fiduciary relationships are in the law synonymous. *Fipps v. Stidham* 50 P. 2d 680, 174 Okl. 473. A fiduciary or confidential relationship may be created by circumstances where equity will imply a higher duty in a relationship because the trusting party has been induced to relax the care and vigilance he would ordinarily exercise. *Hal Taylor Associates v. Unionamerica*, 657 P.2d 743 (Utah 1982), or when one party, after having gained the trust and confidence of another, exercises extraordinary influence over the other party. *In re Estate of Jones*, 759 P.2d 345, 347 (Utah App. 1988). Although Rasekh did not claim in his motion for summary judgment that a confidential relationship did not exist the court determined on its own that no such relationship was shown.

It is not incumbent on Bingham to prove the existence of a confidential relationship unless Rasekh has first raised evidence that such does not exist. **A plaintiff is not required to produce summary judgment evidence raising a material fact question on an essential element of its claim until the defendant/movant first conclusively negates such an element by summary judgment evidence. If the defendant's summary judgment evidence conclusively negates such an element, the plaintiff must then present summary judgment evidence raising a fact issue as to that element. If it does so, summary judgment is not proper.** *Gibbs v. General Motors*

589, Texs 1989; *Christensen v. Sherwood Insurance Services*, 758 S.W.2d 801 (Tex. App.-Texarkana 1988, writ denied); *Orozco v. Texas General Indemnity Co.*, 611 S.W.2d 724 (Tex. Civ. App.-El Paso 1981, no writ).

Bingham first requests that this court determine that Bingham had no obligation to present evidence of a confidential relationship in response to the summary judgment motion, or in the alternative that she did present evidence raising a fact issue concerning the existence of a confidential relationship. Bingham's claims of trust and reliance are fact questions unless patently unmeritorious are for the jury and not to be decided by summary judgment. *Hilton v. Texas Investment Bank, N.A.*, 650 S.W.2d 545 (Tex. App.-Houston [14th Dist.] 1983, no writ); *Kolb v. Texas Employers' Ins. Ass'n*, 585 S.W.2d 870 (Tex. Civ. 1979)

In the case of *In re Brodbeck,, v James*, 915 P.2d 145 (Kan. 1996), the court determined that acts that could also be viewed simply as acts of kindness could also be viewed as acts showing the requisite reliance and trust to survive a motion for summary judgment. The jury rather than the court should be making that judgment.

A confidential relationship may arise under circumstances in which a person occupies a superior position over another with the opportunity to use that superiority to his advantage over the other. *United Fire & Casualty Co. v. Nissan Motor Corp.*, 164 Colo. 42, 433 P.2d 769 (1967).

Similarly, a confidential relationship may arise if: (1) one party has taken steps to induce another to believe that it can safely rely on the first party's judgment or advice, see Restatement (Second) of Contracts § 161d comment f (1982); (2) one person has gained the confidence of the other and purports to act or advise with the other's interest in mind, see Restatement (Second) of Trusts § 2 comment b (1959); or (3) the parties' relationship is such that one is induced to relax the care and vigilance

one ordinarily would exercise in dealing with a stranger, see *Dolton v. Capitol Federal Savings & Loan Ass'n*, 642 P.2d 21 (Colo. App. 1981).

The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party." *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786, 790 (1986). **In other words, the plaintiff must show some dependency on his or her part and some undertaking by the defendant to advise, counsel and protect the weaker party. For example, a plaintiff's lack of business expertise, and a defendant's undertaking the responsibility of providing financial advice to a close friend or family member, may indicate a fiduciary relationship. *McGowan v. Pillsbury Co.*, 723 F. Supp. 530, 536 (W.D. Wash. 1989).**

The summary judgment evidence before the court to support the existence of a confidential relationship, which taken as true show Bingham's dependency on Rasekh and his undertaking to provide financial advice to a close friend was the following:

1. Appellant was unsophisticated. She was a divorcee with nine children. Her entire work experience had been a sales clerk and substitute teacher. Her education was high school and two years of part time schooling to qualify for entrance into a nursing curriculum. She had never worked in or operated a day care center.
2. Appellee was a real estate agent who told her to not trust the advice of her brother or daughters because they were not as successful as him.
3. Appellant did not comprehend the magnitude of the transaction concerning the Hirschi Center.

4. Appellee ingratiated himself into appellant's family, referring to appellant as his American Mom. At one point appellee asked appellant if he could marry one of her daughters as a way of obtaining U.S. citizenship. Appellee took appellant's minor daughter to Egypt to the marriage of his sister.

5. Appellee became appellant's financial advisor and appellant relied on him to make her business decisions. Appellant believed that he would protect her and look out for her best interests.

6. Appellant reposed complete trust in appellee, to the extent that she signed the purchase documents without reading them, ignored contrary advice from her friends, brother and daughters and invested all of her money in the day care center leaving her with no remaining funds.

III.

THE COURT ERRED IN APPLYING THE STATUTE OF FRAUDS.

The promise of appellee to appellant that she had no risk in purchasing the day care center, and which induced her to invest everything she had into the business, upon the promise that appellee would buy it back if it were not successful is the most important aspect of appellant's case. This is the promise that provided Plaintiff with a no risk investment. It is her position that she would never had entered into the transaction without this promise and that she had total trust in appellee.

Appellee argued to the court and the court accepted the proposition that such promise in this case was unenforceable because it violated the statute of frauds. Because the promise if violated would be a violation of the fiduciary duty appellee owed to appellant and not just a violation of an oral contract, the promise is taken out of the purview of the statute of frauds and is enforceable because a confidential relationship or fiduciary duty creates an exception to the statute of frauds. *Swon v.*

Huddleston, 282 S.W.2d 18, 24-26 (Mo. 1955); *Crane v. Centerre Bank of Columbia*, 691 S.W.2d 423, 425-26 (Mo. App. W.D. 1985); see also John D. Calamari & Joseph M. Perillo, *Contracts* § 19-46 (3d ed. 1987). *W.G. Jenkins & Co. v. Standrod*, (1928) 46 Idaho 614, 269 P. 586; see 72 Am.Jur.2d Statute of Frauds § 176 at 707 (1974) and *Brock & Davis Co., Inc. v. Charleston National Bank*, (S.D. W.Va. 1977) 443 F.Supp. 1175, *Teetling v. Indiana State Bank*, 436 N.E.2d 855, *Jarnigan v. Busby*, 867 P.2d 63, (Colo. 1993).

VI

THE COURT ERRED WHEN IT DETERMINED THAT BINGHAM'S ACTION PREVENTED RASEKH FROM SELLING

STANDARD OF REVIEW FOR THIS ISSUE ON APPEAL:

Summary judgment is granted only when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). In reviewing a grant of summary judgment, this court views "the facts in a light most favorable to the losing party below" and gives "no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." *Blue Cross & Blue Shield v. State of Utah*, 779 P.2d 634, 636-37 (Utah 1989).

The court in the memorandum decision page 5 determined that the promise of Rasekh to resell the property if it was unprofitable would preclude summary judgment and then court went on to find that Bingham's own actions prohibiting Rasekh from selling the property precludes the claim as a matter of law.

The question that must be asked is how would listing with VR Brokers preclude Rasekh from selling? Why couldn't Rasekh attempt to sell the property while it was listed with VR Brokers? In fact VR Brokers released their listing in sufficient time to sell the Hirschi Center before it was foreclosed. Rasekh made no effort to sell the property either while it was listed or after the listing was released, in fact he denies he made any such promise. If he made no effort to sell how can there

be uncontroverted evidence that Bingham's action made it impossible for him to sell.

V.

BINGHAM HAD THE RIGHT TO RELY ON RASEKH'S REPRESENTATIONS.

One has the right to rely on the representations of a fiduciary unless such reliance is irrational. *Field v. Century 21*, 63 Cal. App.4th 18, 73 Cal. Rptr. 2d 784, 1998. It is well settled that a representee has a right to rely upon representations where a confidential or fiduciary relationship exists between the parties. *Hugh v. Kennedy*, 22 N.C. App. 509; 207 S.E.2d 301. In such cases a high degree of frankness and fair dealing is required, and the representee cannot be charged with lack of diligence in failing to make an independent investigation, either at the time or afterward." 37 Am. Jur. 2d, Fraud and Deceit, § 254, p. 342. "It is a well settled principle of the law of fraud, applied particularly by courts of equitable jurisdiction, that it is the duty of a person in whom confidence is reposed by virtue of the situation of trust arising out of a confidential or fiduciary relationship to make a full disclosure of any and all material facts within his knowledge relating to a contemplated transaction with the other party to such relationship, and any concealment or failure to disclose such facts is a fraud." *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d

Rasekh by claiming that Appellant had no right to rely on what he said is really making the argument that she should not be able to recover because of her contributory negligence, but where a fiduciary relationship exists the buyer has the right to rely on the representations of the broker and contributory negligence is not a defense. *Neff v. Bud Lewis Co.*, 89 N.M. 145, 548 P.2d 107 (N.M.Ct.App.1976).

VI.

THE COURT ERRED IN FINDING NO NEGLIGENT MISREPRESENTATIONS

Even without a fiduciary duty the claim of negligent misrepresentation should survive summary judgment. Bingham alleges that Rasekh made certain negligent misrepresentations to her that induced her to purchase the Hirschi property. The cause of action for negligent misrepresentation is not based on failure to disclose, but rather on incorrect disclosures. The case of *Schroeder v. Rose*, 701 P. 2d 327 (Idaho Ct. App. 1985), which was cited by Rasekh, makes it clear that misleading or erroneous responses about a sale amounts to misrepresentation. (See also PROSSER AND KEETON ON TORTS §106 at 738 and §107 at 745 (5th ed. 1984). In alleging negligent misrepresentation Appellant does not contend that Rasekh had the obligation to investigate everything about the business and report it to Appellant, but rather that he had the obligation to properly investigate and accuracy of any representations that he did make about the business. Bingham alleges that the following representations were not true and were an inducement to purchase the property.

- (a) that the Hirschi Center purchase price was fair, was not unconscionable, and constitute a prudent investment for the Plaintiff.
- (b) That the Hirschi's business had sufficient cash flow to meet all expenses and contingencies including the payments on the first trust deed note which Plaintiff would be obligated to pay.
- (c) the income from the Hirschi Center business would provide all the income and investment needs of both the Plaintiff, her family and his sister,
- (d) that he had conducted a business and investment analysis of the Hirschi's business which he had found to be so profitable that he had written on top of the listing agreement that his father, who was interested in the property on behalf of his sister, would be exempt from the realtor fee,
- (e) that when Plaintiff took over the Hirschi's business that she could step into the shoes of the Hirschi's and continue to operate the day care business without the need for the further investment,

(f) that Marleen, the Hirschi's daughter, who was managing the Hirschi's child day care business was a duly qualified manager and would teach her how to manage and operate the business,

(g) That both Marleen and the present employees had agreed to stay for a minimum of six months,

(h) that the employees would be willing to stay longer if she was willing to continue their employment,

(i) That all lesson plans respecting the day care of the children were all in place,

(j) that Marleen and the present staff would instruct her in the teaching methods such that before Marleen left she would be proficient in the use of the lesson plans,

(k) that all the permits for operating the business were in place and would not have to be changed or altered,

(l) that the day care business was in compliance with all state codes and regulations,

(m) that the buildings comprising the Hirschi Center were in a good state of repair,

(n) that all the equipment was in good operating condition.

VII.

FAILURE TO MITIGATE DAMAGES IS AN ISSUE FOR TRIAL.

Although the court did not grant summary judgment on the issue of mitigation raised by Rasekh, the court did state at page 6 of the memorandum decision as follows: "For the foregoing reasons, together with the reasons set forth by counsel for

Rasekh in both the written submissions and oral argument, the defendant's Motion is granted.

Since the court addressed every other issue with particularity Bingham does not think the court intended to grant summary judgment based upon a finding that she failed to mitigate her damages, but in an abundance of caution this issue is raised. Also the issue of mitigation may come up in the future by motion and Bingham requests the court's guidance on the issue.

1. APPELLANT MADE EVERY EFFORT TO MITIGATE HER DAMAGES

Within days of purchasing the Hirschi Center Appellant realized that Mr. Rasekh got her into a deal that would not work. Once she was out of his control and able to think clearly she could see that she had no money and no experience to run a day care center. She could see that she may lose her down payment and she immediately began the effort to mitigate her damages. She never wanted to make a profit, but only to recoup her down payment. When the offer to purchase came from Mr. Roberts Appellant approached her brother, who she trusted and asked for his advice. He told her not to accept the offer because Mr. Roberts had no money of his own and the offer was contingent on raising the \$150,000.00 down payment by soliciting investors. Appellant's brother advised her that it would be fool hardy to tie up the property for 90 days for Mr. Roberts to attempt to raise money. He advised her to hold Mr. Rasekh to his promise to sell or buy the property. The obvious proof of the lack of the bone fides of Mr. Roberts offer was his failure to pay one penny toward the lease obligation that he later signed for the Hirschi Center.

The burden of proving Appellant has not mitigated her damages and that the award should be correspondingly reduced is on defendant. *John Call Eng'g, Inc. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah App. 1990), *Lebaron v. Rebel Enterprises*,

823 P.2d 479 (Utah 1991). Appellant cannot be faulted for not accepting a frivolous offer. It is up to Rasekh to prove that if Appellant had accepted the offer from Mr. Roberts he would have been able to come up with the down payment and made the contract payments thereafter. No proof has been made to this court that the offer was bone fide or that Mr. Roberts would have performed any better if that offer had been accepted than he did when his later offer to lease was accepted. If there was any evidence that Roberts was capable of performing on his offer Rasekh could have presented it to this court and did not.

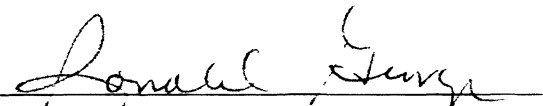
VII CONCLUSION

The court erred in applying the law in determining that there was no statutory imposed fiduciary duty. The court also erred in applying the law in determining that the statute of frauds applied.

Either Bingham had no duty to present summary judgment evidence of a confidential relationship or in the alternative sufficient summary judgment evidence was presented to present to create a factual issue concerning the existence of a confidential relationship. Bingham presented sufficient summary judgment evidence of a breach of fiduciary duty by alleging that Rasekh induced her to purchase the Hirschi Center by telling her that it was a good investment, that she had no risk, that he would buy it back from her if it didn't work out and by telling her to ignore the advise of her family and friends not to buy the Hirschi Center. In addition Bingham presented sufficient summary judgment evidence of negligent misrepresentations.

Summary Judgment should be reversed and Bingham should be allowed to persuade a jury that there was breaches of fiduciary duty and negligent misrepresentations.

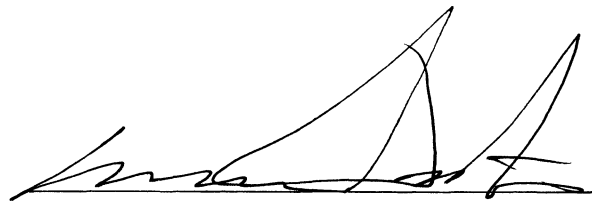
Respectfully submitted this 16th day of August, 2002.


Ronald George, attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned, hereby certifies that on the 16nd day of August, 2002, that two copies of the Appellants Main Brief on Appeal and the Appellant's Addendum in Support of her Brief were mailed postage prepaid to the following:

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

MARIE BINGHAM,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 970901897
vs.	:	
RANDAL ROBERTS, MICHAEL DRURY,	:	
VRUtah, Inc., a Utah Corporation,	:	
KAL RASEKH, an individual,	:	
COLDWELL BANKER PREMIER REALTY,	:	
INC., a Utah Corporation,	:	
HARVEY C. HIRSCHI and LOIS R.	:	
HIRSCHI,	:	
Defendants.	:	

FILED DISTRICT COURT
Third Judicial District

OCT 10 2000

By 151 SALT LAKE COUNTY
Deputy Clerk

This matter was before the Court for oral argument on defendants VR Utah, Drury and Rasekh's Motions for Summary Judgment. The Court had previously granted Summary Judgment as to defendants Hirschi by way of Minute Entry, dated August 14, 2000.

On September 18, 2000, the Court heard oral argument from counsel for the moving defendants and the plaintiff. The Court took the matter under advisement at the conclusion of oral argument to consider the arguments presented and to once again review the legal authorities submitted by the parties. The Court has accomplished those tasks and being fully advised, enters the following Memorandum Decision.

Dealing first with the Motion of VR Utah and Michael Drury, the Court is satisfied that that Motion must be granted. The substance of the plaintiff's claims against these defendants are that Drury promised to sell the property for \$1 million within three months and that if it could not be sold, he would release the listing, which was for one year, that defendants VR Utah and Drury failed to use reasonable and acceptable efforts to sell the property, and, finally, defendants failed to release the listing timely, based upon the claimed oral promise to sell within three months.

In response to those claims, the defendants Drury and VR Utah contend initially that the plaintiff, by accepting VR Utah's Release agreement, is estopped from asserting claims against the defendants. The plaintiff counters that she did not sign the Release agreement, but in her deposition the plaintiff apparently testified under oath that she accepted the Release agreement. Accordingly, the defendants are entitled to Summary Judgment on that issue alone.

Further, the plaintiff's claim that there was an oral promise to sell the property for \$1 million within three months or release the listing is not well taken. There was an agreement between the parties for listing the property that does not provide as the plaintiff suggests. The agreement does not provide for selling the

property within three months and does not provide that if it is not sold within three months, that the listing agreement would be revoked. A reading of the document shows it to be an integrated document and it specifically indicates that there are no oral promises or agreements other than what is contained in the document.

Based upon the foregoing, as well as the other arguments asserted by counsel for defendants Drury and VR in its moving papers and in oral argument, the Court is satisfied that there are no genuine issues of material fact, and further that the defendants Drury and VR are entitled to Summary Judgment on the plaintiff's claims.

The defendants also seek an award of attorney's fees. Paragraph 13 of the listing agreement provides that if litigation is commenced incident to the listing agreement, that the defendants are entitled to recover reasonable attorney's fees, together with costs and expenses. Accordingly, the Court is required to grant the defendants' request for fees based upon the listing agreement between the plaintiff and the defendants VR Utah and Drury. Counsel for defendants may submit an appropriate Affidavit with the Order granting Summary Judgment. The Order granting Summary Judgment and awarding fees should be prepared in such a fashion so as to allow the Court to insert an amount of attorney's fees once

the Court has reviewed the defendants' counsel's Affidavit in connection therewith.

Turning to the Motion for Summary Judgment sought by defendant Kal Rasekh, the Court is equally convinced that it is required to grant Summary Judgment in favor of defendant Rasekh and against the plaintiff on the plaintiff's claims against said defendant.

The plaintiff claims that there was a confidential relationship between herself and the defendant Rasekh, and that that confidential relationship creates a fiduciary duty. In the first instance, a close personal relationship does not necessarily create a fiduciary duty. The duty is created by law for a real estate agent, and a fiduciary obligation, to the extent that the plaintiff would have this Court define the same, is not required of a real estate agent. The plaintiff's claims that she had no control over her free will and the decisions she made to buy this property is belied by the fact that she did conduct an independent investigation, consulted an accountant, and consulted a trusted family member who, in fact, recommended against the purchase. There is no evidence in the record that would support a submission to the jury that the plaintiff's ability to make her own decisions had been overpowered by the defendant Rasekh because of their personal relationship.

The plaintiff has conceded the fifth cause of action against defendant Rasekh on the basis of conflict of interest.

Finally, the plaintiff asserts that defendant Rasekh made an oral promise to her that he would sell the property if the purchase she was making did not work out. While that oral promise, the existence of which is disputed by defendant Rasekh, would create a question of fact that would prohibit Summary Judgment, the plaintiff's own actions prohibiting defendant Rasekh from attempting to resell the property after the plaintiff determined that the purchase was inappropriate, precludes her claim as a matter of law. Immediately after purchasing the property, the plaintiff granted an exclusive listing for one year to Drury and VR Utah. Under that listing agreement, defendant Rasekh could not have undertaken to sell the property, assuming for the sake of this Motion that there was an oral promise to do so. Plaintiff's own actions have prohibited defendant Rasekh from complying with the oral promise that the plaintiff claims existed.

Defendant Rasekh had no legal duty to investigate, as real estate agent in this matter, for both the seller and plaintiff/buyer. The fact that he did not know of the claimed falsities of the Hirschi's (previously dismissed) is undisputed. As previously indicated, Utah case law clearly indicates that real

estate agents are not expected and not required to investigate properties they are selling.

Finally, the plaintiff claims that there was an oral agreement on the part of defendant Rasekh to repurchase the center if it was unprofitable. That oral agreement is unenforceable under the statute of frauds, the plaintiff's arguments notwithstanding.

Finally, the plaintiff claims that defendant Rasekh was unjustly enriched as a result of the November, 1995, foreclosure. As a matter of law, there is no evidence to support an allegation of unjust enrichment for Mr. Rasekh after the property was foreclosed upon by the Hirschis, in trying to sell the property on their behalf.

For the foregoing reasons, together with the reasons set forth by counsel for Rasekh in both the written submissions and oral argument, the defendant's Motion is granted.

Defendant Rasekh is apparently seeking fees based upon the listing agreements of September 6, 1995, and October 27, 1995. The listing agreements above-referenced are not the basis upon which this Court is granting Summary Judgment, and accordingly there is no basis to award fees in favor of the defendant Rasekh and against the plaintiff. To the extent that defendant Rasekh is seeking fees, those are denied.

The Court will expect Orders granting Summary Judgment as to defendants Drury and VR, and defendant Rasekh, to be submitted in accordance with Rule 52(a) of the Utah Rules of Civil Procedure, specifically setting forth the basis upon which this Court is granting Summary Judgment.

Dated this 10 day of October, 2000.

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TIMOTHY R. HANSON
DISTRICT COURT JUDGE