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Marie Bingham v. Randal Roberts, Michael Drury,
VRUtah, Inc., a Utah Corporation, Kal Rasekh, an
individual, Coldwell Banker Premier Reality, INC.,
a Utah corporation, Harvey C. Hirschi and lois R.
Hirschi, individuals : Brief of Appellee

Utah Court of Appeals

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Paul D. Veasy; R. David Grant; Parsons, Behle & Latimer; Attorneys for Defendant and Appellee.
Ronald S. George; Attorney for Plaintiff and Appellant.

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IN THE UTAH COURT OF APPEALS

MARIE BINGHAM,

Plaintiff and Appellant,

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, individuals,

Defendants.

KAL RASEKH,

Defendant and Appellee.

Appellate Case No. 20010651-CA

BRIEF OF THE APPELLEE

**Appeal from a Judgment of the Third Judicial District Court, Salt Lake County,
Utah, Honorable Timothy R. Hanson**

RONALD S. GEORGE (7721)
Attorney for Plaintiff and Appellant
3804 Highland Drive, No. 8
Salt Lake City, Utah 84106

PAUL D. VEASY (3964)
R. DAVID GRANT (6233)
PARSONS BEHLE & LATIMER
Attorneys for Defendant and Appellee Kal
Rasekh
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84145-0898

ORAL ARGUMENT REQUESTED

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Attorneys for Defendant and Appellee Kal
Rasekh
201 South Main Street, Suite 1800
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JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2002).

STATEMENT OF ISSUES

I. Did the trial court correctly determine that a fiduciary obligation, to the extent that Marie Bingham (“Bingham”) would have the court define the same, is not required of a limited real estate agent?

“In considering an appeal from a grant of summary judgment, [the appellate court] view[s] the facts in a light most favorable to the losing party below ... [a]nd in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, [the appellate court] give[s] no deference to the trial court’s conclusions of law: those conclusions are reviewed for correctness.” Blue Cross and Blue Shield of Utah v. State, 779 P.2d 634, 636 (Utah 1989) (citations omitted).

This issue was preserved in the trial court. R. at 935-37; at 1074-75.

II. Did the trial court correctly determine that, whether or not a confidential relationship existed between Bingham and Kal Rasekh (“Rasekh”) outside of Bingham’s purchase of the Hirschi Center, Bingham conducted her own independent investigations of the Hirschi Center, thus rebutting any inference of a confidential relationship in connection with Bingham’s purchase of the Hirschi Center?

“In considering an appeal from a grant of summary judgment, [the appellate court] view[s] the facts in a light most favorable to the losing party below ... [a]nd in determining whether those facts require, as a matter of law, the entry of judgment for the

prevailing party below, [the appellate court] give[s] no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." Blue Cross, 779 P.2d at 636 (citations omitted).

This issue was preserved in the trial court. R. at 1074; see also R. at 1072-73.

III. Did the trial court correctly determine that any alleged oral promise by Rasekh to purchase the Hirschi Center from Bingham in the event it was unprofitable was unenforceable under the Utah statute of frauds?

"In considering an appeal from a grant of summary judgment, [the appellate court] view[s] the facts in a light most favorable to the losing party below ... [a]nd in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, [the appellate court] give[s] no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." Blue Cross, 779 P.2d at 636 (citations omitted).

This issue was preserved in the trial court. R. at 938-39; at 1075-76; at 1078-79.

IV. Did the trial court correctly determine that Bingham's actions that prevented Rasekh from selling the Hirschi Center preclude her claim for breach of any alleged oral promise to sell the Hirschi Center in the event it was unprofitable?

"In considering an appeal from a grant of summary judgment, [the appellate court] view[s] the facts in a light most favorable to the losing party below ... [a]nd in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, [the appellate court] give[s] no deference to the trial court's

conclusions of law: those conclusions are reviewed for correctness.” Blue Cross, 779 P.2d at 636 (citations omitted).

This issue was preserved in the trial court. R. at 1076-78.

V. Did the trial court correctly determine that Rasekh had no duty to investigate the truth or falsity of the alleged misrepresentations regarding the Hirschi Center?

“In considering an appeal from a grant of summary judgment, [the appellate court] view[s] the facts in a light most favorable to the losing party below ... [a]nd in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, [the appellate court] give[s] no deference to the trial court’s conclusions of law: those conclusions are reviewed for correctness.” Blue Cross, 779 P.2d at 636 (citations omitted).

This issue was preserved in the trial court. R. at 933-35.

VI. Did the trial court correctly determine that Bingham did not rely or could not reasonably have relied on any alleged misrepresentations told Bingham by Rasekh regarding the Hirschi Center given that she conducted her own independent investigations?

“In considering an appeal from a grant of summary judgment, [the appellate court] view[s] the facts in a light most favorable to the losing party below ... [a]nd in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, [the appellate court] give[s] no deference to the trial court’s conclusions of law: those conclusions are reviewed for correctness.” Blue Cross, 779 P.2d at 636 (citations omitted).

This issue was preserved in the trial court. R. at 1071-73.

DETERMINATIVE PROVISIONS

Utah Code Ann. § 25-5-3 (1998). Leases and contracts for interest in lands.

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

Utah Admin. R. 162-6.2.16.3 (2002). Duties of a limited agent.

A principal broker and licensees acting on his behalf who act as agent for both seller and buyer, or lessor and lessee, commonly referred to as “dual agents,” are limited agents since fiduciary duties owed to seller and to buyer, or to lessor and lessee, are inherently contradictory. A principal broker and licensees acting on his behalf may act in this limited agency capacity only if the informed consent of both buyer and seller, or lessor and lessee, is obtained.

Utah Admin. R. 162-6.2.16.3.2 (2002).

[A] limited agent owes the following fiduciary duties to all parties:

- (a) Obedience, which obligates the limited agent to obey all lawful instructions from either the buyer or the seller, lessor and lessee, consistent with the agent’s duty of neutrality;
- (b) Reasonable care and diligence;
- (c) Holding safe all money or property entrusted to the limited agent; and
- (d) Any additional duties created by the agency agreement.

STATEMENT OF THE CASE

A. Nature of the Case.

This dispute involves an attempt by Bingham, the purchaser of certain property located at 9825 S. 1300 E., Sandy, Utah, that included a home and a day-care/reception facility (the “Hirschi Center”), to blame the seven defendants involved in the transaction for her decision to purchase the Hirschi Center and to immediately thereafter attempt to sell the Hirschi Center for a profit, and her loss of the Hirschi Center to foreclosure. This appeal involves only her attempt to blame her real estate agent, Kal Rasekh, for her decision to purchase and sell the Hirschi Center, and her loss of the Hirschi Center to foreclosure. According to Bingham, Rasekh in various ways guaranteed the success of her purchase.

On October 3, 1994, Bingham purchased the Hirschi Center for \$800,000. R. at 62, ¶ 44; at 696, ln. 17-19; at 756, ln. 8-13; at 845. The sellers, defendants Harvey C. and Lois R. Hirschi (the “Hirschis”), took back a note and trust deed for \$600,000 of the purchase price. R. at 757, ln. 14-22; at 758, ln. 7-19; at 845; at 848-52; at 854-56. Two weeks after the closing of her purchase, and independent of Rasekh, Bingham listed the Hirschi Center for sale a price of \$1,000,000 with defendants Michael Drury (“Drury”) and VRUtah, Inc. (“VRUtah”). R. at 723, ln. 1 to 724, ln. 16; at 834-35. During March and April 1995, Bingham and defendant Randal Roberts (“Roberts”) exchanged offers and counteroffers for purchase by Roberts of the Hirschi Center. R. at 762, ln. 1 to 763, ln. 2; at 732, ln. 1-11; at 865-66; at 868-71. Instead, in June, 1995, Bingham entered into a commercial lease agreement with Roberts that ultimately failed. R. at 765, ln. 12 to

766, ln. 13; at 887-908; at 767, ln. 3-8; at 768, ln. 1-25. Bingham did not sell the Hirschi Center. On November 14, 1995, the Hirschis foreclosed their trust deed, approximately thirteen months after Bingham purchased the Hirschi Center. R. at 762, ln. 6 to 763, ln. 19; at 67 ¶ 69-70; at 932 ¶ 22; at 1014 ¶ 40.

Seventeen months later, on March 17, 1997, Bingham filed her Complaint initiating this action asserting two causes of action solely against Roberts for breach of the lease agreement and for fraud with regard to alleged misrepresentations regarding the lease. R. at 1-22. On or about March 28, 1998 or three and one half years after her October 3, 1994 purchase of the Hirschi Center, Bingham filed her Amended Complaint that includes fourteen causes of action against Roberts and the other six defendants. Six of the causes of action were against Rasekh. R. at 53-92.

B. Course of Proceedings.

Over the course of the proceedings at the trial court, Bingham either dismissed the defendants based on settlements, or the defendants, including Rasekh, filed motions for summary judgment. Rasekh moved the trial court for entry of summary judgment dismissing Bingham's claims against Rasekh, including the Third Cause of Action for negligent misrepresentation, the Fourth Cause of Action for breach of fiduciary duty, the Fifth Cause of Action for conflict of interest, the Sixth Cause of Action for breach of contract, the Twelfth Cause of Action for unjust enrichment, and the Fourteenth Cause of Action for punitive damages. R. at 653-56.

Rasekh argued that Bingham had expressly consented to Rasekh's representation of both Bingham as purchaser and the Hirschis as sellers of the Hirschi Center, and thus

the relationship and duties between Bingham and Rasekh were defined by Utah Admin. R. 162-6-2.16.3.2 (2002). R. at 936; at 1074. Rasekh argued that he did not know the alleged falsity of any alleged misrepresentations, and that, as a real estate agent, he had no duty to investigate. R. at 933-35. Rasekh also argued that Bingham could not have reasonably relied on any alleged misrepresentations made by Rasekh regarding the Hirschi Center because of the information she received in conducting her own independent investigations regarding the Hirschi Center. R. at 935; at 1071-74. Rasekh further argued that any alleged oral promise to purchase the Hirschi Center in the event it was unprofitable was unenforceable under the Utah statute of frauds, and that Bingham's actions prevented performance of any alleged oral promise to sell the Hirschi Center in the event it was unprofitable. R. at 938-39; at 1075-78. Finally, Rasekh argued that he was not unjustly enriched by the Hirschis' foreclosure as a matter of law, and the facts of the case did not justify imposition of punitive damages. R. at 938-42.

C. Disposition at the Trial Court.

On October 10, 2000, the trial court issued its Memorandum Decision in which it granted Rasekh's Motion for Summary Judgment as well as defendants Michael Drury and VRUtah's Motion for Summary Judgment. R. at 1154-61. On November 14, 2000, the trial court entered its Determination of Non-Disputed Facts and Conclusions of Law Regarding Rasekh's Motion for Summary Judgment ("Findings and Conclusions") and Judgment Dismissing Claims Against Defendant Kal Rasekh. R. at 1183-67; at 1198-1202 (copies included in Addendum).

D. Statement of Facts.

The undisputed facts material to the trial court's grant of summary judgment in favor of Rasekh are as follows:

1. On or about June 16, 1994, the Hirschis signed a one year listing agreement, listing the Hirschi Center for sale with a listing price of \$900,000 with Coldwell Banker Premier Realty ("Coldwell") as the listing broker and Rasekh as the listing agent. R. at 664a, ln. 7-14; at 665, ln. 15-21.

2. In July 1994, Rasekh contacted Bingham and informed her that the Hirschi Center was for sale. R. at 675, ln. 11 to 678, ln. 22. On July 20, 1994, Bingham signed a Real Estate Purchase Contract offering to purchase the Hirschi Center for \$900,000, with certain contingencies and providing for seller financing of a portion of the purchase price (the "Hirschi Center REPC"). R. at 679, ln. 23 to 680, ln. 1; at 810-12. The Hirschi Center REPC was a standard form real estate purchase contract, not a contract for the sale of a business. R. at 810-11.

3. Between July 23 and August 2, 1994, the Hirschis signed four counteroffers to the Hirschi Center REPC in which the Hirschis proposed an increased down payment and modification of the financing terms, and certain other modifications to the proposed sale of the Hirschi Center to Bingham. R. at 753, ln. 5 to 755, ln. 4; at 813-19. Bingham submitted at least two of her own counteroffers. R. at 841; at 843. On August 3, 1994, Bingham signed the fourth counteroffer to the Hirschi Center REPC from the Hirschis. R. at 681, ln. 24 to 683, ln. 14; at 755, ln. 5-9; at 816. At that time, Bingham understood she was buying the Hirschi Center. R. at 682, ln. 15-25.

4. The Hirschi Center REPC, as amended, conditioned Bingham's purchase of the Hirschi Center on her approval of a professional inspection. R. at 478 ln. 1-13. Bingham did not think about obtaining a professional inspection. R. at 478 ln. 14-25. Bingham made no written objection about the results of an inspection, as the Hirschi Center REPC, as amended, allowed her to do. R. at 481, ln. 19-22.

5. Bingham initialed the Confirmation of Agency Disclosure paragraph 5 in the Hirschi Center REPC, acknowledging that Rasekh represented both the buyer and the seller in the transaction. R. at 709, ln. 13 to 710, ln. 6. Bingham understood at the time she signed her initials on the Confirmation of Agency Disclosure paragraph in the Hirschi Center REPC that Rasekh represented both the buyer and seller in connection with the sale of the Hirschi Center. R. at 710, ln. 2-6.

6. Between July 20 and October 3, 1994, Bingham visited the Hirschi Center between five and eight times independent of Rasekh. R. at 689, ln. 3-9. For the first visit, Bingham had an appointment with the Hirschis and the Hirschis showed Bingham the entire property for sale, including the house and center. R. at 687, ln. 22 to 688, ln. 1. Bingham went and looked at the house on at least two additional occasions and looked at the center several times on her own. R. at 687, ln. 7-21. On at least one occasion, Bingham took her boyfriend, Stanley Spafford ("Spafford"), to visit the Hirschi Center. R. at 691, ln. 11 to 692, ln. 1; at 774, ln. 15-20; at 781, ln. 9-20. Bingham had access to the buildings prior to the closing, and, in fact, Spafford concluded that the decor was a little outdated, that the carpet needed to probably be replaced and the buildings could have used a fresh coat of paint. R. at 690, ln. 8-25; at 781, ln. 21 to 783, ln. 5. Bingham

also recognized, prior to the closing, that the buildings needed to be painted, and the carpet replaced. R. at 713, ln. 7 to 714, ln. 22; at 715, ln. 17 to 716, ln. 24.

7. Prior to the closing on the sale of the Hirschi Center, the Hirschis provided Bingham copies of financial statements showing annual receipts and disbursements for the Hirschi Center for most years for the period from 1984 to 1994. R. at 713, ln. 8-20; at 824-832.

8. Bingham and Spafford visited with the Hirschis' accountant, Vincent Tilby ("Tilby") regarding the financial statements after Bingham received them and before the closing. R. at 689, ln. 10-18; at 701, ln. 19 to 703, ln. 22; at 779, ln. 1 to 780, ln. 13. Tilby was cooperative and provided Bingham and Spafford with the information they wanted to know, and did not refuse to answer any questions. R. at 780, ln. 9-13; at 708, ln. 22-24. After reviewing the financial statements, Spafford discussed the financial statements with Bingham, and discussed with her the fact that, with the required additional mortgage payment arising from Bingham's purchase of the Hirschi Center, it would be tough financially or would be a break-even. R. at 775, ln. 14 to 778, ln. 22. The financial statements provided to Bingham showed that the daycare business had no profit. R. at 708, ln. 15-21.

9. Some time prior to closing, upon Bingham's request, the Hirschis agreed to reduce the purchase price for the Hirschi Center from \$900,000 to \$800,000. R. at 696, ln. 17 to 698, ln. 21. The more Bingham looked at the Hirschi Center, she wanted to purchase it for less based on its condition. R. at 717 ln. 22 to 718, ln. 16.

10. There is no evidence that Rasekh knew of the alleged falsity of any of the alleged misrepresentations regarding the condition or viability of the Hirschi Center. R. at 736, ln. 9-15; at 737, ln. 22 to 738, ln. 1; at 739, ln. 1-4; at 740, ln. 23 to 741, ln. 1; at 742, ln. 6-9; at 743, ln. 7-10; at 744, ln. 15-18; at 745, ln. 16-19; at 746, ln. 11-14; at 747, ln. 18-21; at 748, ln. 15-18; at 749, ln. 14-17; at 750, ln. 8-11; at 751, ln. 3-6.

11. Shortly before the scheduled closing and after Rasekh had returned from a trip to Egypt, Bingham went to a face-to-face meeting with the Hirschis at the house, and Bingham told Rasekh she was not going to buy the Hirschi Center. R. at 693, ln. 20 to 694, ln. 10. The Hirschis were scheduled to leave shortly to Russia on a church mission, and Rasekh was upset that Bingham would try at the last minute to renegotiate. R. at 694, ln. 5 to 696, ln. 19; at 791, ln. 14 to 794, ln. 14. According to Bingham and at Bingham's insistence, Rasekh negotiated some final concessions from the Hirschis, and the final reduction of price to \$800,000. R. at 695, ln. 22 to 696, ln. 19. Shortly thereafter, Bingham paid an additional amount in earnest money. R. at 699, ln. 20 to 700, ln. 16.

12. The closing of the sale of the Hirschi Center from the Hirschis to Bingham pursuant to the Hirschi Center REPC as amended took place on October 3, 1994. See R. at 62, ¶ 44. The Hirschis took back an All-Inclusive Trust Deed and All-Inclusive Note Secured by All-Inclusive Trust Deed in the amount of \$600,000, both dated October 3, 1994, for a portion of the purchase price. R. at 757, ln. 14-22; at 758, ln. 7-19; at 845; at 848-52; at 854-56. Bingham paid \$181,000 in cash for the purchase of the Hirschi Center. R. at 756, ln. 17-23; at 752, ln. 2-24. Also, Coldwell Banker Premier agreed as an

accommodation to defer a portion of its commission, and Bingham signed a note payable to Coldwell Banker Premier and Rasekh in the amount of \$18,762.74. R. at 795, ln. 21 to 797, ln. 19; see also R. at 758, ln. 21 to 759, ln. 8; at 760, ln. 4-12; at 858; at 860-61.

13. On October 17, 1994, two weeks after closing her purchase of the Hirschi Center, Bingham listed the Hirschi Center for sale with VRUtah on a one-year exclusive listing with a listing price of \$1,000,000 (the “VRUtah Listing”). R. at 723, ln. 1 to 724, ln. 16; at 834-35. In the VRUtah Listing, “family problems” is listed as the reason for the sale. R. at 834. On March 8, 1995, Bingham signed an Addendum to the VRUtah Listing, reducing the listing price to \$900,000. R. at 725, ln. 16-22; at 837.

14. Bingham thought the Hirschi Center would sell within three months of listing it for sale with VRUtah. R. at 726, ln. 3-13; at 719, ln. 7-13. Bingham did not pay her tax obligations, alarm monitoring, and other obligations associated with the Hirschi Center, and downsized the daycare business, just maintaining it. R. at 727, ln. 8-21; at 728, ln. 2-11. During June, July and August of 1995, Bingham had only a few daycare participants. R. at 730, ln. 16-23. Bingham understood that it would have been a very good decision to not make further expenditures if the Hirschi Center had sold quickly because she would have gotten her money out plus a profit and not had to put any money into it. R. at 728, ln. 18 to 729, ln. 5. The Hirschi Center did not sell within three months for the anticipated price, and Bingham’s obligations, including those to the Hirschis, were past due. R. at 727, ln. 8-21; at 728, ln. 2-11; at 839.

15. Harvey Hirschi sent Bingham a letter dated January 6, 1995, in which Mr. Hirschi informed Bingham that she was obligated to reimburse Mr. Hirschi \$3,846.50 for taxes paid on the Hirschi Center. R. at 761, ln. 15-24; at 863.

16. During March and April 1995, Bingham and Roberts exchanged offers and counteroffers for purchase by Roberts of the Hirschi Center. R. at 762, ln. 1 to 763, ln. 16; at 865-66; at 868-71; at 873-75.

17. On or about April 5, 1995, Bingham received a Notice of Default with regard to the \$600,000 note and deed of trust Bingham had given the Hirschis as part of the purchase price for her purchase of the Hirschi Center, stating that Bingham was in default of her obligation to reimburse the Hirschis \$3,846.59 for taxes, and to pay attorneys' fees and costs in the amount of \$700.00, plus late charges of \$530.96. R. at 763, ln. 21 to 764, ln. 6; at 877-78.

18. Bingham received additional Notices of Default dated April 28, 1995 and May 18, 1995, stating that Bingham was in default of her obligation to reimburse the Hirschis for taxes, and to pay additional attorneys' fees and costs, plus late charges. R. at 880-81; at 883-85.

19. After rejecting Roberts' offers to purchase the Hirschi Center which would have involved \$150,000 cash up front, Bingham entered into a Commercial Property Lease with an option to purchase with Roberts dated June 1, 1995. R. at 765, ln. 24 to 766, ln. 13; at 887-908. Roberts did not make the lease payment due July 1, 1995 or any subsequent payment. R. at 767, ln. 3-8. Bingham sent a Notice of Default dated August

16, 1995 to Roberts declaring the Commercial Property Lease to be in default for failure to make the required payments. R. at 768, ln. 1-25.

20. Bingham received a Notice of Default dated July 10, 1995, stating that Bingham was in default of her obligation to pay \$5,275.98 due June 1, 1995, and to pay attorneys' fees and costs of \$1,300.00, plus late charges of \$1,312.70. R. at 910-11. Based on this Notice of Default, the Hirschis were statutorily authorized to instruct the trustee on their trust deed to conduct a trustee's sale of the Hirschi Center in November 1995, after giving the statutorily required notice of the sale. See Utah Code Ann. § 57-1-24 and -25 (Supp. 2002).

21. On or about September 6, 1995, after receiving four notices of default, Bingham listed the Hirschi Center for sale with Rasekh on a one-month listing. R. at 769, ln. 19 to 770, ln. 6; at 798, ln. 25 to 800, ln. 20; at 913-14. The listing expired and Bingham did not renew the listing until October 27, 1995, when Bingham listed the Hirschi Center for sale with Rasekh on a listing to expire February 27, 1996. R. at 770, ln. 23 to 771, ln. 18; at 800, ln. 21 to 801, ln. 15; at 916-17.

22. Bingham did not sell the Hirschi Center. R. at 762, ln. 6 to 763, ln. 19. Thereafter, on November 14, 1995, the Hirschis foreclosed their trust deed taken to secure payment of the purchase price for the Hirschi Center from Bingham. R. at 67, ¶ 69-70; at 449.

23. On January 20, 1996, the Hirschis signed a new listing agreement with Rasekh, providing for an exclusive right to sell the Hirschi Center for six months and providing for a 6% commission. R. at 786, ln. 11 to 787, ln. 7; at 919-20. The Hirschis

closed on April 29, 1996 a sale of the Hirschi Center to a group of investors including Nancy Adair, Raed Salem, and Nivin Abuzeid. R. at 788, ln. 16 to 789, ln. 25; at 665, ln. 18 to 668, ln. 12. None of the money for the April 1996 purchase of the Hirschi Center came from Rasekh, and he did not have any financial interest in the purchase other than acting as real estate agent. R. at 790, ln. 1-18.

SUMMARY OF ARGUMENTS

Rasekh was a limited real estate agent for the Hirschi Center. The Hirschis and Bingham consented to Rasekh's representation of both the Hirschis as sellers and Bingham as purchaser of the Hirschi Center. Rasekh's non-contractual duties were defined in Utah Admin. R. 162-6.2.16.3.2 (2002), and do not include the duty of full disclosure. Even if Rasekh had the duty of full disclosure, that duty involves only the duty to make full disclosure of the known material facts, and does not include duties defined by Bingham, including the duty to fully investigate any possible ramifications of a purchase. As a matter of sound public policy, a real estate agent is not an insurer to a purchaser of the success of a purchase of real property.

Bingham argues that her relationship with Rasekh outside of her purchase of the Hirschi Center creates an issue of fact as to whether she was in a confidential relationship with Rasekh. Whether or not Bingham had a confidential relationship with Rasekh outside of her purchase of the Hirschi Center, it is undisputed that Bingham conducted her own independent investigations regarding her purchase of the Hirschi Center rebutting any inference of a confidential relationship in connection with that purchase.

Bingham's claim of Rasekh's alleged oral promise to purchase the Hirschi Center from Bingham in the event it was unprofitable is unenforceable pursuant to the Utah statute of frauds. Bingham argues that Rasekh is a fiduciary, and as such, the statute of frauds does not apply to the alleged promise. First, Rasekh does not have the fiduciary duties as asserted by Bingham. Second, the cases cited by Bingham for the proposition that there is a general exception to the statute of frauds applicable to fiduciaries are based on two inapplicable narrow exceptions to the statute of frauds.

Insofar as Rasekh made an alleged promise to sell the Hirschi Center in the event it was unprofitable, such a promise was unenforceable by Bingham. Within two weeks of her purchase of the Hirschi Center, Bingham listed the Hirschi Center for sale for \$1,000,000, or \$200,000 more than she purchased it for under a one-year exclusive listing with VRUtah. Until the property was released from the listing, VRUtah was Bingham's exclusive agent to sell the Hirschi Center. Further, prior to VRUtah's release of its one-year listing, Bingham had entered into a lease of the Hirschi Center with an option to purchase with Roberts. In the interim, Bingham had failed to fulfill her monetary obligations in connection with the Hirschi Center. By the time she entered into a one month listing with Rasekh, the Hirschi Center was already in foreclosure. When Bingham entered into a subsequent four-month listing with Rasekh, the Hirschi Center was weeks from foreclosure. By effectively preventing fulfillment of any alleged oral promise by Rasekh to sell the Hirschi Center for Bingham, she relinquished or waived any right to enforce the alleged oral promise.

With regard to Bingham's claim for negligent misrepresentation, it is undisputed that Rasekh did not know of the falsity of any alleged misrepresentations. A real estate agent does not have, and should not have as a matter of sound public policy, a duty to investigate properties being listed. Also, Bingham conducted her own investigations regarding the Hirschi Center, and did not, as a matter of law, rely on any alleged misrepresentations by Rasekh.

The Court should affirm the trial court's grant of summary judgment in favor of Rasekh.

ARGUMENT

Bingham has mischaracterized the rulings of the trial court and ignored the undisputed evidence that supports those rulings as a matter of law. Bingham lists alleged "facts" without appropriate citation to the record that allegedly create a genuine issue of fact that precludes the trial court's entry of summary judgment. See Utah R. App. P. 24(a)(7), (9). However, "[a]lthough the facts and the inferences from the facts properly before the court are to be construed in favor of the opponent on a motion for summary judgment, the mere existence of issues of fact do not preclude summary judgment. The issues of fact must be material to the applicable rule of law." Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983).

The trial court's rulings are all supported by undisputed evidence in the record. Any disputed facts are not material to the grant of summary judgment. As a matter of law, Bingham cannot evade her personal responsibility for her decision to purchase the Hirschi Center by claiming liability on the part of Rasekh.

The position taken by Bingham is that Rasekh was an insurer of the success of her purchase of the Hirschi Center, because he did not advise her against the investment. A real estate agent's duties have never extended so far, and as a matter of sound public policy, should not extend so far. Whether Bingham characterizes Rasekh's alleged statements to Bingham that the purchase of the Hirschi Center involved no risk as a misrepresentation, as a fiduciary duty, or as a promise, Bingham's claims fail as a matter of law. A real estate agent is not and should not be an insurer of the success of a real estate purchase of his client as a matter of sound public policy.

I. THE TRIAL COURT CORRECTLY DETERMINED THAT RASEKH OWED NO DUTY TO BINGHAM THAT WAS BREACHED.

In the Appellant's Main Brief ("Appellant's Brief"), Bingham acknowledges that Rasekh was a limited agent under Utah law. See Appellant's Brief at 14. Nonetheless, Bingham argues that "[t]he court was in error when it found no statutory fiduciary duty to appellant." Id. The court did not conclude that no duty was owed to Bingham, but rather concluded that Rasekh's duties did not extend as far as suggested by Bingham.

The court stated:

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 [appellant] 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.

R. at 1157 (emphasis added).

In the Amended Complaint, Bingham claims that Rasekh had a duty to investigate the business run in the Hirschi Center, determine it was a bad investment for Bingham, and advise her not to make the investment. R. at 77, ¶ 114. According to Bingham in the Amended Complaint, Rasekh had a duty to advise Bingham that she did not have sufficient financial resources to operate the business of the Hirschi Center, and that the business would be immediately insolvent. R. at 76, ¶¶ 109-10. Now on appeal, Bingham asserts additional breaches that she argues would constitute breaches of an alleged fiduciary duty by Rasekh. In particular, Bingham asserts that “[h]er claims are that [Rasekh] convinced [Bingham] to purchase the property so that he could earn a large commission, that he mislead [sic] 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.” Appellant’s Brief at 15-16. Each of these claims but the first deals with a different cause of action other than Bingham’s Fourth Cause of Action for breach of fiduciary duty. The second, third and fourth assertions listed deal with Bingham’s claim for negligent misrepresentation. The fifth claim that Rasekh would buy back the property if it wasn’t profitable deals with Bingham’s claim for breach of contract.

It is undisputed that a limited agent's non-contractual duties are limited because of the unique role of a limited agent. As explained in the Utah Administrative Code, "[a] principal broker and licensees acting on his behalf who act as agent for both seller and buyer, or lessor and lessee, commonly referred to as 'dual agents,' are limited agents since the fiduciary duties owed to seller and to buyer, or to lessor and lessee, are inherently contradictory." Utah Admin. R. 162-6.2.16.3 (2002). Accordingly, a limited agent's non-contractual duties are obedience to all lawful instructions, reasonable care and diligence, and holding safe all money or property entrusted to the limited agent. Utah Admin. R. 162-6.2.16.3.2 (2002). Bingham has not cited to any evidence in the record, nor has she alleged, that Rasekh violated any of these non-contractual duties imposed on a limited agent under Utah law.

As a matter of law, the fact that Rasekh earned a partial commission on the sale of the Hirschi Center from the Hirschis to Bingham could not be the basis for a claim of breach of fiduciary duty, because a commission is inherent in virtually every brokerage arrangement. That aspect of the relationship cannot be the basis of a breach of fiduciary duty or every seller or buyer of real property that became dissatisfied with the sale or purchase would have a basis to sue the broker or agent. See Bushnell Real Estate, Inc. v. Nielson, 672 P.2d 746, 751 (Utah 1983) ("The broker is not an insurer of the subsequent performance of the contract . . ."). Further, the fact that Rasekh earned a partial commission on the sale did not breach any of the duties of a limited agent as defined under Utah law. See Utah Admin. R. 162-6.2.16.3.2 (2002).

None of the other alleged breaches of fiduciary duty cited by Bingham breach the duties of a limited agent as defined under Utah law. Rasekh's non-contractual duties would not include a duty to fully investigate the business run in the Hirschi Center, determine it was a bad investment for Bingham, and advise her not to make the purchase. The duty of full disclosure of a buyer's agent is eliminated when the agent is a limited agent representing both the buyer and seller. Compare Utah Admin. R. 162-6.2.16.2(c) (2002) with Utah Admin. R. 162-6.2.16.3.2 (2002). Nonetheless, a real estate agent's duty of full disclosure, when it arises, is to make full disclosure of known material facts, and does not include the duty to fully investigate. Hopkins v. Wardley Corp., 611 P.2d 1204, 1206 (Utah 1980). A real estate agent's duty of full disclosure has never extended to a duty to investigate and disclose all possible ramifications of a transaction.

To require the agent to give the principal notice of any conceivable information which might possibly influence the principal would create an oppressive burden on the agent. Such a rule would lead to the consideration of information extraneous to the issues in the case. It would permit speculation and could easily lead to unwarranted results.

Musselman v. Southwinds Realty, Inc., 704 P.2d 814, 818 (Ariz. Ct. App. 1985).

Further, a real estate agent's fiduciary duties, even if unlimited, would not encompass the duty suggested by Bingham. In Bingham's view, a real estate agent is liable if he fails to advise a client not to make an investment that later goes bad. In other words, under Bingham's theory, a real estate agent is an insurer of the success of his client's investment, unless he advises his client against the investment. A real estate

agent's duties have never extended so far, and, as a matter of policy, should not extend so far. See id. at 816.

The Court should affirm the ruling of the trial court that a fiduciary obligation, to the extent that Bingham has argued, is not required of a real estate agent, particularly not a limited agent, and that Rasekh did not breach any of a limited agent's non-contractual duties under Utah law.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT, WHETHER OR NOT A CONFIDENTIAL RELATIONSHIP EXISTED OUTSIDE OF THE SALE OF THE HIRSCHI CENTER, BINGHAM CONDUCTED HER OWN INVESTIGATIONS OF THE HIRSCHI CENTER INDEPENDENT OF RASEKH AND MADE HER OWN DECISION.

In the Appellant's Brief, Bingham argues that the evidence in the record raises an inference of a confidential relationship because: (1) Bingham was unsophisticated; (2) Bingham did not comprehend the magnitude of her purchase of the Hirschi Center; (3) Bingham believed Rasekh would protect her and look out for her best interests; (4) Bingham reposed complete trust in Rasekh; (5) Rasekh told her to trust his advice over the advice of family members; (6) Rasekh had a personal relationship with the family; and (7) Rasekh became her financial advisor. Appellant's Brief at 19-20. Bingham suggests, therefore, that summary judgment was inappropriate on this issue.

Contrary to Bingham's argument, the trial court did not rule that there was no confidential relationship between Bingham and Rasekh. Rather, the trial court ruled:

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.

R. at 1157. The trial court correctly determined that the undisputed facts established as a matter of law that Bingham did not relinquish control over the decision making process to Rasekh, notwithstanding their relationship.

“The law presumes that one ordinarily makes his or her own judgments, however imperfect, and acts on them; it does not readily assume that one's will has been overborne by another. Therefore, the law does not lightly recognize the existence of a confidential relationship.” Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). “[I]t must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other.” Id. (quoting Bradbury v. Rasmussen, 401 P.2d 710, 713 (Utah 1965)). A confidential relationship will only be found when one party relinquishes control over the decision making process. Von Hake, 705 P.2d at 770. When the evidence of a confidential relationship would not support a verdict, the trial court has a duty to decide the issue. Rhoads v. Publications, Inc., 700 P.2d 840, 846 (Ariz. Ct. App. 1984).

It is undisputed that Bingham did conduct her own investigations regarding her purchase of the Hirschi Center, independent of any input she received from Rasekh. Bingham visited the Hirschi Center at least five times independent of Rasekh, and at least once with her boyfriend. Bingham and her boyfriend visited with the Hirschis' accountant regarding financial statements Bingham had received from the Hirschis. Prior

to closing, Bingham discussed with her boyfriend that the Hirschi Center needed some renovation and that, with the required additional mortgage payment, it would be tough financially. Also, Bingham consulted with her family members, and her brother and other family members advised against purchasing the Hirschi Center. R. at 1054-55 ¶ 21.

It is also undisputed that Bingham decided to list the Hirschi Center with VRUtah on a one-year listing just two weeks after her purchase, with a listing price of \$1,000,000, or \$200,000 more than she purchased it for, all independent of Rasekh.

The undisputed evidence establishes that, as a matter of law, Bingham did not relinquish control over the decision making process to Rasekh with regard to her purchase of the Hirschi Center. The trial court correctly granted summary judgment on this issue.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT ANY ALLEGED ORAL CONTRACT FOR RASEKH TO PURCHASE THE HIRSCHI CENTER WAS UNENFORCEABLE UNDER THE STATUTE OF FRAUDS.

The trial court correctly concluded that any alleged agreement on the part of Rasekh to purchase the Hirschi Center was unenforceable pursuant to the statute of frauds. Bingham admitted that she has no writing with regard to Rasekh's alleged promise. R. at 733, ln. 5-15. It is well established in Utah, both by statute and in the case law, that oral promises involving the purchase or sale of real estate must be in writing to be enforceable. See Chadwick v. Arnold, 95 P. 527, 530 (Utah 1908); Utah Code Ann. § 25-5-3 (1998). Like other statutes of fraud, the Utah statute of frauds with regard to the

enforceability of oral real estate contracts was enacted as a result of long-standing policy determinations.

This case amply illustrates the important policy considerations underlying the statute of frauds in the real estate context. The absence of a writing makes the existence and the terms of the agreement to repurchase uncertain. Indeed, the statute of frauds was designed precisely to prevent litigation such as this, where the parties are entangled in a dispute over what was or was not promised The conflicting evidence and arguments presented to this Court illustrate well the dangers posed by permitting oral real estate transactions. If a court allows parol evidence of an unwritten contract, it can never be certain that it is not perpetuating rather than preventing a fraud.

Seale v. Citizens Savings & Loan Ass'n, 806 F.2d 99, 104 (6th Cir. 1986) (oral agreement to repurchase real property not enforceable because it violated statute of frauds).

In the Appellant's Brief, Bingham argues that the alleged oral promise of Rasekh to purchase the Hirschi Center "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." Appellant's Brief at 20. Bingham is incorrect for two reasons. First, as shown above and as the trial court correctly determined, there was no confidential or fiduciary relationship between Bingham and Rasekh to the extent that Bingham would have the court define the same. Second, a confidential relationship or fiduciary duty does not create some general exception to the applicability of the statute of frauds. Nor do the cases cited by Bingham so hold.

Bingham cites cases that deal with two narrow exceptions to the statute of frauds, one involving knowingly false oral affirmations regarding the credit of a third person, and the other involving constructive trusts. Certain courts have held that the statute of frauds provision that precludes actions on an oral misrepresentation regarding the credit of a third person (see Utah Code Ann. § 25-5-5 (1998)) should not apply if the oral misrepresentations are made by a fiduciary. Four of the authorities cited by Bingham fall within this narrow exception. See, e.g., W.G. Jenkins & Co. v. Standrod, 269 P. 586, 588 (Idaho 1928); Teeling v. Indiana Nat'l Bank, 436 N.E.2d 855, 858-59 (Ind. Ct. App. 1982); Brock and Davis Co. v. Charleston Nat'l Bank, 443 F. Supp. 1175, 1179 (S.D.W. Va. 1977) (citing Standrod case); see also 72 Am. Jur. 2d Statute of Frauds § 176 (1974). Further, other courts have held that the statute of frauds does not apply if a breach of fiduciary duty gives rise to a constructive trust. The other four authorities cited by Bingham fall within this narrow exception. See, e.g., Jarnagin v. Busby, Inc., 867 P.2d 63, 66-67 (Colo. Ct. App. 1993); Crane v. Centerre Bank of Columbia, 691 S.W.2d 423, 426 (Mo. Ct. App. 1985); Swon v. Huddleston, 282 S.W.2d 18, 24 (Mo. 1955); see also John D. Calamari and Joseph M. Perillo, Contracts § 19-46 (3rd ed. 1987). A justification given for this second narrow exception is that a constructive trust, imposed on a “fiduciary, arises by operation of law, and, accordingly, the statute of frauds is no bar.” Mazzera v. Wolf, 183 P.2d 649, 651 (Cal. 1947).

All of the cases cited by Bingham are inapposite. Bingham did not claim that Rasekh made any misrepresentation regarding the credit of a third person, nor did Bingham seek imposition of any constructive trust. Under the facts of this case,

imposition of a constructive trust would be inapplicable. The court should affirm the trial court's determination that the statute of frauds prevents enforcement of any alleged oral agreement to purchase the Hirschi Center.

IV. THE TRIAL COURT CORRECTLY DETERMINED THAT BINGHAM'S ACTIONS PREVENTING RASEKH FROM SELLING THE HIRSCHI CENTER PRECLUDE HER CLAIM FOR BREACH OF ANY ALLEGED ORAL PROMISE TO SELL THE HIRSCHI CENTER IN THE EVENT IT WAS UNPROFITABLE.

In the Appellant's Brief, Bingham argues that Rasekh could have attempted to sell the Hirschi Center while it was listed with VRUtah. Further, Bingham makes the conclusory and unsupported assertion that "VR[Utah] released their [sic] listing in sufficient time to sell the Hirschi Center before it was foreclosed." Appellant's Brief at 21. Bingham also makes the conclusory assertion that "Rasekh made no effort to sell the property either while it was listed or after the listing was released" Id.

In the Memorandum Decision, the trial court stated:

Finally, the [appellant] 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 [appellant's] own actions prohibiting defendant Rasekh from attempting to resell the property after the [appellant] determined that the purchase was inappropriate, precludes her claim as matter of law. Immediately after purchasing the property, the [appellant] 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. [Appellant's] own actions have prohibited defendant Rasekh from complying with the oral promise that the [appellant] claims existed.

R. at 1158.

Bingham's arguments fail. A contracting party may not by willful act or omission make it impossible or more difficult for the other party to perform and then take advantage of the other party's breach. See Cahoon v. Cahoon, 641 P.2d 140, 144 (Utah 1982); Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979). "It has been held for generations that a party to a contract may not interfere with performance by the party to be charged and still enforce the letter of the contract." Roberts v. United States, Great American Ins. Co., 357 F.2d 938, 945 (Cl. Ct. 1966) (quoting Bateson-Stolte, Inc. v. United States, 172 F. Supp. 454, 458 (Cl. Ct. 1959)). "Interference need not make performance impossible or impracticable in the substantive legal sense in order for it to provide an excuse for nonperformance." Murray E. Gildersleeve Logging Co. v. Northern Timber Corp., 670 P.2d 372, 376 (Alaska 1983).

Bingham admits that after the closing on her purchase of the Hirschi Center she believed she could no longer trust Rasekh and "[a]s a result of her friends['] advice she entered into an agreement with Defendant Michael Drury and VRUtah to sell the Hirschi Center" Appellant's Brief, Facts Section ¶¶ 33-34. It is undisputed that she signed a one-year exclusive listing agreement with VRUtah, as the trial court stated in the Memorandum Decision. R. at 723, ln. 1 to 724, ln. 16; at 834-35. The listing price was \$1,000,000, or \$200,000 more than Bingham paid for the Hirschi Center. R. at 834-35. By an addendum dated March 8 1995, Bingham agreed that the listing price would be reduced to \$900,000. R. at 837.

In the Appellant's Brief, Bingham's unsupported conclusion that "VR [Utah] released their listing in sufficient time to sell the Hirschi Center before it was foreclosed" is apparently based on Bingham's factual assertion number 39 in the Appellant's Brief that Bingham "finally obtained a release from VRUtah in June 1995. She then contacted Rasekh and told him VRUtah Brokers had released and that he need [sic] to either buy the Hirschi Center or sell it immediately as I she [sic] would lose her life's savings." Appellant's Brief, Statement of Facts ¶ 39. Bingham admits that Rasekh told her he could not list and sell the Hirschi Center while it was subject to VRUtah's exclusive listing. Appellant's Brief, Statement of Facts ¶ 35. What Bingham fails to disclose is the undisputed fact that, prior to the date of the release signed by VRUtah (see Appellant's Brief, Statement of Facts ¶ 39), Bingham had signed a Commercial Lease as well as an Option to Purchase Property, both dated June 1, 1995, to lease the Hirschi Center to Roberts for a 30-month term, with an option for Roberts to purchase the Hirschi Center. R. at 887-908.

Bingham does not dispute that she chose not to pay her tax obligations, alarm monitoring, and other obligations associated with the Hirschi Center after she listed it for sale with VRUtah. See R. at 727, ln. 8-21; R. at 728, ln. 2-11. It is undisputed that Bingham received notices of default from the successor trustee in connection with the Deed of Trust that Bingham gave to the Hirschis to secure her payment obligation for a portion of the purchase price dated April 5, April 28, May 18, and July 10, 1995. R. at 877-78; at 880-81; at 883-85; at 910-11. Bingham sent her own notice of default to

Roberts dated August 16, 1995 declaring a default in Roberts lease obligations. R. at 768, ln. 1-25.

Then, almost one year from Bingham's purchase of the Hirschi Center and after the Hirschis had commenced foreclosure, Bingham finally entered into a one-month listing agreement with Rasekh in September 1995. R. at 913-14. Bingham then entered into a four-month listing agreement with Rasekh on October 27, 1995, just weeks before the foreclosure sale scheduled to occur on November 14, 1995. R. at 916-17. Bingham asserts without any support that Rasekh made no effort to sell the Hirschi Center after the listing with VRUtah was released, but Bingham has no personal knowledge of what Rasekh did or did not do.

Bingham made it virtually impossible for Rasekh to sell the Hirschi Center by listing it with VRUtah on a one-year exclusive listing, while failing to make her required payments, including her payment obligations to the Hirschis. The listing agreement with VRUtah unambiguously appointed VRUtah as Bingham's exclusive sales agent with regard to the Hirschi Center for the one-year term of the agreement. R. at 834-35; at 1158; cf. Gump & Ayers Real Estate, Inc. v. Domcoy Investors V, 733 P.2d 128, 130 (Utah 1987) (comparable provision). During the term of the agreement, Rasekh could not act as Bingham's sales agent. Insofar as Rasekh did promise to sell the Hirschi Center for Bingham in the event it was not profitable, Bingham in effect waived the right to enforce that promise by choosing instead to enter into a one-year exclusive listing agreement with VRUtah in October 1994 for sale of the Hirschi Center for \$1,000,000

(\$200,000 more than Bingham paid for the Hirschi Center) approximately two weeks after she purchased it.

Moreover, Bingham made it virtually impossible for Rasekh to sell the Hirschi Center when Bingham entered into a lease with Roberts with an option to purchase dated June 1, 1995, and allowing the Hirschi Center to go into foreclosure. It is undisputed that Bingham entered into a listing agreement with Rasekh only two months before the foreclosure sale by the Hirschis. R. at 769, ln. 19 to 770, ln. 6; at 798, ln. 25 to 800, ln. 20; at 913-14; at 449.

Further, the Court may affirm the grant of summary judgment by the trial court with regard to the alleged oral promise to sell the Hirschi Center in the event it was unprofitable on alternate grounds. Bill Nay & Sons Excavating v. Neeley Constr. Co., 677 P.2d 1120, 1123 (Utah 1984) (Appellate court may “affirm a trial court’s decision whenever [it] can do so on a proper ground, even though it was not the ground on which the trial court relied in its ruling.”). The alleged promise to resell the Hirschi Center in the event it was not profitable is one of two alleged alternative performances, one of which – the alleged oral promise to purchase the Hirschi Center – would be within the statute of frauds. Although there is a split of authority, certain courts hold that, in such a case, neither alternative performance is enforceable. Quirk v. Bank of Commerce & Trust Co., 244 F. 682, 687 (6th Cir. 1917); 73 Am. Jur. 2d Statute of Frauds § 526 (1974); Annotation, Validity and effect of oral agreement in alternative, one of the alternatives being within the Statute of Frauds, 13 A.L.R. 271 (1921). The reason for this rule is that, if the contract could be enforced for that part not within the statute of frauds,

it would be based on noncompliance with an invalid portion of the contract. 73 Am. Jur. 2d Statute of Frauds, § 526 (1974); see also Quirk, 244 F. at 687. Accordingly, Bingham is barred by the Utah statute of frauds from pursuing her alleged damages claim based on Rasekh's failure to sell the Hirschi Center for her in alleged violation of the alleged oral promise.

On either basis, the trial court correctly determined that Bingham could not recover damages against Rasekh for any alleged oral promise to sell the Hirschi Center for her in the event it was unprofitable, and granted summary judgment in favor of Rasekh on this claim.

V. THE TRIAL CORRECTLY DETERMINED THAT RASEKH HAD NO DUTY TO INVESTIGATE THE TRUTH OR FALSITY OF THE ALLEGED MISREPRESENTATIONS REGARDING THE HIRSCHI CENTER, AND BINGHAM DID NOT RELY ON THOSE REPRESENTATIONS, BUT CONDUCTED HER OWN INDEPENDENT INVESTIGATIONS.

In the Appellant's Brief, Bingham argues that she was entitled to rely on Rasekh's alleged negligent misrepresentations without conducting any independent investigation because of the alleged confidential or fiduciary relationship between Bingham and Rasekh. Appellant's Brief at 22. Bingham further argues that the claim for negligent misrepresentation should survive because Rasekh did not properly investigate the accuracy of representations he passed on about the Hirschi Center. Id. at 23.

In the Memorandum Decision, the trial court ruled:

Defendant Rasekh had no legal duty to investigate, as real estate agent in this matter, for both the seller and [appellant]/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.

R. at 1158-59.

It is undisputed that there is no evidence that Rasekh knew of the alleged falsity of any of the alleged misrepresentations regarding the condition or viability of the Hirschi Center. R. at 736, ln. 9-15; at 737, ln. 22 to 738, ln. 1; at 739, ln. 1-4; at 740, ln. 23 to 741, ln. 1; at 742, ln. 6-9; at 743, ln. 7-10; at 744, ln. 15-18; at 745, ln. 16-19; at 746, ln. 11-14; at 747, ln. 18-21; at 748, ln. 15-18; at 749, ln. 14-17; at 750, ln. 8-11; at 751, ln. 3-6. Imposing the burden on a real estate agent to thoroughly investigate every possible aspect of properties for sale at the peril of potential liability would increase the risk of selling real estate, making real estate agents insurers for purchasers. As this Court has explained,

[r]eal estate agents are not ... home inspectors and should not be required to thoroughly investigate each home they have on the market to discover latent defects. The responsibility to observe patent, and any discoverable latent, defects falls on the buyer of the home and is usually accomplished by hiring a knowledgeable home inspector to scrutinize the home before finalizing a sale. ... [T]he mere fact that the real estate agent has a duty to disclose known defects to potential purchasers does not mean that the agent is liable for all subsequent problems that come to light. ... Only when the purchaser can establish that the agent had both the duty to disclose and knowledge of the defects is recovery appropriate.

Schafir v. Harrigan, 879 P.2d 1384, 1390 (Utah Ct. App. 1994); see also Mitchell v. Christensen, 2001 UT 80 ¶ 11, 31 P.3d 572 (caveat emptor applies if a defect in real property is discoverable by reasonable care).

Beyond the fact that Rasekh had no duty to investigate the condition or viability of the Hirschi Center, Bingham's arguments are incorrect for two reasons. First, as discussed above, there was no fiduciary or confidential relationship between Bingham and Rasekh with regard to Bingham's purchase of the Hirschi Center to the extent that Bingham would have the court define the same. Second, the trial court also found that Bingham did not rely or could not reasonably have relied on any alleged misrepresentations by Rasekh because she did conduct independent investigations. R. at 1192; Addendum, Findings and Conclusions at 10.

In Jardine v. Brunswick Corp, 423 P.2d 659, 662 (Utah 1967), the Utah Supreme Court defined the tort of negligent misrepresentation. Among the elements defined by the Jardine court which a plaintiff is required to prove in a negligent misrepresentation action, a plaintiff must prove that the person making the allegedly negligent misrepresentation was in a superior position to know the material facts, and that the plaintiff reasonably relied on those allegedly negligent misrepresentations. Id. The Jardine court stated that

one who complains of being injured by such a false representation [a negligent misrepresentation] cannot heedlessly accept as true whatever is told him, but has the duty of exercising such degree of care to protect his own interests as would be exercised by an ordinary, reasonable and prudent person under the circumstances; and if he fails to do so, is precluded from holding someone else to account for the consequences of his own neglect.

Id. at 662-63.

Although the Jardine court referred to the failure to fulfill this duty as “somewhat analogous to contributory negligence ...,” id. at 662, later courts have referred to this duty as part of the element of reasonable reliance. Maack v. Resource Design & Constr., Inc., 875 P.2d 570, 577 (Utah Ct. App. 1994) (“Therefore, in order to successfully bring an action for negligent misrepresentation, the Maacks must demonstrate that they at least took reasonable steps to ascertain the truth of Kesselring’s representation that there was a one-year builder’s warranty, or, worded differently, that the Maacks’ reliance on Kesselring’s statement without some further inquiry was reasonable under the circumstances.”).

In this case, Bingham could not have reasonably relied on any alleged misrepresentations of Rasekh, as a matter of law, because of the information she received regarding the Hirschi Center. See Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1067 (Utah 1996). Bingham performed several independent investigations. It is undisputed that she visited the Hirschi Center on numerous occasions, she was given financial statements regarding the business, she spoke with others regarding the financial statements including her boyfriend, and she discussed the profitability of the business with the Hirschis and their accountant whom she later retained. In light of Bingham’s access to the financial information regarding the Hirschi Center and to the Hirschis’ accountant, Bingham was in a superior position to Rasekh to learn about the profitability of the business and her ability to make it a success. Further, with the information in her possession, Bingham could not have reasonably relied on any alleged misrepresentations of Rasekh as a matter of law. With the information she had, Bingham made the decision

to purchase the Hirschi Center, she put it up for sale within two weeks after the closing of her purchase for \$1,000,000, a mere \$200,000 more than she paid for it, and ultimately she lost it through foreclosure.

In this case, Bingham did independent investigations, and had facts that put her on notice of the truth. She could not have reasonably relied on any alleged negligent misrepresentations as a matter of law, as found by the trial court. Gold Standard, 915 P.2d at 1067 (no reasonable reliance because of correspondence which contradicted alleged representations); Mikkelson v. Quail Valley Realty, 641 P.2d 124, 126 (Utah 1982) (plaintiff could not have reasonably relied on erroneous property dimensions having inspected the property and having acknowledged receipt of FHA appraisal showing correct dimensions); Jardine, 423 P.2d at 662 (no reasonable reliance after defendant's representative declined to make stronger commitment, and cautioned plaintiff to protect himself).

On either basis, the Court should affirm the trial court's grant of summary judgment on Bingham's Third Cause of Action for negligent misrepresentation.

VI. THE TRIAL COURT DID NOT ADDRESS RASEKH'S MOTION FOR SUMMARY JUDGMENT REGARDING MITIGATION, AND THE ISSUES ARE NOT RIPE FOR APPEAL.

Although Bingham "in an abundance of caution" discussed mitigation of damages in the Appellant's Brief, the trial court did not enter any order with regard to Rasekh's Motion for Summary Judgment Regarding Mitigation of Damages (the "Mitigation Motion"). Accordingly, the issues raised in the Mitigation Motion and not addressed in the first instance by the trial court are not appropriately before this Court on appeal, and

will not be otherwise addressed herein. See Jackson v. Righter, 891 P.2d 1387, 1390 (Utah 1995); Ahlstrom v. Anderson, 728 P.2d 979, 979 (Utah 1986).

CONCLUSION

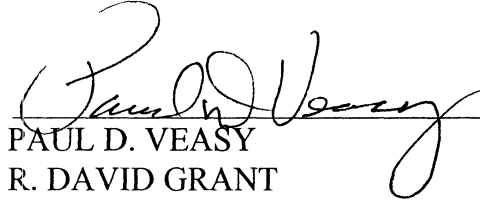
The Court should affirm the trial court's grant of summary judgment in favor of Rasekh. As a matter of law, Rasekh is not responsible or liable for Bingham's decision to purchase the Hirschi Center and then immediately attempt to sell it for a profit. Rasekh was not an insurer of the success of her purchase.

Rasekh's non-contractual duties did not go to the extent argued by Bingham, and did not include a duty to investigate, or to counsel Bingham not to purchase the Hirschi Center. Regardless of the relationship between Bingham and Rasekh outside of Bingham's purchase of the Hirschi Center, Bingham conducted her own independent investigations regarding her purchase of the Hirschi Center, and made her own decision. Any alleged oral promise by Rasekh that he would purchase the Hirschi Center from Bingham in the event it was unprofitable was unenforceable under the Utah statute of frauds. Bingham's own actions in entering into a one-year exclusive listing with VRUtah two weeks after her purchase of the Hirschi Center, in entering into a lease with an option to purchase with Roberts, in failing to meet her financial obligations in connection with the Hirschi Center in the interim, and in finally entering into a listing agreement with Rasekh after foreclosure had commenced and shortly before it was completed prevented her from being able to enforce any alleged oral promise to sell the Hirschi Center in the event it was unprofitable. It is undisputed that Rasekh did not know the alleged falsity of any alleged misrepresentations, and he had no duty to investigate. Also, Bingham did not

rely or could not reasonably have relied on any alleged misrepresentations by Rasekh because she did her own independent investigations regarding the condition and financial viability of the Hirschi Center.

DATED this 18 day of September, 2002.

PARSONS BEHLE & LATIMER

A handwritten signature in cursive script, appearing to read "Paul D. Veasy", is written over a horizontal line.

PAUL D. VEASY

R. DAVID GRANT

Attorneys for Plaintiff and Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of September, 2002, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing **BRIEF OF THE APPELLEE** to:

Ronald S. George
3804 Highland Dr. # 8
Salt Lake City, Utah 84106
Attorney for Plaintiff and Appellant



R. David Grant

ADDENDUM

The following documents are included in this Addendum:

1. Determination of Non-Disputed Facts and Conclusions of Law Regarding Defendant Kal Rasekh's Motion for Summary Judgment.
2. Judgment Dismissing Claims Against Defendant Kal Rasekh.

FILED DISTRICT COURT
Third Judicial District

NOV 14 2000

SALT LAKE COUNTY
[Signature]
Deputy Clerk

RAYMOND J. ETCHEVERRY (#0094)
PAUL D. VEASY (#3964)
R. DAVID GRANT (#6233)
PARSONS BEHLE & LATIMER
Attorneys for Defendants Coldwell Banker Premier Realty
and Kal Rasekh
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

* * * * *

MARIE BINGHAM,

Plaintiff,

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, individuals.,

Defendants.

**DETERMINATION OF NON-
DISPUTED FACTS AND
CONCLUSIONS OF LAW
REGARDING DEFENDANT KAL
RASEKH'S MOTION FOR
SUMMARY JUDGMENT**

Case No. 970901897CV

Judge Timothy R. Hanson

* * * * *

Pending before the Court on August 7, 2000, were four summary judgment motions, the motion of defendants Harvey C. Hirschi and Lois R. Hirschi (collectively, the "Hirschis") for summary judgment, the motion of defendants VRUtah, Inc. and Michael Drury (collectively,

“VRUtah”) for summary judgment, the motion of defendant Kal Rasekh (“Rasekh”) for summary judgment and Rasekh’s alternative motion for summary judgment regarding mitigation of damages. Due to the limited time available, the Court only heard oral argument with regard to the Hirschis’ motion for summary judgment and Hirshis’ related motion to strike portions of the affidavit of the plaintiff Marie Bingham (“Bingham”). Oral argument on the remaining motions for summary judgment was continued to September 18, 2000.

At the hearings on the pending summary judgment motions, Bingham was represented by Rondal S. George. The Hirschis were represented by Perrin R. Love of Clyde Snow Sessions & Swenson. VRUtah was represented by Phillip W. Dyer. Rasekh was represented by Paul D. Veasy of Parsons Behle & Latimer.

After the August 7, 2000 hearing, the Court entered its Minute Entry dated August 14, 2000 in which the Court granted the Hirschis’ motion for summary judgment as well as the Hirschis’ motion to strike portions of Bingham’s affidavit.

After the September 18, 2000 hearing, the Court entered its Memorandum Decision dated October 10, 2000 in which the Court granted VRUtah’s motion for summary judgment and Rasekh’s motion for summary judgment.¹ The Memorandum Decision instructed counsel to submit Orders granting summary judgment in favor of VRUtah and Rasekh in accordance with Rule 52(a) of the Utah Rules of Civil Procedure.

¹ At the September 18, 2000 hearing, the Court did not address Rasekh’s alternative motion for summary judgment regarding mitigation of damages. Instead, the Court reserved determination of that motion for a later date in the event Rasekh’s motion for summary judgment was not granted.

DETERMINATIONS OF NON-DISPUTED MATERIAL FACTS

Based on the undisputed evidence in the record, the Court has determined that a material dispute does not exist with respect to the following facts:

1. On or about June 16, 1994, the Hirschis signed a one year listing agreement, listing the Hirschi Center for sale with a listing price of \$900,000 with Coldwell Banker Premier Realty (“Coldwell”) as the listing broker and Rasekh as the listing agent.

2. In July 1994, Rasekh contacted Bingham and informed her that the Hirschi Center was for sale. On July 20, 1994, Bingham signed a Real Estate Purchase Contract offering to purchase the Hirschi Center for \$900,000, with certain contingencies and providing for seller financing of a portion of the purchase price (the “Hirschi Center REPC”). The Hirschi Center REPC was a standard form real estate purchase contract, not a contract for the sale of a business. The business associated with the Hirschi Center was “thrown in.”

3. Between July 23 and August 2, 1994, the Hirschis signed four counteroffers to the Hirschi Center REPC in which the Hirschis proposed an increased down payment and modification of the financing terms, and certain other modifications to the proposed sale of the Hirschi Center to Bingham. Bingham submitted at least two of her own counteroffers. On August 3, 1994, Bingham signed the fourth counteroffer to the Hirschi Center REPC from the Hirschis. At that time, Bingham understood she was buying the Hirschi Center.

4. The Hirschi Center REPC, as amended, conditioned Bingham’s purchase of the Hirschi Center on her approval of a professional inspection. Bingham did not think about obtaining a professional inspection, although she was familiar with buyers obtaining inspections.

Bingham made no written objection about the results of an inspection, as the Hirschi Center REPC, as amended, allowed her to do.

5. Bingham initialed the Confirmation of Agency Disclosure paragraph in the Hirschi Center REPC, acknowledging that Rasekh represented both the buyer and the seller in the transaction. Bingham understood at the time she signed her initials on the Confirmation of Agency Disclosure paragraph in the Hirschi Center REPC that Rasekh represented both the buyer and seller in connection with the sale of the Hirschi Center.

6. Between July 20 and October 3, 1994, Bingham visited the Hirschi Center between five and eight times independent of Rasekh. For the first visit, Bingham had an appointment with the Hirschis and the Hirschis showed Bingham the entire property for sale, including the house and center. Bingham went and looked at the house on at least two additional occasions and looked at the center several times on her own. On at least one occasion, Bingham took her boyfriend, Stanley Spafford ("Spafford"), to visit the Hirschi Center. Bingham had access to the buildings prior to the closing, and, in fact, Spafford concluded that the decor was a little outdated, that the carpet needed to probably be replaced and the buildings could have used a fresh coat of paint. Bingham also recognized, prior to the closing, that the buildings needed to be painted, and the carpet replaced.

7. Prior to the closing on the sale of Hirschi Center, the Hirschis provided Bingham copies of financial statements showing annual receipts and disbursements for the Hirschi Center for most years for the period from 1984 to 1994. These financial statements were accurate.

8. Bingham and Spafford visited with the Hirschis' accountant, Vincent Tilby ("Tilby") regarding the financial statements after Bingham received them and before the closing. Tilby was cooperative and provided Bingham and Spafford with the information they wanted to know, and did not refuse to answer any questions. After reviewing the financial statements, Spafford discussed the financial statements with Bingham, and discussed with her the fact that, with the required additional mortgage payment arising from Bingham's purchase of the Hirschi Center, it would be tough financially or would be a break-even. Based upon her review of the financial statements before the closing of her purchase of the Hirschi Center, Bingham concluded that the daycare business had no profit.

9. Some time prior to closing, upon Bingham's request, the Hirschis agreed to reduce the purchase price for the Hirschi Center from \$900,000 to \$800,000. The more Bingham looked at the Hirschi Center, she wanted to purchase it for less based on its condition.

10. Shortly before the scheduled closing and after Rasekh had returned from a trip to Egypt, Bingham went to a face-to-face meeting with the Hirschis at the house, and Bingham told Rasekh she was not going to buy the Hirschi Center. The Hirschis were scheduled to leave shortly to Russia on a church mission, and Rasekh was upset that Bingham would try at the last minute to renegotiate. According to Bingham and at Bingham's insistence, Rasekh negotiated some final concessions from the Hirschis, and the final reduction of price to \$800,000. Shortly thereafter, Bingham paid an additional amount in earnest money.

11. The closing of the sale of the Hirschi Center from the Hirschis to Bingham pursuant to the Hirschi Center REPC as amended took place on October 3, 1994. The Hirschis

took back an All-Inclusive Trust Deed and All-Inclusive Note Secured by All-Inclusive Trust Deed in the amount of \$600,000, both dated October 3, 1994, for a portion of the purchase price. Bingham paid \$181,000 in cash for the purchase of the Hirschi Center, which is the amount she has sought in this case in damages. Also, Coldwell Banker Premier agreed as an accommodation to defer a portion of its commission, and Bingham signed a note payable to Coldwell Banker Premier and Rasekh in the amount of \$18,762.74.

12. On October 17, 1994, two weeks after closing her purchase of the Hirschi Center, Bingham listed the Hirschi Center for sale with VRUtah, Inc. on a one year exclusive listing with a listing price of \$1,000,000 (the “VRUtah Listing”). In the VRUtah Listing, “family problems” is listed as the reason for the sale. On March 8, 1995, Bingham signed an Addendum to the VRUtah Listing, reducing the listing price to \$900,000.

13. Bingham thought the Hirschi Center would sell within three months of listing it for sale with VR Utah, Inc. Bingham did not pay her tax obligations, alarm monitoring, and other obligations associated with the Hirschi Center, and downsized the daycare business, just maintaining it. During June, July and August of 1995, Bingham had only a few participants. Bingham stopped operating the daycare business in September 1995. Bingham understood that it would have been a very good decision to not make further expenditures if the Hirschi Center had sold quickly because she would have gotten her money out plus a profit and not had to put any money into it. The Hirschi Center did not sell within three months for the anticipated price, and Bingham’s obligations, including those to the Hirschis, were past due.

14. Harvey Hirschi sent Bingham a letter dated January 6, 1995, in which Mr. Hirschi informed Bingham that she was obligated to reimburse Mr. Hirschi \$3,846.50 for taxes paid on the Hirschi Center.

15. Bingham received an Offer for Purchase and Sale of Assets from Randall Roberts (“Roberts”) dated March 2, 1995, offering to purchase the Hirschi Center for \$650,000 to be used for a restaurant, with a \$50,000 cash down payment, and an assumption of the note from the Hirschis in the amount of \$600,000. Bingham had until March 13, 1995 to accept the offer.

16. By Counter Offer # 1 dated March 8, 1995, Bingham offered to sell the Hirschi Center to Roberts with a purchase price of \$750,000, with a \$150,000 cash down payment and \$600,000 to be financed over 30 years at 10% interest, plus 3% of gross sales generated from the buyer’s new business for 24 months or 2% of gross sales for 36 months, whichever was greater. Roberts had until March 15, 1995 to accept Bingham’s counteroffer.

17. Although Roberts did not accept Bingham’s counteroffer, he did submit a new offer which incorporated the terms of Bingham’s counteroffer, not including the obligation to pay a percentage of the gross sales. With a new Real Estate Purchase Contract dated March 16, 1995, Roberts presented Counter Offer “C” to Bingham, in which Roberts offered to purchase the Hirschi Center with a purchase price of \$750,000, with a \$150,000 down payment and assuming the \$600,000 note from the Hirschis. Bingham had until March 20, 1995 to accept this

new offer. Bingham did not accept the new offer which had deleted from her counteroffer the proposed obligation to pay a percentage of the gross sales from the new business.²

18. On or about April 5, 1995, Bingham received a Notice of Default with regard to the \$600,000 note and deed of trust Bingham had given the Hirschis as part of the purchase price for her purchase of the Hirschi Center, stating that Bingham was in default of her obligation to reimburse the Hirschis \$3,846.59 for taxes, and to pay attorneys' fees and costs in the amount of \$700.00, plus late charges of \$530.96.

19. Bingham received additional Notices of Default dated April 28, 1995 and May 18, 1995, stating that Bingham was in default of her obligation to reimburse the Hirschis for taxes, and to pay additional attorneys' fees and costs, plus late charges.

20. After rejecting Roberts' offers to purchase the Hirschi Center which would have involved \$150,000 cash up front, Bingham entered into a Commercial Property Lease with an option to purchase with Roberts dated June 1, 1995. Roberts did not make the lease payment due July 1, 1995 or any subsequent payment.³

² Roberts presented one additional Real Estate Purchase Contract to Bingham dated April 3, 1995, in which Roberts offered to purchase the Hirschi Center with a purchase price of \$785,000, with a \$185,000 cash down payment and assuming the \$600,000 note from the Hirschis. Bingham had until April 7, 1995 to accept this further offer.

³ Bingham sent a Notice of Default dated August 16, 1995 to Roberts declaring the Commercial Property Lease to be in default for failure to make the required payments. On March 18, 1997, Bingham filed her Complaint initiating this action. The Complaint was solely against Roberts and contained two causes of action, one for breach of the lease agreement, and a second for fraud in connection with the lease. Over one year later, on or about May 11, 1998, Bingham filed her Amended Complaint, asserting fourteen causes of action against seven defendants, including Roberts and Rasekh.

21. Bingham received a Notice of Default dated July 10, 1995, stating that Bingham was in default of her obligation to pay \$5,275.98 due June 1, 1995, and to pay attorneys' fees and costs of \$1,300.00, plus late charges of \$1,312.70. Based on this Notice of Default, the Hirschis were statutorily authorized to instruct the trustee on their trust deed to conduct a trustee's sale of the Hirschi Center in November, 1995, after giving the statutorily required notices of the sale.

22. On or about September 6, 1995, after receiving four notices of default, Bingham listed the Hirschi Center for sale with Rasekh on a one month listing, and again, on October 27, 1995, Bingham listed the Hirschi Center for sale with Rasekh on a listing to expire February 27, 1996. In the September 6 and October 27, 1995 listing agreements, the parties agreed that, except with regard to the costs of mediation which Bingham did not pursue, "in case of the employment of an attorney in any matter arising out of this Listing Agreement (including a sale of the Property) the prevailing party shall be entitled to receive from the other party all costs and reasonable attorney's fees, whether the matter is resolved through court action or otherwise."

23. Bingham did not sell the Hirschi Center. Thereafter in November, 1995, the Hirschis foreclosed their trust deed taken to secure payment of the purchase price for the Hirschi Center from Bingham.

24. On January 20, 1996, the Hirschis signed a new listing agreement with Rasekh, providing for an exclusive right to sell the Hirschi Center for six months and providing for a 6% commission. The Hirschis closed on April 29, 1996 a sale of the Hirschi Center to a group of investors including Nancy Adair, Raed Salem, and Nivin Abuzeid. None of the money for the

April 1996 purchase of the Hirschi Center came from Rasekh, and he did not have any financial interest in the purchase other than acting as real estate agent.

CONCLUSIONS OF LAW

1. Judgment is granted in favor of Rasekh dismissing Bingham's claims for negligent misrepresentation contained in Bingham's Third Cause of Action. Judgment is granted on the following grounds:

a. Real estate agents are not expected and have no duty to investigate properties they are selling. Schafir v. Harrigan, 879 P.2d 1384, 1390 (Utah Ct. App. 1994).

b. Bingham had the duty of exercising such degree of care to protect her own interests as would be exercised by an ordinary, reasonable and prudent person under the circumstances. Jardine v. Brunswick Corp., 423 P.2d 659, 662 (Utah 1967).

c. Because Bingham conducted her own independent investigation of the condition of the Hirschi Center and its financial viability, consulted an accountant and consulted a trusted family member who recommended against purchasing the Hirschi Center, either Bingham did not rely on any alleged misrepresentations by Rasekh or any reliance by Bingham was unreasonable as a matter of law. Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1067 (Utah 1996); Mikkelson v. Quail Valley Realty, 641 P.2d 124, 126 (Utah 1982); Conder v. A.L. Williams & Assocs., 739 P.2d 634, 639 (Utah Ct. App. 1987); Faw v. Greenwood, 613 P.2d 1338, 1340 (Idaho 1990).

d. Bingham suffered no injury or damage from any alleged misrepresentation. Bingham purchased real property from the Hirschis pursuant to a standard

real estate purchase contract. Bingham did not purchase a business, but rather, the daycare business was “thrown in” by the Hirschis. Bingham paid nothing for the daycare business, and therefore, Bingham suffered no injury or damage.

2. Judgment is granted in favor of Rasekh dismissing Bingham’s claims for breach of fiduciary duty contained in Bingham’s Fourth Cause of Action. Judgment is granted on the following grounds:

a. Bingham consented to Rasekh’s representation of the Hirschis as sellers and Bingham as buyer in connection with Bingham’s purchase of the Hirschi Center, and accordingly, Rasekh’s duties to Bingham were necessarily limited as provided under Utah law. See Rogers v. Division of Real Estate, 790 P.2d 102, 107 (Utah Ct. App. 1990); Utah Admin. R. 162-6-2.16.3.2 (1996); Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980).

b. There is no evidence that Rasekh violated a duty to disclose known material facts. Such a duty does not include a duty to fully investigate. Hopkins v. Wardley Corp., 611 P.2d 1204, 1206 (Utah 1980).

c. Rasekh’s duties as real estate agent in connection with Bingham’s purchase of the Hirschi Center would not encompass the duties alleged by Bingham. Hopkins, 611 P.2d at 1206; Musselman v. Southwinds Realty, Inc., 704 P.2d 814, 816 (Ariz. Ct. App. 1985).

d. There is no evidence in the record that would support a submission to the jury that Bingham’s ability to make her own decisions had been overpowered by Rasekh because of their personal relationship. 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 Bingham would have the Court define the same, is not required of a real estate agent. Further, Bingham's claim that she had no control over her free will and the decisions she made to buy the 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 Bingham's purchase of the Hirschi Center.

3. In Plaintiff's Memorandum in Opposition to Defendant Kal Rasekh's Motion for Summary Judgment (the "Opposition Memorandum"), Bingham conceded that, because she signed the agency disclosure which disclosed that Rasekh also represented the Hirschis, Rasekh's dual representation did not involve a conflict of interest. Therefore, Rasekh is entitled to summary judgment on Bingham's Fifth Cause of Action asserted herein against Rasekh for conflict of interest, and judgment is granted in favor of Rasekh dismissing the Fifth Cause of Action.

4. Judgment is granted in favor of Rasekh dismissing Bingham's claims for breach of contract contained in Bingham's Sixth Cause of Action. Judgment is granted on the following grounds:

a. Insofar as there existed an alleged oral promise by Rasekh to sell the Hirschi Center for Bingham if the purchase she was making did not work out, Bingham's own actions prohibited Rasekh from complying with the oral promise, and precluded her claim for breach of the alleged promise as a matter of law. Cahoon v. Cahoon, 641 P.2d 140, 144 (Utah 1982); Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979). Immediately after purchasing the

Hirschi Center, Bingham granted a one year exclusive listing to VR Utah, Inc. and Michael Drury to sell the Hirschi Center rendering it impossible for Rasekh to comply with the alleged oral promise.

b. Any alleged oral promise by Rasekh to repurchase the Hirschi Center in the event it was unprofitable was unenforceable pursuant to the Utah Statute of Frauds as an oral promise for the purchase or sale of real estate. Chadwick v. Arnold, 95 P. 527, 530 (Utah 1908); Utah Code Ann. § 25-5-3 (1998).

5. Judgment is granted in favor of Rasekh dismissing Bingham's claims for unjust enrichment contained in Bingham's Twelfth Cause of Action. Judgment is granted because, as a matter of law, there is no evidence to support an allegation of unjust enrichment for Rasekh after the Hirschi Center was foreclosed by the Hirschis. Bingham's rights in the foreclosure process were protected by statute. See Baldwin v. Vantage Corp., 676 P.2d 413, 418 (Utah 1984); Utah Code. Ann. § 57-1-23 to -34. It is undisputed that Rasekh had no financial interest in the Hirschi Center after it was foreclosed by the Hirschis, other than as real estate agent in the subsequent sale.


6. Judgment is granted in favor of Rasekh dismissing Bingham's claims for punitive damages contained in Bingham's Fourteenth Cause of Action. Judgment is granted on the following grounds that punitive damages may only be awarded if compensatory or general damages are awarded. Utah Code Ann. § 78-18-1(1)(a) (1996). Rasekh is entitled to summary judgment on all other claims, and so Rasekh is also entitled to summary judgment on Bingham's claim for punitive damages.

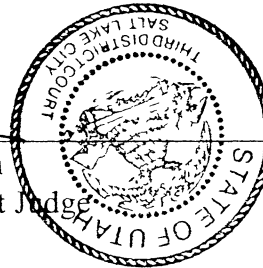
7. Rasekh is not entitled to recover his attorneys' fees incurred in defending himself in this action. The September 6 and October 27, 1995 listing agreements which contain attorneys' fees provisions are not the basis upon which the Court is granting summary judgment in favor of Rasekh.

8. Rasekh is the prevailing party herein entitled to recover his costs pursuant to Rule 54(d) of the Utah Rules of Civil Procedure.

DATED this 14 day of November, 2000.

BY THE COURT:


Timothy R. Hanson
Third District Court Judge



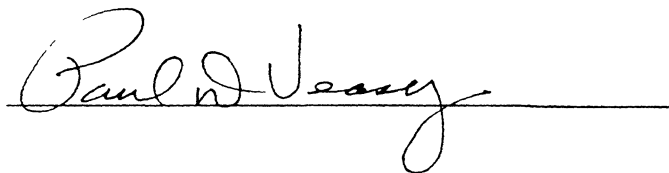
CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of October, 2000, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing proposed **DETERMINATION OF NON-DISPUTED FACTS AND CONCLUSIONS OF LAW REGARDING DEFENDANT KAL RASEKH'S MOTION FOR SUMMARY JUDGMENT**, to:

Ronald S. George
3804 Highland Drive, Suite 5
Salt Lake City, Utah 84106

Perrin R. Love
Clyde Snow Sessions & Swenson
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2215

Phillip W. Dyer
221 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "Paul D. Veasey", is written over a horizontal line.

NOV 14 2000

SALT LAKE COUNTY
CLERK
[Signature]
865 4 6000

RAYMOND J. ETCHEVERRY (#0094)
PAUL D. VEASY (#3964)
R. DAVID GRANT (#6233)
PARSONS BEHLE & LATIMER
Attorneys for Defendants Coldwell Banker Premier Realty
and Kal Rasekh
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

* * * * *

MARIE BINGHAM,

Plaintiff,

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, individuals.,

Defendants.

**JUDGMENT DISMISSING
CLAIMS AGAINST DEFENDANT
KAL RASEKH**

Case No. 970901897CV

Judge Timothy R. Hanson

* * * * *

Pending before the Court on August 7, 2000, were four summary judgment motions, the motion of defendants Harvey C. Hirschi and Lois R. Hirschi (collectively, the "Hirschis") for summary judgment, the motion of defendants VRUtah, Inc. and Michael Drury (collectively,

“VRUtah”) for summary judgment, the motion of defendant Kal Rasekh (“Rasekh”) for summary judgment and Rasekh’s alternative motion for summary judgment regarding mitigation of damages. Due to the limited time available, the Court only heard oral argument with regard to the Hirschis’ motion for summary judgment and Hirschis’ related motion to strike portions of the affidavit of the plaintiff Marie Bingham (“Bingham”). Oral argument on the remaining motions for summary judgment was continued to September 18, 2000.

At the hearings on the pending summary judgment motions, Bingham was represented by Rondal S. George. The Hirschis were represented by Perrin R. Love of Clyde Snow Sessions & Swenson. VRUtah was represented by Phillip W. Dyer. Rasekh was represented by Paul D. Veasy of Parsons Behle & Latimer.

After the August 7, 2000 hearing, the Court entered its Minute Entry dated August 14, 2000 in which the Court granted the Hirschis’ motion for summary judgment as well as the Hirschis’ motion to strike portions of Bingham’s affidavit.

After the September 18, 2000 hearing, the Court entered its Memorandum Decision dated October 10, 2000 in which the Court granted VRUtah’s motion for summary judgment and Rasekh’s motion for summary judgment. The Memorandum Decision instructed counsel to submit Orders granting summary judgment in favor of VRUtah and Rasekh in accordance with Rule 52(a) of the Utah Rules of Civil Procedure.

The Court has also now entered its Determination of Non-Disputed Facts and Conclusions of Law Regarding Defendant Kal Rasekh’s Motion for Summary Judgment (“Non-Disputed Facts and Conclusions”).

NOW THEREFORE, for the reasons stated in the Memorandum Decision, and based on the Non-Disputed Facts and Conclusions, and good cause otherwise appearing, it is hereby

ORDERED ADJUDGED AND DECREED that judgment is entered in favor of defendant Kal Rasekh and against plaintiff Marie Bingham, dismissing all claims asserted against Kal Rasekh in the Verified Amended Complaint with prejudice and on the merits, including:

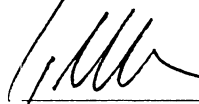
1. All claims asserted against Rasekh in Bingham's Third Cause of Action for negligent misrepresentation;
2. All claims asserted against Rasekh in Bingham's Fourth Cause of Action for breach of fiduciary duty;
3. All claims asserted against Rasekh in Bingham's Fifth Cause of Action for conflict of interest;
4. All claims asserted against Rasekh in Bingham's Sixth Cause of Action for breach of contract;
5. All claims asserted against Rasekh in Bingham's Twelfth Cause of Action for unjust enrichment;
6. All claims asserted against Rasekh in Bingham's Fourteenth Cause of Action for punitive damages.

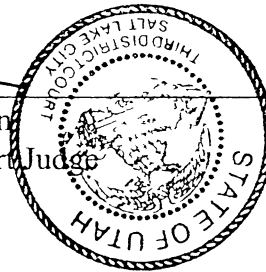
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Rasekh is the prevailing party in this action. Rasekh may submit to this Court a Memorandum of Costs pursuant to Rule 54(d) of the Utah Rules of Civil Procedure. After Bingham has an opportunity

to respond, the Court will consider any submissions by Rasekh and enter a supplemental judgment, if appropriate.

DATED this 14 day of November, 2000.

BY THE COURT:


Timothy R. Hanson
Third District Court Judge




CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of October, 2000, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing proposed **JUDGMENT DISMISSING CLAIMS AGAINST DEFENDANT KAL RASEKH**, to:

Ronald S. George
3804 Highland Drive, Suite 5
Salt Lake City, Utah 84106

Perrin R. Love
Clyde Snow Sessions & Swenson
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2215

Phillip W. Dyer
221 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "Paul D. Weary", is written over a horizontal line.