

2001

## Marie Bingham v. Kal Rasekh : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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

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

THE HONORABLE TIMOTHY R. HANSEN DISTRICT COURT JUDGE

---

**APPELLANT'S REPLY BRIEF**

---

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Appeals

\_\_\_\_\_  
Clerk of the Court

**IN THE UTAH COURT OF APPEALS**

MARIE BINGHAM,

Plaintiff and Appellant

vs.

KAL RASEKH,

Defendant and Appellee

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## **PRELIMINARY STATEMENT**

The Appellant's Addendum of Exhibits was filed for the convenience of the Court in locating Bingham's citations to the record. On page 17 of his brief Rasekh argues that Bingham has not made proper citations to the record to support her Facts. Bingham noted in her Brief's "Preliminary Statement" that she had duplicated the fact statement as set out in her "Memorandum in Opposition to Defendant Kal Rasekh's Motion for Summary Judgment" as filed below ( R at 1004-1026). In that Memorandum Bingham's Fact Statements cited to exhibits contained in an Addendum of Exhibits as filed below (See Exhibit "A" Attached) to which Appellant's Appeal Addendum is a duplication. That is true with the exception of the Memorandum for Summary Judgment ( R at 921 - 945 and 1004 - 1026) as well as certain affidavits filed below ( R at 984 - 991, 1041-1045, 1046-1049, 1050-1062) which were included at the end of the Bingham Appeal Addendum.

Bingham intended to point out to the Appellate Court the District Court Clerk's Certificate of the Record Pages which applied to the Addendum. Upon conducting an investigation it was learned that the Plaintiff's Addendum as filed below was missing from the District Court's record as were pertinent parts of the Addendum of Rasekh ( R at 658-920) filed below. Appellant has filed a Motion to

have the district court record supplemented to incorporate the lost Addendum of Exhibits.

Thus all references in the Fact Statements of the Appellant to the Addendum filed on Appeal will have been certified when the district court clerk certifies the Addendum as filed below which should preclude any question as to whether the exhibits as cited by Appellee were before the lower court. <sup>1</sup>

#### ADDENDUM INDEX

Items 1 through 21 are identically found in Record ("R") at 1255 through 1400.

Item	Identification	Page(s)
1	Michael Drury Deposition - December 14, 1999 - Select pages. <b>R at 1255 - 1267;</b>	1-12
2	Marie Bingham Deposition - October 25-26, 1999 - Select Pages from Volumes I. <b>R at 1268-1293; See also 452 - 550; 670 - 768; See also 13 - 34.</b>	13-38
3	Marie Bingham Deposition - November 22, 1999 - Select pages from Volume II - <b>R at 1294-1305; See Also 640-645 and 38(a) - 50.</b>	39-50
4	Kal Rasekh Deposition - December 16, 1999 - Select pages. <b>R at 1306-1313; See also 51-61 and 785 - 789.</b>	51-58
5	Harvey Hirschi Deposition - December 14, 1999 - Select pages. <b>R at 1314-1316;</b>	59-61

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<sup>1</sup>In a discussion with the district court appellate clerk it was learned that these exhibits had possibly been removed by the judges clerks and not returned to the file. The district court appeals clerk indicated that the Addendum of Exhibits when found or supplemented and incorporated into the clerk's Certification of the Record would take on page numbers following those of the present Clerk's Certificate. Thus, the Addendum of Exhibits as filed below will most likely comprise page numbers 1255 through 1400 of the paginated record.

6	VR Utah Offer for Purchase and Sale of Assets Agreement and Addendum dated 3-2-1995. <b>R at 1317-1318</b>	62-63
7	April 20, 1995 Letter from Consolidated Realty to Marie Bingham. <b>R at 1319-1320</b>	64-65
8	May 24, 1995 Letter from Marie Bingham to Michael Drury/VRUtah. <b>R at 1321</b>	66
9	May 24, 1995 Release Agreement provided to VR Utah by Marie Bingham and signed by Bingham. <b>R at 1322-1323</b>	67-68
10	May 24, 1995 Letter from W. David Weston to Randall Roberts re: copies of lease agreement. <b>R at 1324</b>	69
11	June 3, 1995 Letter from W. David Weston to Randall Roberts re: copies of commercial lease agreement. <b>R at 1325</b>	70
12	Commercial Property Lease dated June 1, 1995 between Randall Roberts and Marie Bingham - along with Option to Purchase. <b>R at 1326-1347</b>	71-92
13	Release Agreement dated June 22, 1995 signed by VR Utah. <b>R at 1348</b>	93
14	Notice of Default dated July 10, 1995 from Hirschi to Marie Bingham. <b>R at 1349</b>	94
15	August 16, 1995 Notice of Default from Marie Bingham to Randall Roberts re: Lease. <b>R at 1351</b>	96
16	1-26-1995 Memo Record of Showing re: Gordon Olsen. <b>R at 1353</b>	98
17	May 8, 1995 Letter from Marie Bingham to Randall Roberts re: W. David Weston to act as agent. <b>R at 1354</b>	99
18	On or about September 18, 1995 - Letter from Marie Bingham to Kal Rasekh. <b>R at 1355</b>	100
19	Plaintiff's Verified Answers to Defendant Michael Drury and VR Utah, Inc. First Set of Interrogatories to Plaintiff. <b>R at 1358-1377</b>	103-122



20	January 11, 1995 Letter from VRUtah to Steve Tate re: Hirschi Center. <b>R at 1378</b>	123
21	Randall Roberts - Steak Restaurant - Prospectus - dated June 15, 1995. <b>R at 1379-1400</b>	124-145
22	Defendant Kal Rasekh's Memorandum in Support of Motion for Summary Judgment. <b>R at 921-945</b>	146-170
23	Plaintiff's Memorandum in Opposition to Defendant Kal Rasekh's Motion for Summary Judgment. <b>R at 1004 - 1025</b>	171-192
24	Affidavit of Marie Bingham in Opposition to Defendants Michael Drury, VR Utah and Kal Rasekh's Motions for Summary Judgment. <b>R at 1050 - 1062</b>	193-205
25	Affidavit of Jennifer Weston Smith in Opposition to Defendant Kal Rasekh's Motion for Summary Judgment. <b>R at 1046 -1209</b>	206-209
26	Affidavit of David Weston in Opposition to Defendants Michael Drury, VR Utah and Kal Rasekh's Motions for Summary Judgment. <b>R at 1041 - 1045</b>	210-214
27	Affidavit of Marie Bingham in Opposition to Defendants Harvey C. and Lois R. Hirschi's Motion for Summary Judgment. <b>R at 984 - 991</b>	215-222

## FACTS REBUTTAL STATEMENT

### RASEKH HAS NOT REFUTED THE FACTS ESTABLISHING A CONFIDENTIAL RELATIONSHIP

I. Uncontroverted Facts: (¶¶ 's are to Mrs. Bingham's Fact Statements in the Opening Brief).

Rasekh's facts and arguments would limit the Court's focus to Rasekh as a limited agent by virtue of his real estate license and the sale documents. Rasekh presents no contrary facts to rebut Mrs. Bingham's Facts (¶¶ 's 3 - 6) that the

confidential relationship Rasekh established with Mrs. Bingham far surpassed that of a real estate agent seeking to show a property, make a sale and collect a commission. Rasekh does not dispute the Facts (¶¶'s 3-6) which establish that, independent of his role as a real estate agent and leading up to the listing agreement, he ingratiated himself with Marie Bingham and her family so as to develop a trusting confidential relationship (See App I pg. 58).

Nor is any evidence presented to counter the fact that within the framework of the confidential relationship Rasekh developed, he obtained confidential personal financial information about Mrs. Bingham's finances (¶¶ 1-3, 6, 12, 28 - 29) which he later exploited. Rasekh's Facts do not counter the evidence that Rasekh, as a result of his confidential relationship, learned that Mrs. Bingham was receiving an inheritance from the sale of her father's home and that she would be willing to sell her own home where she lived for 30 years because of her financial distress arising from the support of her (nine) children following a divorce (¶¶'s 2, 28 - 29 Also App. pg. 14a, 195 ). Rasekh also learned that her sole outside income was her part time work as a sales clerk in a clothing store and that she could be duped because of her lack of sophistication (¶¶ 1-2).

Rasekh does not refute the facts that his acts over a two year period consisted of, among others, popping into the Bingham home unannounced for dinner, frequent

visits during the week in casual clothing following a soccer practice (App 194), proposing to marry one of Marie Bingham's daughters and taking one of her daughters to Egypt to attend his sister's wedding (App pgs. 194, 58 "like a son to the Bingham family"). Once having gained her confidence he proposed to secure her (then uncertain) future by placing her in a home associated with a business which would provide her a substantial income without risk (¶¶ 14, 17, 21 - 22, 26 - 27). The independence and security that only a person in Mrs. Bingham's situation would hope for in her dreams.

The uncontroverted evidence is that Mrs. Bingham had no ability to evaluate the risk's associated with Rasekh's investment advice. Notwithstanding her several visits to the Hirschi Center there is simply no evidence that she had any business acumen (¶¶ 's 1-2, 8, 14, 19, 27) with which to evaluate her experience. Just the opposite, she had no experience and naively relied on Rasekh's affirmations that there was no risk, that his advice was the best for her and in the event of the unforeseen he would take care of her through his assurances of repurchase (¶¶ 's 27, 22, 17). The unrefuted evidence is that Mrs. Bingham lacked the capital to have survived for one week in the business Rasekh induced her to purchase so as to obtain a commission (¶¶ 's 30-32). When the weight of that reality descended upon her shoulders and Rasekh was no longer anywhere to be found her trust faded (¶¶ 's 31-33). The fact most noteworthy

is that after an intimate two year prior relationship that saw Mr. Rasekh in the Bingham home weekly, once He obtained the commission from the Hirschi business and her home the visits instantly terminated and Rasekh vanished out of the Bingham's lives.

## **REPLY ARGUMENTS**

### **I.**

#### **THE EXISTENCE OF A CONFIDENTIAL RELATIONSHIP IS ESTABLISHED FOR SUMMARY JUDGMENT PURPOSES**

Rasekh did not contest the existence of a confidential relationship in making his motion for summary judgment and does not do so in his brief, remarking only as follows:

Whether or not Bingham had a confidential relationship with Rasekh outside 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. (Rasekh's brief, pg. 17).

After reading again the trial court's findings and based upon the argument made in Rasekh's brief Mrs. Bingham now believes that the court did not rule that the lack of a confidential relationship was established as a matter of law, but rather framed summary judgment on the existence of a lack of breach of duties. In any event there is sufficient evidence of a confidential relationship to send that issue to a jury. Rather than arguing that there is no confidential relationship Rasekh makes the erroneous

statement that if Mrs. Bingham made an investigation in this case that such investigation rebuts any inference of a confidential relationship in connection with this purchase.

## **II.**

### **A JURY QUESTION EXISTS CONCERNING BREACH OF FIDUCIARY DUTIES.**

The argument that an investigation rebuts any inference of a confidential relationship misconstrues the law. For purposes of this appeal since it is not claimed that a confidential relationship does not exist as a matter of law, the existence of such relationship is established for summary judgment purposes. The proper focus in connection with this purchase is whether there is a question of fact concerning violation of fiduciary duties.

Where a confidential relationship exists, a presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the defendant to prove absence of unfairness by a preponderance of the evidence. See *Robertson v. Campbell*, Utah, 674 P.2d 1226 (1983). As stated in *Robertson v. Campbell*, *id.* the doctrine of confidential relations requires that if a confidential relationship is found to exist between two parties to a transaction, and if the superior party (in whom trust has been reposed) benefits from the transaction, then "equity raises a presumption of undue influence and casts upon that party the burden to show

affirmatively entire fairness on his part and freedom of the other from undue influence."

See also *Reubsamen v. Maddocks*, Me., 340 A.2d 31, 36 (1975), quoting *Eldridge v. May*, 129 Me. 112, 116, 150 A. 378, 379 (1930) (ellipsis in original omitted).

It is not up to the party in the inferior position of the confidential relationship to prove that she acted under the influence of the dominant party, but rather the dominant party must affirmatively show entire fairness on his part and freedom of the other from undue influence. One of the duties imposed by a confidential relationship is that the fiduciary must act in an entirely fair manner and must not exert undue influence on the other.

Is it not evidence of undue influence for Rasekh to tell Mrs. Bingham to not trust the advice of her brother or daughters because they were not as successful as him? Even though Rasekh told Mrs. Bingham to disregard the advise of her brother and daughters he is urging this court to preclude her from seeking relief because she obtained and then disregarded such advise. Choosing instead to trust Rasekh based upon his claims that he knew better than her family that this was a good investment and in fact one without risk, because he stood ready to buy her out if necessary. One of the very elements of a confidential relationship is the dominance of one party and the weakness of the other. It should seem obvious that Mrs. Bingham's willingness to

disregard the advice of others after being told to do so by Rasekh is strong evidence of her weakness, which subjects her to the power of Rasekh, rather than a reason to preclude the application of the confidential relationship. *Hiltsley v. Ryder*, 738 P.2d 1024, 1027 (Utah 1987). Rasekh faults Mrs. Bingham for the very weakness that is a necessary element of the relationship. The fact that Mrs. Bingham sought advice from family and friends and then disregarded it when told to do so by Rasekh could be construed by a jury as evidence of undue influence. Every reasonable inference should be viewed in a light most favorable to the party opposing summary judgment *Katzenberger v. State*, 735 P.2d 405, 408 (Utah App. 1987). In addition the breach of a promise made during a confidential relationship will be construed as constructively fraudulent because of the special reliance present. *Estate of Davis*, 954 S.W. 2d 374. A promise made and broken by the one in the superior position is not only a breach of promise, but also a breach of fiduciary duty, and can be pursued as a breach of fiduciary duty and constructive fraud. The two strongest indications of the breach of fiduciary duties is the promise that there was no risk to Mrs. Bingham and to disregard information to the contrary because Rasekh knew best because of his experience and personal success.

The determination whether or not there is a breach of fiduciary duties is highly

fact dependent. *C & Y Corp. v. General Biometrics*, 896 P.2d 47 (Utah 1995), and therefore not normally susceptible to summary judgment. All of the facts need to be explored by the jury to determine whether or not Rasekh violated his fiduciary duties by his actions in this case.

### **III. THE STATUTE OF FRAUDS DOES NOT APPLY**

Rasekh claims that all of the cases cited by Mrs. Bingham for the proposition that a fiduciary relationship takes oral promises out of the statute of limitations fall within two narrow exceptions, not applicable to the facts of this case; namely misrepresentations regarding credit and the imposition of a constructive trust. It is not true that all of the decided cases fall within these two narrow exceptions, in fact just the opposite is true. The case of *Teeling v. The Indiana Nat. Bank*, 436 N.E. 2d 855, 859 (Indiana 1982), states the following:

Finally, we find the question of whether the existence of a fiduciary duty falls outside the operation of the Statute of Frauds, IC 32-2-1-6, is one of first impression in Indiana. However, it has been held the statute was not intended to cover oral representations made in violation of a fiduciary relationship.

See also *W.G. Jenkins & Co. v. Standrod*, (1928) 46 Idaho 614, 269 P. 586; see 72 Am. Jur. 2d Statute of Frauds § 176 at 707 (1974) and *Brock & Davis Co., Inc. v.*



*Charleston National Bank*, (S.D. W.Va. 1977) 443 F.Supp. 1175. As explained by the Idaho Supreme Court in *W.G. Jenkins & Co. v. Standrod*, *supra* at 620-621, 269 P. at 588:

"[i]n *Pasley v. Freeman*, (1789) 3 Term Rep. 51, 1 R.R. 634, 100 Eng. Reprint 450, it was held that a false affirmation as to the credit of a third person, made by the defendant with intent to defraud the plaintiff, and in reliance upon which the plaintiff extended credit to the third person, was actionable though it did not appear that the defendant benefitted by the deceit or that he colluded with the person benefitted, but merely knowingly asserted the falsehood. It is generally considered that it was to remedy the evils and abuses growing up under this decision that Lord Tenterden's Act was passed by Parliament in 1828. *Knight v. Rawlings*, [(1907) 205 Mo. 412, 104 S.W. 38]. Our statute (C.S. § 7978), though abbreviated in form, is founded upon Lord Tenterden's Act. No case has been cited, and we find none, applying such statute to a situation where the representors were acting in a fiduciary capacity. The Dissenting opinion of Grose, J., in *Pasley v. Freeman*, *supra*, urges against the adoption of the rule there laid down, among other reasons, the fact that the defendant was in no situation in which the law considered him in any trust or demanded from him any account of the credit of the third person; and in *Knight v. Rawlings*, *supra*, in applying the Missouri statute as prohibiting evidence of oral representations involved in that case, it is pointed out that the defendant there did not sustain a confidential relation to plaintiff. We think the statute was not intended to cover oral representations made in violation of a fiduciary relationship. The gravamen of the charge here is a breach of those relations, and if, as an incident to proving that charge, it becomes necessary to prove oral representations, we think the statute does not preclude such proof, in view of its history and purpose. Like the statute in *Jenkins*, IC 32-2-1-6 is a modern enactment of Lord Tenterden's Act. *Cook v. Churchman*, (1885) 104 Ind. 141, 3 N.E. 759. We conclude, therefore, the existence of a

fiduciary relationship removes a case from the operation of IC 32-2-1-6.

The court in *Teeling*, *supra*, pointed out that this was a case of first impression in Indiana. This is the case in Utah as well. The courts in Utah have declared that the statute of frauds should not be imposed in such a way as to aid in the commission of a fraud. *Jenkins v. Percival*, 962 P.2d 796, 347 (Utah 1998). The court should declare as did the supreme court of Idaho and other courts that the statute of frauds should not be used to aid the commission of constructive fraud by following the lead of other states and holding that the statute of frauds does not apply to representations made in a fiduciary capacity.

Mrs. Bingham would hope that it would be the policy of the state of Utah that a real estate agent, acting in a confidential relationship as an investment advisor, could not induce a buyer to make an investment by promises that there was no risk because the agent/advisor would buy the property from the purchaser if the investment did not work out and then hide behind the statute of frauds. Real estate agents are certainly entitled to make commissions from sales, but they should not be allowed to make commissions from sales wherein they give investment advice through the establishment of a confidential relationship and by making promises that they do not keep and then attempt to shield themselves from liability by invoking the statute of frauds to cover

what otherwise would be constructive fraud on their part.

When viewing the evidence in a light most favorable to Mrs. Bingham there certainly is the appearance that Rasekh is a con man. Creating a trusting relationship with Mrs. Bingham, inducing her to put all of the money in the world she has into a business, telling her to trust him and not others, promising there is no risk, and then dropping her like a hot potato, both professionally and socially, when he gets his commission.

#### **IV.**

#### **RASEKH COULD HAVE FULFILLED HIS FIDUCIARY DUTIES.**

Rasekh admits that before the Hirschi Center was foreclosed that Rasekh took a listing from Mrs. Bingham for the Center (See Rasekh's Brief page 14 ¶ 21). During the time he had this listing Rasekh could have fulfilled his fiduciary duty and purchased the Hirschi Center from Mrs. Bingham, before it was foreclosed. In addition Rasekh's fiduciary responsibility required that he monitor the situation after the sale. It was Rasekh's sudden disappearance after the sale that developed her mistrust and forced the Mrs. Bingham into the position of having to list with someone else. If Rasekh had maintained the same relationship and level of contact with Mrs. Bingham after the sale as he did before he certainly could have found a way to fulfill his fiduciary duties.

**V.**  
**THERE IS EVIDENCE OF NEGLIGENT MISREPRESENTATIONS**

In *Galloway v. AFCO Development Corp.*, 777 P.2d 506 (Utah 1989), the court stated that a professional real estate agent is in a far better position than the buyer to ascertain whether the security for the buyer's investment was indeed adequate, and since a commission was received the real estate agent was thus under a duty to ascertain the truth of his representations concerning the adequacy of the security he represented the investors would receive. In failing so to do, he was negligent, and, therefore, liable for negligent misrepresentation. Rasekh's position that he had no duty to investigate the claims he made about the financial condition of the Hirschi Center run afoul of the holding of *Galloway*, id.

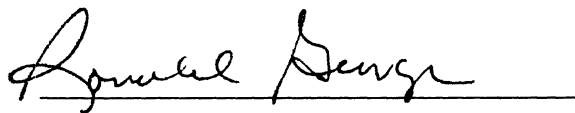
Since Rasekh told Mrs. Bingham to ignore the advise of her brother which was contrary to his he should not be able to claim there are uncontradicted facts that would establish that her reliance on his statements was not reasonable. To determine whether reliance is reasonable all facts connected with the case must be examined, and this determination is usually a question for the jury. *Berkeley Bank for Coops. v. Meibos*, 607 P.2d 798, 801 (Utah 1980). The rational found In *Berkeley Bank for Coops.*, id., concerning reasonable reliance should also apply. In that case the court

held it could be reasonable to rely on oral statements made by the bank about a note even though the note contained written provisions to the contrary. A jury should decide if Mrs. Bingham's reliance on Rasekh's promises and assurances were reasonable based upon his position of superiority, the bond of trust and statements to trust and rely on Rasekh because of his experience and financial success and ignore advise contrary to his.

## **VI CONCLUSION**

Summary Judgment was not appropriate and should be reversed where the evidence is persuasive that a confidential relationship existed between Rasekh and Mrs. Bingham and that there were breaches of fiduciary duty and negligent misrepresentations. It is also a jury question whether Mrs. Bingham's reliance was reasonable.

Respectfully submitted this 21st day of October, 2002.

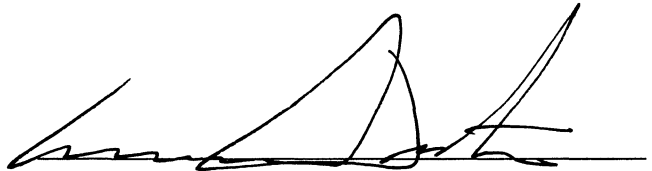
A handwritten signature in black ink, appearing to read "Ronald George", is written over a horizontal line.

Ronald George, attorney for Mrs. Bingham

## CERTIFICATE OF SERVICE

The undersigned, hereby certifies that on the 21st day of October, 2002, that two copies of the Mrs. Bingham's Reply Brief on Appeal were mailed postage prepaid to the following:

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**IN AND FOR THE THIRD JUDICIAL DISTRICT COURT**

**SALT LAKE COUNTY, STATE OF UTAH**

---

MARIE BINGHAM,	)	Case No. 970901897cv
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
RANDAL ROBERTS, MICHAEL DRURY, VRUtah )	)	Judge: Timothy R. Hansen
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.	)	

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PLAINTIFF'S ADDENDUM OF EXHIBITS  
IN SUPPORT OF HER MEMORANDUMS IN OPPOSITION TO  
DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

PLAINTIFF'S ADDENDUM OF EXHIBITS  
IN OPPOSITION TO DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

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