

1995

Kay Berger, Inc., Marvin Chernow and Marilyn Chernow v. David Hooper and Mansell and Associates : Brief of Appellee

Utah Court of Appeals

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**KAY BERGER, INC., MARVIN
CHERNOW AND MARILYN CHERNOW.**

VS.

Defendants and Appellants.

No. 950200
930905391CV

Priority #15

**APPEAL FROM THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT, STATE OF UTAH
THE HONORABLE FRANK G. NOEL, DISTRICT COURT JUDGE**

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UTAH
DEPARTMENT
OF

DOCKET NO. 950745-CA

FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

KAY BERGER, INC., MARVIN
CHERNOW AND MARILYN CHERNOW,

Plaintiffs and Kay Berger, Inc., :
Appellee, :
:

vs. :

DAVID HOOPER and MANSELL & ASSOCIATES, : No. 950200
: 930905391CV
:

No. 950200
930905391CV

Defendants and Appellants. :

BRIEF OF APPELLEE, KAY BERGER, INC.

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JUDICIAL DISTRICT, STATE OF UTAH
THE HONORABLE FRANK G. NOEL, DISTRICT COURT JUDGE**

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JURISDICTION

The Utah Supreme Court had original appellate jurisdiction in this case pursuant to U.C.A. 78-2-2(3)(j). The Utah Supreme Court "poured-over" this case to the Utah Court of Appeals on November 6, 1995.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Berger disagrees with the following statements contained in appellants' Statement of the Issues Presented for Review:

Hooper and Mansell incorrectly state at pages 2-3, paragraph B. that "Appellee's claims, whether breach of contract or promissory estoppel, are based on the premise that the Appellants acted wrongfully when they did not obtain the signature of Jane Boniakowski on the Listing Agreement." As discussed *infra*, Kay Berger, Inc.'s claim for commission is based upon a unilateral contract with Hooper and Mansell.

Hooper and Mansell incorrectly state at page 3, paragraph C. that "Frank and Jane Boniakowski, not the appellants, wrongfully backed out of the escrow agreement." There was never any escrow agreement in connection with sale of the Boniakowski's home to the Chernows. Also, it is undisputed that Jane Boniakowski never signed the Listing Agreement for the home, and consequently there was nothing for her to rescind.

Berger submits that the following statement more correctly frames the issues presented to this court for review:

1. Did the Third District Court correctly hold that the uncontroverted material facts support summary judgment on Berger's promissory estoppel claim?

The standard for appellate review of orders granting summary judgment is that of correction of error and no deference is to be given to the trial court's legal conclusions. Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989); and

2. Did the Third District Court correctly hold that Berger adequately pled her cause of action?

The standard for appellate review of orders granting summary judgment is that of correction of error and no deference is to be given to the trial court's legal conclusions. Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989).

DETERMINATIVE RULES

Sections 3 and 5.1 of the Rules and Regulations Governing the Operation of the Multiple Listing Service of the Salt Lake Board of Realtors state, inter alia.,:

Section 3 Purpose: The Multiple Listing Service [MLS] is a means by which authorized participants make blanket unilateral offers of cooperation and compensation to other participants acting either as subagents, buyer's agents or both.

* * * *

Section 5.1 Agreement: All participants of the MLS before receiving service are required to sign an agreement that they have read, understand, accept and agree to abide by and faithfully observe the rules and regulations of the MLS.

* * * *

Section 18 Compensation Specified on each Listing: The listing broker shall specify on each listing filed with the Multiple Listing Service, the compensation offered to other multiple listing service participants for their services in the sale of such listing. Note 1. In filing a property with the Multiple Listing Service of a Board of Realtors the participant of the service is making a blanket unilateral offer of cooperation to the MLS participants, and shall therefore specify on each listing filed with the service, the compensation being offered to the other MLS participants. Specifying the compensation on each listing is necessary because the cooperating broker has the right to know what his compensation shall be prior to his endeavor to sell. [emphasis added]

STATEMENT OF THE CASE

Berger concurs with appellants' description of the nature of the case, course of proceedings and disposition of the case below.

RELEVANT FACTS

The following facts were set forth in the Statement of Undisputed Facts contained in plaintiffs' Memorandum in Support of Motion for Summary Judgment. (R 45-53) Hooper and Mansell specifically agreed in their responsive memorandum that they did not contest these facts for purposes of their own Countermotion for Summary Judgment. (R 119-120)¹

1. Hooper is an experienced Realtor who has been selling real estate in the Salt Lake City area since 1971. The vast majority of his experience has been with residential real estate. He has served two four-year terms as Director of the Salt Lake Board of Realtors, is a past-president of the Salt Lake Board and is currently serving a three-year term as Director of the Utah Association of Realtors. Hooper is currently an associate broker for Mansell. (R 45, 61-63).

2. Barbara Harrison has been an active Realtor in Salt Lake City for seven years. During the relevant time frame she was an associate broker for Mansell. (R 45, 92-93).

3. Harrison met Frank Boniakowski at a party at Frank Boniakowski's home ("the Property"). She learned that Frank Boniakowski intended to sell the Property

¹Appellants' Countermotion for Summary Judgment was denied at the same time the court granted appellee's Motion for Summary Judgment on the issue of liability.

and she recommended that he use Hooper, because of Hooper's real estate expertise. Harrison's conversation with Frank Boniakowski occurred about a week before July 16, 1993. (R 46, 93-95).

4. Hooper and Harrison met with Frank Boniakowski several days prior to July 16th. At the initial meeting, Hooper and Harrison explained the services Mansell could provide. (R 46, 93-95).

5. Hooper and Harrison met with Frank Boniakowski again on July 16th. At that time, Mr. Boniakowski agreed to list the Property for sale with Mansell. He gave Hooper and Mansell an exclusive listing for the property. (R 46,66,96).

6. During the July 16th meeting, Hooper and Frank Boniakowski filled out a Multiple Listing Form, which was signed by Mr. Boniakowski, as owner of the property. Hooper and Frank Boniakowski also executed a Listing Contract. (R 46,66,105).

7. Hooper knew from the time of his earliest meeting with Frank Boniakowski that Jane Boniakowski was a co-owner of the Property. He had obtained a printout regarding the Property from the County Assessor's office indicating that Frank and Jane Boniakowski were joint and several owners of the Property. (R 46-47,67).

8. Hooper did not discuss with Frank Boniakowski at their first or second meeting the need for all owners to sign the Listing Contract. Hooper knew Jane Boniakowski was living in Canada at the time. (R 47,68,69).

9. After signing the Listing Contract, Hooper specifically asked Frank Boniakowski "do we need to send this paperwork to Jane for her signature or do you feel that she is in agreement with this price and selling the house." Frank Boniakowski indicated to Hooper that he had talked to Jane Boniakowski and that she was in agreement. Hooper relied on Frank Boniakowski's statement and never sent the Listing Contract to Jane Boniakowski for signature and never instructed Frank Boniakowski to do so. (R 47,70).

10. It is Hooper's usual practice as a professional Realtor to obtain all owners signatures' on a Listing Contract. In this case he relied on Frank Boniakowski's representations as to Jane's wishes. It is also Harrison's practice as a professional Realtor to obtain signatures of all owners of Property on the Listing Contract as soon as possible. (R 47,71,97).

11. Hooper believes that over the years he has reviewed the rules applicable to the MLS. He considers himself bound by the rules of the MLS and is generally familiar with the requirement that information submitted to the MLS be accurate. (48,72-73).

12. Berger called Hooper on July 27th and informed him that she had a buyer for the Property. They arranged to meet at the Property that same day. The meeting took place on July 27th at the Property with Frank Boniakowski, Hooper, Harrison and Berger. (R 48,74-75,98).

13. Berger presented the Chernow's Earnest Money Sales Agreement to Frank Boniakowski, Hooper and Harrison. After some discussion Frank Boniakowski signed the Earnest Money Sales Agreement. (R 48,76,98,106-107).

14. Hooper indicated that he would immediately send the Earnest Money Sales Agreement to Jane Boniakowski in Canada for her signature via Federal Express. (R 48,77,98).

15. At that time neither Hooper nor Harrison had informed Berger or the Chernows that Jane Boniakowski had never agreed in writing to list the Property. (R 48,88,99).

16. Hooper never asked Frank Boniakowski whether he had power of attorney for Jane Boniakowski. (R 49,90).

17. After the July 27th meeting, Berger and the Chernows proceeded with their inspections. Berger contacted Hooper sometime after their July 27th meeting and said the inspections had been completed. (R 49,78).

18. Berger never stated to Hooper that the Chernows would not buy the Property if the foregoing three items were not taken care of by Boniakowski. (R 49,109).

19. Frank Boniakowski contacted Harrison on August 6th by telephone. He informed Harrison that he had decided to not sell the home. Harrison strongly suggested that Frank Boniakowski contact Hooper. (R 49,100-101).

20. Hooper received a telephone call from Frank Boniakowski informing

Hooper that he would not sell. This call occurred on or about August 6th. Hooper then called Berger and left a message on her telephone answering machine that Frank Boniakowski had decided to cancel the sale. (R 51,80-81).

21. Berger contacted Hooper the next morning to discuss the situation with Hooper. During the course of the discussion Hooper stated to Berger that Jane Boniakowski was refusing to sign the Earnest Money Sales Agreement. At that point Berger asked Hooper whether he had obtained Jane Boniakowski's signature on the Listing Contract and Hooper told her that he had not. (R 51, 81-82).

22. Hooper testified at his deposition that if a piece of real property is listed for a certain price on the MLS and Hooper's client offers that price, Hooper assumes that his client will be able to buy the property if no other conditions pertain. (R 51-52,87,89).

23. Harrison does not have any properties listed on the MLS where all owners have not signed the Listing Contract. It is her customary practice as a Realtor to have all owners sign the Listing Contract. (R 52,102).

24. When Harrison is acting as buyer's agent and is showing property listed on the MLS she assumes that all owners have authorized the property to be listed. (R 52,103).

25. The Rules and Regulations Governing the Operation of the Multiple

Listing Service of the Salt Lake Board of Realtors state, inter alia,:

Section 3 Purpose: The Multiple Listing Service is a means by which authorized participants make blanket unilateral offers of cooperation and compensation to other participants acting either as subagents, buyer's agents or both.

* * * *

Section 5.1 Agreement: All participants of the MLS before receiving service are required to sign an agreement that they have read, understand, accept and agree to abide by and faithfully observe the rules and regulations of the MLS.

* * * *

Section 18 Compensation Specified on each Listing: The listing broker shall specify on each listing filed with the Multiple Listing Service, the compensation offered to other multiple listing service participants for their services in the sale of such listing. Note 1. In filing a property with the Multiple Listing Service of a Board of Realtors the participant of the service is making a blanket unilateral offer of cooperation to the MLS participants, and shall therefore specify on each listing filed with the service, the compensation being offered to the other MLS participants. Specifying the compensation on each listing is necessary because the cooperating broker has the right to know what his compensation shall be prior to his endeavor to sell. [emphasis added]

(R 52-53)

26. The Salt Lake Board of Realtors Residential/Condominium Data Input form prepared by David Hooper specifies in Section 3 entitled Listing Office Information that the buyer agency commission for the Property shall be three percent. (R 53,112).

SUMMARY OF ARGUMENT

The Third District Court correctly held that Hooper and Mansell are liable to Berger based upon the equitable theory of promissory estoppel. Berger produced ready, willing and able buyers who accepted the price offered in the Listing Contract. The buyers were unable to purchase the Property and Berger did not receive her commission due to Hooper and Mansell's failure to obtain all listing owners' signatures on the Listing Contract. Regardless of Hooper and Mansell's failure to obtain authorization to sell the property, Hooper and Mansell are liable to Berger for her 3% commission. A unilateral contract was formed when Berger produced ready, willing and able buyers.

ARGUMENT

I. The Third District Court correctly held that the uncontroverted material facts support summary judgment in favor of Kay Berger, Inc., based upon the equitable theory of promissory estoppel.

A. The material, uncontroverted facts support summary judgment.

The Chernows retained Berger in July 1993 to act as their real estate agent in purchasing a home in Salt Lake City. (R 108) Berger found a home for the Chernows through the Salt Lake Board of Realtors Multiple Listing Service ("MLS") in July 1993. (R 109) The home was located at 3628 Wasatch Cove Circle ("the Property") and was listed for \$430,000. (R 105)

The Chernows decided to accept the listing offer by submitting an Earnest Money Sales Agreement on the Property. Berger presented that Agreement to one of the

listed sellers, Frank Boniakowski, and Boniakowski's listing agents, Hooper and Barbara Harrison of Mansell & Associates. The Agreement was presented on July 27, 1993. (R 74-76,98,106-107)

The Earnest Money Sales Agreement presented by Berger was for the full listed price of the Property, \$430,000. The only contingencies included in the Agreement were that the Chernows qualify for financing (which they subsequently did on a more expensive home) and that certain informational physical inspections of the home be completed. (R 106-107)

Frank Boniakowski executed the Earnest Money Sales Agreement on July 27th. (R 107) Hooper represented that he would immediately send the Agreement to Jane Boniakowski, who was in Canada at the time, for her signature. (R 77,98) Jane Boniakowski was Frank Boniakowski's wife, and was a co-owner of the Property. (R 67)

The Chernows and Berger retained inspectors to inspect the property and the inspections were satisfactorily completed. (R 78) The Chernows never indicated to Boniakowski, Hooper or Harrison that they intended to rely on the results of the inspections to rescind the Earnest Money Sales Agreement. (R 109) Berger faxed a letter to Hooper on August 4th indicating that all of the inspections were satisfactory. (R 111)

On August 7, 1993, Berger received a message that had been recorded on her company's answering machine on August 6th. The message was from Hooper and stated that Boniakowski had rescinded the Earnest Money Sales Agreement. (R 80-81) Berger subsequently learned that Hooper and Mansell had failed to obtain Jane Boniakowski's signature on the MLS Listing Contract for the Property. (R 81-82) This occurred despite Hooper's knowledge that Jane Boniakowski was a joint and several

owner of the Property. (R 67) Berger was never paid any commission on the Property, despite producing buyers who were ready, willing and able to pay the full amount of the listing price.

B. The elements of promissory estoppel have been met

Promissory estoppel is an equitable claim for relief. The factual prerequisites for promissory estoppel are:

(1) a promise reasonably expected to induce reliance; (2) reasonable reliance inducing action or forbearance on the part of the promisee or third person; and (3) detriment to the promisee or third person.

Weese v. Davis County Comm'n, 834 P.2d 1, n.17 (Utah 1992)

Utah has also adopted the Restatement (Second) of Contracts Section 90, which describes promissory estoppel as follows:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Andreason v. Aetna Cas. & Surety Co., 848 P.2d 171 (Utah App. 1993).

Hooper's listing on the MLS constituted a promise reasonably expected to induce reliance. Berger reasonably relied on the belief that if she produced ready, willing and able buyers for the full listing price of the property, Berger would receive her 3% commission from Hooper and Mansell. Berger suffered detriment as a result of Hooper and Mansell's actions; she expended substantial efforts to obtain ready, willing and able buyers and received no commission from Hooper and Mansell in return.

1. Promise

The Listing Contract signed by Frank Boniakowski authorized Hooper and Mansell to sell the Property for \$430,000.00. Frank Boniakowski promised to pay Hooper a seven percent commission if Hooper produced a buyer for the listed price. The Listing Contract specifically instructed and authorized Hooper and Mansell to place the listing on the MLS. Hooper and Mansell's listing on the MLS, together with the Rules and Regulations of the MLS and the Chernows' acceptance of the listing price, constituted a promise. Hooper and Mansell promised to pay Berger a three percent commission on the \$430,000.00 listed price for the Property, if she produced ready, willing and able buyers for the property at the listed price.

Participants in the MLS system agree to abide by and faithfully observe the Rules and Regulations of the MLS. Those Rules and Regulations include a clear statement that:

In filing a property with the Multiple Listing Service of a Board of Realtors, the participant of the service is making a blanket unilateral offer of cooperation to the other MLS participants, and shall therefore specify on each listing file with the service, the compensation being offered to the other MLS participants.

The nature of the MLS blanket unilateral offer is discussed in Roger Crane and Associates, Inc. v. Felice, 875 P.2d 705 (Wash.App. 1994). In Roger Crane, the court reviewed an action by a real estate broker and agency against a vendor and another broker seeking a portion of the real estate commission generated by the sale of a home.

Plaintiff Crane claimed to be a cooperating broker. In assessing the nature of an MLS listing agreement, the court stated:

A listing agreement is a unilateral contract and until performance by Crane, the putative subagent, there was no obligation to pay Crane a commission. [Citations omitted]. The language of the MLS Restated Rules and Operational Procedures does not require a different result. Article I, section 1.1 of the MLS Restated Rules and Operational Procedures states that a listing creates a "blanket unilateral offer of subagency...". **Here, the performance required by Crane to accept the unilateral offer of subagency, and create a binding contract, was presentment of a ready, willing and able buyer or presentment of an offer to purchase the Felice home.** (emphasis added)

Id. at 709

The listing placed by Hooper and Mansell for the Property constituted a blanket unilateral offer to pay Kay Berger a three percent commission if she could produce a willing and able buyer at the listed price. Berger produced ready, willing and able buyers, thus creating a binding contract with Hooper and Mansell, but never received her commission from Hooper and Mansell.

Hooper and Mansell have provided the court with a number of string citations to broker contract cases. The holdings support the general rule that if a seller signs a listing agreement with an agent and the agent finds a buyer who is ready, willing and able to buy at the listing price then the seller owes his agent the agreed upon commission. Berger does not quarrel with this notion, and in fact relies upon it in support of her unilateral contract with Hooper and Mansell.

2. Reasonable Reliance

Berger and the Chernows reasonably relied on the information contained in the multiple listing. Hooper and Harrison admitted it is reasonable to expect that if one accepts the listing price for a piece of property, one will be able to purchase the property for that price. Neither Hooper nor Harrison ever told Berger or the Chernows that Jane Boniakowski had not authorized the sale of the property. As a result, Berger and the Chernows expended substantial time and effort in attempting to purchase the Property. It would be unjust to deny Berger her commission under these circumstances.

Appellants argue that Berger has not established reasonable reliance sufficiently to prevail on her promissory estoppel claim. Appellants have overlooked Hooper's own admission in this regard; Hooper testified in his deposition that if real estate is listed for a certain price on the MLS and Hooper's client offers that price, Hooper assumes that his client will be able to buy the property if no other conditions pertain. (R 51-52,87,89) Mansell's employee, Barbara Harrison, testified at her deposition that it is her customary practice as a Realtor to have all owners sign the Listing Contract and that when she is acting as a buyer's agent and is showing property listed on the MLS she assumes that all owners have authorized the property to be listed. (R 52,102-103)

Appellants argue that reasonable reliance presents a genuine issue of material fact precluding summary judgment. Berger does not quarrel with the notion that reasonable reliance is generally a question of fact. The problem with Hooper and Mansell's argument is that they did not controvert any of the material facts introduced by

Berger in support of Berger's motion for summary judgment. Since the material facts are uncontroverted the question of reasonable reliance can be resolved as a matter of law.

Analogy can be drawn to the issue of proximate cause. Questions of proximate cause are generally reserved for the jury. Steffensen v. Smith's Management Corp., 820 P.2d 482, 486 (Utah App. 1991). However the issue of proximate cause can be taken from the jury "where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation." Id. at 487, citing Robertson v. Sixpence Inns of America, Inc., 789 P.2d 1040, 1047 (Ariz. 1990).

Appellants characterize as an "enormous assumption" the notion that all owners of a parcel of real property must sign a multiple listing agreement in order for a broker to have proper authority to list the property. This completely misses the point. Sellers and their agents should be required to deal fairly with buyers and their agents. In this case, appellants did not deal fairly with Berger or the Chernows. Hooper and Mansell never told Berger or the Chernows that they did not have approval of all owners to sell the Property. As a result, Berger and the Chernows ended up wasting time and money.

Hooper and Mansell essentially urge that the MLS should be informational only; buyers and agents would have to check each representation in a listing with all property owners before they could rely on that representation. The Multiple Listing Service is not merely informational. Hooper himself testified at his deposition that if a piece of real property is listed on the MLS for a certain price and Hooper's client offers that price, Hooper assumes that his client will be able to buy the property if no other conditions pertain. (R 51-52,87,89) Hooper did not characterize such an assumption as

"enormous" at his deposition. Additionally, real estate brokers who participate in the MLS expressly agree that "authorized participants make blanket unilateral offers of cooperation and compensation to other participants acting either as subagents, buyer's agents or both." (R 52-53)

3. Detriment

Berger clearly suffered detriment by not receiving her commission. Hooper and Mansell promised to pay Berger a three percent commission if she could produce a buyer at the listed price. Permitting Hooper and Mansell to withdraw this promise would be unfair and inequitable.

C. Public policy grounds support the Third District Court's Order granting summary judgment.

As a matter of public policy, this court should not permit seller's agents to escape the reasonably foreseeable consequences of listing properties for sale without obtaining authorization from all owners. Under Hooper and Mansell's approach, brokers could list property for sale on the MLS without any authorization from an owner. Participating agents and the public would be left without a remedy in cases where the owners decide not to honor the listing offer.

If a broker elects to list a property on the MLS without proper owner authorization, it should be at that brokers' own peril. It would be patently unfair to expect subagents to expend time and effort to secure a ready, willing and able buyer with no reasonable expectation of earning a commission. That is precisely the reason the Rules and Regulations governing the MLS require listing agents to make a "blanket unilateral of cooperation and compensation."

II. The Third District Court correctly held that Berger adequately pled her causes of action.

Appellants complain that plaintiffs did not specifically allege breach of contract in their Amended Complaint and claim Berger should therefore have been barred from presenting a breach of contract argument in Berger's Partial Motion for Summary Judgment. Appellants' argument fails on two grounds: 1) promises enforced under the theory of promissory estoppel are considered contracts and 2) Rule 8 of the Utah Rules of Civil Procedure clearly provides for notice pleading.

The definition of promissory estoppel relied upon by the Utah Supreme Court is set forth in Section 90 of the Restatement of Contracts. The supplemental notes to Section 90 refer to Sections 193-209 of Corbin on Contracts. Section 193 of Corbin on Contracts states in part:

. . . there have always been informal promises that are enforceable without any expression of assent by the promisee and without any consideration in the sense of an equivalent given in exchange. These informal contracts are not "bargains" and are not made by the process of offer and acceptance. They are "unilateral" and not "bilateral" contracts.

Appellants' brief ignores the fact that a binding promise under promissory estoppel theory is a unilateral contract. Appellants brief also ignores the well-established Utah law on the subject of notice pleading. As the Utah Supreme Court stated in Blackham v. Snelgrove, 3 U.2d 157, 160, 280 P.2d 453, 455 (1955) "a complaint is required to give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved."

The Amended Complaint in this case more than meets the requirements of Rule 8. Detailed factual allegations outline the nature and basis of plaintiffs' claims. (R 16-22) The mere fact that plaintiffs did not plead a separate cause of action for breach of contract is immaterial; a fair reading of the Amended Complaint makes clear the nature and scope of Berger's claims.


Appellants' claim there is no contractual language of which they are aware, whether written or oral, that obligates the appellants to pay a commission to Berger. (Appellants' brief, pp. 21-22) The terms of Arnold's contract with Mansell and Hooper are clearly stated in the Rules and Regulations Governing the Operation of the MLS: the MLS "is a means by which authorized participants make blanket unilateral offers of cooperation and compensation to other participants acting either as subagents, buyer's agents or both." Hooper and Mansell explicitly offered to pay Berger a 3% commission if she produced a ready, willing and able buyer. Berger produced ready, willing and able buyers but never received her 3% commission from Mansell and Hooper.

CONCLUSION

This court should affirm the Third District Court's order granting Berger summary judgment for her 3% commission in the amount of \$14,914.52.

DATED this 17 day of November, 1995.

KIPP AND CHRISTIAN, P.C.


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MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, this 17th day of November, 1995, a true and correct copy of the foregoing Brief of Appellees Kay Berger, inc., Marvin Chernow and Marilyn Chernow, to the following:

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