1981

Hal Taylor Associates, a Utah Corporation v. Unionamerica, Inc., a Corporation, aka Westmor; Ramshire, Inc., a Corporation; William R. Stevenson; Park City Reservations, Inc, a Corporation dba Skyline Realty; Harry F. Reed and Gary Cole : Brief of Respondents Unionamerica, aka Westmor Ramshire, Inc. and William R. Stevenson

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

HAL TAYLOR ASSOCIATES, a Utah Corporation, Plaintiff-Appellant, vs. UNIONAMERICA, INC., a corporation, aka WESTMOR; RAMSHIRE, INC., a corporation; WILLIAM R. STEVENSON; PARK CITY RESERVATIONS, INC., a corporation dba SKYLINE REALTY; HARRY F. REED and GARY COLE, Defendants-Respondents.	)	Case No. 17359

BRIEF OF RESPONDENTS UNIONAMERICA, AKA WESTMOR;
RAMSHIRE, INC.; and
WILLIAM R. STEVENSON

APPEAL FROM A JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH
HONORABLE JAMES S. SAWAYA, JUDGE

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STATEMENT OF THE NATURE OF THE CASE

This is a dispute between appellant, the listing broker of a piece of real property sold by respondent Unionamerica, Inc., and respondent Park City Reservations, Inc., as to the rights of the respective parties to a real estate commission of $96,000 heretofore deposited by Unionamerica, Inc. in an interest bearing escrow account for the benefit of appellant and Park City Reservations, Inc.

DISPOSITION IN LOWER COURT

After a trial, the court awarded 60% of the deposited commission (amounting to $57,600 plus interest) to respondent

Park City Reservations, Inc., and 40% of the deposited commission ($38,400 plus interest) to appellant. The court also awarded appellant a judgment against respondent Unionamerica in the amount of $2,550 plus interest, as the commission due on a second sale of real property. The court ruled that appellant was not entitled to compensatory damages over and above its share of the real estate commimssions, and ruled that appellant was not entitled to punitive damages, attorneys' fees or costs.

RELIEF SOUGHT ON APPEAL

Respondents request that the trial court judgment be affirmed in all respects. Only Point II, Point III and Point IV of appellant's brief apply to respondents Unionamerica, Inc.; Ramshire, Inc.; and Stephenson; and these are the only points that will be addressed herein.

STATEMENT OF FACTS

The Transcript of Proceedings contained in the Record on Appeal will be referred to by the letters "Tr." followed by the transcript page number(s), and exhibits will be referred to as "Ex." followed by the exhibit number(s). There is no dispute that respondent Unionamerica, Inc. and its wholly-owned subsidiary, respondent Ramshire, Inc. are one and the same for purposes of this action and they will be referred to together as "Unionamerica". Appellant will be referred to also as "HTA"; Hal Taylor will be referred to as "Taylor"; respondent Park

City Reservations, Inc. dba Skyline Realty will be referred to as "Skyline" and respondents Stevenson, Reed and Cole will be referred to by their surnames.

The following statement of facts will briefly discuss only the facts necessary to supplement, clarify or controvert those facts contained in appellant's Statement of Facts that pertain to the claims against Unionamerica and Stevenson.

On February 17, 1977 Taylor and HTA entered into a written agreement (the Settlement Agreement) settling a prior lawsuit brought by them against Unionamerica and Greater Park City Company (GPCC), who is not a party to the present action. The Settlement Agreement required both Unionamerica and GPCC to enter into exclusive listing agreements with HTA as to all Summit County real estate either of them might wish to sell during a period of five (5) years. (Trial Court Finding No. 9, Appendix E)

The Settlement Agreement stated as follows:

> On all property listed with Taylor, he will be required to perform the usual real estate broker activities and will be entitled to a commission rate, of six percent (6%), and Taylor will further agree to a fee-splitting arrangement giving sixty percent (60%) to the selling broker and forty percent (40%) to the listing broker.

(Ex. P-2, Appendix A)

Also on February 17, 1977, pursuant to and consistent with the Settlement Agreement, Unionamerica entered into a written Vacant Property Listing Agreement (the Listing Agreement) with HTA for the sale of approximately 10.5 acres of property

(the Village Property) owned by Unionamerica in Park City, Utah. The Listing Agreement was on the standard form generally used in the community and gave HTA the exclusive right to sell the Village Property in return for a 6% commission to be paid no matter who might sell the property during the listing period. (Trial Court Finding No. 10, Appendix E; Ex. P-3, Appendix B.)

On their face, neither the Settlement Agreement nor the Listing Agreement required the owner to direct inquiries from prospective buyers to HTA. (Tr. 177 - 178.) Throughout discovery and the trial, HTA's counsel referred to prospective buyers who might direct inquiries about the property to the owner as "walk-ins" and, for the sake of clarity, appellees will hereinafter use that term. Taylor on behalf of HTA, Stevenson on behalf of Unionamerica, and Ray Johnson (Johnson) on behalf of GPCC were the individuals who prepared the Settlement Agreement. Their recollections as to conversations on February 17, 1977 concerning such "walk-in" buyers vary.

Although Taylor testified at trial that the parties orally agreed that walk-ins to either Unionamerica or GPCC would be referred to HTA (Tr. 51), his "recollection" did not occur until well after this action was filed and appeared to be based on the testimony of GPCC's Johnson (Tr. 142 - 143.) Taylor could not specifically recall what was said during the conversations or whether Stevenson actually said he would refer walk-ins to HTA (Tr. 152 - 154). In his early pleadings, filed before he talked to Johnson, Taylor made no mention of such an

oral agreement.

Although Johnson testified that there was an agreement to refer walk-ins to HTA, he appeared to be referring to persons "walking in" as a result of a $5,000 joint advertising campaing proposed between Unionamerica and HTA (Tr. 202). Johnson's recollection on this point was also hazy, and Taylor testified that the proposed joint advertising campaign was never performed (Tr. 124 - 125).

Stevenson's recollection of the February 17 conversations concerning walk-ins was quite different. He testified that the subject came up only because GPCC did not wish to sell properties at the time the Settlement Agreement was made. Taylor wanted to know what would happen if a prospective buyer approached GPCC with an offer to purchase unlisted properties. Johnson stated that HTA would still get a commission. Stevenson said he did not participate in the discussion because Unionamerica wanted to list its properties immediately and therefore the discussion did not apply to Unionamerica. The question of walk-ins, as defined by appellant's counsel, was not discussed and never occurred to Stevenson at the time (Tr. 295 -296, 301, 360 - 361).

Since neither the Settlement Agreement nor the Listing Agreement referred to the subject of walk-ins, and since the Settlement Agreement expressly provided that someone other than HTA could become a selling broker entitled to 60% of the commission, Judge Croft ruled prior to trial that neither

agreement contained any express or implied provision requiring Unionamerica to refer walk-ins to HTA (Judge Croft's Order of June 4, 1979, Appendix C). Judge Sawaya adopted Judge Croft's Order at trial (See Memorandum Decision of Judge Sawaya dated May 7, 1980, Appendix D). Although Taylor contended at trial that he relied on the exclusive right to sell language as covering the referral of walk-ins (Tr. 136 - 137), evidence of customary usage of this language in the real estate industry did not support Taylor's interpretation (Tr. 172), and there was no evidence that Stevenson or Unionamerica could have been aware of such "customary usage" even if it existed.

At trial, after hearing the testimony of Taylor, Johnson and Stevenson, and after assessing the credibility of each, Judge Sawaya found that there was no oral agreement to refer walk-ins to HTA, and no mutual mistake or fraud that would have justified reforming the Settlement Agreement or Listing Agreement (See Memorandum Decision dated May 7, 1980; Appendix D, Finding of Fact No. 11, Appendix E). Although HTA contended that custom and practice in the real estate industry required Unionamerica to refer walk-ins to the listing broker, Taylor testified that this case represented the first time he had been confronted with the issue of whether walk-ins had to be referred to the listing broker (Tr. 136).

Shortly after the Settlement and Listing Agreements of February 17, 1977, Taylor, on behalf of HTA, contacted Skyline and other real estate brokers to seek their assistance in

selling the Village Property, and offered to give 60% of the commission to any broker that sold the Village Property (Finding of Fact No. 12, Appendix E; Tr. 117 - 118).

Around October 1, 1977, Jack Davis (Davis), the eventual purchaser of the Village Property, had a telephone consversation with Robert Volk (Volk), the president of Unionamerica, concerning the Village Property. Davis was referred to Volk by Gordon Luce (Luce), a Unionamerica director who knew of Davis' interest in purchasing resort properties and knew of the availability of the Village Property. Davis and Volk agreed to meet in Park City on October 3 and Volk requested that Stevenson meet them there also (Deposition of Volk, pp. 18 - 24; Deposition of Davis, pp. 14 - 15; Tr. 323; Findings No. 13 and 14, Appendix E).

Stevenson called HTA to find out if Taylor could be present at the meeting with Davis, in case he was needed to answer questions. Stevenson was informed that Taylor was in San Francisco and would not return until later in the week. Stevenson did not request to be put in touch with Taylor because he did not know how interested Davis was in the Village Property and did not want to ask Taylor to return from San Francisco just on the possibility he might be needed to answer questions. Stevenson did not ask to speak with Ken Oswald (Oswald), a salesman in the HTA office acquainted with Stevenson, because he did not have confidence in Oswald's abilities (Tr. 368 - 370; Finding No. 17, Appendix E).

On October 3, 1977, Stevenson met Volk at the Salt Lake City airport. Volk informed Stevenson that Volk would not be able to meet with Davis, and Volk asked Stevenson to go without him. Stevenson then called Cole because he knew Cole and knew Cole worked for Reed at Skyline. Stevenson had confidence in Reed's abilities and wanted a broker to be available if needed (Tr. 325 - 327, 371; Finding No. 18, Appendix E).

Stevenson met with Davis and Davis' wife on October 3 and was asked some questions concerning potential development of the Village Property which he could not answer. He then arranged for Reed and Cole to meet himself and the Davises on October 4, at which time they visited the Village Property (Tr. 372 - 373; Finding No. 19, Appendix E).

On October 17, 1977 Stevenson, on behalf of Unionamerica, and Davis both signed an earnest money agreement, negotiated and prepared by Reed and Cole, for the purchase and sale of the Village Property (Tr. 344 - 347; Ex. P-9). Neither Taylor nor HTA were involved in the negotiations culminating in this agreement nor, indeed, even met Davis until October 24 (Tr. 78 - 81). On October 26, 1977 Stevenson and Davis executed a real estate contract calling for multiple closings (Ex. P-12; Finding No. 12, Appendix E).

The evidence showed that the sale to Davis was consummated only as the result of the substantial time and effort devoted by Reed, Cole and Skyline. Since Davis was new to Park City, Reed had to sell Davis on the potential of the area for

real estate development (Tr. 457 - 459). Reed and Cole also met with both Stevenson and Davis in California to negotiate the terms of the sale (Tr. 344 - 347, 411 - 414). Because the terms of the real estate contract (Ex. P-12) permitted Davis to withdraw from the deal if the development that was planned became unfeasible, Reed and Cole worked exhaustively for several months after October, 1977 in order to insure that the project cleared the various hurdles encountered by a major real estate development, so that Davis would go through with the sale (Tr. 597 - 602). It was this latter effort that was the most time consuming and perhaps the most important.

At no time did Stevenson attempt to conceal or misrepresent the source of the buyer. The first conversation between Taylor and Stevenson concerning Davis occurred on October 19, 1977, at which time Stevenson fully disclosed to Taylor how Davis learned of the Village Property (Tr. 88). When Stevenson first referred Davis to Reed and Cole, it was not for the purpose of forcing Taylor or HTA to split any commission (Tr. 329, 379).

Stevenson believed the term "selling broker" was used in the Settlement Agreement to mean the broker that brought in an offer from a buyer that was accepted and that resulted in a closed sale through the efforts of that broker, and believed that Reed, Cole and Skyline had performed these functions (Tr. 378), and the trial court so found (Finding No. 27, Appendix E). However at a meeting held on October 24, 1977, Taylor demanded

to be paid 100% of the $96,000 commission that resulted from the sale of the Village Property (Tr. 90, Ex. P-10). Taylor testified he did not recall what he said at that meeting (Tr. 96). However, Stevenson and Reed were both present and testified that Taylor indicated that he would not agree to pay 60% of the commission to Skyline as the selling broker because of his personal animosity toward Cole (Tr. 595 - 596, 610 - 611, 644). Stevenson and Reed also testified that at this meeting Taylor orally agreed that the entire commission could be placed in escrow until the dispute between HTA and Skyline was resolved, although he did not sign the real estate agreement containing the escrow provision (Tr. 354, 472 - 473, 597; Ex. P-11). A subsequent letter from HTA's counsel indicated acquiescence in an escrow agreement (Ex. D-19).

Because of the conflicting claims to the $96,000 commission, and based upon the advice of counsel, Unionamerica deposited the entire amount into an interest-bearing escrow account at the time of the first closing in May, 1978 (Tr. 355, 375 - 376, 418). By order of the district court dated September 5, 1978, the parties were required to maintain this sum in the interest-bearing account, subject to withdrawal only upon order of the court (Appendix G). After judgment in this action, the district court ordered the release of 40% of the commission plus interest to HTA, based upon the stipulation of all parties dated February 6, 1981.

The trial court ruled that Unionamerica's deposit of the commission into an escrow account was reasonable under the circumstances, found that Unionamerica breached no fiduciary or other duty to HTA, did not award compensatory or punitive damages or attorney's fees, and ruled that each party would bear its own costs (Finding No. 26, Conclusions of Law No. 8 and No. 9, Appendix E; Judgment, Appendix F).

ARGUMENT

POINT I

RESPONDENTS UNIONAMERICA, INC. AND STEVENSON OWED NO FIDUCIARY DUTY TO APPELLANT, AND OWED NO CONTRACTUAL DUTY, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, TO REFER WALK-INS TO APPELLANT.

A. RESPONDENT PRINCIPALS OWED NO FIDUCIARY DUTY TO APPELLANT HTA AS THEIR AGENT.

In point IIA. of its brief, appellant appears to contend that because appellant as agent owed a fiduciary duty to its principal, Unionamerica, there is also a fiduciary duty owed by Unionamerica to appellant. Apopellant cites no authority for this proposition, probably because there is none. The cited portions of Am. Jur. 2d relied upon by appellant do not indicate that the duty owed by a principal to its agent is a fiduciary duty. Instead, they state that the only duties owed by a principal to its agent are contractual duties and the implied duty to act in good faith that is a part of every contract. See

also, Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975).

Am. Jur. 2d directly contradicts the very contention for which appellant cites it. 12 Am. Jur. 2d Brokers § 100, p. 851 states as follows:

> ...in the ordinary transaction there is no trust and confidence reposed by the broker in the principal, as there is by the principal in the broker.

There is practically no case law discussing a claim that a principal owes a fiduciary duty to its agent, simply because there is so little merit to such a claim that it is rarely raised. However, in Campbell v. Sickels, 197 Va. 298, 89 S.E.2d 14 (1955) a claim similar to HTA's claim here was rejected. In that case plaintiff real estate broker and defendant landowner entered into an exclusive right to sell agreement which required the payment of a commission to the broker, regardless of who made the sale. The agreement also fixed the terms upon which the owner was willing to sell. The broker obtained an offer that was different than the terms fixed in the agreement, and the owner not only refused the offer but also refused to tell the broker why the offer was not acceptable. In response to the broker's claim that the owner acted in bad faith, analogous to HTA's claim presently before this court, the Virginia Supreme Court stated as follows:

> The duty of a landowner to a broker is different from the duty of a broker to a landowner. The broker occupies a fiduciary relation to his client and so long as that relation continues he is under a legal obligation, as well as a high moral duty, to give his principal loyal

> service and the benefit of his information as to the property entrusted to him for sale...
>
> There is no such confidential relation flowing from the principal to the broker. A principal's contractual duty is to compensate his broker for services rendered in accordance with his contract of employment, and so long as the relation of principal and agent exists to exercise good faith toward him. (89 S.E. 2d at 18 - 19, footnotes deleted, emphasis added.)

The good faith duty referred to by the court meant good faith in carrying out the terms of the contract, not a good faith duty separate and apart from the contract. This is apparent from the court's ruling that the landowner had no duty to the broker to modify the terms of sale set forth in her agreement with the broker, or to accept an offer that did not meet those terms.

In the case at hand, the only duty of Unionamerica and Stevenson to HTA was to act in good faith in carrying out the terms of the Settlement Agreement and the Listing Agreement. As will be discussed more fully below, the trial court correctly ruled that neither of these agreements contained any express or implied provision regarding walk-ins, nor any oral or written agreement requiring respondents to refer walk-in buyers to appellant.

The question of whether a fiduciary relationship exists is a question of fact for the trial court Blodgett v. Martsch, 590 P.2d 298 (Utah 1978). To accept appellant's position would mean that the attorney's fiduciary duty to his client creates a fiduciary duty from the client to his attorney, which is nonsense. Unionamerica and Stevenson owed HTA no duty other

than contractual duties. See also, Mann v. American Western Life Insurance Co., 586 P.2d 461 (Utah 1978).

B. THE RECORD SUPPORTS THE RULING OF THE TRIAL COURT THAT NEITHER THE SETTLEMENT AGREEMENT NOR THE LISTING AGREEMENT CONTAINED ANY EXPRESS OR IMPLIED REQUIREMENT THAT UNIONAMERICA REFER WALK-INS TO APPELLANT, AND THE FINDING THAT THERE WAS NO ORAL AGREEMENT BY UNIONAMERICA APART FROM THESE WRITTEN AGREEMENTS.

1. No express or implied terms in the written agreements.

At trial, Taylor conceded the obvious fact that neither the Settlement Agreement nor the Listing Agreement contained language expressly requiring Unionamerica to refer walk-ins to HTA (Tr. 177 - 178). Taylor also conceded that the only language relied upon as implying this requirement is the language in the Listing Agreement giving HTA the exclusive right to sell the Village Property and providing that the commission must be paid even if Unionamerica is the procuring cause of the sale (Tr. 135 - 136). In Point II.B. of its brief, HTA argues that the one who first "finds" the buyer is always the procuring cause of the sale and that since Unionamerica would be the finder of any walk-in buyer and therefore the procuring cause of a sale to any walk-in, it would be required by the Listing Agreement to refer walk-ins to HTA.

Unionamerica and Stevenson cannot be held liable to pay

any party any amount other than the amount already paid into escrow, regardless of the outcome of the procuring cause issue. Nevertheless, these respondents must point out that appellant mischaracterizes Judge Croft's order entered prior to trial (Appendix C), as well as the law generally in arguing that Unionamerica impliedly agreed to refer walk-ins to appellant.

Appellant contends that Judge Croft ruled that in order for Skyline to have been the procuring cause of the sale of the Village Property, entitled to 60% of the commission as the selling broker, Skyline had to both "find" the buyer and "negotiate" the sale. Appellant further contends that this is inconsistent with Judge Croft's unequivocal ruling in the same order that no implied provision of the written agreements required Unionamerica to refer walk-ins to appellant.

The only inconsistency in Judge Croft's order is created by appellant's misinterpretation of that order. Judge Croft made no determination that a "selling broker" must both find a buyer and negotiate an agreement in order to become a procuring cause of a sale. Even a cursory reading of the order reveals that Judge Croft's use of the words "find" and "negotiate" were not intended to create an absolute standard which a "selling broker" must meet, but were intended only to indicate in a general sense that the parties to the Settlement Agreement intended to motivate brokers other than HTA to attempt to sell the Village Property, by offering these brokers 60% of the commission.

At no time since this action was filed have any of the respondents ever contended that anyone other than Unionamerica "found" Jack Davis, the buyer. If this fact alone barred Skyline's right to 60% of the commission, Judge Croft would not have found that "...further issues of fact remain to be determined...". At trial, Judge Sawaya did not interpret Judge Croft's order as setting the standard for a "selling broker" nor was he asked to by appellant. The Memorandum Decision and Findings of Fact entered by Judge Sawaya showed that he felt bound by the binding portions of Judge Croft's order, but not by any offhand use of the words "find" and "negotiate" (Appendices D and E).

Implicit in Judge Sawaya's finding that Skyline performed the obligations of a selling broker is the proposition that the one who negotiates and closes the sale is the procuring cause even if someone else "finds" the buyer (Finding No. 27, Appendix E). This proposition is supported by the case law. In cases where more than one broker is eligible to make a sale, if the broker who "finds" the buyer is not able to negotiate or close a sale, and another broker is able to negotiate and close a sale with the same buyer, the latter broker is the procuring cause of the sale. Hurley v. Kallof, 2 Ariz. App. 446, 409 P.2d 730 (1966); Reed v. Taylor, 322 P.2d 147 (Wyo. 1958). Although these are not exclusive listing cases, they are analogous to the case at hand. When the Settlement Agreement and Listing Agreement are construed together, as they must be, HTA's only exclu-

sive right was to be paid 40% of the commission. Whether HTA or another broker was entitled to the 60% selling broker's commission depended upon who was the procuring cause of the sale. Even assuming Davis had been referred to HTA or "found" by HTA, if another broker negotiated and closed the sale, the other broker might well be the procuring cause and HTA would not be entitled to the selling broker's commission.

It is clear from the facts that after Unionamerica "found" Davis, the negotiation and closing of the sale were performed exclusively through Skyline. After Davis visited the Village Property on October 4, 1977, neither Stevenson nor Unionamerica had any contact with Davis until October 17, 1977 when Reed called Stevenson to discuss the Davis offer which Unionamerica accepted after negotiating through Reed (Tr. 343 - 350). HTA certainly was not involved in finding the buyer or negotiating or closing the sale, and even its 40% commission was earned through the efforts of Skyline.

Common sense alone dictates that the minimal involvement of Luce, Volk and Stevenson did not bring about the sale of a piece of property for $1,600,000 to a man who had never before been to Park City. Reed and Cole sold Davis on Park City and the Village Property, then negotiated the terms of the written agreements, and, most importantly, made sure that the development of the property would materialize so that Davis would not exercise his option to withdraw from the sale (Tr. 344 - 347, 411 - 414, 457 - 459, 597 - 602). The evidence overwhelmingly sup-

ported the finding of fact by the trial court that Skyline performed the obligations of a selling broker, and there is no basis for disturbing that finding on appeal (Finding No. 27, Appendix E). Neither the facts nor the law supported HTA's theory that Unionamerica was the procuring cause of the sale to the walk-in buyer, or that it therefore had an implied obligation to refer Davis to HTA.

Paragraph 36(c) of the fact statement in appellant's brief indicates that under an exclusive right to sell listing, custom and practice in the real estate industry in the State of Utah impliedly obligates the owner to refer walk-ins to the listing broker. However, the parties' stipulation at trial regarding the contents of the real estate manual relied upon by Taylor did not include this obligation in describing an exclusive right to sell listing, and Taylor testified that he had never before been confronted with the issue of whether an exclusive right to sell listing impliedly obligated the owner to refer walk-ins to the listing broker (Tr. 136, 172). Even if such a custom and practice existed, it was binding only upon those who knew or should have known of its existence. Holley v. Federal American Partners, 507 P.2d 381, 29 Utah 2d 212 (1973), Pacific Horizon Distributing, Inc. v. Wilson, 439 P.2d 874, 249 Ore 591 (1968). Testimony at trial indicated that Stevenson was not a real estate broker or salesman at any relevant time and that he had been involved in Unionamerica's real estate transactions for a relatively short time before the events in

question (Tr. 274 - 276). There was no evidence that either Unionamerica or Stevenson knew or could have known of the alleged custom and practice.

No implied covenant to act in good faith in carrying out the terms of the Settlement Agreement and Listing Agreement required Unionamerica to refer walk-ins to HTA. The duty to act in good faith does not add to or vary the terms of these agreements. See, Mann v. American Western Life Insurance Co., supra. The only commission that was guaranteed to HTA under these agreements was the 40% listing broker commission. The only act by Unionamerica that could have frustrated HTA's right to that commission was refusal of the Davis offer. The referral to Skyline did not frustrate that right; it led to the sale from which the 40% commission to HTA flowed.

The Settlement Agreement and the Listing Agreement were both executed on the same day as a part of the same transaction and must be construed together. The Settlement Agreement made the exclusive right to sell in the Listing Agreement non-exclusive. The Settlement Agreement was not just an agreement among brokers to split commissions based upon some form of multiple listing. As Judge Croft ruled, it was an agreement between Unionamerica and HTA to give brokers other than HTA a right to sell the Village Property. HTA was not entitled to become the procuring cause other than by its own efforts. The referral of Davis to Skyline did not make Skyline the procuring cause and did not deprive HTA of the opportunity to become the procuring

cause since there was no way to tell whether the Davis referral would result in a sale (Tr. 369). Skyline became the procuring cause by its own efforts.

Courts will not construe contracts as containing implied terms that add to or vary the substantive rights and responsibilities created by express terms, nor will they find implied terms which the parties are likely to have stated in express language had they intended to include those terms at all. Fuller Market Basket, Inc. v. Gillingham, 539 P.2d 868, 14 Wash. App. 128 (1975); Smith v. Phlegar, 236 P.2d 749, 73 Ariz. 11 (1951); Tippman v. Sears, Roebuck & Co., 280 P.2d 775, 44 Cal. 2d 136 (1955); Camino v. Simon, 219 P.2d 1018, 203 Okla. 234 (1950). The duty to refer walk-ins is a term that HTA and Unionamerica would have included expressly, if they had intended to include it at all. See, Beasley-Kelso Associates, Inc. v. Fenney, 228 S.E.2d 620, 30 N.C. App. 708 (1976) in which the brokerage contract expressly specified that the owner had to refer walk-ins to the broker, in return for a reduction of the commission due on a sale to a walk-in, as an incentive to the owner. If Unionamerica impliedly agreed to refer walk-ins to HTA, did HTA impliedly agree to accept a reduced commission on a sale to a walk-in, as an incentive or consideration for such referrals? At best, the Listing Agreement's silence as to walk-ins is an ambiguity, which under Utah law, must be construed against HTA as the broker who prepared the agreement. Olsen v. Kidman, 235 P.2d 510, 120 Utah 443 (1951).

2. No Oral Agreement

Since the District Court ruled prior to trial that the written agreements contained no express or implied provisions regarding walk-ins, HTA's theory at trial was that these agreements had to be reformed to reflect an oral agreement that the parties made. The trial court found no such oral agreement and it is unclear whether HTA is contesting this finding on appeal. What is clear is that HTA did not meet its burden of proof on this issue, which is a heavy burden in light of the statute of frauds and parole evidence barriers.

Even though Judge Sawaya was bound by Judge Croft's earlier ruling, the trial court considered much the same evidence on the oral agreement issue as would be considered on the implied agreement issue, and found appellant's evidence unpersuasive. This evidence consisted of testimony by Taylor, Johnson and Stevenson concerning conversations they had during the preparation of the Settlement Agreement on February 17, 1977. Naturally, the passage of time impaired the recollections of all three witnesses; none of them could remember what was actually said; and there were significant differences in the testimony of each. Taylor's memory must be questioned because of his admission that he did not recall a conversation regarding walk-ins until he spoke with Johnson long after this action was filed (Tr. 142 - 143). If a conversation in which Stevenson and Johnson agreed to refer walk-ins to Taylor occurred, it is unbelievable that Taylor did not recall this conversation at the

time he filed a lawsuit claiming that a duty to refer walk-ins was owed to HTA.

Johnson's recollection was also questionable, and at one point he testified that the agreement was to refer walk-ins who came in as a result of the joint advertising campaign that was never implemented (Tr. 124 - 125, 202). Stevenson's testimony made the most sense, in light of the factual context in which the conversations occurred. On February 17, 1977, Unionamerica wanted to list most of its properties while GPCC did not. The question Taylor had was whether he would receive a commission if GPCC sold one of its unlisted properties to a walkin, and Johnson answered in the affirmative. The conversation did not apply to Unionamerica and dealt with the question of commissions rather than referrals (Tr. 295 - 296, 301, 360 - 361).

It is the trial court that determines the facts in a breach of contract case. Santi v. Denver & R.G.W.R. Co., 442 P.2d 921, 21 Utah 157 (1968). It is also the trial court's job to draw inferences from the facts, and the trial court should not be reversed unless no reasonable mind could draw the same inferences. Centurian Corp. v. Fiberchem, Inc., 562 P.2d 1252 (Utah 1977). Even in an action seeking the equitable remedy of reformation, and even where the evidence is conflicting, the appellate court should defer to the advantaged position of the trial court hearing the evidence, and should not reverse factual findings even if it would have decided the matter differently. Jacobsen v. Jacobsen, 557 P.2d 156 (Utah 1976); Del Porto v.

Nicolo, 495 P.2d 811, 27 Utah 2d. 286 (1972); Corbet v. Corbet, 472 P.2d 430, 24 Utah 2d. 378 (1970).

In the case at hand the oral agreement issue turned on the credibility of the various witnesses. It is obvious that the trial court accepted the testimony of Stevenson, and with good cause. An appellate court is not able to asssess the credibility of witnesses in the way the trial court can and the trial court's assessments of witness credibility should not be disturbed on appeal. Cannon v. Wright, 531 P.2d 1290 (Utah 1975); People's Finance & Thrift Co. of Ogden v. Doman, 497 P.2d 17, 27 Utah 2d. 404 (1972).

Under Utah law, reformation may not be ordered unless the evidence relied upon is clear and convincing. Sine v. Harper, 222 P.2d 571, 118 Utah 415 (1950). The proof required is greater than that required by the preponderance of the evidence standard. Greener v. Greener, 212 P.2d 194, 116 Utah 571 (1949). Appellant simply did not meet its burden of proof.

Appellant does not improve its position by relying upon the tort of intentional creation of civil liability under § 871a of Restatement of Torts 2d. In order to establish such a tort, appellant would first have to establish that Unionamerica and Stevenson had a duty to refer walk-ins to appellant. As has been shown above, appellant cannot establish such a duty under any express or imnplied provision of the written agreements, under any oral agreement, or under any theory of fiduciary duty. Also, it was not the referral by Unionamerica that made Skyline

the procuring cause of the sale and entitled it to the selling broker's commission, it was Skyline's own efforts. Finally, as will be discussed in more detail below, appellant cannot establish that Unionamerica acted with any intent to injure appellant.

POINT II

RESPONDENTS UNIONAMERICA, INC. AND STEVENSON ACTED IN GOOD FAITH WITH RESPECT TO THE REFERRAL OF JACK DAVIS, AND ACTED IN GOOD FAITH, WITH APPELLANT'S CONSENT, AND IN RELIANCE UPON THE ADVICE OF COUNSEL, IN DEPOSITING THE $96,000 COMMISSION IN AN INTEREST BEARING ESCROW ACCOUNT PENDING RESOLUTION OF THE DISPUTE BETWEEN APPELLANT AND RESPONDENT SKYLINE, AND THERE IS NO BASIS FOR AN AWARD OF PUNITIVE DAMAGES.

A. RESPONDENTS ACTED IN GOOD FAITH REGARDING THE REFERRAL OF JACK DAVIS

Even though Stevenson had no fiduciary or contractual duty to do so, he called HTA first when he learned of Davis, the prospective purchaser of the Village Property. Taylor was out of town and since Stevenson did not know if Taylor would be needed or whether Davis was really interested in the property, he did not attempt to contact Taylor further. Stevenson was acquainted both with Oswald, an HTA salesman, and Cole, who worked for Reed at Skyline. He contacted Reed and Cole rather than Oswald because he had more confidence in Reed's abilities.

He arranged for Reed and Cole to meet himself and Davis, only after lerning that Davis had questions he could not answer (Tr. 325 - 327, 368 - 373).

Stevenson never attempted to conceal or misrepresent how Davis learned of the Village Property and informed Taylor during their next conversation, on October 19, 1977, that Unionamerica had made the first contact with Davis. Stevenson testified that he could recall no oral agreement on February 17, 1977 to refer walk-ins, and that the question of where walk-ins would be referred did not occur to him at that time. He never acted with the purpose to deprive HTA of any commission and the question of who would receive the selling broker's commission did not occur to him when he first contacted Reed and Cole (Tr. 88, 294 - 296, 301, 329, 379).

The foregoing is consistent only with the utmost of good faith on the part of Stevenson and Unionamerica. The main motivation of both Stevenson and Unionamerica was to consummate a sale of the Village Property on favorable terms. Although Stevenson wanted to involve Taylor personally, when Taylor was not available it was only natural for him to involve someone he had confidence in, especially since Volk, his superior, had not been able to meet Davis (Tr. 326). Even if a referral to Oswald had resulted in a sale, HTA or Taylor would have been entitled only to 25% of the selling broker's portion of the commission (Tr. 193 - 195). Since Stevenson knew that the Settlement Agreement anticipated the involvement of other brokers, there

was no reason for him not to call on one of those brokers, especially since HTA as listing broker would get 40% of the commission in any event if a sale occurred (Tr. 292). If, as HTA argues, Skyline was HTA's sub-agent, then a referral to Skyline was the same as a referral to HTA, just as a referral to Oswald would have been the same as a referral to HTA. There was no reason for Stevenson not to fully inform Taylor what had occurred, since he had no reason to think that he had done anything wrong.

The evidence amply supports the finding of the trial court that there was no factual basis for a finding of conspiracy, conversion, wrongful creation of a liability, breach of a duty to act in good faith, breach of fiduciary duty or intentional infliction of emotional distress (Findings of Fact and Conclusions of Law, Appendix E). There is no basis for this court to disturb the trial court findings on these questions of fact.

B. RESPONDENTS ACTED IN GOOD FAITH, WITH APPELLANT'S CONSENT, AND IN RELIANCE UPON THE ADVICE OF COUNSEL IN DEPOSITING THE $96,000 COMMISSION IN AN INTEREST BEARING ESCROW ACCOUNT, AND THERE IS NO BASIS FOR AN AWARD OF PUNITIVE DAMAGES.

Appellant contends that it is entitled to an award of punitive damages even though it lost on every significant issue before the trial court. Appellant cites Nash v. Craigco, Inc., 585 P.2d 775 (Utah 1978) for the proposition that punitive

damages may be awarded even where compensatory damages are not awarded. However compensatory damages were not sought in that case, and the court merely held that punitive damages may be awarded in an equitable action, if the defendant is held liable and the circumstances warrant. If compensatory damages are sought, punitive damages may not be awarded unless grounds for compensatory damages are established. Maw v. Weber Basin Water Conservancy District, 436 P.2d 230, 20 Utah 2d 195 (1968). In the case at hand, appellant established no grounds for either actual damages or equitable relief, and therefore punitive damages are precluded.

Even if appellant had established liability on the part of respondents, this still would not have been an appropriate case for punitive damages. No Utah case that respondents are aware of has ever awarded punitive damages based solely on a breach of contract. The courts of many jurisdictions have held that punitive damages are generally not available in an action for breach of contract, unless some independent tort is involved. See, Temmen v. Kent-Brown Chevrolet Co., 605 P.2d 95, 227 Kan. 45 (1980); Continental National Bank v. Evans, 489 P.2d 15, 107 Ariz. 378 (1971); Waters v. Trenckmann, 503 P.2d 1187 (Wyo. 1972). Although appellant attempts to characterize some of its claims against Unionamerica and Stevenson as tort claims, they are all based on the false premises that respondents had a contractual duty to refer walk-ins to appellant.

Punitive damages may be awarded only if the conduct of

the defendant is willful and malicious. Palombi v. D. & C. Builders, 452 P.2d 325, 22 Utah 2d 297 (1969). Punitive damages may not be awarded where defendant has acted in good faith, even though his actions were wrongful. Calhoun v. Universal Credit Co., 146 P.2d 284, 106 Utah 166 (1944). Stevenson's good faith regarding the referral of Davis has been discussed above. The claim for punitive damages against Unionamerica is based upon the actions of Stevenson and upon the good faith deposit of the commission due on the sale of the Village Property into an interest bearing escrow account, for the exclusive benefit of the contesting brokers.

Unionamerica found itself confronted with an interpleader situation, since it made no claim to the commimssion but was subject to the conflicting claims of HTA and Skyline. HTA argues that Unionamerica should have at least paid it the 40% listing broker commimssion. However, this was not what HTA was asking for. It was asking for for 100% (Tr. 90, Ex. P-10), and there is no evidence that it would have accepted less, so that tender of 40% would have been a futile act which Unionamerica was not required to perform. See, Williston on Contracts § 1819 (3rd ed., 1972). Also, there was a real issue at trial as to whether HTA had done anything to earn the 40% commission, even from Taylor's testimony (Tr. 124 - 130). HTA's anticipatory breach of the Settlement Agreement, by refusing to pay 60% of the commission to the selling broker, relieved Unionamerica of any duty to pay a commission until the dispute was resolved.

See, Williston on Contracts §§ 1300 et. seq. (3d ed., 1972). Understandably, Skyline would not consent to the release of the 40% commission to HTA unless the 60% was released to it (Tr. 477 - 478). Although Unionamerica may have believed the 60%-40% split was proper, it was in no position to act on that belief until the dispute was resolved.

Three factors established Unionamerica's good faith beyond doubt. First, Taylor orally consented to the escrow arrangement on October 24, 1977, and his counsel acquiesced in the arrangement in a subsequent letter (Tr. 354, 472 - 473, 597, Ex. D-19). Second, Unionamerica acted upon the advice of counsel in escrowing the entire commission (Tr. 355, 375 - 376, 418). Third, the district court ratified the escrow arrangement and extended it indefinitely shortly after this action was filed (Appendix G).

Unionamerica never converted the money to its own use and no party has been damaged from loss of the use of the money because it has continued to earn interest throughout this dispute. The trial court's factual finding that Unionamerica acted reasonably should not be disturbed on appeal (Appendix E). Finally, since spite towards Cole motivated Taylor in this matter, it is he who has acted maliciously rather than Unionamerica or Stevenson (Tr. 595 - 596, 610 - 611, 644).

POINT III

THE TRIAL COURT ACTED PROPERLY AND WITHIN ITS DISCRETION IN DECIDING NOT TO AWARD COSTS AND ATTORNEYS' FEES TO APPELLANT, AND APPELLANT IS NOT ENTITLED TO COSTS AND ATTORNEYS' FEES INCURRED ON THIS APPEAL.

The sole cause for this litigation has been Taylor's and HTA's unjustified claim to 100% of the commission due on the sale of the Village Property. For HTA to contend it is entitled to attorneys' fees based upon a trial court judgment ordering the very 60%-40% split of the commission which all respondents offered to HTA years ago is ludicrous. Even if appellant had prevailed at trial on some of its breach of contract claims, the trial court would have been within its discretion to refuse to award attorneys' fees, despite provisions in the contract calling for attorneys' fees. Fullmer v. Blood, 546 P.2d 606 (Utah 1976).

Pursuant to the Settlement Agreement, the trial court did award appellant a commission of $2,550 on a sale of property from Unionamerica to Davis not related to the Village Property sale. However the Settlement Agreement does not provide for attorneys' fees and no separate listing agreement was made on this second property. Attorneys' fees may not be awarded in Utah except pursuant to contract or statute. Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977). Cluff v. Culmer, 556 P.2d 498 (Utah 1976). No statue applies here. Again, the trial court's dis-

cretion regarding attorneys' fees should not be disturbed on appeal.

Attorneys' fees on appeal are usually not awarded unless the position of one party is frivolous. See, Bates v. Bates, 560 P.2d 706 (Utah 1977). If this is the standard, then it is respondents that are entitled to attorneys' fees on appeal, not appellant.

CONCLUSION

Unionamerica and Stevenson owed no fiduciary, contractual, or other duty to refer Davis to HTA. Unionamerica and Stevenson have acted with the utmost of good faith regarding both the referral of Davis and the deposit of the commimssion into an interest bearing escrow account. The trial court's findings, conclusions and judgment are amply supported by both the evidence and the law and should not be disturbed on appeal. The trial court exercised its discretion properly in refusing to award attorneys' fees. If any part is entitled to attorneys' fees on this appeal, it is respondents.

Respectfully Submitted,

PRINCE, YEATES, & GELDZAHLER

F. S. Prince, Jr.

James A. Boevers

James A. Boevers
Third Floor Mony Plaza
424 East Fifth South
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 1981, I served two copies of the foregoing Brief of Respondents upon Kent. B. Linebaugh, Esq. of Jardine, Linebaugh, Brown & Dunn at 370 East South Temple, Suite 401, Salt Lake City, Utah 84111 and Stephen G. Crockett, Esq. of Martineau, Rooker, Larsen & Kimball at 36 South State Street, No. 1800, Salt Lake City, Utah 84111 by leaving the same at his office with his clerk or other person in charge thereof.

PRINCE, YEATES, & GELDZAHLER

By: James A Boevers

February 17, 1977

The following sets forth the terms of an agreement between Hal Taylor, William Stevenson, Vice President of Unionamerica (Westmor), and Ray Johnson, President of Greater Park City Company, to settle the lawsuit Taylor vs. Greater Park City Company, et. al.

It is agreed that Unionamerica (Westmor) and Greater Park City Company will enter into exclusive listing agreements with Hal Taylor and Associates for the next five (5) years for all properties located within Summit County which Unionamerica (Westmor) or Greater Park City Company desire to sell with the exception of the properties actually used for skiing by Greater Park City Company.

This agreement is voided if Hal Taylor and Associates is sold in whole by Mr. Taylor and this agreement as it affects only Hal Taylor and Associates and Greater Park City Company is void if Greater Park City Company changes ownership in whole.

Unionamerica (Westmor) will immediately enter in an exclusive listing agreement with Hal Taylor and Associates for the 10.5 acres of land commonly called the "Village Land" and the approximate 8.3 acres of land commonly called "Comstock/ Claimjumper II". Greater Park City Company will immediately enter into an exclusive listing agreement with Hal Taylor and Associates for the remaining Snow Country Condominiums. Further, the listing agreement between Unionamerica (Westmor) and Hal Taylor and Associates will provide for a splitting of advertising costs up to $5,000 on a to-be-agreed-upon advertising schedule.

Twenty-Five Thousand Eight Hundred Dollars ($25,800) will be paid to Hal Taylor and Associates as follows:

> Within fifteen (15) days following dismissal of all claims, Unionamerica will pay to Hal Taylor and Associates Twelve Thousand Nine Hundred Dollars ($12,900) cash.

Appendix A

Within fifteen (15) days following dismissal of all claims, Greater Park City Company will either pay a like amount or give Hal Taylor and Associates a note for Twelve Thousand Nine Hundred Dollars ($12,900) all due and payable within one (1) year plus interest at the rate of eight and one-half percent (8.5%).

On all property listed with Taylor, he will be required to perform the usual real estate broker activities and will be entitled to a commission rate, of six percent (6%), and Taylor will further agree to a fee-splitting arrangement giving sixty percent (60%) to the selling broker and forty percent (40%) to the listing broker.

This settlement includes a dismissal with prejudice of all claims included in the above mentioned action and an agreement on the part of all parties to bear their own costs and expenses.

AGREED AND ACCEPTED:

UNIONAMERICA (Westmor)

By _____
Vice President

GREATER PARK CITY COMPANY

By _____

HAL TAYLOR AND ASSOCIATES

By _____

/slp

VACANT PROPERTY LISTING

Date Listed 2-17-77 | √ Yes | 0 No

LOCATION VILLAGE COMPLEX-PARK CITY, UTAH Occupied by ______ at ______

Owner WESTMOR Address L.A. CALIF Phones Res. ______ Bus. ______

PRICE $ 1,685,000.00 Cash Payment $ 1/3 DOWN Balance $ - 2-3 YEARS Per ______ including interest at ____%

DESCRIPTION

APPROX. 10.5A. CONSISTING OF 5 SITES COMMONLY DESCRIBED AS FOLLOWS: 1.6A UNION AMERICA SITE; 2.339A CLEMENTINE SITE; 2.570 A DESTINATION SITE; 2.820A SHERATON SITE; 1.507A SITE ADJACENT TO SHERATON SITE.

SIZE OF LOT 10.5A by ______ Alley ______ Water ______ Fence ______ Garage ______ Carport ______

Sidewalks ✓ Sewer ✓ Connected ✓ Curb & Gutter ✓ Pavement ✓ Taxes $ ______
(Note any unpaid balance to be assumed by buyer)

Mortgage / Contract { ~~Bal. ______ due ______ Payable to ______ at $ ______ per mo. Incl. Int. at ______%~~

Will consider exchange for N/A

Remarks: ______

SALES AGENCY CONTRACT

HAL TAYLOR ASSOCIATES Company

In consideration of your agreement to list the property described above, and to use reasonable efforts to find a purchaser therefor, I hereby grant you for the period of FIVE YEARS from date hereof the exclusive right to sell or exchange said property or any part thereof, at the price and terms stated hereon, or at such other price or terms to which I/we may agree in writing.

During the life of this contract, if you find a buyer who is ready, able and willing to buy or exchange said property or any part thereof, at said price and terms, or any other price or terms, to which I may agree in writing, or if said property or any part thereof is sold or exchanged during said term by myself or any other person, firm or corporation, I agree to pay you a commission of 6% — or if sold or exchanged within three months after such expiration to any person, firm or corporation to whom the property is offered, or shown by me or anyone during the term of this listing, I agree to pay you the commission above stated, and in case of the employment of an attorney to enforce this agreement or any rights arising out of the breach thereof, I agree to pay a reasonable attorney's fee and all costs of collection.

In the event that a prospective purchaser makes a deposit or part payment on said property or any part thereof and I subsequently declare a forfeiture, you are authorized to retain so much of said sum as would equal your commission if such sale had been fully consummated.

I hereby warrant the information given above to be true and that I have marketable title to said property or an otherwise established right to sell or exchange that which I am listing free from encumbrances except as stated. I agree to execute the necessary documents in proper form, final conveyance to be by warranty deed or ______ (deed) and to prorate general taxes, insurance, rents, interest and other expenses affecting said property to agreed date of possession, and to furnish a good marketable title with either an abstract to date or at my option a policy of title insurance in the amount of purchase price and in the name of the purchaser. In the event of sale of other than real property I agree to provide proper conveyance and acceptable evidence of title or right to sell or exchange.

You are hereby authorized to place a "For Sale" sign on said property.

City of PARK CITY, State of UTAH, this 17TH day of FEB., 1977

Accepted 17 FEB. 1977 ______ Owner

HAL TAYLOR ASSOC. Company x Ramshire, Inc. Owner

by Hal Taylor Salesman

I hereby acknowledge receipt of a copy of this agreement. x by William R. Stevens Owner

"This is a legally binding form. If not understood, seek other advice."

FORM 130—VACANT PROPERTY LISTING—KELLY CO., 55 W. NINTH SO., S.L.C.

JUN 5 1979

Kent B Linebaugh
JARDINE, LINEBAUGH, BROWN & DUNN
Attorneys for Plaintiffs
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FILED
JUN 5 1979

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

COUNTY OF SUMMIT, STATE OF UTAH

HAL TAYLOR ASSOCIATES, a Utah corporation, and HAROLD W. TAYLOR, Plaintiffs, vs. UNIONAMERICA, INC., a corporation, aka WESTMOR; RAMSHIRE, INC., a corporation; WILLIAM R. STEVENSON; PARK CITY RESERVATIONS, INC., a corporation dba SKYLINE REALTY; HARRY F. REED; and GARY COLE, Defendants.	ORDER DENYING MOTION OF DEFENDANTS' SKYLINE, REED AND COLE FOR PARTIAL SUMMARY JUDGMENT Civil No. 5557

O R D E R

This matter having come on for hearing pursuant to Notice before the above entitled Court on the 2nd day of April, 1979, Plaintiffs appearing by and through their counsel of record, Kent B Linebaugh of Jardine, Linebaugh, Brown & Dunn, and Defendants Skyline, Reed and Cole appearing by and through their counsel of record, Stephen G. Crockett of Martineau & Maak, and Defendants Unionamerica, Ramshire and Stevenson appearing by and through their counsel of record, Donald J. Winder of Prince, Yeates & Geldzahler, the Court having heard the agruments of counsel and considered the relevant memorandum filed in behalf of Defendants Skyline, Reed and Cole, and being otherwise fully advised in the premises,

The Court finds that the Settlement Agreement and the Listing Agreement contemplate that other parties not involved in the lawsuit might find buyers for the listed properties and negotiate a sale therefor, and that neither Agreement contains any express or implied provision that Unionamerica or Ramshire would direct any "walk in buyer" to Plaintiffs. Such issues are thus now resolved for all future proceedings in this case.

But further issues of fact remain to be determined with respect to Counts V, VI, IX, X and XI and,

IT IS HEREBY ORDERED that the Motion of Defendants Skyline, Reed and Cole for Partial Summary Judgment of Dismissal of said Counts be and is hereby denied.

DATED this 4th day of June, 1979.

Attest: Suzanne Kinnard

Bryant H. Croft
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order was served this 22nd day of May, 1979 by depositing copies of same in the United States mail, first class postage prepaid, addressed to:

Stephen G. Crockett
Martineau & Maak
Attorneys for Defendants Skyline, Reed and
36 So. State, Suite 1800
Salt Lake City, Utah 34111

Donald J. Winder
Prince, Yeates & Geldzahler
Attorneys for Defendants-Unionamerica, Ra
and Stevenson
424 East 5th South
Salt Lake City, Utah 84111

Kent B Linebaugh

MAY 12 1980

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

HAL TAYLOR ASSOCIATES, a Utah corporation, and HAROLD W. TAYLOR,	:	
Plaintiffs,	:	
vs.	:	MEMORANDUM DECISION
UNIONAMERICA, INC., a corporation, aka WESTMOR; RAMSHIRE, INC., a corporation; PARK CITY RESERVATIONS, INC., a corporation, dba SKYLINE REALTY, HARRY F. REED; and GARY COLE,	:	CIVIL NO. 5557
Defendants.	:	

The Court is of the opinion that the record of this case and the evidence supports the following findings on the issues presented.

1. That Park City Reservations, Inc. was a licensed real estate broker at all times material to the issues of this case.

2. Hal Taylor Associates did perform all services and discharged all obligations required of it by the Settlement Agreement and the Village listing.

3. The order of Judge Croft entered June 4, 1979, is a valid and binding order which resolved all issues therein together with all future proceedings of this case.

4. That the Settlement Agreement was not reformed by any oral agreement of the parties or mutual mistake of the parties.

5. That plaintiff is entitled to the relief demanded in Count III of its Fourth Amended Complaint and is awarded judgment as therein prayed.

6. That the claims of plaintiffs on all other counts their Fourth Amended Complaint are not supported by the record the evidence and the Court finds in favor of the defendants and against the plaintiffs.

7. That the real estate commission now held in escrow gether with all accumulated interest should be divided 40% to plaintiffs and 60% to the defendant Park City Reservations, In

The Court would request that both counsel for defendan join in preparing and submitting Findings of Fact, Conclusions Law and Judgment consistent with the foregoing ruling to the C pursuant to the rules of the Third Judicial District Court.

Dated this 7th day of May, 1980.

James S. Sawaya

JAMES S. SAWAYA, DISTRICT JUDG

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

HAL TAYLOR ASSOCIATES, a Utah corporation, and HAROLD W. TAYLOR, Plaintiffs, vs. UNIONAMERICA, INC., a corporation, aka WESTMOR; RAMSHIRE, INC., a corporation; WILLIAM R. STEVENSON; PARK CITY RESERVATIONS, INC., a corporation, dba SKYLINE REALTY; HARRY F. REED; and GARY COLE, Defendants.	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 5557

The above entitled matter came on for trial without a jury, on January 14, 1980, before the above entitled Court, the Honorable James S. Sawaya, District Court Judge, presiding. Plaintiffs were represented by their counsel, Kent B. Linebaugh; defendants Unionamerica, Inc., Ramshire, and William R. Stevenson were represented by their counsel F. S. Prince, Jr.; and defendants Park City Reservations, dba Skyline Realty, Harry F. Reed, and Gary Cole were represented by their counsel, Stephen G. Crockett.

The Court having heard and considered the evidence, together with the arguments of counsel, and being fully advised in the premises, hereby makes and enters its Findings of Fact and Conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff, Hal Taylor Associates (HTA) is a Utah corporation and has its principal place of business in Summit County, Utah.

2. Plaintiff Harold W. Taylor (Taylor) is a resident

of Summit County, State of Utah. Harold W. Taylor is the sole owner of Hal Taylor Associates and is a real estate broker licensed to do business in the State of Utah.

3. Defendant Unionamerica, Inc. (Unionamerica) is a foreign corporation qualified to transact business in the State of Utah, and having its principal place of business in the State of Utah in Summit County.

4. Defendant Ramshire, Inc. (Ramshire) is a wholly owned subsidiary of Unionamerica and is a foreign corporation qualified to transact business in the State of Utah, having its principal place of business in the State of Utah in Summit County.

5. Defendant Park City Reservations, Inc., dba Skyline Realty (Skyline) is a Utah corporation, having its principal place of business in Summit County, and was a licensed real estate broker at all times material to the issues of this case.

6. Defendant William R. Stevenson (Stevenson) is a resident of the State of California. Defendant Stevenson acted as Vice President of defendant Ramshire during the period of time material to the allegations contained in plaintiffs' complaint.

7. Defendant Harry F. Reed (Reed) is a resident of and has his principal place of business in Summit County, State of Utah. Defendant Reed is the owner of Skyline and at all times relevant to this action, was a real estate broker licensed to do business in the State of Utah.

8. Defendant Gary Cole (Cole) is a resident of and has his principal place of business in Summit County, State of Utah. Defendant Cole at all times relevant to this action was a real estate salesman licensed by the State of Utah in the office of Skyline.

9. On February 17, 1977, plaintiffs Hal Taylor and Hal Taylor Associates entered into a written agreement ("the Settlement Agreement") to settle a lawsuit then pending by them against Greater Park City Company (GPCC) and defendant Unionamerica. Pursuant to the Settlement Agreement, defendant Unionamerica agreed to enter into an exclusive listing agreement with HTA for any property that it might wish to sell over a period of five years. The Settlement Agreement provided that HTA would be required to perform the usual real estate broker activities and "(Taylor) will be entitled to a commission rate, of six percent, and Taylor will further agree to a fee splitting arrangement giving sixty percent (60%) to the selling broker and forty percent (40%) to the listing broker."

10. Also on February 17, 1977, HTA entered into a Vacant Property Listing Agreement for the sale of approximately 10.5 acres of property (the "Village" property) in Park City, Utah, owned by defendant Ramshire, Inc.

11. The entire agreement between plaintiffs Hal Taylor and Hal Taylor Associates and defendants Unionamerica, Inc., and Ramshire, Inc., is contained in the Settlement Agreement and the Vacant Property Listing Agreement. These agreements were not altered or added to by any oral agreements between the parties, now was there any fraud on the part of one or more defendants nor any mutual mistake involved in the formation of these agreements.

12. None of the parties to the foregoing Agreement disclosed the terms thereof to Skyline Realty or any of its officers or agents. Shortly after entering into the February 17, 1977, Agreement, the plaintiffs contacted Skyline Realty and requested the assistance of Skyline Realty in selling the property. Each of the parties understood that should Skyline sell

the property, it would be entitled to receive sixty percent (60%) of the commission from any such sale.

13. On or prior to October 1, 1977, Mr. Jack Davis (Davis), the eventual purchaser of the "Village" property, had a telephone conversation with Mr. Robert Volk, the President of Unionamerica, Inc. This conversation was arranged by a mutual acquaintance. Davis indicated he was interested in purchasing property in a resort area, to wit, the "Village" property in Park City, Utah. Davis and Volk agreed, either in this initial conversation or in a subsequent one, to meet in Park City, Utah so that Davis could see the property.

14. On the morning of October 3rd, Volk directed Stevenson to fly from Los Angeles to Salt Lake City for the purpose of meeting him and Jack Davis, and showing Davis the "Village" property. Stevenson had previously been informed that there was someone in San Diego expressing interest in the property, although he had not yet heard of the Davis name.

15. Volk was unable to meet in Park City and instructed Stevenson to go to Park City to meet Davis.

16. Davis and his wife went to Park City, Utah, on or about October 3, 1977. They either talked to or met briefly with Stevenson on the night of October 3rd.

17. On October 3rd, after being told to go to Park City to meet Davis, Stevenson called Taylor's office to see if he would be available. He was told that Taylor was out of town and would not be back until later in the week.

18. After he arrived at the Salt Lake City Airport, and after trying to contact Taylor, Stevenson called Cole and asked if he could meet with Cole and Reed at Cole's house in Park City. He told Cole that there was a person interested in the

"Village" land and inquired as to whether Cole and Reed would be available the next day to meet with Stevenson and the interested party (Davis).

19. Stevenson, Reed, Cole, and Mr. and Mrs. Davis met on the morning of October 4th at the Eating Establishment in Park City for breakfast. After breakfast the five people went in Reed's car to acquaint the Davis' with the City of Park City in general and the "Village" property in particular.

20. Stevenson did not see Jack Davis again between the time they parted on October 4th and the time the Earnest Money Agreement was signed on October 17th.

21. Subsequent to the meeting on October 4th, and at Davis' invitation, Reed and Cole went to San Diego and met with Davis in the latter's office. At that time Davis executed the Earnest Money Receipt and Offer to Purchase, and delivered to Reed and Cole the earnest money required by the offer. Later the same day, Stevenson and Cole, representing Mr. Davis, went to Los Angeles and presented the offer to Stevenson who accepted on behalf of Ramshire.

22. Mr. Davis testified and the Court so finds that Mr. Davis after meeting Reed and Cole decided that he wanted Reed and Cole to represent his interests in Park City, Utah.

23. Prior to obtaining the Earnest Money Receipt and Offer to Purchase, defendant Reed confirmed with plaintiff Taylor that Taylor had a listing relating to the property and that Taylor would be willing to split the commission on any sale in accordance with the usual custom in the community, viz. forty percent (40%) to the listing broker and sixty percent (60%) to the selling broker. At the time Reed disclosed that he had a possible buyer for the property, Reed did not disclose that the

client had been referred to Skyline by defendant Stevenson, an officer of defendant Ramshire, Inc.

24. On October 26, 1977, Ramshire, Inc., and Davis executed the Real Estate Agreement, and Davis paid the $25,000.00 due at that time, to the escrow agent.

25. Since the date of the Real Estate Agreement, Davis has paid for and obtained conveyance of two of the parcels of property described in the Real Estate Agreement, and has constructed, or is in the process of constructing, approximately 14 condominium units.

26. At the time of the first of the multiple closings called for in the Real Estate Agreement, Unionamerica, pursuant to the provisions of paragraph 13 of the Agreement, deposited the $96,000.00 in an interest bearing escrow account pending settlement or resolution of the dispute between the brokers. None of the defendants have at any time since that closing had the use or benefit of the $96,000.00 so deposited. Unionamerica acted reasonably in so depositing these funds in an escrow account in light of the dispute.

27. Skyline Realty by and through its agents, Reed and Cole, fully performed the obligations required of a selling broker under the fee splitting agreement reached between plaintiffs and Skyline Realty.

28. The Court finds that any defense as to the lack of capacity by the defendant Park City Reservations, Inc., to maintain this action should have been pleaded in plaintiffs' answer to the counterclaim asserted by Park City Reservations Inc., or, at the very least, prior to trial. Although the plaintiffs had knowledge of the facts upon which they based the defense as to lack of capacity, such defense was not raised until the trial was

almost complete.

29. During 1979, Unionamerica or one of its subsidiaries sold a condominium apartment to Mr. Jack Davis for the sum of $42,500.00. The parties negotiated directly and concluded the sale without assistance of a real estate broker.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. Plaintiffs Hal Taylor and HTA performed all services and discharged all obligations required of them by the Settlement Agreement and the Vacant Property Listing Agreement.

2. The Settlement Agreement and the Vacant Property Listing Agreement were not altered, added to or modified by oral agreement of the parties, nor will these agreements be reformed on the grounds of mutual mistake or fraud.

3. Park City Reservations, Inc., was a licensed real estate broker at all times material to the issues of this case.

4. The Settlement Agreement and the Vacant Property Listing Agreement contemplate that, in addition to HTA, other brokers might find buyers for the listed properties and negotiate sales therefore. Neither agreement contains any express or implied provisions that Unionamerica or Ramshire would direct to HTA persons making inquiries about the listed properties.

5. Unionamerica acted reasonably in paying the $96,000.00 commission into an interest bearing escrow account pending settlement or resolution of the dispute between the brokers, and Unionamerica's failure to pay HTA strictly in accordance with the terms of the listing agreement is excused.

6. HTA is entitled to receive forty percent (40%) of the $96,000.00 held in the escrow account, together with the

interest thereon accrued, and Park City Reservations, Inc., is entitled to receive the remaining sixty percent (60%) of the $96,000.00 held in such account, together with interest accrued thereon.

7. HTA is entitled to judgment against Unionamerica and Ramshire in the amount of six percent (6%) of $42,500.00, or $2,550.00, together with interest thereon at the rate of six percent (6%) per annum from the date of sale of the condominium apartment to Jack Davis to the date of judgment, and together with interest at the rate of eight percent (8%) per annum from the date of judgment until paid.

8. The Court finds there is no factual basis for a finding of a conspiracy, conversion, wrongful creation of a liability, breach of a duty to act in good faith, breach of a fiduciary duty, or intentional infliction of mental distress, and the Court concludes that none of the foregoing torts occurred in this case.

9. The Court having concluded that defendants were not guilty of tortious acts against the plaintiffs, and that none of the parties breached the applicable contracts, hereby concludes there is no basis for plaintiff's claim for punitive damages.

10. By virtue of plaintiffs' failure to timely raise the defense of lack of capacity to maintain this action, the Court finds that any such defense was waived by the plaintiffs. The Court further finds that any such defense must fail because at all times pertinent to this action the defendant Harry F. Ret[illegible] was a broker licensed by the State of Utah and was operating on

behalf of Park City Reservations, Inc., dba Skyline Realty.

MADE AND ENTERED this ____ day of _____, 1980.

BY THE COURT:

_____
James S. Sawaya, Judge

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

HAL TAYLOR ASSOCIATES, a Utah corporation, and HAROLD W. TAYLOR, Plaintiffs, vs. UNIONAMERICA, INC., a corporation, aka WESTMOR; RAMSHIRE, INC., a corporation; WILLIAM R. STEVENSON; PARK CITY RESERVATIONS, INC., a corporation, dba SKYLINE REALTY; HARRY F. REED; and GARY COLE, Defendants.	JUDGMENT Civil No. 5557

The above entitled cause came on regularly for trial, without a jury, on January 14, 1980, before the Honorable James S. Sawaya, District Court Judge. Plaintiffs were represented by their counsel, Kent B. Linebaugh; defendants Unionamerica, Inc., Ramshire, and William R. Stevenson were represented by their counsel, F. S. Prince, Jr.; and defendants Park City Reservations, Inc., dba Skyline Realty, Harry F. Reed and Gary Cole were represented by their counsel, Stephen G. Crockett.

The Court having considered the evidence and the arguments of counsel, and having entered its Findings of Fact and Conclusions of Law, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That plaintiff Hal Taylor Associates have and recover from defendant Unionamerica, Inc., the sum of $96,000.00 together with the interest that has accrued thereon in the escrow account into which said sum has been placed.

2. That defendant Park City Reservations, Inc., dba Skyline Realty, have and recover from plaintiff Hal Taylor

Associates the sum of $57,600.00, together with the interest thereon that has accrued in the escrow account into which the $96,000.00 has been placed.

3. The foregoing Judgment shall be satisfied by distributions from the escrow account to the parties as follows:

(a) Hal Taylor Associates and Harold W. Taylor shall receive forty percent (40%) of the $96,000.00 deposited by Unionamerica and/or Ramshire, Inc., and in addition any interest that has accrued on the forty percent (40%) to be distributed; and

(b) Park City Reservations, Inc., dba Skyline Realty shall receive the remaining sixty percent (60%) of the $96,000.00 deposited by Unionamerica and/or Ramshire, Inc., and in addition any interest that has accrued on the sixty percent (60%) to be distributed.

4. That Summit County Title Company, the escrow agent is hereby ordered to make such distributions from the escrow account upon receipt of this Judgment.

5. That plaintiffs have and recover from defendant Unionamerica the sum of $2,550.00 together with interest thereon from June 23 1978 in the amount of $328.80, making a total judgment of $2878.80 to bear interest at the rate of eight percent (8%) per annum. @ 6% 1.63 / day.

6. That the parties shall bear their own costs in this matter.

MADE AND ENTERED this ____ day of _____, 1980.

BY THE COURT:

James S. Sawaya, Judge

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DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

COUNTY OF SUMMIT, STATE OF UTAH

HAROLD W. TAYLOR, dba HAL TAYLOR ASSOCIATES, Plaintiff, vs. UNIONAMERICA, INC., a corporation, aka WESTMOR; RAMSHIRE, INC., a corporation; WILLIAM R. STEVENSON; PARK CITY RESERVATIONS, INC., a corporation, dba SKYLINE REALTY; HARRY F. REED; and GARY COLE, Defendants.	ORDER RE: MOTIONS OF DEFENDANTS, UNIONAMERICA, RAMSHIRE AND STEVENSON, TO DISMISS AND IN THE NATURE OF INTERPLEADER; AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT Civil No. 5557

ORDER

This matter came on for hearing on the 5th day of September, 1978, before the above-entitled court, the Honorable DEAN E. CONDER presiding, pursuant to written notices with respect to the above-designated motions, plaintiff appearing by and through his counsel of record, Kent B Linebaugh, defendants, Unionamerica, Ramshire and Stevenson, appearing by and through their counsel of record, Donald J. Winder, and defendants, Skyline, Reed and Cole, appearing by and through their counsel of record, Stephen G. Crockett, the court having heard the arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Motion of defendants, Unionamerica, Ramshire and Stevenson, to dismiss be and hereby is denied without prejudice to bringing such motion again in response to subsequent pleadings.

2. That the Motion of defendants, Unionamerica, Ramshire and Stevenson, in the nature of an interpleader be and hereby is denied, and the parties are ordered to cause the $96,000.00 commission to be maintained in an interest-bearing account subject to withdrawal only on the order of the court.

3. That plaintiff's Motion for Partial Summary Judgment be and hereby is denied without prejudice to bringing such motion again subsequent to additional pleadings being filed herein.

4. That plaintiff's oral motion for leave to file a Second Amended Complaint be and hereby is granted, which Complaint shall be served upon opposing counsel and mailed for filing herein on or before September 20, 1978.

5. That on or before September 20, 1978, plaintiff's counsel shall serve and mail for filing herein a Statement of Points and Authorities in support of plaintiff's contention that punitive damages are recoverable for breaches of contract as averred in plaintiff's Second Amended Complaint.

Dated as of the 5th day of September, 1978.

Dean E. Conder
District Court Judge