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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NUMBER 800801

DONALD KAY and PATRICIA KAY,
Appellants

v

PROFESSIONAL REALTY CORPORATION
Appellee

APPENDIX

Andrew S. Fine
Howard I. Legum and
John R. Lomax, of
FINE, FINE, LEGUM & FINE
720 Law Building
Norfolk, Virginia 23510
Attorneys for Appellants

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and in failing to allow them to file
a Third Amended Motion for Judgment

THIS AGREEMENT, Made this 13th day of August, 1973, by and between Donald and Pat Kay, Agents, and PROFESSIONAL REALTY CORPORATION, a Virginia corporation, Realtor;

W I T N E S S E T H :

WHEREAS, Agents have devoted certain time and effort to matters preliminary to the execution of an agreement with respect to the purchase of certain real estate in the City of Virginia Beach, Virginia by Dalby-White Associates from Jonathan R. and Sarah B. Sanderlin comprised of approximately 189 acres at the intersection of Kempsville Road and Providence Road, and

WHEREAS, Realtor desires to set forth agreement between the parties with respect to compensation of Agents for services rendered with respect to said agreement,

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, the parties hereto do agree as follows:

1. So long as Agents remain in the employ of Realtor, Agents shall be entitled to one-half of the listing commissions actually collected at settlement by Realtor with respect to the sale of all or any part of the hereinabove described property, said listing commission to be determined in accordance with the standard fifty-fifty split policy of Realtor now in effect

2. Realtor agrees that if Agents remain in the employ of Realtor until such time as all the hereinabove property is sold or otherwise disposed of by Dalby-White Associates, that Agents shall receive not less than the total sum of Fifty Thousand Dollars ($50,000.00) as Agent's part of said listing commissions. Any listing commissions of any kind, actually paid by Realtor to Agents with respect to the sale of all or any part of the hereinabove described property shall be applied toward said sum.

3. Realtor may advance to Agents from time to time as agreed between the parties cash amounts to be charged against the aggregate sum payable to Agents pursuant to this agreement, which amounts shall be deducted from future commissions accruing to Agents pursuant hereto.

4. This agreement shall terminate upon sale of all the property hereinabove described by Dalby-White Associates, and Agents shall have no right of action with respect to any amounts accruing pursuant hereto until ninety (90) days after all such property is sold and settlement thereon has been held and commissions due Realtor have been paid.

5. In the event Agents terminate as Agents for Realtor prior to the sale of the property as herein contemplated, then Agents and Realtor shall negotiate a settlement at that time of any sums accruing to Agents.

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their signatures as of the day and year first above written.

Donald Kay (SEAL)
Donald Kay

Pat Kay (SEAL)
Pat Kay

PROFESSIONAL REALTY CORPORATION

BY Charles E. Dalby Jr.
Charles E. Dalby, Jr., President

ATTEST:

Paul E. King
Paul E. King, Secretary

APPROVED BY:

Wendell A. White
Wendell A. White, Director

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DONALD KAY AND
PAT KAY,

Plaintiffs

v. **AT LAW NO.** L-8594

PROFESSIONAL REALTY CORPORATION,
a Virginia corporation,
SERVE: Charles E. Dalby, Jr.
President
Suite 108
3284 Virginia Beach Boulevard
Virginia Beach, Virginia

and

WENDELL A. WHITE
Corporate Officer
Professional Realty Corporation
Suite 108
3284 Virginia Beach Boulevard
Virginia Beach, Virginia,

Defendant

MOTION FOR JUDGMENT

TAKE NOTICE: That I will move the Circuit Court of the City of Virginia Beach, Virginia, for an award of a judgment against you, defendant, for the sum of $355,317.94 for damages and interest for this, to-wit:

1. That the plaintiffs, being licensed real estate agents in the Commonwealth of Virginia, and the defendant entered into a written contract on 13 August 1973 with the defendant, a real estate company licensed by the Commonwealth of Virginia.

2. That the agreement sets forth the position of the parties at the time of the execution of this agreement, namely that the agents "have devoted certain time and effort to matters preliminary to the execution of an agreement with respect to the purchase of certain real estate in the City of Virginia Beach", which was known as the Sanderlin tract comprising approximately 180 acres at the intersection of

COPY

Kempsville Road and Providence Road.

3. That the parties to the agreement set up compensation for the services rendered to the agents.

4. That the plaintiffs are entitled to and have vested unto themselves one-half of the listing commissions actually collected by the defendant resulting from the sale of all or any portion of the property.

5. That the listing commission represents a 50/50 split of the fees earned by the defendant as a realtor in connection with the sale of the aforementioned property.

6. That over a period of years the plaintiffs have sought to obtain an accounting from the defendant with respect to the properties actually sold and have sought payment in accordance with the 50/50 split.

7. That the defendants have declined to provide either an accounting or the 50/50 split in accordance with the agreement.

8. That the plaintiffs have continued to work for the defendant in hopes of being able to resolve this matter amicably.

9. That the defendant has failed to respond.

10. That under the terms of the agreement the monies are not due the plaintiffs until 90 days after all the property is sold so long as the plaintiffs remain in the employ of the defendant.

11. That after seeking an accounting and an agreement with respect to payment and after receiving no satisfactory response from the defendant it was necessary for the plaintiffs to terminate their relationship as agents for the realtor in order to seek relief sought in this suit.

12. That on the 9th day of October 1979 plaintiffs terminated as agents for the defendant.

13. That the defendant has breached its contract in its failure to comply with the terms of paragraph 5 when the plaintiffs terminated as agents and the defendant failed to negotiate a settlement at that time of sums accruing the plaintiffs.

WHEREFORE, plaintiffs seek a judgment against the defendant in the sum of $355,317.94 with interest due.

DONALD KAY AND PAT KAY

By Andrew S. Fine
Of Counsel

ANDREW S. FINE of
Fine, Fine, Legum & Fine, p.q.
720 Law Building
147 Granby Street
Norfolk, Virginia 23510

COPY

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DONALD KAY and PAT KAY,	:	
Plaintiffs	:	
v.	:	LAW DOCKET NO. L-8594
PROFESSIONAL REALTY CORPORATION,	:	
Defendant	:	

D E M U R R E R

Now comes Professional Realty Corporation, by its Counsel, and demurs to the Motion for Judgment, on the following grounds:

1. That the Agreement sued on is unenforceable because of vagueness.

2. That the Motion for Judgment is insufficient in law.

3. That the Motion for Judgment fails to allege that any damages were suffered by plaintiffs.

4. That the Motion for Judgment fails to allege any facts on which the relief prayed for or any other monetary judgment can be based.

WHEREFORE, defendant prays that said Motion for Judgment be dismissed.

PROFESSIONAL REALTY CORPORATION

By Sgd/JERROLD G. WEINBERG
Of Counsel

Jerrold G. Weinberg
WEINBERG & STEIN, p.d.
1510 First Virginia Bank Tower
Post Office Box 3789
Norfolk, Virginia 23514

LAW OFFICES
WEINBERG & STEIN
NORFOLK, VIRGINIA

CERTIFICATE

I hereby certify that a true copy of the foregoing Demurrer was mailed this 14th day of November, 1979, to Andrew S. Fine, Esquire, of Fine, Fine, Legum & Fine, 720 Law Building, 147 Granby Street, Norfolk, Virginia, 23510, Counsel of Record for Plaintiffs.

Sgd/JERROLD G. WEINBERG
Jerrold G. Weinberg

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DONALD KAY, et al.,

Plaintiffs

v. LAW DOCKET NO. L-8594

PROFESSIONAL REALTY CORPORATION,

Defendant

O R D E R

On the 30th day of November, 1979, the parties appeared by their counsel, and the Court heard arguments on the Demurrer heretofore filed by defendant.

UPON CONSIDERATION WHEREOF, it is ADJUDGED and ORDERED that said Demurrer be and is hereby sustained but with leave to plaintiffs to file an Amended Motion for Judgment on or before December 11, 1979.

ENTER this day of December, 1979.

Judge

I ask for this:

Donald H. Weinberg, p.d.

Seen and Exception Noted:

Andrew L. Fine, p.q.

LAW OFFICES
EINBERG & STEIN
ORFOLK, VIRGINIA

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DONALD KAY and PAT KAY,

Plaintiffs

v. LAW DOCKET NO. L-8594

PROFESSIONAL REALTY CORPORATION,

Defendant

AMENDED MOTION FOR JUDGMENT

TAKE NOTICE: That I will move the Circuit Court of the City of Virginia Beach, Virginia, for an award of a judgment against you, defendant, for the sum of $355,317.94 for damages and interest for this, to-wit:

1. That the plaintiffs, being licensed real estate agents in the Commonwealth of Virginia, and the defendant entered into a written contract on 13 August 1973 with the defendant, a real estate company licensed by the Commonwealth of Virginia.

2. That the agreement sets forth the position of the parties at the time of the execution of this agreement, namely that the agents "have devoted certain time and effort to matters preliminary to the execution of an agreement with respect to the purchase of certain real estate in the City of Virginia Beach", which was known as the Sanderlin tract comprising approximately 189 acres at the intersection of Kempsville Road and Providence Road.

3. That the parties to the agreement set up compensation for the services rendered to the agents.

4. That the plaintiffs are entitled to and have vested unto themselves one-half of the listing commissions actually collected by the defendant resulting from the sale of all or any portion of the property.

5. That the listing commission represents a 50/50 split of the fees earned by the defendant as a realtor in connection with the sale of the aforementioned property.

6. That over a period of years the plaintiffs have sought to obtain an accounting from the defendant with respect to the properties actually sold and have sought payment in accordance with the 50/50 split.

7. That the defendants have declined to provide either an accounting or the 50/50 split in accordance with the agreement.

8. That the plaintiffs have continued to work for the defendant in hopes of being able to resolve this matter amicably; that the plaintiffs performed all of the conditions of the contract on their part; and that the plaintiffs performed and provided valuable services for the defendant and that the reasonable value of said services is $355.317.94.

9. That the defendant has failed to respond.

10. That under the terms of the agreement the monies are not due the plaintiffs until 90 days after all the property is sold so long as the plaintiffs remain in the employ of the defendant.

11. That after seeking an accounting and an agreement with respect to payment and after receiving no satisfactory response from the defendant it was necessary for the plaintiffs to terminate their relationship as agents for the realtor in order to seek relief sought in this suit.

COPY

12. That on the 9th day of October 1979 plaintiffs terminated as agents for the defendant.

13. That the defendant has continued to deny the plaintiffs the sums due and has failed otherwise to comply with the terms of the agreement of 13 August 1973 and has breached its contract with the plaintiffs.

14. That the contract between the parties contemplates that the defendant account to the plaintiffs with respect to all of the property which had been sold as of the date of the plaintiffs' termination and that the sums due resulting from said accounting of the property then sold by the defendant out of the Sanderlin tract would be paid plaintiffs. The accrued sums resulting from the Sanderlin tract sales are now due and unpaid.

WHEREFORE, plaintiffs seek a judgment against the defendant in the sum of $355,317.94 with interest due from October 23, 1979.

DONALD AND PAT KAY

By_____
Of Counsel

ANDREW S. FINE of
Fine, Fine, Legum & Fine, p.q.
720 Law Building
147 Granby Street
Norfolk, Virginia 23510

CERTIFICATE

I hereby certify that a true copy of the foregoing Amended Motion for Judgment was mailed to Jerrold G. Weinberg, Esquire, p.d., 1510 First Virginia Bank Tower, Post Office Box 3789, Norfolk, Virginia 23514, this 6th day of December, 1979.

By_____
Of Counsel

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DONALD KAY and PAT KAY,	:	
Plaintiffs	:	
v.	:	LAW DOCKET NO. L-8594
PROFESSIONAL REALTY CORPORATION,	:	
Defendant	:	

DEMURRER TO AMENDED MOTION FOR JUDGMENT

Now comes Professional Realty Corporation, defendant herein, by its counsel, and demurs to the Amended Motion for Judgment as such pleading fails to state a cause of action and fails to state facts upon which the relief demanded can be granted.

The grounds on which defendant concludes the Amended Motion for Judgment is insufficient at law are as follows:

1. It is alleged that the parties "entered into a written contract on 13 August 1973" (paragraph 1 of the Amended Motion for Judgment), but such "written contract" is neither made an exhibit to nor otherwise made part of the Amended Motion.

2. The relevant terms of the "written contract" are neither set forth nor described anywhere in the Amended Moti

3. Only mere conclusions, as to the claimed mean of the "written contract" are alleged, rather than factual allegations as to the actual terms of the "written contract."

WHEREFORE, defendant prays that said Amended Motion for Judgment be dismissed.

PROFESSIONAL REALTY CORPORATION

By _____
Of Counsel

LAW OFFICES
HNBERG & STEIN
RFOLK, VIRGINIA

Jerrold G. Weinberg
WEINBERG & STEIN, p.d.
1510 First Virginia Bank Tower
Post Office Box 3789
Norfolk, Virginia 23514

CERTIFICATE

I hereby certify that a true copy of the foregoing Demurrer to Amended Motion for Judgment was mailed this 26th day of December, 1979, to Andrew S. Fine, Esquire, of Fine, Fine, Legum & Fine, 720 Law Building, 147 Granby Street, Norfolk, Virginia, 23510, Counsel of Record for Plaintiffs.

_____
Jerrold G. Weinberg

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DONALD KAY, et al.,	:	THIS 11 DAY OF Jan 1980
Plaintiffs	:	
v.	:	LAW DOCKET NO. L-8594
PROFESSIONAL REALTY CORPORATION,	:	
Defendant	:	

O R D E R

On the 4th day of January, 1980, the parties appeared by their counsel, and the Court heard arguments on the Demurrer to Amended Motion for Judgment heretofore filed by defendant.

Upon Consideration Whereof, it is ADJUDGED and ORDERED that said Demurrer to Amended Motion for Judgment be and is hereby sustained but with leave to plaintiffs to file a Second Amended Motion for Judgment within ten days from the date of the entry of this Order.

ENTER this _____ day of January, 1980.

_____
Judge

A Copy Teste: J. Curtis Frair, Clerk
By _____, D.C.

I ask for this:

Donald S. Weinberg, p.d.

Seen and Exception Noted:

Andrew J. Tess, p.q.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DONALD KAY AND PAT KAY,

Plaintiffs

v. LAW DOCKET NO. L-8594

PROFESSIONAL REALTY CORPORATION,

Defendant

AMENDED MOTION FOR JUDGMENT

TAKE NOTICE: That I will move the Circuit Court of the City of Virginia Beach, Virginia, for an award of a judgment against you, defendant, for the sum of $355,317.94 for damages and interest for this, to-wit:

COUNT I

1. The parties entered into an agreement, an executed copy being attached hereto as plaintiffs' Exhibit A and to be used as part of this Amended Motion for Judgment.

2. Defendant breached said agreement by failure to comply with paragraphs 1 and 5 of said agreement.

3. Plaintiffs terminated as agents for the defendant on October 9, 1979, prior to the sale of all of the property described in said agreement. The parties had orally agreed, subsequent to the execution of the said written agreement, that under paragraph 5 of said agreement the plaintiffs would be entitled to one-half of the listing commissions actually collected at settlement by defendant through date of termination of plaintiffs as agents for defendant. Defendant breached the settlement contemplated by paragraph 5 of said agreement.

4. Plaintiffs are entitled to the sum of $355,317.94, with interest from October 9, 1979, representing one-half of the listing commission actually collected by defendant through said date.

COUNT II

5. The allegations of paragraphs 1, 2, 3 and 4 are adopted as part of this Count.

6. The reasonable value of the services rendered by the plaintiffs to the defendant is $355,317.94.

WHEREFORE, plaintiffs seek a judgment against the defendant in the sum of $355,317.94 with interest due from October 9, 1979, plus costs.

DONALD KAY AND PAT KAY

By Andrew S. Fine
Of Counsel

ANDREW S. FINE of
Fine, Fine, Legum & Fine, p.q.
720 Law Building
147 Granby Street
Norfolk, Virginia 23510

LAW OFFICES
INE, FINE, LEGUM
& FINE

CERTIFICATE

I hereby certify that a true copy of the foregoing Amended Motion for Judgment was mailed to Jerrold G. Weinberg, Esquire, p.d., 1510 First Virginia Bank Tower, P. O. Box 3789, Norfolk, Virginia 23514, this 10th day of January, 1980.

By Andrew S. Fine
Of Counsel

EXHIBIT A

THIS AGREEMENT, Made this 13th day of August, 1973, by and between Donald and Pat Kay, Agents, and PROFESSIONAL REALTY CORPORATION, a Virginia corporation, Realtor;

W I T N E S S E T H :

WHEREAS, Agents have devoted certain time and effort to matters preliminary to the execution of an agreement with respect to the purchase of certain real estate in the City of Virginia Beach, Virginia by Dalby-White Associates from Jonathan R. and Sarah B. Sanderlin comprised of approximately 189 acres at the intersection of Kempsville Road and Providence Road, and

WHEREAS, Realtor desires to set forth agreement between the parties with respect to compensation of Agents for services rendered with respect to said agreement,

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, the parties hereto do agree as follows:

1. So long as Agents remain in the employ of Realtor, Agents shall be entitled to one-half of the listing commissions actually collected at settlement by Realtor with respect to the sale of all or any part of the hereinabove described property, said listing commission to be determined in accordance with the standard fifty-fifty split policy of Realtor now in effect

2. Realtor agrees that if Agents remain in the employ of Realtor until such time as all the hereinabove property is sold or otherwise disposed of by Dalby-White Associates, that Agents shall receive not less than the total sum of Fifty Thousand Dollars ($50,000.00) as Agent's part of said listing commissions. Any listing commissions of any kind, actually paid by Realtor to Agents with respect to the sale of all or any part of the hereinabove described property shall be applied toward said sum.

3. Realtor may advance to Agents from time to time as agreed between the parties cash amounts to be charged against the aggregate sum payable to Agents pursuant to this agreement, which amounts shall be deducted from future commissions accruing to Agents pursuant hereto.

4. This agreement shall terminate upon sale of all the property hereinabove described by Dalby-White Associates, and Agents shall have no right of action with respect to any amounts accruing pursuant hereto until ninety (90) days after all such property is sold and settlement thereon has been held and commissions due Realtor have been paid.

5. In the event Agents terminate as Agents for Realtor prior to the sale of the property as herein contemplated, then Agents and Realtor shall negotiate a settlement at that time of any sums accruing to Agents.

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their signatures as of the day and year first above written.

Donald Kay (SEAL)
Donald Kay

Pat Kay (SEAL)
Pat Kay

PROFESSIONAL REALTY CORPORATION

BY Charles E. Dalby Jr.
Charles E. Dalby, Jr., President

ATTEST:

Paul E. King
Paul E. King, Secretary

APPROVED BY:

Wendell A. White
Wendell A. White, Director

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DONALD KAY, et al.,	:	
Plaintiffs	:	
v.	:	LAW DOCKET NO. L-8594
PROFESSIONAL REALTY CORPORATION,	:	
Defendant	:	

DEMURRER TO SECOND AMENDED MOTION FOR JUDGMENT

Now comes Professional Realty Corporation, defendant herein, by its counsel, and treating the paper writing filed on or about January 11, 1980 and captioned "Amended Motion for Judgment" as the "Second Amended Motion for Judgment" plaintiffs were granted leave to file by the previous Order of this Honorable Court entered on January 11, 1980, demurs to such Second Amended Motion for Judgment as such pleading fails to state a cause of action and fails to state facts upon which the relief demanded can be granted.

The grounds on which defendant concludes that both Count I and Count II of the Second Amended Motion for Judgment are insufficient at law are as follows:

COUNT I

1. The agreement or agreements alleged are unenforceable because of vagueness.

2. There are no factual allegations to support the mere conclusions alleged that:

(a) "Defendant breached said [written] agreement by failure to comply with paragraphs 1 and 5 of said agreement" (paragraph 2 of the Second Amended Motion).

(b) "Defendant breached the settlement contemplated by paragraph 5 of said agreement" (paragraph 3).

(c) "Plaintiffs are entitled to the sum of $355,317.94..." (paragraph 4).

3. It is impossible as a matter of law to have "breached [a] settlement" that is only "contemplated" (paragraph 4), instead of actual.

4. There is no allegation of any consideration to support the oral agreement allegedly made "subsequent to the execution of the ... written agreement" (the second sentence of paragraph 5), nor any facts from which it may be concluded that an enforceable oral agreement exists.

5. Plaintiffs cannot allege facts or take a position contrary to facts previously alleged and a position previously taken. In their previously filed original Motion for Judgment and Amended Motion for Judgment, plaintiffs claimed that defendant was indebted to them by a written agreement and now attempt, for the first time, to claim such indebtedness by an oral agreement.

6. Plaintiffs cannot sue on both a written agreement and an oral agreement allegedly made at different times.

7. There is a misjoinder of causes of action.

8. Any claim based on the alleged oral agreement is barred by the Statute of Frauds, Va. Code § 11-2.

COUNT II

9. Paragraphs 1 through 8 above are incorporated herein by reference as if repeated *in haec verba*.

10. "The reasonable value of the services rendered ..." (paragraph 6) is immaterial.

LAW OFFICES
WEINBERG & STEIN
NORFOLK, VIRGINIA

11. Plaintiffs cannot sue on the theory of express and implied contracts at the same time.

WHEREFORE, defendant prays that said Second Amended Motion for Judgment be dismissed without leave to amend and with prejudice to plaintiffs.

PROFESSIONAL REALTY CORPORATION

By Sgd/JERROLD G. WEINBERG
Of Counsel

Jerrold G. Weinberg
WEINBERG & STEIN, p.d.
1510 First Virginia Bank Tower
Post Office Box 3789
Norfolk, Virginia 23514

CERTIFICATE

I hereby certify that a true copy of the foregoing Demurrer to Second Amended Motion for Judgment was mailed this 30th day of January, 1980, to Andrew S. Fine, Esquire, of Fine, Fine, Legum & Fine, of Counsel for Plaintiffs, 720 Law Building, 147 Granby Street, Norfolk, Virginia, 23510.

Sgd/JERROLD G. WEINBERG
Jerrold G. Weinberg

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

- -

DONALD KAY, et al.,	:	
Plaintiffs,	:	
vs.	:	LAW DOCKET NO. L-8594
PROFESSIONAL REALTY CORPORATION,	:	
Defendant.	:	

- -

Before: The Honorable Kenneth N. Whitehurst, Jr., Judge of the aforesaid court.

Date: February 29, 1980.

Place: Virginia Beach, Virginia.

APPEARANCES:

FINE, FINE, LEGUM & FINE,
By: Howard I. Legum and Andrew S. Fine,
Counsel for the Plaintiffs.

JERROLD G. WEINBERG,
Counsel for the Defendant.

Reported by:
Sharon B. Borden, CSR, RPR.

1 MR. WEINBERG: Your Honor, we were here last
2 Friday, and I asked Mr. Legum would he be in his office,
3 that I would take the order to him that afternoon. I
4 received a telephone message from him. I called him
5 back. He told me he wanted the grounds of the demurrer
6 that you ruled on set out.
7 I told him I could not read judge's minds, and I
8 read him this order that's before you and he refused to
9 endorse it. He said he was going to file notice for
10 rehearing, which, of course, he's done.
11 I gave him notice of presentment today. He was
12 cooperative in clearing the date with me. I withdrew
13 the order noting his exception because in your presence
14 he said last Friday would I do that, and I said certainly.
15 THE COURT: Howard?
16 MR. LEGUM: Your Honor, Mr. Weinberg argued, and,
17 of course, I couldn't refute him as to what took place
18 before Judge Wahab and before Your Honor on the original
19 motion for judgment demurrer and demurrer to the first
20 amendment.
21 Andrew Fine was there, and he wants to present to
22 Your Honor what his understanding of what Judge Wahab's
23 ruling was to show there was no inconsistency between the
24 last amended motion for judgment and the original motion
25 for judgment as to the agreement contemplated by Paragraph

1 5 of the agreement, and Andrew would like to argue that
2 point to show what was meant because it wasn't read very
3 closely by Mr. Weinberg, the last amended motion and the
4 pleading of it.
5 In addition to that, Andrew wants to argue as to
6 what Judge Wahab actually ruled, of course his notes are
7 in the file, and show that he did not rule that Paragraph
8 5 was enforceable.
9 Is that right, Andrew?
10 MR. FINE: I would like to be heard on that,
11 Your Honor.
12 THE COURT: All right.
13 MR. FINE: If I might look at the notes of
14 Judge Wahab. Are those the notes when we had an argument
15 before Judge Wahab in November?
16 The judge ruled that Paragraph 5 was vague, and he
17 asked me what, in fact, the terms of the agreement were
18 that upon termination that one-half of the listing
19 agreement accrued through and including the date of the
20 termination was due to the case, and Judge Wahab specifically
21 recited to me, and I wrote down his words, that which
22 would be acceptable, and in his notes that Your Honor has
23 before you, if I might read those, it says, "To allege
24 accounting and settlement due upon termination of
25 employment under Paragraph 13 of the agreement."

1 That's what I did in the --

2 MR. LEGUM: Paragraph 13 for the motion for

3 judgment.

4 MR. FINE: Excuse me. For the motion for judgment,

5 and that's what I did in the amended motion for judgment

6 that has been filed.

7 In Paragraph 14, which I alleged that the contract

8 between the parties contemplates that the defendant

9 account to the plaintiffs with respect to all the property

10 which had been sold as of the date of the plaintiff's

11 termination, and that the sums due resulting from said

12 accounting of the property then sold by the defendant out

13 of the Sanderlin tract would be paid the plaintiffs.

14 Then I allege the accrued sums resulting from the

15 Sandler tract sales are now due and unpaid.

16 MR. WEINBERG: I'm sorry. You are reading from

17 the first or second amended motion for judgment, or the

18 original motion?

19 MR. FINE: The amended motion for judgment.

20 MR. WEINBERG: The first amended motion for

21 judgment?

22 MR. FINE: It's styled amended motion for judgment.

23 MR. WEINBERG: There are two styled that.

24 MR. FINE: I'm sorry. This is the first.

25 Now, it is alleged that there is an inconsistent

1 position with respect to what commission would be paid
2 in the event of termination, and it is alleged, and now
3 we are looking at the second amended motion for judgment,
4 and for the first time we recite specifically when that
5 happened, and that was subsequent to the execution of the
6 written agreement. I might add that Mr. Weinberg
7 acknowledged in the hearing before Judge Wahab the written
8 agreement was drafted by his client, so, you know, the
9 vaguery that we are seeking to have parole evidence on
10 should be construed against his client.
11 With respect to Paragraph 3, I mean the second
12 amended motion for judgment, count one, Paragraph 3
13 I don't believe the Court, if it reads carefully the
14 allegations, will find that there was, in fact, an
15 inconsistent position between count one of the first bill
16 of complaint and the third bill of complaint.
17 We simply said in the first bill of complaint in
18 Paragraph 13 that after we terminated, that the defendant
19 failed to negotiate a settlement, and that simply was a
20 quote of the contract. In count one of the amended motion
21 for judgment we say that there was an agreement after
22 the written instrument in which the parties had agreed to
23 what the commission would be, and I don't think that those
24 two are inconsistent. The fact that they refused to pay us
25 or pay my clients in accordance with the oral agreement

1 after termination is not inconsistent with the fact that
2 there was an oral agreement with respect to sums that were
3 to be paid.
4 I think Judge Wahab's notes are consistent with
5 the fact that he was prepared to accept oral evidence
6 as to the terms of the contract because he indicates they
7 should be alleged, and that's what we did in the first
8 amended motion for judgment.
9 I might add that in addition to the agreement
10 having been prepared by the defendant, both parties acted
11 on this agreement for a period of seven years. It's a
12 matter of most serious consequence to my client if, in
13 fact, the Court were to rule that the contract was too
14 vague by reason of the fact that the fifth paragraph was
15 vague. There's ample evidence to support the fact that
16 parole evidence should be accepted, but even if the
17 Court didn't do that, it would be unthinkable, it seems to
18 me, to then prevent the plaintiff or the plaintiffs from
19 having their day in court on the issue of quantum meruit;
20 that is, the value of the services performed for seven
21 years, both parties having acted upon what they thought
22 was a written agreement which was prepared by the defendant.
23 So for those reasons I would strongly urge the Court
24 to, one, reconsider; two, if there's any question in the
25 Court's mind, to give us the benefit of the doubt by

1 discussing what it was that Judge Wahab had in his mind,
2 because there's nothing in the record other than his notes
3 and discussing it with him upon his return because that's
4 a very important issue as to whether or not he ruled
5 that the contract was too vague to be enforceable, and I
6 would submit that it wasn't and that his notes are
7 perfectly consistent with what I said, and that we be
8 permitted to file if based upon all of the pleadings the
9 Court does not feel that we have satisfactorily alleged
10 grounds. Certainly no harm would be done by allowing us
11 to file a third amended motion for judgment, though I
12 don't think it's necessary based upon the state of the
13 pleadings as they are presently before the Court.
14 I would also like to submit for the record a
15 memorandum which has come to my attention certified and
16 would like to submit this as a document at this hearing,
17 which is a certification to the Million Dollar Sales Club
18 in 1973, which, in fact, reflects, which was prepared
19 by the then comptroller of Professional Reality which
20 reflects the commission that was due at that time and
21 was expressed, and I would like to submit that in
22 support vested of our amended motion for judgment and I
23 would like to offer that at this time.
24 MR. WEINBERG: May my objection be noted? I have
25 never seen it or ever heard of it. What we are really

1 arguing here, I guess, is another hearing after the Court
2 has ruled against them already on a demurrer, and here he
3 is offering two pieces of paper as a document.
4 They know better, Your Honor. There's not even
5 a color of right to offer this, and they know it. I think
6 it's frivolous.
7 MR. FINE: Well, it's not frivolous, and the suit
8 is not frivolous.
9 I would like to offer that. If Your Honor would
10 look at the notation which reflects the amount which is
11 in affidavit form submitted by the comptroller of
12 Professional Reality reflecting what was due them at
13 that time.
14 I would also like to offer this as a basis upon
15 which to file an additional amended motion for judgment.
16 MR. WEINBERG: We object to this being received
17 as evidence or anything else. Do I need to state my
18 grounds for the record?
19 THE COURT: Yes, sir.
20 MR. WEINBERG: No witness identifies it. We are
21 here on a legal matter, not an evidentiary matter. It's
22 irrelevant. It's not material. It's incompetent, and I
23 think it's too clear to bear evidence. I don't need to
24 clutter the record. You can't present evidence on any
25 argument of a demurrer.

1 MR. FINE: You can certainly attach documents to
2 pleadings, and what we are seeking to do is include this
3 as an exhibit.
4 MR. WEINBERG: After the pleading is filed? When
5 it's not referred to in the pleading?
6 MR. FINE: And in furtherence of our motion to
7 allow us to file a third amended motion for judgment.
8 MR. WEINBERG: I don't want to be heard any
9 further on that issue.
10 THE COURT: Mr. Weinberg, part of your argument
11 last week when you were here was the fact it was frivolous,
12 and there was no money owed and that kind of thing. I
13 am going to allow it for that purpose. I realize it's
14 not evidence in the case, which we are not here to hear
15 today, but I am going to allow it for that purpose.
16
17 (Whereupon, the aforementioned document was
18 received in evidence and marked as Complainant's
19 Exhibit No. 1.)
20
21 MR. FINE: That concludes it.
22 MR. WEINBERG: Your Honor, Mr. Legum told you
23 last week several times, and I wrote it down in my
24 longhand notes and put it in quote marks, that with
25 reference to the second sentence of Paragraph 3 of the

1 second amended motion for judgment that he captioned
2 amended motion for judgment, it starts off, "The parties
3 had orally agreed subsequent to the execution of the
4 written agreement --"
5 THE COURT: Which one are you talking about?
6 MR. WEINBERG: Count one of the second amended
7 motion for judgment, Paragraph 3, the one filed around
8 January 11th. Count one, I think Your Honor is looking at.
9 THE COURT: Okay.
10 MR. WEINBERG: Paragraph 3, the second sentence
11 says, "The parties had orally agreed subsequent to the
12 execution of the written agreement that under Paragraph 5
13 of said agreement the plaintiffs would be entitled to
14 one-half of the listing commissions actually collected
15 at settlement by defendants through the date of termination
16 of plaintiffs as agent for the defendant."
17 The following sentence said, "The defendant has
18 breached its contract in its failure to comply with the
19 terms of Paragraph 5 in this agreement." Mr. Legum tells
20 us several times we did reach a settlement.
21 Now, what Judge Wahab did is sustain in his order,
22 he sustained the demurrer, and the demurrer set forth
23 as one of the grounds it was breached and filed, argued.
24 Each party filed gripes; that the parties had an agreement
25 that was not enforceable. They filed a demurrer. He said

1 he was going to sustain the demurrer for the first alleged
2 motion for judgment.
3 Judge Wahab told -- Although Andrew Fine signed
4 it, he told Your Honor he prepared it himself, and he
5 told you what he meant when he pleaded that second
6 sentence of Paragraph 3 of count one, quote, We did reach
7 a settlement, unquote. That was absolutely contrary.
8 There was no way what Mr. Legum told you can be reconciled
9 with Paragraph 13 of the original motion for judgment.
10 It's signed by Mr. Andrew Fine. It says, "Defendant failed
11 to negotiate a settlement at that time."
12 Every time a demurrer is sustained, they come up
13 with different facts, and the entire reason for the rule
14 of Rohanna versus Vazanna in cases like Hardrow versus
15 Watson is, like we argued to you last time, so when a
16 lawyer tells a client the demurrer is sustained, the
17 client can't then come up with more facts.
18 The rule is salutory and wholesome. It's to keep
19 people from changing their theories and facts every time
20 there's a ruling on the law. If they had reached a
21 settlement, why did he tell his lawyer when the original
22 motion for judgment was drawn that he hadn't made a
23 settlement? His pleading failed to negotiate his settlement.
24 Then two pleadings later the plaintiff is claiming,
25 and Mr. Legum tells Your Honor, quote, we did reach a

1 settlement, unquote. Mr. and Mrs. Kay, or one of them
2 at least, upon being advised that an agreement to enforce
3 a settlement was not enforceable, an agreement to
4 negotiate a settlement was not enforceable in the Circuit
5 Court of the City of Virginia Beach then comes up with
6 new facts and say, "Oh, we did reach a settlement," after
7 they sue us for failing to reach a settlement.
8 They want to re-argue Judge Wahab's ruling, Your
9 Honor's ruling on the first amended motion for judgment
10 and Your Honor's ruling for the second amended motion for
11 judgment, and there should be some end to litigation.
12 In connection with this paper they gave you, I
13 stick to what I told you before, too. It doesn't show
14 how much money has been paid to Mr. Kay while this was
15 going on. I mean, I can't argue the facts of the case
16 just because they come up with paper to introduce it as
17 evidence.
18 MR. FINE: Are you through?
19 MR. WEINBERG: One other point. Mr. Fine says
20 the contract was drafted by the defendant. Obviously
21 a corporation can't do anything, people do it. Mr. Fine
22 and I told Judge Wahab, and I know Mr. Fine will tell you
23 this, that this agreement was not drafted by either of
24 us. I think we told him that, Andy, and I don't think
25 a lawyer did draw it.

1 MR. FINE: And we both said thank goodness.

2 MR. WEINBERG: Yes. The way it's drawn is no skin
3 off the nose of either me or Andy. We didn't do this, and
4 I don't think a lawyer did, any lawyer.

5 MR. FINE: Judge, let me in response point out to
6 Your Honor that the language in the motion for judgment,
7 the first motion for judgment, is consistent with that
8 language in Paragraph 3 of count one of the second amended
9 motion for judgment. It says, "The defendant --"

10 THE COURT: Where are you reading now, in the
11 original motion for judgment?

12 MR. FINE: Paragraph 13, Your Honor. "That the
13 defendant has breached its contract in its failure to
14 comply with the terms of Paragraph 5 when the plaintiffs
15 terminated as agents, and the defendants failed to
16 negotiate a settlement at that time of sums accruing the
17 plaintiffs."

18 Now, that when read with the second sentence of
19 count one of Paragraph 3 of the amended motion for
20 judgment --

21 MR. LEGUM: Second.

22 MR. FINE: Second amended motion for judgment said,
23 "The parties had orally agreed subsequent to the execution
24 of the written agreement, that under Paragraph 5 of said
25 agreement the plaintiffs would be entitled to one-half of

1 the listing commissions actually collected at settlement
2 by defendants through the date of termination of plaintiffs
3 as agent for the defendant."
4 That is not inconsistent with Paragraph 13 of the
5 original motion for judgment because, number one, settlement
6 was -- the word settlement was used by the defendants in
7 drawing this matter. Settlement means different things to
8 laymen, but what it may or may not have meant with respect
9 to whether or not funds passed or whether or not there
10 was an agreement, I think that there is some room for
11 interpretation as to whether or not that means the funds
12 were transacted and passed hands, or whether or not they
13 had reached an agreement with respect to what was owed
14 the plaintiffs.
15 Count one of Paragraph 3 simply says, of the second
16 amended motion for judgment, that they had reached an
17 oral agreement as to what funds were due. Paragraph 13 of
18 the motion for judgment simply says that the defendant
19 failed to negotiate a settlement at that time of sums
20 accruing the plaintiffs, and, of course, an important word
21 in that is accruing.
22 We were taking the position at that time that the
23 monies were due. We knew how much they were, but they failed
24 to make payment to us. Again, I don't think the two counts
25 of Paragraph 13 of the original motion for judgment and

1 count one, Paragraph 3 are inconsistent in any way.

2 MR. WEINBERG: Well, Mr. Fine said originally

3 failed to negotiate a settlement, he pleaded in Paragraph 13.

4 Mr. Legum said down here "We did reach a settlement."

5 Settlement does not mean different things to different

6 people when you are speaking in legal terms, and Mr. Fine

7 and Mr. Legum are both able lawyers.

8 Your Honor, we had five other grounds of this

9 demurrer we argued last time, too, that we haven't even

10 mentioned this morning. Of course, I don't think I was

11 wrong on any of the others either.

12 MR. FINE: Well, I think that clearly if you look

13 at the language of Paragraph 3, count one, we are stating

14 that the agreement was breached after the written contract

15 and before termination. In Paragraph 13 we say that they

16 failed to negotiate a settlement of sums accruing the

17 plaintiffs, and in that context of the first motion for

18 judgment that was after they had terminated because the

19 previous paragraph, Paragraph 12 says "that on the 9th day

20 of October, 1979, plaintiffs terminated as agents for the

21 defendant."

22 Then the next paragraph, and we are asking Your

23 Honor to read --

24 THE COURT: Where are you reading from now, Andy?

25 MR. FINE: The original motion for judgment.

1 THE COURT: Okay. Which paragraph?

2 MR. FINE: Paragraph 12. We are saying on the 9th
3 of October they terminated as agents, and after that time
4 the defendants failed to negotiate a settlement at that
5 time of sums accruing the agents. That's what Paragraph 13
6 says.

7 What we are saying in count one of the second
8 amended motion for judgment is that Page 3, that subsequent
9 to the execution of the written agreement; that is, after
10 1973 but prior to the time of termination of October 9,
11 1979, there was an agreement with respect to what the
12 amounts were that were due to the plaintiffs.

13 The two are not inconsistent because they speak of
14 different time frames, and in the original motion for
15 judgment the language there is simply a quote from the
16 inartfully drawn document which is the basis of this
17 controversy, the contract of the 13th of August, 1973,
18 which says in its Paragraph 5 that in the event plaintiffs
19 terminated as agents for realtor prior to the sale of
20 the property as herein contemplated, then agents and
21 realtors shall negotiate a settlement at that time of any
22 sums accruing to agents.

23 So we take the position that the amended motion
24 for judgment, counts one and two, are both perfectly
25 proper in terms of their stating a cause of action that's

1 not inconsistent with the original motion for judgment.

2 THE COURT: Jerry, do you have anything further?

3 MR. WEINBERG: Your Honor, that last argument

4 loses me completely. I don't see how they can conceivably

5 wiggle out of the inconsistent position. Paragraph 13 of

6 the original motion for judgment says that we fail to

7 comply with the terms of Paragraph 5, and plaintiffs

8 terminated as agents, quote, and the defendant failed

9 to negotiate a settlement at that time, unquote. That's

10 the language of the Exhibit 5, agents and realtors shall

11 negotiate a settlement.

12 We have a contract saying shall negotiate a

13 settlement. The pleadings say we failed to negotiate a

14 settlement Mr. Legum told Your Honor when he argued

15 last week the amended motion for judgment, second amended

16 motion for judgment, and you sustained the demurrer last

17 week to the second sentence of count one, which was

18 interpreted to mean, quote, we did reach a settlement.

19 One says we failed to reach a settlement, and the

20 next one says we did reach a settlement. If they are

21 suing on that settlement, which I can only assume they

22 are now, they can't claim a settlement of a position taken

23 contrary to what they originally pleaded.

24 If there was a settlement, Your Honor will recall

25 we argued somewhat the statute of frauds section involved

1 because it's a licensed real estate agent, and for lack of
2 consideration, plus the fact the agreement does not set
3 forth specificity. Even the amended motion for judgment
4 sets forth conclusions, says they are entitled to the
5 money because we breached a contract. It doesn't say
6 how we breached it. It doesn't say why we are entitled
7 to it.
8 It's not that Mr. Legum told you one time last
9 week a settlement had been reached, he said it several
10 times, and Mr. Fine doesn't argue to the contrary. He
11 now says the settlement means different things when it's
12 used in different places, in his different pleadings.
13 The fact pure and simple is they don't have a case.
14 THE COURT: Andy, do you have anything further?
15 MR. FINE: One last parting word, and that is --
16 Two last parting words. One is that I think the magic
17 words in Paragraph 13 are at that time. Clearly that
18 does not preclude the pleadings that were subsequently
19 filed because this speaks of a period after the 9th day
20 of October, 1979, and the pleading that was filed, the
21 second amended motion for judgment, count one, speaks
22 of a time prior to October 9, 1979.
23 The other is that I would like to quote Judge Wahab,
24 who in his wisdom has said about demurrers, he said he had
25 never made an error by overruling a demurrer.

1 MR. WEINBERG: He sustained a lot of them, too,
2 though.
3 You could make an error. You could force the
4 defendant into two weeks of discovery and a two-week trial.
5 THE COURT: Andy, you weren't here last week.
6 We went through this for a considerably longer period of
7 time.
8 MR. FINE: No, sir.
9 THE COURT: Your original motion for judgment,
10 agreement with respect to payment, and after receiving
11 no satisfactory response from the defendant it was necessary
12 for the plaintiffs to terminate the relationship as
13 agents for the realtor in order to seek relief sought
14 in the suit.
15 You go further to say the defendant breached his
16 contract by his failure to comply with the terms of
17 Paragraph 5 when defendant failed to negotiate a
18 settlement with plaintiffs at that time.
19 Now, in Paragraph 11 you have indicated there was no
20 accounting and no agreement, and then --
21 MR. FINE: It doesn't say there was no agreement.
22 It says an agreement with respect to payment. That's
23 terribly important.
24 THE COURT: I am going to deny your motion this
25 morning and maintain the previous position. I am going

1 to sustain the demurrer that's already been sustained.

2 MR. WEINBERG: I have the order right here,

3 Your Honor. They have a copy of that.

4 THE COURT: You want to note your objection, Andy?

5 It's already in there.

6 MR. LEGUM: Judge, he drew the order without the

7 benefit of our motion. I think for the record there ought

8 to be either another order incorporated in this order

9 stating our motion from this day was overruled.

10 We also ask for leave to amend --

11 MR. WEINBERG: Your Honor, I don't want to have to

12 draw any orders that Mr. Legum is going to refuse to

13 endorse or draw something so bad I will refuse to

14 endorse it because I know what he's doing.

15 He asked me would I put in the order the ground

16 on which the demurrer was sustained. I didn't know of

17 any ground I filed the demurrer on that was overruled.

18 There's no necessity for any further order. They will

19 never stop. This ends the case, that order right there,

20 and they can appeal -- their next step is with the

21 Supreme Court if they want to listen to them.

22 MR. LEGUM: I had understood, Your Honor, you

23 sustained it on two grounds. Maybe I was in error. One

24 was Judge Wahab had ruled Paragraph 5 was too vague; and,

25 number two, there was an inconsistent position taken

between Paragraph 13 of the original motion for judgment and Paragraph 3 of count one of the second motion for judgment. Your Honor did not mention any other grounds.

THE COURT: Mr. Legum, as you know, there was a long argument here last Friday. We spent a long time on this. Mr. Weinberg had set out a great number of counts in his demurrer. Frankly, I didn't write down each one of those, all that we heard argument on, each one of those, and you responded to each one of those. I didn't write it all down in the entirety, and you-all didn't have a court reporter last week. I don't think you did.

Did you-all have a court reporter?

MR. LEGUM: No, sir, we didn't.

THE COURT: I think the order as it's presented sustains the demurrer as it was submitted to the Court and is sufficient.

MR. WEINBERG: Thank you, Your Honor.

(Whereupon, this hearing was concluded.)

1
2 C E R T I F I C A T E
3 STATE OF VIRGINIA
4 CITY OF NORFOLK, to-wit:
5 I, Sharon B. Borden, CSR, RPR, certify that
6 the foregoing is a true and correct transcript of the
7 motion had in Judge's chambers, in the case of Donald
8 Kay, et al. versus Professional Realty Corporation, in
9 the said court, on February 29, 1980.
10 Given under my hand this 24th day of March, 1980.
11
12
13
14 Sharon B. Borden
Court Reporter
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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DONALD KAY, et al.,	:	
Plaintiffs	:	
v.	:	LAW DOCKET NO. L-8594
PROFESSIONAL REALTY CORPORATION,	:	
Defendant	:	

O R D E R

On the 22nd day of February, 1980, the parties appeared by their counsel, and the Court heard arguments on the Demurrer to Second Amended Motion for Judgment.

Upon Consideration Whereof, it is ADJUDGED and ORDERED that said Demurrer to Second Amended Motion for Judgment be and is hereby sustained without leave to plaintiffs to amend, and that this case be and is hereby dismissed with prejudice to plaintiffs.

To which action of the Court, plaintiffs duly objected and excepted.

ENTER this 29th day of February, 1980.

sgd/ Kenneth W. Whitehurst
JUDGE

I ask for this:

Donald G. Weinberg, p.d.

Seen:

sgd/ Andrew S. Fine, p.q.

LAW OFFICES
NBERG & STEIN
FOLK, VIRGINIA

APPELLANTS' ASSIGNMENTS OF ERROR

a. The Court erred in sustaining the Defendant's Demurrer to the Plaintiffs' Motion for Judgment.

b. The Court erred in sustaining the Defendant's Demurrer to the Plaintiffs' Amended Motion for Judgment.

c. The Court erred in sustaining the Defendant's Demurrer to the Plaintiffs' Second Amended Motion for Judgment.

d. The Court erred in dismissing the suit with prejudice to the Plaintiffs and in failing to allow them to file a Third Amended Motion for Judgment