73737-6

NO. 73737-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
Jan 28, 2016
Court of Appeals
Division I
State of Washington

MR. 99 & ASSOCIATES, INC.; MARTIN S. ROOD,

Respondents,

v.

8011, LLC, a Washington limited-liability company; WALTER MOSS and JANE DOE MOSS, husband and wife, and their marital community; KARI GRAVES and JOHN DOE GRAVES, husband and wife, and their marital community,

Appellants,

FIRST AMERICAN TITLE COMPANY,

Defendant.

BRIEF OF APPELLANT

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INTRODUCTION

8011, LLC ("Owner") engaged broker Martin Rood ("Rood") to lease or sell Owner's real property, but the agreement expired before Rood presented any offers, and months passed without any communication. Rood eventually presented an offer from his client, Mazda, hoping to be a dual agent. But Owner, uncomfortable with a dual agency and mistrusting Rood, repeatedly refused to sign a new listing agreement. After negotiations Rood remained involved in failed, Owner and Mazda entered a PSA on their own that did not provide Rood a commission.

Rood's commission is barred by the statute of frauds, where the only writing was legally defunct before any offer was made. The procuring cause rule does not apply, where Rood did not procure a buyer during the Agreement's express six-month term, and where the Agreement contains a tail provision addressing commissions in the event a sale was consummated after the Agreement expired.

As professionals, brokers are expected to know and follow the law governing their contracts. Rood failed to do so, and failed to perform under the terms of the Agreement. This Court should reverse the summary judgment in Rood's favor, grant summary judgment for Owner, and award Owner attorney fees and costs.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Owner's motion for summary judgment that, as a matter of law, Rood is not entitled to a commission. CP 436-38, 2446-48.
2. The trial court erred in granting Rood's cross-motion for summary judgment that, as a matter of law, Rood is entitled to a $107,000 commission. CP 436-38.
3. The trial court erred in denying Owner's motion for reconsideration. CP 436-38.
4. The trial court erred in awarding Rood $192,870.20 in attorney fees, $2,429.47 in costs, and $31,458 in prejudgment interest. CP 40.
5. The trial court erred in entering a judgment for Rood in the amount of $334,757.67. CP 28-29.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Does the statute of frauds bar Rood's claim for a commission, where the only written agreement was legally defunct before the buyer even expressed an interest in the Property?
2. Is the procuring cause rule inapplicable where: (a) Rood did not bring Owner any offers before the Agreement

expired; and (b) the Agreement has a tail provision expressly providing how commissions would be paid in the event that a sale was consummated after the Agreement expire or was terminated?

3. Assuming *arguendo* the procuring cause rule applies, do Roods' repeated breaches of his statutory and common law duties bar any commission?

STATEMENT OF THE CASE

Since the trial court resolved this matter on summary judgment, this Court "considers the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party," here the appellants. ***Bishop v. Hansen***, 105 Wn. App. 116, 118, 18-19 P.3d 448 (2001).

A. The parties entered a Lease Listing Agreement for the lease of sale of real property.

Appellant Kari Graves is the authorized agent for 8011, LLC, a Washington limited liability company owned by her father, Walter Moss, and her mother's estate. CP 1528-29. Graves holds a power of attorney for her father. CP 1528. 8011, LLC ("Owner") owned commercial property ("the Property") located on Highway 99 in Everett, Washington, between Paine Field and Everett Mall. CP

1529. Moss operated his business there for many years before retiring. *Id.*

A few years after Moss' retirement, Owner decided to lease the Property, hoping to sell it when the economy improved. *Id.* Due to Moss' age, Graves represented Moss and Owner in efforts to lease the Property. *Id.* In July 2011, Moss' attorney introduced Graves and Moss to Martin Rood, a commercial real estate broker, and the president and owner of Mr. 99 & Associates, a real estate brokerage ("Rood"). CP 1528-29. Owner and Rood entered an "EXCLUSIVE LEASE LISTING AGREEMENT" ("Lease Listing Agreement" or "Agreement"[1]) on or about July 21, 2011. CP 1475-77, 1529. The terms of this Agreement are central to this dispute.

The Lease Listing Agreement gave Rood an exclusive right to lease the Property. CP 1475. The Agreement included an express six-month term, titled "DURATION OF AGREEMENT," commencing on July 21, 2011, and expiring on January 21, 2012. CP 1475 ¶ 1.[2] The Agreement defined the term "lease" as "lease, sublease, sell, or enter into a contract to lease, sublease or sell." CP 1475 ¶ 3. In other

[1] Attached as Appendix A.

[2] The parties agree that the Agreement expired in January 2012 and that the "2011" was a typo. CP 496.

words, the listing agreement is an agreement to lease or "sell." *Id.* The "DEFINITIONS" section also provides that the terms "this Agreement," and "during the term hereof," include any extensions or renewals of the Agreement. *Id.*

The "COMMISSION" provision, paragraph 6, sets forth five ways Rood would be entitled to a commission (CP 1476 ¶ 6):

> (a) Rood leases or procures a lease on the terms of the Agreement or other terms acceptable to owner.[3]
>
> (b) Owner leases the Property through someone else during the term of the Agreement;
>
> (c) "Owner lease[d] the Property within six months after the expiration or sooner termination of this Agreement to a person or entity that submitted an offer to purchase or lease the Property during the term of this Agreement or that appears on any registration list provided by [Rood] pursuant to this Agreement . . ."
>
> (d) Owner voluntarily made the property "unleasable"; or
>
> (e) Owner cancelled the Agreement or prevented Rood from leasing the property.

Paragraph 6 provides that Rood's commission on a lease would be 5% of the gross lease amount for the entire term. *Id.* Paragraph 9, titled "ADDITIONAL TERMS," makes "part of this Agreement" a

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[3] Although the version of the Agreement Owner signed did not include the lease terms (CP 1476 ¶ 2), Rood apparently wrote the terms into the Agreement at a later date. CP 161.

commission of 5% of the gross selling price, in the event Rood sold the property for Owner. CP 1477.

The COMMISSIONS provision also allowed Rood to provide Owner a "registration list" within 15 days after "the expiration or sooner termination of [the] Agreement." CP 1476 ¶ 6. That list, if any, "shall only include . . . persons or entities to whose attention the Property was brought through the signs, advertising, or other action of [Rood] or who received information secured directly or indirectly from or though [Rood] during the term of this Agreement." *Id.* If such a list was provided, Owner would be required to provide it to any other broker who assisted Owner with the Property. *Id.*

In sum, where Rood did not lease or sell the Property during the Agreement's term, and where Owner did not lease or sell it to someone else, make it unleaseable, or cancel the Agreement, the Agreement allowed Rood a commission in only one of two circumstances: (1) Owner leased or sold the Property no later than July 21, 2012 (six months after the Agreement's expiration) to a person who submitted a written offer to lease or purchase the Property before January 21, 2012 (the Agreement's expiration date): or (2) Owner leased or sold the Property no later than July 21, 2012,

to an entity on a registration list Rood gave Owner no later than February 5, 2012 (with 15 days of the Agreement's expiration date). CP 1476 ¶ 6. As addressed in detail below, Rood did not submit any written offers to Owner during the Agreement's term, Rood did not provide a registration list, and Owner did not lease or sell the property on or before July 21, 2012.

B. The Lease Listing Agreement expired in January 2012, without any written offers to lease or purchase.

Rood listed the Property for lease with the Commercial Brokers Association ("CBA") at a rate of $8,500 per month. CP 1530. He also put up a sign on the Property, showing it as available "for lease." *Id.* He did not list the Property for sale, and never advertised it as being for sale. *Id.*

As discussed above, the Lease Listing Agreement includes a provision governing the term of the Agreement, which commenced on July 21, 2011, and expired on January 21, 2012. CP 492, 1475. Rood did not generate any significant leads during the Agreement's six-month term.[4] CP 1530. It is undisputed that Rood provided no

[4] Although Rood repeatedly acknowledged that the Agreement had expired (CP 1552-53, 1562, 1709, 7011, 2417), he also claimed that the provision entitling him to a commission for selling the property was not subject to the "DURATION" provision setting forth the Agreement's express term and expiration date. CP

written offers during the Agreement's term. *Id.* There is no mention in the record of any registration list.

Owner did not extend the Agreement after it expired in January 2012. *Id.* Indeed, Owner and Rood had no contact at all for nearly three months. *Id.*

C. Three months later, Rood contacted Graves out of the blue, asking whether Owner would be interested in selling the Property.

Three-months after the Agreement expired, Rood contacted Graves "out of the blue" in April 2012. CP 1530. Rood asked whether Owner would consider selling the Property, claiming that he had a potential buyer. *Id.* Graves replied that Owner would consider an offer to purchase. *Id.*

Graves understood the Agreement to be expired when Rood approached her about a sale. *Id.* Owner had not solicited Rood to find a buyer, having preferred to lease the property until the economy improved. CP 1529-30. The parties did not extend the Agreement, or sign a new listing agreement. CP 1184, 1530, 1552-53, 1709, 1711, 2417.

1498, 2370-71. This argument is addressed in full below. *Supra*, Argument § C. 2.

D. A month later (now four months after the Agreement expired) Rood gave Graves a written offer to purchase the Property on behalf of his client, Mazda of Everett.

Rood wrote an offer to purchase the Property for his client, Mazda of Everett ("Mazda") on May 18, 2012, four months after the Agreement expired. CP 1530, 1567, 1584. Rood hoped to act as a dual agent. CP 1530, 1584.

Graves met with Rood to discuss the offer, telling Rood that she had never previously been involved in a real estate negotiation and was "very unsure about the process." CP 1531. Rood insisted that the deal was "normal [and] straight forward," giving little advice as to a counter-offer. *Id.* When Graves told Rood that she was concerned about him acting as a dual agent, he insisted that it was best for both parties. *Id.* Graves left the meeting feeling anxious and unrepresented. *Id.*

E. When Graves attempted to have another broker represent Owner, Rood refused to acknowledge her broker, insisting that he represented Owner.

Graves elected not to respond to Rood's Mazda offer. CP 1530-31. She instead took the offer to three other brokers in late May and early June. CP 1532. Graves told the brokers that she did not trust Rood and wanted other representation in the negotiation. *Id.*

Each broker analyzed Mazda's offer in detail, explaining significant risks in the offer and what Owner needed to do to protect itself. *Id.* Rood had never done so. CP 1532-33. Graves was convinced that Rood was not representing Owner's best interests. *Id.*

Graves elected to work with one of these brokers, Matt Henn. CP 1533. Henn sent Graves a draft PSA, agreeing to represent Owner for a 1% commission. *Id.* When Graves told Henn that she was concerned about getting embroiled in a lawsuit with Rood, Henn suggested that while unnecessary, Owner could still pay Rood the 5% commission in his first offer from Mazda. *Id.* Graves was then willing to pay a 6% commission to make sure the deal was done properly and to avoid any litigation. *Id.*

In early-to-mid June, Henn called Rood to tell him that he was representing Owner. CP 1533, 1581. Rood was "appalled," insisting that he represented Owner "on the listing side." CP 1582. Again, however, Rood repeatedly acknowledged that the listing Agreement expired in January, five months before Henn called Rood. CP 1552-53, 1562, 1709, 1711, 2417.

In a subsequent phone call, Graves straightforwardly told Rood that she wanted a different broker to represent Owner. CP

1533. During that call, and in a June 10 email, Rood insisted that he was handling the deal as a dual agent, and flatly refused to "recognize" Henn as Owner's agent. CP 1533-34, 1584. Not knowing what to do, and feeling "bullied" by Rood, Graves did not insist on Henn's representation. CP 1535-36.

F. Graves reluctantly allowed Rood to continue negotiations on Mazda's behalf, but refused to sign a new listing agreement.

Graves met with Rood on June 12, 2012, allowing him to continue negotiations with Owner on Mazda's behalf. CP 1536. She continued to feel unrepresented at this meeting. *Id.*

For the first time since the Lease Listing Agreement had expired in January, Rood asked Graves to sign a new agreement. *Id.* Graves "absolutely refused." *Id.* As a result, Rood told Graves that he would have to remove his signage and take the Property off the market. *Id.* Graves told him he should do so. *Id.*

Through June and July, Rood repeatedly asked Graves to sign a new listing agreement. CP 1184, 1536, 1591, 1592-93. It is undisputed that Graves flatly refused. *Id.*

During the same time, Rood left his signage on the Property and continued to list the Property on the Commercial Brokers

Association. CP 1168. Rood received some interest in the Property – some he shared with Graves, and some he did not. CP 1537-39. Rood made clear that he would not bring Graves any offers to lease unless she signed a new listing agreement. CP 1539-40.

G. After Rood twice refused to submit Owner's counter-offer's to Mazda, Graves lost any remaining confidence that Owner's interests were being protected, walked away from the deal, and later closed directly with Mazda.

On July 28, Graves Owner's attorney asked Rood to submit a counteroffer to Mazda, but he refused. CP 1541, 1633-34. When Graves insisted that the counteroffer was final, Rood again refused to submit it to Mazda, stating that they had already indicated their unwillingness to come up on the purchase price. *Id.* In the same exchange, Rood again requested a new listing agreement. *Id.*

Two days later, Graves told Rood that Owner was nearly ready to stop dealing with Mazda, but would submit one final offer. CP 1542. Rood again refused. CP 1542-43. In her own words, Graves "caved," allowing Rood to submit the offer he wrote. CP 1543. Graves made clear this was Owner's final offer. *Id.*

When Mazda nonetheless made another counter, Graves declined to respond. CP 1544. By mid-August, Graves began negotiating with Mazda directly through Owner's attorney. CP 1545.

In late August, Graves asked a new attorney to review what appeared to be the final deal between Owner and Mazda, having lost confidence that Owner's interests were being protected. CP 1547-48.

On September 4, Owner's attorney sent a new offer directly to Mazda, copying Rood on the email. CP 1552. Rood continued to insist that he represented Owner, while simultaneously acknowledging that the Lease Listing Agreement had expired long ago. CP 1552-53, 1709, 1711, 2417.

Rood insisted the Lease Listing Agreement contemplated "'future' offers,'" but the Lease Listing Agreement does not mention "future offers." CP 1711, 1475-77. Rood ignores the commission provision, expressly stating that he would be entitled to a commission only if: (1) he obtained a written offer during the Agreement's six-month term; and (2) Owner leased or sold to that entity within six-months of the Agreement's expiration. CP 1476. Neither happened.

On September 28, Owner's attorney informed Rood that Owner had discontinued negotiations with Mazda. CP 1403, 1553. Days later, Mazda reached out to Graves, asking why she had walked away from the negotiations. CP 1554. Owner and Mazda

were able to reach a final agreement in October. *Id.* This agreement did not include any commission for Rood. *Id.*

H. Procedural History.

Rood filed a complaint in February 2013, seeking a $107,000 commission, 5% of the final sales price, and attorney fees under the expired Lease Listing Agreement. CP 2407-23. Owner filed an amended answer in July, seeking attorney fees under the Agreement, and filing a counterclaim alleging Consumer Protection Act violations. CP 2377-91.

Rood moved for summary judgment to dismiss Owner's CPA claim as a matter of law, in February 2014. CP 2360. Rood filed the same motion on April 22, 2014. CP 1886-95. That same day, Rood filed a separate motion for partial summary judgment, arguing that he procured a buyer for Owner, so was entitled to a commission as a matter of law. CP 2278-95.

Owner responded to both motions on May 8, and Rood replied on May 19. CP 1486-96, 1497-1520, 1745-1814, 1815-21. Both motions were set before Judge George Appel for May 23, 2014. CP 1886, 2278. Judge Appel granted Rood's motion to dismiss Owner's

CPA claims as a matter of law, but denied his motion regarding the procuring cause rule. CP 1466-67, 1468-70.

In April 2015, Owner moved for summary judgment that as a matter of law, Rood's claim for a commission was barred by the statute of frauds. CP 1440. Rood filed an answer and cross-motion for summary judgment, largely failing to address the statute of frauds, and repeating the argument that Rood was entitled to a commission as a matter of law under the procuring cause rule. CP 1103-32. Owner replied on May 22, and Judge Joseph Wilson heard the motion on May 27, 2015. CP 604-15.

The court initially denied both motions for summary judgment, acknowledging that the issue was a legal one, but that fact questions precluded summary judgment. CP 515-16, 554. The case was set for trial on June 23. CP 516.

Owner subsequently moved for reconsideration, and on June 10, the trial court notified the parties via email that it was prepared to rule as a matter of law if the parties agreed to strike the June 23 trial date, stating that the court could not have a decision before the 23rd. CP 1-14. The parties ultimately agreed to strike the trial date, so long as the court considered both the response and reply on

reconsideration before ruling. *Id.* Rood responded on June 16, and Owner replied the next day. CP 447-70, 439-43. The court denied Owner's Motion for Reconsideration on June 18, also denying Owner's motion for summary judgment, and granting Rood's cross-motion for summary judgment, ruling as a matter of law that Rood was entitled to a 5% commission, $107,000. CP 436-38.

The trial court subsequently granted Rood's request for attorney fees under a fee provision in the expired listing agreement. CP 28-29, 40. The total award to Rood, including the commission, fees, costs, and prejudgment interest was $334,757.67. CP 28-29. Owner timely appealed. CP 2427.

ARGUMENT

A. Standard of review.

Since the trial court resolved this matter on summary judgment, this Court's review is *de novo*. ***Bishop***, 105 Wn. App, at 118. The Court engages in the same inquiry as the trial court, considering all facts and all reasonable inferences in the light most favorable to the nonmoving party. 105 Wn. App. at 118-19. Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 118.

B. The Statute of Frauds bars Rood from recovering a commission.

The parties' Agreement expired by its own terms months before Rood brought Owner the Mazda offer. Upon its expiration, the Agreement was legally defunct. Thus, there was no valid writing entitling Rood to a commission, and his claim is barred by the statute of frauds.

1. Real estate brokers are professionals, and may recover a commission for the sale of real property only upon a written agreement that satisfies the statute of frauds.

A brokerage agreement to sell real property for a commission must satisfy Washington's statute of frauds:

> In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: . . (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

RCW 19.36.010; ***Bishop***, 105 Wn. App. at 120. Indeed, RCW 18.86.080(7), governing a broker's compensation for the sale of real property, confirms that the statute of frauds applies:

> Nothing contained in this chapter negates the requirement that an agreement authorizing or employing a broker to sell or purchase real estate for compensation or a commission be in writing and signed by the seller or buyer.

"The fraud sought to be prevented by RCW 19.36.010(5) 'relates to disputes as to the amount of commission or compensation, the term of the listing agreement, if exclusive or nonexclusive, and most important, if any agreement existed at all.'" ***Bishop***, 105 Wn. App. at 120 (quoting ***House v. Erwin***, 83 Wn.2d 898, 904, 524 P.2d 911 (1974)).

To satisfy the statute of frauds, the contract must be in writing, and must establish all material terms:

> The memorandum or memoranda in writing, to satisfy the requirements of the statute, must not only be signed by the party to be charged but it must also be so complete in itself as to make recourse to parol evidence unnecessary to establish any material element of the undertaking. Liability cannot be imposed if it is necessary to look for elements of the agreement outside the writing.

Smith v. Twohy, 70 Wn.2d 721, 725, 425 P.2d 12 (1967) (citing ***Forland v. Boyum***, 53 Wash. 421, 102 P. 34 (1909); ***Mead v. White***, 53 Wash. 638, 102 P. 753 (1909); ***Cushing v. Monarch Timber Co.***, 75 Wash. 678, 135 P. 600 (1913); ***Campbell v. Weston Basket & Barrell Co.***, 87 Wash. 73, 151 P. 103 (1915); ***Dybdahl v. Continental Lumber Co.***, 133 Wash. 81, 233 P. 10 (1925); ***Baillargeon, Winslow & Co. v. Westenfeld***, 161 Wash. 275, 295 P. 1019 (1931); ***Bharat Overseas Ltd. v. Dulien Steel Prods., Inc.***, 51

Wn.2d 685, 321 P.2d 266 (1958)). Thus, parol evidence is not permitted to establish essential terms or to cure any deficiencies. ***Smith***, 70 Wn.2d at 725 (citing ***Broadway Hospital & Sanitarium v. Decker***, 47 Wash. 586, 92 P. 445 (1907); ***Mead***, 53 Wash. 638; ***Cushing***, 75 Wash. 678; ***Lewis v. Elliott Bay Logging Co.***, 112 Wash. 83, 191 P. 803 (1920); ***Martinson v. Cruikshank***, 3 Wn.2d 565, 101 P.2d 604 (1940); ***Fosburgh v. Sando***, 24 Wn.2d 586, 166 P.2d 850 (1946)).

Absent a valid writing satisfying the statute of frauds, a broker typically will be barred from maintaining a suit for compensation. ***Ctr. Invs., Inc. v. Penhallurick***, 22 Wn. App. 846, 849, 592 P.2d 685 (1979) (citing ***Engleson v. Port Cresent Shingle Co.,*** 74 Wash. 424, 133 P. 1030 (1913) "and cases cited therein").[5] Indeed, if a broker were allowed to recover for the value of his services without a writing "the statute [of frauds] would not have the effect intended." ***Penhallurick***, 22 Wn. App. at 849-50 (quoting Restatement

[5] ***Penhallurick*** recognizes that a broker who is the "procuring cause" may recover a commission under an oral agreement, where the final purchase and sale agreement provides for a commission. 22 Wn. App. at 850. Here, however, Owner's PSA with Mazda did not provide for a commission. CP 1723-42. As addressed below, Rood is not entitled to a commission, where he did not "procure" Mazda for Owner during the Agreement's term, and where the Agreement contains a provision dictating how commissions will be paid if a sale is consummated after the Agreement expires. *Infra*, Argument § C.

(Second) of Agency §468, at 399 (1958), Comment on Subsection 2). Brokers are professionals who can reasonably be expected to know and follow the law (*id.*):

> Brokers are professionals; it is not unfair to deprive them of compensation if they do not adopt the safeguards of which they should be aware.

2. Since the Agreement expired, it is legally defunct, and cannot entitle Rood to a commission.

When a listing agreement expires, it is "legally defunct." ***Penhallurick***, 22 Wn. App. at 849 (quoting ***Pavey v. Collins***, 131 Wn.2d 864, 870 199 P.2d 571 (1948)); ***Thayer v. Damiano***, 9 Wn. App. 207, 210, 511 P.2d 84 (1973) (same). Thus, the Agreement was "legally defunct" after it expired by its own terms on January 21, 2012. CP 1475 ¶ 1. It is undisputed that the parties did not extend the Agreement, or enter a new written agreement. CP 1184, 1530, 1536, 1592, 1592-93. Thus, there was no valid written agreement entitling Rood to a commission.

3. There are no equitable exceptions to the statute of frauds, a positive statutory mandate rendering any contract that offends it void and unenforceable.

Our Supreme Court has long held that Washington's statute of frauds is not an equitable doctrine, but a "positive statutory mandate which renders void and unenforceable those undertakings

which offend it." ***Smith***, 70 Wn. 2d at 725 (citing ***Forland***, 53 Wash. at 424; ***Farrell v. Mentzer***, 102 Wash. 629, 632, 174 P. 482 (1918); ***Sposari v. Matt Malaspina & Co.***, 63 Wn.2d 679, 388 P.2d 970 (1964)). As stated over one-hundred years ago, contracts that violate of the statute of frauds "are held void by force of the statute, and the rights of the parties can never be determined by resort to equitable principles." ***Forland***, 53 Wash. at 424. This is so even if the statute of frauds operates to defeat a "just claim":

> It may be that a strict application of the statute in some cases will operate to defeat a just claim, but that is not a sufficient reason for attempting to remove those cases from the operation of the statute . . . .

Farrell, 102 Wash. at 632.

The basis of the trial court's ruling is unclear, but it is apparent that the court considered whether Rood could recover a commission under a theory of implied contract or *quantum meruit*. CP 485-86. Neither can be used to circumvent the statute of frauds. ***Cushing***, 75 Wash. 678; ***Keith v. Smith***, 46 Wash. 131, 134, 89 P. 473 (1907).

In ***Cushing***, the broker sued the seller, seeking a commission for obtaining a buyer for seller's real property. 75 Wash. at 679. The written brokerage agreement did not contain all necessary terms, specifically lacking a proper description of the real property. *Id.* at

679-80, 685. Since parol evidence was necessary to complete the brokerage agreement, the Court held the agreement void under the statute of frauds. *Id.* at 685-86.

The broker argued that he should be permitted to recover a commission under a theory of "implied contract." *Id.* at 687. Rejecting that argument, the ***Cushing*** Court unequivocally held that, "[t]o permit a recovery upon the *quantum meruit* or upon an implied contract would be to defeat the purpose of the statute and supply by implication a contract which the statute expressly says may only be proven by written evidence." *Id.*

The same is true here. As in ***Cushing***, the statute of frauds applies, and permitting Rood to recover on a theory of *quantum meruit* or implied contract would defeat the purpose of the statute of frauds. This Court should reverse with instructions to grant summary judgment in Owner's favor.

C. Rood is not entitled to a commission under the procuring cause rule.

Although the stature of frauds generally bars a broker from bringing suit for a commission absent a valid written contract, Washington recognizes the "procuring cause" rule, permitting recovery where a broker "is employed to procure a purchaser and

does procure a purchaser to whom a sale is eventually made," regardless of who makes the sale. ***Willis v. Champlain Cable Corp.***, 109 Wn.2d 747, 754, 748 P.2d 621 (1988). Our courts may apply this rule to allow a broker who procures a buyer, and whose efforts bring about the sale, to recover his commission when the seller terminates the agency "in bad faith" before the sale is complete. ***Willis***, 109 Wn.2d at 754. The purpose of the rule is to prevent a seller from terminating a broker in bad faith, while benefiting from his efforts. 109 Wn.2d at 754-55.

The procuring cause rule generally applies where: (1) the seller and broker have an oral agreement; (2) the broker is the procuring cause of an eventual sale; and (3) the seller memorializes the agreement to pay a commission in a subsequent writing between seller and purchaser. *Id.* at 755 (citing ***Penhallurick***, 22 Wn. App. at 850). The rule also historically has been applied where the brokerage agreement does not fix the term of the agency, and seller terminates the agency in the midst of negotiations to deprive the broker of a commission. ***Zelensky v. Viking Equip. Co.***, 70 Wn.2d 78, 82-83, 422 P.2d 293 (1966) (citing ***Knox v. Parker***, 2 Wash. 34, 25 P. 909 (1891); ***Norris v. Byrne***, 38 Wash. 592, 80 P. 808 (1905);

Lawson v. Black Diamond Coal Mining Co., 53 Wash. 614, 102 P. 759 (1909); ***Merritt v. American Catering Co.***, 71 Wash. 425, 128 P. 1074 (1912); ***Duncan v. Parker***, 81 Wash. 340, 142 P. 657 (1914)). But as discussed fully below, the procuring cause rule does not apply where, as here: (1) the brokerage agreement has an express term and the broker did not procure a buyer in that term; **or** (2) the agreement has a tail provision providing for a commission post-termination or expiration. ***Willis***, 109 Wn.2d at 755; ***Syputa v. Druck, Inc.***, 90 Wn. App. 638, 645-46, 954 P.2d 279, *rev. denied*, 136 Wn.2d 1024 (1998).

1. The procuring cause rule does not apply, where Rood – through no fault of Owner – failed to procure a buyer before the Agreement expired by its own terms.

Dating at least as far back as 1909, our Supreme Court has repeatedly stated "a general rule of universal application that a broker employed for a definite time to effect a sale of property must negotiate the sale within the time fixed to be entitled to his commission." ***Brackett v. Schafer***, 41 Wn.2d 828, 832, 252 P.2d 294 (1953) (citing ***Kane v. Dawson***, 52 Wash. 411, 100 P. 837 (1909); ***Swift v. Starrett***, 117 Wash. 188, 200 P. 1108 (1921); ***Pavey***, 31 Wn.2d at 870); ***Koller v. Flerchinger***, 73 Wn.2d 857, 859, 441 P.2d 126 (1968); ***Penhallurick***, 22 Wn. App. at 848-49 (citing

Restatement (Second) of Agency §§ 445, 446 (1958)); ***Thayer***, 9 Wn. App. at 210. "The rationale for these cases" is that a contract that has expired by its own terms is "'legally defunct, and, . . . there is nothing upon which an extension may legally operate.'" ***Penhallurick***, 22 Wn. App. at 849 (citing ***Pavey***, 31 Wn.2d at 870); see also ***Thayer***, 9 Wn. App. at 210. The broker can (and should) protect his interest against subsequent sales in the brokerage contract. ***Koller***, 73 Wn.2d at 860; ***Penhallurick***, 22 Wn. App. at 849.

Our courts will excuse the broker's failure to perform "within the period fixed" by the brokerage contract only if the principal causes the broker's delay:

> An exception to this rule is made where the broker's delay in discharging his duty within the period fixed is due to the fraud or fault of the owner.

Brackett, 41 Wn.2d at 832; ***Koller***, 73 Wn.2d at 859. This is consistent with the rule that a broker can recover a commission only where the owner revokes the agency in "bad faith." ***Willis***, 109 Wn. 2d at 754 (citing ***Zelensky***, 70 Wn.2d at 83; ***Feeley v. Mullikin***, 44 Wn.2d 680, 685, 269 P.2d 828 (1954)).

In short, the "general rule" is that where, as here, the brokerage agreement is for a definite term, the broker must perform within that

term to obtain a commission. ***Brackett***, ***Koller***, ***Penhallurick***, and ***Thayer***, *supra*. If he fails to perform within the fixed term, he may obtain a commission only if the principal caused his failure in bad faith. *Id.*

Owner engaged Rood to lease or sell the Property for a "definite term," six months. CP 1475 ¶ 1. That term commenced on July 21, 2011, and expired on January 21, 2012. *Id.* It is undisputed that Rood did not bring Owner any written offers, or even any significant leads during the Agreement's term. CP 1530. Thus, Rood plainly failed to perform before the Agreement expired. CP 1475 ¶ 1.

Where Owner did not prevent Rood from performing "within the period fixed" by the Agreement, Rood is not entitled to a commission. ***Brackett***, 41 Wn.2d at 832; ***Koller***, 73 Wn.2d at 859. Rood never claimed that Owner prevented him from performing in the only relevant timeframe – July 2011 to January 2012, the Agreement's fixed term. Absent a showing that Owner's fault or fraud prevented Rood from performing before January 2012, there is no exception to the general rule that Rood must have performed during the Agreement's fixed term to obtain a commission.

In short, through no fault of Owner, Rood did not procure anything in the Agreement's six-month term. CP 1530. When the Agreement expired by its own terms, it was "'legally defunct.'" ***Penhallurick***, 22 Wn. App. at 849 (quoting ***Pavey***, 31 Wn.2d at 870). And it is undisputed that Graves repeatedly refused to enter a new contract. CP 1536, 1591, 1592-93. Thus, under the many controlling cases discussed above, Rood is not entitled to a commission under the procuring cause rule as a matter of law.

2. Rood's arguments to the contrary are meritless.

Rood ultimately acknowledged that he did not procure Mazda during the Agreement's term:

> THE COURT: You've completely missed my argument, you just completely missed it. What the hell did he procure during the terms of the agreement?
>
> [COUNSEL]: Prior to January 2012 he did not have a live buyer prospect.
>
> THE COURT: He didn't procure anything.

CP 501. But before this admission, Rood argued that he procured Mazda in 2011, before even entering the Lease Listing Agreement with Owner. CP 492. This assertion is meritless.

Although Rood began working with Mazda in 2010 or 2011, before entering the Agreement with Owner, Rood acknowledges that

Mazda was uninterested in Owner's Property until months after the Agreement expired. CP 642-43, 1069. Rood first notified Mazda about Owner's Property in April 2011, but Mazda was not interested, desiring instead to purchase the building it was then leasing. CP 643. When the owner would not sell, Mazda tasked Rood with finding a building at least eight miles from Lynnwood Mazda, as Washington State law requires an eight-mile separation between dealers. *Id.* Owner's Property, being 7.5 miles from Lynwood Mazda, was not suitable, and Rood and Mazda "did not consider it." *Id.*

Mazda continued to focus on another property from February 2012, to at least March 1, 2012, months after Rood's Agreement with Owner expired. CP 643, 696. It was not until April 2012, three months after the Agreement expired, that Mazda expressed a renewed interest in the Property. CP 708-11, 1082. Even then, Mazda still had not obtained a waiver of the 8-mile rule, disqualifying Owner's Property. CP 708, 1082.

Sometime after mid-April 2012, Mazda obtained a waiver of the 8-mile rule. CP 643, 708. On May 18, 2012, four-months after Rood's Agreement with Owner expired, Rood emailed Graves Mazda's first written offer. CP 925, 1567, 1900.

In short, Rood acknowledges that Mazda was not even interested in the Property until months after his Agreement with Owner expired. CP 643, 708. Likewise, Rood did not "procure" an offer until months after the Agreement expired. CP 643, 1567. Any argument that he procured Mazda during the Lease Listing Agreement's term is meritless.

Equally meritless is Rood's suggestion that the Agreement's express six-month term did not govern his commission on the *sale* of the Property, but only on a lease. CP 491-92, 1498-99. The Agreement plainly states that it expired in January 2012. CP 1475. Yet Rood argued before the trial court that paragraph 9, setting forth his commission if he sold the property, was not governed by the Agreement's DURATION provision. CP 491-92, 1498-99. Rood claimed that paragraph 9 was "the only term [in the Agreement] that deals with a prospective sale," and "is silent as to how long it lasts." CP 492. Thus, according to Rood, the lease listing portion of the Agreement expired in January 2012, but the sales portion of the Agreement never expired. *Id.* That is absurd. ***City of Tacoma v. City of Bonney Lake***, 173 Wn.2d 584, 593, 269 P.3d 1017 (2012) (courts must interpret contacts to avoid absurd results).

It is also at odds with the Agreement's plain language. The Agreement gives Rood the right to lease or sell the property, defining the term "lease" as: "lease, sublease, sell, or enter into a contract to lease, sublease, or sell the Property." CP 1475 ¶ 3. Thus, Paragraph 9, is not the "only term" addressing a sale – the entire Agreement addresses sales. CP 492. Paragraph 9 simply clarifies Rood's commission in the event of a sale. CP 1477.

Moreover, it should go without saying that the terms set out in paragraph 9 are part of the Agreement, where paragraph 9 states: "the following amendments or addenda . . . are part of this Agreement." *Id.* And nothing in paragraph 9 suggests that it is not bound by the DEFINITIONS and DURATION provisions in the Agreement. *Id.* This Court construes contacts as a whole. ***Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.***, 183 Wn.2d 485, 489, 352 P.3d 790 (2015).

In sum, the Agreement plainly includes sales, and equally plainly expired on January 2012. Since Rood did not procure a buyer before the Agreement expired, he cannot recover a commission under the procuring cause rule.

3. The procuring cause rule does not apply, where the Agreement has a tail provision, defining the only situations in which Rood would be entitled to a commission when the lease or sale occurred after the Agreement expired.

As our Supreme Court has plainly stated, the procuring cause rule does not apply "when, as here, a written contract provides the manner by which termination can be effected as well as how commissions will be awarded when an employee or agent is terminated." ***Willis***, 109 Wn.2d at 755. As this Court more recently explained, in the absence of a contractual provision providing how commissions will be awarded if an agent is terminated, "the procuring cause doctrine acts as a gap filler." ***Syputa***, 90 Wn. App. at 645-46. Thus, the procuring cause "rule is inapplicable only if a written contract expressly provides 'how commissions will be awarded when an employee or agent is terminated.'" *Id.* (quoting ***Willis***, 109 Wn.2d at 755). That is, if there are "contractual provisions addressing posttermination commissions," the rule does not apply. *Id.* at 646.

Contract provisions providing for a commission after the termination or expiration of a listing agreement are commonly referred to as a "tail." ***Roger Crane & Assocs. v. Felice***, 74 Wn. App. 769, 774, 875 P.2d 705 (1994). Their purpose is to protect a broker who finds and presents a purchaser during the term of the

listing agreement, but who does not close the sale in that term. ***Roger Crane***, 74 Wn. App. at 774-75. Tail provisions are strictly construed. ***Thayer***, 9 Wn. App. at 710.

In ***Thayer***, for example, the expired listing agreement included a tail providing that the seller would pay the broker a commission if: (1) the broker placed the seller in contact with a buyer during the agency; and (2) the seller sold the property to that buyer within 180 days after the termination of the agency. 9 Wn. App. at 710. The appellate court "strictly" interpreted the tail to require a sale within 180 days after termination of the agency for the broker to be entitled to a commission. *Id.* The court explained that there must be a "reasonable time period" for the sale to be consummated, but that when the "listing agreement itself provided such a reasonable time period," then the broker may recover a commission only if the sale is consummated within the tail-provision's term. *Id.* at 210-11.

The procuring cause rule does not apply, where the Agreement had a tail provision. ***Willis***, 109 Wn.2d at 755; ***Syputa***, 90 Wn. App. at 646. Paragraph 6, "COMMISSION," entitled Rood to a commission if "Owner lease[d] the Property within six months after the expiration or sooner termination of th[e] Agreement to a person

or entity that submitted an offer to purchase or lease the Property during the term of th[e] Agreement or that appears on any registration list provided by [Rood] pursuant to th[e] Agreement." CP 1476. As discussed above, the Agreement defines the term "lease" to include sales. CP 1475 ¶ 3. Thus, the statement in the tail provision "Owner *leases* the Property within six months . . . ," means leases or sells. *Id.* (emphasis added).

There is no "gap" to fill here. ***Syputa***, 90 Wn. App. at 645-46. Instead, the Agreement plainly provides for how commissions will be awarded in the event of termination or expiration. CP 1476 ¶6. Thus, the procuring cause rule does not apply. ***Willis***, 109 Wn.2d at 755; ***Syputa***, 90 Wn. App. at 646.

Rood cannot recover a commission under the tail – he never even claims to have satisfied its terms. CP 1476 ¶ 6. Rood never claims to have provided a registration list. *Id.* Thus, he could recover a commission on the Mazda sale only if: (1) Mazda "submitted an offer to purchase or lease the Property during the term of [the] Agreement"; and (2) Owner leased or sold to Mazda before July 21, 2012 – six months after the expiration of the Agreement. *Id.* Neither happened.

Mazda made no offer on the Property before the Agreement expired. CP 1530. The sale was not consummated "within six months after the expiration . . . of [the] Agreement." CP 1476, 2326. Owner and Mazda did not come to an Agreement until October – 9 months after the Agreement expired. CP 2326, 2341.

In sum, Rood did not procure Mazda before the Agreement expired, so cannot invoke the procuring cause rule. Neither can Rood invoke the procuring cause rule to side-step the tail provision set forth in his own brokerage contract. Rood contracted for how a commission would be paid in the event that a sale was not consummated during the Agreement's term. The law does not permit him to ignore the contract or his failure to perform within its terms.

D. Even if Rood had been entitled to a commission, his repeated breaches of RCW 18.86.030 & .040 should bar him from obtaining it.

The facts in this case disclose numerous breaches of a broker's duties that "may not be waived." RCW 18.86.030 & .040. Rood's breaches should bar him from obtaining any commission, much less attorney fees and costs. *See* CP 1784-90; *see, e.g.*, ***Cogan v. Kidder, Mathews & Segner, Inc.***, 97 Wn.2d 658, 667-68, 648 P.2d 875 (1982) (failure to disclose dual agency is breach of duty

of loyalty requiring disgorgement of commission; citing and quoting, *inter alia*, Restatement (Second) of Agency § 469 (1958)); ***Meerdink v. Krieger***, 15 Wn. App. 540, 545, 550 P.2d 42 (1976) (breach of duty permits loss of commission); ***Koller v. Belote***, 12 Wn. App. 194, 198-99, 528 P.2d 1000 (1974) (failure to disclose all material facts permits disgorgement of commission).

The "duties of broker" statute provides (RCW 18.86.030):

> (1) Regardless of whether a broker is an agent, the broker owes to all parties to whom the broker renders real estate brokerage services the following duties, which may not be waived:
>
> (a) To exercise reasonable skill and care;
>
> (b) To deal honestly and in good faith;
>
> (c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;
>
> (d) To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; . . .

In addition to those duties, RCW 18.86.040 imposes additional non-waivable duties on the seller's agent:

> (1) Unless additional duties are agreed to in writing signed by a seller's agent, the duties of a seller's agent are limited to those set forth in RCW 18.86.030 and the following, which

> may not be waived except as expressly set forth in (e) of this subsection [inapplicable here]:
>
> (a) To be loyal to the seller by taking no action that is adverse or detrimental to the seller's interest in a transaction;
>
> (b) To timely disclose to the seller any conflicts of interest;
>
> ...
>
> (d) Not to disclose any confidential information from or about the seller, except under subpoena or court order, even after termination of the agency relationship . . . .

Rood violated all of these duties. He failed to exercise reasonable care and skill by mispresenting the status of the Agreement after it plainly had expired on its own terms. When Rood first brought Owner an offer from Mazda – months after the Agreement had expired – he eschewed Grave's concerns that he could not adequately represent both parties. CP 1531. Rood never told Graves that he represented Mazda, that the Agreement had expired, and that she could hire another broker, but that he would like to proceed as a dual agent. When Graves hired another broker, Rood refused to "recognize" him, again falsely claiming that he still represented Owner. CP 1533, 1584. All the while, Rood was aware that Owner was unwilling to sign a new listing agreement. CP 1184, 1190, 1536, 1591, 1592-93.

During this timeframe, Rood, who still had his advertising up despite having been asked to remove it, was receiving offers on the Property. CP 1168, 1537-41, 1549-50. Continuing to ask Graves for a new agreement, Rood claimed on the one hand that he need not bring Owner lease offers without a new listing agreement, and on the other that he continued to represent Owner. CP 1537-39, 1549-50. This sort of unethical gamesmanship violated Rood's duty of care and his duty to deal honestly and in good faith. RCW 18.86.030(1)(a) & (b).

Rood admits that he did not present all offers to Owner, violating RCW 18.86.030(1)(c). Rood had written offers to lease the property from "Mr. R" that he never presented to Owner, asserting both that he represented Owner and that he required a new written contract. CP 1537-41. While Rood may claim that some offers were not written, that is again because he was playing both ends against the middle, telling Mr. R not to make offers because the property was under contract – another misrepresentation. *Id.* At a minimum, Rood failed to disclose material facts, violating RCW 18.86.030(1)(d).

Perhaps most importantly in this case, Rood never disclosed, in writing, that he intended to be a dual agent for Owner and Mazda.

RCW 18.86.030(1)(g). When Rood first approached Graves with the Mazda offer, Owner had no agent, the Agreement with Rood having expired. While it was apparent that Rood wanted to be a dual agent, Graves immediately expressed her discomfort with that proposed arrangement. CP 1531. Given her concerns and general mistrust of Rood, Graves tried to hire a broker to represent Owner. CP 1531-33. Rood then misrepresented to her – repeatedly – that he was a dual agent and that he would not "recognize" the broker Owner had hired. CP 1533, 1584. In other words, Rood insisted that he represented Owner despite the Agreement's expiration, and refused to work with Owner's chosen agent, all the while failing to disclose in writing his purported dual agency. For Rood to take advantage of his superior knowledge and experience in this fashion is a gross violation of both the letter and the spirit of RCW 18.86.030.

The same is true for RCW 18.86.040: Rood repeatedly violated his duty of loyalty by bad-mouthing Graves to other parties to the transaction; he never disclosed his blatant conflict of interest in playing both ends against the middle; and (at least arguably) his insulting attitude disclosed confidential information, in the sense that he weakened Graves' bargaining position by alleging to the buyer

that she did not know what she was doing. CP 1544, 1547, 1648, 1674.

Rood's flagrant violations of RCW 18.86.030 & .040 should properly subject him – at the very least – to disgorgement of any commission allegedly due him. ***Cogan***, 97 Wn.2d at 667-68; ***Meerdink***, 15 Wn. App. at 545; ***Koller***, 12 Wn. App. at 198-99. Since Rood is not entitled to a commission, he is not entitled to attorney fees. And of course, to the extent he denies these violations, there are certainly genuine issues of material fact that precluded summary judgment in this case. The Court should reverse and award summary judgment to Owner, or reverse and remand for trial.

E. This Court should reverse the fee award to Rood, and order the trial court to grant summary judgment to Owner and award it attorney fees.

For all of the reasons stated above, this Court should reverse the summary judgment and the trial court's fee award to Rood, grant summary judgment to Owner, and remand for a fee award to Owner. For the same reasons, the Court should award Owner attorney fees on appeal under the fee provision in the expired Agreement. *See, e.g.*, ***Deep Water Brewing, LLC v. Fairway Res. Ltd.***, 152 Wn. App. 229, 278-279, 215 P.3d 990 (2009):

> The court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, *i.e.*, when the dispute actually arose from the agreements. *See* ***Hemenway v. Miller***, 116 Wn.2d 725, 742-43, 807 P.2d 863 (1991); ***Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n***, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); ***Hill v. Cox***, 110 Wn. App. 394, 411-12, 41 P.3d 495 (2002) (contractual fees awarded when prevailing party elected to proceed on statutory tort claim rather than contract); ***Edmonds v. John L. Scott Real Estate, Inc.***, 87 Wn. App. 834, 855-56, 942 P.2d 1072 (1997) (contract-based fees awarded for negligence claim when duty breached was created by parties' agreement); ***W. Stud Welding***[, ***Inc. v. Omark Indus., Inc.***], 43 Wn. App. [293,] at 299[, 716 P.2d 959 (1986)] (contract-related tortious interference claim justified awarding of contract-based fees); 25 David K. DeWolf et al., WASHINGTON PRACTICE: CONTRACT LAW AND PRACTICE § 14:18, at 357 (2d ed. 2007) (even in cases where plaintiff's claims are founded in tort or another legal theory, award of contract attorney fees may be appropriate).

Here too, this dispute arose from the Lease Listing Agreement, which was central to this dispute – in particular whether paragraph nine regarding sales was somehow unaffected by the duration provision. This Court may and should, therefore, award attorney fees and costs to Owner under the Agreement's fee provision. CP 1476 ¶8; RAP 18.1.

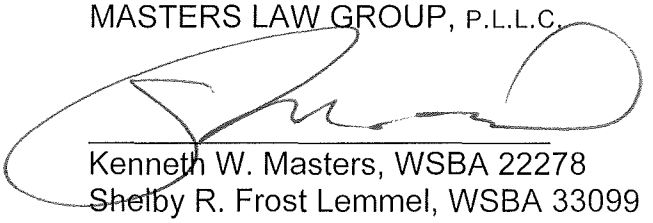
CONCLUSION

There was no writing that satisfied the statute of frauds, where the only written Agreement between Owner and Rood expired long before Rood presented Mazda's offer. The procuring cause rule does

not apply, where Rood procured no buyer before the Agreement expired, and where the Agreement contains an express tail provision. This Court should reverse and grant Owner summary judgment under the statute of frauds, and reverse the order granting summary judgment in Rood's favor. Finally, this Court should reverse the fee award, award Owner attorney fees and costs on appeal, and instruct the trial court to award Owner fees and costs as well.

RESPECTFULLY SUBMITTED this 28th day of January, 2016.

MASTERS LAW GROUP, P.L.L.C.



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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be emailed or mailed a copy of the foregoing **BRIEF OF APPELLANTS** postage prepaid, via U.S. mail, on the 28th day of January, 2016, to the following counsel of record at the following addresses:

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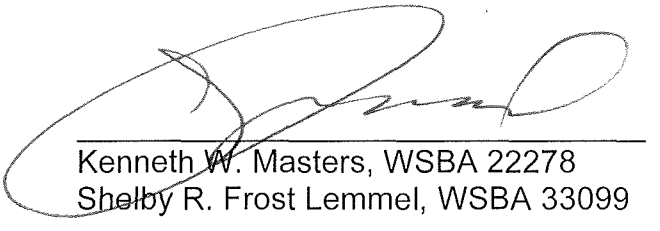

Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099

RCW 18.86.030

Duties of broker.

(1) Regardless of whether a broker is an agent, the broker owes to all parties to whom the broker renders real estate brokerage services the following duties, which may not be waived:

(a) To exercise reasonable skill and care;

(b) To deal honestly and in good faith;

(c) To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase;

(d) To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; provided that this subsection shall not be construed to imply any duty to investigate matters that the broker has not agreed to investigate;

(e) To account in a timely manner for all money and property received from or on behalf of either party;

(f) To provide a pamphlet on the law of real estate agency in the form prescribed in RCW 18.86.120 to all parties to whom the broker renders real estate brokerage services, before the party signs an agency agreement with the broker, signs an offer in a real estate transaction handled by the broker, consents to dual agency, or waives any rights, under RCW 18.86.020(1)(e), 18.86.040(1)(e), 18.86.050(1)(e), or 18.86.060(2) (e) or (f), whichever occurs earliest; and

(g) To disclose in writing to all parties to whom the broker renders real estate brokerage services, before the party signs an offer in a real estate transaction handled by the broker, whether the broker represents the buyer, the seller, both parties, or neither party. The disclosure shall be set forth in a separate paragraph entitled "Agency Disclosure" in the agreement between the buyer and seller or in a separate writing entitled "Agency Disclosure."

(2) Unless otherwise agreed, a broker owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable.

[2013 c 58 § 3; 1996 c 179 § 3.]

RCW 18.86.040

Seller's agent—Duties.

(1) Unless additional duties are agreed to in writing signed by a seller's agent, the duties of a seller's agent are limited to those set forth in RCW 18.86.030 and the following, which may not be waived except as expressly set forth in (e) of this subsection:

(a) To be loyal to the seller by taking no action that is adverse or detrimental to the seller's interest in a transaction;

(b) To timely disclose to the seller any conflicts of interest;

(c) To advise the seller to seek expert advice on matters relating to the transaction that are beyond the agent's expertise;

(d) Not to disclose any confidential information from or about the seller, except under subpoena or court order, even after termination of the agency relationship; and

(e) Unless otherwise agreed to in writing after the seller's agent has complied with RCW 18.86.030(1)(f), to make a good faith and continuous effort to find a buyer for the property; except that a seller's agent is not obligated to seek additional offers to purchase the property while the property is subject to an existing contract for sale.

(2)(a) The showing of properties not owned by the seller to prospective buyers or the listing of competing properties for sale by a seller's agent does not in and of itself breach the duty of loyalty to the seller or create a conflict of interest.

(b) The representation of more than one seller by different brokers affiliated with the same firm in competing transactions involving the same buyer does not in and of itself breach the duty of loyalty to the sellers or create a conflict of interest.

[2013 c 58 § 5; 1997 c 217 § 2; 1996 c 179 § 4.]

RCW 18.86.080

Compensation.

(1) In any real estate transaction, a firm's compensation may be paid by the seller, the buyer, a third party, or by sharing the compensation between firms.

(2) An agreement to pay or payment of compensation does not establish an agency relationship between the party who paid the compensation and the broker.

(3) A seller may agree that a seller's agent's firm may share with another firm the compensation paid by the seller.

(4) A buyer may agree that a buyer's agent's firm may share with another firm the compensation paid by the buyer.

(5) A firm may be compensated by more than one party for real estate brokerage services in a real estate transaction, if those parties consent in writing at or before the time of signing an offer in the transaction.

(6) A firm may receive compensation based on the purchase price without breaching any duty to the buyer or seller.

(7) Nothing contained in this chapter negates the requirement that an agreement authorizing or employing a broker to sell or purchase real estate for compensation or a commission be in writing and signed by the seller or buyer.

[2013 c 58 § 9; 1997 c 217 § 6; 1996 c 179 § 8.]

RCW 19.36.010

Contracts, etc., void unless in writing.

In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) every special promise to answer for the debt, default, or misdoings of another person; (3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry; (4) every special promise made by an executor or administrator to answer damages out of his or her own estate; (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

[2011 c 336 § 540; 1905 c 58 § 1; RRS § 5825. Prior: Code 1881 § 2325; 1863 p 412 § 2; 1860 p 298 § 2; 1854 p 403 § 2.]

CBA Form XL
Exclusive Lease
Rev. 1/2011
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EXCLUSIVE LEASE LISTING AGREEMENT

This Agreement is made by and between B111, LLC ("Owner") and Mr. 99 & Associates, Inc. ("Firm"). Owner hereby grants to Firm the exclusive and irrevocable right to lease and to receipt for deposit in connection therewith Owner's commercial real estate legally described as set forth on attached Exhibit A and commonly described as 11409 Hwy 99, City of Everett, 98204, Snohomish County, Washington (the "Property").

1. **DURATION OF AGREEMENT.** This Agreement shall commence on July 21, 2011 and shall expire at 11:59 p.m. on January 21, 2011.

2. **PRICE AND TERMS.** Owner agrees to list the Property at a lease price of $_____ per _____ and shall consider offers that include the following terms:

   Term of Lease: _____

   Terms: _____

3. **DEFINITIONS.** As used in this Agreement, (a) "CBA" shall mean the Commercial Brokers Association; (b) "lease" shall mean lease, sublease, sell, or enter into a contract to lease, sublease, or sell the Property; and (c) "lessee" shall include sublessee, if applicable. The phrases "this Agreement" and "during the term hereof" include extensions or renewals of this Agreement.

4. **AGENCY / DUAL AGENCY.** Owner authorizes Firm to appoint Mr. 99 & Associates, Inc. as Owner's Listing Broker. This Agreement creates an agency relationship with Listing Broker and any of Firm's brokers who supervise Listing Broker's performance as Owner's agent ("Supervising Broker"). No other brokers affiliated with Firm are agents of Owner, except to the extent that Firm, in its discretion, appoints other brokers to act on Owner's behalf as and when needed.

   If the Property is leased to a tenant represented by one of Firm's brokers other than Listing Broker ("Tenant's Broker"), Owner consents to any Supervising Broker who also supervises Tenant's Broker acting as a dual agent. If the Property is leased to a tenant who Listing Broker also represents, Owner consents to Listing Broker and Supervising Broker acting as dual agents. Owner has received from Listing Broker the pamphlet entitled "The Law of Real Estate Agency."

   If any of Firm's brokers act as a dual agent, Firm shall be entitled to the entire commission payable under this Agreement plus any additional compensation Firm may have negotiated with the tenant.

5. **PROPERTY OWNERSHIP AND INFORMATION.** Owner warrants that Owner has the right to lease the Property on the terms set forth in this Agreement, and that the Property is free and clear of any encumbrances which would interfere therewith. Owner also warrants that the information on the Property Information pages of this Agreement is correct. Owner understands that Firm and other members of CBA will make representations to prospective lessees based solely on the property information in this Agreement and agrees to indemnify and hold Firm and other members of CBA harmless in the event the foregoing warranties are incorrect. Owner acknowledges receipt of a copy of this Agreement, with the Property Information pages of this Agreement fully completed.

EXCLUSIVE LEASE LISTING AGREEMENT
(continued)

6. **COMMISSION.** Firm shall be entitled to a commission if: (a) Firm leases or procures a lessee on the terms of this Agreement, or on other terms acceptable to Owner; (b) Owner leases the Property directly or indirectly or through any person or entity other than Firm during the term of this Agreement; (c) Owner leases the Property within six months after the expiration or sooner termination of this Agreement to a person or entity that submitted an offer to purchase or lease the Property during the term of this Agreement or that appears on any registration list provided by Firm pursuant to this Agreement or an "Affiliate" of such a person or entity that submitted an offer or that appears on the registration list; (d) the Property is made unleasable by Owner's voluntary act; or (e) Owner cancels this Agreement, or otherwise prevents Firm from leasing the Property. The commission shall be calculated as follows: *5% of gross lease amount for entire term.*

Firm shall submit any registration list to Owner within 15 days after the expiration or sooner termination of this Agreement and shall only include on the registration list persons or entities to whose attention the Property was brought through the signs, advertising or other action of Firm, or who received information secured directly or indirectly from or through Firm during the term of this Agreement. Owner shall provide the registration list to any other brokers that assist the Owner with this Property. "Affiliate" means, with respect to any person or entity that submitted an offer during the term of this Agreement or that appears on the registration list, a person or entity which has more than a 10% ownership or voting interest in such an entity or any entity in which more than 10% of the ownership or voting interests are owned or controlled by such a person or entity.

7. **FIRM/MULTIPLE LISTING.** Firm shall cause this listing to be published by CBA for distribution to all CBA members through CBA's listing distribution systems. Firm shall cooperate with all other members of CBA in working toward the lease of the Property. Owner understands and agrees that all property information contained in this Agreement or otherwise given to CBA becomes the property of CBA, is not confidential, and will be given to third parties, including prospective lessees, other cooperating members of CBA who do not represent the Owner and, in some instances, may represent the lessee and other parties granted access to CBA's listing systems. Owner agrees that Firm may record this Agreement. Regardless of whether a cooperating member is the firm of the lessee, the Owner, neither or both, the member shall be entitled to receive the selling office's share of the commission as designated by the listing office. IT IS UNDERSTOOD THAT CBA IS NOT A PARTY TO THIS AGREEMENT, AND ITS SOLE FUNCTION IS TO FURNISH THE DESCRIPTIVE INFORMATION SET FORTH IN THIS LISTING TO ITS MEMBERS, WITHOUT VERIFICATION AND WITHOUT ASSUMING ANY RESPONSIBILITY FOR SUCH INFORMATION OR IN RESPECT TO THIS AGREEMENT.

8. **ATTORNEY'S FEES.** In the event either party employs an attorney to enforce any terms of this Agreement and is successful, the other party agrees to pay a reasonable attorney's fee and any costs and expenses incurred. In the event of trial, venue shall be in the county in which the Property is located, and the amount of the attorney's fee shall be as fixed by the court.

EXCLUSIVE LEASE LISTING AGREEMENT
(continued)

8. **ADDITIONAL TERMS.** In addition to the Property Information pages of this Agreement and Exhibit A (legal description), the following amendments or addenda (which are also attached hereto) are part of this Agreement: *If Walter Moss (2011, LLC) leases premises to his son or to the Pierro Family, they shall be exempted from paying a commission to Mr. 99 & Associates, Inc. on this lease. If Mr. 99 & Associates, Inc. sells this property for landlord, then Mr. 99 & Associates, Inc. will be entitled to a commission of 6% of the gross selling price.*

OWNER

Owner/Authorized Signature

Name: Walter Moss

Title:

Date: July 21, 2011

Owner/Authorized Signature

Name:

Title:

Date:

FIRM

Mr. 99 & Associates, Inc., Firm (Company)
(Office)

By _____
(Authorized Representative)

Date: July 21, 2011