

NO. 67116-2-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

PHILIP BASKARON, individually,

Appellant,

vs.

KAUSHAL, INC.; NARESH KAUSHAL; RAVINDER P. KAUSHAL;
SURUL CHAWLA, NAMIT CHAWLA, individually, CAMERON
ENTERPRISES, CAROLYN CHAWLA, individually,

Respondents.

BRIEF OF RESPONDENTS
CAMERON ENTERPRISES AND CAROLYN CHAWLA

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I. INTRODUCTION

Appellant Philip Baskaron (“Baskaron”) is a real estate broker who submitted several purchase offers to Respondents Cameron Enterprises (“Cameron”) and Carolyn Chawla (“Chawla”) concerning the sale of five ARCO gas stations. None of the offers submitted were accepted. When it was clear that the parties submitting the offers could not obtain financing to purchase the stations, Cameron and Chawla entered into a completely different Management & Option Agreement (“M&O Agreement”) for the management of three of the five stations. Baskaron filed this action seeking a commission for the M&O Agreement.

Baskaron is not entitled to a commission on the M&O Agreement because there has been no sale of property. Further, there was no agreement by Cameron or Chawla to pay a commission to Baskaron for the M&O Agreement, written or otherwise. As such, Baskaron’s claim is barred by the statute of frauds, RCW 19.36.010(5). For the reasons stated herein, Cameron and Chawla respectfully request that the Court affirm the trial court’s order granting Cameron and Chawla’s motion for summary judgment.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court properly granted Cameron and Chawla's motion for summary judgment.

B. Issues Pertaining to Assignments of Error

1. Was there a "sale" of property that could support a right to a commission?

2. Does the statute of frauds preclude Baskaron's claim for a commission when there is no written agreement between the parties?

3. Can the "procuring cause rule" dispense with the writing requirement of the statute of frauds, when no sale occurred and when there is no evidence of a subsequent writing confirming an oral agreement to pay a commission?

III. STATEMENT OF THE CASE

A. Factual Background

Cameron owns several ARCO AM/PM gas stations. (CP 20)

Chawla is the principal of Cameron. (*Id.*) Following her late husband's passing, Chawla decided to sell the remaining stations owned by Cameron.

(*Id.*) Those stations included the following:

1. 2101 6th Street, Bremerton, WA 98311 ("Naval");
2. 15244 Silverdale Way N.W., Poulsbo, WA 98370 ("Poulsbo");

3. 950 North 85th Street, Seattle, WA 98103 (“Aurora”);
4. 1515 164th Street S.W., Lynnwood, WA 98087 (“Lynnwood”); and
5. 7599 S.R. 303 N.E., Bremerton, WA (“Fairgrounds”).

(CP 20-21) Cameron owned the real property upon which the Naval, Poulsbo, Lynnwood and Fairground stations rest. (CP 21) Cameron had certain assets in the Aurora station, but did not own the real property. (*Id.*)

Baskaron was a commercial real estate/business broker. (CP 21) He had assisted Cameron and Chawla’s late husband sell a station Cameron owned in the Greenwood neighborhood in Seattle. (*Id.*) That sale closed on December 28, 2006. (*Id.*) Baskaron was paid his full commission. (*Id.*) Following Chawla’s husband’s passing, Baskaron indicated that he wished to help her sell the remaining five stations. (*Id.*)

Chawla was interested in selling the stations and told Baskaron that she would review any offers that Baskaron presented. (*Id.*) However, no listing or brokerage agreement of any kind was entered between Chawla and Baskaron. (*Id.*) Rather, Chawla permitted Baskaron to present her with offers. (*Id.*) Each offer contained terms regarding any sales commissions to which Baskaron may be entitled if the sale was closed. (*Id.*) Thus, any commissions to which Baskaron may be entitled were determined on an offer-by-offer basis. (*Id.*)

Over time, Baskaron presented many offers to Chawla under this arrangement, most of which never materialized. For instance, on September 7, 2007, Baskaron presented an offer from Chiran Jit of GN Investments, Inc. to purchase the Lynnwood station. (CP 21, 26-42) Baskaron prepared the offer. (*Id.*) In Section 26 of the offer, he inserted that he is to be paid “7%” of the sales price as a commission. (CP 34) Ultimately, GN Investments, Inc. did not obtain financing, and the deal fell through. (CP 21) Chawla paid a \$1,000 transfer fee to ARCO in connection with the proposed deal. (*Id.*)

On December 7, 2007, Baskaron presented an offer from Kim Chung to purchase the Fairgrounds station. (CP 22, 44-60) In Section 27 of the offer, he again inserted that he is to be paid “7%” of the sales price as a commission. (CP 51) A contract was signed, and Chawla paid a \$1,000 transfer fee to ARCO in connection with the proposed deal. (CP 22) This deal was subject to approval of ARCO, which included several tests. Ms. Chung failed the ARCO English test, and the deal failed. (*Id.*)

On April 15, 2008, Baskaron presented an offer from Basi, LLC to purchase the Fairgrounds station. (CP 22, 62-77) In Section 27 of the offer, he again inserted that he is to be paid “7%” of the sales price as a commission. (CP 74) This deal too fell through. (CP 22) However, Basi, LLC had deposited \$50,000 in earnest money. (*Id.*) Pursuant to Section

27, Baskaron was paid half of the earnest money following the rescission of the contract. (*Id.*)

On June 8, 2008, Baskaron presented an offer from Third Petro, Inc. to purchase the Lynnwood station. (CP 22, 79-99) In Section 26 of the offer, he again inserted that he is to be paid “7%” of the sales price as a commission. (CP 87) This deal failed, and Chawla paid a \$1,000 transfer fee to ARCO in connection with the proposed deal. (CP 22)

On June 27, 2008, Baskaron put together an offer from Sunwood Trade, Inc. on the Aurora station. (CP 22, 100-08) In Section 27 of the offer, he again inserted that he is to be paid “7%” of the sales price as a commission. (CP 106) This deal too fell through. (CP 22)

On July 7, 2008, Baskaron submitted an offer from VOTA Investments, LLC for the purchase of the Bremerton station. (CP 22, 110-36) Baskaron and his wife are Members of VOTA Investments, LLC. (CP 138) In Section 27 of the offer, he again inserted that he is to be paid “7%” of the sales price as a commission. (CP 117) Baskaron was unable to obtain financing by the contingency deadline and this deal failed. (CP 22) Chawla paid a \$1,000 transfer fee to ARCO in connection with the proposed deal. (*Id.*)

On August 8, 2008, Baskaron prepared four offers from Kaushal, Inc. to purchase (1) the Aurora station for \$300,000; (2) the Lynnwood

station for \$3.4 million; (3) the Bremerton station for \$3 million; and (4) the Poulsbo station for \$3 million. (CP 22, 194-258) The Aurora offer was for the purchase of certain assets, but not the real property. (*Id.*) The remaining offers were for the purchase of the stations with the real property. (*Id.*) Section 26 of these draft offers provides for a “6%” commission. (CP 201, 214, 232, 250) If the offers were made and accepted, the total sales price would have been \$9.7 million. However, the draft offers were never signed by Kaushal, Inc. or Chawla. (*Id.*)

Rather, Kaushal, Inc. submitted a Membership Purchase Agreement (“MPA”) to Chawla. (CP 23, 140-46) The agreement contemplated that Chawla would form an LLC, known as Cameron Enterprises, LLC and would then transfer assets of Cameron to the LLC. (CP 23, 140) Kaushal, Inc. would then purchase 20 percent of the membership interests of the LLC. (*Id.*) The assets of the Corporation included the Naval, Poulsbo, Aurora, Lynnwood and Fairgrounds stations. (*Id.*)

The MPA contemplated a total purchase price of \$1,000,000 for the 20 percent interest. (CP 23, 141) The MPA also granted Kaushal, Inc. an option to purchase the remaining 80 percent share of the membership units for \$8,700,000 less all secured and unsecured debt and plus certain

amounts of store inventory. (*Id.*) Nothing in the MPA states that Baskaron is entitled to a commission of any kind. (CP 23)

The MPA was expressly conditioned on “Approval of this Agreement by Cameron’s lender Bank of America” and “Review and approval of the parties’ accountants and/or counsel of this Agreement within 10 business days of this Agreement.” (CP 142) The MPA was signed on October 2, 2008. (CP 145)

On or about October 7, 2008, Chawla and Cameron’s attorney, Robert F. Baker, wrote to Kaushal, Inc. notifying them that the MPA would not be approved by legal counsel. (CP 23, 148) The letter also advised that a letter of intent would be prepared expressing Chawla’s interest in turning management of the gas stations over to Kaushal, Inc., with an option to purchase the stations. (CP 148) Baskaron was copied on the letter. (*Id.*)

On October 27, 2008, Kaushal, Inc. agreed to purchase the Aurora station for \$300,000. (CP 23, 150-59) A new offer was prepared by Baskaron and submitted and signed by both Kaushal, Inc. and Chawla. (CP 150-59) At closing, Baskaron was paid a six percent commission, which totaled \$18,000, as set forth in the written offer. (CP 24)

Subsequently, some of the principals of Kaushal, Inc. formed

Kaushal and Chawla, LLC.¹ Kaushal and Chawla, LLC entered into a Management and Option Agreement (“M&O Agreement”) with Cameron on December 10, 2008. (CP 24, 161-92) Under this agreement, management of three of the five stations, Naval, Poulsbo, and Lynnwood were given to Kaushal and Chawla, LLC. (CP 24, 161) Cameron also granted Kaushal and Chawla, LLC a five-year option to purchase the stations. (CP 24, 172) The M&O Agreement was not prepared by Baskaron and he had no involvement in negotiating this transaction. (CP 24) Nothing in the M&O provides that Baskaron is entitled to a commission. (CP 24)

Baskaron incorrectly alleged in his Complaint that “defendants completed the membership purchase.” (CP 3) As stated above, the MPA proposed by Kaushal, Inc., which proposed a transfer of Cameron’s assets (five stations) into an LLC and the purchase of a 20-percent membership interest by Kaushal, Inc., was rejected by Cameron’s legal counsel. Rather, a completely different deal was reached with the principals of Kaushal and Chawla, LLC regarding management of three (not five) of the stations, with an option to purchase. The purchase option has not been

¹ The Chawla in Kaushal and Chawla, LLC are Sushma Chawla and Namit Chawla, not Carolyn Chawla and are not related to Carolyn Chawla. Sushma Chawla was not an owner of Kaushal, Inc.

exercised and Cameron still owns the Naval, Poulsbo, Lynnwood, and Fairgrounds stations. (CP 24)

Baskaron alleges that “The defendants refused to pay the plaintiff his business brokerage fees under the agreement between the parties.” (CP 3). He also alleges, “The parties agreed to a brokerage fee of 6% of the total purchase of \$9,700,000. Plaintiff was paid a business broker commission of \$300,000 on this price.” (CP 3) Contrary to Baskaron’s contention, there was no agreement between the parties regarding his commission. No listing agreement was entered between Baskaron and Cameron or Chawla. (CP 21)

Further, nothing in the MPA or the M&O Agreement provide for a commission. The only written documents relating to commissions are contained in the draft offers that Baskaron prepared for Kaushal, Inc. in August 2008 for the purchase of four of the stations. (CP 194-258) However, those agreements were never signed by Kaushal, Inc. or Cameron. Subsequently, Kaushal, Inc. and Cameron did sign one of those offers to purchase the Aurora station. (CP 23, 150-59) As he acknowledges, Baskaron was paid a brokerage commission on the \$300,000 sale of the Aurora station. (CP 3) No other written agreements exist that would entitle Baskaron to the commissions he seeks.

B. Procedural History

On March 11, 2011, Cameron and Chawla filed a motion for summary judgment. (CP 7) The trial court heard the argument of counsel on April 8, 2011. (RP 1) The trial court explained its reasoning in its oral decision at the hearing:

I think the colloquy between the Court and counsel did flesh out many of the issues that were of concern to the Court.

On summary judgment I will offer a comment or two here. I always have a feeling that in the event of any appellate review, it is de novo, the appeals court looks at the same thing the Court looks at. And so in a sense, remarks of the trial court really don't matter all that much.

I have been working on an order here, have listed everything that was before the Court because that is important for the record.

I don't understand from this record just why, with all the involvement that Mr. Baskaron had in this transaction and accepting his declaration, in attempting to infer and construe from that everything most favorably to the nonmoving party, Mr. Baskaron, I don't understand why there never was a writing concerning his commission.

But the reality is there never was such a writing. And his declaration states that he was assured that Ms. Chawla would pay him a commission on any sale. No sale took place here.

If somehow it is a sale, it would be defeated by the Statute of Frauds. Because there is no written provision for the commission or for the sale of real estate. There is an option.

My understanding is that Mr. Baskaron is arguing that the ultimate agreement, the management and option agreement of December 10th, 2008 – the Court understands there was also an amendment in April of 2009 – has no provision for payment of commission.

But my understanding of what Mr. Baskaron's intention is, is that the Statute of Frauds does not apply because it's not an agreement to sell or purchase real estate. The Court heard argument that it was really a business interest here, option to purchase, management to cash flow and the like. But again, there's nothing in writing.

The contention then is that there should be some sort of an oral agreement for the Court or the jury to adjudicate in the event of a trial. It appears to the Court based on the evidence that's been presented here that the jury or this Court could only, in the end, speculate as to the terms of any alleged oral agreement. I just don't see enough there, even if accepted by the Court, to constitute an agreement.

The Court is accordingly going to grant this motion based upon the materials submitted and the present record. And certainly the Court's comments aren't intended to be comprehensive in the sense of attempting to list everything that was persuasive to the Court. But we did have extended argument, extended colloquy. And I did want to afford the parties the courtesy of some sort of an explanation of the ruling the Court is making at this time. . . .

(RP 37-39) The trial court issued an Order Granting Cameron and Chawla's Motion for Summary Judgment. (CP 265-67)

On April 18, 2011, Baskaron filed a motion for reconsideration.

(CP 269-83) Before the trial court ruled on that motion, however, Baskaron filed a Notice of Appeal on May 6, 2011.

IV. SUMMARY OF ARGUMENT

Baskaron cannot claim a commission when there has been no sale. The M&O Agreement provides for the management of three gas stations. Under its terms, Cameron still owns them. Baskaron submits no evidence of a sale and none exists.

In any event, if there had been a sale, which there was not, it inherently would be a sale of real estate because Cameron owns the real estate. As such, in order for Baskaron to receive a commission, the statute of frauds requires a written commission agreement. There is no evidence of any agreement, in writing or otherwise, regarding a payment of a commission to Baskaron on the M&O Agreement. Therefore, Baskaron's claim is precluded by the statute of frauds.

Baskaron seeks to subvert the requirements of the statute of frauds by invoking the "procuring cause rule." However, this rule only applies to a "sale," which has not occurred. Further, with an oral agreement, the rule requires that there be some subsequent writing confirming the oral agreement to pay a commission. Yet, there is no subsequent writing in this case concerning a commission for Baskaron for the M&O Agreement. Accordingly, the procuring cause rule is inapplicable.

For all the foregoing reasons, Baskaron's claim fails as a matter of law, and the trial court properly granted Cameron and Chawla's motion

for summary judgment.

V. ARGUMENT

A. Standard of Review

Appellate courts review summary judgment decisions de novo, performing the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). Summary judgment should be granted if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56; *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The nonmoving party “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value” in opposing summary judgment. *Seven Gables Corp. v. MGM / UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Rather, “the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Id.* at 13.

B. No Sale of Property Occurred that Could Support a Right to a Commission

Baskaron claims a commission for monies received by Cameron and Chawla through the M&O Agreement entered with Kaushal and Chawla, LLC for the management of three of the gas stations. Baskaron’s

claim is fatally flawed because there has been no sale of any interest that could entitle him to a commission.

Chawla was interested in selling the five stations and told Baskaron that she would review any offers that Baskaron presented. However, no listing or brokerage agreement of any kind was entered between Chawla and Baskaron. Rather, Chawla permitted Baskaron to present her with offers. Each offer contained terms regarding any commissions to which Baskaron would be entitled if the sale closed. Baskaron submitted many offers, most of which never closed, and for which he received no commissions. However, for the one offer that was accepted and in which the sale closed, Baskaron was paid the commission provided for in the written offer.

Baskaron initially presented offers on behalf of Kaushal, Inc. for the purchase of four of the five stations. Those offers were never signed. Kaushal, Inc. then proposed the MPA, which required Cameron to transfer assets to an LLC and for Kaushal, Inc. to purchase a membership interest from Cameron. This proposal was rejected by Cameron's legal counsel. Ultimately, when it was clear that Kaushal, Inc. was not in a financial position to purchase the stations, Cameron entered into the M&O Agreement with Kaushal and Chawla, LLC for the management of three of the gas stations.

The M&O Agreement did not satisfy Cameron and Chawla's original objective to sell the stations, nor does it even resemble the purchase offers that Baskaron had originally presented for the four gas stations. This agreement is fundamentally different than what Baskaron initially proposed; it involves different parties, different stations, and the focus is on the management of three stations. Significantly, no sales of the stations have yet to occur.

Baskaron concedes that there has been no sale of real estate. (Appellant's Brief. at 10.) However, he argues that the agreement "was for the purchase of a business interest with a credit option for the real property." (*Id.*) Baskaron quotes the following sentence from Chawla's deposition testimony in support of that statement: "They purchased the business interest from me." (CP 369-70²)

The uncontroverted evidence shows that there was neither a sale of a business interest nor of real estate. Baskaron carelessly cites Chawla's testimony out-of-context. The quoted testimony above is on page 77 of Chawla's deposition testimony. (CP 368) The discussion actually begins on Page 75. (CP 366) This discussion relates solely to the sale of

² As of the date of this filing, Baskaron has not properly designated the records he cites as Clerk's Papers 291-446. Therefore, Cameron and Chawla did not have the official copy of the record prepared by the Superior Court.

Cameron's business interest in the Aurora station, for which Baskaron was paid a commission. (CP 24, 366-68) For that station, Chawla owned the business but not the real estate. (CP 367) Thus, she testified, "[t]hey purchased the business interest from me." (CP 368) This testimony has nothing at all to do with the M&O Agreement, which does not involve the Aurora station. That agreement provides for the management of three of the original five stations, each of which includes real estate. Chawla still owns those three stations, the real estate and the businesses. (CP 24) Accordingly, there has been no sale of the business interests, and there is absolutely no evidence to the contrary.

Moreover, the fact that the M&O Agreement contained an option does not make the transaction a "sale" for which Baskaron would be entitled to a commission. In *Town and Country Real Estate, Inc. v. Wales*, 24 Wn. App. 586, 602 P.2d 727 (1979), the court held, "We decline to hold that an option agreement is a contract for sale. The fact that the option is coupled with a lease does not make it a sale before the option is exercised." *Id.* at 587. The court reasoned that an option contract is primarily distinguished from a contract of sale by the fact that the Optionee had not presently agreed to purchase the home. *Id.* at 589. "Because they have not yet agreed to buy, they can decide to terminate their lease at any time without any penalty other than their loss of their

consideration of the option.” *Id.* In sum, the court ruled, “The general rule is that an option contract does not entitle a broker to recover a commission in advance of sale when the broker was employed to find a purchaser.” *Id.* In sum, no sale of any business or real estate has occurred that could entitle Baskaron to a commission.

C. Even if There Were a “Sale,” the Statute of Frauds Precludes Baskaron’s Claim for a Commission Because There is no Written Agreement Between the Parties

Even if the Court concluded that the M&O Agreement was a “sale” of Cameron’s interests in the stations, Baskaron’s claim for a commission is barred by the statute of frauds.

Agreements for commissions on sales of real property are void unless they are in writing and signed by the party to be charged. The statute of frauds, RCW 19.36.010, provides as follows:

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 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.

(Emphasis added).

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 v. Hansen*, 105 Wn. App. 116, 120, 19 P.3d 448 (2001) (citing *House v. Erwin*, 83 Wn.2d 898, 904, 524 P.2d 911 (1974)). Essential to any writing meeting the terms of the statute as it relates to real estate brokerage agreements is a description of “the parties, the employment, the description of the real estate and *the agreement to pay the commission.*” *Id.* (citing *Cushing v. Monarch Timber*, 75 Wash. 678, 685, 135 P. 660 (1913) (emphasis in original)).

Baskaron cannot produce a written commission/brokerage agreement for his claim that he is entitled to a commission for the M&O Agreement. Chawla did not sign a listing/brokerage agreement with Baskaron. Rather, Chawla simply let Baskaron submit offers on a case-by-case basis. Each offer submitted set forth what commission Baskaron would have received if the deal closed.

While Baskaron drafted offers from Kaushal, Inc. to purchase four of the stations for a total of \$9.7 million, Kaushal, Inc. never signed the offers, and such offers were not formally presented to Cameron for approval. Because neither Kaushal, Inc. nor Cameron signed the draft offers, the draft offers do not satisfy the statute of frauds as it relates to Baskaron’s claim for commissions. Further, nothing in the MPA that Kaushal, Inc. subsequently proposed to Cameron contains any agreement

regarding a commission for Baskaron. Nor does the M&O Agreement entered between Cameron and Kaushal and Chawla, LLC contain any agreement to pay Baskaron a commission. In short, there is no written agreement signed by Cameron or Chawla that could support Baskaron's claim for a commission.

The one exception is the sale of the Aurora station. Following Cameron's rejection of Kaushal, Inc.'s MPA proposal, Kaushal, Inc. resubmitted the draft offer prepared by Baskaron for the Aurora station. Cameron accepted this offer, and Baskaron was paid pursuant to the commission structure contained in the offer. Baskaron acknowledges he was paid a commission on this transaction. Because Baskaron cannot produce a written commission agreement signed by Cameron as it relates to the other stations, his claims for unpaid commissions for the other stations fail as a matter of law.

Baskaron seeks to escape the application of the statute of frauds by arguing that the M&O Agreement was "not an agreement to sell or purchase real estate." (Appellant's Br. at 10.) Rather, Baskaron characterizes it as a sale of a "business interest." *Id.* As discussed above, there is no evidence that either a real estate or business interest was sold. Baskaron relies on an out-of-context statement in Chawla's deposition testimony that had nothing at all to do with the M&O Agreement. If

Cameron had sold the stations covered by the M&O Agreement, it necessarily would have involved the sale of real estate. The undisputed facts are that Cameron owned the businesses and the real estate for these three stations. The option contemplates a sale of both the business and real estate. Therefore, if the Court were persuaded that the M&O Agreement is a “sale,” it necessarily includes the sale of real estate, and is subject to the statute of frauds. Because there is no written agreement concerning a commission, Baskaron’s claim fails as a matter of law.

D. The Procuring Cause Rule does not Dispense with the Writing Requirement of the Statute of Frauds

“The procuring cause rule states that when a party is employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, he is entitled to a commission regardless of who makes the sale if he was the procuring cause of the sale.” *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 754, 748 P.2d 621 (1998); *see also*, *Professionals 100 v. Prestige Realty, Inc.*, 80 Wn. App. 833, 836-37, 911 P.2d 1358 (1996). However, the procuring cause rule does not apply to this case for several reasons.

First, the procuring cause rule specifically relates to sales. As quoted above, “The procuring cause rules states that when a party is employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, he is entitled to a commission regardless of who

makes the sale if he was the procuring cause of the sale.” *Willis*, 109 Wn.2d at 754 (Emphasis added). Because there have not been any sales of the stations, the procuring cause rule is inapplicable.

Second, an employment agreement between the seller and the broker is a prerequisite to a broker’s recovery of a commission from the seller under the procuring cause rule. *Haskell v. Raugust*, 49 Wn. App. 719, 724, 745 P.2d 535 (1987). Cameron did not enter into an employment agreement with Baskaron. Cameron did not sign a listing or brokerage agreement with Baskaron, under which Baskaron was hired as its agent to locate buyers for Cameron’s stations. Rather, Chawla simply told Baskaron that Cameron would consider any offers that Baskaron presented to Cameron. Each offer contained specific terms related to Baskaron’s commission. If a deal was reached, Baskaron would be paid pursuant to the terms of the offer. Therefore, Baskaron was to be paid only if he presented an offer that was accepted and a deal was closed. Any other broker was free to submit offers as well. In sum, there was no “employment” agreement between Cameron or Chawla and Baskaron.

Baskaron alleges that there was an “oral agreement” by Chawla to pay Baskaron a commission on the M&O Agreement. However, this allegation is not supported by any evidence.

Baskaron submitted a self-serving declaration in opposition of Chawla's motion for summary judgment. Yet, even in that declaration, Baskaron provides no testimony that Chawla agreed to pay him a commission on the M&O Agreement. Rather, he offered hearsay testimony that in August 2008, at a dinner, he offered to reduce his commission from seven percent to six percent. This testimony has nothing to do with the M&O Agreement. In August 2008, Baskaron submitted purchase offers for Kaushal, Inc. for four stations, in which he was to be paid a six percent commission. It is undisputed that these offers were never accepted. The hearsay statements relate to these rejected offers. Baskaron submits no testimony or evidence that Chawla agreed to pay him a commission on the M&O Agreement.

Baskaron cites an August 11, 2008 letter of recommendation that Chawla wrote at his request as evidence of the "oral agreement." (CP 384-85) He quotes the letter stating that Baskaron "has soldiered on with all my five other stores" as a clear manifestation that an oral contract existed. (Appellant's Br. at 10.) However, this letter says nothing more than that Baskaron was working to find buyers for the stores, which is perfectly consistent with Chawla's testimony that she allowed Baskaron to present offers on a case-by-case basis with the commission terms set forth in each offer.

More importantly, nothing in the August 11, 2008 letter says anything about the terms of the alleged “oral agreement,” including the most essential, “*the agreement to pay the commission.*” *Bishop v. Hansen*, 105 Wn. App. at 120 (emphasis in original). As Baskaron correctly points out, “An oral agreement between the parties requires mutual assent to the essential terms of the purported agreement,” which include “the parties, the promise, the terms and conditions and the price or consideration.” (Appellant’s Br. at 6) (citing *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 85, 22 P.3d 804 (2001); *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998)). Here, there is no evidence whatsoever about the essential terms of the purported “oral agreement.”

Baskaron similarly points to a letter Chawla wrote concerning the sale of the Poulsbo station and a handwritten note concerning a sales lead as evidence of the “oral agreement.” (CP 386-89) Again, neither of these documents says anything about an agreement to pay a commission or the amount of the commission. Further, neither document relates to the M&O Agreement. In fact, the handwritten note relates to the Aurora store that was eventually sold and for which Baskaron received a commission.

In sum, there is no evidence of any oral agreement to pay a commission on the M&O Agreement. As such, the trial court correctly concluded in its oral decision as follows:

The contention then is that there should be some sort of an oral agreement for the Court or the jury to adjudicate in the event of a trial. It appears to the Court based on the evidence that's been presented here that the jury or this Court could only, in the end, speculate as to the terms of any alleged oral agreement. I just don't see enough there, even if accepted by the Court, to constitute an agreement.

The Court is accordingly going to grant this motion based upon the materials submitted and the present record.

(RP 38-39)

Additionally, Baskaron cannot demonstrate that there was a subsequent writing confirming Chawla's alleged oral agreement to pay a commission on the M&O Agreement. Baskaron cites *Center Investments, Inc. v. Penhallurick*, 22 Wash. App. 846, 592 P.2d 685 (1979) for the proposition that so long as there is a subsequent writing for the sale, then a broker may receive a commission based on an oral contract. In the absence of such a subsequent writing, Baskaron's reliance on this case is misplaced.

In *Penhallurick*, although there was no written brokerage agreement between the agent, Center Investments, and the seller, Penhallurick, there was evidence of an oral agreement followed by a

writing signed by Penhallurick acknowledging his obligation to pay Center a commission. *Penhallurick*, 22 Wash. App. at 848. (Emphasis added.) The court cited a line of Washington authority in upholding Center's commission.

There is also a line of Washington cases permitting a broker or real estate agent to recover if his services have already been performed. Generally, those cases have involved an oral agreement between broker and seller with a subsequent writing between seller and buyer. The courts have held that if the broker was the procuring cause of the eventual sale for which there had been a subsequent writing, the broker was entitled to payment for past services.

Penhallurick at 850. Applying that line of cases, the court held, “[t]he subsequent option contract between Strand-Diversified [the buyer] and Penhallurick was a written acknowledgement by Penhallurick of an existing obligation to Center.” *Id.* (Emphasis added.)

The critical fact in *Penhallurick* was that there was a subsequent writing confirming the oral agreement to pay a commission. Baskaron misapplies the holding by arguing that all that is required is some subsequent writing, such as the M&O Agreement. (Appellant's Br. at 10) This is incorrect. The subsequent writing must confirm an oral agreement to pay a commission.

In this case, there is no evidence of an oral agreement to pay Baskeron a commission for the M&O Agreement and there is no subsequent written agreement between anybody discussing a commission

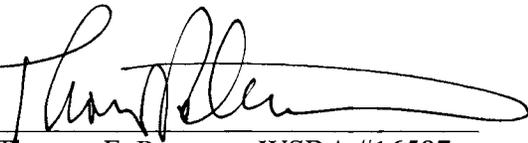
for Baskeron. Accordingly, *Penhallurick* does not support the payment of a commission in this case. Under the facts of this case, the procuring cause rule cannot subvert the writing requirements of the statute of frauds.

VI. CONCLUSION

Cameron and Chawla respectfully request that the Court affirm the trial court's order granting summary judgment. There is no evidence that any sale occurred which could support a commission to Baskaron. Even if the M&O Agreement were construed as a "sale," which it was not, the sale would have involved real estate. The statute of frauds requires any commission agreement to be in writing. It is undisputed that no such written agreement exists, precluding Baskaron's claim for a commission. Further, the procuring cause rule cannot subvert the statute of frauds' writing requirement in this case. The rule pertains to sales of real property, but no sale has occurred in this case. Also, in order for an oral commission agreement to be enforced, there must be some subsequent writing confirming the oral agreement. No such writing exists in this case. For all of the foregoing reasons, the trial court properly granted Cameron and Chawla's motion for summary judgment.

Respectfully submitted this 26th day of January, 2012

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By 

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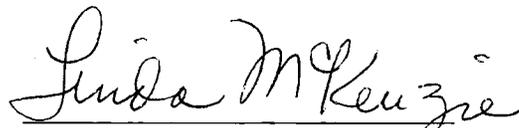
VII. CERTIFICATE OF SERVICE

I certify that on the 27th day of January, 2012, I caused a true and correct copy of this Brief of Respondents Cameron Enterprises and Carolyn Chawla to be served on the following in the manner indicated below:

Maria Stirbis
7520 Bridgeport Way West
Suite B
Lakewood, WA 98499

- | | |
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| <input checked="" type="checkbox"/> | U.S. Mail |
| <input checked="" type="checkbox"/> | Electronic Mail |
| <input type="checkbox"/> | Legal Messenger |
| <input type="checkbox"/> | Hand Delivery |

Counsel for Appellant


Linda McKenzie, Legal Assistant