

68608-9

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No. 68608-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SERGEY SAVCHUK,

Appellant,

v.

CHRISTINE SAMS and METRO REALTY, INC.,

Respondents.

BRIEF OF RESPONDENTS

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APPEALS DIVISION
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STATEMENT OF THE CASE

This case arises out of the sale of a house on five-acres with residential development potential in Ferndale, Washington. Plaintiff Sergey Savchuk ["Savchuk"] agreed to purchase the property from defendant Jerde for \$725,000 in January of 2007. Savchuk is a residential builder and small developer in Whatcom County. Sams, a real estate salesperson licensed to Metro Realty, was the buyer's agent representing Savchuk in the transaction. Anne Inman and Muljat Group represented Jerde. Sams and Inman were acquaintances and had worked together on other transactions. Inman also had worked with Savchuk on other transactions. CP 211-12.

Jerde wanted cash for the property, but Savchuk did not want to obtain lender financing for the purchase, as he had other projects going and did not want another loan to show on his credit report. So, the parties agreed to a schedule of installment payments of \$50,000 every two months. The agreement inconsistently called for a note and deed of trust, but required Savchuk to pay the balance of the purchase price by August 31, 2007, the closing date. A note and deed of trust were never signed. Ordinarily, when a note and deed of trust are used, the transaction closes when the buyer makes the down payment, the seller delivers a deed to the buyer and the buyer executes a note secured by a deed of trust. A seller-

financed note usually is amortized over a 30-year term, but requires a cash-out (“balloon payment”) in three to five years. Between closing and the cash-out, the buyer is the “owner” of the property and has all the benefits and burdens of ownership. Here, however, Jerde retained title and possession, Jerde never delivered a deed to Savchuk and Savchuk never executed a note or deed of trust in favor of Jerde. In other words, although the agreement called for a note and deed of trust, the parties treated the agreement as a purchase and sale agreement with a delayed closing, rather than a seller-financed transaction. CP 212.

The agreement also provided that Jerde would pay commissions of 4% to the listing broker (Muljat Group) and 2½% to the selling broker (Metro Realty) as and when payments were made by Savchuk. Savchuk denies having knowledge of that arrangement. It is not unusual for brokerage fees to be paid in advance of closing when the seller receives nonrefundable payments from the buyer. CP 212.

By the original closing date, the real estate market had begun to slow down and Savchuk said he could not get financing for the \$500,000 unpaid balance due under the contract. So, the parties extended the closing date by nine months to May 30, 2008, with Savchuk making a lump sum payment of \$250,000, plus installments of \$25,000 every other month. All payments were expressly made “nonrefundable.” Sams was out of the

country when the August 2007 extension agreement was prepared by Inman and signed by Savchuk and Jerde. Sams was not aware of the extension agreement before Savchuk signed it and did not advise Savchuk concerning it. When Sams left the country, she expected the transaction to close while she was gone and had no idea that an additional extension would be negotiated. CP 212-13. The August 2007 extension agreement made no mention of a note or deed of trust, which the court of appeals found cured any ambiguity in the original agreement.

When the extended closing date arrived, Savchuk failed to close the transaction. Savchuk commenced a lawsuit against Jerde seeking a refund of some or all of his payments. Later, Savchuk joined Sams and Metro Realty. Shortly before trial, Savchuk settled with Jerde. Under the settlement, Savchuk purchased the property from Jerde, Savchuk assumed the existing loan and Jerde gave Savchuk a partial refund. The net result was that Savchuk purchased the property for \$102,500 less than he had agreed to pay. Sams and Metro Realty moved for summary judgment, which the trial court granted. Savchuk appealed.

ARGUMENT

Savchuk's appeal clearly is without merit because: (a) Sams owed no duties to Savchuk after January 8, 2007 (the date of the purchase and sale agreement), such that Savchuk has no possible claim for Sams'

alleged failure to act after that date; and (b) no alleged acts of Sams before January 8, 2007, proximately caused Savchuk's alleged damages.

Savchuk erroneously argues that:

1. Sams owed duties to Savchuk after the purchase and sale agreement was entered into;

2. It was improper for Sams and Metro Realty to receive commissions on the nonrefundable payments made by Savchuk to Jerdes;

3. Sams and Metro Realty had a duty to give legal advice to Savchuk; and

4. Acceptance of commissions before closing is an unfair or deceptive act or practice under the Consumer Protection Act.

All of these arguments involve purely legal issues ripe for summary judgment and the trial court's order granting summary judgment should be affirmed.

1. Sams owed no duties to Savchuk after the purchase and sale agreement was entered into.

All of Savchuk's allegations after January 8, 2007, relate to *failures* of Sams to act, other than Savchuk's claim that Sams "told [him] that [he] could rely on the Jerdes' agent, Anne Inman, to treat [him] fairly"

while Sams was out of the country.¹ CP 163. It follows that if Sams had no duty to act at the time of the alleged omissions, then Savchuk has no claim. Whether Sams had a duty to act is a question of law appropriate for summary judgment.

Contrary to Savchuk's contention, Washington law is clear that the agency relationship between a real estate broker and her client ends when the client enters into a purchase and sale agreement and all contingencies in the agreement are satisfied or waived. Both the case law and agency statute support the propositions that (a) the agency relationship between a real estate broker and her client ends when the commission has been earned, (b) the commission is earned when the client has entered into a purchase and sale agreement and all contingencies have been satisfied or waived, and (c) the broker owes no duties to the client after the agency relationship has terminated, other than the duties of confidentiality and accounting (not at issue here).

The case law in Washington is well-settled on this issue. "[T]here is no legal basis for asserting that the [principal]-broker agency relationship extends beyond the time when the broker has earned his

¹ Savchuk does not claim that Sams prepared or reviewed the August 2007 extension agreement before Savchuk signed it. Savchuk admits that he negotiated the terms of the extension directly with Inman and that the extension agreement prepared by Inman accurately reflected his understanding of the due dates and amounts of the payments. CP 164.

commission. It follows, and we so hold, that there was no duty upon [the brokers] to attend the closing or to perform services for [the principal] during the closing.” *Pilling v. Eastern and Pacific Enterprises Trust*, 41 Wn.App. 158, 165, 702 P.2d 1232, review denied, 104 Wn.2d 1014 (1985).

“Under the general rule, when a seller accepts a purchaser's offer and enters into a binding and enforceable contract for the sale of property, the seller owes a commission to the real estate broker. *White & Bollard, Inc. v. Goodenow*, 58 Wn.2d 180, 187, 361 P.2d 571 (1961). [The seller] contends the general rule does not apply because [the broker] was representing the interests of the purchasers, who were making a belated effort to close. He supports his contention by reference to evidence that [the broker] asked the closing agent to ‘interest [him]self’ in the closing. [The seller] contends this was a violation of [the broker’s] duty of loyalty and establishes that [the broker] is not entitled to a commission, citing *Mele v. Cerenzie*, 40 Wn.2d 123, 241 P.2d 669 (1952) and *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wn.2d 225, 437 P.2d 897 (1968). We do not agree.

“[The broker] fulfilled its contractual obligation to [the seller] upon execution of the earnest money agreement by both [parties] on May 27, 1980. Payment of the commission was not conditioned upon future services by the broker or future consummation of the sale. *Richey v. Bolton*, 18 Wn.2d 522, 140 P.2d 253 (1943). When the agreement was executed, [the broker] was entitled to \$5,000.”

Langston v. Huffacker, 36 Wn.App. 779, 789-90, 678 P.2d 1265 (1984).

The law of real estate agency, chapter 18.86 RCW, is consistent with the case law. Under RCW 18.86.050(1)(e), a buyer’s agent owes a

duty “to make a good faith and continuous effort to find a property for the buyer.” RCW 18.86.070(1) provides that “The agency relationships set forth in this chapter commence at the time that the licensee undertakes to provide real estate brokerage services to a principal and continue until . . . completion of performance by the licensee. . . .” The statute does not say “closing of the transaction.” What constitutes “completion of performance” depends on the nature of the transaction. In this case, completion of performance occurred when Sams found a property for Savchuk, Savchuk entered into a purchase and sale agreement on January 8, 2007, and the feasibility study contingency was waived.

RCW 18.86.070(2) further provides that “[e]xcept as otherwise agreed to in writing, a licensee owes *no further duty* after termination of the agency relationship, other than the duties of: (a) accounting for all moneys and property received during the relationship; and (b) not disclosing confidential information.” (Emphasis added.) As stated in *Pilling v. Eastern & Pac. Enters. Trust*, 41 Wn.App. 158, 702 P.2d 1232, *review denied*, 104 Wn.2d 1014 (1985), “the agent’s duty to act to protect the interests of the principal ends when the purpose of the agency is accomplished and the commission is earned.”

The cases cited by Savchuk are easily distinguishable. Savchuk cites *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 648 P.2d

875 (1982). However, *Cogan* has been distinguished in several subsequent cases on the basis of a “no deal, no commission” clause in the agreement.

“In *Pilling v. Eastern & Pac. Enters. Trust*, 41 Wn.App. 158, 702 P.2d 1232, *review denied*, 104 Wn.2d 1014 (1985), the seller sued the realtor [sic] for breach of fiduciary duty in failing to monitor the closing of the sale. The *Pilling* court rejected the seller’s contention that the realtor’s agents had a fiduciary duty which extended beyond the earnest money agreement to the closing. The *Pilling* court distinguished *Cogan* on the basis that in *Cogan*, the *earning of the commission was conditioned upon the closing of the sale*. In *Pilling*, the agent simply failed to act. *Pilling* stands for the proposition that the agent’s duty to act to protect the interests of the principal ends when the purpose of the agency is accomplished and the commission is earned.” (Emphasis added.)

Ward v. Coldwell Banker/San Juan Properties, Inc., 74 Wn.App. 157, 164, 872 P.2d 69, *review denied*, 125 Wn.2d 1006, 886 P.2d 1133 (1994).

In *Ward*, the agency relationship continued until closing because the financing contingency in the purchase and sale agreement had never been satisfied or waived. Here, to the contrary, the only contingency in the original October 2006 purchase and sale agreement, the feasibility study contingency, was expressed waived in the January 2007 purchase and sale agreement. At that time, the commission was earned and the agency relationship between Savchuk and Sams terminated.

In *Harstad v. Frol*, 41 Wn.App. 294, 704 P.2d 638 (1985), the broker *affirmatively misrepresented* that the seller had to assume certain liabilities in order to close the sale, which was “untrue and motivated to

protect [the broker's] personal interest.” 41 Wn.App. at 299. In addition, the broker failed to disclose a conflict of interest *before* the seller accepted the offer. Here, as in *Pilling*, Savchuk's post-January 2007 claims relate to alleged *failures to act*, which presuppose a *duty to act*. If there is no duty, there can be no breach.

Likewise, in *Burien Motors, Inc. v. Balch*, 9 Wn.App. 573, 513 P.2d 582 (1973), the broker failed to disclose *before* the client offered to purchase the property that the zoning of the property would not permit his client's intended use. Here, there are no allegations of misrepresentation or fraudulent concealment that induced Savchuk to enter into the January 2007 agreement. *Balch* is not on point.

Savchuk correctly states that the existing case law involves sellers' agents, rather than buyers' agents. But, that is a distinction without a difference. The law is the same whether the broker represents the buyer or seller. The duties of a buyer's agent under RCW 18.86.050 and exactly the same as those of a seller's agent under RCW 18.86.040, other than the labels. And, RCW 18.86.070, which governs the termination of the agency relationships, makes no distinction between buyers' agents and sellers' agents.

The “existence of a duty is a question of law;” breach of duty is a question of fact. *Westmark Development Corp. v. City of Burien*, 140

Wn.App. 540, 564, 166 P.3d 813 (2007), *review denied*, 163 Wn.2d 1055, 187 P.3d 753 (2008). If Sams' duties to Savchuk terminated on January 8, 2007, when the purchase and sale agreement was entered into, such that Sams owed no further duties to Savchuk at the time of the alleged negligence, then there can be no breach of duty and summary judgment was appropriate.

2. No alleged acts of Sams before January 8, 2007, proximately caused Savchuk's alleged damages.

The only allegations against Sams before January 8, 2007, relate to preparation of the purchase and sale agreement. However, whatever deficiencies existed in the initial purchase and sale agreement were superseded and cured by the August 2007 extension agreement. This court previously held that "while the original terms of the REPSA may have been ambiguous, the extension agreement is not." This holding is the law of the case. It is undisputed that (a) Inman – not Sams – prepared the August 2007 extension agreement, (b) Sams was not aware of the August 2007 extension agreement until after Savchuk signed it, and (c) Sams did not give any advice to Savchuk concerning the August 2007 extension agreement. Therefore, any negligence by Sams in preparing the purchase and sale agreement could not be a proximate cause of Savchuk's damages.

3. There was nothing improper about Sams and Metro Realty

receiving commissions on the nonrefundable payments made by Savchuk to Jerde prior to closing.

It is undisputed that (a) Sams, Metro Realty and Jerde's broker received their commissions as and when Savchuk made payments to Jerde by agreement with Jerde, and (b) Jerde – not Savchuk – paid the commissions. Savchuk denies having knowledge of that arrangement, although the arrangement was included as a page of the agreement between Savchuk and Jerde. For purposes of this motion, the court must assume that Savchuk did not have knowledge of the commission payments. However, his knowledge of the commission payments or lack thereof does not affect the outcome of the case, so it is not a material fact that precludes summary judgment.

Since Sams and Metro Realty earned their commission when the January 2007 purchase and sale agreement was entered into, there was nothing improper about Sams and Metro Realty receiving commissions before closing. As in *Langston v. Huffacker*, 36 Wn.App. 779, 678 P.2d 1265 (1984), “[p]ayment of the commission was not conditioned upon future services by the broker or future consummation of the sale.”

Savchuk contends that Sams' receipt of commissions on the payments Savchuk made before closing somehow created a greater incentive for Sams to “push” Savchuk into closing the transaction. There

are several flaws in Savchuk's argument. First, as discussed above, the commission already had been earned at the time Sams and Metro Realty received payments. Second, also as discussed above, the agency relationship between Savchuk and Sams had already terminated, such that Sams no longer owed a duty of loyalty to Savchuk at the time of the commission payments. Third, even if Sams still owed a duty of loyalty to Savchuk, the receipt of commission payments did not create a conflict of interest. The phrase "conflicts of interest" is not defined in chapter 18.86 RCW or in the case law. However, Black's Law Dictionary defines "conflict of interest" as "[a] real or seeming incompatibility between one's private interests and one's public or fiduciary duties." BLACK'S LAW DICTIONARY 341 (9th ed. 2009). Receiving commission payments out of nonrefundable installments paid by the buyer to the seller in anticipation of closing, where there were no contingencies in the purchase and sale agreement, is not incompatible with Savchuk's interests. The usual transaction, where the broker is paid at closing, would seem to create a *greater* incentive for a broker to encourage her client to close a transaction, as the broker receives no compensation until the transaction closes. Savchuk's argument that Sams should have anticipated that Savchuk would seek to recover his payments, if he defaulted, is absurd. Savchuk breached the contract and caused his own damages. But, even if

Jerde had breached the contract or had been unable to deliver marketable title, the payment of commissions by Jerde to the brokers would not have been a defense to Savchuk's claim against Jerde for a refund of his payments. The commission payments are a matter between the brokers and Jerde— not Savchuk.

What constitutes a conflict of interest is an issue of law for the court. As such, Mr. Bjerke's testimony on this issue is irrelevant and inadmissible. "[E]xperts are not to state opinions of law or mixed fact and law, such as whether X was negligent, Comment ER 704; 5A K. TEGLAND, WASH.PRAC., EVIDENCE § 309, at 84 (2d ed. 1982)." *Orion Corp. v. State*, 103 Wn.2d 441, 461, 693 P.2d 1369 (1985).

In *Smith v. Preston Gates Ellis, LLP*, 135 Wn.App. 859, 147 P.3d 600 (2006), a legal malpractice action, the court held that the plaintiff had "to demonstrate that a better contract or full disclosure would have prevented the injury or improved his recovery." 135 Wn.App. at 864. In granting summary judgment to the defendant, the court held that:

"Smith could not specifically identify an alternative that would have led to a better outcome. 'I can't tell you what I would have done but I would not have entered into this contract.' He could only speculate that he might have looked for another builder but that he was committed to building his 'dream home.' Smith cannot rely on such speculation to defeat summary judgment. He must present specific facts to rebut Preston's claims. Smith's conjectures do not rise to the level of fact and specificity necessary to

prevent summary judgment.”

135 Wn.App. at 865.

In *Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn.App. 157, 872 P.2d 69, *review denied*, 125 Wn.2d 1006, 886 P.2d 1133 (1994), the seller’s broker failed to disclose that he had guaranteed the buyer’s loan to enable the buyer to get financing. The seller had carried-back a note secured by a deed of trust for a portion of the purchase price. The buyer defaulted on both the lender’s first loan and the seller’s second loan. The lender foreclosed, extinguishing the seller’s second deed of trust. When the seller sued the buyer on the note, the buyer filed for bankruptcy. The seller then sued the broker, alleging breach of fiduciary duty of loyalty for guaranteeing the buyer’s loan without first obtaining the seller’s consent. The court of appeals held that “the broker’s duty to disclose is limited to information known to the broker which the principal can use to make decisions about the transaction in which the broker is involved. . . . Had the [sellers] learned of the guaranty and the circumstances surrounding it when it occurred, whether they liked it or not, there was nothing they could do about it.” 74 Wn.App. at 167. Thus, the guaranty was not material and the broker did not breach any duty by failing to disclose it.

What would Savchuk have done differently, had he known about

commissions being disbursed out of his installment payments? What could he have done? Like *Smith*, it is not enough to prevent summary judgment for Savchuk to say simply that he would not have entered into the contract. Savchuk's after-the-fact argument flies in the face of what he actually did at the time. He wanted the property and was willing to make substantial payments in advance of closing in order to get it. The 2½% commission paid to Sams and Metro Realty did not make a bit of difference to Savchuk and had no effect on his actions.

4. Sams had no duty to give legal advice to Savchuk.

No Washington case has ever held a real estate broker liable for failing to give legal advice to her client. To the contrary, under the leading case of *Cultum v. Heritage House Realtors, Inc.*, 103 Wn.2d 623, 694 P.2d 630 (1985), the Supreme Court held:

“[A] real estate broker or salesperson is permitted to complete simple printed standardized real estate forms, which forms must be approved by a lawyer, it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's business and that such forms will be used only in connection with real estate transactions actually handled by such broker or salesperson as a broker or salesperson and then without charge for the simple service of completing the forms.

...

“[W]e hold that licensed real estate brokers and salespersons, *when completing form earnest money agreements*, must comply with the standard of care of a

practicing attorney” (Emphasis added.)

103 Wn.2d at 630-31.

The Supreme Court in *Cultum* imposed no duty on real estate brokers to explain provisions in the standard forms, to give legal advice to the clients, or to advise their clients to seek legal advice in every transaction.² Rather, the court held that a broker is required to advise the parties to seek legal advice only when the broker believes “there may be complicated legal issues involved.” *Id.* at 630.

Here, neither the January 2007 purchase and sale agreement nor the August 2007 extension agreement involves any “complicated legal issues.” It is in plain and simple language and easily understood by a person of average intelligence. Savchuk is deemed to have read and understood that his payments were “nonrefundable” and that he was obligated to pay the balance of the purchase price in cash at closing on May 30, 2008. One does not need to consult a lawyer to understand the *economic* aspects of a transaction.

With respect to the August 2007 extension agreement, it is undisputed that Sams did not prepare or review the amendment before it was signed. Because the agency relationship between Savchuk and Sams

² Compared with the duty of Limited Practice Officers under APR 12 to advise all parties to a real estate closing to consult their own attorneys in every transaction closed by an LPO.

to pay interest on the unpaid balance of the purchase price, because Jerde did not loan any money to him. The short answer to Savchuk's argument is that he agreed to it. In addition, interest may apply not only to a loan, but also to a *forbearance* of money. The usury law is illustrative. "Every loan *or forbearance* of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties." (Emphasis added.) RCW 19.52.010(1). In this case, the "interest" payments were tantamount to extension fees. Savchuk was supposed to close the transaction in August 2007. When he was unable to do so, Jerde understandably wanted additional compensation for extending the closing date and Savchuk agreed to it. It makes no difference whether the parties characterized the payments as "interest" or "extension fees." They were payments to extend the closing date or for the forbearance of money. There is nothing improper about either.

d. Sams had no duty to advise Savchuk that he could have tendered a promissory note and deed of trust, instead of cash, at closing.

Savchuk again is arguing that Sams should have given legal advice to him. And, the advice Savchuk contends that Sams should have given to him would have been erroneous!

Although the January 2007 purchase and sale agreement contains inconsistencies and ambiguities, the court of appeals held that “while the original terms of the REPSA may have been ambiguous, the extension agreement is not.” Under the August 2007 extension agreement, Savchuk clearly was obligated to pay the balance of the purchase price in cash and close the transaction on May 30, 2008. If Sams had advised Savchuk he could tender a note and deed of trust at closing, she would have been wrong! Savchuk did not have a right to tender a note and deed of trust at closing, so Sams cannot be liable for failing to give him bad advice.

5. Sams was not negligent by failing to review the August extension agreement.

Again, Savchuk is arguing that Sams should have given legal advice to him, which she was not permitted to do. No Washington case has ever held a real estate broker liable for failing to review a document not prepared by the broker, but signed by the broker’s client. It is undisputed Sams was out of the country when the August extension was negotiated, prepared and signed. If Savchuk did not understand it, he should have consulted his attorney, as he had done on other transactions. CP 213.

Savchuk only objection to the August 2007 extension agreement is that it made all payments nonrefundable. Savchuk admits that he agreed to

the due dates and amounts of the payments. Savchuk has asserted that “Inman had not mentioned anything about deposits being ‘nonrefundable’ in [their] previous phone calls, and she did not mention the ‘nonrefundable’ language or explain it in any way when she presented the document to [him].” CP 163. If Inman had not previously mentioned that the payments would be nonrefundable and Savchuk signed the extension agreement at the same meeting that Inman first presented it, then Savchuk could not possibly have discussed with Sams the issue of *nonrefundable* payments! If Sams did not see the extension agreement before it was signed and did not know that it called for nonrefundable payments, she could not have given him advice on the issue.

Even taking the evidence in a light most favorable to Savchuk,³ the only thing Sams allegedly said about the extension was that he could rely on Inman to treat him “fairly.”⁴ CP 163. The short answer to Savchuk’s argument is that Inman did treat Savchuk fairly. There is nothing unfair about the extension agreement. It is simple and straightforward. It clearly provides that “[a]ll payments are non-refundable in the event of failure to close.” CP 190. Sams is not responsible for Savchuk’s failure to read the extension agreement before signing it. Savchuk’s argument that he signed

³ Sams denies having *any* communication with Savchuk while she was out of the country, but for purposes of this appeal, the court must accept Savchuk’s testimony as true.

⁴ Although Savchuk does not identify the legal theory for his claim, it most closely resembles a claim for negligent misrepresentation.

the August 2007 extension agreement without reading it carefully was made to and rejected by the court in *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 745 P.2d 37 (1987).

“[T]here is no evidence that Hayton was deprived of the opportunity to examine the documents. While he was busy when Flint brought the documents, spoke only briefly with Flint, and signed the documents on the flat bed of a truck, there is no indication in the record that Hayton did not have the time or the opportunity, or could not have taken the opportunity, to read the documents or to consult an attorney.”

109 Wn.2d at 382.

Moreover, Savchuk contends only that he relied on Inman to treat him “fairly.” Even though Inman represented Jerde, she owed to Jerde *and* Savchuk a duty “to deal honestly and in good faith.” RCW 18.86.030(1)(a). By saying Savchuk could rely on Inman to treat his “fairly,” Sams was saying nothing more than what the law already required, *i.e.*, Inman would deal “honestly and in good faith” with him. In other words, Inman was legally required to treat Savchuk fairly. Savchuk does not claim, nor could he claim, that he relied on Inman to act in his best interest. Savchuk knew that Inman represented Jerde in the transaction and that Inman was trying to protect and promote Jerde’s interests. Therefore, Savchuk could reasonably rely on Inman to deal honestly and in good faith (fairly) with him, but not to act in his best interest.

In addition, Sams' alleged statement that Savchuk could rely on Inman to treat him fairly is nothing more than an opinion – not a misrepresentation of existing fact. To be actionable, a statement must relate to an existing fact, rather than an opinion or prediction of a future event. *Shook v. Scott*, 56 Wn.2d 351, 353 P.2d 431 (1960).

Savchuk does not allege that Inman misrepresented the extension agreement to him. He does not allege that he was deprived of an opportunity to read it. He does not allege that he asked any questions of Inman or that Inman “explained” the extension agreement to him. He knew that his agent was unavailable. If Savchuk had any questions about the legal aspects of the extension agreement, he should have consulted an attorney before signing it.

6. Sams breached no duty to Savchuk by accepting commission payments for “doing nothing, other than being the ‘procuring cause’ of the sale.”

Being the procuring cause of the sale alone is sufficient consideration to support payment of a commission. “As a general rule, a real estate salesman is a special agent with authority limited to finding a purchaser of the property his principal has listed for sale.” *Larson v. Bear*, 38 Wn.2d 485, 489, 230 P.2d 610 (1951). The duties of a buyer’s agent are defined by statute as follows:

“Unless additional duties are agreed to in writing signed by a buyer's agent, the duties of a buyer's agent are *limited* to those set forth in RCW 18.86.030⁵ and the following, which may not be waived except as expressly set forth in (e) of this subsection:

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

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

(c) To advise the buyer 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 buyer, except under subpoena or court order,

⁵ RCW 18.86.030(1) provides as follows:

“Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee 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 licensee 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 licensee 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 licensee renders real estate brokerage services, before the party signs an agency agreement with the licensee, signs an offer in a real estate transaction handled by the licensee, 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 licensee renders real estate brokerage services, before the party signs an offer in a real estate transaction handled by the licensee, whether the licensee 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.’”

even after termination of the agency relationship; and

(e) Unless otherwise agreed to in writing after the buyer's agent has complied with RCW 18.86.030(1)(f), *to make a good faith and continuous effort to find a property for the buyer*; except that a buyer's agent is not obligated to: (i) Seek additional properties to purchase while the buyer is a party to an existing contract to purchase; or (ii) show properties as to which there is no written agreement to pay compensation to the buyer's agent.” (Emphasis added.)

RCW 18.86.050(1).

Under the clear and unambiguous language of the statute, no other duties are owed by a real estate broker. *Jackowski v. Borchelt*, ___ Wn.2d ___ (No. 83660-4, June 14, 2012).

7. Accepting commissions before closing does not violate the Consumer Protection Act.

Plaintiff claims that Sams’ acceptance of compensation before the closing of a transaction violates the CPA. There is no legal authority for plaintiff’s contention.

“To prevail in a private action brought under the Consumer Protection Act, RCW 19.86.090, the plaintiff must establish that: (1) the defendant has engaged in an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) the plaintiff has suffered injury in his or her business or property, and (5) a causal link exists between the unfair or deceptive act and the injury suffered.”

Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 149, 930 P.2d 288 (1997) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986)).

The plaintiff must establish all five elements and a finding that any element is not met is fatal to plaintiff's claim. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793, 719 P.2d 531 (1986).

For purposes of plaintiff's motion only, Sams and Metro Realty concede that the commissions were received "in trade or commerce," but deny the remaining elements. As to the "unfair or deceptive act or practice" element,

"Whether a party in fact committed a particular act is [an issue of fact]. However, the determination of whether a particular statute applies to a factual situation is a conclusion of law. Consequently, whether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law.

Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997) (citing *Keyes v. Bollinger*, 31 Wn.App. 286, 289, 640 P.2d 1077 (1982)).

First, it is undisputed that (a) Sams, Metro Realty and Jerde's broker received their commissions as and when Savchuk made payments to Jerde by agreement with Jerde, (b) all payments were made *after* the January 8, 2007 agreement was entered into, and (c) Jerde – not Savchuk – paid the commissions. "[S]ince there is no dispute of facts as to what the parties did in this case, whether the conduct constitutes an unfair or deceptive act can be decided by this court as a question of law." *Id.*

Real estate brokerage is a heavily-regulated business. *Wilkinson v.*

Smith, 31 Wn.App. 1, 639 P.2d 768 (1982). Yet, in enacting comprehensive statutes regulating the real estate brokerage business (the real estate licensing law (chapter 18.85 RCW) and the law of real estate agency (chapter 18.86 RCW)), the legislature has not seen fit to prohibit real estate brokers from receiving compensation before the closing of a transaction, as it has with respect to mortgage brokers, for example. “Acts which are done in good faith under an arguable interpretation of the law are not CPA violations.” *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn.App. 357, 374, 936 P.2d 1191 (1997).

Because there is nothing illegal or against public policy about real estate brokers receiving their share of nonrefundable payments received by the sellers before closing, there is no merit to plaintiff’s CPA claim against Sams or Metro Realty, such that summary judgment should be affirmed.

Second, Sams and Metro Realty’s receipt of its commission on payments received by Jerde is a matter of private contract not affecting the public interest.

“Where the transaction was essentially a private dispute . . . , it may be more difficult to show that the public has an interest in the subject matter. Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. . . . However, it is the likelihood that additional plaintiffs have been or will be injured in exactly the same

fashion that changes a factual pattern from a private dispute to one that affects the public interest. . . . Factors indicating public interest in this context include: (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions? As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. The factors in both the 'consumer' and 'private dispute' contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact." (Citations omitted)

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 790-91, 719 P.2d 531 (1986).

Here, it was not even Sams' idea to receive the commission in advance of closing. The listing agent requested it of Jerde and Jerde agreed. Pursuant to multiple listing service rules, when the listing broker receives a portion of the commission from the seller before closing, then the selling broker is entitled to its share of the commission received by the listing broker.

Third, Savchuk did not suffer any injury in his business or property, because *he did not pay the commission* – Jerde paid the commission to the listing broker, who in turn paid the selling office share to Metro Realty, who in turn paid to Sams her share. Savchuk's agreement was with Jerde, and Jerde – not Savchuk – paid the commission.

Fourth, there is no causal link between Sams and Metro Realty's

receipt of the commission and Savchuk's alleged damages. Savchuk made payments pursuant to his agreement with Jerde. It is those payments that Savchuk sought to be refunded.⁶ If Savchuk had prevailed, he would have been entitled to a full refund of the payments without any deduction for the commissions paid to the brokers. There simply is no causal connection between Savchuk's payments to Jerde and the Jerde's payments to Sams and Metro Realty.

Because there are no issues of fact as to whether Sams or Metro Realty committed an unfair or deceptive act or practice, whether the receipt of commissions before closing affects the public interest, whether Savchuk suffered any damages, or whether Savchuk's alleged damages were caused by the receipt of commissions before closing, there would be no merit to Savchuk's CPA claim against Sams or Metro Realty, such that summary judgment was proper.

Savchuk asserts that the receipt of commissions before closing is not the only basis for his CPA claim. However, in paragraph 57 of the Second Amended Complaint, Savchuk alleges only the receipt of commissions before closing as a basis for his CPA claim. Sams and Metro Realty admit they received commissions on installment payments made by

⁶ Shortly before the trial date, Savchuk settled with Jerde. The settlement involved Savchuk acquiring the property, assuming the existing loan and receiving from Jerde a partial refund of his payments.

Savchuk, such that there are no facts in dispute and summary judgment was appropriate.

It is a question of law for the court to decide whether receipt of such commissions is unfair or deceptive; it is not an issue for expert testimony. Again, Mr. Bjerke's testimony on this issue is irrelevant and inadmissible.

Here, as in *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 948 P.2d 816 (1997), "viewing the evidence in the light most favorable to the nonmoving party, we do not find any set of facts which constitute a violation of the Consumer Protection Act."

CONCLUSION

For the above reasons, the court should grant affirm the trial court's decision.

Respectfully submitted this 10th day of August, 2012.


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DECLARATION OF SERVICE

I certify that I successfully emailed a copy of Respondents' Brief to James E. Britain, appellant's attorney, at jim@bgvlawfirm.com, in accordance with GR 30, on August 10, 2012 at Newcastle, Washington.

Douglas S. Ingvall