

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

CAROLYN CAPALBO)
)
 Plaintiff,)
)
 v.)
)
 SAMSON REALTY, LLC)
)
 Defendant.)
 _____)

CL No. 2007-0000442
Hearing Date: April 13, 2007
10:00 a.m.

PLAINTIFF’S OPPOSITION TO DEMURRER AND MOTION TO DISMISS

Plaintiff Carolyn Capalbo, by counsel, files this Opposition to the Demurrer and Motion to Dismiss of Samson Realty, LLC. (“Samson Realty”).

I. IT IS CLEAR THAT THE COMPLAINT PROPERLY STATES A CAUSE OF ACTION AGAINST SAMSON REALTY FOR BREACH OF AGREEMENT.

A. Standards governing demurrers.

In demurring, Samson Realty admits the truth of all material facts which are properly alleged in the Motion for Judgment [Complaint]. *Rosillo v. Winters*, 235 Va. 268, 270, 367 S.E.2d 717, 717 (1988). "Under this rule, the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged." *Id.* The purpose of the demurrer is to test whether the Motion for Judgment (k/n/a Complaint) "contains sufficient allegations of material facts to inform the defendant of the nature and character of the claim" *Hunter v. Burroughs*, 123 Va. 113, 129, 96 S.E. 360, 365 (1918).¹

Here, there is no question that Samson Realty understands the nature of the claims from the face of the Complaint, or the claims that can be viewed as impliedly alleged or inferred from the facts

¹ “And even though a motion for judgment ... may be imperfect, when it is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer; if a defendant desires more definite information, or a more specific statement of the grounds of the claim, the defendant should request the court to order the plaintiff to file a bill of particulars.” *Alexander v. Kuykendall*, 192 Va. 8, 14-15, 63 S.E.2d 746, 749-50 (1951).

alleged. Rather, Samson Realty ignores the well pled allegations and seeks to use the Demurrer and Motion to Dismiss and its companion Motion Craving Oyer to obtain discovery from Ms. Capalbo and/or to have the Court entertain dismissal before Ms. Capalbo has obtained any discovery from the Defendant. The Court should accept those well pled, material allegations as true, and this litigation cannot, and should not, be short-circuited.

B. The Motion for Judgment adequately alleges the existence of and breach of an agreement to pay commissions to Ms. Capalbo.

Samson Realty argues that Ms. Capalbo does not state a cause of action for Breach of Contract (Count 1) because she has not alleged a written contract or attached a written contract to the Complaint. Ms. Capalbo's claim for breach of contract is not based on a single document but is based upon a compendium of written documents, terms verbally agreed upon, terms sustained by parol evidence, the course of conduct between the parties, the standard commission policy of Samson Realty, and the custom and practice of Samson Realty with its other real estate agents.²

² The Complaint clearly states that Ms. Capalbo was a real estate agent for Samson Realty who sold over \$31 million of residential properties in 2005 for which she was paid 80% of the sales commissions and 20% of the commissions were retained by Samson Realty (Complaint at ¶¶ 1, 3-4); and that Samson Realty modified its "standard compensation policy" for all of its agents in January 2006, including Ms. Capalbo, and agreed to pay 85% of the commissions to agents who generated over \$20 million in property sales in the prior year (Complaint at ¶ 5). The Complaint alleges 5 specific properties on which Ms. Capalbo was the listing agent (and procuring agent) for Samson Realty, each of which had real estate contracts signed and ratified while Ms. Capalbo was the agent. (Complaint at ¶ 7), and that each property was subject to Samson Realty's standard compensation policy to pay agents, including Ms. Capalbo, 85% of the sales commissions, with Samson Realty retaining 15% of the commissions. The Complaint alleges further that on August 4, 2006, the Defendant reconfirmed its agreement to pay Ms. Capalbo 85% of the sales commissions on properties for which she was the procuring agent. (Complaint at ¶ 14). The 5 properties specified in the Complaint (at ¶ 7) all went to closing with Ms. Capalbo being the only procuring agent and listing agent on the properties. (Complaint at ¶¶ 7-8). Even the multiple listing service (MLS) identified Ms. Capalbo as the agent on the properties; no other agent was listed.

The Complaint also specifies a property on Richmond Avenue in Manassas, Virginia. (Complaint at ¶ 11). Ms. Capalbo was recognized in an arbitration proceeding by the Virginia Board of Realtors to be the procuring agent for the Defendant, and as a result, Samson Realty received an additional commission from the original sale of this property in 2005, but Samson Realty paid Ms. Capalbo only 30% of the commissions.

The idea that there was no agreement to pay commissions to Ms. Capalbo on any of these properties is nonsense. The Complaint identifies the commissions that Ms. Capalbo was actually paid by Samson Realty on these properties (Complaint at ¶ 10), which ranged from 20% – 30% of the listing commissions received by Samson Realty instead of the 85% which had been promised to Ms. Capalbo. Surely, the Court cannot be deceived to believe that Samson Realty paid these short-changed commissions to Ms. Capalbo out of the goodness of its heart and that, otherwise, there was no agreement to pay commissions to Ms. Capalbo.

The Defendant need only examine its standard commission policy then in effect, the course of conduct between the parties where Samson Realty paid Ms. Capalbo commissions at the rate of 85% for most of 2006, and the custom and practice of Samson Realty where it paid commissions to its other real estate agents at the rates of 80% and 85%. Written documents evincing the standard commission policy, payments to Ms. Capalbo and other Samson Realty agents, listing agreements and real estate closings on which Ms. Capalbo was the procuring sales agent are within the possession of Samson Realty. In addition, Ms. Capalbo had verbal conversations with representatives of Samson Realty in which they agreed to split the listing commissions with her at a specified rate. Attached hereto as Exhibit 1 is a schedule of some of the real estate closings that Ms. Capalbo handled for the Defendant in 2006, all of which paid her 85% of the listing commissions. In addition, Samson Realty has advertised 80/20 and 85/15 commission splits in order to attract and retain real estate sales agents. Ms. Capalbo intends to obtain such documents and deposition testimony in discovery in further support of her claim for breach of contract.

Defendant is also plainly in possession of its own Realty Commission Policies. Attached hereto as Exhibit 2 is the Samson Realty Commission Policy as Updated February 21, 2007, after Ms. Capalbo filed suit. The policy sets forth in writing Samson Realty's real estate commission splits of 80/20 and 85/15. Attached hereto as Exhibit 3 is an e-mail from Michael E. Briggs, Managing Broker, Samson Realty, LLC, dated February 21, 2007, where he points out a change in the Defendant's standard commission policy in the section entitled, "Commission Policy Upon Termination of Affiliation." The change in policy occurred only after Ms. Capalbo filed suit.

Samson Realty and Ms. Capalbo will have an opportunity to obtain discovery from each other in order to adequately defend and prosecute the case. It would be inequitable and unfair to grant the Demurrer and Motion to Dismiss when Ms. Capalbo is in need of documents and other information in Samson Realty's possession.

II. SAMSON REALTY'S RELIANCE UPON THE STATUTE OF FRAUDS OF SECTION 11-2 IS MISGUIDED.

A. The Statute of Frauds was intended to protect the public from unscrupulous real estate brokers and sales agents, not to shield real estate brokers from the commissions claims of their sales agents.

Code of Virginia, Contracts, § 11-2 (Repl. Vol. 2006), reads in pertinent part: "Unless the agreement . . . or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent. . .no action shall be brought . . .

"(7) Upon any agreement or contract for services to be performed in the sale of real estate by a party defined in § 54.1-2100 (real estate broker) or § 54.1-2101 (real estate salesman) . . ."³

The precursor codification of this statute is found in Code of Virginia, Contracts, § 11-2 (Repl. Vol. 1978). The Supreme Court of Virginia in *H-B Ltd. Partnership v. Wimmer*, 220 Va. 176, 257 S.E.2d 770, 773 (1979) applied this interpretation:

The legislative objective in enacting the statute requiring real estate services agreements and contracts to be in writing was to avoid frauds and perjuries, not to act as a bar to action by principals against their agents for fraud or breach of confidence. In short, this section of the statute of frauds was intended to protect the public from unscrupulous real estate agents and brokers, not to act as a shield behind which agents and brokers could seek refuge when their principals charge them with fraud or breach of faith. The purpose of Code § 11-2(6a) [§ 11-2(7)] is to prevent fraud, not to protect the perpetrators of it. *T. v. T.*, 216 Va. 867, 871-72, 224 S.E.2d 148, 151 (1976); *Reynolds v. Dixon*, 187 Va. 101, 106, 46 S.E.2d 6, 8 (1948).

The statute of frauds is not enforced when to do so would cause a fraud and a wrong to be perpetrated. *Wheat v. Wheat*, 3 Va.Law Reg. (N.S.) 177, *aff'd.* by a divided court, 119 Va. [216 Va. 872] 861, 91 S.E. 827 (1916). *Reynolds v. Dixon*, 187 Va. 101, 46 S.E.2d 6 (1948).

³ It is undisputed there were listing agreements between Samson Realty and the residential home sellers or buyer, under which the sellers/buyer agreed to pay sales commissions. Ms. Capalbo, as the agent for Samson Realty, was instrumental in having the agreements executed. The purpose of Section 11-2, to protect the public, has been satisfied. Upon information and belief, Section 11-2 has not been interpreted by the Supreme Court of Virginia to require real estate brokers to have written agreements with their real estate sales agents for the payment of commissions. Yet, this is the result that Samson Realty seeks in order to avoid paying commissions to Ms. Capalbo, even though Samson Realty, as the employing real estate broker, was always in a position to present Ms. Capalbo with a signed written contract.

In *T v. T*, *supra*, 224 S.E.2d at 151-152, the Supreme Court of Virginia elucidated further on avoidance of the statute of frauds:

Therefore, under certain conditions, where there has been part performance, a court of equity will avoid the statute and enforce an oral agreement. In such cases the parole agreement must be certain and definite, the acts proved in part performance must refer to, result from, or be made pursuant to the agreement, and the agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation. Moreover, the act or acts of part performance must be of such unequivocal nature as to be evidence of the existence of an agreement. *Pair v. Rook*, 195 Va. 196, 205, 77 S.E.2d 395, 402 (1953). Indeed, the part performance must be consistent with no theory other than the existence of the alleged oral contract. *Mann v. Mann*, 159 Va. 240, 248, 165 S.E. 522, 525 (1932).

It would be a fraud, a wrong or an injustice upon Ms. Capalbo to enforce the statute of frauds here. Ms. Capalbo gave full performance, and Samson Realty partially performed pursuant to the parties' agreement. As the Supreme Court of Virginia touched upon in *H-B Ltd. Partnership v. Wimmer*, *supra*, real estate brokers and their agents may not hide behind the statute of frauds to shield themselves from the claims of each other. More fundamentally, however, Virginia courts long have recognized that the purpose of the statute of frauds is to prevent the working of a fraud, not to perpetuate one.⁴ *Troyer v. Troyer*, 231 Va. 90, 341 S.E.2d 182 (1986). Also, the effect of the statute of frauds is only procedural. *Hewitt v. Huttger*, 574 F.2d 182 (4th Cir. 1978). Equitable estoppel will thwart the pleading of the statute of frauds in Virginia even without a showing of fraud or deceit. *Nargi v. Camac Corp.*, 820 F.Supp. 253 (W.D. Va. 1992). Thus, where, as here, one party has performed his duties under the contract, the other party may not use the statute of frauds as an excuse not to perform his part. *Wright v. Pucket*, 63 Va. (22 Gratt.) 370 (1872); *Pierce v. Catron*, 64 Va. (23 Gratt.) 588 (1873); *Hale v. Hale*, 90 Va. 728, 19 S.E. 739 (1894).

B. There is sufficient written evidence of Samson Realty's agreement to pay Ms. Capalbo the commission rates as alleged in the Complaint.

⁴ If Samson Realty is claiming that its change in commission rates from 80/20 to 85/15 for its top agents in January 2006 is unenforceable, then Samson is really saying that it had no intention of paying 85/15, and that is tantamount to fraud – and Section 11-2(7) plainly cannot be enforced.

See the discussion in Section I above

Even if Code of Virginia, § 11-2, applied to the relationship between Ms. Capalbo and Samson Realty, the statute requires only that there be something in writing, a note or a memorandum, corroborating the existence of an agreement. Section 11-2(7) should be avoided because there is sufficient written evidence of an agreement between Samson Realty and Ms. Capalbo to pay her at the commission rates alleged in the Complaint. There are checks written and signed by Samson Realty for commissions (establishing part performance and past performance under the parties' agreement), the standard commission policies of Samson Realty, and advertisements used by Samson Realty to attract and retain real estate agents like Ms. Capalbo. These are writings "signed" by Samson Realty. With respect to the checks written to Ms. Capalbo for sales from January through July 2006, when matched to the commissions paid to Samson Realty on the HUD-1 settlement statements, they demonstrate that Samson Realty paid Ms. Capalbo 85% of the commissions except for the properties that are the subject of this lawsuit.

III. THE CONSIDERATION FOR THE PROMISE OF HIGHER COMMISSIONS WAS MS. CAPALBO'S CONTINUED SERVICE TO SAMSON REALTY.

Samson Realty contends that Ms. Capalbo fails to state a claim for breach of contract because she does not allege any consideration underlying Samson Realty's change of commissions from eighty percent (80%) to eighty-five percent (85%).⁵ A reading of the Complaint shows otherwise.

Ms. Capalbo's consideration for the promise of commissions at the rate of 85% was her continued employment and service to Samson Realty. The Complaint alleges in ¶4 that on August 4, 2006, Ms. Capalbo informed Danny Samson that she would be leaving his company to join Keller

⁵ Samson Realty cites to *Seward v. New York Life Ins. Co.*, 154 Va. 154, 168, 152 S.E. 346, 350 (1930) for the proposition that the promise of increased consideration by Samson was not supported by any new consideration. *Seward* is not precedent on the facts before this Court as it involved a property attachment, the assumption of a deed of trust and the equity of redemption. It also appears that *Seward* is not cited in other Virginia published decisions as a precedent.

Williams Realty, but that “she would finish every property sale under contract; that she would maintain relationships with her clients; and that she would make sure the deals went to settlement for the Defendant.” The Complaint further alleges that in exchange for these services, Ms. Samson promised and agreed that Samson Realty would continue to pay her 85% of the sales commissions. Ms. Capalbo, whose license transferred to Keller Williams Realty in early August 2006, had no obligation to continue providing services to Samson Realty. She and her clients could have allowed their listings with Samson Realty to expire before settlement, and she and her clients could have re-listed and closed the sale of their properties for Keller Williams Realty. Instead, Ms. Capalbo’s consideration was her promise and performance in having five properties go to settlement for Samson Realty even though Ms. Capalbo had informed the company that she was joining Keller Williams Realty. The agreement between Ms. Capalbo and Samson Realty was valid and enforceable.

The law in Virginia makes clear that such contracts are valid and enforceable. An employer's promise to pay a bonus to induce an employee to continue in employment is a contract independent of the employment contract itself. Such a promise --

“is not a gratuity or gift, but is an offer on the part of the employer, with whom the offer originates in order to procure efficient and faithful service and continuous employment, and when the employee enters upon the service upon the inducement it becomes a supplementary contract of which he cannot be deprived without sufficient cause.”

Hercules Powder Co. v. Brookfield, 189 Va. 531, 541, 53 S.E.2d 804, 808 (1949), quoting *Roberts v. Mills*, 184 N.C. 406, 410, 114 S.E. 530, 532 (1922). There, the promise was that certain severance benefits would be available to employees who stayed on with the company. The *Hercules* court noted that the plaintiff there, an at-will employee, was under no obligation to continue in the defendant's employ and accordingly, "his reliance upon and continued service because of the promise is sufficient consideration to support the contract and makes agreement complete" *Hercules Powder, supra*, 189 Va. at 541, 53 S.E.2d at 808 - 09. The concept remains vital in Virginia law. In *Twohy v. Harris*, 194 Va. 69, 72 S.E.2d 329 (1952), the employer promised to hold certain corporate stock for the employee's

benefit to discourage the at-will employee from resigning. The Supreme Court held that the employer's promise of the stock was supported by consideration.

Where one makes a promise conditioned upon the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality, and the promisor is liable. . . . Upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration which renders the promise obligatory.

Id. at 81, 72 S.E.2d at 336. See also, *Dulany Foods, Inc v. C.M. Ayers, et al.*, 220 Va. 502, 260 S.E.2d 196 (1979); *Paramount Termite Control, Inc. v. Rector*, 238 Va. 171, 380 S.E.2d 922 (1989).

IV. THE QUANTUM MERUIT AND UNJUST ENRICHMENT CLAIMS ARE VIABLE ALTERNATIVE THEORIES OF RECOVERY WHICH THE TRIER OF FACT CAN CONSIDER IF AN ENFORCABLE EXPRESS AGREEMENT IS NOT FOUND TO EXIST.

Samson Realty refers to the proposition that an implied contractual obligation under quantum meruit and unjust enrichment cannot be imposed “in contravention of an express contract.” Ms. Capalbo’s claims for relief under quantum meruit (Count 2) and unjust enrichment (Count 3) are not in contravention of an express agreement with Samson Realty, but instead are alternative theories of recovery. It is not inconsistent to plead breach of an agreement, quantum meruit and unjust enrichment, even though the plaintiff may recover under only one theory.

Quantum meruit is an equitable doctrine premised on the notion that one who benefits from the labor of another should not be unjustly enriched. *Kern v. Freed Co.*, 224 Va. 678, 299 S.E.2d 363, 363-64 (Va. 1983). To establish a right to relief on this basis under Virginia law, the plaintiff must show that she rendered valuable services to the defendant, which were accepted and requested by the defendant, under circumstances that reasonably notified the defendant that the plaintiff expected to be paid. See *Humphreys Railways, Inc. v. F/V Nils S.*, 603 F.Supp. 95, 98 (E.D. Va. 1984).

Since Samson Realty appears to deny the existence of an enforceable express agreement under Count 1, Ms. Capalbo is entitled to present evidence, first, of the enforceable express agreement, and second, of the alternative claims under quantum meruit and unjust enrichment.

In *Raymond, Colesar, Glaspy & Huss, P.C. v. Allied Capital Corp.*, 961 F.2d 489, 493 (4th Cir. 1992), the Court rejected establishing a per se rule in this area of Virginia law that would foreclose all implied contract claims that happen to coincide with express agreements between different parties on the same subject. The Court affirmed the lower court's decision to allow the jury to decide between an express contract claim and a quantum meruit claim.

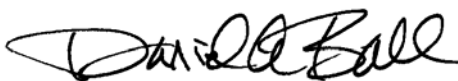
Ultimately, the Court instructs the jury (or takes notice itself) that an implied contract is created by law to establish justice between parties. It does not require mutual assent, but may bind a party against his will. If the Court or jury believes by a preponderance of the evidence that services were performed for which no definite compensation was agreed upon, then the trier of fact may decide the value that the services were reasonably worth. *Marine Development Corp. v. Rodak*, 225 Va. 137, 300 S.E.2d 763, 766 (Va. 1983).

Similar to quantum meruit, the claim for unjust enrichment is an alternative avenue of recovery for Ms. Capalbo if the trier of fact does not find an express contract. *Accord, Reid v. Boyle*, 527 S.E.2d 137 (Va. 2000).

WHEREFORE, Plaintiff Carolyn Capalbo requests that the Demurrer and Motion to Dismiss be denied, and that she be awarded reasonable attorneys' fees and costs incurred in preparing this Opposition.

Respectfully submitted,

CAROLYN CAPALBO, Plaintiff
By Counsel

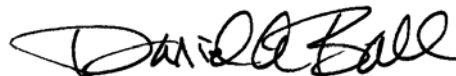


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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2007, I sent a copy of the foregoing pleading by first class mail, postage prepaid, and e-mail (.pdf) to the following:

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