

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY  
STATE OF MISSOURI**

SH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No.
REALTY EXCHANGE, INC.,	)	
	)	Division: 17
Defendant.	)	
	)	

**PARTIAL SUMMARY JUDGMENT AND ORDER**

The matter of Defendant Realty Exchange, Inc.'s ("Realty Exchange") Motion for Summary Judgment, having been fully briefed and heard, it is hereby ordered and adjudged that partial summary judgment shall be granted as follows:

Plaintiff SH's ("SH") Six Count Petition was first addressed in a summary judgment proceeding concerning the Defendant K Associates, LLC. On April 22, 2015, an Order and Judgment issued by this Court ordered that the counts for legal malpractice and breach of fiduciary duty (Counts V & VI) asserted by Plaintiff SH against Defendant K Associates, LLC be dismissed with prejudice. Thereafter, Defendant Realty Exchange filed a motion for summary judgment as to the remaining Counts I through IV. SH's claims against Realty Exchange concern the alleged sale of two separate properties, Dardenne Prairie and the West Pointe Apartments. Counts I and II allege a breach of a contract claim and a Missouri Commission Sales Act claim concerning a commission claim related to property known as Dardenne Prairie Property. Defendant Realty Exchange's Motion for Summary Judgment addressed said counts, and argument was heard concerning same. On December 7, 2016, the court issued an Order denying the summary judgment requests concerning said counts. The Court took under advisement the

remaining counts, Count III, which alleges a breach of fiduciary duty and Count IV, which alleges a Prima Facie Tort concerning a series of allegations related to the sale of property known as the West Pointe Apartments. This Order and Judgment concerns said counts.

### **Statement of Fact**

SH worked as an independent contractor real estate agent for a licensed real estate broker, Realty Exchange.

As to the West Pointe Apartments, SH alleged that while working as an agent for Realty Exchange that she entitled to a commission from the sale of that property from a company referred to as “Gannon” to another company referred to as “Mills.” The West Pointe Apartments were sold from Gannon to Mills in March 2012. SH alleges that Realty Exchange had a legal duty to file a brokers’ lien claim to seek a commission on her behalf regarding the sale of the property; and, thereafter, a legal duty to sue Gannon and Mills to collect such commission.

Realty Exchange filed a broker’s lien under Missouri law pursuant to a Listing Agreement that SH provided to Realty Exchange, together with certain emails. Gannon, Mills and Realty Exchange agreed to arbitrate the brokers’ lien claim subsequent to the sale, and as part of the sale, money was held in escrow until resolution of the arbitration. Realty Exchange instituted an arbitration action against Gannon and Mills. Gannon and Mills counterclaimed in the arbitration, seeking approximately eight million dollars, based on a contention that Realty Exchange’s lien claim was a fraudulent cloud on the title. If Realty Exchange prevailed in arbitration proceeding it would be awarded the commission at issue, which it would share with SH. If it lost, however, Realty Exchange was exposed to significant potential liability far in excess of the commission sought with respect to the claim asserted by Gannon and Mills that the broker’s lien was fraudulently asserted.

During the course of discovery in the arbitration, Realty Exchange had a reasonable basis to conclude that documents supplied by SH, purportedly entitling her to a commission in connection with the sale of the West Pointe Apartments, were intentionally altered and a key signature was forged. Additional facts were also adduced which suggested that Realty Exchange did not have a legitimate claim to a commission for the sale of the West Pointe Properties.

The Listing Agreement was allegedly signed by WS, in his capacity as an employee of Gannon. SH contended that this gave her authorization to sell the West Pointe Apartments. By the time of the arbitration, WS had died, and could not act as a witness. Realty Exchange retained a handwriting expert during the course of the arbitration. The expert concluded that WS's signature on the Listing Agreement was forged. Moreover, the WS signature was dated April 2011, some seven months after the October 2010 date next to SH's signature. The forged signature on the Listing Agreement, together with the date discrepancies, constituted a legitimate and reasonable concern for Realty Exchange in continuing to assert its entitlement to a sales commission.

Additionally, the Gannon decision makers would have testified that they had no knowledge of any such agreement and that WS had no authority to sign such an agreement. DW, the Senior Vice President of Gannon, the owner of the West Pointe Apartments, attests that neither Sharon SH nor Realty Exchange participated in the sale transaction regarding the West Pointe Apartments, nor were they the procuring cause of the sale. DW further asserts that he was the authorized person required to approve any listing agreement pertaining to the sale of West Pointe Apartments. He stated unequivocally that neither Gannon nor any affiliated entities ever entered into any commission agreement concerning the sale of the West Pointe Apartments. DW further asserted that, when he first heard that SH claimed to be the procuring cause of the sale

and that she was entitled to a commission, he conducted an investigation into the matter. His review of Gannon's documents confirmed that there was no listing agreement with respect to the sale of the property. DW also interviewed WS, who denied that he signed any listing agreement. Moreover, DW confirmed that WS did not have the authority to sign a listing agreement on behalf of Gannon and its affiliates, in any event.

Gannon also produced an email written by WS, dated April 16, 2012, after the sale of the West Pointe Apartments, stating: "Unfortunately, my friend SH and her firm just filed a broker's lien on the transaction. She did not earn a fee on the deal and she knows it, but I suppose things are really tough for her firm. The tough part for them is they are risking a cloud of title action for a fee they can simply not prove out. Kind of sad..."

Additionally, Gannon contended that certain emails produced by SH were intentionally altered. The altered emails produced by SH had sentences or phrases added to suggest that SH had involvement in the sale and purported to show that she was inquiring about the sale of the West Pointe Apartments from Mills. SH's versions of the emails added sentences such as "Let me know what K [Mills] says" and "I'll give K [Mills] a call" and "Also, Mills is interested in WP. I had them sign a CA over the info." These emails did not correspond to the emails retrieved from the recipient(s) of the e-mails which were preserved on the Gannon server. When confronted with the obvious discrepancies, SH failed to provide a credible explanation. In fact, the questionable emails were shown to have been sent from SH to herself at a different email address before she presented the emails to Realty Exchange and/or Gannon and Mills. SH claimed that she still had the original electronic version of the altered emails but never produced an electronic version to substantiate her assertion.

Additionally, SH's deposition testimony strains credulity. She testified that she formed

an entity known as East Court Holdings, LLC, a Missouri limited liability company, owned 100% by her, that would receive any commissions or “fees” generated from the sale of the West Pointe Apartments. Consequently, her actions indicated that either she did not believe that Realty Exchange was entitled to any commission or she intended to circumvent the payment of any commission to her broker, Realty Exchange. Finally, SH admitted that she falsely listed herself as the “exclusive sales representative” on the brochure she gave Mills when she presented a confidentiality agreement to him to sign.

Based upon the foregoing, it was both reasonable and prudent for Realty Exchange to settle the arbitration in exchange for mutual releases, without collecting any commission concerning the sale of the West Pointe Property. Consequently, RK, a principal of Realty Exchange, advised SH, on May 31, 2013, that he was surrendering her Real Estate license to the Missouri Real Estate Commission.

### **Conclusions of Law**

**Based up the uncontroverted facts presented to the Court, the Court concludes that Realty Exchange had no duty, as a matter of law, to pursue the collection of a sales commission on the sale of the West Pointe Property and, therefore, is entitled to Summary**

### **Judgment on Counts III and IV**

#### **The Statute of Frauds**

Plaintiff’s claim is based on a purported oral agreement which she contends stretches from at least October 2010 to April, 2013, in which she asserts that Realty Exchange was contractually bound to pursue a brokers’ lien claim concerning the sale of real estate, and that Realty Exchange was further contractually bound to prevail on the claim and supply her with a

percentage of the commission awarded upon prevailing. No written contract was produced.

Missouri Statute § 432.010 RSMo provides:

**No action shall be brought** to charge any executor or administrator, upon any special promise to answer for any debt or damages out of his own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of another person, or **to charge any person upon any agreement made... upon any contract made for the sale of lands... unless the agreement** upon which the action shall be brought, or some memorandum or note thereof, **shall be in writing and signed by the party to be charged therewith,** or some other person by him thereto lawfully authorized, and **no contract for the sale of lands made by an agent shall be binding upon the principal, unless such agent is authorized in writing to make said contract.**” Emphasis added.

If a contract violates the statute of frauds, a plaintiff cannot recover damages for breach of the alleged contract. *Johnson v. Cook*, 167 S.W.3d 258, 265 (Mo. App E.D. 2005).

The Court in *Cage Realty Exchange v. Hanna*, 881 S.W.2d 254 (Mo. App. W.D. 1994), applied a statute of frauds analysis as to a broker’s commission related to an exclusive listing agreement. It held the agreement is subject to the statute of frauds. Likewise, because there exists no written agreement between SH and Realty Exchange to share a sales commission in connection with the sale of the West Pointe property, any and all claims asserted by SH are barred by the Statute of Frauds.<sup>1</sup>

**Realty Exchange had a Statutory Duty to Dismiss the Arbitration**

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<sup>1</sup> Paradoxically, SH, testified that the alleged oral agreement with Realty Exchange included a provision that would absolve Realty Exchange from any duty to assert a commission if it believed her claims for commissions were questionable. See Statement of Facts, ¶ 85 (citing SH depo, pp. 146-147). As such, even if this Court were to determine that the alleged oral contract survives the statute of frauds, Realty Exchange was under no duty to pursue the arbitration claims after legitimate and reasonable doubts of the veracity of the commission claim arose.

Section 429.611 RSMo provides:

“If a claim for a lien has been filed with the county recorder of deeds and a condition occurs that would preclude the broker from receiving compensation under the terms of the real estate broker’s written agreement, the real estate broker shall record and provide the owner of a record a written release or satisfaction of the lien.” Mo. Rev. Stat §429.611.

In the instant case, Realty Exchange was under a statutory obligation to release all rights to the lien claimed when its own expert concluded that the alleged listing agreement contained a forged signature.<sup>2</sup> Similarly, Realty Exchange was statutorily required to dismiss the lien claims pursuant §429.600 RSMo *et. seq.*, because there was reasonably reliable evidence that she was not, in fact, involved in procuring a purchaser of the property. Moreover, Realty Exchange acted as a reasonably prudent broker in questioning her veracity with respect to her involvement in the attempt to collect a commission.

Section 339.151 RSMo makes it illegal to pay a real estate commission without “reasonable cause” that a right to such commission exists and §339.170 RSMo makes pursuit of a questionable commission without reasonable cause a misdemeanor.

Finally, 20 CR 2250-8.020, imposes upon a broker the duty to supervise its agents. If it is determined that a broker has failed to adequately supervise an agent, it can be held civilly liable unless “(C) the broker upon learning of the violation [of Chapter 339] attempted to prevent or mitigate the damage; and “(E) the broker did not ratify the violation.” As such, the burden is on the broker to actively mitigate the damage of a false commission claim once it becomes known, and to actively avoid ratifying the claim. Therefore, once Realty Exchange became

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<sup>2</sup> Again, the Statute of Frauds comes into play because there was no evidence that the purported signatory, WS, was authorized in writing to enter into a contract for the sale of land on behalf of his principal Gannon, the owner of the West Pointe Apartments. To the contrary, all evidence was that WS was not authorized to enter into a listing agreement on behalf of Gannon.

aware of the likelihood of fraud and forgery in the underlying commission claim arbitration, it had a statutory *affirmative* duty to avoid further participation in it.

### **The Termination of the Arbitration Was Done In Good Faith**

This Court concludes that Realty Exchange ceased pursuing the alleged West Pointe commission in good faith, given the following evidence it reviewed before such termination: (a) Before he died WS sent an email in which he denies that SH was entitled to a commission on the sale of the West Pointe Apartments; (b) a handwriting expert retained by Realty Exchange verified that the WS's putative signature on the Commission Agreement was a forgery; (c) SH appeared to have created a series of emails which purported to show that she was inquiring about the sale of the West Pointe Apartments that were shown to be altered from the original emails she sent; (d) The altered emails were produced by SH and were sent from her personal email address to her email address at Realty Exchange giving her the opportunity to make alterations; (e) SH could not adequately explain to Realty Exchange the discrepancies in the emails; (f) SH's testimony indicated that the alleged commission Realty Exchange was pursuing concerned a claim purportedly owned by East Court Holdings, LLC, and *not Realty Exchange*; and (g) SH gave additional testimony during the arbitration which further caused Realty Exchange to question her veracity.

### **There Is No Cognizable Breach of Fiduciary Duty under the Circumstances**

Whether a fiduciary duty exists is a question of law. *Scanwell Freight Express STL, Inc., v. Chan*, 162 S.W.3d 477, 481 (Mo. banc 2005). Where, as here, a breach of fiduciary duty is asserted as a tort claim, the proponent must establish that a fiduciary duty existed between it and the defending party; that the defending party breached the duty; and that the breach caused the proponent to suffer harm.

(Mo.App. 2005). *State Res. Corp. v. Lawyers Title Ins. Corp.*, 224 S.W.3d 39, 48 (Mo. App. S.D. 2007). While an employee owes a fiduciary duty to an employer, no corresponding duty is imposed on the employer. See *Williams v. Dominion Tech. Partners, LLC.*, 265 Va. 280, 576 S.E.2d 752, 757 (Va. 2003). Missouri law provides that an agent is a fiduciary to the employer with respect to matters within the scope of the agency. *State Resources Corp. v. Lawyers Title Ins. Corp.*, 224 S.W.3d 39, 48 (MO SD 2007). Yet, under said circumstances the fiduciary duty is not reciprocal. Further, the exact nature of the duty owed by a fiduciary in each arena is addressed by Missouri Courts. For example, while an insurer may have certain duties towards an insured it is clarified that said duties does not include a duty of an insurance broker to advice availability of optional coverages. See, e.g. *Farmers Ins. v. McCarthy*, 871. S.W.2d 82, 86 (Mo. App. E.D. 1994).

As to Plaintiff's allegations of breach of fiduciary duty there is no law that imposes a fiduciary duty on a broker/employer to pursue commissions on behalf of an agent/employee. There is no law that supports a claim that Realty Exchange had a duty to SH to pursue the claim for a commission in the first place or having instituted arbitration there is no law prohibiting Realty Exchange from settling the Arbitration. A review of Missouri broker/agent related statutes, including those cited above, indicates that no such fiduciary obligation is codified. Further, as addressed *supra*, the Court finds no evidence of a legally binding contract from which the alleged fiduciary duty could be derived.

To the extent SH now claims that a letter of retention between Realty Exchange and its counsel K Associates is a contract from which a "fiduciary duty" owing to SH can be derived, it should be highlighted that SH previously asserted that a letter of retention signed by her with Realty Exchange's counsel was only in her representative capacity. In fact, both the Circuit

Court and the Court of Appeals concurred with her position in this respect. *SH v. K Assocs.* The Memorandum opinion in *SH* concluded that “any benefit SH would have received was not considered a goal under the [retention agreement with Realty Exchange Ex’s counsel]. Therefore, SH was not a third party beneficiary under the [retention agreement]” *SH v. K Assocs.*, As such it is not a contract from which any fiduciary duty could be derived in favor of SH.

### **There Is No Prima Facie Tort Claim Available For Dismissing a Law Suit**

SH alleges that dismissal of the claim for a sales commission in the arbitration by Realty Exchange constitutes a *prima facie tort*. The elements of a claim of *prima facie tort* are: (1) an intentional lawful act by the defendant; (2) intent to cause injury to the plaintiff; (3) injury to the plaintiff; (4) an absence of any justification or an insufficient justification for the defendant's act. *Porter v. Crawford & Co.*, 611 S.W.2d 265, 268 (Mo. Ct. App. 1980). [I]n order for a claim in *prima facie tort* to lie, plaintiff must offer proof 'of an "actual intention" to injure, not merely an intent to do the act which may result in the claimed injury.'" *Thomas v. Special Olympics Mo., Inc.*, 31 S.W.3d 442, 450 (Mo. Ct. App. 2000). To prove actual intent, plaintiff must show actual malice. *Id.*

As addressed *supra*, the Court finds that Realty Exchange acted in good faith in dismissing the arbitration based on the evidence adduced. Furthermore, the court concludes that Realty Exchange had statutory obligations under Missouri law not to pursue the questionable commission claim asserted by SH upon being confronted with the evidence of fraud. Consequently, Realty Exchange had more than adequate justification to dismiss the claim; it had a legal mandate to do such. Additionally, Realty Exchange also faced an \$8,000,000 counterclaim for fraud, and given the known evidence of a forged Listing Agreement and

intentionally altered emails (among other things) Realty Exchange had also had sufficient, independent factual justification for dismissal of its claim in order to avoid the liability of furthering a fraudulent claim. As such, Plaintiff's claim fails as the fourth element "absence of justification".

Additionally, one also cannot claim that Realty Exchange acted with malice. Realty Exchange dismissed a commission claim for which, if it had been valid, it would have received a portion of the commission amount. Thus, it was forfeiting the same type of potential recovery that SH claims. Such action does not constitute malice but rather an unquestionably reasonably prudent thing to do under such circumstances. As such, Plaintiff's claim also fails as the second element of the claim, "malice."

IT IS HEREBY ORDERED, DECREED AND ADJUDGED that Summary Judgment be entered in favor of Realty Exchange, Inc. and against SH as to Counts III and IV and all claims concerning the sale of the West Pointe Apartments and any related commissions. Counts I and II addressing the alleged commission Plaintiff claims to be owed related to the sale of the Dardenne Prairie Property shall be tried to a jury.

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Date

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Joseph L. Walsh, III, Judge