

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

The Honorable DeAndrea G. Benjamin, Circuit Court Judge

C.A. No.: 2010-CP-40-007333

Shelby King, Appellant,

v.

Amy Bennett, The Amy D. Bennett Trust, and Amy Bennett Trustee, Respondents.

FINAL BRIEF OF RESPONDENT

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March 6, 2013

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I. STATEMENT OF ISSUES ON APPEAL

1. Whether to affirm the Lower Court's Order of June 18, 2012 granting Respondents' Motion for Summary Judgment barring a real estate professional from collecting a commission, fees or any compensation from a buyer for purported professional services when there is no written contract for services between the parties.

II. STATEMENT OF THE CASE

Respondent Amy Bennett and her husband were relocating to Columbia, South Carolina from Chicago, Illinois. The Appellant was one of the agents referred to Respondents as an experienced licensed real estate agent. Ms. King obtained no agreement in writing as to the scope and costs of services with Respondents, told the Respondents she does not get paid by the buyers and then sued Amy Bennett, her husband and the named trust claiming that she was owed for her professional real estate services. Appellants' Complaint (Pleadings at R. p.p. 6-17) was filed and served in October 2010. The Complaint sets forth causes of action for Quantum Merit, Unjust Enrichment, Constructive Trust, Fraud, Civil Conspiracy and Conversion by False Pretenses. The purported grounds for recovery on all claims are for monies owed in equity for professional services Ms. King provided to the Bennetts. Respondents moved for Summary Judgment (Pleadings at R. p.p. 94-95) on all claims based on South Carolina law requiring that in order for a real estate agent to recover monies, commissions or fees from a purported customer, they must have a written agreement for such services. The Lower Court agreed that no matter whether Appellant's claims were framed in law or equity, for commissions, fees or any compensation, she cannot recover without a written agreement with Respondents outlining those terms. The Lower Court granted the Summary Judgment by a Form 4 Order dated April 26, 2012 and a written Order by the Honorable DeAndrea G. Benjamin followed on June 18, 2012 (Order at R. p.p. 3-5). Appellant's Motion to Reconsider was denied by Form Order on May 9, 2012 (Order at R. p. 1) and Appellant filed and served her Notice of Appeal on June 6, 2012.

STATEMENT OF FACTS

Ms. King is a licensed professional real estate agent that claims she is entitled to be paid for professional real estate services from the Respondents. The Bennetts were referred to Ms. King when they were relocating from Chicago, Illinois and were in the market to buy a home in Columbia, South Carolina. The Respondents ultimately purchased a home in Columbia at 14 Ashworth Court. Ms. King claims to have spent 125 hours of her time researching homes, market values and trends, previewing homes, communicating with the Respondents about homes, school districts, and other desired features, showing Respondents homes, driving Respondents to the airport and performing other activities real estate professionals regularly perform. Appellant's Complaint, para. 5 (Pleadings at R. p. 10) and Appellant's Initial Brief, pages 3 and 4. The hours and rate for her services created after the litigation states Ms. King wants more than \$24,000.00 from the Respondents for research, showing some homes and driving them to the airport. Ms. King stipulates that she provided these regularly performed real estate services without a written agreement for the costs and scope of her services, Ms. King did not have a signed buyer's agency contract with the Bennetts and did not show or attend the closing of the 14 Ashworth home. Appellant's Brief in Opposition to Defendant's Motion for Summary Judgment filed with the Court on November 8, 2011. (Pleadings at R. p.p. 87-93) See also Appellant's Responses to Respondents' Request to Admit dated September 7, 2011. (Discovery at R. p.p. 139-145) Further, Ms. King stated in writing to Ms. Bennett that she never collects a fee from a buyer.¹ King 00086. (Exhibits at R. p. 206)

¹ Ms. King is contracted to provide real estate services through RE/MAX Advantage Group. Ms. King, despite no buyer's agreement with the Bennetts, sought a portion of the commission owed on the sale of the 14 Ashworth property from Liz Sullivan, the listing agent on the home with whom Bennett signed a buyer agency relationship agreement/dual agency agreement solely for the 14 Ashworth home. The November 29, 2010 letter from the Central Carolina Realtors

There is no dispute that Ms. King has no contract with the Respondents, no buyer's agency agreement or any other written agreement with the Respondents regarding her services and fees and her Complaint only has equitable claims for recovery.² Despite these admissions, the Appellant's framing or description of the business relationship with the Respondents changed during the litigation. In her Initial Brief, Appellant, states she was "engaged" and "retained" by Respondents in November 2009. Appellant's Initial Brief, page 3, para. 2 and Appellant's Initial Brief, page 6, para. 2 In her affidavit dated November 4, 2011 (Exhibit at R. p.p. 184-186), Ms. King states that she provided a Buyer's Agency Agreement to the Respondents on several occasions and at "no time did Defendants indicate that they would not sign the agreement prior to ratifying a contract to purchase a home," but Ms. King provides no affirmative evidence that Respondents' represented they would sign a buyer's agreement with her or any other agreement for her services. King Affidavit, para. 5 at R. p. 184). Despite these admissions and lack of any affirmative writing otherwise, Ms. King boldly states that she was given "every indication that she would be paid." Appellant's Initial Brief, page 2. Amy Bennett admits that she received via email a buyer's agreement from Ms. King early on after being referred to her but states that she told Ms. King she would not sign an exclusive buyer's agreement and that she made no claim she would sign any agreement with Ms. King. Further, Amy Bennett states that she used several

Association to Peggy Gainey, Ms. King's RE/MAX broker, informing her in part that Ms. King had filed an arbitration action with their organization seeking a commission from Ms. Sullivan.

² Ms. King states that none of her claims "relate to recovery of a commission on the sale of the home" located at 14 Ashworth Court in Columbia, South Carolina, but rather, she is suing for equitable relief because the Bennetts "intentionally mislead Appellant into believing she would be paid for her services" in an effort to induce her into continuing to provide services. Appellant's Initial Brief, page 12, para. 2. Coincidentally, her 125 hours and purported rate now concocted equaling \$24,000.00 is the equivalent of the commission owed on the purchase of 14 Ashworth Court.

other agents³ to view homes and discuss moving to Columbia. Deposition of Amy Bennett, page 40 and 43. (Exhibit at R. pp. 181-183). Despite there being no agreement showing terms for the payment after the litigation began, Appellant provided an accounting of a purported 125 hours of services for a demand of \$24,000.00. Ms. King sued the Bennetts to recover in quantum meruit and unjust enrichment, fraud, civil conspiracy, conversion by false pretenses and for a constructive trust of proceeds she asserts she is entitled to receive from Respondents.

ARGUMENT

All of Appellant's Claims Against Respondents Are Barred Because the South Carolina Code Requires A Real Estate Agent To Have a Written Agreement In Order to Obtain a Fee.

Ms. King is a licensed professional real estate agent that claims she is entitled to be paid for professional real estate services from the Respondents. In the Lower Court, Judge Benjamin, for the purpose of considering and granting summary judgment in favor of the Respondents, considered "all services and time Plaintiff provided such commonly known professional real estate services to be true as well as such purported material facts related to Ms. King alerting the Bennetts to the ultimate home they purchased." Order of the Honorable DeAndrea G. Benjamin dated June 18, 2012. (Order at R. p. 4) The Respondents admit that, along with other agents they communicated with, they saw some homes with the Appellant and received emails from Appellant providing sales data and proposed homes for consideration before ultimately purchasing a home at 14 Ashworth Court.

The question for Judge Benjamin and now for this Court is whether Appellant, a long time veteran real estate agent, who admits she failed to get any listing agreement, buyer's agreement or any other writing signed by the Respondents for the scope and costs of a purported 125 hours

³ The real estate agents Bennett spoke with, rode with or otherwise discussed moving to Columbia included Liz Sullivan, Vanda Fitts, Jerry Greene, Peggy Fowler, Fairfax Realty, Luz

of professional services she provided can proceed with equitable claims against the Respondents without such a writing. Judge Benjamin held the Appellant could not.

The Appellant would have the Court believe that the issue on appeal is unclear and that the law of this State dealing with real estate agents and their clients does not require clear writings outlining services and fees to be claimed by agents. Pages 9 through 16 of Appellant's Initial Brief is filled with contorted facts unrelated to the central issue on appeal which are denied by Respondents. The only issue is the writing requirement and the Respondents assert that Title 57 makes it clear that in order for an agent to collect a fee, whether postured as a commission or for some equitable hourly fee, there must be a writing setting forth all essential terms between an agent and a buyer, customer or any other client which receives professional services from a licensee under Title 57.

The South Carolina Code section 40-57-135 (D) (4) is as follows:

A listing or buyer's representation agreement must be in writing and must set forth all material terms of the parties' agency relationship including, but not limited to:

- (a) a description of the agent's duties or services to be performed for the principal including, but not limited to, an explanation of the office policy regarding dual agency and designated agency, if offered by the brokerage;
- (b) the amount of compensation to be paid or the method to be used in calculating the amount of compensation to be paid;**
- (c) an explanation of how and when the agent earns his compensation;**
- (d) an explanation of how compensation will be divided among participating or cooperating brokers, if applicable;
- (e) the amount of retainer fees, deposits, or any other money which is collected before the agent's performance of any services on behalf of the principal and an explanation of whether or not, and if so, under what conditions such monies are refundable or payable to or on behalf of the principal;

Bouleris, Novella Taylor and Terry Futch.

(f) the duration of the agency relationship, setting forth specific dates for the beginning and ending of the relationship;

(g) the signature of all parties.

(h) a listing or buyer's representation agreement may not contain a provision requiring a party signing the agreement to notify the licensee of his intention to cancel the agreement after the definite expiration date;

(i) a listing or buyer's representation agreement must be clearly defined if intended to be either an "exclusive agency" listing or buyer's representation agreement or "exclusive right to sell" listing or "exclusive right to buy" buyer's representation agreement;

(j) a listing or buyer's representation agreement must clearly specify any exception or variation in amount of commission to be paid and circumstances which would apply;

(k) a copy of the listing or buyer's representation agreement must be given to the seller or buyer at the time of, or directly following, signing; and

(l) a buyer's representation agreement must provide a price or price range for property of interest to the buyer and a listing agreement must state the price of the listed property.

S.C. Code Ann. § 40-57-135 (D) (4) (1976) (emphasis added).

As a real estate agent, Ms. King, no matter how she postures the claims she is making and what monies she is asking the Court to award, is barred from recovery because she failed to obtain in writing the amount of compensation she was to be paid and the method to be used in calculating the amount of compensation to be paid. S.C. Code Ann. §40-57-135(D) (4) (b). It is undisputed that no buyer's agreement exists and no other materials are offered by Appellant which would allow her to claim an hourly rate for the asserted 125 hours working with the Bennetts. See *YACOBI PROPERTIES, INC., Plaintiff, v. Eugene L. DUNN and Anita H. Duncan, as Attorney-in-Fact for Eugene L. Dunn, Defendants and Third Party Plaintiffs, v. Stephen A. YACOBI and Yacobi Law Firm, P.C., Third Party Defendants.*, 2006 WL 5434978 (S.C.Com.Pl.).

Appellant asserts that South Carolina Code section 40-57-137(O)(1) (wrongfully and repeatedly cited by Appellant) allows a real estate professional without any written agreement related to the scope and costs of such services to demand payment from a prospective buyer who chooses not to enter into an agency relationship. This argument is incorrect and would be nonsensical considering the entire scope of Title 57 and the protections set forth therein for all parties dealing with a real estate professionals.

The South Carolina Code section 40-57-137 (O) (1) is as follows:

(O)(1) Prospective buyers and sellers of unlisted real estate who do not choose to establish an agency relationship with a licensee but who use the services of the licensee are considered customers. A licensee may offer the following services to a customer including, but not limited to:

- (a) identify and show property for sale, lease, or exchange;
- (b) provide real estate statistics and information on property;
- (c) provide pre-printed real estate form contracts, leases, and related exhibits and addenda;
- (d) act as a scribe in the preparation of real estate form contracts, leases, and related exhibits and addenda;
- (e) locate a list of architects, engineers, surveyors, inspectors, lenders, insurance agents, attorneys, and other professionals; and
- (f) identify schools, shopping facilities, places of worship, and other similar facilities on behalf of any of the parties in a real estate transaction.

(2) A licensee offering services to a customer shall:

- (a) timely present all offers to and from the parties involving the sale, lease, and exchange of property;
- (b) timely account for all money and property received by the broker on behalf of a party in a real estate transaction;
- (c) provide a meaningful explanation of agency relationships in real estate transactions;
- (d) provide an explanation of the scope of services to be provided by the licensee; and

(e) be fair and honest and provide accurate information in all dealings.

S.C. Code Ann. § 40-57-137 (0) (1) (emphasis added)

First, § 40-57-137 (0) (1) (c) and (d) require the licensee to provide terms related to the agency relationship and the scope and services to be provided by the licensee. Nowhere in the provision does the law allow an agent to forego the requirements set for in Title 57 for written terms of the agreement between the parties, but rather, this provision allows for agents to be paid for certain services that purportedly do not reach the level of an agency relationship. This relationship however still requires the written understanding between the customer and agent. To allow otherwise, the drafters of § 40-57-137 (0)(1) would have been advocating an agent being able to demand and collect for services without the essential elements of the services being outlined and a clear meeting of the minds between a professional and their customer. In the case at hand, Ms. King need only have said to the Respondents that if they did not want to sign a buyer's agreement with her she would charge them a billable rate for the services she outlined in her complaint and bill them at certain stages and have the Respondents agree to those terms by signing the writing. Ms. King chose not to do so. No matter how much she states she was always led to believe she would be paid, and the Respondents mislead and deceived her when she herself was seeking payment from multiple parties, the law puts the burden on her to obtain the writing and she fails to do so at her own peril.

Further, Appellant would have the Court conclude that no writing is needed for her to take proceeds in trust and make and receive offers on behalf of clients. § 40-57-137 (0)(1) is purportedly for when potential clients do not wish to establish an agency relationship with an licensee, but the provision goes on to describe the services an agent can provide and what they shall do in that relationship. The section requires that a licensee timely provide offers to and

from parties and account for proceeds given in the transaction. § 40-57-137 (0) (1) (a) and (b). While the provision appears to assert that these agent duties do not create an agency relationship with the customer, an assertion that the Respondent and substantial case law would deny, there is no basis for the Appellant to claim that a customer giving such authority to an agent does not require that the authority given, and the charges and duties authorized, to be in a writing signed by the parties.

The South Carolina legislature passed the law, as other states have done, to protect the public from the very action being claimed by Ms. King. The law requires a more orderly method to ensure real estate agents are compensated. Use of oral agreements related to agents and their clients can be an unsafe practice and a requirement that listing agreements be in writing helps to foster fair dealings between parties, standardize real estate practice, prevent fraud and avoid litigation. 24 Del.C. § 2928; 24 Del.C. § 2905(1) (1988); *E. Commercial Realty Corp. v. Fusco*, 654 A.2d 833 (Del. 1995).

Requiring a writing between an agent and their client prevents disputes by agents who would claim a part of a commission or fee is due and it evolves into endless questions over the understanding between the parties, how much work was done by the agent and the method of calculating the fee or commission. Ms. King is a seasoned real estate agent who knew or should have known not to invest significant time or resources into finding a home for the Bennetts as she claims without a written agreement. All of Title 57, but specifically sections 40-57-135 (D)(4) and 40-57-137(O)(1), were passed to prevent the harsh results that can appear to come from eager real estate agents wanting to solicit business but fail to obtain the writings to protect their clients and themselves. Without this writing requirement, agents could simply learn of prospective buyers, do purported market research and send unsolicited emails and make phone

calls, maybe even show a few of the listings all in an attempt to earn the buyer's agreement without requiring the potential client to sign an agreement for these services. To allow Ms. King to assert a claim now would promote the practice of any eager agent who aggressively pursues a client to perform such services without the customers confirming through a writing, and then the agent sending the potential client a bill if they do not get the listing or agency agreement.

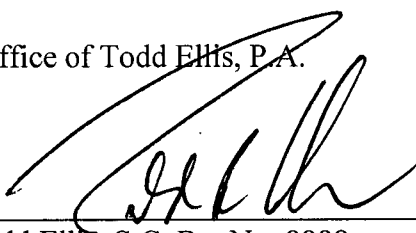
CONCLUSION

For the reasons set forth above, including but not limited to, because there is no writing signed by the parties outlining the terms for which Ms. King claims she is entitled to be paid, by contract or in equity, the Court should affirm Judge Benjamin's June 18, 2012 Order.

Respectfully submitted,

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By: _____


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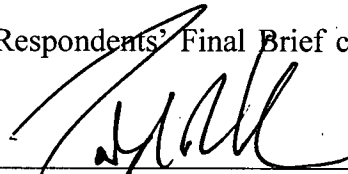
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondents' Final Brief complies with Rule 211(b), SCACR



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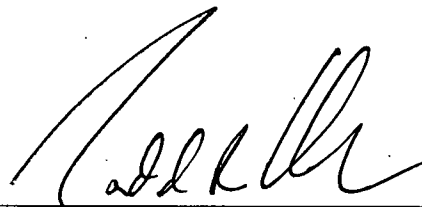
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PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondents** on T. Jeff Goodwyn, Jr., Esquire, Counsel for the Appellant at the address below by depositing a copy of same in the United States Mail, postage prepaid, on March 6, 2013.

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