

STATE OF VERMONT
WINDSOR COUNTY

Walnut Hill Realty, LLC
Plaintiff

v.

Robecca Haskell
Defendant

SUPERIOR COURT
Docket No. 733-10-08 Wrcv

FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER

The above-captioned matter came on for court trial on September 28, 2009. Plaintiff Walnut Hill Realty, LLC was represented by attorney Patrick Ankuda, Esq. Defendant Robecca Haskell was present and represented by attorney John Brady, Esq. Based upon the credible evidence presented at trial, the court makes the following findings of fact, conclusions of law, and order.

Findings of Fact

Walnut Hill Realty is a real estate agency owned by principal broker Rebecca Sanford. Ms. Sanford has been a real estate broker for many years and she has a principal broker's license. She started the agency and was its only employee for a period of time.

At the outset, Walnut Hill represented only buyers in real estate transactions. It has since expanded its scope of operations and is now considered to be "full service," meaning that it represents both buyers and sellers. Walnut Hill also now provides property maintenance services.

Walnut Hill has also hired additional agents over time, including defendant Robecca Haskell. Ms. Sanford and Ms. Haskell first met each other in 2001 when Ms. Haskell bought a house that had been listed for sale by Ms. Sanford. (Ms. Sanford was a Remax agent at that time.)

About five years later, Ms. Haskell was seeking employment as a real estate agent (she had her real estate license by that time) and was referred by a mutual colleague to Ms. Sanford, who had since started Walnut Hill. Ms. Sanford and Ms. Haskell met and discussed job opportunities, and Ms. Haskell eventually started working for Walnut Hill in late November or early December 2006.

When Ms. Sanford started working for Walnut Hill, the business was located in Springfield at the Walnut Hill Farm. Ms. Haskell worked primarily out of her own home

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in Chester. She had a written employment contract which provided that she would receive 50% of the buyers' commission at first, although percentage would increase as her sales increased.

Things went well between Walnut Hill and Ms. Haskell during 2007. Ms. Sanford gave her leads on potential buyers in order to give Ms. Haskell business and to assist in her training. For her part, Ms. Haskell met her contractual expectations; she worked seven days per week and closed a considerable number of properties. Ms. Haskell says that she made about \$90,000 in gross commissions during 2007, for which she received about \$55,000. Both parties seemed happy with the relationship.

During the spring of 2008, Ms. Sanford began implementing a number of changes to the real estate agency in order to increase business. She and her husband made plans to move the office to Ludlow and decided that the new office should stay open longer hours. This made it necessary for the agents to spend time in the office putting in "floor time." Ms. Sanford also decided to expand beyond a buyer's agency and to begin to offer listing services and property-management services. She furthermore hired an additional agent, Amy Perry, who started working at Walnut Hill when it opened in Ludlow in March 2008. As discussed in more detail below, all of these changes became a source of some disagreement between the parties.

Ms. Haskell signed a new employment contract with Walnut Hill on February 24, 2008, which was shortly after the decision to move was made but before the move actually occurred. (P. Ex. 1.) At the time she signed the contract, Ms. Haskell was aware of the plans to move the office, to put in floor time, and to expand beyond a buyer's agency.

The written contract was prepared by Ms. Sanford on behalf of Walnut Hill, and although it is not a paradigm of clarity, it clearly provides for an employment relationship of at least one year. The contract also specifies that Ms. Haskell was required to make at least \$48,000 in annual commissions in order to continue employment. Ms. Haskell was concerned because this was approximately double the requirement of her 2007 contract, but she signed the contract anyway.

The contract also allowed Ms. Sanford to receive commission advances in order to ensure an income flow. The agreement was that Ms. Haskell could ask for an advance of \$2,000 per month on the fifteenth day of any month in which she had not already earned \$2,000 in commissions. The advances were to be repaid out of any subsequently-earned commissions, and there was a cap on total advances of \$12,000 at any one time. The agreement required repayment of any advances upon termination.

The contract also somewhat addressed the need for additional floor time. It provided that "[f]loor time coverage to be agreed upon by all agents actively working in the Ludlow Branch." (P. Ex. 1.) However, the contract did not specify how much floor time was expected from each agent, or when the floor time would need to be taken.

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Ms. Haskell did a lot of extra work in helping to set up the Ludlow office. The employment contract contemplated this and called for her to be paid \$1,500 for this work.

Ms. Sanford claims that Ms. Haskell was resistant to the business changes that were made in the spring of 2008. For example, Ms. Sanford contends that Ms. Haskell wanted to keep working out of her house and did not want to put in floor time, and that Ms. Haskell was also upset about not getting the same number of buyer leads as before. Ms. Sanford says that this was because she was giving buyer leads to Ms. Perry, since Ms. Perry was the one working on the floor. On the whole, Ms. Sanford says that Ms. Haskell was sharing her unhappiness with anyone who would listen and therefore creating a negative working atmosphere in the office.

Ms. Haskell denies having a negative attitude or causing problems in the workplace. She admits that she objected to having fixed hours for floor time but denies objecting to floor time in general. She also admits that she is more comfortable working with buyers than with sellers, and that she felt that Walnut Hill should not have expanded into a full-service agency because this jeopardized existing agreements with buyers.

Ms. Haskell took another job with a local attorney (Richard Bowen) shortly after the Ludlow office opened, and the position started sometime between April 1st and May 15th. It appears that Ms. Sanford was aware of this employment and did not object to it, although the extent to which this employment may have impacted Ms. Haskell's ability to put in floor time is not clear. Ms. Haskell claims that she was meeting her floor time responsibilities and was not refusing to share in floor time.

There were meetings about floor time expectations. At first, fourteen hours per week were expected from each agent. Later, the expectation was increased to 24 hours per week. Ms. Sanford and Ms. Perry claim that this was agreed to at a meeting which Ms. Haskell attended, but Ms. Haskell denies that she was present at any such meeting.

In any event, floor time expectations were never reduced to writing or made part of the employment contract. Although Ms. Sanford may have desired that each agent be obligated to put in 24 hours of floor time each week, she did not make this part of the employment contract. The obligation remained to perform floor time as mutually agreed.

Nevertheless, Ms. Perry says that Ms. Haskell was not covering all her floor time and was unhappy about having to do it. Ms. Perry told Ms. Sanford about Ms. Haskell's displeasure sometime in early to mid June 2008. Ms. Sanford never spoke directly with Ms. Haskell concerning attitude.

In early June 2008, Ms. Haskell told Ms. Sanford that she would need to be out for a period of time (approximately June through September) due to a medical problem. Ms. Sanford had been aware of the medical issue in general terms for approximately a year prior to this, and was supportive of the request for leave. There has been no suggestion that Ms. Haskell was dismissed because she needed medical leave.

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The parties exchanged a series of emails in early June in which Ms. Haskell expressed concern about her ability to repay the commission advances and sought to renegotiate the employment contract. (P. Ex. 3.) Ms. Sanford did not agree to the proposals, but rather responded on June 11th by assuring Ms. Haskell that she could repay the advances "through commissions earned as a buyer agent, once the market is better and you are feeling well and focused." (D. Ex. I.) Ms. Sanford also suggested that a monthly repayment plan could be arranged, but reiterated that "[t]he only thing we'd like to see is you acquiring new clients and selling property to earn commissions." (D. Ex. I.)

In other words, the June 11th email expressed Ms. Sanford's belief that if Ms. Haskell returned to work in September, she would be able to earn commissions in an amount that was at least equivalent to the advances she had already received. At the time, Ms. Haskell had taken four advances worth \$8,000 and was also obligated to repay some realtor dues and phone bills that were her responsibility but that Walnut Hill had repaid. She was also entitled to a credit for \$1,500 for her help in setting up the Ludlow office. It was undisputed at trial that the balance of sums was \$6,713.14. (P. Ex. 10.)

Two weeks later, on June 26th, the parties exchanged some emails concerning the potential listing of Ms. Haskell's house, as well as other issues. There was no suggestion in these emails that Walnut Hill was unhappy with Ms. Haskell's job performance or that Ms. Haskell would be unable to return to work once her medical problems had been addressed.

Two days later, on June 28th, Ms. Sanford decided to terminate Ms. Haskell. The stated reason at trial was that Ms. Sanford happened to look at the real estate licenses on the office wall and realized that Ms. Haskell's license had expired at the end of May. Ms. Sanford claims that she called Ms. Haskell just before lunch but was unable to reach her. She left a message on Ms. Haskell's cell phone.

Ms. Sanford then sent an email to Ms. Haskell notifying her of her termination. (P. Ex. 7.) This was followed several days later by a written letter of termination dated June 30th, 2008. (P. Ex. 8.) Neither document provides a reason for the termination. Instead, the documents merely state that Walnut Hill felt that it was no longer in its best interests to continue the relationship. Ms. Sanford requested that Ms. Haskell prepare a promissory note for the \$6,713.14 owed to Walnut Hill. Ms. Haskell has not made any payments towards this alleged debt.

The actual reason for Ms. Haskell's termination was not established at trial. It was clear, however, that the sudden and chance discovery of the lapsed real estate license was not the real reason for the termination. It is not credible that a two-year employee would be discharged immediately and without any discussion on the basis of the discovery of a lapsed license, especially where the employee was on medical leave at the time of the discovery and the steps necessary for reinstatement had not been explored. (It may have been only payment of a \$25 penalty.) The discovery of the lapsed license was

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convenient; it was not the real reason why Ms. Haskell was discharged suddenly and without discussion.

At the same time, Ms. Haskell's version of the events surrounding the lapsed license was equally incredible. She testified that he had a discussion with the Vermont Real Estate Commission on May 29, 2008, in which she expressed her concern that she might not be able to get her license renewal in on time, i.e., by June 1st. She claims that she was considering driving the renewal up to Montpelier but was assured that it would likely get there on time if she mailed it that day.

Despite her concerns, however, Ms. Haskell did not mail the renewal herself. Instead, she says that she left it on the desk at Walnut Hill for someone else to mail, and that for whatever reason, it never made it to the Real Estate Commission.

It is inconsistent to have been concerned enough about the timeliness of the renewal to have considered driving from Ludlow to Montpelier to deliver the renewal in person, but then to have left it to chance that someone else would mail the letter in a timely fashion. Furthermore, it does not appear that Ms. Haskell ever followed up by calling the Commission regarding her license even after she did not receive the renewed license for nearly a month. (She had been assured that the process would take 48 hours.) The license renewal dated May 29, 2008, and the check for the renewal fee, mistakenly dated May 30, 2008, are not independently verified and, after the events of June 28th, become entirely self-serving.

In any event, Ms. Haskell claims that her discharge came as a complete surprise. Certainly, although there was evidence of friction on the floor time issue, there is nothing in the documents that reveals any indication that a discharge was being contemplated at any time prior to June 28th.

Looking to the employment agreement, there was a provision that allowed termination by either party if the commissions requirement was not met. Under the circumstances presented here, there was no way of knowing whether commissions would have been met for 2008 because Ms. Haskell was terminated halfway through the year. The commissions clause does not provide a basis for the termination.

Likewise, although there were disagreements about floor time, the contract did not support termination based on the evidence presented here. The contract itself contained only vague requirements regarding floor time (that the agents would agree on it later) and there were no provisions providing for the discharge of unhappy employees or those creating a negative working atmosphere. The evidence did not establish that Ms. Haskell failed to carry out or attempt to carry out her contractual obligations in good faith.

Finally, as mentioned above, the allegations concerning the lapsed license were not stated as the reason for the termination in the June 28th email or the June 30th letter. Instead, neither document provided a reason for the termination. In short, the decision to

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terminate Ms. Haskell appears to have been made rapidly, and it has not been satisfactorily explained.

On the question of damages, the evidence showed that Ms. Haskell was the listing agent on a property sale involving Apron Strings at the time of her termination. That sale closed during the summer of 2007 sometime after Ms. Haskell's discharge, and she would have been entitled to a commission of approximately \$1,300 if she had been a licensed agent at the time. Ms. Sanford claims that she did not apply the commission to Ms. Haskell's debt because of the licensure problem.

It becomes speculative to venture down the path of predicting whether other actual sales would have occurred had Ms. Haskell stayed on as a real estate agent. For example, there was a real estate purchase by one Jimetty who had been working with Ms. Haskell, but the sale was made under a new buyer's agreement with another Walnut Hill agent (Kelly Martell) and not under the agreement made by Ms. Haskell. It is simply speculative whether Jimetty would have purchased the property had he continued to work with Ms. Haskell.

At the same time, it is clear that the parties expected Ms. Haskell to earn at least \$6,713.14 in commissions between her return from medical leave in September and the end of the year. This is shown by the June 11th email discussed above, in which Ms. Sanford expressed confidence that Ms. Haskell could repay her advances "through commissions earned as a buyer agent, once the market is better and you are feeling well and focused." (D. Ex. I.) Ms. Sanford would not have asked for the advances to be repaid through earned commissions if she did not expect Ms. Haskell would be able to earn at least that amount.

Finally, after the termination, Ms. Haskell worked part-time at a ski shop earning \$12 per hour during the winter of 2008-2009. She did not establish the total amount she earned or the number of hours she worked.

Conclusions of Law

In the complaint, Walnut Hill seeks repayment of the commission advances and certain phone bills under theories of breach of contract and unjust enrichment. Ms. Haskell denied the allegations in the complaint and filed a counterclaim for wrongful discharge, seeking damages based upon lost earning opportunities and other incidental expenses. Since the question of why the termination occurred in the first place is the thread that unravels the case, the court begins by addressing the counterclaim for wrongful discharge.

One of the threshold disputes at trial was whether Ms. Haskell was an at-will employee or whether her employment was instead governed by a written employment agreement for a definite term. This question is important because at-will employees "may be discharged at any time with or without cause," whereas an employment contract for a definite term "may not be terminated by the employer before the expiration of that

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term except for just cause.” *Sarvis v. Vermont State Colleges*, 172 Vt. 76, 79 (2001); *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 23 (1995).

It was undisputed at trial that a written employment contract governed the relationship between the parties, and although the written contract was not a model of clarity in many respects, it was clear enough that the employment relationship was supposed to last for a minimum of one year. Continuation of the employment relationship beyond one year required Ms. Haskell to meet a performance condition (\$48,000 in commissions during the calendar year) or further agreement of the parties. As such, this was a written employment contract for a definite term of one year, and the real estate agency was not permitted to terminate the contract prior to the expiration of the definite term in the absence of just cause. *Sarvis*, 172 Vt. at 79.

The concept of “just cause” means “some substantial shortcoming detrimental to the employer’s interests, which the law and a sound public opinion recognize as a good cause for [the employee’s] dismissal.” *Dulude v. Fletcher Allen Health Care, Inc.*, 174 Vt. 74, 80 (2002) (internal quotations omitted). As *Dulude* further explains:

The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. To be upheld, discharge for just cause must meet two criteria of reasonableness: one, that it is reasonable to discharge the employee because of certain conduct, and the other, that the discharge had fair notice, express or fairly implied, that such conduct would be grounds for discharge.

Id.

In this case, the credible evidence did not show that the real estate agency acted reasonably in discharging Ms. Haskell halfway through the employment term. Among the four reasons that the agency proffered to explain the discharge, none of them were the real reason for the discharge, and moreover, none amounted to just cause for termination.

On the explanation involving floor time and the disputes surrounding floor time, the credible evidence presented at trial established that Ms. Haskell spent at least some time on the floor, even though it was not as much time as Ms. Sanford would have liked. To the extent that Ms. Sanford had expectations regarding specific numbers of hours on the floor, those expectations were never reduced to writing or made part of the employment agreement. The evidence did not establish that the agents, including Ms. Haskell, all agreed to a specific amount of time on the floor. Nor did the evidence establish that Ms. Haskell failed to act in good faith with respect to floor time. It follows that, in the absence of an agreement to work a specific number of hours or proof that Ms. Haskell failed to act in good faith, there was not cause to terminate Ms. Haskell based on the number of hours she spent on the floor.

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Likewise, the allegations about complaints and unhappiness did not rise to the level of misconduct warranting termination without discussion or prior notice. There was no indication that the parties discussed the workplace atmosphere with each other prior to June 28th, and there was no evidence in the June communications between the parties that termination on the basis of discord was imminent. In short, although the evidence showed friction and disagreement between various agents in the Ludlow office, it did not show that "the employee's conduct was egregious enough that the discharge was reasonable." *Sarvis*, 172 Vt. at 79-80 (citation omitted).

As discussed in more detail above, the lapsed real estate license also was not the real reason for the discharge, nor did it amount to just cause for termination. The license was not mentioned by Ms. Sanford in either the June 28th email or the June 30th termination letter, which is not consistent with a claim that the lapsed license was so problematic that immediate termination without any further discussion was necessary. Furthermore, given that no one explored the steps necessary for reinstatement of the license, the court is not persuaded that the lapsed license rose to the level of just cause for termination.

Finally, the employment contract does not support the suggestion that Ms. Haskell's termination was based on a failure to earn minimum commissions. Ms. Haskell was discharged in June, and thus it cannot be said with certainty whether she would or would not have met the performance conditions in the contract of earning \$48,000 in commissions during the calendar year.

For these reasons, the court concludes that Ms. Haskell has proven her claim for breach of contract: that Walnut Hill wrongfully discharged her before the end of her definite term of employment without having an adequate reason for doing so. The court therefore addresses the question of damages for the wrongful discharge.

Ms. Haskell seeks recovery of the commissions she would have earned had she been permitted to remain on as a real estate agent for the remainder of the calendar year. As discussed in more detail above, the evidence established that the parties themselves expected Ms. Haskell to be able to earn at least \$6,713.14 in commissions after her return from medical leave and before the end of the year.

It becomes speculative to consider damages beyond that amount. The evidence showed that Ms. Haskell was entitled to the \$1,300 commission from the Apron Springs sale, but there is no reason why this commission should not be considered as part of the commissions that Ms. Haskell was expected to earn by the end of the year. Nor did the evidence show that the Jimetty sale or other sales were reasonably certain to occur, or that if the sales did occur that the commissions would exceed the amount of the advances. See *Haynes v. Golub Corp.*, 166 Vt. 228, 238 (1997) (explaining that the measure of damages in employment actions must be supported by the evidence and not speculative). For these reasons, the court finds the amount of the commission advances (\$6,713.14) to be the measure of damages that was supported by the evidence presented at trial. Ms. Haskell is entitled to keep the advances as compensation for lost earning opportunities.

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It follows that Walnut Hill has not proven its claim for breach of the employment contract or unjust enrichment based on a failure to repay the advances. Ms. Haskell has proven that she is entitled to keep the money. Since the money is rightly hers, it is neither unjust nor a contractual breach for her to keep it.

The final judgment in this case will be that Ms. Haskell has proven her claim for wrongful discharge but that her damages are \$0. This reflects the fact that she has proven damages in the amount of the commission advances she already received. There is no need for any further money to change hands as a result of the judgment.

ORDER

Judgment is entered for defendant Rebecca Haskell on the claims set forth in plaintiff Walnut Hill Realty LLC's complaint, and the plaintiff shall take nothing. Judgment is entered for defendant Rebecca Haskell on the counterclaim for wrongful discharge, but she has not proven entitlement to recover any damages beyond that amount already paid. Defendant shall accordingly take nothing further on the counterclaim.

Dated at Woodstock, Vermont this 20 day of November, 2009.



Hon. Harold E. Eaton, Jr.
Superior Court Judge

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