

STATE OF VERMONT
WINDSOR COUNTY, SS.

JAMES DAVID GILMER,
Plaintiff

v.

NORMAN FAUTEUX and
LAND EAST CONSTRUCTION CORPORATION,
Defendants

WINDSOR SUPERIOR COURT

DOCKET NO. S315-95 WrC

DECISION AND ORDER

This matter is before the court for a decision on defendants' motion for judgment as a matter of law, and on the merits of the case. The court held a hearing on June 12, 1997. Attorney Ernest P. Sachs represents the plaintiff. Attorney Peter M. Flanagan represents the defendants. At the conclusion of the plaintiff's case, defendants moved for a judgment as a matter of law. The court deferred ruling on the motion at that time. As set forth below, the plaintiff has introduced evidence sufficient to support a claim as a matter of law, and the defendants' motion is accordingly denied.

FINDINGS OF FACT

1. Plaintiff James David Gilmer (Gilmer) is a resident of Lebanon, New Hampshire. He is a real estate broker licensed in Vermont and in New Hampshire.
2. Defendant Norman Fauteux (Fauteux) is a resident of Epsom, New Hampshire. At pertinent times he has acted as an agent for defendant Land East Construction Corporation. At pertinent times Rob Court has acted as an employee and agent for Norman Fauteux.
3. At pertinent times prior to September 20, 1995, defendant Land East Construction Corporation (Land East) was a corporation doing business in Vermont, and owning a parcel of real property known as the North Hartland Dry Kiln (NHDK) property and located on Depot Street in North Hartland, Vermont.
4. In December of 1991, the Windsor County Superior Court issued a Final Order of Divorce in the case Lorraine K. Davis v. Merrill G. Davis, S062-90 WrFd. At that time Merrill G. Davis was

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a principal owner of Land East.

5. Paragraph (6) of the Davis v. Davis divorce decree contains the following provision:

(6) Defendant Merrill G. Davis shall transfer to Plaintiff Lorraine K. Davis one-half of his interest in any stock or other ownership interest in any corporation or partnership including, without limitation, Atkinson-Davis Corporation, Land East Corporation, Connecticut Valley Equipment, Inc., and Hartland Dry Kiln and Milling, Inc., and he shall do so immediately. Defendant Merrill Davis shall promptly transfer control of all said corporations or partnerships to Norman Fauteau of Epson, New Hampshire (or if he is unavailable or unwilling to serve, then to an individual whom said Fauteau appoints) for the purpose of liquidating all said corporations or partnerships, within three years unless the Internal Revenue Service requires a shorter period in which case the shorter period shall be used. After all corporations or partnerships have been liquidated and creditors paid, the net proceeds shall be divided between the parties equally, and such division of net proceeds may begin on a dollar-for-dollar basis as soon as there are net proceeds to divide.

6. Defendant Norman Fauteux (Fauteux) is the "Norman Fauteau" referenced in paragraph (6) of the Davis divorce decree.

7. Pursuant to the Davis divorce decree, Fauteux began to liquidate the Davis assets. He sometimes referred to himself as "trustee," and he signed documents on behalf of Land East in that capacity. The assets to be liquidated included the NHDK property.

8. Fauteux did not immediately engage the services of a real estate broker. Instead, he proceeded to sell some of the assets on his own. His employee, Rob Court, did the bulk of the work of researching the properties and locating buyers. As a result, Fauteux sold 18 properties without the services of a broker. However, he did not succeed in selling all the assets on his own.

9. After a period of selling the assets on his own, Fauteux engaged the services of Gilmer, a real estate broker whom he had met sometime during 1989 or 1990, to help with the properties that were harder to sell.

10. During much of 1992 through 1995, Gilmer provided real estate services for Fauteux, assisting him with liquidation of the Davis assets. During that time, Gilmer had frequent contact with Fauteux, as well as with Fauteux's employee Rob Court and Fauteux's attorney Peter Flanagan. When

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Gilmer and Fauteux first began their business relationship, Rob Court showed Gilmer the properties and turned over the information he had developed on his own about the properties.

11. The NHDK property was one of the many listed parcels. The asking price for the NHDK property was \$1,000,000.

12. Fauteux had not succeeded in selling the NHDK property prior to listing it with Gilmer in 1992. It was a difficult property to sell, in part because it contained underground tanks which gave rise to environmental concerns. At times Fauteux referred to the property as "The Great White Elephant."

13. Gilmer and Fauteux had listing agreements with respect to several parcels, including the NHDK property. Between 1992 and 1995, they succeeded in selling approximately 15 properties in 10 to 12 transactions. Gilmer received commission payments for parcels that were sold, but the NHDK property remained unsold.

14. In September of 1992, Fauteux executed an open, or non-exclusive, listing agreement with Gilmer concerning the sale of the NHDK property. Under the terms of the listing, Fauteux agreed to pay Gilmer a commission if Gilmer procured a buyer. By its terms, the listing agreement was to expire by the end of September 1993. The NHDK property was not sold by September of 1993.

15. In September of 1993, Fauteux executed a renewal listing agreement with Gilmer concerning the sale of the NHDK property. By its terms, this second listing agreement was to expire by the end of September 1994. The NHDK property was not sold by September of 1994.

16. Fauteux signed the above agreements as Trustee for Land East Corporation, which was incorrectly identified in the first agreement as Atkinson Davis Corp.

17. The above-described agreements listed the property at a price of \$1,000,000 and provided for a commission on the following terms: 10% on the first \$500,000, 5% on any amount over \$500,000.

18. The above-described listing agreements were non-exclusive. If Fauteux were to sell the property independently of any efforts by Gilmer, then Gilmer would not be entitled to any commission. This happened with other properties that Fauteux had listed with Gilmer. Specifically,

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when Merrill Davis himself bought a sawmill property from Fauteux as trustee, Gilmer received no commission.

19. Immediately after the first listing agreement of September 1992, Gilmer identified two potential buyers for the NHDK property. In Gilmer's view the most promising buyer was the Cersosimo Lumber Company (Cersosimo) of Brattleboro, Vermont. Gilmer believed that Cersosimo was the primary candidate to buy the property, because of the size and nature of its business, and because of the proximity of this kiln to its sawmills. Fauteux did not want to be involved in any transaction with the second prospect Gilmer identified, because of prior bad business dealings, and he told Gilmer not to contact that other prospect.

20. Gilmer contacted Cersosimo and let the lumber company know that the dry kiln property was for sale at an asking price of \$1,000,000. Gilmer does not remember with whom he spoke, but Cersosimo responded that it was not interested in purchasing the property. During the two years between September of 1992 and September of 1994, Gilmer occasionally made contact with Cersosimo, but nobody from Cersosimo expressed any interest in buying the property.

21. At the end of September 1994, Gilmer's listing agreement expired, and he asked Fauteux to execute another renewal agreement. Fauteux indicated that he was reluctant to sign an additional renewal agreement. He explained to Gilmer that he was unsure whether or not his authority as liquidating agent would extend beyond December of 1994 (*i.e.* three years following the date of the Davis divorce decree). Also, the possibility remained that Merrill Davis himself would buy the property. If that happened, Gilmer would not be paid a commission.

22. Fauteux asked Gilmer to continue working on finding a buyer for the NHDK property. When Gilmer repeated his request for a signed listing agreement, since a written agreement is a prerequisite to a commission under the real estate rules, Fauteux responded: "Don't worry, if there's a buyer you'll be paid." Fauteux frequently told Gilmer that he would honor his agreements with Gilmer even in the absence of a current written contract. Fauteux also told Gilmer that if he were re-appointed as liquidating agent for the Davis assets, he would sign a new listing agreement with Gilmer.

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23. Fauteux had a general practice of doing business orally and not engaging in written correspondence or paying attention to written agreements. In the course of dealings between Gilmer and Fauteux, there were occasions when Gilmer negotiated sales of property based on oral agreements with Fauteux. On occasion, when a sale was concluded, Fauteux would execute a listing agreement when he paid Gilmer the anticipated commission, so Gilmer would have a listing agreement on file to support his commission.

24. During the fall of 1994, Gilmer continued to provide services for Fauteux. Gilmer's services included a continuation of his efforts to find a buyer for the NHDK property.

25. During the fall of 1994, Gilmer believed that defendants would pay him a commission if he succeeded in selling the NHDK property, and based on his substantial business relations with Fauteux over the two prior years, this was a reasonable belief.

26. During the fall of 1994, Gilmer and Fauteux had cause to be optimistic about the prospects for selling the NHDK property. Testing in August of 1994 had brought some resolution of the environmental concerns arising from the presence of the underground storage tanks, and the property became more marketable.

27. In October of 1994, Gilmer again contacted Cersosimo to discuss the availability of the NHDK property. He spoke with Jeffrey Morse on at least two occasions. One time Morse returned a phone call to Gilmer. Gilmer interpreted Morse's call as an indication that Cersosimo might have become interested in pursuing the purchase. This was the first time that Cersosimo had shown any interest, although Gilmer had made previous contacts with the company.

28. Morse, who is General Manager of Cersosimo Lumber Company, was aware that Gilmer was working on the sale of the NHDK property as a broker.

29. From the fall of 1994 through January of 1995, Gilmer met several times with Cliff Allard about a sale of the property.

30. On January 13, 1995, Fauteux told Gilmer that the asking price for the NHDK property would be reduced from \$1,000,000 to \$750,000.

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31. On January 13, 1995, when Gilmer learned from Fauteux that the asking price would be reduced, he called Cersosimo and left a message for Jeffrey Morse, informing him that the NHDK property would be available for \$750,000. At that time Gilmer did not know whether or not Cersosimo would be interested in buying the property at the reduced price. At no time did Gilmer mail Cersosimo any information about the NHDK property.

32. Cliff Allard's attorney contacted Gilmer about putting together a deal for a sale at \$650,000. Gilmer informed Fauteux, who asked him to try to keep the deal going and to represent that Fauteux was still the trustee (although his authority had expired). Fauteux then told Gilmer that, if the property were sold, he would be paid on the same terms as in the expired listing agreements.

33. For the next two weeks, Gilmer worked with Allard on a possible purchase. Allard made an offer of \$650,000, but then Allard decided not to buy and called the negotiations off.

34. During March of 1995, Cliff Allard called Gilmer and told him to expect a phone call from Rob Brewer. Gilmer promptly informed Fauteux of Brewer's interest. Brewer was a former employee of Cersosimo, and he knew how to operate a dry kiln. He did not want his identity as a potential buyer known, and he arranged for inquiries to be made on his behalf by Scott Lake, who did not disclose Brewer's identity. Lake visited the NHDK property on March 28, 1995. When Lake asked who would be in a position to discuss a sale of the property, Frank Haley, who was operating the kiln, told him to contact Norman Fauteux.

35. Lake called Fauteux, and the two of them discussed a possible purchase. Later Lake received a return phone call from Rob Court, who told Lake to contact Gilmer, explaining that Gilmer was handling the sale of the property.

36. On March 30, 1995, Lake began discussing a possible purchase with Gilmer. Fifteen minutes later, Brewer called Gilmer to continue the discussion, and requested that the negotiations and Brewer's identity be kept confidential.

37. Gilmer and Fauteux began serious negotiations with Lake and Brewer. The parties came to an agreement as to general terms and price, and they exchanged several drafts of purchase and sales

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agreements.

38. On May 22, 1995, after Gilmer gave Fauteux the latest draft of a purchase and sale agreement from Brewer and Lake, Fauteux told Gilmer that he expected to be reappointed as liquidating agent for the Davis assets. That day Gilmer hand-delivered a new listing agreement concerning the NHDK property to Fauteux's office. The terms were identical to the prior listing agreements, except for the reduction in asking price. Fauteux contacted Lorraine Davis's agent, and after such consultation, agreed with Gilmer that if Lake and Brewer were to purchase the property for approximately \$650,000, then Gilmer would receive a commission on the sale. Gilmer assumed Fauteux had signed the listing agreement. In the past, it was Rob Court who had actually put the copy of the signed listing agreement in the mail to Gilmer, as Fauteux was not attentive to paperwork. Gilmer continued to work with Brewer and Lake on the terms of a sale.

39. In June of 1995, Fauteux received a telephone call from a Tim Hanson, expressing interest in a possible purchase of the NHDK property. Hanson explained that he represented another party, but he declined to reveal the identity of the interested party.

40. Fauteux and his employee Rob Court were very curious to learn more about this mystery buyer. They traced the telephone call from Hanson and ascertained that the call had originated from Malone, New York, which is located near the border between the United States and Canada.

41. Fauteux called Gilmer and asked whether he had had any dealings with Tim Hanson or anyone from the Malone area. Gilmer told Fauteux that he did not know anything about Tim Hanson, and that he was not aware of any potential buyer from Malone, New York, or of any potential buyer from Canada. Fauteux and Gilmer dubbed the undisclosed principal of Tim Hanson the "mystery buyer," and discussed whether it might be a buyer procured by Gilmer who was trying to do an end run around Gilmer.

42. Fauteux believed from Tim Hanson that the mystery buyer would visit the property on July 13, 1995.

43. In late June and early July, Lake and Brewer continued working with Gilmer on buying

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the property, and they put together another proposed purchase and sale agreement. Fauteux asked Gilmer to review the proposal and indicated that he would give it to Peter Flanagan for attorney review only after Gilmer had reviewed it, in an attempt to minimize attorney costs.

44. Gilmer reviewed the Lake and Brewer proposal and provided Fauteux with written comments. Fauteux and Gilmer discussed the terms.

45. By this time, in anticipation of purchasing the kiln, Brewer and Lake were soliciting business from among Cersosimo's customers, and were attempting to line up business for the North Hartland Dry Kiln under Brewer's ownership.

46. Unbeknownst to Gilmer, Fauteux, or Court, the mystery buyer was Cersosimo Lumber Company. Tim Hanson was a Cersosimo employee whose job was to buy and sell properties for the company.

47. On Monday, July 3, 1995, a day when many businesses were not working, Cersosimo company president Dominic Cersosimo made an unannounced visit to the NHDK facility with his general manager, presumably Jeffrey Morse. Mr. Cersosimo had been following the efforts to sell the kiln for many months through his contacts in the industry. He knew that the sellers had received interest in the purchase from Allard but that that sale had fallen through, and that there was current activity with Brewer. He probably knew that Brewer was soliciting business from his customers. He definitely knew that a kiln owned and operated by Brewer would compete with his own business, which also operated several kilns. He looked around the kiln, but the only person he talked to at the kiln that day was Ken Phillips, the maintenance man at the facility, who told him that the property was still available for sale, and that he should talk to Frank Haley.

48. On Wednesday, July 5, Mr. Cersosimo again visited the NHDK property, without contacting Gilmer or anyone else in advance, and talked to Frank Haley, who was currently leasing and operating the kiln. Mr. Cersosimo expressed interest in a possible purchase. Frank Haley told him to contact Norman Fauteux. Mr. Cersosimo was not told that Gilmer was handling the sale, nor did he see any signs at the property directing interested parties to contact Gilmer. After this visit,

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Mr. Cersosimo told his general manager Jeffrey Morse to contact Norman Fauteux and try to buy the property.

49. On Friday, July 14, 1995, Gilmer visited the NHDK property to find out who the mystery buyer was who was supposed to have visited the property on July 13th. Gilmer spoke with Frank Haley. Gilmer learned that the mystery buyer was Cersosimo, and that representatives from Cersosimo had inspected the property in great detail.

50. When Gilmer learned that Cersosimo was the mystery buyer with an interest in purchasing the NHDK property, Gilmer immediately made two phone calls. First, he called Cersosimo and left a message for Jeffrey Morse, asking why Cersosimo had not contacted him, and asking for a return call to discuss the property. Gilmer did not hear back from Cersosimo.

51. Gilmer's second call was to Fauteux, whom he did not reach. He left messages (1) that the mystery buyer was Cersosimo, (2) that he would continue to work on a possible sale to Lake and Brewer, at a price of \$650,000, and (3) that he would call Fauteux again on Monday morning to discuss the status of the sale of the property. He also faxed the most recent version of the Brewer and Lake proposed contract.

52. Over the weekend, someone from Cersosimo made several personal telephone calls to Fauteux at Fauteux's vacation home in Maine. Gilmer had never felt free to do this. No one contacted Gilmer or told him about those calls.

53. On Monday morning, July 17, 1995, Gilmer called Fauteux, and the two of them had a friendly conversation. At that time there was no purchase and sale agreement in place. Fauteux indicated that he expected to talk with Cersosimo representatives that afternoon at 2:00. They discussed the relative merits of the two prospective purchasers. Gilmer strongly recommended to Fauteux that, if Cersosimo's interest was genuine, then Fauteux should sell the NHDK property to Cersosimo, whom he had identified as the most likely buyer from the beginning, and who was in a superior financial position to follow through with the purchase. Gilmer and Fauteux planned to talk again that Wednesday, as Gilmer was going to be out of town. Gilmer had no doubt that he and

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Fauteux were working in coordination with each other, and that Cersosimo was a buyer Gilmer had developed through his work as a broker.

54. On Monday afternoon, July 17, 1995, Fauteux met with Mr. Cersosimo, and the two of them reached an agreement for a sale of the NHDK property at a price of \$675,000, which was reduced to a fully executed written agreement that afternoon.

55. Jeffrey Morse was aware of Gilmer's contacts with him in October of 1994 and in January of 1995, and perhaps from prior to October of 1994. Jeffrey Morse testified, but gave no explanation of why, when Mr. Cersosimo instructed him in July of 1995 to buy the property, he did not contact Gilmer, or return Gilmer's phone call on Friday, July 14, 1995.

56. On Tuesday, July 18, 1995, Lake and Brewer learned that Cersosimo had contracted to buy the property, and faxed this news to Gilmer, who learned of it from the fax when he returned to his office.

57. On Wednesday, July 19, 1995, Gilmer went to the NHDK property and met with Fauteux's chemist. The two of them reviewed photographs and maps that Gilmer had made. Gilmer still assumed that he was working on behalf of Fauteux as the broker on the deal, and that he would be paid a commission.

58. That same day Gilmer returned to his office and called Fauteux. He tried to reach Fauteux several times. However, contrary to his usual practice, Fauteux did not return the calls.

59. Gilmer called Fauteux's attorney Peter Flanagan. Flanagan informed Gilmer that Fauteux planned to sell the NHDK property to Cersosimo, but that Fauteux did not intend to pay Gilmer a commission for the sale. Fauteux was taking the position that Gilmer had not procured the sale to Cersosimo. Gilmer argued to Flanagan that he had initiated the contacts with Cersosimo. Flanagan suggested that Gilmer speak with Fauteux.

60. That same day Gilmer spoke with Rob Court. Gilmer indicated to Court that he had registered Cersosimo's interest as a buyer. Court responded: "You certainly have. I'll register that with Norm." Court's reference was to Norman Fauteux.

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61. Gilmer continued to call Fauteux, and he managed to speak with him after several attempts. They discussed whether or not Gilmer would be entitled to a commission. Fauteux said that he had asked the Cersosimo representatives about their contacts with Gilmer, and that they had told him they had not heard from Gilmer for a long time, so therefore Fauteux did not consider that Gilmer had procured Cersosimo as a buyer.

62. After Gilmer called Fauteux several times, Fauteux or his representatives told Gilmer not to call Fauteux any more. Fauteux indicated that Gilmer should communicate with him only through his attorney, Peter Flanagan.

63. On July 21, 1995, Gilmer sent Fauteux a letter, expressing his disappointment over Fauteux's decision not to pay the commission. Gilmer explained that he believed he was due a commission as a matter of fairness, although he understood he might not have a legal claim because of the lack of a written listing agreement. At that time he had not contacted a lawyer concerning whether or not he had a legal basis for claiming a commission.

64. In August of 1995, Fauteux informed Gilmer that the sale of NHDK property to Cersosimo was to take place on September 15, 1995, but that Fauteux did not plan to pay any commission to Gilmer based on this sale.

65. On September 20, 1995, Norman Fauteux, as an agent acting on behalf of Land East Corporation and its owners, sold the NHDK property to North Hartland Dry Kilns, Inc., a corporation closely tied to Cersosimo Lumber Company.

66. Gilmer has not received any commission on the sale of the NHDK property.

67. After this court issued an attachment, the sum of \$58,750 was placed in escrow from the sale proceeds pending the outcome of this litigation. The amount of \$58,750 is the amount due under the formula for determining the commission under the listing agreements in effect from September 1992 to September 1994, and under the terms of the renewal listing agreement delivered to Fauteux on May 22, 1995, which Fauteux never signed.

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CONCLUSIONS OF LAW

Issues

This case concerns plaintiff's claim that he is entitled to receive a commission on the September 20, 1995, sale of the NHDK property. Plaintiff contends that he had a valid listing agreement, and that he procured the sale. Defendants dispute both of these elements, arguing (1) that the parties had no written listing agreement at the time and therefore no commission is payable, and (2) that the sale came about independently of plaintiff's efforts. Defendants also argue that Defendant Norman Fauteux should not be held liable as an individual because he acted on behalf of Land East Corporation.

Listing Agreement

Defendants question the existence of any valid listing agreement. The parties had a valid listing agreement covering the time period between September of 1992 and September of 1994. However, they disagree about the enforceability of any agreement that extended beyond the expiration date of the written agreements, which was September 29, 1994.

Vermont law stresses the importance of written agreements. The Rules of the Vermont Real Estate Commission require that the parties execute a written listing or agreement before a broker renders any brokerage services. RVREC Rule 4.7. Moreover, under the rules a broker may receive a commission only if the compensation is provided for in a written agreement signed by both the broker and the client. RVREC Rule 4.12(c).

The Vermont Supreme Court has expressed strong support for the requirement of a written listing agreement, at times stating the listing requirement in broad terms: "In order to recover a commission, a broker must have a written listing agreement 'containing all the ingredients expressly mandated by law under the statute.'" Arjay Properties, Inc. v. Hicks, 143 Vt. 335, 337-38 (1983) (citing and quoting Currier v. Letourneau, 135 Vt. 196, 200 (1977); Green Mountain Realty v. Fish, 133 Vt. 296, 299 (1975)). In Arjay, one of the owners had never signed the listing agreement with the broker. However, the Court has rejected the view that the requirements of the Real Estate

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Commission rules must be technically construed in every respect, or that the broker's right to a commission is necessarily defeated by a defect in the agreement. MacDonald v. Roderick, 158 Vt. 1 (1992). The general rule is that a violation of the rules "with respect to the form or content of a listing agreement will bar recovery of a commission only if the violation somehow taints the agreement or makes its enforcement unfair. That taint will always be found where an agreement is oral because the requirement of a writing ensures that the parties are fully aware of the terms of the agreement." Id. at 7. In MacDonald, although there was a technical violation of the Real Estate Commission rules in the form of a failure to use required language, and in the misstatement of a term, the Court held that there was no effect on the broker's right to recover a commission, because the violation would not make the recovery unfair since there was no nexus between the asserted violation and the dispute between the parties. Id. at 7.

Where an agreement is only oral, in violation of the Real Estate Commission rules, then taint will be found, barring recovery of a commission. The reason is that the requirement of the writing ordinarily ensures that the parties are fully aware, in advance, of the terms of the listing agreement. MacDonald at 7. Nevertheless, the Court has recognized the possibility of exceptions to this bright-line rule: absent a written listing agreement, a commission will be denied "unless there is a reason to except the case from the general rule." Bensen v. Gall, 158 Vt. 106, 110 (1992). In Bensen, the Court did not end its analysis with the statement that there was no right to recovery because there was no written listing agreement. Instead, it did an exhaustive analysis to determine whether the plaintiff broker qualified for a commission on any one of several theories that would have constituted an exception to the general rule. In the end, the Court found no reason to except the case from the general rule, but the reason was that the dispute between the parties was "caused, at least in part, but the absence of clear terms of agreement between the parties at the outset" (id. at 112); which is often the case where there is no written agreement.

The instant case presents a novel issue. There was a written agreement between the parties for two years, and its terms were clear. *Cf.* Bensen at 112. Based on the clear written agreement, the

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parties understood the fundamental terms of the contract, including the identification of the property to be sold, the formula for determining the commission, the fact that the listing was non-exclusive, meaning that Fauteux could sell independently and Gilmer had to register any buyer he worked on with Fauteux, and other standard terms of an open listing agreement. The expiration date was also clear. Although the expiration date passed, the parties' actions and statements provide strong evidence of a mutual intent to extend the expiration date beyond September 29, 1994. This was particularly clear after May 22, 1995, when Fauteux learned that his authority as trustee was continued and he confirmed that Gilmer would be paid if he was responsible for a buyer, and Gilmer delivered a renewal contract to Fauteux with terms that were not only clear and specific, but also identical to the terms that had been in effect for two years.

Although Fauteux never signed the renewal agreement, everything else about his behavior was designed to encourage Gilmer to continue working toward the sale as if the renewal of the listing agreement had been signed. On several occasions Fauteux asked Gilmer to continue working on the sale. Findings 22, 32, 43. Fauteux assured Gilmer that he would be paid a commission if he procured a sale. Findings 22, 32, 38. Fauteux also promised that he would sign a renewal agreement as soon as his own authority was clarified, and then later when his authority was clear, he led Gilmer to believe that he would sign the agreement and mail it to Gilmer. Findings 22, 38. Gilmer also received indirect assurances from Fauteux's assistant Rob Court. Finding 35. Moreover, Gilmer had reason to rely on Fauteux's assurances: Fauteux had a practice of doing business orally, but he also had a history of honoring his oral commitments. Finding 23. Finally, even after the sale took place, and Fauteux decided to deny Gilmer's claim for a commission, Fauteux did not rely on any assertion that there was no listing agreement; at that time he relied upon his argument that Gilmer had not procured the sale. Findings 59 and 61.

Under the circumstances, the only reasonable conclusion is that the parties had a clear agreement that Gilmer would be paid if he procured a sale. It would not be fair to bar Gilmer from receiving a commission merely because the expiration date on the written agreement had passed, or

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because Fauteux delayed, to his own advantage, in signing the renewal agreement while simultaneously assuring Gilmer that it was in effect. This case presents reasons to find an exception to the general rule. Cf. Bensen at 110. The reason is that all the pertinent terms were perfectly clear, having been the terms of a signed written agreement for two years and the terms of an identical unsigned renewal agreement for at least two months. The failure to comply technically with the Real Estate Commission rules in this case does not "taint" the agreement or make its enforcement unfair, because the terms were clear, and there is no nexus between the violation and the dispute between the parties. Cf. MacDonald at 7. The court concludes that the parties had an enforceable listing agreement.

Procurement

The crux of the dispute between the parties is whether or not plaintiff procured the sale to Cersosimo Lumber Company. "It is, of course, axiomatic that plaintiff must show more than incidental relationship to the resulting sale. That it was the procuring cause must be shown." Ellis-Gould Corp. v. Kelly, 134 Vt. 255, 257 (1976). "Although the broker's efforts need not be the sole cause of the sale, it is essential that they dominate the transaction and amount to something more than an incidental or contributing influence." Kelly v. Beaudoin, 131 Vt. 27, 32 (1972) (*quoting, with approval, from Walbridge Agency, Inc. v. Rutland Hospital*, 123 Vt. 149, 154 (1962) (Holden, J., *dissenting*)). "The mere listing of property with one broker or conferring upon him the right to sell does not deprive the owner of the privilege of accomplishing a sale of the property through his own efforts, or those of another broker." Id. at 32-33 (*quoting with approval from Justice Holden's dissent in Walbridge*).

The instant case involves a non-exclusive listing agreement. Gilmer is entitled to receive a commission only if he was the procuring cause of the sale. Id. at 33.

The North Hartland Dry Kiln property is an unusual parcel of real estate, and the market for it is limited. In 1992 there were some environmental concerns about the property. Fauteux had already tried to sell the property for several months, and had not succeeded despite his success with

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independent sales of 18 other properties from the Davis estate. The marketability of the property was so problematic that Fauteux referred to it as "The Great White Elephant." Eventually, in an effort to sell the property, Fauteux engaged the services of real estate broker Gilmer.

In 1992, when Gilmer acquired the listing on the NHDK property, he immediately identified Cersosimo as the primary candidate to purchase the property, because of the relationship between the property as a dry kiln facility, and the nature, location and extent of Cersosimo's business as a lumber company operating several dry kilns. Gilmer told Fauteux about Cersosimo, and he contacted Cersosimo about the availability of the property. During the next two years, Gilmer did not direct his efforts toward trying to sell the property to Cersosimo, because Cersosimo had told him that it was not interested, but he continued to contact Cersosimo periodically about the property. Eventually his efforts bore fruit. During the fall of 1994, Gilmer and Fauteux had reason to be optimistic about the prospects for a sale, because there was some resolution of the environmental concerns about the property. Gilmer again contacted Cersosimo to discuss the availability of the property, and there was at least some indication of progress: Cersosimo General Manager Jeffrey Morse returned Gilmer's phone call to obtain more information.

A few months later, in January of 1995, Fauteux reduced the asking price from \$1,000,000 to \$750,000. Gilmer called Jeffrey Morse at Cersosimo to let him know about the price reduction on January 13, 1995, the day the price reduction occurred. Gilmer did not know whether or not the price reduction would stimulate further interest by Cersosimo, but Jeffrey Morse had previously expressed mild interest in the property. It was reasonable for Gilmer to "work" the Cersosimo possibility given the price reduction, and he did so immediately.

Meanwhile, Gilmer continued to work on selling the property to other potential buyers. Within a short period of time, Cliff Allard came close to a purchase, and then Scott Lake and Rob Brewer began pursuing the property. Although the Allard sale fell through, it is likely that a sale to Brewer would have taken place if Cersosimo had continued to deny any interest. It is also likely that Gilmer's negotiations with other potential buyers, particularly Brewer, served to spark Cersosimo's

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interest.

Eventually Cersosimo became interested, but Cersosimo was not direct about expressing its interest. In June of 1995, Cersosimo initiated contact with the seller by having its representative Tim Hanson call Fauteux, without revealing Cersosimo's identity as the interested party. There was no public revelation of Cersosimo's interest in buying the property until July of 1995, when Cersosimo very quickly came to terms on a purchase and sale agreement by ignoring Gilmer and dealing directly with Fauteux.

It appears that Cersosimo's interest had developed earlier in 1995. Two obvious factors are (1) that the seller had reduced the price significantly, and (2) that other potential purchasers were becoming interested and close to purchase. Gilmer made a point of keeping Cersosimo informed about the price and availability of the property, and Gilmer also was instrumental in cultivating the interest of other potential buyers. To the extent that both of these factors played a role in precipitating the sale to Cersosimo, Gilmer deserves credit for performing his function as broker on the Cersosimo sale. If he had only cultivated other buyers, he could claim no effect on Cersosimo's interest, but by cultivating the other buyers *and* maintaining periodic contact with Cersosimo, he kept alive his role as the broker with whom Cersosimo was supposed to work, and Jeffrey Morse, General Contractor, knew this. It is difficult to identify what more Gilmer could have done with Cersosimo to maintain his role as a broker in a professional manner, given the lack of Cersosimo's responsiveness to his contacts. Cersosimo watched and waited until the time was ripe, and then sought to bypass Gilmer.

In actuality, the sale of the North Hartland Dry Kiln property took years to develop. In order to reach an agreement at an appropriate price, it was necessary to develop interest among several buyers, not just one buyer. Gilmer developed the interest of those several buyers, and he also kept Cersosimo informed of the pertinent developments. Fauteux argues that the sale took place after very brief negotiations between himself and Cersosimo in June and July of 1995, but the surrounding circumstances indicate that there is much more to the story. The efficient negotiations in June and

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July of 1995 would not have been possible without the groundwork laid by Gilmer. Gilmer did his job as broker, and he procured the resulting sale. It seems clear that if Tim Hanson had identified himself as a Cersosimo employee during his phone call from Malone in June 1995, Fauteux would have referred Hanson to Gilmer (as he had done with Brewer three months earlier), and Fauteux would have had his suspicions that the "mystery buyer" was trying to do an end run around Gilmer confirmed. Although it is true that Fauteux and Cersosimo worked out the final details of the sale, the court is left with the impression that Fauteux and Cersosimo acted as two professional entities "attempt[ing] to evade payment of an earned commission." Ellis-Gould Corp. v. Kelly, 134 Vt. 255, 256 (1976). The court concludes that Gilmer earned his commission, and that he is entitled to payment.

Defendants' Liability

When Gilmer performed his brokerage services with respect to the sale of the NHDK property, he acted as an agent for defendant Land East. At all times Fauteux held himself out as a representative for Land East, and he signed the listing agreement as Trustee for Land East. Gilmer's contractual relationship was with Land East. Gilmer acted with the understanding that Fauteux was merely an agent for Land East. Land East has not denied the relationship. At trial one attorney represented both defendants.

Under the circumstances, it is not appropriate to hold Fauteux liable as an individual. The court will enter judgment against Land East Corporation, but not against Norman Fauteux.

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ORDER

Defendants' motion for judgment as a matter of law is DENIED.

Judgment shall enter in favor of Plaintiff James David Gilmer and against Defendant Land East Construction Corporation, in the amount \$58,750 plus interest and costs. Interest shall be calculated from September 20, 1995.

Dated this 20th day of June, 1997.

Mary Miles Teachout

Hon. Mary Miles Teachout,
Presiding Superior Court Judge

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