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# Callies v. O'Neal Appellant's Reply Brief Dckt. 34968

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

RANDY CALLIES, TRICIA CALLIES, CHRISTOPHER PLANINSHEK, DAWN PLANINSHEK and HERON STREET PROPERTIES, LTD, LC.,

Plaintiffs/Appellants,

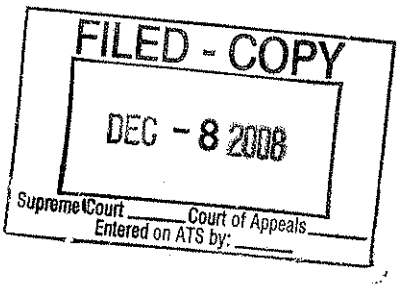
vs.

GEORGE P. O'NEAL; CHARTER BUILDERS, INC., an Idaho Corporation; PHEASANT RUN, LLC; SHAKESPEARE CONDOMINIUMS, LLC, HAMPTON PLACE, LLC; SILVER OAKS, LLC; CBI-BVBI, LLC; FOXBORO, LLC; CRYSTAL BLUE, LLC; and CHARTER POINTE APARTMENTS, LLC,

Defendants/Respondents.

Supreme Court No. 34968

**APPELLANTS' REPLY BRIEF**




Appeal from the District Court of the Fourth Judicial District of

The State of Idaho, in and for the County of Ada

Honorable Kathryn A. Sticklen

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## I. THERE ARE GENUINE ISSUES OF FACT WHICH PRECLUDE SUMMARY JUDGMENT.

While appellants have always conceded that, when the listing agreements were initially signed, they did not include detailed descriptions of the properties to be sold, there are still genuine issues of material fact as to whether the parties supplemented or amended the contracts to provide those descriptions. On page 7 of their brief, respondents assert:

> It is also clear from the record that CBI at no time agreed to add legal descriptions of the Agreements subsequent to their execution.

This claim is predicated on respondents' statement of the facts at R., Vol. II, Ex. 2, paragraphs 9 and 10. However, it ignores the evidence submitted by appellants in opposition to this factual claim. Specifically, Callies testified in her affidavit that, after the brokerage contracts had been signed:

> The legal description of the parameters of the property had been prepared by the project engineer prior to the execution of the Listing Agreement, the final plat recorded on April 11, 2006, and after that date, prior to its renewal and extension on February 28, 2006, the individual legal descriptions for the units were provided by George P. O'Neal and also incorporated within the listing.

R., Exhibits 8 and 9, page 3.

In other words, while the parties knew what property had to be sold at the time that the contracts were executed, specific descriptions of the individual parcels of that property that had to be sold were not available until a later time. When those descriptions became available, they were added to the agreement. If accepted by a jury, this evidence would permit the inference that the original contracts had expressly been supplemented or modified to include those specific descriptions.

Alternatively, Callies also testified in her affidavit that O'Neal and she had followed

the same procedure utilized in the case at bar on a number of earlier projects, including Concord Commons, Boomer, Fenway Park Fourplexes and Townhomes, Pheasant Run, Lake Forest, Hampton Estates and Foxboro. R., Exhibits 8 and 9, page 3. This testimony, if accepted by the jury, would permit the inference that the parties had implicitly supplemented or modified the original agreements by following the course of practice that had successfully been utilized in the previous projects to permit sales of individual parcels within the projects, bring cash into the project and then use that cash to complete it.

Parties are free to amend, vary or modify their contracts, *Silver Syndicate v. Sunshine Mining Co.*, 101 Idaho 226, 611 P.2d 1011 (1979), and consent to modification may be implied from a course of conduct consistent with the asserted modification. *Jones v. Micron Technologies, Inc.*, 129 Idaho 241, 923 P.2d 486 (Ct.App. 1996).

In this connection, it is significant that, in the case at bar, respondents gave no notice that they did not propose to honor the agreement established by the parties' course of practice with each other. It was not until appellants had sold the property that an issue was raised regarding the sufficiency of the original agreements:

> There had not been any issues with the legal description or the seller named for the previous year and half that they had been going under purchase and sale contracts while I had been marketing them. It wasn't until six months after and just before closing the buildings that he claimed the addresses were incorrect and that the wrong seller was named on the listing agreement and purchase and sale contracts.

R., Exhibits 8 and 9, page 4.

Whether the finder of fact would view the supplementation or modification of the original agreements to be an express addition or change to the original agreement as opposed to an implied one, or vice versa, is of no import to the present proceedings. What

is important is that the finder of fact could rationally make either choice, depending upon its perception of the evidence as a whole. It therefore cannot be resolved as a matter of law on summary judgment.

None of the authorities cited by respondents challenges the principle that parties are free to amend their agreements and that such an amendment may be implied through their conduct. Therefore, they are consistent with the foregoing analysis. *White v. Rehn*, 103 Idaho 1, 644 P.2d 323 (1982), is a case involving the transfer of real property, rather than a brokerage agreement, a fact that respondents ignore in their argument to the court. Respondents cite it for the proposition that parol evidence is not admissible to clarify the terms of an agreement which is ambiguous due to a lack of valid legal description. In *White*, Rehn had agreed to sell 960 acres out of a 9,000 acre parcel of land. An earnest money agreement was prepared which contained a description which failed to pinpoint exactly which 960 acres were to be transferred. Under these circumstances, the court concluded that the parol evidence was intended to supply the property description, which it held to violate the statute of frauds. However, the court did not state that parol evidence may never be used:

> Parol evidence may be resorted to for the purpose of identifying the description contained in the writing, with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the particular parties negotiated, and supplying a description thereof which may have been omitted from the writing.

103 Idaho at 3 citing *Allen v. Kitchen*, 16 Idaho 133, 100 P. 1052 (1909).

In the case at bar, the parol evidence is not intended to supply the property descriptions, which were provided by the plats described in Callies' affidavits. Instead, the parol evidence spoke to how those descriptions came to be incorporated into the

brokerage agreement between the parties, which is entirely consistent with the court's remark in *White* that parol evidence may be used to "identify" the description contained in the agreement.

Moreover, *White* does not stand for the proposition that a legal description sufficient to transfer property is required to enforce a contract for commissions due on the sale of that property. The agreement between appellants and respondents identified the projects which were subject to the commission agreement with the understanding that the legal descriptions to the property would be provided at a later date. Nothing in *White* precludes an enforcement of the agreement between Callies and CBI.

Respondents cite *Good v. Hansen*, 110 Idaho 953, 719 P.2d 1213 (Ct.App.1986), for the proposition that a party has the right to rescind an agreement that is unenforceable. In that case, Good had assigned a money judgment to Hansen with the understanding that the proceeds would be used as a down payment for the purchase of Hansen's house. Hansen failed to deliver the deed and Good sought rescission of the agreement for failure of consideration. Hansen's arguments that Good had other remedies besides rescission failed because of the statute of frauds.

In the case at bar, it is undisputed that appellants performed their obligations under the brokerage contracts at issue. The rescission now before this court was therefore not predicated upon a lack of consideration. It was, instead, predicated solely on the statute of frauds, which was not the issue before the court in *Good*, which therefore provides no support for respondents' position in this case.

## II. NEITHER IDAHO CODE §54-2050 *NOR GARNER V. BARTSCHI* SUPPORTS RESPONDENTS' POSITION IN THIS CASE.

Respondents argue that Idaho Code §54-2050 renders the listing agreements unenforceable and further argue that *Garner v. Bartschi*, 139 Idaho 430, 80 P.3d 1031 (2003) supports this conclusion. Neither argument is justified.

Idaho Code §54-2050 requires that brokerage agreements be in writing and that they contain a "legally enforceable description of the property". I. C. §54-2050(1)(b). Respondents read into this language the corollary that the legal description must meet the requirements of Idaho Code §9-503 as opposed to those of Idaho Code §9-508, because Idaho Code §54-2050 is more specific than Idaho Code §9-508. Respondents Brief, p. 12. That, however, is a *non sequitur*. While Idaho Code §54-2050 is indeed more detailed than Idaho Code §9-508, the added detail speaks to matters other than the legal description required by Idaho Code §9-508. There is nothing in Idaho Code §54-2050 that clearly indicates the legislature's intent to alter the interpretation that this court had previously placed upon Idaho Code §9-508. Under those circumstances, the authority cited on pages 15 through 21 of appellants' opening brief is controlling. A "legally enforceable" property description under Idaho Code §9-508 requires only that the descriptions be sufficient to show that there is no misunderstanding between the seller and broker as to the property involved and that the descriptions be sufficient to enable the broker to locate the property, show it and point out its boundaries to prospective purchasers. The same standard is appropriate in this case Idaho Code §54-2050 is *in pari materia* with Idaho Code §9-508. *Matter of Adoption of Chancy*, 126 Idaho 554, 887 P.2d 1061 (1995).

Respondents also read into Idaho Code §54-2050 a requirement that the "legally enforceable description" must be contained in the listing agreement at the time the agreement is executed. There is nothing in the statute which requires, or even addresses, how or when the description must be inserted into the contract. Nothing in the statute precludes the parties from relying upon a number of documents executed at one time, or series of documents incorporated into the agreement over time, if that is how they choose to satisfy the terms of the statute, so long as the description is a part of the agreement when the broker makes her claim for a commission.

Respondents also cite *Garner v. Bartschi*, 179 Idaho 430, 80 P.3d 1031 (2003), in support of their position that Idaho Code §54-2050 requires a legally enforceable description sufficient to transfer property under Idaho Code §9-503. This claim fails, because neither party in *Garner* argued that Idaho Code §9-508 was the controlling statute. Therefore, the court never had occasion to discuss either that statute or *Central Idaho Agency v. Turner*, 92 Idaho 306, 442 P.2d 442 (1968), the primary authority on which appellants rely in asserting that the descriptions in the brokerage agreements were sufficient in this case.

*Garner* is to the case at bar as *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989), was to *Fuller v. Wolters*, 119 Idaho 415, 807 P.2d 633 (1991). In *Griggs*, the court upheld an award of attorney fees in a legal malpractice action under Idaho Code §12-120(3), which provides for attorney fees in any "commercial transaction". Two years later, in another action for legal malpractice, the court held that, although the contract between attorney and client was a commercial transaction, an action for malpractice was properly characterized as a tort claim. For that reason, the court disallowed a recovery of attorney

fees under Idaho Code §12-120(3). The court explained these apparently contradictory conclusions by observing that, in *Griggs*, neither party had presented the issue of whether a malpractice action fell within Idaho Code §12-120(3). By parity of reasoning, *Garner* is not controlling in this case, where appellants have consistently relied upon Idaho Code §9-508 and *Central Idaho Agency v. Turner* throughout the proceedings and where *Garner* does not address that issue.

The application of *Garner* to the instant case is further rendered inapposite due to the circumstances of this case, which are distinguishable from those of *Garner*. In *Garner*, no property was transferred. In the instant case, property descriptions sufficient to satisfy both Idaho Code §9-503 and §9-508 were supplied, and a series of transactions actually closed. The holding in *Garner* therefore does not apply to the facts of this case.

## III. APPELLANTS ARE ENTITLED TO RECOVER UNDER THE DOCTRINES OF PARTIAL PERFORMANCE AND ESTOPPEL.

In the case at bar, the partial performance by appellants necessarily remedied the alleged deficiency asserted by respondents to defeat the claims for commissions. It is undisputed in this case that, on account of appellants' efforts, respondents were able to close a large number of agreements for the purchase and sale of real property. This could not have occurred in the absence of property descriptions that were sufficient to meet the requirements of Idaho Code §9-503. Thus, appellants' performance of their obligations under the brokerage agreements justifies the application of the doctrine of quasi estoppel.

Respondents cite *Weatherhead v. Cooney*, 32 Idaho 127, 180 P.2d 60 (1919), for the proposition that "equitable defenses do not apply" to actions to enforce listing agreements, Respondent's Brief, page 17, claiming that *Garner* mandates the conclusion

that *Central Idaho Agency v. Turner* has been overruled. *Weatherhead* involved an action to recover the value for services rendered in finding a purchaser for mining claims. The case involved a statute similar to §9-508, which required that any contract for the payment of a real estate commission on the sale of a mining claim to be in writing. In *Weatherhead*, there was no writing of any kind to support the claim for the commission. Not surprisingly, the court held that part performance could not take the case out of the statute frauds because to do so would render the statute a nullity.

It is not clear from the opinion in *Weatherhead* whether defendant conceded, as a matter of fact, that there was a brokerage agreement and used the statute of frauds to defeat an otherwise valid claim, or whether the existence of the oral agreement was denied and the statute of frauds was merely the defense on which judgment happened to have been rendered pursuant to defendant's demurrer. Thus, it is not clear whether the plaintiff in *Weatherhead* was simply an officious intermeddler or whether he had any reasonable expectation of being paid for work actually authorized by the defendant.

*Weatherhead* is therefore factually distinguishable from the case at bar, because in this case it is undisputed that there were, in fact, written brokerage agreements between the parties. There can therefore be no doubt, but that respondents agreed that appellants were authorized to sell the property affected by the brokerage contracts. The only alleged shortcoming in the written documents is the absence of the property descriptions at the time that the documents were signed. However, even at that time, the parties involved, the projects to be subject to the agreement, the length of time, the amounts of the commission and all of the other essentials to the contract were clearly in writing. Moreover, viewing the facts in the light most favorable to appellants, the property descriptions were

incorporated into the contract after the signing of the document by express or implied agreement of the parties, thus enabling respondents to close the purchase and sale agreements negotiated by appellants. Thus, the performance of the contracts necessarily remedied the alleged deficiency and the doctrine of quasi estoppel should be applied.

This conclusion is buttressed by *Central Idaho Agency v. Turner*, one of the cases disparaged by respondents as deviating from the *Weatherhead* doctrine. Idaho law in 1968 was not nearly so harsh as it was in 1919, reflected by the fact that this court, in *Central Idaho Agency v. Turner*, overruled inconsistent earlier authority.

The situation in the instant case differs substantially from that in *Lettunich v. Key Bank*, 141 Idaho 362, 109 P.3d 1104 (2005). Lettunich involved Idaho Code §9-505(5) which requires that a promise or commitment to lend money in the principal amount of $50,000.00 or more shall be made in writing or the agreement is invalid. Lettunich had contacted Key Bank for the purpose of obtaining the $500,000.00 guarantee to purchase cattle. Lettunich testified that Key Bank's representative had orally committed to provide the financing in the form of a cattle term loan. Based on that representation, Lettunich purchased over $400,000.00 in cattle. After the purchase, Key Bank advised Lettunich that it could not extend the credit that he needed. The court in Lettunich noted that to be specifically enforceable by the doctrine of part performance, an oral agreement must be complete, definite and certain in all of its material terms or contain provisions which are capable in themselves of being reduced to certainty. The court in that case held:

> Even though it could be inferred that Lettunich partially performed by purchasing cattle at the sale, there is no evidence in the record of a complete and enforceable agreement. For example, there is no indication of the amount of the loan, the interest rate, the disbursement schedule, the terms of repayment, the security for the loan, or the parties' rights after default. While none of these terms

> individually may be determinative, the lack of all of them in this case makes the oral agreement to lend money vague, incomplete and unenforceable. Consequently, the doctrine of part performance does not apply to this case.

*Lettunich* is, in any event, a case of promissory estoppel, rather than quasi estoppel. Respondents gloss over this difference in their analysis of the decision. The fact is, however, that the elements of promissory estoppel are significantly different than those of quasi estoppel. *Compare Gillespie v. Mountain Park Estates, L.L.C.*, 138 Idaho 27, 56 P.3d 1277 (2002), *with City of Sandpoint v. Sandpoint Independent Highway Dist.*, 126 Idaho 145, 879 P.2d 1078 (1994). In *Lettunich*, the case of promissory estoppel, the bank received nothing from Lettunich by reason of its promise. In this case, in which quasi estoppel is involved, respondents received significant benefits from the closing of contracts negotiated by appellants for their benefit.

Respondent's reliance on *Garner* is also misplaced. Garner discussed the concepts of part performance and quasi-estoppel in the context of the attempt to avoid the unjust results of the statute of frauds. The court noted that quasi-estoppel prevents a party from reaping an unconscionable advantage or from imposing an unconscionable disadvantage upon another by changing positions. However, in that case, the court found that the buyer had not suffered an unconscionable disadvantage and that the seller had not obtained any advantage other than remaining on the property, which is where she started in any event. Hence, she had gained nothing from the transaction itself. In the instant case, respondents have been benefitted by the significant profits they received in the sale of the property. Furthermore, appellants have also suffered unconscionable detriments.

While respondents argue that "there is no evidence the record of the funds purportedly expended by the appellants in reliance on the agreements", Respondent's

brief, page 21, this only creates an issue of fact, because the affidavit of Tricia Callies establishes that respondents allowed her and her company to invest substantial amounts of time and effort into the marketing and sale of the properties at issue. Callies testified that she is due commissions of between $235,900.00 and $421,800.00 for the Charter Pointe listing (record, Exhibit 8, paragraph 10) and $546,600.00 for the Silver Oaks listing (record, Exhibit 9, paragraph 14). In addition to having to pass up another opportunities, Callies incurred $97,219.26 as direct costs due to her marketing efforts (record, Exhibit 8, paragraphs 10 and 12, and Exhibit 9, paragraphs 14 and 15).

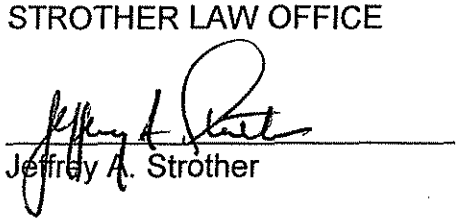
In the instant appeal, there exists a written contract which set forth all of the elements of the contract as between the parties. By their performance of her obligations pursuant to the agreement, appellants remedied the only shortcoming in the contract that has been identified by respondents. Respondents reaped the benefits of appellants' performance and should be estopped, under the circumstances of this case, from reliance upon the statute of frauds to defeat appellants' claim for compensation.

## IV. CONCLUSION

For all the reasons set forth in this document, the court should reverse the summary judgment granted by the district court and remand the case for further proceedings.

DATED this 8th day of December, 2008.

STROTHER LAW OFFICE



Jeffrey A. Strother

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2008, two true and correct copies of the foregoing document were served by first-class mail, postage prepaid, and addressed to the offices indicated below:

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