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Case No. 98-CV-0108
(Consolidated with 99-CV-0010)

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BY *J. Thaler*
DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

* * *

SCM ROLLING J. RANCH, a Nevada
limited liability company,

Plaintiffs,

vs.

BUCKEYE CREEK CORPORATION, a
Nevada corporation, et al.

Defendants.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT

CENTURY 21, CLARK PROPERTIES, INC.,
a Nevada corporation,

Plaintiff,

vs.

BUCKEYE CREEK CORPORATION, a Nevada
corporation; et al.

Defendants.

This action came on for trial before this Court beginning October 15, 2001, and
resuming on January 22, 2002, the Honorable Steven P. Elliott presiding, between Plaintiff,
CENTURY 21, CLARK PROPERTIES, INC., a Nevada Corporation, which was represented by
Kevin P. Ryan, Esq., of the law firm of Bader & Ryan, Ltd., and Defendants, BUCKEYE
CREEK CORPORATION, a Nevada Corporation ("Buckeye"), and JOHN SHAHIN (herein
collectively "Defendants") who were represented by Stephen C. Mollath, Esq., of Prezant &

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1 Mollath. Testimony was presented by way of live witnesses and by way of deposition.
2 Documentary evidence was also introduced. All issues and claims having been tried to this
3 Court and the parties having submitted the matter for decision following argument on
4 January 24, 2002; the Court being fully advised having reviewed the evidence and
5 arguments of counsel and considered the law, now sets forth its Findings of Fact,
6 Conclusions of Law and Judgment:

7 **FINDINGS OF FACT**

8 1. The First Amended Complaint in this case was filed on March 23, 1999.
9 Plaintiff asserted causes of action against Defendants for breach of contract, breach of the
10 covenant of good faith and fair dealing, civil conspiracy, quantum meruit, and unjust
11 enrichment. Plaintiff's First Amended Complaint also asserted claims against DON BENTLY
12 and BENTLY FAMILY LIMITED PARTNERSHIP for intentional interference with contractual
13 relations and prospective economic advantage and civil conspiracy. Prior to the beginning
14 of trial in this matter, Plaintiff settled with Don Bently and the Bently Family Limited
15 Partnership.

16 2. Pursuant to a writing dated February 13, 1995, Plaintiff and Defendants
17 entered into an agreement whereby Plaintiff represented Defendants as sellers' non-
18 exclusive agent with regard to the sale of certain real property and water rights owned by
19 Defendants. At no time was said agreement terminated by either party.

20 3. Pursuant to writing dated July 1, 1996, Plaintiff registered with Defendants,
21 Donald Bently as a potential buyer for Defendants' real property and water rights.

22 4. On November 3, 1997, SCMOTHERSELL, INC., dba SCM CORPORATE GROUP,
23 STEVE C. MOTHERSELL, President and/or assignee ("Purchaser"), entered into an
24 Agreement of Purchase and Sale ("Purchase and Sale Agreement") pertaining to
25 Defendants' real property and water rights. The Purchase and Sale Agreement is a lawful
26 and valid contract.

27 5. Consistent with the terms of the Purchase and Sale Agreement, Purchaser
28 extended the close of escrow date from January 15, 1998, to January 29, 1998.
Subsequent to January 29, 1998 Purchaser sought further extensions to the close of
escrow. Such requests for further extensions beyond January 29, 1998, by Purchaser were

1 unreasonable, and the Purchase and Sale Agreement was properly cancelled by Defendants
2 in writing on February 6, 1998. Purchaser was not ready, willing, and able to close the
3 transaction with Defendants on January 29, 1998.

4 6. Plaintiff was the procuring cause of Purchaser. Because Purchaser was not a
5 ready, willing, and able buyer on January 29, 1998, Plaintiff is not entitled to a real estate
6 commission regarding the transaction between Purchaser and Defendants.

7 7. Following the termination of the Purchase and Sale Agreement on February 6,
8 1998, Defendants sold the real property and water rights to Bently Family Limited
9 Partnership. Donald Bently is a representative of the Bently Family Limited Partnership. At
10 the time of the sale to Bently, Plaintiff remained Defendants' listing agent regarding said
11 real property and water rights. Plaintiff is therefore entitled to the Seller's side of the real
12 estate commission on said transaction. At no time did Plaintiff waive or relinquish its right
13 or claim to said commission, and Defendants did not pay any commission to Plaintiff. By
14 letter dated February 18, 1998, Plaintiff stated that it relinquished its commission on the
15 sale from Defendants to Bently. However, no consideration was provided to Plaintiff for
16 such relinquishment of commission and the letter was written pursuant to coercion by
17 SHAHIN. Therefore, no waiver or relinquishment of commission occurred.

18 8. Plaintiff provided Defendants with valuable real estate services from which
19 Defendants benefited. Plaintiff introduced the Bently Defendants to the Buckeye Creek real
20 property. Defendants did not pay a commission for the services of a seller's real estate
21 agent in the Bently sale, which in good conscience and justice should have been paid to
22 Plaintiff. To date, Plaintiff has not been paid.

23 9. Shahin commingled funds with Buckeye and governed Buckeye. There was a
24 unity of interest and ownership between Shahin and Buckeye. Adherence to the fiction of
25 Buckeye's corporate independence would promote injustice and fraud. Buckeye's sole
26 asset was raw land and it had no income or cash reserves to conduct business. Defendant,
27 John Shahin, is the alter ego of Buckeye Creek Corporation and was the alter ego of said
28 entity at all relevant times for purposes of this action.

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1 10. With regard to the transaction between Defendants and Bently Family Limited
2 Partnership, Defendants knowingly and intentionally excluded Century 21 from participation
3 in the transaction.

4 **CONCLUSIONS OF LAW**

5 This Court has jurisdiction over all parties and all claims being made. Pursuant to
6 Nevada law, Defendant, John Shahin is the alter ego of Buckeye Creek Corporation. In
7 order for Plaintiff to prove "alter ego", it had to demonstrate that Buckeye was influenced
8 and governed by John Shahin; that there was unity of interest and ownership; and that
9 adherence to the fiction of a separate entity would sanction fraud or promote injustice.
10 See McCleary Cattle Co. v. Sewell, 73 Nev. 279, 317 P.2d 957 (1957). Plaintiff presented
11 evidence to prove each element. Moreover, pursuant to Polaris Industrial Corp. v. Kaplan,
12 103 Nev. 598, 601, 747 P.2d 884 (1987), Plaintiff proved that John Shahin commingled
13 funds with Buckeye, Buckeye was undercapitalized, Buckeye's funds were used to pay John
14 Shahin's person debts, and John Shahin treated Buckeye's assets as his own. Further, the
15 actions of John Shahin as Buckeye's alter ego caused injury to Plaintiff and promoted
16 injustice. As a result, John Shahin is personally liable for the damages suffered by Plaintiff
17 in this case.

18 Plaintiff also proved that Defendants breached the listing agreement between it and
19 Defendants. In order to prevail on a breach of contract claim, Plaintiff must prove the
20 existence of a contract, performance by Plaintiff, breach by Defendants, and damages to
21 Plaintiff. See Western Distribution Co. v. Diodosio, 841 P.2d 1053 (Colo. 1992). Plaintiff
22 had an agreement with Defendants to act as Defendants' listing agent. Plaintiff registered
23 with Defendants the potential buyers with which it met in furtherance of the sale of
24 Defendants' real property and water rights. The agreement was never terminated, and
25 Defendants eventually sold the real property and water rights to a buyer which Plaintiff
26 registered. Defendants failed to pay Plaintiff a commission on said sale whereby Plaintiff
27 suffered damages in the amount of \$75,000.00.
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1 Plaintiff also proved its claim for unjust enrichment. Plaintiff proved that Defendants
2 received a benefit from Plaintiff as a result of Plaintiff's work to introduce Bently to the
3 property. Plaintiff proved that said benefit was appreciated by Defendants, and that
4 Defendants accepted and retained the benefit of Plaintiff's work under such circumstances
5 that it would be inequitable for Defendants to do so without paying Plaintiff for said
6 services. See Leasepartners Corporation v. Robert L. Brooks Trust, 113 Nev. 747, 942 P.2d
7 182 (1997). Defendants were unjustly enriched in that they did not pay the agreed-upon
8 commission to Plaintiff, despite the sale of the real property and water rights to a buyer
9 registered by Plaintiff. In that the Court has already awarded Plaintiff damages for
10 Defendants' breach of contract, no additional damages are awarded for Defendants' unjust
11 enrichment.

12 With regard to Plaintiff's claim for quantum meruit, it can not be sustained in this
13 case because real estate agents expend labor and money promoting a listing but are not
14 entitled to a commission unless they procure a sale. Therefore, quantum meruit is not an
15 appropriate theory of recovery for real estate agents.

16 Plaintiff did not prove its claim for civil conspiracy.

17 With regard to Plaintiff's claim for breach of the covenant of good faith and fair
18 dealing, as a result of the Court's finding in favor of Plaintiff on its breach of contract claim,
19 this claim for relief is rendered moot.

20 Pursuant to Hornwood v. Smith's Food King, 105 Nev. 188, 772 P.2d 1284 (1989),
21 Plaintiff is the prevailing party in this litigation and is entitled to reasonable costs.

22 However, the costs attributed to Lyle and Murphy, LLP, are disallowed since Marvin
23 Murphy was not permitted to testify.

24 Moreover, as set forth in this Court's Order dated February 8, 2002, Defendants are
25 not entitled to any set off as a result of Plaintiff's settlement with Don Bently and Bently
26 Family Limited Partnership.

27
28 **JUDGMENT**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

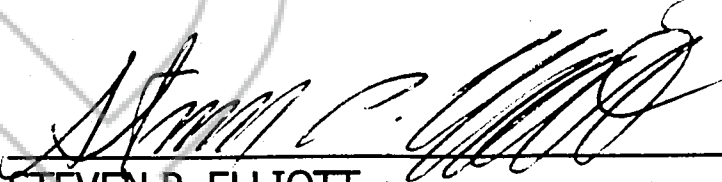
1 1. The Court finds in favor of Plaintiff and against Defendants, John Shahin and
2 Buckeye Creek Corporation jointly and severally;

3 2. Defendants and each of them, jointly and severally, shall pay Plaintiff the sum
4 of \$75,000 in damages with prejudgment interest thereon in the amount of \$30,157.80;

5 3. Defendants and each of them, jointly and severally, shall pay Plaintiff's costs
6 in the amount of \$9,280.86.

7 Based upon the foregoing, Plaintiff shall have judgment against Defendants, jointly
8 and severally, in the total sum of \$114,438.66 with interest thereon at the legal rate as
9 provided by law.

11 **DATED** this 21 day of March, 2002.

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14 _____
15 STEVEN P. ELLIOTT
16 District Judge

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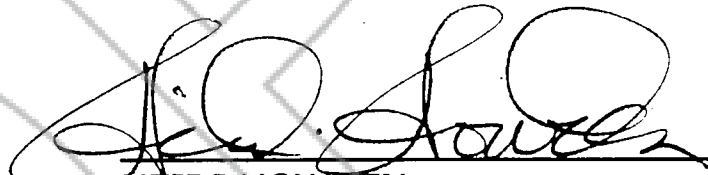
CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Department Ten of the Second Judicial District Court, and that on the 21 day of March, 2002, I deposited in the county mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached Order addressed as follows:

Kevin Ryan, Esq.
232 Court St.
Reno, NV 89501

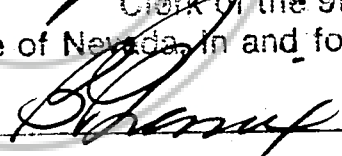
Stephen Mollath
6560 SW McCarran Blvd., #A
Reno, NV 89509

DATED this 21 day of March, 2002.


HEIDI HOWDEN
Administrative Assistant

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: April 25, 2002
Clerk of the 9th Judicial District Court
of the State of Nevada, in and for the County of Douglas,
By  Deputy

SEAL

REQUESTED BY
Bader + Ryan
IN OFFICIAL RECORDS OF
DOUGLAS CO., NEVADA

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LINDA SLATER
RECORDER

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