

FILED

12 OCT 04 AM 11:21

Honorable Kimberley Prochnau  
November 2, 2012 at 9:30 a.m.  
With Oral Argument  
CASE NUMBER: 12-2-06755-4 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

WINDERMERE REAL ESTATE/CAPITAL  
HILL, INC.,

Plaintiff,

v.

MELANIE POLIK AND JOHN DOE POLIK,

Defendants.

No. 12-2-06755-4 SEA

**DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

**1. Relief Requested.** The Defendant, Melanie Polik, moves for summary judgment dismissing the Plaintiff's claims with prejudice.

**2. Statement of Facts.** On June 20, 2011, Melanie Polik ("Seller") entered into an Exclusive Sale and Listing Agreement with the Tessera Group, LLC ("Firm") to sell her home located at 6602 East Greenlake Way North, in Seattle, Washington. (Exhibit 1).

Paragraph 2 of that Agreement provided in pertinent part:

...This Agreement creates an agency relationship with Listing Broker and any of the Firm's brokers who supervise Listing Broker's performance as Seller's agent ("Supervising Broker")....

Paragraph 3 stated:

**3. Commission.** If (a) Firm procures a buyer on the terms in this Agreement, or on other terms acceptable to Seller; or (b) Seller directly or indirectly or through any person or entity other than the Firm, during the Listing Term hereof, sells the property; Seller will pay Firm a commission of ...5% of the sales price....From Firm's commission, Firm will offer a cooperating member of MLS representing a buyer...3% of the sales price.....

On August 4, 2012, Melanie Polik signed a Residential Real Estate Purchase and Sale Agreement ("RRESPA") to sell her home to George A. Sandison and Lynn Rowland(the "Buyers"). (Exhibit 2). The Buyers' agent was Katherine J. Buchanan from Windermere RE/Capital Hill, Inc. The General Terms of the RRESPA provides:

**v. Commission.** Seller and Buyer agree to pay a commission in accordance with any listing or commission agreement to which they are a party. The Listing Firm's commission shall be apportioned between Listing Firm and Selling Firm as specified in the listing. Seller and Buyer hereby consent to Listing Firm or Selling Firm receiving compensation from more than one party. Seller and Buyer hereby assign to Listing Firm and Selling Firm, as applicable, a portion of their funds in escrow equal to such commission(s) and irrevocably instruct the Closing Agent to disburse the commission(s) directly to the Firm(s). In any action by Listing or Selling Firm to enforce this paragraph, the prevailing party is entitled to court costs and reasonable attorneys' fees. Seller and Buyer agree that the Firms are intended third party beneficiaries under this Agreement.

However, Paragraph 6 of the General Terms of the Residential Real Estate Purchase and Sale Agreement states in pertinent part:

The preliminary commitment, and the title policy to be issued, shall contain no exceptions other than the General Exclusions and Exclusions in the Policy and Special Exceptions consistent with the Condition of Title herein provided. If title cannot be made

1 so insurable prior to the Closing Date, then as Buyer's sole and  
2 exclusive remedy, the Earnest Money shall, unless Buyer elects  
3 to waive such defects or encumbrances, be refunded to the  
4 Buyer, less any unpaid costs described in this Agreement, and  
this Agreement shall thereupon be terminated. Buyer shall have  
no right to specific performance or damages as a consequence  
of Seller's inability to provide insurable title.

5 In this instance, when the Title Policy issued (Exhibit 3), it showed that the property  
6 had not been conveyed from her mother's estate to Melanie Polik, and was still vested in:

7 3. The heirs and devisees of Ethel Polik, deceased, pursuant  
8 to probate proceedings in King County Superior Court Cause  
No. 02-4-06287-1.

9 This title exception was properly indicated on the preliminary commitment under  
10 Schedule B—Section II Special Exceptions number 5 and note 2, and rendered title  
11 uninsurable.

12 Melanie Polik did not learn of this defect until September 15, 2011. The Buyers did not  
13 elect to waive this defect.

14 Melanie Polik was unable make the title insurable prior to the Closing Date of  
15 September 30, 2011. Even after her attorney was able to begin work on clearing title, it took  
16 him several weeks to complete that task.

17 Accordingly, pursuant to Paragraph 6 of the General Terms of the Residential Real  
18 Estate Purchase and Sale Agreement, the Earnest Money was refunded to the Buyers, and  
19 the Agreement was terminated.

20 Tessera Group, LLC did not receive a commission on this transaction.

21 In addition, on November 15, 2011, the Buyers signed Form 51 (Exhibit 4) which  
22 provides in pertinent part:

23 1. **Release.** The parties agree that the Agreement between  
them and all other agreements or undertakings between them in

1 respect to the Property are hereby rescinded; and each releases  
2 the other and all real estate firms and brokers involved with this  
3 sale from any and all present or future liability thereunder and/or in  
4 connection with said sale, other than as set forth hereinafter,  
provided, that nothing herein shall be construed to terminate any  
existing agency relationships or agreements unless otherwise  
agreed in writing.

5 Nonetheless, on February 22, 2012, the Plaintiff commenced this suit seeking to  
6 recover a commission "equal to 3% if the contract purchase price" and/or "to recover  
7 damages for Defendants' breach of contract or to recover under the doctrine of promissory  
8 estoppel", including their "reasonable attorneys' fees as provided by the Listing Agreement."

9 **3. Statement of Issues.**

10 A. Is the Buyers' agent entitled to a commission of three (3%) percent on  
11 this transaction?

12 B. Is the Buyers' agent entitled to damages for breach of contract?

13 C. Is the Buyers' agent entitled to recover damages under the doctrine of  
14 promissory estoppel?

15 D. Is Melanie Polik entitled to recover her attorney fees and costs?

16 **4. Evidence Relied Upon.** Declaration of Melanie Polik In Support of Motion for  
17 Summary Judgment.

18 **5. Authority.**

19 **A. The Buyers' Agent Is Not Entitled To A Commission**  
20 **Of Three (3%) Percent On This Transaction.**

21 In the first instance, Melanie Polik had no obligation to pay any commission to the  
22 Buyer's agent, Windermere Real Estate/Capitol Hill, Inc.

23 In the Exclusive Listing and Sale Agreement between Melanie Polik and Tessera

1 Group, LLC, Polik agreed to pay a commission only to Tessera, if it procured a buyer.

2 Windermere's right to obtain a commission on this transaction is derived from that  
3 section of the Listing Agreement which provided: "*From Firm's commission, Firm will offer a*  
4 *cooperating member of MLS representing a buyer...3% of the sales price.....*

5 Thus, Windermere is entitled to receive a commission, only from whatever  
6 commission Tessera might receive, not from Melanie Polik directly. But, Windermere did not  
7 join Tessera as a party to its complaint, even though Tessera is a necessary party to any  
8 complaint that it did not receive a commission on this transaction. *National Homeowners*  
9 *Ass'n v. City of Seattle*, 82 Wash. App. 640,643, 919 P.2d 615 (1996)(A party is necessary if  
10 the party's absence "would prevent the trial court from affording complete relief to existing  
11 parties to the action or if the party's absence would either impair that party's interest or  
12 subject any existing party to inconsistent or multiple liability.")

13 That said, this Court does not need to reach this infirmity because it is undisputed that  
14 Tessera did not receive a commission on this transaction. Since Tessera did not receive a  
15 commission on this transaction, there was no commission from which to pay a commission to  
16 Windermere, a condition precedent to Windermere's right to recover.

17 **B. The Buyers' Agent Is Not Entitled**  
18 **To Damages For Breach of Contract.**

19 The Exclusive Listing and Sale Agreement between Melanie Polik and Tessera Group,  
20 LLC does not provide a basis for Windermere to recover for each of the reasons set forth in  
21 the preceding section (i.e. Tessera did not receive a commission from which to pay a  
22 commission to Windermere).

23 In addition, the Residential Real Estate Purchase and Sale Agreement terminated,

1 pursuant to Paragraph 6 of the General Terms.

2 Finally, pursuant to Form 51, Melanie Polik and the Buyers rescinded the Residential  
3 Real Estate Purchase and Sale Agreement, and each released "the other and all real estate  
4 firms and brokers involved with this sale from any and all present or future liability  
5 thereunder". Contract rescission restores the parties to the positions they would have  
6 occupied if no contract had ever been made. Since, the Residential Real Estate Purchase  
7 and Sale Agreement was rescinded, Windermere has no contractual claim for damages.  
8 *Bloor v. Fritz*, 143 Wash.App. 718, 739-741, 180 P.3d 805 (2008).

9 **C. The Buyers' Agent Is Not Entitled To Damages**  
10 **Under The Doctrine Of Promissory Estoppel.**

11 A party seeking recovery under a theory of promissory estoppel  
12 must prove five prerequisites: (1) A promise that (2) the  
13 promisor should reasonably expect to cause the promisee to  
14 change his position and (3) that does cause the promisee to  
15 change his position (4) justifiably relying upon the promise, in such  
16 a manner that (5) injustice can be avoided only by enforcement of  
17 the promise.<sup>1</sup>

18 The promise must be a legally binding promise. A statement of future intent is not  
19 sufficient to constitute a promise for the purpose of promissory estoppel. An intention to do a  
20 thing is not a promise to do it.<sup>2</sup>

21 In this case, Melanie Polik made no promise to Windermere at all.

22 **D. Melanie Polik Is Entitled To Recover Her Attorney Fees And Costs.**

23 Even though, Melanie Polik had no obligation to pay a commission to Windermere

<sup>1</sup> *Kim v. Dean*, 133 Wn.App. 338, 348, 135 P.3d 978 (2006).

<sup>2</sup> *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn.App. 5, 13, 98 P.3d 491 (2004); *Pacific Cascade Corp. v. Nimmer*, 25 Wn.App. 552, 556, 608 P.2d 266 (1980), citing *Meissner v. Simpson Timber Co.*, 69 Wash.2d 949, 957, 421 P.2d 674 (1966).

1 based on her Exclusive Listing and Sale Agreement with Tessera Group, LLC. Rather,  
2 Tessera agreed to pay a commission to “a cooperating member of MLS representing a  
3 buyer” from its commission. But, Tessera did not receive a commission on this transaction  
4 from which to pay a commission to Windermere.

5 The Residential Real Estate Purchase and Sale Agreement *terminated*, pursuant to  
6 Paragraph 6 of its General Terms, when title could not be made insurable before the Closing  
7 Date, and the earnest money was refunded to the Buyers.

8 And, pursuant to Form 51, Melanie Polik and Windemere’s Buyers *rescinded* the  
9 Residential Real Estate Purchase and Sale Agreement, and each *released* “the other and all  
10 real estate firms and brokers involved with this sale from any and all present or future liability  
11 thereunder”.

12 Yet, because Windermere has alleged that Melanie Polik is liable to Windermere for  
13 its reasonable attorney fees and expenses, pursuant to the Exclusive Listing and Sale  
14 Agreement which contains a fee-shifting provision, Melanie Polik is entitled to recover her  
15 reasonable attorney fees and expenses, if she prevails, pursuant to RCW 4.84.330<sup>3</sup>.

16 Accordingly, we conclude that the broad language “[i]n any action  
17 on a contract” found in RCW 4.84.330 encompasses any action in  
which it is alleged that a person is liable on a contract. Further,

18 <sup>3</sup> RCW 4.84.330 states in pertinent part:

19 In any action on a contract or lease ..., where such contract or  
20 lease specifically provides that attorneys' fees and costs, which  
21 are incurred to enforce the provisions of such contract or lease,  
22 shall be awarded to one of the parties, the prevailing party,  
whether he or she is the party specified in the contract or lease  
or not, shall be entitled to reasonable attorneys' fees in addition  
to costs and necessary disbursements.....

23 As used in this section “prevailing party” means the party in whose  
favor final judgment is rendered.

1 because General American obtained a judgment dismissing  
2 Herzog's cause of action, General American became a "prevailing  
3 party" within the meaning of that statutory terminology. Hence,  
4 General American was properly entitled to an award of reasonable  
5 attorney fees incurred at trial.<sup>4</sup>

6 See also, *Bloor v. Fritz, supra*.

## 7 CONCLUSION

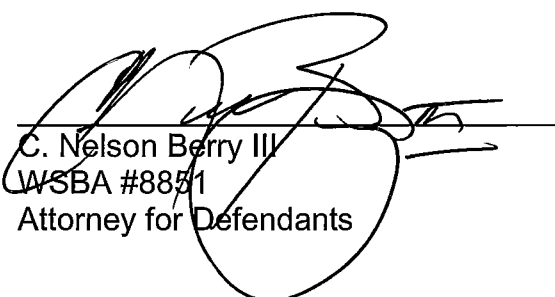
8 There is no genuine issue of material fact.

9 Windermere is not entitled to recover a commission on a transaction which never  
10 closed, and for which no commission was earned or received by Tessera Group, LLC. The  
11 RRESPA terminated and then rescinded by the parties thereby foreclosing any claim under  
12 that contract or for contractual damages. No one promised Windermere a commission if the  
13 transaction did not close, and no commission was generated.

14 Windermere's claims must be dismissed.

15 If Melanie Polik prevails, she is entitled to recover her reasonable attorney fees and  
16 costs. In such an event, she will present a separate motion for her reasonable attorney's  
17 fees and expenses after this Court's ruling.

18 Respectfully submitted this 4th day of October, 2012.

19   
20 C. Nelson Berry III  
21 WSBA #8851  
22 Attorney for Defendants

23 <sup>4</sup> *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn.App. at 197; see also,  
*Kaintz v. PLG, Inc.*, 147 Wn.App. 782, 787, 197 P.3d 710 (2008).



1  
2  
3  
4  
5  
6  
7  
8 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
9 **IN AND FOR THE COUNTY OF KING**

10 WINDERMERE REAL ESTATE/CAPITAL  
11 HILL, INC.,

12 Plaintiff,

13 v.

14 MELANIE POLIK AND JOHN DOE POLIK,

Defendants.

**No. 12-2-06755-4 SEA**

**SUMMARY JUDGMENT**

15 THIS MATTER having come on duly and regularly before the undersigned Judge upon  
16 the Defendant Melanie Polik's Motion for Summary Judgment; and the Court having  
17 reviewed the records and files contained herein, including the Declaration of Melanie Polik in  
18 Support of Defendants' Motion for Summary Judgment; having reviewed the records and files  
19 contained herein; having heard the argument of counsel; finding no genuine issue of material  
20 fact; and being otherwise fully advised in the premises; now, therefore, it is hereby

21 ORDERED that the Defendants' Motion for Summary Judgment is granted; and it is  
22 further  
23

1 ORDERED that the Plaintiff's claim of entitlement to a commission is dismissed with  
2 prejudice; and it is further

3 ORDERED that the Plaintiff's claim for breach of contract is dismissed with prejudice;  
4 and it is further

5 ORDERED that the Plaintiff's claim for promissory estoppel is dismissed with  
6 prejudice; and it is further

7 ORDERED that, as the prevailing party, the Defendant Melanie Polik is entitled to an  
8 award of her reasonable attorney fees and expenses, the amount of which shall be  
9 determined by separate motion.

10 Done in Open Court this 2<sup>nd</sup> day of November, 2012.

11  
12  
13 Honorable Kimberley Prochnau  
Superior Court Judge

14 Presented By:

15  
16  
17 C. Nelson Berry III  
18 WSBA #8851  
Attorney for Defendants

19 Approved as to Form:

20  
21  
22 Lars L. Neste  
WSBA # 28781  
23 Attorney for Plaintiff