STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 28, 2013)

JAMES DURKIN d/b/a DURKIN COTTAGE REALTY	:	
VS.	:	**C.A. No. PC 05-2566**
GESELDA M. DELANEY	:	

DECISION

SAVAGE, J. This matter is before the Court for decision following a non-jury trial. Plaintiff James Durkin filed a Complaint for breach of contract to establish his right to a real estate commission arising out of Defendant Geselda M. Delaney's sale of property in Narragansett, Rhode Island. Defendant has filed a Counterclaim alleging breach of fiduciary duty and seeking compensatory and punitive damages. For the reasons set forth in this Decision, this Court finds in favor of Plaintiff as to his Complaint for breach of contract and awards him damages for the unpaid commission in the amount of $16,500, plus statutory interest and costs. It denies Plaintiff's request for attorney's fees under R.I. Gen. Laws § 9-1-45. This Court also denies Defendant's Counterclaim for breach of fiduciary duty and compensatory and punitive damages.

I

FACTS[1] AND TRAVEL

Plaintiff James Durkin d/b/a Durkin Cottage Realty is a licensed real estate broker with an office located in Narragansett, Rhode Island. Defendant Geselda M. Delaney is the former

[1] These core facts are drawn from the pleadings and the testimony and exhibits introduced at trial. The testimony has not yet been officially transcribed. This Court makes additional factual findings, as necessary to its analysis of the parties' claims, later in this Decision.

owner of residential property located at 1414 Ocean Drive in Narragansett, Rhode Island (the Property).[2] (Countercl. ¶ 4). Defendant, who was a resident of Pawtucket, Rhode Island, used the Property as a second home and often rented it when she was not using it personally. In renting the Property over the years, Defendant employed the services of Plaintiff. According to Plaintiff, it was customary during this time for him to have a signed rental agreement with Defendant, advertise the Property in print and on the Internet, show the Property, enter into rental agreements with tenants on behalf of Defendant, collect security deposits and rents due, and act as the contact person for issues arising with the Property during the rental period. In return for these services, Plaintiff testified that his company would receive a commission equal to twenty percent of the gross rental price of the Property. This arrangement between the parties led to the rental of the Property several times a year for approximately a decade.

A conversation between the parties in September 2004 led Plaintiff to believe that Defendant might cease the rental arrangement of years past and sell the Property. Further communication between Plaintiff and Defendant in December 2004 confirmed Defendant's intent to sell. Defendant then secured an outside appraisal of the Property using an appraisal company suggested by Plaintiff. The appraiser rendered a report, dated December 15, 2004, that assessed the Property's fair market value at $393,000. (Pl.'s Ex. 1, Appraisal Report). Plaintiff testified that he never saw the appraisal report until after he commenced this litigation—as it was prepared by the appraisal company at Defendant's direct request—and that Defendant told him that she had an appraisal for $300,000, which he thought was low.

Plaintiff claims that on January 20, 2005, he became aware that Defendant intended to

[2] Geselda Delaney died on May 1, 2010, at the age of ninety-three, prior to the trial of this matter. Following her death, Leo Cardosi, in his capacity as the Executor of her estate, was substituted as the party defendant in this action. For the sake of clarity, this Court will continue to refer to Geselda Delaney as the "Defendant" in this Decision.

sell the Property to Emily Huggins upon Huggins' return from a nursing trip abroad. He claims further that, at Defendant's request, he scheduled an appointment with her for January 22, 2005 to list the Property for sale. Huggins, who became closely acquainted with Defendant while cleaning the Property between rentals, was a former employee and close family friend of Plaintiff. In fact, Plaintiff testified that his relationship with the Huggins family was so amiable—prior to this litigation—that he had hosted an engagement party at his home for Huggins and her fiancé Charles Cummiskey, III.

Plaintiff testified that on January 22, 2005—the date that he was scheduled to meet Defendant at his office to discuss listing her Property for sale—he received a call from Defendant reporting that she thought someone had broken into the Property because she had found the rear door open and damage to the door casing. After calling Plaintiff, Defendant called the Narragansett Police Department to report the incident. Plaintiff then traveled to the Property, surveyed the damage with Defendant, and was present when the police arrived to prepare an incident report. Officer Prest, who responded to the police call, testified that Defendant's demeanor was calm and unremarkable when he arrived at the Property to investigate the reported crime. Plaintiff had brought certain paperwork to the Property with him and proceeded to enter into a listing agreement with Defendant with respect to the sale of the Property (the "Agreement").

The Agreement is a standard "Exclusive Right to Sell Listing Agreement" published by the Rhode Island State-Wide Multiple Listing Service. (Pl.'s Ex. 2, Listing Agreement). By the boilerplate terms of the Agreement, Defendant granted Plaintiff the exclusive right to sell the Property for a period of six months, "[i]n consideration of Broker submitting this listing and corresponding photo(s) to State-Wide Multiple Listing Services, Inc. (MLS), . . . and of Broker's

efforts to procure a purchaser of subject real estate." Id. ¶ 2. The Agreement contained a "Terms of Sale" clause that set the listing price of the Property at $300,000. Id. ¶ 3. A "Compensation to Broker" clause followed the listing price, and stated that "[a]s compensation for services, Seller agrees to pay Broker . . . 6 percent of the gross sales price" under certain conditions, including:

> (1) If Broker procures a ready, willing and able Buyer;
>
> (2) If the [P]roperty is sold by Broker, or through any other person including the Seller, on the above terms or any other price and terms acceptable to Seller during the above time period or any extension of the time period;
>
> (3) If within 180 calendar days of the final termination, including extensions, of this Exclusive Right to Sell Listing Agreement, the Property is sold, conveyed, or otherwise transferred to anyone with whom Broker has had contact directly and/or indirectly prior to final termination of this listing. This section shall not apply if Seller enters into another valid listing agreement with another licensed real estate Broker after the final termination of this Exclusive Right to Sell Listing Agreement;
>
> (4) If the completion of the sale is prevented by default of Seller, then upon such default.

Id. ¶ 5(a)(1)-(4).

In addition to the boilerplate terms of the standard listing agreement, Plaintiff added additional handwritten terms to Agreement. Id. On the first page of the Agreement, he wrote the number six in the blank next to the amount of the commission. Id. ¶9. In the bottom right hand corner of that page, Plaintiff also wrote "Commission to James Durkin to be paid outside of closing." Id. Defendant placed her initials at the bottom of this page and also signed the bottom of the page under the language about payment of the commission. Id. Under the "Additional Provisions" clause located on the second page of the Agreement, Plaintiff wrote "strictly to sell to Chuck Cumminskey [sic] + Emily Huggins if they want" and "no need to put into MLS." Id.

¶ 15. The signatures of both Defendant and Plaintiff appear at the bottom of this page of the Agreement. Id. Plaintiff testified that he inserted these handwritten provisions concerning the sale to Huggins and Cummiskey, the MLS listing, and payment of his commission into the Agreement before Defendant signed it and with her knowledge and consent.[3]

The Agreement was the product of discussions between Plaintiff and Defendant on January 22, 2005. Defendant told Plaintiff that she had discussed selling the Property to Huggins and Cummiskey and wanted him to offer it to them for sale before anyone else. She also told Plaintiff that she may have discussed selling the Property to them for $275,000. Plaintiff agreed to contact Huggins and Cummiskey first to see if they wanted to buy the Property. He also explained to Defendant what the amount of his commission would be based either on the listing price or the lower price she mentioned and how it would affect her net proceeds from any sale. The next day, Plaintiff received a telephone call from Emily Huggins' father, a personal friend, and he told Mr. Huggins that he had met with Defendant to sign a listing agreement and that "Emily was all set" to buy the Property if she wanted.

Plaintiff testified that his next contact with Defendant was two days later when she called him to report that following Huggins' return to the United States, she had met with Huggins and Cummiskey and signed documents pertaining to the sale of the Property. Defendant indicated that Cummiskey, a Rhode Island licensed real estate agent, had prepared the documents. According to Plaintiff, Defendant then purportedly asked him whether any of these documents

[3] Plaintiff acknowledged that paying a broker a commission outside of closing is rare, but that he thought he should be paid outside of the closing due to his close relationship with the Huggins family; he thought Emily Huggins' father would feel that she paid too much for the Property because he was involved. Plaintiff testified that he explained this reasoning to Defendant before she undersigned this provision. When asked why he was still pursuing payment of the commission given his close relationship with the Huggins family, Plaintiff responded that it was because Defendant wanted him to have the commission. Id.

were the same as the ones she had signed with him days earlier. Plaintiff claims that he then called Huggins who confirmed that she had signed a purchase and sales agreement with Defendant. Plaintiff explained that he already had a signed listing agreement with Defendant—of which Huggins denied knowledge—and expressed his disappointment with her for forcing Defendant to sign papers for the sale of the Property. Huggins, who testified for the Defendant, claims that the tone of this conversation was much more quarrelsome, with Plaintiff accusing her of trying to cheat him out of his commission.

In fact, the document that Defendant signed with Huggins and Cummiskey was a purchase and sale agreement—a standard form published by the Rhode Island Association of Realtors—which purported to list the purchase price of the Property as $275,000, made no mention of a listing agent or any commission to be paid, and set a closing date of February 28, 2005. See Pl.'s Exs. 6 & 14 ¶¶ 3 & 4, Purchase and Sale Agreement. At trial, Cummiskey admitted that he could not account for the original document, that he filled out most of the document before Defendant signed it, and that Defendant had no attorney or anyone else assisting her with the transaction. He also admitted making changes to the document after she signed it. Compare Pl.'s Ex. 6 (stating that the buyers paid the deposit by check #599 and identifying the Property as Lots 175 and 176) with Pl.'s Ex. 14 (containing no deposit check number and identifying the Property solely as Lot 175).[4]

It is noteworthy that the $275,000 purchase price is over $100,000 less than the $393,000 appraised value of the Property as of December 2004 and $25,000 less than the listing price in

[4] Absent evidence of the original Purchase and Sale Agreement and testimony of the Defendant, and given the discrepancies between the two copies of this document in evidence and Cummiskey's admission that he made changes to this document after Defendant signed it, this Court cannot determine with any certainty the actual terms of the Purchase and Sales Agreement signed by Defendant.

the Agreement that Plaintiff and Defendant executed two days before Defendant signed the Purchase and Sale Agreement. In addition, the Purchase and Sale Agreement made no provision for payment of a brokerage commission to Plaintiff or anyone else. It also is significant that Huggins and Cummiskey rushed to close on the sale of the Property as soon as possible, even though the Purchase and Sale Agreement set a mortgage contingency date of February 20, 2005, contained certain inspection contingencies and established a closing date of February 28, 2005; indeed, the closing took place on January 28, 2005, only four days after its execution. (Pl.'s Ex. 10, HUD-1 Statement).

Plaintiff testified that he learned of the closing date after speaking with Defendant; however, she did not identify the closing attorney. He testified that he assumed that the closing attorney would be the attorney who normally handled Defendant's legal matters, so he proceeded to contact that attorney to review the necessary closing documents and set up the requisite inspection of the Property prior to the closing date. (Pl.'s Exs. 7 & 8, Faxes to Attorney McCloskey). On January 26, 2005, Plaintiff faxed a letter to the closing attorney, stating that Defendant had informed him that "she signed a sales agreement with [Huggins] and [Cummiskey]," and "[i]n everyone's best interest[,] I would ask that you fax me any documentation that I should review." (Pl.'s Ex. 7). This letter also stated that Plaintiff had a signed listing agreement with Defendant and that "[i]f upon review all are correctly executed[,] then I will order a smoke detector inspection, as well as, a water meter reading." Id. A second letter, faxed to the closing attorney on January 27, 2005, stated that Defendant had informed Plaintiff that the closing would occur on the following day and that he would attend and bring with him the disclosures signed by Defendant on January 22, 2005. (Pl.'s Ex. 8).

Despite this attempted contact, however, Plaintiff confirmed that he never received or

reviewed the Purchase and Sale Agreement or any other documentation concerning the closing nor did he facilitate any routine tests or inspections of the Property prior to the closing. Plaintiff attended the closing held at the attorney's office on January 28, 2005, along with Defendant, Huggins, Cummiskey, and Cummiskey's mother. Defendant came to the closing with Huggins and Cummiskey. Plaintiff testified that he sat next to Defendant and reviewed the closing documents before she signed them. According to Plaintiff, the entire transaction lasted approximately thirty minutes, during which time there existed "a heavy air in the room." Plaintiff left the room first after the closing ended and claims that Defendant started to leave with him, only to go back inside after "she forgot" that she came with Huggins and Cummiskey.

At trial, Plaintiff acknowledged that, contrary to his usual practice, he did not provide the closing attorney with a statement for his commission. None of the closing documents made reference to payment of a real estate commission with regard to the sale of the Property, and the space allotted for listing a real estate commission on the HUD-1 Statement is blank. (Pl.'s Ex. 10, HUD-1 Statement). In addition, there is no evidence showing that a discussion concerning payment of a commission to Plaintiff occurred at the closing or that Plaintiff made any request for payment at that time. As noted, Plaintiff and Defendant had agreed that the commission would be paid to Plaintiff outside of the closing. (Pl.'s Ex. 2).

Plaintiff testified that, after Defendant signed the Agreement, his next communication with her concerning payment of a commission occurred when he sent her a bill. This invoice, dated February 15, 2005, was entered into evidence as part of the billing history between the parties. (Def.'s Ex. F, Def.'s Billing History). The bill listed a $16,500 charge for the "[s]ale of 1414 Ocean Rd." and an additional $50.00 charge for "[s]now plowing." Id. Plaintiff testified that after sending the bill, Defendant called and asked if he preferred that she send separate

checks instead of one; however, despite this conversation, Plaintiff never received payment for the commission. Id. Huggins admitted that she told Defendant not to pay Plaintiff's bill.

On May 20, 2005, Plaintiff filed a Complaint for breach of contract, alleging that Defendant had failed to pay him the six percent (6%) commission due under the Agreement—equal to $16,500—upon the sale of the Property. (Compl. ¶ 7). Plaintiff also sought attorney's fees in connection with his breach of contract claim, pursuant to R.I. Gen. Laws § 9-1-45,[5] and other damages.[6] Id. ¶¶ 9, 11.

On June 10, 2005, Defendant filed an Answer to the Complaint in which she denied the validity of the Agreement, asserted affirmative defenses that the Complaint is barred by the Statute of Frauds and fails to state a claim upon which relief can be granted, and alleged that Plaintiff procured her signature on the Agreement through fraud, misrepresentation, and breach of fiduciary duty. (Def.'s Answer). Defendant also filed a Counterclaim as part of her Answer, alleging breach of fiduciary duty (Count I) and seeking compensatory and punitive damages (Counts I and II). She claims that Plaintiff negligently and intentionally failed to both identify the nature of the documents that he asked her to sign and disclose to her that by signing the Agreement, she was obligating herself to pay Plaintiff a commission for the sale of the Property

[5] This statute provides, in pertinent part, as follows:

> The court may award a reasonable attorney's fee to the prevailing party in any civil action arising from a breach of contract in which the court:
> (1) Finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party; or
> (2) Renders a default judgment against the losing party.

R.I. Gen. Laws § 9-1-45.

[6] Plaintiff also sought payment from Defendant for an alleged $50.00 debt for his facilitating snow removal from the Property, which was listed on the invoice along with the commission. (Compl. ¶ 9). As discovery showed that, unbeknownst to Plaintiff, Defendant already had paid the snow removal company directly for these services, however, Plaintiff agreed to dismiss this claim at trial.

within a week. (Def.'s Countercl. ¶¶ 19, 22). Defendant's Counterclaim further alleges that Plaintiff had prior knowledge of her intention to sell the Property to Huggins and Cummiskey and nonetheless induced her to sign documents giving Plaintiff a commission for the sale of the Property, despite Plaintiff's failure to provide services normally associated with entitlement to such a commission, including procurement of a purchaser, assistance in sales price negotiations, preparation of purchase and sale documents, procurement of seller's closing documents, and participation at the closing. (Def.'s Countercl. ¶¶ 13, 14). Huggins secured an attorney for Defendant and assisted her in filing her pleadings and responding to discovery. Defendant's estate paid legal bills incurred as a result of legal services provided to non-party defense witnesses Huggins and Cummiskey, as well as Defendant, during the course of the litigation.

This matter was heard by this Court, sitting without a jury.[7] Witnesses testifying for the Plaintiff included Karen DeBoeur, an employee of Durkin Cottage Realty; Officer Ryan Prest, who responded to Defendant's call concerning the alleged break-in at the Property; and Plaintiff. Witnesses testifying for the Defendant included Leo Cardosi, Defendant's brother and Executor of her estate; Emily Huggins and Charles Cummiskey, who purchased the Property from Defendant; and John D. Lynch, Jr., who testified as to Defendant's claim for attorney's fees. Notably, Defendant did not testify, as she had died prior to trial. In light of her death, Defendant's counsel raised objections to the admissibility of statements attributed to her by Plaintiff. This Court allowed the testimony to be elicited, but reserved judgment as to its

[7] Prior to trial, Plaintiff also filed a separate civil action against Emily Huggins in Washington County Superior Court. See Durkin v. Huggins, C.A. No. WC-2011-0065 (R.I. Super. Ct., filed Feb. 7, 2011). In that action, Plaintiff alleges that Huggins had knowledge of Plaintiff's Agreement with Defendant before she entered into the Purchase and Sale Agreement with Defendant and proceeded to intentionally and tortiously interfere with Plaintiff's contractual relationship with Defendant. Huggins filed an Answer denying Plaintiff's allegations. Notably, although this case has not progressed beyond the initial pleadings stage, it is still pending in Superior Court.

admissibility.[8]

At trial, Plaintiff attempted to limit Defendant's cross-examination of James Durkin on the issue of lack of consideration for the Agreement, as Defendant had not asserted the failure of consideration as an affirmative defense in her Answer. Defendant responded that she was not required to plead the affirmative defense of lack of consideration in response to Plaintiff's breach of contract claim, as consideration for the alleged contract was part of Plaintiff's burden of proof in proving his prima facie claim for breach of contract. Defendant argued, in the alternative, that the issue had been tried by implication and also orally moved to amend her Answer to include this affirmative defense. Plaintiff then objected on the grounds that Defendant had waived this affirmative defense for failure to raise it in a timely manner before trial. This Court allowed testimony pertaining to the issue of lack of consideration, but reserved decision as to whether it could be considered, pending determination of the issue of waiver.[9]

After Defendant rested, Plaintiff moved for judgment as a matter of law on Defendant's Counterclaim for breach of fiduciary duty. This Court reserved decision on that motion.[10] Plaintiff then filed a post-trial memorandum on May 6, 2011, seeking judgment in his favor and payment of a real estate commission in the amount of $16,500 based upon the alleged sale of the

[8] Under the hearsay exception in Rule 804 of the Rhode Island Rules of Evidence, when the declarant is unavailable to testify at trial because of death, "[a] declaration of [the decedent] shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." R.I. R. Evid. 804(a)(4), (c). The statements attributed to Geselda Delaney in this case appear to satisfy the requirements of this Rule and, hence, are admissible under its hearsay exception. Were the statements not admitted, however, this Court's Decision would remain the same.

[9] This procedural issue will be addressed by this Court later in this Decision.

[10] This Court now denies that motion, finding that the weight and credibility of Plaintiff's testimony is material to the issue of breach of fiduciary duty, such that it is precluded from finding the absence of breach as a matter of law. It thus will proceed to address Defendant's Counterclaim on its merits later in this Decision.

Property within the terms of the Agreement. He also seeks attorney's fees, pursuant to R.I. Gen. Laws § 9-1-45, claiming that Defendant has failed to raise any justiciable issues of law or fact in defense to Plaintiff's breach of contract claim. Defendant filed a post-trial memorandum on May 19, 2011, urging this Court to find that Plaintiff procured Defendant's signature on the Agreement through breach of the fiduciary duty that he owed Defendant. She argues further that despite her signature on the Agreement, Plaintiff has failed to provide any services that would entitle him to a real estate commission. Plaintiff then filed a reply to Defendant's post-trial memorandum on June 13, 2011, arguing that Defendant has waived the affirmative defense of lack of consideration for the Agreement and that all evidence presented at trial supports Plaintiff.[11] On September 10, 2012, Plaintiff filed a supplemental memorandum that contains proposed findings of fact and conclusions of law.

II

STANDARD OF REVIEW

Rule 52(a) of the Superior Court Rules of Civil Procedure, which governs this Court's review, requires a trial justice in a non-jury case "to make specific findings of fact upon which he [or she] bases his [or her] decision." Connor v. Schlemmer, 996 A.2d 98, 109 (R.I. 2010) (citing Nardone v. Ritacco, 936 A.2d 200, 206 (R.I. 2007)). In all actions tried upon the facts without a jury, the trial justice "sits as trier of fact as well as law," weighing and considering the evidence, determining the credibility of witnesses, and drawing inferences from the evidence presented. Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d

[11] On July 1, 2011, Defendant filed with the Court a letter which included copies of checks relating to the purchase of the Property. Plaintiff filed a timely objection to this correspondence, which occurred after the close of evidence at trial. As correspondence is an inappropriate vehicle for attempting to expand the record post-trial, this Court will not consider that correspondence or its enclosures in rendering a decision in this case.

181, 184 (R.I. 1984)). Thus, "[w]hen rendering a decision in a non-jury trial, a trial justice 'need not engage in extensive analysis or discussion of all of the evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" Id. (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998)).

On appeal, the Supreme Court's "review of a decision of a trial justice sitting without a jury is quite deferential." In the Matter of the Dissolution of Anderson, Zangari & Bossian, 888 A.2d 973, 975 (R.I. 2006). Moreover, "'[t]he findings of fact by a trial justice sitting without a jury are entitled to great weight and shall not be disturbed on appeal unless the record shows that the findings are clearly wrong or unless the trial justice overlooked or misconceived material evidence on a controlling issue.'" Id. (quoting Burke-Tarr Co. v. Ferland Corp., 724 A.2d 1014, 1018 (R.I. 1999)).

III

ANALYSIS

A

Plaintiff's Complaint for Breach of Contract

Plaintiff claims that he entered into an Agreement with Defendant by which she promised to pay him a commission of 6% of the sale price of the Property. As Defendant sold the Property to Emily Huggins and Chuck Cummiskey for $275,000 and never paid Plaintiff a commission, Plaintiff claims that Defendant breached the Agreement and thus is liable to him for damages for the unpaid commission in the amount of $16,500.

Defendant disputes Plaintiff's claims, arguing that the Agreement fails for lack of consideration and that Plaintiff performed no services under the Agreement that would justify awarding him a commission in this case. As to her argument of failure of consideration for the

Agreement, Defendant acknowledges that this Court allowed evidence to be presented regarding lack of consideration, subject to later determination as to its admissibility, and now urges this Court to consider that evidence.

Plaintiff counters that Defendant waived the affirmative defense of failure of consideration by failing to specifically plead it in her Answer, thus making all evidence of lack of consideration at trial inadmissible. He argues further that, even if the Defendant did not waive the defense, evidence of consideration exists to support the Agreement.

Defendant responds that she was not required to assert lack of consideration specifically as an affirmative defense to Plaintiff's claim for breach of contract and that she raised the defense implicitly by denying his claim for breach of contract in her Answer. In the alternative, she contends that this Court should grant her oral motion to amend her Answer to add the affirmative defense of lack of consideration made at trial.

1

The Law of Contracts

To prevail on a claim of breach of contract, a plaintiff must prove the existence of a contract, breach of that contract, and damages flowing from the breach. Petrarca v. Fidelity and Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005); Gorman v. St. Raphael Academy, 853 A.2d 28, 33 (R.I. 2004) (the Court must "make the predicate findings of offer, acceptance, consideration and breach requisite to determining a breach of contract claim"). A valid contract is "an agreement which creates an obligation," the elements of which are "competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." Rhode Island Five v. Medical Associates of Bristol County, Inc., 668 A.2d 1250, 1253 (R.I. 1996). To be valid, each party must have the intent to be bound by the terms of the agreement. Weaver v. Am. Power

Conversion Corp., 863 A.2d 193, 198 (R.I. 2004); Rhode Island Five, 668 A.2d at 1253. Put another way, "each party must manifest an objective intent to be bound to the agreement." Opella v. Opella, 896 A.2d 714, 720 (R.I. 2006) (quoting Weaver, 863 A.2d at 198).

In Rhode Island, real estate contracts are normally governed by a distinct set of rules for their interpretation and enforcement. "[W]hen a broker is the procuring cause in bringing about a sale, that is, when a sale results from a broker's efforts or negotiations, he or she is entitled to a commission even if the sale was actually accomplished through the efforts of other persons." Rustigian v. Celona, 478 A.2d 187, 190 (R.I. 1984) (citing Gettler v. Caffier, 92 R.I. 19, 22, 165 A.2d 730, 732 (1960)). A real estate broker is deemed "the effective agent, or the procuring cause, when he [or she] is the first broker to interest the prospective purchaser in the property, when he [or she] causes such purchaser to inspect or view the property, and when he [or she] conducts negotiations concerning a sale thereof with the prospective purchaser." Id. As such, a broker is considered to have "sufficiently performed and is entitled to compensation when he or she has produced a prospective purchaser who is ready, willing, and able to purchase at the price and terms of the seller." Id. (citing Judd Realty, Inc. v. Tedesco, 400 A.2d 952, 955 (R.I. 1979); Kirby, Inc. v. Weiler, 108 R.I. 423, 429, 276 A.2d 285, 288 (1971)).

This standard, however, only "applies in situations in which no special contract delineates what constitutes special performance thereunder." Id. (citing Judd Realty, 400 A.2d at 955). If an agreement indicates that the parties intended to depart from this general rule, then it should be interpreted according to well-settled contract principles. Judd Realty, 400 A.2d at 955.

2

The Contract

a

Assent

In addressing Plaintiff's claim of breach of contract, this Court first must determine if Plaintiff and Defendant entered into and assented to the terms of the Agreement. It then must address Defendant's claim that the Agreement is invalid for lack of consideration. This Court finally must interpret the Agreement to determine if Defendant breached the Agreement so as to be liable to Plaintiff for damages.

Plaintiff premises his claim of breach of contract on the Agreement that he introduced into evidence as Exhibit 2. An examination of that exhibit shows that it is a two-page boilerplate document entitled, "Exclusive Right to Sell Listing Contract" produced by the State-Wide Multiple Listing Service, Inc. See Pl.'s Ex. 2. It contains additional terms, handwritten by Plaintiff, is dated January 22, 2005 and is signed by both parties. Id. In fact, Geselda Delaney signed both pages of the Agreement. Id. Her initials appear at the bottom of the first page of the Agreement and her signature appears under the handwritten language added by Plaintiff to the bottom of that page that reads, "Commission to James Durkin to be paid outside of closing." Id. That page also contains Plaintiff's handwritten additions to the Agreement that set a list price of $300,000 and a commission to Plaintiff, upon the occurrence of certain conditions, of six percent of the gross sales price. Id. ¶¶ 3, 5. Defendant's signature also appears at the bottom of the second page of the Agreement, together with Plaintiff's signature. Id. In the middle of the page, above their signatures, appears handwritten language, inserted by Plaintiff under the section entitled, "Additional Provisions," that states: "strictly to sell to Chuck Comminsky [sic] and

Emily Huggins if they want" and "no need to put in MLS." Id. ¶ 15. The trial testimony of Plaintiff establishes, to this Court's satisfaction, that Geselda Delaney signed both pages of the Agreement and that Plaintiff signed at the end of the Agreement after Plaintiff inserted into the Agreement and discussed with Defendant all of the handwritten terms that appear in the document.

Under Rhode Island law, a party who signs a written agreement is bound by law to its terms, absent proof that he or she assented to the contract due to fraud, violence, undue influence, or the like, and may not claim that he or she did not intend to agree to its terms. See Dante State Bank v. Calenda, 56 R.I. 68, 79, 183 A. 873, 878 (1936); J. Weil & Co. v. Quidneck Mfg. Co., 33 R.I. 58, 64, 80 A. 447, 449 (1911). As a general rule, therefore, a party who signs a document manifests his or her assent to it and cannot later complain that he or she did not read or understand the agreement. See Manchester v. Pereira, 926 A.2d 1005, 1012 (R.I. 2007); Fleet Nat'l Bank v. 175 Post Rd., LLC., 851 A.2d 267, 275 (R.I. 2004); F.D. McKendall Lumber Co. v. Kalian, 425 A.2d 515, 518 (R.I. 1981).

Here, the evidence shows that Geselda Delaney signed the Agreement that contained all of the terms alleged by Plaintiff. See Pl's Ex. 2. She is deemed, therefore, absent evidence of fraud or undue influence, to have assented to all of its terms. There is insufficient evidence to show that, at the time she signed the Agreement, she did not read or understand its terms. In fact, under the paragraph entitled "Seller's Responsibility," the Agreement advises: "Seller should carefully read all documents to assure that they adequately express Seller's understanding." Id. ¶ 17. In signing the Agreement, its language that appears immediately above her signature suggests that she did so. It states:

> I, the Seller, warrant that I am the owner of the property or have the authority to execute this contract. I acknowledge that I have read and understand this

Agreement . . . .

Id. (emphasis added).

Moreover, even if Geselda Delaney did not read or understand the Agreement, there is no evidence of fraud or undue influence to negate her assent. In fact, there is evidence to suggest that she was of sound mind at the time she executed the Agreement and no evidence to suggest that Plaintiff knew otherwise or misrepresented the nature of the Agreement to her at the time she executed it. Cf. Dante State Bank, 56 R.I. at 79, 183 A. at 878. While the Defendant alludes to fraud on the part of Plaintiff as part of her Counterclaim for breach of fiduciary duty, she failed to present the testimony of Geselda Delaney or any other evidence to prove any fraud or undue influence on the part of Plaintiff. Absent the invalidity of the Agreement, therefore, Defendant is bound by its terms.

b

Consideration

Although this Court has found that the parties in fact entered into the Agreement and both assented to its terms, Plaintiff still cannot prevail on his claim of breach of contract if the Agreement fails for want of consideration. Before this Court can address the issue of consideration, however, it first must determine whether Defendant is procedurally barred from raising this issue by failing to specifically plead lack of consideration as an affirmative defense in her Answer prior to trial.

i

Procedural Considerations

Pursuant to Rule 8(c) of the Superior Court Rules of Civil Procedure, a party is required to set forth in a responsive pleading certain affirmative defenses—including failure of

consideration. See R.I. R. Civ. P. 8(c); Rhode Island Hosp. Trust Nat'l Bank v. de Beru, 553 A.2d 544, 547 (R.I. 1989) (citing Tucker v. Mammoth Mart, Inc., 446 A.2d 760, 762 (R.I. 1982)). The failure to raise an affirmative defense in a timely manner constitutes a waiver of that defense. See R.I. R. Civ. P. 12(h); Duquette v. Godbout, 416 A.2d 669, 670 (R.I. 1980). Yet, there is no requirement that an affirmative defense be specifically labeled as such; the defense may be pleaded in general terms so long as it gives the plaintiff fair notice of the defense. Tucker, 446 A.2d at 762.

Our Supreme Court has stated that the rationale behind the waiver rule is that "the special pleading of an affirmative defense protects the complaining party from unfair surprise at trial." Hanley v. State, 837 A.2d 707, 711 (R.I. 2003) (quoting Duquette, 416 A.2d at 670). In addressing the tension that may arise between the requirement of pleading an affirmative defense in Rule 8(c) or its waiver, and the provision of Rule 15 allowing the liberal amendment of pleadings, the Supreme Court requires consideration by the trial court of the extent of prejudice to the plaintiff in allowing any amendment and the defendant's knowledge of the circumstances that should have alerted him or her to the existence of such an affirmative defense. Id. at 711.

Under the circumstances of this case, this Court does not find that Defendant had to assert the affirmative defense of lack of consideration to preserve that issue for trial. Indeed, Plaintiff has cited no authority for the proposition that a defense of failure of consideration must be asserted affirmatively by a defendant in a breach of contract action or it is waived. Consideration for the contract is an essential element of Plaintiff's claim for breach of contract that he must prove at trial. See Rhode Island Five, 668 A.2d at 1253 (the elements of an enforceable contract are "competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation"). Requiring Defendant to assert an affirmative defense

of failure of consideration in her Answer to such a claim to avoid a waiver of that defense thus would be tantamount to shifting the burden of proof improperly from Plaintiff to Defendant as to an essential element of Plaintiff's case.

Even assuming, arguendo, that Defendant was required to assert in her Answer the affirmative defense of failure of consideration, this Court would find that she did so. In Defendant's Answer, she denied the validity of the alleged Agreement. (Def.'s Answer ¶¶ 5-7). Under Rhode Island law, a contract, to be valid, must evidence "competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." Rhode Island Five, 668 A.2d at 1253 (emphasis added). As evidence of consideration is thus required for Plaintiff to prove the validity of the Agreement at issue here, Defendant's denial in her Answer of the contract's validity necessarily gave Plaintiff "fair notice of the defense [of failure of consideration]." de Beru, 553 A.2d at 547. There is no requirement beyond such notice that the defense of failure of consideration be "specifically labeled as [an affirmative defense]." Id.

In addition, Defendant's Counterclaim stated that Plaintiff "failed to provide services normally associated with entitlement to such a commission, including procurement of a purchaser, assistance in sale price negotiations, preparation of sale documents, procurement of seller's closing documents, and participation at closing." (Def.'s Countercl. ¶ 13). These allegations implicitly raise the defense of failure of consideration. Under Rule 8(c), "[w]hen a party has mistakenly designated a defense as a counterclaim . . . , the court on terms, if justice so requires, should treat the pleading as if there has been a proper designation." R.I. R. Civ. P. 8(c). As Defendant's Counterclaim thus gives Plaintiff fair notice of the defense of lack of consideration, this Court cannot find that Defendant waived the defense or that allowing her to assert it prejudices Plaintiff in any way. It necessarily follows, therefore, that this Court cannot

find that Defendant waived the defense.

Moreover, putting aside the pleadings, Plaintiff had fair notice of Defendant's intent to raise the defense of failure of consideration from discovery in this case. During his deposition, Plaintiff was asked numerous questions concerning the consideration, if any, that he provided Defendant in exchange for the Agreement, including "[w]hat consideration if any flowed to [Defendant] as a result of you receiving this commission?" (Def.'s Ex. H, Deposition of James Durkin 103:14.) Furthermore, Defendant's pre-trial memorandum, filed on March 30, 2011, plainly outlines the elements of contract formation and details Plaintiff's burden of proving valid consideration to be successful on his claim at trial. (Def.'s Pre-trial Mem. at 14).

As a result, even assuming that Defendant was required to assert the affirmative defense of failure of consideration in her Answer and failed to do so, this Court cannot find that Defendant waived that defense. See Lajayi v. Fafiyebi, 860 A.2d 680, 687 (R.I. 2004) ("[W]aiver is the voluntary, intentional relinquishment of a known right. It results from action or nonaction"); Haydon v. Stamas, 900 A.2d 1104, 1112-13 (R.I. 2006) (waiver that results from a party's actions may be expressed in the actions themselves or implied from them and "may arise where a person against whom the waiver is asserted has pursued such a course of conduct as to sufficiently evidence an intention to waive a right or where his [or her] conduct is inconsistent with any other intention than to waive it."); Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 65 (R.I. 2005) ("[i]mplied waiver of a legal right must be proved by a clear, unequivocal, and decisive act of the party who is alleged to have committed waiver"). There is no evidence that Defendant intended to relinquish her right to defend Plaintiff's contract action on grounds of lack of consideration. Indeed, her Answer, Counterclaim, discovery and pre-trial memorandum all evidence a contrary intention—namely, to raise that defense at trial.

Moreover, even if it is determined that Defendant was required to plead the affirmative defense of failure of consideration specifically, this Court finds that she should be allowed to amend her Answer to assert that defense more particularly under Rule 15, pursuant to her motion to amend asserted at trial. Rule 15(b) provides:

> [i]f evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the objecting party in maintaining the party's action or defense upon the merits.

R.I. R. Civ. P. 15(b). Accordingly, it permits a trial justice to allow amendments to pleadings liberally, even at trial, absent a showing of extreme prejudice to the opposing party. Kenney v. Providence Gas Co., 118 R.I. 134, 142, 372 A.2d 510, 514 (1977) ("[T]o justify exclusion of evidence on the ground that it is outside the pleadings, [the] objecting party must be seriously disadvantaged and mere allegations of surprise, not substantiated by the facts, will not suffice.").

Consideration is a required element of Plaintiff's claim of breach of contract that Defendant challenged in her Answer and Counterclaim. It was the subject of pre-trial discovery. Indeed, the issue of consideration lies at the core of this controversy. This Court thus finds that Plaintiff was on notice of this issue from the beginning of the case. As such, this Court sees no prejudice to Plaintiff in allowing Defendant to amend her Answer to assert the affirmative defense of lack of consideration[12] and admitting the evidence pertinent to the issue of consideration to which Plaintiff objected at trial.

[12] Although not required to do so, Defendant is granted leave to file an Amended Answer to assert the affirmative defense of lack of consideration, pursuant to her oral motion to amend made at trial.

For all of these reasons, this Court overrules Plaintiff's objections to the evidence of consideration admitted conditionally at trial. It thus will go on to address the question of whether the Agreement fails for want of consideration.

ii

Evidence of Consideration

Under Rhode Island law, contracts require consideration to support them. McGrath v. R.I. Retirement Bd., 906 F. Supp. 749, 762 (D.R.I. 1995), aff'd, 88 F.3d 12, 20 (1st Cir. 1996); Hayes v. Plantation Steel Co., 438 A.2d 1091, 1094 (R.I. 1982). Consideration consists of some right, interest or benefit accruing to one party or some forbearance, detriment or responsibility given, suffered or undertaken by the other party. Nat'l Educ. Ass'n - R.I. by Scigulinsky v. Retirement Syst., 890 F. Supp. 1143, 1159 (D.R.I. 1995); Marcotte v. Harrison, 443 A.2d 1225, 1231 (R.I. 1982). Consideration must be bargained for and must induce the other party's performance. Flanders & Medeiros, Inc. v. Bogosian, 868 F. Supp. 412, 418 (D.R.I. 1994), aff'd in part, rev'd in part, 65 F.3d 198, 207 (1st Cir. 1995). Adequate consideration for a contract is defined as consideration "equal, or reasonably proportioned, to the value of that for which it is given, or as that which is not so disproportionate as to shock our sense of that morality and fair dealing which should always characterize transactions between [persons]." Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc., 51 F. Supp. 2d 81, 92 (D.R.I. 1999), aff'd, 215 F.3d 182, 195 (1st Cir. 2000).

Under the boilerplate terms of the Agreement at issue here, "[i]n consideration of Broker submitting this listing and corresponding photo(s) to State-Wide Multiple Listing Service, Inc. . . and of Broker's efforts to procure a purchaser of [the Property]," the "Seller grant[ed] [Broker] the exclusive right . . . commencing on [January] 22, 2005 and expiring . . . on [July] 22, 2005 to

sell . . . [the Property]." Pl.'s Ex. 2, ¶ 2. While the parties modified this standard form agreement to eliminate the requirement that the Property be listed in the MLS, they left intact the Broker's ongoing obligation, for the duration of the Agreement, to make "efforts to procure a Purchaser of the Property." Id. ¶¶ 2, 15. "As compensation for [these] services [of the Broker]," the Agreement further bound "Seller . . . to pay Broker [a commission of] 6 percent of the gross sales price . . . under the following conditions:"

> (1) If Broker procures a ready, willing and able Buyer;
>
> (2) If the [P]roperty is sold by Broker, or through any other person including the Seller on the above terms or any other price and terms acceptable to Seller during the above time period or any extension;
>
> (3) If within 180 calendar days of the final termination, including extensions, of this Exclusive Right to Sell Listing Agreement, the Property is sold, conveyed, or otherwise transferred to anyone with whom Broker has had contact directly and/or indirectly prior to final termination of this listing. This section shall not apply if Seller enters into another valid listing agreement with another licensed real estate Broker after the final termination of this Exclusive Right to Sell Listing Agreement;
>
> (4) If the completion of the sale is prevented by default of Seller, then upon such default.

Pl's Ex. 1, ¶ 5(a)(1)-(4). (emphasis added).

A fair reading of the Agreement suggests that, by its terms, the Seller promised to give the Broker an exclusive listing of the Property for a period of six months and promised to pay the Broker the stated commission if the Property was sold during that time period by Broker or anyone else, including the Seller, on the terms stated in the Agreement or any other terms acceptable to the Seller. Id. In exchange, the Broker promised to make efforts, during that time period, to procure a purchaser of the Property. Id. ¶2.

The Agreement thus bestowed a right, interest or benefit and a detriment or responsibility upon each of the parties. See Nat'l Educ. Ass'n, 890 F. Supp. at 1159; Marcotte, 443 A.2d at 1231. The Broker received the exclusive right to sell the Property and the right to a commission from Seller upon its sale by any party in exchange for his obligation to try to sell the Property; the Seller received the benefit of the services of the Broker who had an incentive to help Seller sell the Property on Seller's terms within six months in exchange for her obligation to pay the Broker a commission upon a sale of the Property by any party. See Pl.'s Ex. 2, ¶¶ 2, 5(a).

While the Agreement contemplated a sale "to Chuck Cummiskey + Emily Huggins if they want," that provision did not alter the Broker's obligation to make "efforts to procure a purchaser [of the Property]" while the Agreement was in effect. Id. ¶ 15. There was no Purchase and Sale Agreement between Defendant and Huggins and Cummiskey negotiated or executed at the time Plaintiff and Defendant entered into the Agreement. Indeed, the existence of the Agreement arguably assisted Defendant in ultimately securing the Purchase and Sale Agreement with them. In addition, Huggins and Cummiskey could have chosen not to purchase the Property on terms acceptable to Defendant or could have failed to close on any such purchase. After signing the Agreement, Defendant could have enlisted Plaintiff's assistance under the Agreement to negotiate and consummate a sale of the Property to Huggins and Cummiskey or to some other purchaser. Plaintiff would have been required to assist.

As of the time the parties executed the Agreement, therefore, it is clear that it was supported by adequate consideration. To hold otherwise would be tantamount to declaring the standard form MLS "Exclusive Right to Sell Listing Contract" invalid. The issue of consideration must be viewed as of the date of the Agreement when Plaintiff obligated himself to help Defendant sell her Property to Huggins and Cummiskey, if they wanted, or to some other

party. This issue cannot be viewed in hindsight through the lens of what Plaintiff, in fact, did to assist Defendant in the sale of the Property, as Defendant was in control of whether Plaintiff was asked to make efforts or did make efforts to negotiate and consummate a purchase and sale agreement with Huggins and Cummiskey or procure another purchaser after the date of the Agreement.

Accordingly, this Court finds that the issue of lack of consideration for the alleged Agreement between Plaintiff and Defendant was appropriately tried. Based on the testimony and evidence presented, this Court finds, by a preponderance of the evidence, that the Agreement was supported by adequate consideration.

c

Breach

Under the express terms of the Agreement to which the parties assented, and which this Court has declared valid, Defendant promised to pay Plaintiff a commission of "6 percent of the gross sales price" if, inter alia, "the [P]roperty is sold by Broker, or through any other person including the Seller" on the terms in the Agreement or any other price and terms acceptable to Seller during the six-month term of the Agreement. See Pl.'s Ex. 2, ¶ 5(a)(2) (emphasis added). This provision of the Agreement, in contrast to paragraph 5(a)(1) of the Agreement, obligated Defendant to pay Plaintiff the commission even if Plaintiff did not procure a ready, willing and able Buyer or sell the Property himself.[13] Id.

There is no dispute that at the time Defendant sold the Property to Huggins and Cummiskey, in accordance with the Purchase and Sale Agreement dated January 24, 2005, the

[13] As such, this provision of the Agreement reflected the intent of the parties to depart from the general rule that a broker is entitled to a commission when he or she is the procuring cause in bringing about a sale. Cf. Judd Realty, Inc., 400 A.2d at 955.

Agreement between Plaintiff and Defendant already existed. See Pl.'s Exs. 6 & 14. The Purchase and Sale Agreement reflected a purchase price of $275,000—lower than the listing price contained in the Agreement—but was nonetheless apparently assented to by Defendant and the buyers. Id.; see also Pl.'s Ex. 10 (HUD-1 Statement).

By the terms of the Agreement, that sale obligated Defendant, as Seller, to pay Plaintiff, as Broker, a commission of 6 percent of the $275,000 sale price, or $16,500. It matters not that the Defendant chose to sell the Property herself to Huggins and Cummiskey without using the services of Plaintiff to assist her in that regard. Indeed, it appears to this Court that Plaintiff stood ready—and, in fact was legally obligated—to assist Defendant in negotiating and consummating the sale with Huggins and Cummiskey or to attempt to procure another purchaser in the event that Huggins and Cummiskey either chose not to buy the Property or their purchase and sale agreement with Defendant fell through. It was Huggins and Cummiskey, together with Defendant, who actually deprived the Plaintiff of any opportunity to fulfill his obligation to make efforts to sell the Property under the Agreement. Huggins and Cummiskey secured the purchase of the Property at a price advantageous to themselves, and then rushed to close on the Property, without first addressing the payment of Plaintiff's commission with either Defendant or Plaintiff. None of their actions, however, can undo Plaintiff's legal right to the commission promised by Defendant in advance of Huggins' and Cummiskey's decision and agreement with Defendant to buy.

Accordingly, Plaintiff has satisfied this Court that, under the express language of the Agreement, he is entitled to a commission on the Defendant's sale of the Property to Huggins and Cummiskey of 6 percent of the $275,000 gross sales price of the Property—or $16,500. It is undisputed that Defendant, operating on the misadvice of Huggins and Cummiskey, never paid

Plaintiff this commission. Defendant is thus liable to Plaintiff on his Complaint for breach of contract in the amount of $16,500,[14] plus interest and costs.[15]

B

Defendant's Counterclaim for Breach of Fiduciary Duty

This Court finally must address Defendant's Counterclaim for breach of fiduciary duty. Defendant claims that shortly after she notified Plaintiff that she planned to sell the Property to Huggins and Cummiskey, Plaintiff appeared at the house with documents that he asked her to sign. Defendant alleges that Plaintiff thus breached a fiduciary duty owed to her—based on trust built over their long-time business relationship—by asking Defendant to sign the Agreement without explaining the nature of the document and by intentionally failing to disclose to Defendant that, in signing the document, she would obligate herself to pay a commission to Plaintiff for a sale to be consummated within a week.

[14] Plaintiff also seeks attorney's fees under R.I. Gen. Laws § 9-1-45. While he is the prevailing party in this action as to his claim of breach of contract, this Court finds that there is not "a complete absence of a justiciable issue of either law or fact raised by the losing party." R.I. Gen. Laws. § 9-1-45. Indeed, as evidenced by this Decision, the issues of assent, consideration and breach of contract were justiciable. Had Plaintiff truly believed otherwise, he presumably would have moved for summary judgment or judgment as a matter of law as to his Complaint. Accordingly, his request for attorney's fees, in addition to his request for compensatory damages, in connection with his claim of breach of contract is denied.

[15] The fact that these transactions may seem unfair to Defendant or her Estate is not lost on this Court. Plaintiff secured a commission from Defendant based on his promise to assist her in selling her Property but then was asked to do nothing based on the unilateral action of the buyers and Defendant. Huggins and Cummiskey secured the Property at a bargain price, particularly in light of Defendant's appraisal of the Property and the commission she owed Plaintiff. They paid Defendant $118,000 less than the Property's appraised value and Defendant still had to pay Plaintiff a $16,500 commission on top of that. Defendant arguably suffered a financial loss of up to $134,500 upon selling the Property. Absent claims by Defendant against Huggins and Cummiskey, or evidence that she was of unsound mind or was deceived, however, Defendant must be held to the terms of the contracts she signed—the Agreement with Plaintiff and her Purchase and Sales Agreement with Huggins and Cummiskey—however financially unwise those contracts may seem in retrospect.

Plaintiff admits that he had a fiduciary duty to Defendant based on their realtor-client business dealings regarding Defendant's Property, and specifically points to Exhibit 3, the Disclosure Regarding Real Estate Agency Relationship, which expressly states that such a fiduciary relationship exists. Plaintiff denies, however, that he breached that duty. He claims that he reviewed the Agreement with Defendant before she signed it and made her aware that she would be paying him a commission regardless of whether the Property was sold to Huggins and Cummiskey or some other party.

Under Rhode Island law, to prevail on a claim of breach of fiduciary duty, a plaintiff must establish: "(1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that duty; and (3) the defendant's breach harmed the plaintiff." A. Teixeira & Co. v. Teixeira, 699 A.2d 1383, 1387 (R.I. 1997). If a fiduciary duty is found to exist, such duty "is one of trust and confidence and imposes the duty on the fiduciary to act with the utmost good faith." Notarantonio v. Notarantonio, 941 A.2d 138, 145 (R.I. 2008) (quoting Hendrick v. Hendrick, 755 A.2d 784, 789 (R.I. 2000)).

Here, Plaintiff admits that he had a fiduciary duty to Defendant. (Pl.'s Reply ¶ 8). Their fiduciary relationship is evidenced by the document entitled "Disclosure Regarding Real Estate Agency Relationship" that the Defendant signed. (Pl.'s Ex. 3). This document states that Plaintiff—as the listing agent—owes Defendant "a fiduciary duty of utmost care, integrity, honesty, loyalty, disclosure and confidentiality" while representing Defendant's best interests in the real estate transaction. Id. ¶ 1.

While it is not disputed, therefore, that a fiduciary relationship existed between the parties, there is insufficient evidence from which this Court can find that such a duty was breached. Plaintiff testified that he explained the Agreement to Defendant before she signed it

and made her aware that she would be paying him a commission regardless of whether she sold the Property to Huggins and Cummiskey or some other party. There is no evidence to contradict Plaintiff's testimony in this regard. There likewise is no evidence that Plaintiff misled Defendant as to the nature or terms of the Agreement. Indeed, the Agreement may have assisted Defendant in securing a Purchase and Sale Agreement with Huggins and Cummiskey and closing on the Property swiftly (albeit at a price advantageous to the buyers). As such, the testimony and evidence that Defendant presented at trial—which was devoid, understandably, of the Defendant's own testimony—did not establish, by a preponderance of the evidence, that Plaintiff failed to act in good faith in his dealings with Defendant or otherwise breach his fiduciary duty to her. In fact, it appears that Huggins and Cummiskey may have convinced Defendant to assert this Counterclaim against Plaintiff to attempt to shift the blame for Defendant's financial loss on the sale away from them and to Plaintiff. This Court thus finds that Defendant failed to prove her Counterclaim for breach of fiduciary duty.

IV

CONCLUSION

For all of these reasons, this Court grants judgment in favor of Plaintiff on his Complaint for breach of contract in the amount of $16,500, plus statutory interest and costs. It denies Plaintiff's request for attorney's fees under R.I. Gen. Laws § 9-1-45. Defendant's Counterclaim for breach of fiduciary duty and compensatory and punitive damages is denied and dismissed.

Counsel shall confer and submit to this Court forthwith for entry an agreed upon form of Order and Final Judgment that are consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Durkin v. Delaney

CASE NO: PC 05-2566

COURT: Providence County Superior Court

DATE DECISION FILED: May 28, 2013

JUSTICE/MAGISTRATE: Savage, J.

ATTORNEYS:

For Plaintiff: Jacqueline M. Bouchard, Esq.; Patrick J. Dougherty, Esq.

For Defendant: Arthur M. Read, II, Esq.