THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0467

AKWA VISTA, LLC

V.

NRT, INC. d/b/a COLDWELL BANKER RESIDENTIAL BROKERAGE and
FRANK C. SCHOENTHALER

RULE 7 MANDATORY APPEAL FROM THE
HILLSBOROUGH COUNTY NORTHERN DISTRICT SUPERIOR COURT

BRIEF FOR THE DEFENDANTS/APPELLANTS
NRT, INC. d/b/a COLDWELL BANKER RESIDENTIAL BROKERAGE and FRANK C. SCHOENTHALER

By: Peter G. Callaghan, Esq.,
NH Bar # 6811

Simon R. Brown, Esq.
NH Bar # 9279

PRETI, FLAHERTY,
BELIVEAU & PACHIOS,
PLLP
57 North Main Street
P.O. Box 1318
Concord, NH 03302-1318
(603) 410-1500

Oral Argument by
Peter G. Callaghan

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court erroneously denied the Defendants' Motion for Judgment Notwithstanding the Verdict and for Remittitur

2. Whether there was sufficient evidence to support the verdict for Plaintiff on its breach of contract claim

3. Whether the recital language in the contract could impose a contractual obligation on Defendant

4. Whether Plaintiff's election to affirm the contract precludes its claim for breach

5. Whether the contract, as portrayed by Plaintiff, violated the statute of frauds

6. Whether the evidence was sufficient to support the verdict for Plaintiff on its negligent misrepresentation claim

7. Whether Plaintiff proved its damage claims, including causation

8. Whether the damage award of $850,000 was excessive or unsupported by the evidence

9. Whether Plaintiff's failure to mitigate its damages precludes an award

10. Whether the jury verdict denying Defendant's counterclaims was against the weight of the evidence

All issues were raised in Defendants' Motion for Judgment Notwithstanding the Verdict and for Remittitur, Defendants' Reply to Plaintiff's Objection and Motion to Reconsider. (Appendix 001, 032 and 048). Issues 4 and 6 were also raised at the close of Plaintiff's case. (Transcript Vol. 2, pp. 263-67).

STATEMENT OF THE CASE

Appellants NRT, Inc. d/b/a Coldwell Banker Residential Brokerage ("Coldwell Banker") and Frank Schoenthaler appeal from the denial of their Motion for Judgment Notwithstanding the Verdict and for Remittitur following a jury verdict for Appellee Akwa Vista, LLC in the amount of $850,000. The dispute arises out of an Exclusive Right to Sell Agreement entered into between Coldwell Banker and Akwa Vista, whereby Akwa Vista granted Coldwell Banker the exclusive right to sell lots in a 171 - lot subdivision in the Weirs Beach section of Laconia, New Hampshire. Frank Schoenthaler was the agent for Coldwell Banker who worked with Akwa Vista.

Akwa Vista claimed Coldwell Banker breached the Exclusive Right to Sell Agreement by failing to produce $4 Million in lot sales at the commencement of the contract, as purportedly required by the Agreement. The contract language relied on by Akwa Vista was in the recitals of the agreement There was no language in the terms of the listing agreement that imposed the obligation alleged by Akwa Vista. Coldwell Banker countered that it was not obligated to produce $4 million in lot sales at the commencement of the Agreement and that if there was such an obligation, it substantially complied by producing offers Akwa Vista unreasonably rejected. Coldwell Banker sought to dismiss the breach of contract claim as Akwa Vista had elected to proceed under the contract despite claiming breach, which is prohibited.

Akwa Vista also claimed that Coldwell Banker and Mr. Schoenthaler negligently misrepresented their ability to deliver builders who would buy 26 lots at an aggregate price of $4 Million. Appellants argued that they accurately represented their ability, which was reflected in the notes of one of Akwa Vista's principals, and that there was no

evidence of justifiable reliance as Akwa Vista did not change its position regarding the purchase of the property, as it was going to buy the property and proceed with the project with or without Coldwell Banker, and it did not suffer damages.

The jury found in favor of Akwa Vista on the breach of contract and negligent misrepresentation claims and for Coldwell Banker and Schoenthaler on Akwa Vista's claims for intentional misrepresentation and violation of RSA 358-A The jury awarded Akwa Vista $850,000, consisting of (1) $722,000 in interest on its loan from April 2004 to August 2007 that it claims it would have saved had it received the $4 Million for the 26 lots in April 2004, and (2) $126,000 in interest charges on private loans it claimed were incurred in 2005 – 2006 to fund construction. Akwa Vista argued that it could have saved $772,000 by paying down its loan by $84,000 for each of the 26 lots ($202,000 for 2004 - 2005, $223,000 from 2005 - 2006, $223,000 from 2006 - 2007, and $74,000 in 2007). There was no evidence that Akwa Vista actually paid that interest or incurred those charges. Moreover, those damages were excessive, as Akwa Vista did nothing to mitigate its losses after parting ways with Coldwell Banker. As to the $126,000 in private loans, the undisputed evidence revealed that because Akwa Vista still had over $1 Million in construction financing available there was no need for private loans. Furthermore, there was no testimony that the amounts borrowed actually went to construction costs.

Coldwell Banker filed a counterclaim to recover $140,484.00 it incurred in advertising and marketing expenses during the year it performed under the Agreement. Coldwell Banker claimed that Akwa Vista misrepresented its ability to develop the premises as a subdivision and intentionally concealed that it was intentionally and

knowingly underfunded to complete the construction by $1.5 Million. The jury found for Akwa Vista on Coldwell Banker's counterclaims for breach of contract, intentional misrepresentation, negligent misrepresentation and violation of RSA 358-A.

At issue in this appeal is the Court's refusal to set aside the jury verdict for Akwa Vista on its breach of contract and negligent misrepresentation claims, the Court's refusal to remit the verdict for Akwa Vista and the Court's refusal to set aside the jury verdict for Akwa Vista on Coldwell Banker's counterclaims.

STATEMENT OF FACTS

Akwa Vista intended to turn 400 acres of undeveloped land atop Brickyard Mountain in the Weirs Beach section of Laconia, New Hampshire overlooking Lake Winnipesaukee into a subdivision (Tr. 1:57).[1] Over the course of two and one-half years, before entering into any agreement with Coldwell Banker, Akwa Vista had spent over $1 Million seeking subdivision approval. (Tr. 1:9, 1:120).

Frank Schoenthaler approached Akwa Vista in April 2003 about serving as the exclusive listing agent. (Tr. 1:11-12). He explained that Coldwell Banker could bring builders to the table who could buy bulk lots and would then construct homes on the lots. (Tr. 2:294-95). Coldwell Banker would not be paid a commission on the builder purchase from Akwa Vista, but would only be paid once the builder sold to the ultimate end user - the homeowner. (Tr. 2:295). From the first meeting on April 3, 2003, Mr. Schoenthaler stressed the importance of sufficient funding to do the work. (Tr. 2:321).

[1] The trial transcript has been prepared in four volumes, for each day of trial, with a sequential page numbering system. Thus, citations to the transcript shall be to the volume and page (e.g., 1:1 for volume 1, page 1).

In an April 7, 2003 letter, Mr. Schoenthaler advised Mr. Mailloux "Coldwell Banker is willing to assist your company to secure an adequate line of financing to build roads and complete the marina…" (Tr. 1:106). In a June 13, 2003 letter, Mr. Mailloux indicated to Mr. Schoenthaler that he was "in no position to consider signing an exclusive agreement" until he had all of the "financing in place" for both Akwa Vista and 441 Lake Ave., as had been discussed. (Tr. 3:393-94). At that time Akwa Vista had sought $8 Million in financing from Southern New Hampshire Bank in order to fund its acquisition costs and infrastructure costs ($4 Million). (Appendix to Appellants' Brief ("App.") at 069). The loan was approved that month and extended several times in 2003. (App. 075 - 076). Mr. Mailloux then came back to Mr. Schoenthaler to discuss the exclusive listing and advised Mr. Schoenthaler that he had the financing secured. (Tr. 3:394).

By February 2004, before any agreement with Coldwell Banker, the loan amount was increased to $9.25 Million due to the acquisition of additional parcels, but the construction costs remained the same. (App. 77). The final bank Commitment Letter, accepted by Akwa Vista on March 20, 2004, after the agreement with Coldwell Banker, was for $9.7 Million to reflect further increases in acquisition costs with the construction costs remaining at $4 Million. (App. 79). As Mr. Mailloux admitted, $4 Million was <u>always</u> the number to do the infrastructure work. (Tr. 1:112).

Mr. Schoenthaler presented to Akwa Vista Coldwell Banker's Builder Program, in which it would use its relationships with homebuilders to bring them in to buy lots. (Tr. 1:13; 1:62; 2:294-95; 3:399-400). Under this program, Mr. Schoenthaler would act as a facilitator to bring the developer and builder together and help the builders obtain financing. (Tr. 2:296-97). Coldwell Banker waived any commission on the sale of land

and would not be paid until the completed house was sold to a homeowner, out of the proceeds of the sale. (Tr. 2:295). Coldwell Banker's plan, as explained to Akwa Vista, was to start with one builder first who would buy a significant block of lots to start the project off, then bring in others to continue the momentum. (Tr. 2:304).

Akwa Vista received a conditional subdivision approval from the City of Laconia on October 20, 2003, requiring, inter alia, that it provide "site restoration security, a performance guarantee" to the City and that it provide "110% of the estimated cost for remaining site work" (Tr. 1:115-16); App. 088). Akwa Vista could not close on the property until it met this condition. (Tr. 1:117). Southern New Hampshire Bank issued a letter of credit for $4.028 Million to meet this condition. (Tr. 1:118). This was the same cost for construction that had been in the financing approvals since June 2003. (Tr. 1:119). Akwa Vista did not close on the property until April 2-5, 2004. (Tr. 1:45, 1:53).

On March 4, 2004, Akwa Vista and Coldwell Banker signed an Exclusive Right to Sell Agreement. (App. 064). The parties agreed to a delayed effective date, with the Agreement providing as follows: "This Agreement shall take effect on the date DEVELOPER acquires fee simple title to the Premises." (App. 067). When Akwa Vista took title to the property on or about April 2, 2004, the Agreement became effective. (Tr. 1:45).

The Exclusive Right to Sell Agreement set forth in the recitals the following prefatory language to explain the circumstances under which the parties had entered into the Agreement:

> Whereas COLDWELL BANKER NEW HOMES has secured four (4) to six (6) home builders who are committed to purchasing twenty-six (26) residential building lots from DEVELOPER at an aggregate price of $4,000,000, the DEVELOPER, in recognition of COLDWELL BANKER

> NEW HOMES' efforts as herein described, has agreed to list the sale exclusively with COLDWELL BANKER NEW HOMES, the 163 residential building lots…on the terms and conditions hereinafter set forth.
>
> NOW, THEREFORE, in consideration of the representations and covenants herein provided, the parties mutually agree as follows:
>
> [numbered paragraphs setting forth the specific terms followed]

(App. 064).

The first paragraph of the specific terms of the Agreement described Akwa Vista's obligation to use its best efforts to develop the premises into a 171 - lot subdivision:

> 1. DEVELOPMENT OF PREMISES: The DEVELOPER agrees to use its reasonable best efforts to develop the Premises as a subdivision with 171 building Lots thereon; 'best efforts' shall mean that DEVELOPER will take such prompt action as may be required to obtain all licenses and permits necessary for the development of the Premises as a subdivision consistent with sound financial practice.

(App. 064).

The second paragraph of the specific terms described what Akwa Vista gave to Coldwell Banker:

> 2. LISTING: The DEVELOPER hereby lists the Listed Lots in "Akwa Vista" with, and grants to, COLDWELL BANKER NEW HOMES for the Listing Period of three years from the date hereof, the exclusive right to sell the Lots for prices to be determined by the DEVELOPER. COLDWELL BANKER NEW HOMES shall market and sell every other Listed Lot under the Phasing Schedule attached hereto in the first instance until DEVELOPER authorizes otherwise.

(App. 064).

Coldwell Banker's obligations were set forth in paragraphs 3 and 6:

> 3. BROKER'S OBLIGATION TO DEVELOPER: Throughout the Listing Period, Broker shall exercise due diligence in procuring buyers for the Listed Lots at prices acceptable to DEVELOPER. In connection therewith, Broker agrees to do, perform, or cause to be done or performed, the following:

a. To provide the management and administration for the coordination of marketing and merchandise elements to include but not be limited to sales office displays and set up, sign programs, production of collateral materials, advertising, media plan, special events, and construction and maintenance and staffing of two (2) model homes from which sales activities will be conducted;

b. To hire and/or employ development sales and marketing personnel designated to perform services in respect of the marketing and sales of the Property;

c. To act as escrow agent and monitor all escrow and loan processing to closing of escrow;

d. To provide periodic reports to DEVELOPER at least quarterly on the status of all pending escrows and a recapitulation of the sales program, including but not limited to, sales and traffic reports, media response, escrow and loan processing, buyer profiles, prospect follow-up systems, and inventory control;

e. To assume responsibility for any or all of the following items:
   i. All sales activity respecting the Listed Lots
   ii. Sales Training
   iii. Scheduling of pre-closing inspections by prospective purchasers
   iv. Coordination of post sales programs
   v. Scheduling on-site sales and marketing personnel;

f. To abide by all applicable laws, rules, regulations, and the Declaration of Covenants in respect of the sales and marketing of the Listed Lots;

g. To provide a reasonable, continuous and readily identifiable advertising program (within the then prevailing standards of the real estate development and marketing industry and with DEVELOPER input and approval) for the Listed Lots in such advertising media so as to generate continuous buyer interest in the Listed Lots, which advertising shall include Subdivision name and logo; Broker's name, logo, telephone number, and website; brochures; and billboards;

h. To be accountable for establishing a neat, well maintained office/furnished model. The sales office/furnished model shall be maintained seven (7) days a week. • *The on site marketing office will be closed on the following holidays: New Year's Day, Easter, Memorial Day, Fourth of July, Labor Day, Thanksgiving and Christmas.*

i. To provide a readily identifiable on site program for the purposes of directing the prospective purchasers to Listed Lots and/or homes thereon.

j. COLDWELL BANKER NEW HOMES shall lease from DEVELOPER the first floor of 441 Lakeside Avenue as a sales office/showroom. The term of the lease shall match the Listing Period unless earlier terminated as permitted in the Lease. (The second floor shall be occupied by the Mailloux family). Rent shall be $2,800 per month, triple net.

6. ADDITIONAL OBLIGATIONS: COLDWELL BANKER NEW HOMES agrees to use reasonable efforts to procure purchasers of the Listed Lots and/or homes, including cooperating with agents from other firms and to list the Listed Lots and/or homes with the local Multiple Listing Service consistent with, and not in violation of, the Service's rules and regulations. To facilitate COLDWELL BANKER NEW HOMES' marketing efforts, the DEVELOPER grants to COLDWELL BANKER NEW HOMES the sole authority to advertise the Listed Lots for sale and to place FOR SALE signs on the Premises, including the Akwa Soleil Logo - "It's a Mailloux Family Neighborhood.

Once an offer on a home or Lot has been accepted in writing, COLDWELL BANKER NEW HOMES has no obligation to solicit or present further offers.

(App. 064 - 066).

For its efforts, Coldwell Banker was to receive its compensation from the builders and agreed to "accept in full payment, a commission equal to 5% or 5 ½% of the total sale price to be paid only if and when the deed for an Improved Lot is delivered to the customer by a home builder (5 ½% is for the furnished home program)." (App. 066 at ¶5). Paragraph 4 of the Agreement makes clear that consideration from Akwa Vista was

limited: "In consideration of the foregoing, the DEVELOPER agrees to a 3-Year Exclusive Right to Sell Listed Lots without commission and promises to refer all home purchasers to COLDWELL BANKER NEW HOMES as compensation to COLDWELL BANKER NEW HOMES." (App. 066). The only consideration given by Akwa Vista was the exclusive listing or the right to be the sales agent. (Tr. 1:26; 1:131).

The Agreement also contained a termination provision that allowed Akwa Vista to terminate the exclusive right to sell:

> 7. TERMINATION: Should COLDWELL BANKER NEW HOMES fail to produce a minimum of twenty-six (26) Lot sales at the commencement of this Agreement or shall fail to sell a minimum of thirty (30) Lots[2] in any year during a Listing Period, DEVELOPER may terminate this agreement on fourteen (14) days prior written notice to COLDWELL BANKER NEW HOMES.

(App. 066). There is no mention of any other remedy if the sales were not attained on an annual basis during the Agreement and no mention of a guaranteed $4 Million in lot sales.

While the prefatory language in the Agreement indicated that builders were "committed to purchasing," the Agreement was silent as to whether the builder purchases were unconditional or what conditions would be attached. There was no specification as to what lots they were committed to purchasing, the purchase price for any of the 26 lots or any other details. The Agreement was silent on who would pay the 10% current use tax, as to any financing contingencies attached to a builder purchase, what any builder was required to pay for a deposit, when any deposit would be released to the developer, the closing date for the builder purchase and how the builder purchase was tied to the

[2] There is no other mention in the Agreement of this 30-lot benchmark.

developer's completion of the most important element to the builders - bringing water, sewer and utilities to the lots. (App. 064-067).

Following execution of the Agreement (March 4th), but before Akwa Vista closed on the property (April 2nd), and thus before the effective date of the Agreement, Akwa Vista finalized its loan to purchase the property and fund the construction. Akwa Vista signed Southern New Hampshire Bank's Commitment Letter on March 20, 2004. (App. 84). There was no mention in the Commitment Letter of the supposed guaranteed funds forthcoming from Coldwell Banker and the bank's financing was not contingent on such funds. (App. 79 - 84); (Tr. 1:122).

In this same period between March 4 and April 2, there were several important communications between Mr. Schoenthaler and Akwa Vista related to the lot sales. A March 22, 2004 email from Akwa Vista's attorney reported that Frank Schoenthaler indicated he wanted to do option agreements with certain builders. (Tr. 1:31-32). In a March 29, 2004 phone call, Mr. Schoenthaler told Shanna (Mailloux) Bekar of Akwa Vista, that Butler Bank, the bank who was going to finance the largest builder who was going to buy 30 lots (Mr. Ellis), had declared it would need "gravel on the roads" before it would close. (Tr. 1:28; 3:396-97). This was reflected in Ms. Bekar's notes of the call. (Tr. 1:28). She admitted that she knew "gravel on the roads" meant that water and sewer were installed and the gravel was down prior to paving. (Tr. 1:29); (Tr. 2:258 (Adam Mailloux explaining that "base gravel" is put down on the roads after pipes and utilities are installed)).

Akwa Vista prepared an Agreement between Owner and Contractor to establish for the bank at closing that the infrastructure cost was $4,028,000. (App. 85). This

document was signed by Richard Mailloux on behalf of both parties on April 2, 2004. (App. 85). The $4.028 million was the identical number requested by the City of Laconia in the form of a letter of credit to secure performance. (Tr. 1:118). Mr. Mailloux created a Schedule of Values itemizing the cost of various components of the work, to match the $4.028 million. (Tr. 1:127). Although he knew that this figure was $1.5 million short of the cost to complete the infrastructure, (Tr. 1:119), Mr. Mailloux did not tell Southern New Hampshire Bank before the April 2 closing of the $1.5 Million shortfall (Tr. 1:123-24) nor did he tell Coldwell Banker. (Tr. 1:100). Akwa Vista had known since at least December 2003, several months before the Exclusive Right to Sell Agreement, that there would be a shortfall. (Tr. 1:36-37).

In April 2004, Akwa Vista listed homes for sale in the Multiple Listing Service on behalf of OHC Development. (2:319); (App. 092 - 096). The model homes had been approved by the Maillouxs. (Tr. 2:319). For the next year following the effective date of the Agreement, Coldwell Banker worked to sell lots and dedicated its best salesperson to the project, hired staff (including Mr. Mailloux's brother-in-law), developed and paid for the Akwa Vista website, signage and promotional materials, paid carrying costs of $2,800 per month on a Mailloux parcel at the site, and spent a total of $140,484. (Tr. 2:322, 3:404); (App. 103 - 116). After Akwa Vista demanded a payment of $60,000 per month in April 2005, Coldwell Banker and Akwa Vista parted ways. (Tr. 2:171).

Coldwell Banker delivered to Akwa Vista in April 2004 an Option to Purchase Agreement from OHC Development for the purchase of 30 lots at a total price of $4.5 Million. (App. 120). This offer provided that Akwa Vista would pay the current use tax and conditioned transfer of deposits and closings on the stages of completion of water

and sewer. (App. 120). Akwa Vista did not consider this a real offer and thought it was fabricated. (Tr. 1:179). Akwa Vista similarly viewed the offer of Stephen Joseph & Associates for 20 lots presented by Coldwell Banker in July 2004. (Tr. 1:140-41); (App. 121).

In 2004, Akwa Vista encountered a number of obstacles in performing the infrastructure work. Neighbors successfully sued for beach access, a neighboring condominium association successfully sued to enforce an easement, neighbor opposition and issues with runoff led to a cease and desist order, and fuel and material costs increased. (Tr. 2:165-68). Akwa Vista incurred $450,000 in attorney's fees to defend the litigations and to resolve legal issues with the City of Laconia. (Tr. 2:168). There was significant publicity over the suits and adverse orders. (Tr. 3:408).

I. SUMMARY OF ARGUMENT

Akwa Vista's breach of contract claim was premised solely on the recital language in the Agreement. Such prefatory language can not form the basis of a binding contractual obligation, particularly where, as here, the explicit provisions of the contract merely imposed on Coldwell Banker an obligation to use its best efforts to sell the lots/homes. Even if the recital paragraph can impose an obligation on Coldwell Banker to produce builders “committed to purchasing” 26 lots at an aggregate price of $4 Million, it complied by bringing reasonable offers to Akwa Vista.

The Agreement could not be interpreted to impose on Coldwell Banker an obligation to deliver <u>unconditional</u> sales of $4 Million at the commencement of the Agreement. The Agreement referenced builders who were “committed to purchasing,”

but it was silent on the important conditions of those purchases, including what lots were to be purchased, the price per lot, who would pay the 10% current use tax ($400,000 on $4 Million in sales) what the deposits would be, when the deposits would be released to the developer, what financing contingencies would be imposed by builders and their lenders, and how the completion of the infrastructure (water, sewer and utilities) would impact the closings. Akwa Vista was informed before the effective date of the Agreement that the builders would not pay the current use tax, would not make large non-refundable deposits, and would condition closing on the completion of water and sewer.

Akwa Vista proceeded under the contract and demanded performance by Coldwell Banker for one year prior to terminating the agreement. Having proceeded under the contract for one year, Akwa Vista cannot assert breach and collect damages.

If the Agreement is construed as obligating Coldwell Banker to $4 Million in builder purchases, then it violates RSA 506:1, the Statute of Frauds, which applies where a real estate broker promises to make or procure a transfer, as was alleged here. Absent a writing containing the essential terms of the purchase, the contract is unenforceable.

The negligent misrepresentation claim should have been set aside because Akwa Vista was informed, before the effective date of the Agreement, that the anticipated builders would not pay $4 Million in cash at closing but would be offering options to purchase with conditions. Akwa Vista was also informed before the effective date of the Agreement that no builder would close until water and sewer were completed by the developer. Thus, to the extent there was any misrepresentation, these statements cured them. Knowing what it did prior to the April 2 closing, Akwa Vista could not have reasonably relied on any earlier statements of Mr. Schoenthaler. Moreover, it is

undisputed that Akwa Vista was always going to proceed with the project, with or without Coldwell Banker.

Even if the verdict for Akwa Vista could stand, the damages should be remitted. The sole remedy under the Agreement for a breach was for Akwa Vista to terminate the Exclusive Listing; there was no provision for the award of damages. Akwa Vista merely granted Coldwell Banker the exclusive right to sell, and it did not suffer damages from giving Coldwell Banker the right to sell. Even if money damages were available, the award was not supported by the evidence, as there was no proof that Akwa Vista actually incurred the damages or incurred the damages on account of Coldwell Banker; Akwa Vista claimed that it would have borrowed more money and thus it would have incurred its claimed damages in any event. The damages were excessive to the extent the award included damages for interest payments made in the years following the termination of the contract, as Coldwell Banker was no longer on the job working to sell lots, but other real estate agents were in place. The claim of $126,000 for interest incurred on purported private loans for construction was excessive and not supported by the evidence as funds were still available under the construction loan and there was no evidence the so-called private loans were utilized for construction purposes.

With respect to Coldwell Banker's counterclaims, the evidence clearly showed that the Agreement required Akwa Vista to develop the premises as a subdivision, Coldwell Banker relied on Akwa Vista's representations that it was fully financed to develop the premises, and, contrary to its representations, Akwa Vista was intentionally underfunded to complete the construction by $1.5 Million, which it concealed from Coldwell Banker. Akwa Vista concealed this shortfall from the City of Laconia when it

obtained a letter of credit, required for subdivision approval, and from its construction lender. The verdict for Akwa Vista on Coldwell Banker's counterclaims should have been set aside.

II. ARGUMENT

A. Standard of Review

"A motion for judgment notwithstanding the verdict based upon the sufficiency of the evidence presents a question of law." Gowan v. Brothers, 121 N.H. 377, 380 (1981). "A party is entitled to JNOV based upon the sufficiency of the evidence only when the sole reasonable inference that may be drawn from the evidence, which must be viewed in the light most favorable to the nonmoving party, is so overwhelmingly in favor of the moving party that no contrary verdict could stand." MacKenzie v. Linehan, 158 N.H. 476, 479 (2009). See also Boynton v. Figueroa, 154 N.H. 592, 602 (2006).

B. No Reasonable Jury Could Conclude There was a Breach of Contract

"The interpretation of a contract is a question of law," which the Court reviews de novo. In Re: Liquidation, 157 N.H. 543, 546 (2008) (citation omitted). A breach of contract occurs when one party fails “to perform any promise which forms the whole or part of a contract.” Poland v. Twomey, 156 N.H. 412, 415 (2007). It was incumbent on Akwa Vista to show the jury that the alleged promise was a part of the contract and, if so, that Coldwell Banker failed to perform. Akwa Vista has failed to do so.

1. The whereas clause did not create a binding obligation

Plaintiff relied solely on the "whereas" clause to support its contract claim, alleging that it imposed upon Coldwell Banker a contractual obligation to produce builders who would pay an aggregate price of $4 Million for 26 lots. The "whereas"

clause, as a matter of law, did not contractually obligate Coldwell Banker to produce builders who would pay an aggregate price of $4 Million for 26 lots.

"Recitals in a contract, such as 'whereas' clauses are merely explanations of the circumstances surrounding the execution of the contract, and are not binding obligations unless referred to in the operative provisions of the contract." 17A C.J.S. Contracts § 317 at 340. See also 17A AM JUR 2d Contracts § 383 at 371 ("since recitals indicate only the background of a contract, that is, the purposes and motives of the parties, they do not ordinarily form any part of the real Agreement. Generally, they do not have the force of contractual stipulations."). See also Livingston v. 18 Mile Point Drive, Ltd., 158 N.H. 619, 626-27 (2009) (where the court held notations on the contract "were not, in themselves, contracts, but rather comprised recitals…"). Here, there was no reference to the "whereas" clause in the operative provisions of the Agreement.

"It is standard contract law that a 'whereas' clause, while sometimes useful as an aid to interpretation, 'can not create any right beyond those arising from the operative terms of the document.'" Grynberg v. F.E.R.C., 71 F. 3d 413, 416 (D.C. Cir. 1995) (quoting Abraham Zion Corp. v. Lebow, 761 F. 2d 93, 103 (2d Cir. 1985)). See also Olympic Chevrolet v. General Motors, 959 F. Supp. 918, 923 (N.D. Ill. 1997) (quoting Atlantic Mut. Ins. v. Metron Eng'g, 83 F. 3d 897, 899 (7th Cir. 1996)) ("introductory language or recitals are not binding obligations unless so referred to in the operative portion of the instrument."); Trecom Business Systems, Inc. v. Prasad, 980 F. Supp. 770, 773 (D.N.J. 1997) ("a recital of intent in a 'whereas' clause cannot create any right beyond those established by the operative terms of the contract.").

As the “whereas” clause was the sole basis for the claim that $4 Million in sales was a guaranteed contractual obligation, and it was not referred to in the operative provisions of the agreement, it was unreasonable for the jury to find such an obligation and the verdict should be set aside.[3]

2. No contractual provision obligated Coldwell Banker to produce builders who would buy lots unconditionally - there was no guarantee of $4 Million

Even if the prefatory language is deemed to create a binding obligation to produce builders “committed to purchasing” 26 lots at an aggregate price of $4 Million, the obligation was not as broad as urged by Appellee. Akwa Vista argued at trial that the builder purchases would be unconditional. Shanna (Mailloux) Bekar testified that Akwa Vista expected $4 Million at the April closing. (Tr. 1:14; 1:34). Richard Mailloux testified that Akwa Vista expected $4 Million at closing, calling the promise a “guarantee of $4 Million.” (Tr. 1:83-84). In Akwa Vista’s view, the only conditions on that guarantee were that Akwa Vista had to close on the property and have all of the permits. (Tr. 1:85). Contrary to Akwa Vista’s unsupported assertions, there is simply no language in the Agreement that required Coldwell Banker to produce builders "committed to purchasing without condition or qualification” or that constituted a Coldwell Banker guarantee of $4 Million in sales. There was no testimony indicating Coldwell Banker

[3] Akwa Vista may argue the termination paragraph contains a sufficient reference to the “whereas” clause to create the obligation, but that provision merely identifies possible grounds for termination of the exclusive listing and establishes benchmarks at which the sales efforts would be considered successful. Indeed, one ground for termination, achieving 30 lot sales in a year, is not mentioned in the "whereas" clause and there was no suggestion this created a separate contractual obligation. Consistent with the expectation that lots would be sold, Akwa Vista was afforded the right to terminate if certain sales levels were not met. The termination paragraph does not even mention and thus does not establish a $4 Million sales obligation agreed to by Coldwell Banker.

gave a guarantee; the best Akwa Vista could muster was that Mr. Schoenthaler did not advise them of the builder conditions. (Tr. 1:16, 62-63). It made no sense that Coldwell Banker would guarantee $4 Million from builders it did not control. (Tr. 2:302).

Akwa Vista's argument ignores the facts before it. There were many critical conditions on any builder purchase that had not been resolved by March 4, 2004. One such issue concerned who would pay the current use tax. This was raised before the Agreement was signed by Mr. Schoenthaler when he noticed that Akwa Vista's Public Offering contained a sample Purchase and Sale Agreement providing the buyer would pay the current use tax. (Tr. 2:311-12); (Tr. 1:97). He requested that Akwa Vista pay the current use on the first thirty lots and Akwa Vista indicated it was willing to work it out. (Tr. 2:312). The current use tax was $400,000 on $4 Million in sales that Mr. Mailloux did not want to pay (Tr. 1:89-90). Mr. Mailloux acknowledged the current use tax was "an integral part of the purchase price" yet it was not addressed in the Exclusive Right to Sell Agreement. (Tr. 1:97). He admitted it was left to be resolved, stating at trial if "I had to pick up the current use, I may of [sic] done that. It's all a matter of negotiation." (Tr. 1:99). With this "integral" issue left to be negotiated, it was unreasonable to find there was a guarantee. As it turned out, this was one of the issues that caused Mr. Mailloux to reject the builder options to purchase presented by Coldwell Banker.

Another important unresolved issue was builder financing. Prior to the effective date of the Agreement, Akwa Vista knew builders would require financing and had met with officials of Butler Bank as Butler was going to finance one of the proffered builders. (Tr. 1:87; 1:27). Shanna Bekar conceded it was "normal" for builders to need financing. (Tr. 1:27). Mr. Mailloux acknowledged he had no information on financing

contingencies (Tr. 1:89). Within a few weeks of the agreement and prior to the closing on the property, following a meeting at which Butler Bank was "noncommittal," (Tr. 2:315), Akwa Vista was informed by Mr. Schoenthaler that Butler Bank would not provide financing until the water and sewer were installed. (Tr. 1:28-29). Mr. Mailloux admitted it was reasonable for a builder to condition his purchase on Akwa Vista's completion of water and sewer. (Tr. 2:158-59). That was particularly true here where the letter of credit issued to the City was $1.5 million short of the necessary funds to complete the water and sewer. (Tr. 2:159-60). Akwa Vista's experience with Mailloux associate Dan Martin and Shanner Homes illustrates the importance of a financing contingency. Akwa Vista told the bank in December that Martin would buy 10 lots (App. 076) and it was still expected in March that Martin would buy 10-11 lots, but in the end he could not obtain the necessary financing. (Tr. 1:43-44). This issue also turned out to be a major reason why Akwa Vista rejected builder options to purchase presented by Coldwell Banker.

Other unresolved issues included what lots would be purchased and what the purchase price would be for each lot. (Tr. 1:87, 90). As Akwa Vista reserved the right to unconditionally reject a builder offer (Tr. 1:90), these were critical issues. Thus, it was known to Akwa Vista and understood by Coldwell Banker that there were conditions on any builder offer. Perhaps the strongest evidence of this is that Akwa Vista closed on April 2 without addressing these issues; this shows that producing builders who would buy unconditionally was not a contractual provision. The jury's findings completely disregarded the facts.

Despite their contentions that they expected to receive $4 Million on April 2, Akwa Vista grudgingly acknowledged that delivery of $4 Million in cash at the April closing was “not how it works” in the “real world.” (Tr. 2:178). Mr. Mailloux testified repeatedly that a signed document and a deposit check are necessary prerequisites to establishing a purchase obligation. (Tr. 1:57, 58, 67, 69 and 85). Of course, those were not produced before April 2, 2004. The request of Akwa Vista’s attorney to Mr. Schoenthaler in March 2004, asking if Coldwell Banker would lend money against the deposits (Tr. 1:32), is telling. This shows that Akwa Vista knew there would be deposits paid by builders, which would not be immediately available and that there would not be cash at closing. It was asking for loans against the deposits to serve as a bridge to when the builder money would be available. Akwa Vista's lawyer's letter dated April 30, 2004 indicated "Akwa has not received a list of the 4-6 home builders and others contacted by you as potential purchasers of lots." (App. 099). This is directly contrary to the claim at trial that $4 Million was guaranteed for April. Akwa Vista’s lawyer’s letter of January 20, 2005 to Frank Schoenthaler is further evidence that Akwa Vista knew water and sewer must be completed as a condition of any builder purchase, stating “In the next few months, [Akwa Vista] will be completing the infrastructure at Akwa Vista. Now is the time for you to produce the home builders to purchase 26 or more residential building lots.” (App. 101). These letters are consistent with Coldwell Banker's assertions.

The absence of evidence as to integral terms of the Agreement is also important. There was no evidence of any discussion between Akwa Vista and Frank Schoenthaler before March 4 that builders were committed to buying <u>with no conditions or qualifications</u>. Not a single witness testified to any such conversation. There was no

evidence that in the days leading up to the April closing, when Akwa Vista claims it was anticipating $4 Million in cash, of any push for the specifics of builder purchases, such as what lots, what price per lot, deposit amounts, availability of deposits, who would pay current use, the financing contingencies or what other contingencies would be imposed. Throughout Mr. Mailloux's testimony, he complained that he needed to see a signed document and a check from a builder; yet he appeared unconcerned up to and following the April closing that no such paperwork was forthcoming.

All of the witnesses who addressed the issue of conditions (Frank Schoenthaler, Richard Mailloux, Lou Baldoumas, Albert Ellis and Joe Pelich) acknowledged and agreed that purchases of lots always have conditions and the principal condition was financing terms.

All of the evidence clearly demonstrated that there was no promise to produce buyers without qualifications and no guarantee of $4 Million, the contract did not require production of buyers without qualifications, all conditions or qualifications were expected and anticipated by both sides (particularly as to who would pay the current use tax and when builders would close (upon completion of water and sewer)). The only reasonable inference that could be made from the evidence presented was that the contract did not require Coldwell Bank to produce buyers with no conditions.

It was improper to read into the Agreement more than what it contemplates. Paragraph 9 stated that "this Agreement…sets forth the entire agreement between the parties…" (App. 066), and this prevents Coldwell Banker from being held to any promise or guarantee not set forth as an obligation in the contract. The jury could not consider any undisclosed meaning or expectation Akwa Vista may have had. Although

the Court instructed the jury "[y]ou are not to consider any undisclosed meaning or intention that one of the parties might have had," it is clear that this is exactly what the jury did, as there were no contract terms supporting the verdict.

3. Coldwell Banker complied with the contract.

Even if there was a promise to deliver builders "committed to purchasing" 26 lots at an aggregate price of $4 Million, Coldwell Banker complied by presenting the OHC Option to Purchase 30 lots at $4.5 Million. OHC was ready to purchase sufficient lots at a sufficient price to comply with any contractual obligation. Akwa Vista had been to see OHC projects and was told in March 2004 OHC was going to submit an option to purchase 30 lots (see Shanna Bekar's phone log). (Tr. 1:43).[4] If Mr. Mailloux and Akwa Vista had agreed to the terms in the offer, the purchase would have occurred. That it did not is not the fault of Coldwell Banker and does not constitute a breach.

Similarly, Coldwell Banker produced the offer of Stephen Joseph & Associates. Again, Mr. Mailloux blocked the sale by refusing to negotiate in good faith. The "deal killer" was Mr. Mailloux's demand for a $750,000 non-refundable deposit. (Tr. 2:243).

If one accepts Akwa Vista's position that $4 Million in sales was guaranteed in the contract, Akwa Vista changed the terms by refusing to pay the current use tax. That refusal increased the price by $400,000, which changes the agreement. In doing so, Akwa Vista breached what it agreed to. Coldwell Banker is thus not liable under the contract.

[4] The issue of who would pay the current use tax on the sale of these 30 lots was also discussed in March. (Tr. 2:312).

C. Plaintiff's Election to Proceed With the Contract Precludes its Claim for Breach

The verdict on the contract claim should also be set aside because Appellee elected voluntarily to proceed under the contract. New Hampshire law prohibits a plaintiff from proceeding on claims of both breach of contract and misrepresentation. In Green v. Sumner Properties, 152 N.H. 183 (2005), the Court held that a party who claims it entered into an agreement in reliance upon a misrepresentation of material fact my elect to rescind the agreement and refuse to proceed ***or*** it may elect to affirm the contract and sue for damages for misrepresentation, but it may not do both. Here, Akwa Vista elected to proceed (for one year) under the contract and retain the benefits; having done so, it cannot then sue for breach of that same contract based on misrepresentation.

Akwa Vista alleged in its Complaint that Coldwell Banker was in breach when it failed to produce signed purchase and sale agreements on March 4, 2004. (App. 57 at ¶ 10). At trial Akwa Vista argued that it considered Coldwell Banker to be in breach on April 2, 2004, (Tr.2:177), Mr. Mailloux testified that he did not believe Ellis was real and thought the OHC offer was "fabricated" (Tr. 2:179), and he continued to think Coldwell Banker was in breach through the summer of 2004, when the Stephen Joseph (Joe Pelich) Option was presented in July. (Tr. 1:72).

Akwa Vista's conduct belies its claims at trial. Despite its contention that Coldwell Banker was in breach as of April 2 and thereafter, Akwa Vista did not terminate the Agreement in the first year. Instead, Akwa Vista executed an Amendment to Exclusive Right to Sell Agreement on May 27, 2004, to change the compensation if a co-broker was involved in a sale. (Tr. 2:299); (App. 068). There is no mention of the

purported guarantee in this Amendment. There was no evidence whatsoever of any communication hinting that there was a breach for failing to deliver the guarantee.

Rather than terminate, Akwa Vista accepted the benefits of Coldwell Banker's efforts, including the payment of the $2,800 per month for the Lakeside Avenue property and the preparation of the brochures, newsletters, website and promotional materials, and the hiring of staff and dedication of personnel for this project.

Akwa Vista did what the law prohibits. It affirmed the contract and accepted the benefits for over one year during which time it now says it believed Coldwell Banker was in breach, and now claims damages for breach. The law prohibits Akwa Vista from doing both. Akwa Vista's explanation, that it believed the builders were coming, rings hollow; Akwa Vista thought they were "fabricated" and "not real" and refused to even negotiate with the builders who submitted options to purchase in April and July of 2004. Accordingly, Akwa Vista cannot proceed on its contract claim.

D. The Contract as Presented Violated the State of Frauds

If the contract was considered to bind Coldwell Banker or any builder to the purchase of real estate, it violated the Statute of Frauds, RSA 506:1, which requires contracts for the sale of land to be in writing. Mr. Mailloux repeatedly testified at trial that he needed to see "a signed document and a check" from a builder. (Tr. 1:67, 69 and 85). Mr. Mailloux knew no builder was bound to purchase lots until the builder had signed a binding agreement. There was never a binding agreement signed between any Coldwell Banker procured builder and Akwa Vista.

"A contract to procure the transfer of an interest in land by a person other than the promissor is within the Statute of Frauds." Restatement Second of Contracts § 126(1).

Comment b to § 126(1) specifically explains that when a real estate broker "promises to make or procure a transfer" the Agreement is within the Statute of Frauds. Thus, accepting Plaintiff's theory, the Statute of Frauds applies. With no writing between any builder and Akwa Vista, and essential terms omitted from the Exclusive Right to Sell Agreement, the contract proposed by the Akwa Vista and found by the jury plainly violates RSA 506:1. Lapierre v. Cabral, 122 N.H. 301, 305 (1982).

E. Plaintiff Failed to Prove it Suffered any Damages Due to a Breach of Contract

Plaintiff also failed to show that it suffered any damages caused by a breach of contract. Akwa Vista did not claim it bought the property in reliance on the contract. The evidence was undisputed that the only thing Akwa Vista did in reliance on the contract was grant the exclusive listing to Coldwell Banker. (Tr. 1:26, 131). As Mr. Mailloux conceded, Akwa Vista was going to purchase the property with or without Coldwell Banker. (Tr. 1:120). Thus, to restore Akwa Vista to its position merely required termination of the exclusivity, not an award of damages.

Had the exclusive listing never been signed, Akwa Vista claims it would have borrowed more money. If that had happened, it would have been paying the very same interest it claimed as damages and likely more as its principal loan amount would have increased.

Akwa Vista did not show that it actually paid the claimed $722,000 in interest on the $84,000 for each of the 26 lots it says should have been paid down; it merely claimed it "would have saved" this amount. It did not introduce evidence that it borrowed money in order to continue working on infrastructure, and it failed to explain why it did not

utilize the $1 Million available on the construction loan. Akwa Vista failed to prove it suffered any damages that were caused by a breach of contract.

F. Akwa Vista Failed to Prove Key Elements of its Misrepresentation Claim

Akwa Vista's negligent misrepresentation claim fails for lack of evidence on key elements. In order to prevail on a claim for negligent misrepresentation, Plaintiff was required to prove that it justifiably relied on a misrepresentation and suffered damages as a result. Snierson v. Scruton, 145 N.H. 73, 78 (2000). Plaintiff has not met this burden.

1. Any misrepresentation was rescinded before April 2

Akwa Vista claimed Mr. Schoenthaler, prior to the March 4 Agreement, misrepresented that he could bring purchase and sale agreements from builders who would buy 26 lots for $4 Million at closing. (App. 057 at ¶ 10). Assuming that occurred, the undisputed evidence at trial showed that any misrepresentation was rescinded before the effective date of the Agreement. Frank Schoenthaler informed Akwa Vista in March, before the effective date of the Agreement, that there would be Option Agreements (not Purchase and Sale Agreements), the seller must pay the 10% current use tax on the first thirty lots (the buyer would not pay, changing what seller expected), and the bank providing the financing would not finance until there was "gravel on the roads" (closings would thus be when water and sewer were completed, not on April 2 or at any time near that date). This was confirmed by the testimony of Akwa Vista witnesses, Shanna (Mailloux) Bekar and Richard Mailloux and also by Frank Schoenthaler.

There was no evidence that anyone from Akwa Vista asked Mr. Schoenthaler between March 4 and April 2 to confirm the builders would be paying cash at closing. The only communications from Coldwell Banker in that period were to fully disclose that

there were no builders ready to pay cash on April 2. Mr. Schoenthaler updated all material information for Akwa Vista prior to the closing. Thus, there was full disclosure before April 2 sufficient to vitiate any purported misrepresentation prior to March 4. See Ingaharro v. Blanchette, 122 N.H. 54, 57 (1982) (seller has duty to disclose when he learns earlier statement was false). Indeed, the OHC offer provided to Akwa Vista in mid-April mirrored the emails and notes of Akwa Vista from March on the critical conditions; the OHC offer was an option to purchase, for 30 lots, the seller had to pay the current use tax, and closing was conditioned on the developer completing water and sewer. Thus, no reasonable jury could have found there was a misrepresentation and verdict should have been set aside.

2. There was no reliance on any misrepresentation

The only evidence of reliance on any statement or representation made by Mr. Schoenthaler was in granting the exclusive listing. Plaintiff alleged in its Writ that the exclusive listing was granted in reliance on the statements of Mr. Schoenthaler made prior to March 4. (App. 058 ¶12). The Agreement specifically indicates the exclusive listing was granted "in recognition of COLDWELL BANKER NEW HOMES' efforts." The evidence at trial was identical. There was no evidence that plaintiff relied on any representation by Frank Schoenthaler in closing on the property.

Moreover, Akwa Vista did not contend that granting the exclusive listing caused its damages but that the damages flowed from its closing on the property and borrowing the funds for purchase and construction. There was no evidence Akwa Vista closed on the property and agreed to the loan in reliance on anything said by Coldwell Banker prior to March 4. As Mr. Mailloux testified, he was proceeding with the closing regardless of

whether he had a contract with Coldwell Banker. (Tr. 1:120). When Akwa Vista contracted with Coldwell Banker, Mr. Mailloux had been working on the subdivision approvals for over two years, had spent over $1 Million to obtain the approvals, had his financing in place since June of 2003, the construction loan component of the financing had always been set at or near $4 Million, and the financing was not contingent on $4 Million in sales. (Tr. 1:122).

The sole reasonable inference for the jury was that while Akwa Vista may have relied on Frank Schoenthaler in granting the exclusive listing, it did not rely on him in closing on the purchase of the property, on the bank loan or working on the infrastructure.

The trial court ruled that Akwa Vista "may have made some other arrangements." (Tr. 2:266). A flaw in that analysis is that any other arrangements would have involved borrowing more money from Southern New Hampshire Bank or a private lender, (Tr. 1:120-21), and thus paying the very sums it claimed as damages. A second flaw is both lenders declined additional funding for Akwa Vista. (Tr. 1:121-22).

3. There was no justifiable reliance

Even if there was reliance beyond granting the exclusive listing, it was not justifiable. With the information known prior to the April 2 closing, it was unreasonable and unjustifiable for Akwa Vista to proceed with the closing in reliance on anything Mr. Schoenthaler said prior to March 4. Mr. Mailloux was a developer for 30 years who knew contracts for the sale of land must be in writing, knew that there are contingencies placed on purchases of real estate, had placed contingencies on his own purchase of this

property, and agreed that it was reasonable for a builder to condition his purchase on Akwa Vista's completion of water and sewer.

Akwa Vista knew before April 2 that there would be no cash at closing because builders could not obtain financing until water and sewer were complete, it knew before April 2 that the buyer of the first 30 lots would not agree to pay the current use tax, it knew before April 2 that there would be options to purchase and no purchase and sale agreements, and it knew before April 2 that many other conditions of sale remained subject to negotiation. Akwa Vista did not know what lots builders wanted to buy, what price they wanted to pay for any particular lot, what conditions they would agree to (on critical issues like the size of the deposit, whether deposits would be refundable, and who would pay the current use tax) or when they would close. The sole reasonable inference the jury could draw was that it was not justifiable to proceed with the closing in reliance on any pre-March 4 statements of Mr. Schoenthaler, based on the information it possessed and the critical information it lacked on the date of the closing.

Akwa Vista had a simple choice to make on April 2 before the closing, if it in fact was relying on Mr. Schoenthaler in deciding to go forward with the closing: it simply had to delay the closing until he had the builder cash or until it had the signed document and a check from a builder following negotiations. The decision to go forward with nothing in hand was unreasonable.

4. No damages were caused by any misrepresentation

Akwa Vista also failed to prove any damages were caused by a negligent misrepresentation prior to March 4. First, the damages were not proven. Second, it was not the entering into the exclusive listing that caused any damages (Akwa Vista gave up

nothing in the Agreement but the right to list and was going to close without the Agreement), it was closing on the purchase of the property and the loan, and the acts of Akwa Vista as it worked on the infrastructure, that potentially caused damages. Akwa Vista went forward with full knowledge that there would be builder options to purchase with conditions including closing on completion of water and sewer and the seller paying the current use tax. Third, it was not foreseeable that damages would flow, as Mr. Mailloux acknowledged he never informed Coldwell Banker he was underfinanced and he never told Coldwell Banker that he would have to borrow more money if the $4 Million was not delivered. (Tr. 1:100). Indeed, the infrastructure cost was always set as $4 Million, at least for seven months before the March 4 Agreement, and when Akwa Vista twice increased the loan amount from $8 Million to $9.7 Million, it never sought additional funds for construction. The cause of Akwa Vista's damages was its concealing from the City of Laconia, Southern New Hampshire Bank and Coldwell Banker that it was underfunded by $1.5 Million.

G. Coldwell Banker Should Prevail on its Counterclaims

Richard Mailloux admitted he was underfinanced and that he did not inform Coldwell Banker or Mr. Schoenthaler of this. He led them to believe Akwa Vista was fully financed and could complete the infrastructure from June 2003 until this suit was filed, just as he misled the bank and the City of Laconia.

It was critically important to Coldwell Banker that Akwa Vista be fully financed, which is why Mr. Schoenthaler asked about it and offered assistance in April 2003. Mr. Mailloux knew in June 2003 the importance of financing, as he would not discuss an exclusive listing with Coldwell Banker until he had the bank’s commitment letter.

Moreover, the parties' Agreement reveals how important it was for Akwa Vista to have the financing to complete the infrastructure, as Coldwell Banker could not be paid until a builder constructed a home and sold that home to an end user. The only way that could happen, agreed by all witnesses, was for the infrastructure to be completed so that an occupancy permit could issue. If Akwa Vista could not complete the infrastructure, Coldwell Banker could not be paid.

Akwa Vista engaged in unfair or deceptive acts and practices, it misrepresented to Coldwell Banker the true nature of its financing, and it breached its contractual duty to act in good faith and to deal fairly with Coldwell Banker. As a result, and in reliance on Akwa Vista's misrepresentations Coldwell Banker signed the Agreement and spent $140,484 in the year it worked on this project, never knowing that Akwa Vista was underfinanced. Mr. Schoenthaler testified that had he known that Akwa Vista would not be able to complete all aspects of the development, Coldwell Banker would never have entered into this Agreement. Additionally, Akwa Vista breached the contract by failing to deal fairly and in good faith, as evidenced by its unreasonable rejection of the OHC and Stephen Joseph offers, its concealment of its underfunding, its failure to timely complete the infrastructure, and in forcing Coldwell Banker off the job in April 2005 by demanding that it pay $60,000 per month to avoid termination.

The jury's verdict was unreasonable and judgment should be entered for Coldwell Banker on its Counterclaims in the amount of $140,484. That should at least be doubled under RSA 358-A:10 as it was clear the Akwa Vista violation was willful or knowing.

H. The Trial Court Should Have Ordered a Remittitur

"Direct review of a damages award is the responsibility of the trial judge, who may disturb a verdict as excessive if its amount is conclusively against the weight of the evidence and if the verdict is manifestly exorbitant. The proper standard for the trial court's review of a jury award is whether the verdict is fair." Debenedetto v. CLD Consulting Engineers, 153 N.H. 793, 809 (2006). "The amount of a verdict is conclusively against the weight of the evidence only if no reasonable jury could have reached it." Guyotte v. O'Neill, 157 N.H. 616, 621 (2008).

"Damages are available only if the harm was a reasonably foreseeable result at the time the parties entered into the contract. One way a Plaintiff may satisfy this requirement is by specifically proving that the Defendant 'had reason to know the facts' at the time the parties contracted and to foresee that the injury would be a probable consequence of a breach." Independent Mechanical Contractors v. Gordon T. Burke & Sons, 138 N.H. 110, 114 (1993). Judged against these standards, Appellee was not entitled to any damages, or if entitled to damages, it was not entitled to all the damages.

Akwa Vista was awarded two categories of damages: (1) $722,000 in interest it claims it could have "saved" had it received the $4 million in April 2004 and been able to pay down its loan by $84,000; and (2) $126,000 in interest charges paid on amounts it claimed to have borrowed in 2005 – 2006 purportedly for construction costs.

The damages awarded were wholly against the weight of the evidence and the verdict was manifestly exorbitant. Akwa Vista did not establish that it actually paid the $722,000 in interest it claimed it accumulated on the $84,000 pay down. While Mr. Mailloux testified that Akwa Vista "would have saved" these payments (Tr. 1:77-78), he

never testified that Akwa Vista actually made those interest payments. Though the law does not require mathematical certainty in computing damages, the law requires "an indicia of reasonableness." Bailey v. Sommovigo, 137 N.H. 526, 531 (1993). "Speculative losses are not recoverable." Hydraform Prods. Corp. v. American Steel & Alum. Corp., 127 N.H. 187, 197 (1985). "The party seeking to recover must convince the court that the damages sought represent charges that were justly and fairly incurred." Robert E. Tardiff, Inc. v. Twin Oaks Realty Trust, 130 N.H. 673, 679 (1988). Akwa Vista's claim was not reasonable, its losses were speculative and it failed to prove the claimed damages were justly and fairly incurred.

Further, it was excessive to award $223,000 for 2004 – 2005, when Akwa Vista had unreasonably rejected the OHC and Stephen Joseph offers, had not sought additional funding and was running into delays in completing the infrastructure and bad publicity due to its own actions precluded sales. It was excessive to award any amount for April 2005 - July 2007 after Akwa Vista had forced Coldwell Banker off the project with a $60,000 per month demand. Coldwell Banker lost the opportunity to generate sales when Akwa Vista was finally getting to a point of completing the infrastructure.

The award of $126,000 in interest on amounts borrowed from insiders was also excessive and against the weight of the evidence. One Million dollars remained on the construction loan when these debts were allegedly incurred. There was no evidence the cost of construction had increased (Mr. Mailloux projected an increase, but his estimates showed the cost was still in line with the $4.028 Million budget), and there was no evidence that the borrowed amounts were actually used for construction costs. Akwa Vista failed to address why it borrowed funds and incurred interest charges when there

was still at least $1 Million remaining on the construction loan / letter of credit in 2005 – 2006. (Tr. 1:172). Akwa Vista simply made the claim without connecting the money to the project. It was not reasonably foreseeable that these costs would be incurred, as Coldwell Banker was not informed that Akwa Vista was underfinanced.

The damages should also be eliminated or reduced because Plaintiff failed to use reasonable efforts to avoid the harm. "A plaintiff has a general duty to mitigate damages." Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 836 (2006). "As a general rule, Plaintiffs may not recover damages for harm that could have been avoided through reasonable efforts or expenditures." Flanagan v. Prudhomme, 138 N.H. 561, 575 (1994). The doctrine of avoidable consequences provides "that a party cannot recover damages flowing from consequences which that party could reasonably have avoided." Anglin v. Kleeman, 140 N.H. 257, 263 (1995). See also Mailloux v. Town of Londonderry, 151 N.H. 555, 563 (2004).

Akwa Vista could have easily avoided the damages it claimed by delaying the closing until documentation was signed for $4 Million in lot sales, not going through with the closing without such documentation, obtaining proper financing at the outset, telling Coldwell Banker and the City the truth about being underfinanced, negotiating in good faith and accepting the OHC and/or the Stephen Joseph offer, avoiding the cease and desist orders, asking for funding on this project before all of the problems surfaced, and controlling costs. Akwa Vista should not benefit by its failure to avoid the consequences of its own actions that hindered Coldwell Banker's ability to sell $4 Million in lots at the outset. The damages award was unfair and should be set aside entirely or substantially reduced.

III. CONCLUSION

For the foregoing reasons, Coldwell Banker and Frank Schoenthaler respectfully request that this Honorable Court set aside the Jury Verdict on Akwa Vista's breach of contract and negligent misrepresentation claims and enter judgment for them. Alternatively, should one or both of the verdicts stand, Appellants request that Court set aside the damage award and remand the matter. Appellant Coldwell Banker respectfully requests the jury verdict for Akwa Vista on Coldwell Banker's counterclaim be set aside and judgment entered for Coldwell Banker for $140,484.

Respectfully submitted,

NRT, INC. d/b/a COLDWELL
BANKER RESIDENTIAL
BROKERAGE and
FRANK C. SCHOENTHALER

By their attorneys,

PRETI, FLAHERTY, BELIVEAU
& PACHIOS, PLLP

Dated: December 15, 2009

By: _____

Peter G. Callaghan, NH Bar #6811
P.O. Box 1318
Concord, NH 03302-1318
(603) 410-1500

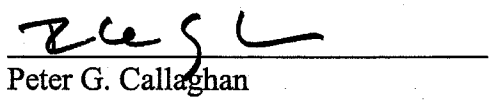
CERTIFICATE OF SERVICE

I hereby certify that two copies of this Brief have been forwarded via first-class mail to William B. Pribis, Esquire, and that this Brief conforms to the requirements of Supreme Court Rule 16.

Peter G. Callaghan

ORAL ARGUMENT

Attorney Peter G. Callaghan will present the oral argument for Appellants. 15 minutes is requested.



Peter G. Callaghan