

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

**2009 TERM
DECEMBER SESSION**

CASE NO. 2009-0552

**NEW HAMPSHIRE REAL ESTATE MANAGEMENT
& BROKERAGE, INC.**

v.

CA INVESTMENT TRUST & a.

APPEAL FROM RULING FROM THE STRAFFORD COUNTY SUPERIOR COURT

**BRIEF FOR NEW HAMPSHIRE REAL ESTATE MANAGEMENT
& BROKERAGE, INC., APPELLANT**

**Bianco Professional Association
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(15 minute oral argument)

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QUESTIONS PRESENTED

The issues presented for appeal are as follows*:

1. Whether the Court erred in finding that New Hampshire Real Estate Management & Brokerage, Inc. (hereinafter "NHRE") was not entitled to a real estate broker's commission when the Court found that all the terms of the Exclusive Listing Agreement that NHRE entered into with CA Investment Trust through its Trustees and/or agents (hereinafter collectively referred to as "CA Investment Trust") were satisfied.
2. Whether the Court erred in requiring a meeting of the minds between CA Investment Trust and the buyer as to the time frame for closing before NHRE was entitled to a real estate broker's commission where, after the buyer agreed to all terms of the Exclusive Listing Agreement and the time frame proposed for closing was reasonable, CA Investment Trust decided it would not convey the Windshire Garden Apartments to the buyer unless the buyer also agreed to purchase an adjacent, near-vacant office building and, accordingly, refused to negotiate with the buyer in good faith to finalize a Purchase and Sale Agreement.
3. Whether the Court erred in finding that NHRE was not entitled to any compensation under the doctrine of *quantum meruit* where, in reliance on the repeated representations by CA Investment Trust that it wished NHRE to procure a buyer for the Windshire Garden Apartments, NHRE marketed the property to multiple entities and ultimately produced a buyer who was willing to pay the full asking price for the property and meet all the other terms of the Exclusive Listing Agreement, but CA Investment Trust changed its mind about proceeding with the sale of the Windshire Garden Apartments and refused to negotiate with the buyer in good faith to finalize a purchase and sale agreement.
4. Whether the Court erred in not awarding NHRE attorney's fees and costs.

* Although the issues presented in NHRE's Notice of Appeal included a question on whether the Court erred in finding that CA Investment Trust did not violate the Consumer Protection Act, RSA 358-A:1, et seq., NHRE voluntarily withdraws this issue and it is, accordingly, not briefed herein.

STATEMENT OF FACTS

This case arises from an Exclusive Listing Agreement which entitled Plaintiff to a commission if a ready, willing and able buyer was procured who was willing to purchase the Defendants' apartment complex under the terms set out in the Exclusive Listing Agreement. Plaintiff asserted that such a buyer was produced, but the Defendants declined to proceed with the sale and refused to pay the commission owed.

George Brandt Atkins (hereinafter "Atkins") is the president and broker of New Hampshire Real Estate Management & Brokerage, Inc. (hereinafter "NHRE"). *Trn. p. 64.* Atkins has been affiliated with NHRE since its inception in 1984 or 1985 and has held a New Hampshire broker's license since the same time. *Trn. p. 65.* NHRE is "a full-service real estate company, specializing in commercial sales and residential property management." *Trn. pp. 64-65.*

CA Investment Trust, Defendant in the underlying suit, owned a one-hundred two (102) unit apartment complex located at 70-72 Webb Place Drive in Dover, New Hampshire which is known as Windshire Gardens. *Trn. p. 4, Plaintiff's Appendix at p. 57.*

NHRE first became involved with Windshire Gardens when the property was introduced and subsequently sold to CA Investment Trust through Yvon Cormier (hereinafter "Cormier") and Leo Roy (hereinafter "Roy"). *Trn. p. 66.* NHRE later handled the initial "lease-up" of Windshire Gardens and had a contract for the ongoing property management services. *Trn. p. 66, Plaintiff's Appendix at p. 57.*

Atkins understood Cormier to be the principal in CA Investment Trust and Roy to be his agent. *Trn. p. 67.* Roy confirmed this and testified that he was an agent of the CA Investment Trust, and that he was authorized to sign the various documents at issue in this case on behalf of

CA Investment Trust and to retain Atkins' brokerage services. *Trn. pp.* 138-139.

A Property Management Agreement hiring NHRE to manage Windshire Gardens went into effect on August 1, 2003. Plaintiff's Appendix at p. 57. The Property Management Agreement was terminated, following the dispute giving rise to this litigation, by letter to Atkins dated May 31, 2005, with an effective termination date of July 31, 2005. Plaintiff's Appendix at p. 75.

The Property Management Agreement contained the following clause:

5.9 OTHER TERMS OF MUTUAL AGREEMENT During the term of this agreement, NH Real Estate shall have the first option to list the property exclusively should the owners decide to sell. In Exchange, NH Real Estate will market the property at a reduced commission rate of six percent (6%) for residential buildings under 5 units, seven percent 7% for residential buildings with twelve or less units and eight percent (8%) for all other types of properties. All sale activity involving NHRE will entitle them to a commission equal to the above rate schedule.

Plaintiff's Appendix at p. 57.

During the time Atkins managed Windshire Gardens under the Property Management Agreement, Roy "asked on numerous occasions" for NHRE to locate a buyer for Windshire Gardens. *Trn. p.* 69. For close to a year and a half Atkins worked on procuring a buyer for the property. *Trn. p.* 137. This work was done on the representation that CA Investment Trust wanted NHRE to find a buyer. *Trn. p.* 137.

In his effort to find a buyer, Atkins used his contacts to reach individuals who might have an interest in purchasing Windshire Gardens and "brought at least a half dozen people to the site and showed the property." *Trn. p.* 70. Atkins spent a great deal of time with six to eight buyers with potential interest in the property dependant upon a set price for the sale. *Trn. p.* 73. Atkins did receive an offer to purchase the property from Latham Properties for \$11,600,000. *Trn. pp.* 71-72. Plaintiff's Appendix at p. 61. Atkins also had several discussions with Ronald Dupont

(hereinafter "Dupont") about Windshire Gardens. *Trn. pp. 72-73.* Dupont viewed the property in 2004 and indicated that if there was ever a set price for the property he would be interested in purchasing it. *Trn. p. 73.*

In early 2005, Dupont and Atkins spoke again and Atkins indicated that he believed he was close to receiving from Roy, terms that were agreeable for a sale. *Trn. p. 73.* Subsequently, Roy agreed to a listing price of \$12,900,000 and Atkins then submitted an Exclusive Listing Agreement explaining that he needed the agreement in writing in order to proceed. *Trn. pp. 73-74.* The Exclusive Listing Agreement was negotiated over a period of approximately three days and involved several drafts which were submitted to Roy for his review. *Trn. p. 107.* The Exclusive Listing Agreement was signed by Roy, as agent of CA Investment Trust, on March 28, 2005. Plaintiff's Appendix at p. 62.

When completed, the Exclusive Listing Agreement contained a commission of one and a half percent (1.5%) of the price to be paid to NHRE. *Trn. p. 74.* Specifically, the Exclusive Listing Agreement provided that:

CA Investment Trust ("SELLER") hereby gives the undersigned NH Real Estate Management and Brokerage, ("AGENCY"), on this date, March 24, 2005, in consideration of AGENCY's agreement to list and promote the sale, lease or exchange of property located as 70-73 Webb Place Drive, Dover, NH 03801 the exclusive right to sell, lease or exchange said property at a price of \$12,900,000.00 on the terms herein stated, or at any other price and terms to which SELLER may authorize or consider. If, during the term of this agreement, an individual or entity is procured who is ready, willing and able to purchase at said price, or upon another price and terms to which SELLER may agree, then SELLER agrees to pay AGENCY a commission of 1.5% of the contract price....

Plaintiff's Appendix at p. 62, (emphasis added).

There was nothing within the Exclusive Listing Agreement that required either a closing or a Purchase and Sale Agreement before this commission was earned. *Trn. p. 137,* Plaintiff's Appendix at p. 62.

William "Bill" Norton (hereinafter "Norton"), Defendants' expert, testified that the portion of the Exclusive Listing Agreement that stated "or upon another price and terms to which SELLER may agree" would apply if the offer made was not a full price offer or if it deviated from the other three specified terms. *Trn. pp.* 181-182 (emphasis added). Norton proceeded to confirm that this portion of the contract would not apply as long as a person was produced by March 31, 2005, that met the four terms of the Exclusive Listing Agreement. *Trn. pp.* 182-183.

The only specified terms required by the Exclusive Listing Agreement were as follows:

- a. A selling price of \$12,900,000;
- b. That the Exclusive Listing Agreement was a onetime listing for Pristine Properties, LLC, Ronald Dupont, Managing Member;
- c. That the buyer must assume existing financing; and
- d. Buyer and seller would split the transfer tax 50/50.

Trn. p. 75, Plaintiff's Appendix at p. 62. NHRE was prohibited from placing a "For Sale" sign on the property, from advertising the property, and from submitting the property to the multi-state listing. *Trn. pp.* 75-76, Plaintiff's Appendix at p. 62.

NHRE subsequently submitted to CA Investment Trust, through Roy, a Letter of Intent from Dupont on behalf of Pristine Properties. Plaintiff's Appendix at p. 64. The Letter of Intent offered the full asking price of \$12,900,000, with an initial deposit of \$500,000 and an additional \$500,000 deposit to be paid upon the time the Purchase and Sale Agreement was finalized. Plaintiff's Appendix at p. 64.

Roy accepted and signed the Letter of Intent on March 28, 2009, with the only change being a shortening of the closing time from the 120 proposed by Dupont to 90 days. Plaintiff's Appendix at p. 64. Atkins discussed the change with Roy, who minimized the change and whose

subsequent actions lead Atkins to believe that the time-frame for closing was a “non issue.” *Trn.* pp. 81, 85.

After signing the Letter of Intent, both parties took steps demonstrating they were proceeding toward the sale. *Trn.* p. 82. Dupont provided Atkins with checks totaling \$500,000 for the initial deposit. *Trn.* p. 82, Plaintiff’s Appendix at p. 83. Roy produced the remaining due diligence materials listed in the Exclusive Listing Agreement and never requested that the Letter of Intent be returned with the 90 day change approved by Dupont. *Trn.* p. 84. Plaintiff’s Appendix at p. 66.

Roy conceded that, as of at least April 5th, the day before the proposed Purchase and Sale Agreement was received, he was providing documents and moving ahead as though the sale was going to occur and that he had never asked for the Letter of Intent to be returned with the shorter closing time approved. *Trn.* pp. 151, 153-154.

The Letter of Intent specified that the parties would have 15 business days to complete the Purchase and Sale Agreement. Plaintiff’s Appendix at p. 64. Norton testified that he would not have expected the Purchase and Sale Agreement to be completed before the Exclusive Listing Agreement expired on March 31, 2005, and further conceded that the Exclusive Listing Agreement did not specify a set time period within which the Purchase and Sale Agreement needed to be submitted. *Trn.* p. 180.

Dupont timely submitted a proposed Purchase and Sale Agreement on April 6, 2005. Plaintiff’s Appendix at p. 67. (Order at pg. 6); *Trn.* pp. 13, 34, and 83. Atkins forwarded the proposed Purchase and Sale Agreement to Roy, but received no response from Roy until two days later when Roy requested a copy with a larger font and the proposed Purchase and Sale Agreement was subsequently resent to Roy in a larger font on April 8th. *Trn.* p. 86. Although

Dupont wanted to proceed with the sale, “no action was ever taken” by CA Investment Trust and no counter-proposal to the proposed Purchase and Sale Agreement was ever received. *Trn. p.* 13-14, 55.

When Atkins was finally able to reach Roy, after numerous calls over four to six days, Roy advised him, for the first time, that Cormier no longer wanted to proceed with the sale unless an additional near-vacant 38,000 square foot office building was included. *Trn. p.* 87. Roy testified that he and Cormier had both changed their mind and decided they wanted to include the office building in the sale. *Trn. pp.* 152, 154. No other reason was provided as to why CA Investment was not proceeding with the sale of Windshire Gardens other than that Cormier had changed his mind, as, Roy represented to Atkins, Cormier did frequently. *Trn. p.* 89.

The office building in question was also owned by CA Investment Trust and the asking price was over \$3,000,000. *Trn. pp.* 88-89. Atkins testified that this was a material change as to what he was hired to do under the terms of the Exclusive Listing Agreement. *Trn. p.* 88. Norton also testified that the addition of an office building was a material change to the Exclusive Listing Agreement between NHRE and CA Investment Trust. *Trn. pp.* 204-205. Roy conceded that the Exclusive Listing Agreement was a contract, and that to change this contract would have required Atkins’ agreement. *Trn. p.* 154.

Roy admitted that at his deposition he had testified that it was the failure to include the additional office building in the sale that was the primary reason CA Investment Trust no longer wanted to sell Windshire Gardens. *Trn. p.* 152-153. Specifically, Roy testified as follows:

Q: In April of 2005, was the primary reason that you and Mr. Cormier did not proceed with the sale because the separate office building was not included in the package?

A: Right.

Trn. p. 143.

Although everyone was proceeding as though a sale was going to occur, the evidence presented showed that Roy had actually changed his mind about proceeding with the sale even before the Exclusive Listing Agreement had expired. *Trn. p. 185.*

When asked if he was ever given a reason why the sale was not proceeding, Dupont stated he thought “it was pretty crystal clear ... that the seller changed his mind.” *Trn. p. 19.* Dupont recalled being told by Atkins that the seller would contemplate moving ahead with the sale of Windshire Gardens if an office building the seller also owned was included in the sale. *Trn. p. 19-20.* Although Dupont was willing to consider purchasing the office building, he was not willing to commit to this additional property under approximately 2-3 months after any purchase of Windshire Gardens. Plaintiff’s Appendix at p. 74.

During Roy’s testimony on cross-examination, several changes between the terms of the Letter of Intent and the proposed Purchase and Sale Agreement were raised. *Trn. p. 143-146.* None of these alleged concerns, however, were raised with Atkins until a year or two after the proposed Purchase and Sale Agreement was submitted, and the details were only articulated during the litigation process. *Trn. p. 93.* Dupont was never contacted with a counter-proposal, or any proposed changes, to the proposed Purchase and Sale Agreement. *Trn. p. 13-14, 55.*

The testimony presented at trial raised the following differences between the proposed Purchase and Sale Agreement and the accepted Letter of Intent as being at issue – none of which were actual impediments to the sale as indicated by the summary of evidence listed in the right-hand column:

Term	Letter of Intent	Purchase and Sale Agreement	Significance
Closing Date	90 days	120 days	Dupont testified that he did not understand this difference to be “a showstopper” and if told the property had to close within the original 90 days would have agreed a 90 day closing period in the proposed Purchase and Sale Agreement. <i>Trn. pp. 15-16, 55.</i> Dupont confirmed he would have agreed to a 90 day closing period even if a 1031 like-kind exchange was done. <i>Trn. p. 53.</i>
Due Diligence	45 days	120 days	Dupont testified that the 120 day period was a typographical error or an oversight. <i>Trn. p. 52.</i> Dupont also testified that he was willing to proceed with a 45 day period and he would even “have probably gone down to 30....” <i>Trn. pp. 51-52, 17.</i>
Repairs		Repairs to heating system	The inclusion of this provision was never raised as a concern by Roy with Mr. Dupont. <i>Trn. pp. 18-19.</i> Repairs were already in progress by CA Investment Trust and were being completed under warranty. <i>Trn. pp. 96-98.</i>
Like Kind Exchange		Allowed for 1301 like-kind exchange	Roy admitted he did not have a concern regarding the 1031 like-kind exchange. <i>Trn. pp. 148-149.</i> Atkins testified that it is standard to have this language added when a Purchase and Sale Agreement is prepared. <i>Trn. p. 136.</i>
Assignment	Buyer was Pristine Properties, LLC “or a successor entity”	Title would go to buyer or “nominee designated by buyer”	A successor entity is commonly understood to be an entity formed by a buyer to assume title of the property. Roy admitted that he signed the Letter of Intent with the provision that it could be transferred to a successor entity without raising this as an issue. <i>Trn. pp. 147-148.</i>
Property Items	Not specified	Included mowers, snow blowers, ice removal equipment, computers, and office supplies	Dupont would have proceeded with the purchase of Windshire Gardens at the \$12,900,000 price even without lawnmowers, snow blower and ice removal equipment, or the computer and office supplies. <i>Trn. pp. 17-18.</i> The inclusion of these property items was never raised as a concern or necessary change with Dupont. <i>Trn. p. 19.</i> Norton testified that these types of items can be trivial adjustments to a purchase and sale agreement in a sale of this magnitude (<i>Trn. p. 208</i>), and he attributed no fault or bad faith to Dupont for including these items in the proposed Purchase and Sale Agreement. <i>Trn. p. 187.</i>

With regard to the additional details in the proposed Purchase and Sale Agreement, Norton testified that if he were advising a seller who received a Purchase and Sale Agreement with terms that the seller did not want to include, they should scratch them out and send it back to see what was agreed on. *Trn. p.* 188-189. Norton also conceded that this would have been the way for CA Investment Trust to learn what Dupont was willing to agree to, but that this was never done. *Trn. p.* 189.

It was not disputed at trial that, typically, multiple drafts of a Purchase and Sale Agreement are exchanged. *Trn. p.* 93. Defendant's expert, Norton, confirmed that Purchase and Sale Agreements can go back and forth multiple times before they are finalized. *Trn. pp.* 185-186. Norton later also admitted that this was generally what would be expected within the industry. *Trn. p.* 186. This was consistent with Atkins' testimony that he had never seen a Purchase and Sale Agreement that was not at least negotiated once a full price offer was made. *Trn. p.* 99.

Throughout the time period in question, Dupont testified that he was ready, willing and able to proceed with the purchase of Windshire Gardens and was willing to negotiate any of the terms of the proposed Purchase and Sale Agreement that may have been a concern for the seller. *Trn. pp.* 20-21. Moreover, for several months, and even up through the time of trial, he remained interested in proceeding with the sale. Plaintiff's Appendix at p. 75, *Trn. pp.* 21, 92.

As evidence of his ability to proceed with the purchase, Dupont testified at trial that he owned "a little bit under 900" apartment units in the State of New Hampshire, regularly transacted commercial real estate throughout the State, and had recently completed a purchase of 240 apartments at a cost of over \$20,900,000. *Trn. pp.* 8-9. Dupont testified that the sale of

Windshire Gardens was a \$12,900,000 transaction which fell within the average range of transactions within which he was involved through his business. *Trn. p. 9.*

Atkins was designated as an expert witness in this case. *Trn. p. 102.* No objection was made to Atkins' designation as an expert and Atkins was allowed to provide opinion testimony at trial without objection. Specifically, when asked if Dupont was a ready, willing and able buyer, Atkins testified that Dupont showed more interest in buying the property than he had seen in his history in the business, and that Dupont was "extremely qualified." *Trn. pp. 100-101.* Atkins later specified that "[t]here was every indication that [Dupont] was ready, willing, and financially able" to move forward with the purchase of Windshire Gardens. *Trn. p. 136.*

Although the sale of Windshire Gardens did not occur, NHRE fulfilled the obligations under the Exclusive Listing Agreement necessary to earn its commission. Specifically, in reviewing each of the four requirements of the Exclusive Listing Agreement, Roy conceded in his testimony that:

- a. Atkins did produce you a buyer who was willing to pay \$12,900,000 for Windshire Gardens (*Trn. p. 139*);
- b. Atkins did produce a one time listing for Pristine Properties, LLC, Ronald Dupont (*Trn. p. 140*);
- c. Dupont was willing to assume the financing (*Trn. p. 141*); and
- d. Dupont was willing to split the transfer tax 50/50 (*Trn. p. 142*).

Counsel for NHRE then asked Roy the following:

Q: So, all the terms of the Exclusive Listing Agreement Mr. Dupont satisfied; is that right?

A: Yup.

Trn. p. 143.

The record provides further verification that each of the terms in question was satisfied:

- a. The Letter of Intent specified a purchase price of \$12,900,000. Plaintiff's Appendix at p. 64. This evidence confirms that the requirements regarding both the amount of the offer and the buyer to whom the listing would be presented were satisfied. Moreover, Dupont was ready, willing and able to proceed with the sale at this price. *Trn. pp.* 8-9, 101, 136.
- b. On March 24, 2005, Atkins sent Roy a fax cover sheet which advised that the buyer (specified as Pristine Properties in the Exclusive Listing Agreement) was "planning to assume existing financing of nine million dollars." *Trn. pp.* 76-78, Plaintiff's Appendix at p.64. This is consistent with Dupont's testimony that he was aware of the terms of CA Investment Trust's loan on the property and was willing to proceed with the assumption of this loan as a part of the purchase of Windshire Gardens. *Trn. p.* 10. The willingness to assume the financing was further confirmed in the proposed Purchase and Sale Agreement, which specified that the seller's loan would be assumed. Plaintiff's Appendix at p. 67.
- c. Dupont testified that a 50/50 split of this tax was the "norm" in New Hampshire. *Trn. p.* 33. Dupont understood this 50% split was statutory in the State of New Hampshire and this was what would happen absent language to the contrary. *Trn. p.* 51. The willingness to proceed in this manner was confirmed in the terms of the subsequently proposed Purchase and Sale Agreement which listed this tax as being split equally between the parties. Plaintiff's Appendix at p. 67.

Atkins testified, without objection, that it was his opinion that the reason the sale fell apart was because the seller added the office building and that he, Atkins, had done all he was contracted to do under the Exclusive Listing Agreement. *Trn. p.* 101. Atkins further rendered the opinion, still without objection, that a Purchase and Sale Agreement was not necessary for him to earn his commission. *Trn. p.* 102.

When no commission was paid, Atkins, on behalf of NHRE, filed a Notice of Commercial Broker's lien pursuant to RSA 447-A on July 7, 2005, a corrected version of which was filed on September 8, 2005, to include both Trustees of CA Investment Trust. Plaintiff's Appendix at p. 77 and 80. Both Notices of Lien specified the amount of the lien to be \$193,500, representing 1.5% of the \$12,900,000 purchase price. Plaintiff's Appendix at p. 77 and 80.

STATEMENT OF THE CASE

On July 2, 2007, within two years of the filing of the real estate broker's lien, as required by RSA 447-A:4, IX, NHRE filed its Writ of Summons against CA Investment Trust and the Trustees of the Trust, seeking enforcement of the lien and payment of the commission. *See* Writ of Summons and Declaration to Writ of Summons. Plaintiff's Appendix at p. 1. An Assented to Motion to Amend Writ of Summons and an Amended Declaration to Writ of Summons was filed with the Trial Court on January 8, 2008. Plaintiff's Appendix at p. 17. On January 10, 2008, with a Clerk's Notice of Decision dated January 11, 2009, the Trial Court Granted the Motion to Amend the Writ of Summons. Plaintiff's Appendix at p. 35, (Notice of Order).

On April 1, 2009, a one day bench trial was held in this matter before the Honorable Judge Kenneth C. Brown. On June 8, 2009, with a Clerk's Notice of Decision dated June 10, 2009, Judgment was entered in Defendants' favor. In reaching his decision, Judge Brown found that NHRE was not entitled to a commission because "[d]espite CA Investment and Pristine agreeing on the terms of the Exclusive Listing Agreement, including the purchase price, the financing, the split of the New Hampshire Real Estate Transfer Tax, CA Investment and Pristine never reached an agreement regarding the terms of the sale, specifically the closing period." Plaintiff's Appendix at p. 36, (Order at p. 5).

Although the parties had both submitted Findings of Fact and Rulings of Law, Judge Brown noted that his Judgment set forth the Court's reasoning as to the essential Findings of Fact and Rulings of Law and that the parties' requests were "granted, denied, or determined to be unnecessary, as consistent with the above narrative." Plaintiff's Appendix at p. 36.

On or about June 19, 2009, NHRE filed a timely Motion to Reconsider. Plaintiff's Appendix at p. 43. Defendants did not file a Motion for Reconsideration.

On or about June 24, 2009, Defendants did file an Objection to Plaintiff's Motion for Reconsideration. Plaintiff's Appendix at p. 53. On July 1, 2009, with a Clerk Notice of Decision dated July 2, 2009, the Court denied NHRE's Motion to Reconsider. Plaintiff's Appendix at p. 56.

A timely Notice of Appeal was filed with this Court on or about August 3, 2009. Defendants did not file a cross-appeal.

SUMMARY OF ARGUMENT

NHRE asserts that, because it produced a buyer who was ready, willing, and able to proceed with the purchase of Windshire Gardens on all the terms set forth in the Exclusive Listing Agreement, the contractual obligations of the Exclusive Listing Agreement were satisfied and CA Investment Trust owes NHRE the contractually agreed upon commission of \$193,500. As the Trial Court specifically made findings that the terms of the Exclusive Listing Agreement were satisfied, it was plain error to look beyond the contract created by the Exclusive Listing Agreement to require a meeting of the minds between CA Investment Trust and Dupont/Pristine Properties on additional terms and conditions before awarding NHRE its commission.

NHRE asserts that it was not necessary for there to be a meeting of the minds with regard to all the terms of the sale, such as the closing date, where the proposed terms were reasonable. Because a time frame for closing was neither specified in the Exclusive Listing Agreement, nor designated as being of the essence, the precise time period for the closing to occur should not be viewed as a term that was essential to the completion of the contract. Under the facts and circumstances of this case, the only requirement regarding a closing date would have been that the proposed time-frame be reasonable. The Trial Court should have found that the proposed 120 day closing period was reasonable as the uncontested evidence, including the testimony of Defendants' own expert, was that a 120 day closing period was within the average closing time for a sale of the nature.

Even if it was necessary for there to be a meeting of the minds on the closing date, NHRE asserts that it was CA Investment Trust's failure to negotiate the Purchase and Sale Agreement in good faith, due to having changed its mind about proceeding with the sale, which prevented the sale from proceeding and, accordingly, that NHRE is entitled to its commission. With regard to

each term of the proposed Purchase and Sale Agreement which was raised as a possible issue, the evidence presented demonstrated that these matters would have been resolved if CA Investment Trust had simply presented Dupont/Pristine Properties with a counter-proposal. With regard to the closing date in particular, on which the Trial Court relied in concluding that there was no meeting of the minds, Dupont testified he would have been willing to proceed with a 90 day closing date if he had been told it was necessary for the sale to occur.

In the alternative, if the Court finds that NHRE is not entitled to the commission that was contracted for in the Exclusive Listing Agreement, NHRE asserts that it is nonetheless entitled to be compensated for its efforts under the doctrine of *quantum meruit*. A significant amount of marketing services were provided to CA Investment Trust, at the request of CA Investment Trust, and in reliance upon its express representations that it wanted NHRE to procure a buyer for Windshire Gardens. To the extent that CA Investment Trust failed to pay any commission to NHRE, it was unjustly enriched by the production of a full price offer for Windshire Gardens, whether or not it chose to avail itself of the opportunity to sell the property at full price.

If this Court finds that NHRE should have prevailed and is owed its commission, then NHRE requests an order that the contractually agreed-upon commission be paid and that this matter be remanded for a ruling regarding an award of reasonable attorney's fees and costs under RSA 447-A.

ARGUMENT

I. NHRE Earned Its Commission As All The Terms Of The Exclusive Listing Agreement Were Satisfied.

The Exclusive Listing Agreement was negotiated by the parties and set forth the contractual terms which needed to be satisfied for NHRE to earn its commission. The Trial Court found that the requirements of the Exclusive Listing Agreement were satisfied, but then erred in requiring that there be a meeting of the minds on additional terms outside the Exclusive Listing Agreement before a commission was owed.

The Exclusive Listing Agreement gave NHRE the “exclusive right to sell, lease or exchange said property at a price of \$12,900,000.00 on the terms herein stated, or at any other price and terms to which SELLER may authorize or consider.” (emphasis added). The Exclusive Listing Agreement goes on to specify that that NHRE was entitled to a 1.5% commission if “during the term of this agreement, an individual or entity is procured who is ready, willing and able to purchase at said price, or upon another price and terms to which SELLER may agree.”

In agreeing to the terms of the Exclusive Listing Agreement, NHRE made a significant concession by agreeing to accept a commission of \$193,500 (1.5% of \$12,900,000) instead of the \$1,032,000 (8% of \$12,900,000) that it would have been entitled to under the terms of the parties' Property Management Agreement. Under the terms of the Exclusive Listing Agreement, NHRE was entitled to a commission that was 81.25% less than it would have been entitled to under the Property Management Agreement, but CA Investment Trust was required to pay such a commission if a ready, willing and able buyer was produced who was willing to proceed under the terms of the Exclusive Listing Agreement, which did not include any requirements pertaining to a closing date or that an actual sale take place.

Although the Trial Court noted that the proposed Purchase and Sale Agreement was submitted after the expiration of the Exclusive Listing Agreement, an issue that CA Investment Trust also raised in its Objection to Plaintiff's Motion to Reconsider, the testimony of Defendant's expert, Norton, confirmed that it was not a requirement of the Exclusive Listing Agreement that a Purchase and Sale Agreement be completed before March 31, 2005, and that he would not have expected a Purchase and Sale Agreement to have been finalized within this time period. Additionally, Roy signed the Letter of Intent which allowed for 15 additional business days for a Purchase and Sale Agreement, indicating that he too was not expecting a completed Purchase and Sale Agreement before the expiration of the Letter of Intent.

NHRE produced a buyer who made a full price offer and agreed to all the terms of the Exclusive Listing Agreement – this is supported by the Trial Court's factual findings which have not been challenged by CA Investment Trust. In this case NHRE fully met the portion of the Exclusive Listing Agreement that provided for a sale "...at a price of \$12,900,000.00 on the terms herein stated...." Under these circumstances, the provisions of the remainder of the sentence, "or at any other price and terms to which SELLER may authorize" (emphasis added), are inapplicable. Norton, Defendants' expert, confirmed this interpretation of the Exclusive Listing Agreement, testifying that the portion of the Exclusive Listing Agreement setting forth the commission to be paid if a buyer was produced who was ready willing and able to purchase at the \$12,900,000 price "or upon another price and terms to which SELLER may agree" would apply only if the offer made was not a full price offer or if it deviated from the other specified terms of the Exclusive Listing Agreement. Norton further confirmed that this portion of the contract would not apply if a buyer was produced by March 31, 2005, that met the terms of the Exclusive Listing Agreement.

The only terms required by the Exclusive Listing Agreement were the following:

- a. A selling price of \$12,900,000;
- b. That the Exclusive Listing Agreement was a one time listing for Pristine Properties, LLC, Ronald Dupont, Managing Member;
- c. That the buyer must assume existing financing; and
- d. That buyer and seller would split the transfer tax 50/50.

Among the Trial Court's findings in this matter contained the following:

- a. That the Plaintiff and the Defendants entered into an Exclusive Listing Agreement. Plaintiff's Appendix at p. 62. (Order at p. 2)
- b. That the Exclusive Listing Agreement provided that NHRE would receive a commission if it produced a buyer that was ready, willing and able to purchase the property for \$12,900,000 under the conditions that (1) the listing was a onetime listing for Pristine Properties, (2) the buyer must assume existing financing, and (3) the seller and buyer would split the real estate transfer tax. Plaintiff's Appendix at p. 62. (Order at p. 2).
- c. That the Exclusive Listing Agreement did not require a "time is of the essence clause" or specify a closing period. Plaintiff's Appendix at p. 62. (Order at p. 2).
- d. That CA Investment and the buyer did agree on the terms of the Exclusive Listing Agreement, including purchase price, financing, and the division of the real estate transfer tax. Plaintiff's Appendix at p. 62. (Order at p. 5)(emphasis added).
- e. That CA Investment did not want to go through with the sale because it wanted to include a neighboring vacant office building in the sale of the Apartments. Plaintiff's Appendix at p. 75. (Order at p. 3).

There was no Motion for Reconsideration filed by Defendant disputing any of these factual findings nor a cross-appeal claiming that any of these findings were unsupported by the evidence.

The New Hampshire Supreme Court "... will not disturb the findings of the trial court unless they lack evidentiary support or are erroneous as a matter of law." Sherryland, Inc. v. Snuffer, 150 N.H. 262, 265 (2003); (citing Key Bank of Maine v. Latshaw, 140 N.H. 634, 636

(1996)). However, “[l]egal conclusions, as well as the application of law to fact, are reviewed independently for plain error.” Sherryland, Inc. v. Snuffer, 150 N.H. 262, 265 (2003)(citing Fleet Bank-N.H. v. Chain Constr. Corp., 138 N.H. 136, 139 (1993)).

The question of whether the Trial Court’s factual findings support the denial of a commission under the terms of the Exclusive Listing Agreement appears to be a question of law and an application of law to the facts, both of which would be reviewed de novo by this Court. Koor Communication, Inc. v. City of Lebanon, 148 N.H. 618, 620 (2002); See also Close v. Fisette, 146 N.H. 480, 484 (2001) (Holding that the proper interpretation of a contract is a question of law for this Court, and is reviewed de novo).

In interpreting a contract, the Court has held that:

In the absence of ambiguity, the parties’ intent will be determined from the plain meaning of the language used. The words and phrases used by the parties will be assigned their common meaning, and we will ascertain the intended purpose of the contract based upon the reasonable meaning that would be given to it by a reasonable person. (citations omitted).

Greenhalgh v. Presstek, Inc., 152 N.H. 695, 698 (2005). In this instance, the Trial Court erred in requiring additional terms beyond those set out within the plain meaning of the Exclusive Listing Agreement, denying NHRE its commission after finding that all the terms of the Exclusive Listing Agreement were met.

The Trial Court found that NHRE found a buyer that satisfied all the terms specified within the Exclusive Listing Agreement, but then incorrectly left the four corners of the Exclusive Listing Agreement contract and examined whether there was also a meeting of the minds on the additional details set out in the Purchase and Sale Agreement proposed by the buyer. This error disregards that a Purchase and Sale Agreement, or even an agreement to proceed with the sale, is not necessary for a commission to be earned.

In Guaraldi v. Trans-Lease Group, 136 N.H. 457, 460-461 (1992), this Court considered facts that were similar to those seen in this case. In Guaraldi, the Plaintiff real estate agent had a contract to sell the Defendant's home. Although the Defendant actually advised the real estate agent that he was no longer willing to sell at the price set forth in the listing agreement, the Defendant never signed an amendment to the listing agreement. The real estate agent then procured buyers who were willing to pay the full original asking price and who might be willing to pay for some additional repairs that the seller had done. The Defendant seller rejected this offer and the buyers subsequently withdrew their offer. Id. at 459.

Although in Guaraldi there was clearly no meeting of the minds between the buyer and seller on terms such as a closing date, repairs to be made, or any other terms beyond the price, this Court upheld the Trial Court's finding that the Listing Agreement was enforceable and that the Plaintiff real estate agent had produced buyers "who were ready willing and able to purchase the defendant's property for [the listed price]." Id. at 460.

In this instance, the same legal principles should apply. There was no agreement regarding any amendment of the Exclusive Listing Agreement to include the office building and CA Investment Trust could not amend the terms of the agreement without the assent of NHRE. See Guaraldi, 136 N.H. at 460-461. The buyer that NHRE produced was ready, willing and able to purchase under all the terms set out in the Exclusive Listing Agreement, including the price. However, like the Defendant in Guaraldi, CA Investment Trust changed its mind regarding the terms under which it was willing to sell Windshire Gardens.

It is well established in New Hampshire case law that a sale need not be completed for a broker to earn a commission. In Roger Coleman Associates, Inc. v. Retsof Company Trust, 117 N.H. 81 (1977) this Court found that a real estate broker was entitled to a commission in a case

where the broker procured a buyer, and that this commission was owed even though the seller did not proceed with the sale after the broker had filed an attachment to secure the broker's commission. This Court specifically held that "[a] real estate broker is entitled to his commission if he is the effective cause of procuring a customer willing and able to buy upon the terms proposed by the owner.... It is not part of the undertaking of the plaintiff that he see that a legal contract was made between the buyer and seller." Id. at 83 (citations omitted).

In Russo v. Slawsby, 84 N.H. 89 (1929) this Court expressly rejected the seller's argument that an agent must procure an enforceable contract of sale to earn a commission. Rather, the Court found that the broker has fully performed and may recover his commission if the failure to carry out the agreement (an oral agreement in the Russo case) arises from some cause other than the default of the buyer. Id.

The holdings of this line of cases was reaffirmed more recently in Blais v. Remillard, 138 N.H. 608 (1994) where the court held that "the sale need not be completed in order for the broker to earn the commission...." Id. at 609, citing both Russo, 84 N.H. at 91 and Roger Coleman Associates, Inc. 117 N.H. at 84.

In the present case, the record reflects that the parties carefully negotiated the Exclusive Listing Agreement, including a significant reduction in the commission amount from that which would have been owed under the Property Management Agreement and that NHRE sought to avoid the very situation in which it now finds itself, i.e. having produced a buyer that was ready, willing and able to meet all four of the terms of the Exclusive Listing Agreement, yet being denied its commission. Although the sale did not proceed, the contractual requirements for NHRE to earn its commission were satisfied and the Trial Court should have found that NHRE was owed its commission.

II. The Trial Court Erroneously Required A Meeting Of The Minds On The Closing Date For NHRE To Earn Its Commission.

The Trial Court relied heavily on the fact that the parties did not reach an agreement on a closing date. The Trial Court looked to Blais v. Remillard, 138 N.H. 608, 610 (1994) for the proposition that there must be a meeting of the minds before a commission is owed and, if the terms offered by the buyer (Dupont/Pristine Properties) varied in any material aspect from those proposed by the seller (CA Investment Trust) then the broker (NHRE) needed to demonstrate that those terms were acceptable to the seller.

On the facts of the instant case, however, this reliance on Blais is misplaced. In Blais, the terms of the proposed sale varied significantly from those specified in the listing agreement entered into between the seller and the realtor broker. Id. at 609. Specifically, in Blais the listing agreement specified a sales price of \$4 million, but the subsequent offer that was received required the seller to finance \$900,000 of this purchase price. Id. at 609. The Court found that “[i]f the terms proposed by the prospective purchaser vary in any material aspect from those proposed by the seller, the broker seeking a commission bears the burden to prove that these different terms were accepted by the seller before the broker is entitled to a commission.” Id. at 610 (citing Bell v. Warren Dev. Corp., 114 N.H. 267, 269 (1974)).

Thus, in Blais, the question was whether the realtor had met her burden of showing that there was a meeting of the mind on the new terms which were proposed by the buyer (which involved significantly different financing arrangements than those set out in the listing agreement). By contrast, in this case the Trial Court specifically found that NHRE did produce a buyer (Dupont/Pristine Properties) that was willing to meet the terms of the Exclusive Listing Agreement and there seems to be little dispute that Dupont was ready, willing and able to proceed with the sale under these terms. Accordingly, there was no shifting of the burden to

show that the “new terms” were acceptable as the original contractual terms set out in the Exclusive Listing Agreement were all satisfied. Therefore, the facts in Blais are readily distinguishable and do not militate against a finding for the Plaintiff.

This is also consistent with Bel Air Associates v. New Hampshire Dep’t of Health and Human Services, 158 N.H. 104, 107-108 (2008), cited by the Trial Court for the proposition that for a meeting of the minds to occur “the parties, must have the same understanding of the terms of the contract and must manifest an intention, supported by adequate consideration, to be bound by the contract.” However, in the instant case the contract in question was the Exclusive Listing Agreement, not the Purchase and Sale Agreement. The terms of the Exclusive Listing Agreement are not disputed, nor is there a challenge to the Trial Court’s factual finding that the terms of the Exclusive Listing Agreement were met. Moreover, the terms of the Exclusive Listing Agreement were negotiated over several days, involved multiple drafts, and included a significantly reduced commission over that which would have been owed under the Property Management Agreement.

Even after significant review and negotiation, the final Exclusive Listing Agreement which was signed by the parties did not require a specific time within which the sale of Windshire Gardens must be completed. Moreover, as the Trial Court correctly found, the Exclusive Listing Agreement did not contain a clause that “time is of the essence” with regard to any closing date and there was no provision requiring that a “time is of the essence” clause be included in any Purchase and Sale Agreement. Accordingly, what the Trial Court has done, in essence, is to reform the parties’ agreement to include establishing a time-frame for closing as an additional material term to the Exclusive Listing Agreement.

“[T]he general rule is that time is not of the essence unless a contract specifically so states....” C&M Realty Trust v. Wiendekeller, 133 N.H. 470, 475 (1990); See also Guy v. Hanley, 111 N.H. 73, 75 (1971). Looking at the law of contracts, if no date is specified (such as in the Exclusive Listing Agreement applicable to this case), then the time for performance must simply be reasonable. See e.g. Tyler v. Webster, 43 N.H. 147, 4, (1861). In this instance the proposed 120 days was a reasonable time period. Atkins testified, without objection, at trial that the average closing time for a transaction such as the one involved in this case would generally be between 90 and 180 days. *Trn. p. 79*. Moreover, Norton, Defendants’ own expert, confirmed that 120 closing period was “right in the – in the median, the mean” of the time within which commercial real estate closings occur. *Trn. p. 177*. Norton proceeded to agree that the 120 day closing period was “not at all unusual” for a typical closing time. *Trn. p. 193*.

When time is not of the essence, “equity treats the time limitation as formal rather than essential.” Catholic Medical Center v. Executive Risk Indemnity, Inc., 151 N.H. 699, 703 (2005). “As a general rule, time is not considered to be of the essence unless the contract specifically states it is.” *Id.*, citing Mailloux v. Dickey, 129 N.H. 62, 66 (1986). Rather, the general rule is that “a contract lacking a designation of specific time for performance obligates the parties to perform within a reasonable time.” Erin Food Services v. Derry Motel, Inc., 131 N.H. 353, 360 (1988), citing Smith v. B., C. & M. Railroad, 36 N.H. 458, 485 (1858).

In the real estate context, where no time was specified for the payment of a commission the Court has applied this equitable principle to conclude that performance was due in a reasonable time. Belleau v. Hopewell, 120 N.H. 46, 51 (1980). Moreover, even after a Purchase and Sale Agreement is signed, unless is it specified that time is of the essence (something neither party requested in this case), it has been held that a party still has a reasonable period of time

after the specified closing date within which to perform under the contract. Leavitt v. Fowler, 118 N.H. 541, 543 (1978).

In this case, the Exclusive Listing Agreement contained no time-frame within which the closing date must occur, nor other indication that time was of the essence with regard to a closing date. Thus, the closing date, unless clearly unreasonable, was neither an essential nor material term of the sale and was not a date which required a meeting of the minds to satisfy the terms of the Exclusive Listing Agreement.

This conclusion is consistent with the precedent established by both Blais and Guaraldi. Blais is silent regarding a closing date and Guaraldi involved no agreement on any terms, including a closing date – only further confirming that this Court has not considered a closing date to be a material term that is required to be agreed upon for a commission to be earned.

III. It Was CA Investment Trust's Failure To Negotiate In Good Faith After Changing Its Mind About Proceeding With The Sale That Prevented The Closing From Occurring.

The evidence presented makes it clear that even before the Exclusive Listing Agreement had expired, CA Investment Trust had changed its mind about proceeding with the sale unless an additional office building, valued at over \$3,000,000, was added to the property to be purchased. Specifically, Roy testified that he and Cormier had both changed their minds and decided they wanted to include the office building and that Cormier frequently changed his mind. Roy admitted in his deposition that it was the failure to include the additional office building in the sale that was the primary reason CA Investment Trust no longer wanted to sell Windshire Gardens.

Although, the evidence presented showed that Roy had changed his mind even before the Exclusive Listing Agreement expired. He acted as though he wanted to proceed with the sale

and continued to provide due diligence materials to Dupont. Roy only communicated the change regarding the additional office building to Atkins after Atkins contacted him to inquire as to why there had been no response to the proposed Purchase and Sale Agreement.

The Defendants' own expert, Norton, testified that the addition of an office building was a material change to the Exclusive Listing Agreement contract between NHRE and CA Investment Trust. Yet, "[i]t is a fundamental principle of contract law that one party to a contract cannot alter its terms without the assent of the other party...." Walker v. Percy, 142 N.H. 345, 349 (1997), citing Guaraldi, 136 N.H. at 460-461. "In order to hold that the contract was modified, the trial court must have found an express or implied mutual agreement between the parties to that effect." Id. (internal quotations omitted), citing Guaraldi, 136 N.H. at 457.

In this instance, there was no assertion or allegation that NHRE had agreed to the addition of the office building to the assets being conveyed. This was a decision made by CA Investment Trust alone, without NHRE's express or implied consent. As there was no agreement to modify the Exclusive Listing Agreement, the only question is whether its terms of the original Exclusive Listing Agreement were met.

As explained more fully above, the facts and the Trial Court's own rulings confirm that the terms of the Exclusive Listing Agreement were satisfied. The problem arose when CA Investment Trust, having changed its mind about proceeding with the sale, failed to even respond to the Purchase and Sale Agreement proposed by Dupont.

"In every agreement, there is an implied covenant that the parties will act in good faith and fairly with one another." Livingston v. 18 Mile Point Drive, Ltd., 158 N.H. 619, 624 (2009), citing Richard v. Good Luck Trailer Court, 157 N.H. 65, 70 (2008). The function of this good-faith requirement includes prohibiting "behavior inconsistent with the parties' agreed-upon

common purpose and justified expectations.” Id., citing Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 293 (1992). “Among the types of bad faith recognized by the courts are evasion of the spirit of the bargain and failure to cooperate in the other’s performance.” Id. at 625, citing Restatement (Second) of Contracts, cmt. 6 at 100-01.

In this instance, CA Investment Trust and NHRE entered into an Exclusive Listing Agreement with the expressed mutual goal of obtaining a buyer for Windshire Gardens. When such a buyer was procured, CA Investment Trust failed to even respond to the proposed full-price Purchase and Sale Agreement, instead indicating it would only proceed with the sale if an additional multi-million dollar office building was also purchased. Such actions are contrary to the spirit of the Exclusive Listing Agreement and demonstrate a lack of good faith and fair dealing.

Case law is clear that a sale need not be completed in order for the broker to earn his or her commission where the failure to close is due to the fault of the seller rather than the buyer. Blais, 138 N.H. at 610. Dupont’s testimony demonstrates that any reasonable attempt to negotiate on the part of CA Investment Trust would have resolved any differences which may have appeared to exist between the parties. While, prior to signing a Purchase and Sale Agreement, CA Investment Trust may have been free to change its mind and decline to sell Windshire Gardens without liability to the buyer, it does not follow that it could do so without liability for payment of the commission owed to NHRE under the Exclusive Listing Agreement. Because it was the fault of CA Investment Trust that negotiations did not continue after CA Investment Trust changed its mind about proceeding with the sale, the Trial Court erred in finding that NHRE was not entitled to its commission.

IV. The Trial Court Erred In Finding That NHRE Was Not Entitled To Any Compensation Under The Doctrine Of Quantum Meruit.

As the Trial Court found, *quantum meruit* claims are based on the doctrine of unjust enrichment. See e.g. Burgess v. Queen, 124 N.H. 155 (1983). As the Trial Court further noted, “[u]njust enrichment may exist when an individual receives a benefit as a result of his wrongful acts, or when he innocently receives a benefit and passively accepts it.” Petrie-Clemons v. Butterfield, 122 N.H. 120, 127 (1982)(citation omitted). The Trial Court, however, erred in finding that CA Investment Trust was not unjustly enriched because it “was not involved in wrongful conduct and acted pursuant to the terms of the [Exclusive Listing Agreement].” Plaintiff’s Appendix at p. 62. (Order at p. 5).

As discussed above, it was CA Investment Trust’s actions in changing its mind about proceeding with the sale of Windshire Gardens and, subsequently, failing to even attempt to negotiate an agreeable Purchase and Sale Agreement, that resulted in the failure of the sale to proceed. For all the reasons discussed above, CA Investment Trust had an obligation to negotiate in good faith toward a Purchase and Sale Agreement as its failure to do so was “inconsistent with the parties’ agreed-upon common purpose and justified expectations, as well as with common standards of decency, fairness and reasonableness.” Livingston, 158 N.H. at 624 (citations and internal quotations omitted). Accordingly, it was CA Investment Trust’s own wrongful conduct that prevented the sale from proceeding – the lack of a sale now providing the basis on which CA Investment Trust is denying that any commission is owed.

In denying NHRE’s *quantum meruit* claim, the Trial Court concluded that NHRE was fairly compensated for its services under the Property Management Agreement. However, the Property Management Agreement specifically included a clause whereby NHRE would be given a commission of eight percent (8%) for “All sale activity.” While “sale activity” is not defined,

the Trial Court's ruling directly overlooks the fact that the terms of the Management Agreement specifically compensated NHRE for management services only and that the language regarding additional compensation for sales activity clearly anticipates additional compensation for sales efforts.

Similarly, as more fully set forth above, NHRE performed all its obligations under the Exclusive Listing Agreement. Again, it was CA Investment Trust's actions in changing its mind about the sale, resulting in an attempt to unilaterally modify the Exclusive Listing Agreement to include an additional multi-million dollar office building, and then refusing to negotiate a Purchase and Sale Agreement which resulted in the failure of the sale to proceed.

In direct reliance on the representations of CA Investment Trust that it wanted NHRE to procure a buyer, Atkins expended significant effort in locating a buyer for Windshire Gardens. For close to a year and a half Atkins worked on procuring a buyer for the property. Atkins used his contacts to reach individuals who might have an interest in purchasing Windshire Gardens and "brought at least a half dozen people to the site and showed the property." Atkins spent a great deal of time with six to eight buyers with potential interest in the property dependant upon a set price for the sale. Atkins did receive an offer to purchase the property from Latham Properties for \$11,600,000. Atkins ultimately produced Pristine Properties (through Dupont) who was willing to pay the full asking price for the property and meet the other terms set out in the Exclusive Listing Agreement.

CA Investment Trust induced NHRE to expend the time and effort to procure a buyer, and then backed out of the transaction because it had changed its mind about the property it wished to have included in the sale. The fact that a sale did not take place neither reduces the amount of work that was done, nor removes the obligation to compensate NHRE for the work

performed. A significant amount of marketing services were provided to CA Investment Trust, at the request of CA Investment Trust, and in reliance upon its express representations that it wanted NHRE to procure a buyer for Windshire Gardens.

To the extent that CA Investment Trust failed to pay any commission to NHRE, it was unjustly enriched by the production of a full price offer for Windshire Gardens, whether or not it chose to avail itself of the opportunity to sell the property at full price. The efforts expended by NHRE also allowed CA Investment Trust to determine the maximum value it thought could be obtained for the property and which, ultimately, Dupont was willing to pay. Accordingly, the Trial Court erred in denying NHRE compensation under the doctrine of *quantum meruit* and this matter should be remanded for a determination as to the value of the services rendered.

V. The Trial Court Erred In Not Awarding NHRE Attorney's Fees.

NHRE's commercial real estate broker's lien was duly recorded at the Strafford County Registry of Deeds at Book 3218, Page 0954, on July 7, 2005, and a subsequent timely amendment to this lien was recorded at Book 3255, Page 0782 of the Strafford County Registry of Deeds on September 8, 2005.

Pursuant to RSA 447-A:4, IX, suit was subsequently filed for the enforcement of the lien for the commission owed and the requested relief specifically includes a prayer for attorney's fees. Plaintiff's Appendix at p. 1 (Writ of Summons) and 17 (Amended Writ of Summons).

RSA 447-A:4, XIII, specifically provides that "[t]he cost of proceedings brought under this chapter including reasonable attorneys' fees, costs, and prejudgment interest due to the prevailing party shall be borne by the non-prevailing party...." Accordingly, should this Court issue the requested order reversing the Trial Court's decision that NHRE is not entitled to its commission, this Court should further order that NHRE is entitled to costs and reasonable

attorney's fees to be paid by CA Investment Trust and remand this matter for a determination of the proper amount of such costs and attorney's fees.

CONCLUSION

The Trial Court erred in concluding that NHRE was not entitled to a commission after finding that all the terms of the Exclusive Listing Agreement were satisfied. The Trial Court further erred by concluding that it was necessary to have a meeting of the minds regarding the details of the Purchase and Sale Agreement, particularly the closing date, as time was not of the essence and the evidence presented at trial demonstrated that the failure to proceed with the sale was the result of the actions of CA Investment Trust who, having changed its mind about proceeding with the sale, failed to even respond to the proposed Purchase and Sale Agreement.

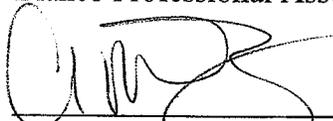
For each and all of the foregoing reasons, the Trial Court's Order of June 8, 2009, should be reversed and judgment should be entered in NHRE's favor in the amount of \$193,500.00. This Honorable Court should further order that NHRE's costs and reasonable attorneys fees are to be paid by CA Investment Trust pursuant to RSA 447-A:4, and this matter should be remanded for a determination of the amount of such costs and attorneys' fees to which NHRE is entitled.

If the foregoing relief is denied for any reason, the Trial Court still erred in determining that NHRE was not entitled to any compensation based on *quantum meruit*. On this issue, this matter should be remanded for a determination of the damages to be awarded to NHRE for its sales efforts made in reliance on CA Investment Trust's express representations that it wished NHRE to procure a buyer to purchase Windshire Gardens for the sum of \$12,900,000.

Respectfully Submitted:
New Hampshire Real Estate
Management & Brokerage Inc.
By Its Attorneys

Bianco Professional Association

Date: December 21, 2009



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REQUEST FOR ORAL ARGUMENT

Plaintiff/Petitioner, New Hampshire Real Estate Management & Brokerage, Inc., hereby respectfully requests an estimated fifteen (15) minutes for oral argument in connection with this matter. Counsel to be heard for the Plaintiff will be Anna M. Zimmerman, Esquire.

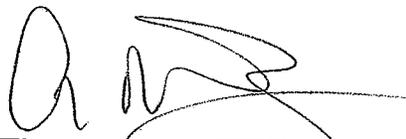
Dated: December 21, 2009

By: 

Anna M. Zimmerman, Esquire

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of December, 2009, forwarded by first class mail, postage prepaid, two copies of the Petitioner's Brief and Petitioner's Appendix to the Brief, to John E. Durkin, Esquire, attorney for CA Investment Trust, Yvon Cormier, and Denise Enxing.



Anna M. Zimmerman, Esquire