STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-05-720

JASON ARTHUR SNYDER

Plaintiff

v.

ORDER ON
DEFENDANTS' MOTION
TO DISMISS

VERRILL DANA, LLP, ANTHONY CALCAGNI, CHARLES OESTREICHER, THE BOULOS COMPANY, INC., JOSEPH BOULOS, and KENT WHITE

Defendants

Before the court are two motions to dismiss plaintiff Jason Arthur Snyder's ("Plaintiff") complaint. The first motion to dismiss is made by defendants Verrill Dana, LLP, Anthony Calcagni and Charles Oestreicher (collectively, "Verrill Dana"). The second motion to dismiss is made by defendants The Boulos Company, Inc., Joseph Boulos, and Kent White (collectively, "Boulos").

BACKGROUND

In 1999, Plaintiff was the owner in joint tenancy, along with his brother, of real estate in Portland, Maine comprising approximately 75 acres ("Rand Road Land.") In December, 1999, Plaintiff and his brother conveyed ownership of approximately 47 acres of the Rand Road Land ("Parcel") to the City of Portland for $1.7 million ("Sale"). Plaintiff claims that the Parcel was worth significantly more than $1.7 million. Verrill Dana represented Plaintiff and his brother in this transaction; Boulos was the real estate listing agent for the Rand Road Land, and received a commission from the Sale.

In six counts, Plaintiff claims (I) legal malpractice against Verrill Dana, (II) misrepresentation against Boulos, (III) breach of contract against Boulos, (IV) breach of the covenant of good faith and fair dealing against Boulos, (V) Consumer protection [commercial context] against all defendants, and (VI) breach of fiduciary duty against all defendants, relating to the Sale.

DISCUSSION

On its motion to dismiss, Verrill Dana asserts that Plaintiff should be judicially estopped from claiming that he personally held title to the Parcel in 1999[1]. Verrill Dana asserts that, in a judicial settlement reached in 2004 with members of his family ("2004 Agreement"), Plaintiff acknowledged that he held the Parcel jointly with his brother as co-trustee of a trust established by his father for the benefit of the members of his immediate family. Verrill Dana claims, therefore, that any claim relating to the Sale belongs to the trust acknowledged by the 2004 Agreement, and not to Plaintiff himself. Finally, Verrill Dana claims that this deficiency in Plaintiff's pleading should be fatal to the claims asserted because Plaintiff was aware of his status at trustee at the time he filed the complaint, and therefore should not be allowed to amend the complaint to relate back to the date of the original filing. (the statute of limitations on these claims ran shortly after Plaintiff filed the complaint.) Verrill Dana also separately asserts that Plaintiff does not have a claim for which relief may be granted

[1] Verrill Dana suggested at oral argument that perhaps a better theory on which to base this motion to dismiss would be collateral estoppel. Collateral estoppel prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment and the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding. *State v. Hughes*, 2004 ME 141, ¶ 5; 863 A.2d 266, 268 (quoting *Cline v. Maine Coast Nordic*, 1999 ME 72, P 9, 728 A.2d 686, 688.) Although the court stated in the order approving the 2004 Agreement that "Defendants Jason A. Snyder and Simon A. Snyder hold title to certain parcels of real estate as trustees of the said trust," this finding was made solely for the purpose of settling claims among the family members, and applies only to the parties to that suit. It did not affect the brothers' transactions with third parties, or, with respect to the Parcel, change their legal status as owners in joint tenancy prior to its sale to the City of Portland. Accordingly, as the issues in that suit are not related to the issues in this suit, collateral estoppel is inapplicable. *See id.*

because it was released by the terms of the 2004 Agreement from any claims relating to the Sale. These positions are adopted by Boulos as the bases for its motion to dismiss.

Judicial estoppel is not applicable to this case. First, Plaintiff's position in this litigation, that he was a joint owner along with his brother of the Parcel at the time of the Sale, is not inconsistent with the terms of the 2004 Agreement. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (stating, "a party's later position must be clearly inconsistent with its earlier position.") As acknowledged above in fn. 1, the 2004 Agreement affected rights among the litigants in that dispute only, and did not change Plaintiff's legal status with respect to third parties.

Second, Plaintiff derives no unfair advantage and imposes no unfair detriment on Verrill Dana or Boulos in bringing this claim on his own behalf as the former owner, in joint tenancy, of the Parcel. *See id.* (stating, "a[nother] consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.") Whether Plaintiff is required, as a result of the 2004 Agreement, to share any proceeds of this litigation with his family members can be of no consequence to Verrill Dana or Boulos. As joint owners of the Parcel, only Plaintiff and his brother may bring action against Verrill Dana and Boulos for their actions relating to the Sale; the 2004 Agreement gives Maria and Carolyn Snyder (Plaintiff's sister and mother) rights only as against Plaintiff and his brother, and does not establish any right by Maria or Carolyn Snyder to sue third parties, such as Verrill Dana or Boulos, for their actions related to the Sale.

Finally, judicial estoppel is inapplicable because Plaintiff's assertion in this litigation that he had an ownership interest in the Parcel prior to the Sale does not create any perception that the court was misled in the litigation related to the

2004 Agreement. *See id.* (stating, "courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.") The court's findings in that litigation were made upon the parties' joint motion, for the purpose of settling their claims. They were not made on the basis of the court's review of evidence. Indeed, the 2004 Agreement recites, "Jason A. Snyder has denied the allegations of the lawsuit, but has agreed to acknowledge [them] as part of the settlement of the lawsuit...".

Given that there is no basis to estop Plaintiff from asserting a claim in his own behalf, the court does not reach Defendants' subsequent arguments on this issue. Defendants have also failed to demonstrate that they were released from liability for their actions in connection with the Sale by the terms of the 2004 Agreement. Paragraph 9 of the 2004 Agreement contains a release related only to Plaintiff, and Plaintiff's brother, sister and mother.

The entry is:

Defendants' motions to dismiss are DENIED.

Dated at Portland, Maine this 20th day of July, 2006.

Robert E. Crowley
Justice, Superior Court

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SUPERIOR COURT
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RAC - Cum - 9/20/2007

JASON ARTHUR SNYDER,

Plaintiff,

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VERRILL DANA, LLP, ANTHONY CALCAGNI, CHARLES OESTREICHER, JOESPH BOULOS, KENT WHITE and THE BOULOS COMPANY, INC.,

Defendants.

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO M.R. CIV. P. 56

This matter comes before the Court on Defendants' Verrill Dana, LLP, Anthony Calcagni and Charles Oestreicher ("Verrill Dana") and The Boulos Company, Inc., Joseph Boulos and Kent White's ("Boulos") Motion for Summary Judgment pursuant to M.R. Civ. P. 56 (c) and Defendants' Verrill Dana and Boulos's Motions in Limine to exclude hearsay statements pertaining to the value of the Rand Road Parcel and to exclude Plaintiff's expert's opinion of value.

Background Facts

This case concerns the sale of certain undeveloped parcels of land located in Portland, Maine, just east of the Maine Turnpike, between Westbrook Street and the Rand Road extension (the "Rand Road Parcel"). On November 17, 1999, Plaintiff Jason Snyder, his brother Simon Snyder and the Barris Trust entered into a Purchase and Sale Agreement (the "Agreement") for 47.19 acres of the Rand Road Parcel for $1,707,565 (approximately $36,184 per acre). The sale closed on December 7, 1999. Jason Snyder filed this suit on December 6, 2005 alleging, among other things, attorney malpractice against Verrill Dana and breach of contract and breach of duty against Boulos, for failing to inform him of

certain critical facts to the contract and for failing to get the best possible price for the Rand Road Parcel. None of the other parties to the contract have sued.

The Rand Road Parcel is comprised of several parcels totaling approximately 73 acres. The individual parcels are owned variously by Plaintiff Jason Snyder in joint tenancy with his brother Simon Snyder (the "Snyder brothers") and the Snyder brothers with the Barris Trust (an unrelated entity). The Snyder brothers' interest in the land was originally held by their father, Arthur T. Snyder.[1] Jason Snyder and Simon Snyder regarded each other as business partners in relation to the sale of the Rand Road Parcel.[2]

In August 1996 Boulos met with the Snyder brothers. At that meeting, Boulos agreed to post "for-sale" signs on the Rand Road Parcel and advise the Snyder brothers should any potential buyers express interest. They expressly did not sign a listing agreement to actively market the Rand Road Parcel.

The Rand Road Parcel was zoned "Industrial-Moderate Impact " as of 1997 through 2001. Residential use was prohibited under this zoning classification.

In May 1997, the Snyder brothers offered to sell the Rand Road Parcel to the United States Postal Service ("USPS") for approximately $31,250 per acre. That price was not set by either Boulos or Verrill Dana. The Snyder brothers discussed the deal with Verrill Dana in June 1997. In July 1997, Boulos entered

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[1] Jason Snyder's counter statement of material facts include many statements regarding Arthur T. Snyder's history with Verrill Dana, Boulos and his real estate transactions. Pursuant to M.R. Civ. P. 56(i)(1) the Court deems those facts immaterial to the issues at summary judgment. Consequently, those statements will not be considered.

[2] Jason Snyder included relationship issues between he and his brother Simon, in his statement of material facts. Pursuant to M.R. Civ. P. 56(i)(1) the Court deems those facts immaterial to the issues at summary judgment. Consequently, those statements will not be considered.

into a letter agreement, drafted by Verrill Dana, with the Snyder brothers and the Barris Trust in connection with the sale of the Rand Road Parcel. The 1997 letter agreement authorized Boulos to accept offers from the USPS for 56 acres of the Rand Road Parcel for $1,875,000 or for another price acceptable to sellers. The letter agreement contained an integration clause and stated that it superseded all prior agreements relating to the listing of the Rand Road Parcel. Jason Snyder specifically modified the 1997 letter agreement prior to signing, by limiting the sale of the 56 acres to the USPS and to no other buyer.

Three extensions to the USPS option contract were signed by the Snyder brothers. The last option contract was extended in October 1998. Jason Snyder was reluctant to sign the third extension, but agreed to do so in negotiations with his brother Simon. In exchange for Jason's signature on the third extension, Simon gave an interest in his portion of the Rand Road Parcel that the Maine Turnpike Authority ("MTA") planned to take by eminent domain (in connection with construction of a new Westbrook turnpike interchange) and allowed Jason Snyder to take the lead in negotiating a price with the MTA. In January 1999, the USPS withdrew their offer to purchase the Rand Road Parcel due to environmental and neighborhood concerns.

During the USPS option, the City of Portland (the "City") threatened to condemn the Rand Road Parcel. In June 1998, the 1997 letter agreement between Boulos, the Snyder brothers and the Barris Trust was modified to add the City as a potential buyer of the Rand Road Parcel. The letter agreement was otherwise unchanged from its 1997 version and expired on December 31, 1998. Boulos asserts that these letter agreements are the sole and total understanding between themselves, the Snyder brothers and the Barris Trust regarding the Rand Road

Parcel. Jason Snyder asserts that, upon the expiration of the 1998 letter agreement, he understood a continuing contractual obligation between the parties that Boulos would provide brokering services and would provide appropriate advice towards the most advantageous sale of the Rand Road Parcel.[3]

The City's commissioned appraisal of the Rand Road Parcel, completed in the summer of 1998, valued the Rand Road Parcel at approximately $22,365 per acre (a subsequent 1999 City appraisal valued the land at approximately $30,700 per acre). In the fall of 1998 the City voted not to take the Rand Road Parcel by eminent domain. In the summer of 1999, the Snyder brothers communicated to the City that they would accept $31,250 per acre for the Rand Road Parcel (the same amount offered by the USPS).

On October 6, 1999Attorney Calcagni sent a six-page letter to the City's counsel summarizing the issues to date regarding the sale of the Rand Road Parcel. The summary included details of the negotiation with the USPS, the City's vote not to exercise eminent domain over the Rand Road Parcel, the potential damages challenge that the Snyder brothers could have in the event of an eminent domain proceeding, the potential effect of the MTA interchange plans, and the potential impact of possible zoning changes on the value of the property. That letter also included reference to a September 1997 appraisal by Henry P. Lomardelli valuing 56 acres of the Rand Road Parcel at between $1.8 and $3.4 million "assuming completion of the [MTA] interchange in December

[3] No case law is supplied in support of this construction of an oral contract. Indeed Jason Snyder admits to Boulos' statement of material fact #20 stating that: "In reliance on the July 1997 letter agreement between the sellers of the Rand Road parcel and The Boulos Company, Inc., The Boulos Company, Inc assisted the sellers in their efforts to sell the Rand Road Parcel to the Postal Service, and later to the City of Portland."

2000." Attached to the letter was a detailed timeline of events "affecting sale of Snyder/Barris Land."

Attorney Calcagni circulated drafts of the letter and timeline to Simon and also allegedly to Jason Snyder and others for their comments and input. Jason is copied on the letter. Verrill Dana asserts that Jason received the letter and marked up drafts, which edits were incorporated into the final letter. Jason denies having received either drafts or the final letter. Attorney Calcagni has records of phone conversations with the Snyder brothers regarding the October 6, 1999 letter and the potential sale of less than 47.19 acres to the City, but Jason Snyder denies that those specific conversations occurred.

At the same time the Boulos Company drafted a letter (October 4, 1999) critiquing the City's appraisal and outlining issues related to the value of the property, including zoning and highest best use. Jason denies receiving this letter too.[4]

Jason Snyder concedes that he, at all times, knew that his interest in the Rand Road Parcel could not be sold or transferred without his signature on an instrument conveying his interest in the property. The Agreement was signed on November 17, 1999. The sale closed on December 7, 1999. At Closing Boulos received a commission of 6% of the sale price of the Rand Road Parcel according to the terms of the 1998 letter brokerage agreement.

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[4] Simon Snyder's deposition corroborates Verrill Dana and Boulos' claims regarding circulation of the October 1999 letter and drafts. (S.Snyder Depo. 311: 9-313:11.) Jason Snyder concedes that all the letters were "presumably" sent to him, that they were faxed to Simon's fax number, but that he never received them. (P. Opposition to Boulos' MSJ, n. 3.) From about June 1997 through September 1999, Jason was living primarily with Simon in his New York apartment.

Boulos and Verrill Dana contend that there was no breach of duty. However, even if a breach of duty were found all duties to Jason Snyder lapsed at the latest on November 17, 1999 when Jason signed and was bound by the Agreement. Furthermore, they contend that there is no proof of damages in this matter as Jason Snyder declined to state an opinion regarding the amount of his damages allegedly arising from the sale of the Rand Road Parcel, and the damage estimation he does have is based on inadmissible testimony. The Defendants claim that the appraiser's testimony is inadmissible because it lacks foundation and because the appraiser is not licensed in the State of Maine.

Discussion

I. Summary Judgment Standard

Summary judgment is proper where there exist no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); *see also Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 4, 770 A.2d 653, 655. A genuine issue is raised "when sufficient evidence requires a fact-finder to choose between competing versions of the truth at trial." *Parrish v. Wright*, 2003 ME 90, ¶ 8, 828 A.2d 778, 781. A material fact is a fact that has "the potential to affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "If material facts are disputed, the dispute must be resolved through fact-finding." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18, 22.

When a defendant seeks summary judgment, a "plaintiff must establish a prima facie case for each element of her cause of action." *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶ 9, 711 A.2d 842, 845. At this stage, the facts are reviewed "in the light most favorable to the nonmoving party." *Lightfoot v. Sch. Admin. Dist. No. 35*, 2003 ME 24, ¶ 6, 816 A.2d 63, 65.

In support of a motion for summary judgment, a party must file a statement of material facts, and each such fact must contain a reference to the record supporting that fact. M.R. Civ. P. 56(h)(1); *see also Levine*, 2001 ME 77, ¶6, 770 A.2d at 656. The statement of material facts must be short and concise. M.R. Civ. P. 56(h).[5] A party may object to any statement of material fact the party contends that the court should not consider. M.R. Civ. P. 56(i)(1).

II. Statute of Limitations:

a. Actions Against Attorneys

Defendant Verrill Dana moves for summary judgment in part asserting that the claim is time barred according to the applicable statute of limitations for actions against attorneys. That statute reads in pertinent part:

> In actions alleging professional negligence, malpractice or breach of contract for legal service by a licensed attorney, the statute of limitations starts to run from the date of the act or omission giving rise to the injury, not from the discovery of the malpractice, negligence or breach of contract, except as provided in this section or as the statute of limitations may be suspended by other laws.

14 M.R.S. ß 753-B (1) (2007) (emphasis added).

The purpose of a statute of limitations is "to provide eventual repose for potential defendants and to avoid the necessity of defending stale claims." *Langevin v. City of Biddeford, 481 A.2d 495, 498 (Me. 1984).* For this reason they are strictly construed. *Dowling v. Salewski*, 2007 ME 78, ¶ 11, 926 A.2d 193. The statute of limitations for legal malpractice actions expressly states that "the

[5] Plaintiff's opposing statement of material facts numbered to 221. The Law Court found 191 statements of material facts as "not meeting the brevity requirement and warned that trial courts have the discretion to disregard excessively long statements and deny motions supported by such statements." Alexander, *The Maine Rules of Civil Procedure with Advisory Committee Notes and Comments*, § 56.1 (6) (C) (2006) (citing *Stanley v. Hancock County Comm'rs*, 2004 ME 157, ¶¶ 27-29, 864 A.2d 169, 178-79).

statute of limitations starts to run from the date of the act or omission giving rise to the injury, not from the discovery of the malpractice, negligence or breach of contract." *Id.* ¶ 12, 926 A.2d 193 (*quoting* 14 M.R.S. ß 753-B(1)). "Absent legislative direction, the decision of when a cause of action accrues is a judicial function." *White v. McTeague*, 2002 ME 160, ¶ 7, 809 A.2d 622 (*citing Nevin v. Union Trust Co., 1999 ME 47, ¶ 24, 726 A.2d 694, 699).*

The Law Court considered each allegation of a plaintiff to determine the date of an act or omission triggering the statute of limitations. *See Larochelle v. Hodsdon*, 690 A.2d 986 (Me. 1997). In that case a real estate broker sued his attorney (son-in-law) for *inter alia* breach of contract and breach of duty. *Id.* at 987. The Law Court concluded that the trial court erred in granting summary judgment to the son –in-law based on the statute of limitations because there existed "genuine issues of material fact as to whether each of his claims accrued within the six-year limitation period." *Id.* at 988. In contrast, the Law Court upheld summary judgment where an attorney allegedly failed to warn a client about a ten-year deadline to commence an action. *White*, ¶ 9, 809 A.2d at 624. In that case the Court found that the alleged failure to warn happened during the course of the representation and thus was barred by the six-year statute of limitations. *Id.*

In this case Jason Snyder alleges that Verrill Dana did not appropriately represent both brothers in legal matters respecting the Rand Road Parcel, failed to communicate that the City would not take the property by eminent domain, failed to present all possible options around the sale of the Rand Road Parcel, and failed to inform Jason Snyder regarding appraisals and development

possibilities that would have impacted his decision to sell the property. Verrill Dana counters that the statute of limitations began to run at the signing of the Agreement; the last possible date of the omission giving rise to injury.

Unlike the *Larochelle* Court's finding that genuine issues of material fact existed regarding when plaintiff's claims accrued, this Court finds that Jason Snyder's claims accrued no later than the signing of the Agreement on November 17, 1999. At that time he was legally bound by the terms of the contract and had weighed all the advice given by counsel. Jason Snyder filed his claim on December 6, 2005, more than six years after the signing of the Agreement, accordingly this Court grants Verrill Dana's motion for summary judgment on the grounds that the claim is time barred pursuant to 14 M.R.S. § 753-B(1).

b. Six-Year General Statute of Limitations

Defendant Boulos likewise moves for summary judgment in part asserting that the claim is time barred according to the applicable statute of limitations. That statute reads in pertinent part: "all civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards." 14 M.R.S. ß 752 (2007).

Two theories motivate Jason Snyder's claim. One is breach of contract and the other breach of a tort-based duty. A tort–based cause of action is deemed to have accrued when a plaintiff "receive[s] a judicially recognizable injury." *Johnston v. Dow & Coulombe, Inc.*, 686 A.2d 1064, 1066 (Me. 1996) (*quoting Bozzuto v. Ouellette, 408 A.2d 697, 699 (Me. 1979)).* The *Johnson* Court found a judicially recognizable injury when an allegedly negligent surveyor performed his task. *Id.* Though the pecuniary harm came later, that Court held that the statute of limitations began to run when the task was

performed. *Id.* A contract cause of action is deemed to have accrued at the time of breach. *Dunelawn Owners' Association v. Gendreau*, 2000 ME 94, ¶ 11, 750 A.2d 591, 595 (*citing Kasu Corp. v. Blake, Hall & Sprague, Inc.* 582 A.2d 978, 980 (Me. 1990)). The *Dunelawn* Court found that the breach occurred when the contract was completed. Id. ¶ 12, 750 A.2d at 595.

Presuming that the "task" is the completion of the contract between the real estate broker and the seller, that determination will dictate when the action accrued. Boulos contends that their task under the letter of agreement was completed at the signing of the Agreement and thus the cause of action should accrue at that time. Jason Snyder counters that Boulos' duties under the contract extended through closing and thus the claim was timely filed. The duties that Jason Snyder asserts were breached by Boulos were: 1) negligently misrepresenting information Boulos knew or should have known that Jason Snyder would rely on in selling the Rand Road Parcel; 2) failing to fully perform the brokerage contract; and 3) a breach of fiduciary duty by failing to achieve the result that plaintiff would have otherwise achieved.

It is the duty of a real estate agent to a seller to "perform the terms of the brokerage agreement made with the seller." 32 M.R.S. § 13273(1)(A) (2007). It is a broker's further duty to "promote the interest of the seller by exercising agency duties as set forth in section 13272." *Id.* The scope of those duties is defined by the brokerage agreement. *See* 32 M.R.S. § 13271(3) (2007). The duty of a real estate broker is generally discharged by producing a customer who is ready, willing and able to meet the exact terms and conditions of [the transaction]. *Chamberlain v. Porter, 562 A.2d 675, 677 (Me. 1989)*; S. Williston, *A Treatise on the Law of Contracts*, ß 1287, at 957 (1968). This

rule, however, may be modified by the parties to the agreement. *Chamberlain,* 562 A.2d at 677. The Law Court has stated that:

> The duty of a broker to find a purchaser "is discharged by producing a customer ready and willing to meet the exact terms of sale proposed by his employer. If, however, he produces a customer who enters into a mutually enforceable contract with the owner for the purchase and sale of the real estate in question, upon terms satisfactory to the owner, the broker is entitled to his commission whether or not the customer actually carries out the terms of this contract. The principal is deemed to have accepted the contract in lieu of exact performance of the broker's contract."

Labbe v. Cyr, 150 Me. 342, 348 (1954) (*quoting MacNeil Real Estate v. Rines,* 144 Me. 27, 31 (1949)). Based on these rules, Boulos' duty would be discharged when it satisfied the brokerage agreement. Once Boulos' duty was discharged, the action accrues.

Thus to determine when Boulos' duty was discharged, the Court must determine the terms of the brokerage agreement between Boulos and Jason Snyder. No material facts are in dispute regarding the events surrounding the formation or content of the written brokerage agreement, which both parties concede, lapsed on December 31, 1998. What is in dispute is whether the terms of the expired brokerage agreement control, or whether a verbal understanding replaced those terms beginning January 1, 1999.

Boulos contends that the terms of the lapsed 1998 letter agreement prevail on the basis of subsequent dealings and because the terms of that agreement were complied with at closing. Jason Snyder asserts that, in lieu of the written contract, his unilateral understanding, that Boulos would provide brokering services and advice towards the most advantageous sale of the Rand Road Parcel, controls. The Law Court has found a bi-lateral oral agreement in conjunction with subsequent dealings sufficient to evidence a brokerage

agreement. *See Carter v. Beckerman,* 249 A.3d 763, 764 (Me. 1969). In this case Jason Snyder concedes that the Boulos' commission was paid in conformity with the 1998 letter brokerage agreement.

This Court holds that the terms of the 1998 letter agreement, which terms were honored at closing, controls the understanding of the parties. That agreement narrowly authorized Boulos to promote the sale of the Rand Road Parcel to either the USPS or the City for a 6% commission. As cited above, "[t]he duty of a broker to find a purchaser "is discharged by producing a customer ready and willing to meet the exact terms of sale proposed by his employer. *Labbe,* 150 Me. at 348.

Consequently this Court holds that the cause of action accrued at the signing of the Agreement on November 17, 1999 and thus this claim is time barred by 14 M.R.S. § 752.

III. Damages

a. Defendants' Joint Motion in Limine Regarding Hearsay.

Verrill Dana and Boulos request the court to rule in limine as inadmissible hearsay certain statements contained in Jason Snyder's statement of material facts. Specifically those facts regarding alleged statements made by Mr. Malone regarding the sale of the Rand Road Parcel and those statements regarding alleged conversations with Paul Danforth regarding Peoples Heritage Bank.

The Court holds that the statements are hearsay pursuant to M.R. Evid. 801(c), not within any recognized exceptions and thus excluded them from evidence pursuant to M.R. Evid. 802.

b. Defendants' Joint Motion in Limine to Exclude Testimony of Plaintiff's Opinion of Value.

Defendants jointly move the court to exclude Jason Snyder from presenting any testimony at trial as to his opinion of value. It is not disputed that Jason Snyder has not provided his own opinion of the value of the Rand Road Parcel. In lieu of his own opinion, Jason Snyder has proffered expert Mark S. Reenstierna ("Reenstierna"), a Massachusetts real estate appraiser. Defendants move to exclude Reenstierna's testimony asserting: 1) that the testimony lacks foundation in its reliance on a development plan that is neither legal under zoning in place in December 1999 nor economically feasible; 2) the opinion is illegal because Reenstierna was not licensed in Maine at the time of the appraisal or at the time of his deposition in this matter (pursuant to 32 M.R.S. § 14003); and 3) the appraisal is not reflective of Jason Snyder's relative proportionate interest in the Rand Road Parcel.

i. Is There Sufficient Foundation to Credit Expert Reenstierna's Opinion of Value?

Reenstierna's estimated value of the Rand Road Parcel on December 7, 1999 is $9,406,000 based primarily upon a certain "conceptual" development plan (the "Plan") created by Robert Daylor. Defendants contend that the Plan is not based on the zoning that existed on December 7, 1999 and therefore it is not a reasonably probable legal use of the Rand Road Parcel and consequently the Plan is an insufficient foundation upon which to base a damages claim.

The Law Court has consistently held that:

> [T]he testimony of a professional appraiser properly to be accepted must be based upon sound principles, and not ignore consideration of the highest and best use of the land involved; that

> opinion evidence without any support in the demonstration and physical facts is not substantial evidence and that opinion evidence is only as good as the facts upon which it is based and; that the opinion of an appraiser is no better than the hypothesis or the assumption upon which it is based; and that an appraiser should give facts upon which his opinion is based.

Farrington v. Me. State Highway Comm'n, 188 A.2d 483, 484 (Me. 1963)(citations omitted). Thus opinions based "wholly or chiefly upon reasons or matters which are legally incompetent or upon principles which are unsound" should be stricken from the record. *Warren v. Waterville Urban Renewal Auth.*, 235 A.2d 295, 298 (Me. 1967)(citation omitted). Moreover, when considering "highest and best use,"[6] that use cannot be "unreasonable, illegal, or purely speculative." *Luce v. Me. Fidelity Life Ins. Co.*, 323 A.2d 589, 592 (Me. 1974).

The issue thus becomes, was the Reenstierna appraisal based upon zoning that was legal in December 1999. Both Defendants' and Plaintiffs' briefs refer to the deposition of Robert Daylor wherein he concedes that the Plan was not lawful under the zoning that existed in December 1999. (Daylor Depo. at 68.)

These facts are not in dispute. Thus the Court holds that, as a matter of law, the Reenstierna opinion was not legally based and therefore is inadmissible. Because Jason Snyder has waived his opinion of property value, no evidence of damages is in evidence.

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[6] Highest and best use has been defined by the American Institute of Real Estate appraisers as:

> The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum profitability.

The Appraisal of Real Estate, Tenth Edition, Chicago 1992, p. 45.

ii. Is a Maine License a Necessary Prerequisite to Admissible Expert Testimony?

Under Maine law "it is unlawful for a person to prepare, for a fee or other valuable consideration, an appraisal or appraisal report relating to real estate or real property in this State without first obtaining a real estate appraisal license." 32 M.R.S. § 14003 (2007). There is no Maine case law construing this statute; however, Defendant's expert (Mark Plourde) stated at deposition that "the appraisal document being compiled by or signed by an appraiser on a property in Maine has to be done so by someone with a license in Maine." (MLP Deposition 7:9-16.)[7]

Jason Snyder concedes that Mark Reenstierna is not a Maine-licensed real estate appraiser but asserts that his father (Donald Reenstierna) became licensed in Maine shortly after the appraisal report was issued and that he co-signed that report. Thus the report and his father's testimony should be admitted.[8]

There is no evidence in the record that Reenstierna (or any member of his firm) was a Maine-licensed real estate appraiser at the time of the appraisal or the time of the appraisal report, thus his testimony is inadmissible under Maine law.

This Court does not need to reach further arguments regarding Plaintiff's damages claim. The Court finds that, even had this claim survived summary judgment any recovery would be barred because there exists neither competent expert testimony nor lay opinion to the value of the Rand Road Parcel.

[7] Plaintiffs Opposition to Defendants' Motion in Limine noted this portion of the Plourde deposition.
[8] No case law is given in support of this argument.

IV. Plaintiff's Motion to Enlarge Summary Judgment and Permit Filing of An Additional Affidavit Respecting Plaintiff's Background and Commercial Sophistication.

Plaintiff's motion to enlarge summary judgment is denied as the content of the proposed affidavit is not relevant to the Court's summary judgment consideration.

The entry is:

Defendant Verrill Dana's Motion for Summary Judgment is GRANTED. Defendant Boulos' Motion for Summary Judgment is GRANTED. Plaintiff Snyder's Motion to Enlarge Summary Judgment Record is DENIED.

DATE: 9-20-07

Roland A. Cole
Justice, Superior Court

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