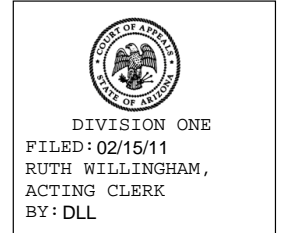


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



R. DALE SCOTT, an individual,) 1 CA-CV 10-0139
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
FIVE STAR DEVELOPMENT, INC., an) Rule 28, Arizona Rules of
entity of unknown origin; FIVE) Civil Appellate Procedure)
STAR DEVELOPMENT RESORT COM-)
MUNITIES, LLC, an Arizona limited)
Liability company; JERRY C. AYOUB,)
and CLAUDIA AYOUB, husband and)
wife, and DAVID SCHMID and)
PATRICIA SCHMID, husband and wife,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-052288

The Honorable Eddward P. Ballinger, Judge

AFFIRMED

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H A L L, Judge

¶1 This is a real estate commission case. R. Dale Scott (Scott) appeals from a grant of summary judgment in favor of Five Star Development, Inc. and Five Star Development Resort Communities, L.L.C. (collectively Five Star), and certain individual defendants. Finding no genuine issue of fact or legal error, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

I. Scott's Background

¶2 Scott is a real estate salesperson. He held a license to sell real estate at all relevant times except for the period from July 31, 2006 to February 15, 2007. Scott's employing real estate broker is Loma Realty, Inc. (Loma Realty), and Jim Sparling (Sparling) is Loma Realty's designated broker.

¶3 Scott also operates Scott Hospitality, L.L.C. (Scott Hospitality), an Arizona limited liability company unrelated to Loma Realty, which is involved in hotel management and what Scott classifies as "non-real estate" deals. Sparling has no involvement with Scott Hospitality.

¶4 This lawsuit arises out of Scott's efforts to collect, in his own name, a \$2,685,000 commission from Five Star based upon Scott's assistance with its purchase and development of Maricopa County real property on the northeast corner of

Mockingbird Lane and Lincoln Drive in Scottsdale and Paradise Valley (the Property).

II. Scott's Communications With Five Star

¶15 Marriott International, Inc. (Marriott) solicited a request for proposal from several developers concerning a Ritz Carlton Hotel and residential project for the Property.¹ Scott alerted Five Star about the opportunity, and encouraged David Schmid (Schmid), Five Star Development's vice president of development, to pursue the acquisition and development of the Property. Between September 2005 and March 2006, Scott kept Schmid abreast of developments via phone and e-mail. Marriott and Five Star engaged in negotiations concerning the Property between March 12 and May 8, 2006.

¶16 On May 6, 2006, Scott sent an e-mail to Schmid with an electronic Scott Hospitality card attached. The message appended an agreement confirming an agency relationship and a fee proposal for a three percent commission for Five Star's approval and execution. Schmid answered: "Fee is fine. No paper required." Scott concedes that none of the e-mails he exchanged with Schmid referenced Loma Realty.

¹ Five Star had made an offer to buy the Property from its previous owner, Sinclair Oil Co. (Sinclair), in 2004, but then rejected Sinclair's counter offer. RC Paradise Valley, a subsidiary of Marriott International, Inc., ultimately obtained the Property from Sinclair by special warranty deed dated June 27, 2005.

¶17 On May 9, 2006, Schmid wrote to Marriott's broker, Arthur Petersen, concerning Five Star's interest in purchasing the Property and assuming the development project. Negotiations ensued between that date and September 2006, with Scott participating or receiving copies of e-mails. Five Star also transmitted a letter of interest dated August 22, 2006, to Joy Berry (Berry), Marriott's senior vice president of real estate development, requesting a ninety-day due diligence period and a closing in December 2006.

¶18 Meanwhile, Loma Realty's broker's license expired on July 31, 2006. As a result, Scott's salesperson's license became "severed" on that date as well. Scott did not reattach his license to a licensed broker until February 15, 2007.

¶19 On September 5, 2006, Schmid sent Scott a newspaper article quoting Berry as stating that Marriott was "shopping for a master developer" for its Ritz Carlton project. Scott responded with an e-mail encouraging Schmid to "keep the faith" and stating: "I would really like to have a fee agreement executed."

¶10 Five Star then provided a form of the "Agency Agreement" between Scott Hospitality and Five Star and signed by Five Star Development President Jerry Ayoub (Ayoub). Scott testified that he rejected the "Agency Agreement" because it

contained no definite termination date and at that point "[t]here was no agreement."

¶11 Scott returned the "Agency Agreement" to Schmid in a revised form, including handwritten edits deleting the reference to Scott Hospitality, deleting the termination clause, and inserting "Loma Realty LLC Jim Sparling, Designated Broker" as the contracting party and Scott as the Five Star Development's exclusive agent. This document, attached to Scott's e-mail, was the first communication in which any reference to Loma Realty appeared.² Ultimately, Scott agreed with Five Star's statement that "[t]here is no written agreement between Loma Realty and any of the Defendants."

¶12 Scott's employment agreement with Loma Realty required him to present all agreements to Loma Realty "for review before they are consummated" and to obtain Sparling's approval and initials. Sparling testified that Scott never presented any documents concerning Five Star to him at any time.

III. Five Star Purchases The Property

¶13 On September 8, 2006, the parties learned that Duke Development had been awarded the project contract for the Property. Immediately thereafter, however, another entity acquired Duke and canceled the contract.

² At about this time, Schmid learned that Scott's license had been severed from Loma Realty. Schmid did not recall discussing the issue with Scott between that time and January 2007.

¶14 Five Star Development Resort Communities, L.L.C. and RC Paradise renewed negotiations for the sale of the Property between September 2006 and February 2007. They executed a sale contract between February 12 and 14, 2007, and RC Paradise conveyed the Property to Five Star by special warranty deed dated May 18, 2007. Paragraph 14.1 of the Purchase and Sale Agreement provides: "The fees of any procuring broker engaged by Purchaser will be paid by Purchaser under a separate agreement. Except for such procuring broker (and Art Petersen and Joseph Pellillo, whose fees, if any, will be paid by the procuring broker); each of the Parties represents to the other Parties that it has dealt with no broker"

IV. This Litigation

¶15 During a February 14, 2007 meeting, Ayoub offered Scott a \$1 million commission. Scott refused the offer and insisted on a 3 percent commission. Ayoub then asked Scott if he was aware of a problem with his license.

¶16 Scott filed a complaint in Maricopa County Superior Court alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and promissory estoppel, and naming the following defendants in addition to Five Star: Ayoub, Claudia Ayoub, Schmid, and Patricia Schmid (collectively the Individual Defendants). Following an unsuccessful motion to dismiss, Five Star deposed Scott and

Sparling and filed two motions for summary judgment based upon: (1) the lack of a signed commission agreement between Five Star and a licensed real estate broker, and (2) the severance of Scott's real estate license for more than six months when he purportedly was earning a commission from Five Star. In response, Scott argued that (1) Schmid's printed name on the May 6, 2006 e-mail satisfied the statute of frauds, (2) the defendants had prevented him from complying with the statute of frauds in the traditional way, (3) an assignment by Sparling of a commission to Scott satisfied the statutes on brokerage commissions, and (4) Scott's license was active at all relevant times.

¶17 After complete briefing and oral argument, the superior court granted summary judgment to Five Star because it found "there was no written document signed on behalf of Defendant Five Star Development, Inc. that evidenced entitlement to the real estate commission Plaintiff claims he is due." The court then concluded that the alternative summary judgment motion based upon license severance was moot.

¶18 On December 10, 2009, the superior court entered final judgment in favor of Five Star and the Individual Defendants, which included an award of \$50,000 in attorneys' fees and \$2811.55 in costs. This appeal followed.

DISCUSSION

I. As A Matter Of Law, There Is No Enforceable Real Estate Commission Agreement.

¶19 A superior court may grant summary judgment if "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing a grant of summary judgment, this court determines de novo whether any genuine issues of fact exist and whether the superior court properly applied the law. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). We view the facts and reasonable inferences from those facts in the light most favorable to the party against whom summary judgment was entered. *Ruelas v. Staff Builders Pers. Servs., Inc.*, 199 Ariz. 344, 345, ¶ 2, 18 P.3d 138, 139 (App. 2001). We will uphold the superior court's decision if it is correct for any reason. *Am. Family Mut. Ins. Co. v. Cont'l Cas. Co.*, 200 Ariz. 119, 121, ¶ 9, 23 P.3d 664, 666 (App. 2001).

¶20 Scott argues that the superior court misapplied Arizona's statute of frauds, A.R.S. § 44-101 (2003), which provides in relevant part:

No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by

some person by him thereunto lawfully authorized:

* * * *

7. Upon an agreement authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or a commission.

In Arizona, this statute of frauds requirement for brokerage contracts has been strictly enforced. *Butterfield v. MacKenzie*, 37 Ariz. 227, 229, 292 P. 1097, 1097-98 (1930) (holding that neither part performance nor complete performance will remove an oral contract for brokerage commissions from the statute of fraud's requirements); *Olson v. Neale*, 116 Ariz. 522, 524, 570 P.2d 209, 211 (App. 1977) (stating that Arizona law does not recognize the applicability of the estoppel doctrine to a real estate listing agreement).

¶21 Scott focuses his attack on the court's finding that, notwithstanding the evidence, there was no written document "signed on behalf of Five Star." The key evidence is the May 6, 2006 e-mail between Scott and Schmid concerning a three percent commission for Scott's role in positioning Five Star to buy and develop the Property. Schmid's e-mail response states: "Fee is fine. No paper required." Scott points out that diverse authorities have recognized that an electronic signature is binding.

¶122 A document is "signed" when a person employs "any of the known modes of impressing a name on paper" including "writing, printing, lithographing, or other such mode, provided that same is done with the intention of signing." *Bishop v. Norell*, 88 Ariz. 148, 151, 353 P.2d 1022, 1025 (1960) (holding that party's typed name on a listing agreement qualified as a sufficient signature and the party to be bound so conceded); see generally Restatement (Second) of Contracts § 134 (1981) (defining a "signature" as "any symbol made or adopted with an intention . . . to authenticate the writing as that of the signer."); cf. *Haywood Sec., Inc. v. Ehrlich*, 214 Ariz. 114, 116-17, ¶¶ 11-15, 149 P.3d 738, 740-41 (2007) (holding that a judgment is appealable when the superior court judge signs it with an electronic signature).

¶123 Scott argues that recognizing Schmid's e-mail to be a signature under the statute of frauds is consistent with the Uniform Electronic Transactions Act, codified at A.R.S. §§ 44-7001 to -7051 (2003 & Supp. 2010). In the context of e-mail, a header displaying the sender's name may be authenticated and adopted as the sender's own writing when the author hits the "send" button. *Int'l Casings Group, Inc. v. Premium Standard Farms, Inc.*, 358 F.Supp.2d 863, 872-73 (W.D. Mo. 2005) (finding the Uniform Commercial Code definition of "signed" satisfied by this means).

¶124 Treating Schmid's e-mail as a signed memorandum presupposes that the parties agreed to conduct the transaction by electronic means, an issue to be "determined from the context and surrounding circumstances, including the parties' conduct." A.R.S. § 44-7005(B) (2003). A person may be deemed to have consented to electronic communications via ongoing participation in such communications, *Int'l Casings*, 358 F.Supp.2d at 875, or by primary use of that medium. *Crestwood Shops, L.L.C. v. Hilkene*, 197 S.W.3d 641, 653 (Mo. Ct. App. 2006).³

¶125 In this case, the parties initially corresponded by e-mail, but then began to exchange draft written agreements for traditional signature after Scott told Schmid in September 2006, "I would really like to have a fee agreement executed."

³ We are not persuaded by Five Star and the Individual Defendants' belated and conclusory argument that Schmid's signature did not meet the secure electronic signature requirements of A.R.S. § 44-7031 (2003). The statute requires evidence that the electronic signature was: "1. [u]nique to the person using it[;] 2. [c]apable of verification[;] 3. [u]nder the sole control of the person using it[; and] 4. [l]inked to the electronic record to which it relates in such a manner that if the record were changed the electronic signature would be invalidated." *Id.* Substantially similar language appears in the Arizona Department of Real Estate's Substantive Policy Statement on Electronic Signatures.

As Scott points out, the foundational integrity of the e-mails is established by the fact that they speak to the same subject and are responsive to each other. At no time have the defendants attempted to argue that Schmid was not using a unique signature under his sole control, or that he was unauthorized to sign on behalf of Five Star Development. Viewing the facts and reasonable inferences in the light most favorable to Scott, we reject the argument.

Assuming, without deciding, that the parties consented to treat the May 8, 2006 e-mail as containing a signature by Schmid complying with the statute of frauds, Scott's claim still fails as a matter of law. The undisputed facts establish that: (1) there was no commission agreement satisfying the requirements of A.R.S. § 32-2151.02 (2008); and (2) the purported commission agreement is not enforceable.

A. The Purported Agreement Fails To Comply With A.R.S. § 32-2151.02(A).

¶26 The May 8, 2006 e-mail must satisfy not only the statute of frauds requirements, but also the following elements of an enforceable brokerage commission agreement:

All real estate employment agreements shall:

1. Be written in clear and unambiguous language.
2. Fully set forth all material terms, including the terms of broker compensation.
3. Have a definite duration or expiration date, showing dates of inception and expiration.
4. Be signed by all parties to the agreement.

A.R.S. § 32-2151.02(A)(1-4). Such an agreement is not required for a licensee to represent a party in a transaction. A.R.S. § 32-2151.02(D). Nevertheless, it is the required means "by which a real estate broker is entitled to compensation for services

rendered pursuant to § 44-101, paragraph 7." A.R.S. § 32-2151.02(E). Scott implicitly acknowledged that the May 6, 2006 e-mail was not a commission agreement by later stating that he would "really like to have a fee agreement executed."

¶127 On September 6, 2008, Scott and Schmid exchanged a draft agreement via e-mail, which Ayoub signed with a handwritten signature in his capacity as president of Five Star Development. Scott rejected the agreement and sent it back with proposed modifications deleting the termination date paragraph and identifying the broker as Loma Realty and himself as Five Star's exclusive agent. Scott testified that they did not negotiate a termination date and, ultimately, there was no agreement.⁴

¶128 Five Star, the Individual Defendants, and Scott did not sign any contract proposals produced thereafter. Accordingly, the facts establish that the documents exchanged by the parties did not contain an agreed upon termination date nor was the document executed by all parties to the agreement. *Id.* The documents therefore fail to satisfy the requirements of A.R.S. § 32-2151.02(A). Scott's testimony and e-mail confirm that the parties had not reached an agreement. Accordingly, Scott's recovery is barred as a matter of law. *See id.*

⁴ Because Scott has abandoned the assignment argument on appeal, we do not address Five Star and the Individual Defendants' arguments pertaining to that issue.

¶129 Scott attempts to cobble together an enforceable agreement from the exchange of e-mails and edited contract drafts, and on appeal contends that they create an implied-in-fact contract. Assuming that Scott has not already waived this argument, he fails to explain how this alleged contract satisfies the "clear and unambiguous" terms requirement of A.R.S. § 32-2151.02(A)(1), especially with respect to the termination date. Scott posits a factually wistful but legally unsupportable scenario in which the prior terms that were agreed upon or "were part of their negotiations" rematerialized and "carried forward" once the Duke Development deal fell through and Five Star again began to pursue the Property.

¶130 More importantly, Scott's theory is at odds with his own deposition admissions that, as recently as September 6, 2006, there was no agreement between the parties and there never was an agreement between the parties and Loma Realty. We therefore reject the argument.⁵

B. The Purported Agreement Is Not Enforceable

¶131 Even if Scott's e-mails constituted a written agreement, his claims would still fail as a matter of law. Both Ninth Circuit and Arizona cases hold that the alleged contract is unenforceable.

⁵ Nor does Scott explain how he can enforce the agreement against the Individual Defendants.

¶132 In *In re Kun*, James Hodge, a real estate salesperson, arranged the sale of three apartments and one hotel to Paul Kun. 868 F.2d 1069, 1069 (9th Cir. 1989). Like Scott, Hodge was not a real estate broker, and had transferred his sales license to AAA at the time he assisted Kun with the last two sales. *Id.* at 1069-70. A written agreement between Hodge and Kun provided for a three percent commission to the "Broker" on any sale. *Id.* at 1070.

¶133 After Kun filed a bankruptcy petition, Hodge submitted an amended proof of claim in an effort to recover the three percent commission. *Id.* Applying Arizona law, both the Bankruptcy Appeals Panel and the Ninth Circuit Court of Appeals held that the commission agreement was unenforceable under Arizona's real estate statutes. *Id.* at 1070-71, 1073.

¶134 The Ninth Circuit relied on A.R.S. § 32-2155 (1989), which then provided: "A broker shall employ and pay only legally licensed salesmen and a salesman shall accept employment and compensation as such only from legally licensed brokers." *Id.* at 1070-71. Based on that statute, the court concluded that "a real estate salesman may receive commissions only from brokers," *id.* at 1070, and consequently the contract was "unenforceable." *Id.* at 1073.

¶135 Similarly, we held that a real estate salesperson could not look to the title company for commissions allegedly

due to her in *Sherman v. First American Title Insurance Co.*, 201 Ariz. 564, 38 P.3d 1229 (App. 2002). The court explained that Arizona law permits only a real estate broker to "directly earn" a commission from a real estate transaction. *Id.* at 568, ¶ 8, 38 P.3d at 1233. In addition to *In re Kun* and A.R.S. § 32-2155(A), the court relied upon the definition of a real estate broker in former A.R.S. § 32-2101(46) [now A.R.S. § 32-2101(48) (Supp. 2010)] as "a person, other than a salesperson, who, for another and for compensation," engages in real estate transactions. *Id.* Moreover, Arizona law authorizes the suspension or revocation of a salesperson's license for accepting compensation "from any person other than the licensed broker to whom the licensee is licensed." *Id.* (quoting A.R.S. § 32-2153(A)(7) (2002)).

¶36 It makes no difference whether or not the party promising to pay the commission is a sophisticated investor. The Arizona statutes are intended "to furnish protection to the public by strict . . . requirements." *In re Kun*, 868 F.2d at 1071 (quoting *Schlicht v. Curtin*, 117 Ariz. 30, 32, 570 P.2d 801, 803 (App. 1977)).⁶

⁶ Scott already conceded in the superior court: "Scott does not dispute that the legal right to collect the commission belongs to the broker under A.R.S. § 32[-]2101 and that he can only accept commission only from the licensed broker under A.R.S. § 32-2155. Scott takes no issue with the law that provides that Scott could not sue Five Star as a real estate salesperson

¶137 Accordingly, these authorities preclude Scott from enforcing his alleged contract against Five Star and the Individual Defendants as a matter of law. See *id.* This holding obviates the need to consider whether A.R.S. § 32-2130(G) (Supp. 2010) precludes Scott's recovery because Scott's license was severed during part of the relevant time frame.

II. Attorneys' Fees

¶138 Scott requests that we vacate the superior court's attorneys' fee award to Five Star and the Individual Defendants pursuant to A.R.S. § 12-341.01(A) (2003). The statute grants courts the discretion to award reasonable attorneys' fees to the successful party in any contested action arising out of contract, express or implied. *Id.* We review the application of the attorneys' fee statute to this case de novo. *Ariz. Tile, L.L.C. v. Berger*, 223 Ariz. 491, 498-99, ¶ 35, 224 P.3d 988, 995-96 (App. 2010). If fees are available under the statute, we review the award for an abuse of discretion. *Id.* at 498, ¶ 35, 224 P.3d at 995.

¶139 Scott contends that, in the event of reversal, Five Star and the Individual Defendants "would no longer be the prevailing party." Because we affirm the judgment, the

. . . . Clearly . . . if the commission was paid, it would be paid to Loma."

defendants remain the successful parties for purposes of the statute.

CONCLUSION

¶40 We affirm the grant of summary judgment. In addition, we award reasonable attorneys' fees on appeal to Five Star and the Individual Defendants pursuant to A.R.S. § 12-341.01(A). This award is conditioned upon the parties' compliance with Rule 21(c) of the Arizona Rules of Civil Appellate Procedure. Finally, we award the defendants their costs pursuant to A.R.S. § 12-341 (2003).

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Judge

_____/s/_____
LAWRENCE F. WINTHROP, Judge