IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

THOMAS L. STROMEI and STROMEI REALTY, LLC, a New Mexico Limited Liability Company,

Plaintiffs-Appellees/Cross-Appellants,

vs. **No. 30,499**

RAYELLEN RESOURCES, INC., a New Mexico Corporation, LIONEL BURNS, an individual, JANE BURNS, a/k/a JANE MCVEY, an individual, KENYON BURNS, et al.,

Defendants-Appellants/Cross-Appellees.

Appeal from the District Court, Sandoval County
Before the Honorable George P. Eichwald, Thirteenth Judicial District

BRIEF IN CHIEF OF DEFENDANTS-APPELLANTS

Oral Argument Is Requested

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Appellants (Defendants below) Rayellen Resources, Inc. ("Rayellen"), Lionel Burns ("Burns"), Jane McVey ("McVey") and Kenyon Burns ("Kenyon") (collectively, "Defendants") file this Brief in Chief on their appeal.

SUMMARY OF PROCEEDINGS

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Burns and McVey were husband and wife, who separated in 2006 and divorced in 2007 (Ex. I7[1]). At all relevant times, Burns, McVey, and their son Kenyon owned Rayellen. In March 1989, Rayellen purchased a 117,000-acre ranch, the L Bar, located in Sandoval, McKinley, and Cibola counties. (Tr.[2] 3:53, 5:126; Exs. 186-188). Beginning in 1989, Plaintiff/Appellee Tom Stromei ("Stromei") began working on the L Bar (Tr. 5:129-131). He and his realty company, Stromei Realty, filed this action in October 2006. The case was tried to a jury before the Hon. George P. Eichwald on the following issues: breaches of two contracts (one oral, one written); breach of the implied covenant of good faith and fair dealing on each contract; fraudulent misrepresentation; tortious interference with contract; breach of fiduciary duty; and aiding and abetting breach

[1]Plaintiffs' trial exhibits consist of a letter and a number; Defendants' exhibits are numbered.

[2]The trial consists of 15 volumes of transcript. Defendants will reference the transcript with the abbreviation "Tr.," followed by the volume and page number. Hearings will be referred to by date.

of fiduciary duty. Plaintiffs sought compensatory and punitive damages. (RP 2900-2906).

At the close of Plaintiffs' case and after the close of evidence, Defendants moved for judgment as a matter of law as to all claims, which the trial court denied. (Tr. 11:189-225, 13:151). The court, however, granted Plaintiffs' motion for judgment as a matter of law on Defendants' defense that the oral contract was barred by the statute of frauds. (Tr. 13:142-149).

The jury returned a verdict awarding Stromei damages of $4.5 million ($1,350,000 each from Rayellen, Burns, and McVey; $450,000 from Kenyon) for breach of the oral agreement and awarding Stromei Realty damages of $2.9 million ($870,000 each from Rayellen, Burns and McVey; $290,000 from Kenyon) for breach of the written agreement. The jury declined to award punitive damages. (RP 2965-2966).

Defendants filed a post-trial Motion for Judgment as a Matter of Law or To Alter or Amend the Judgment (RP 3476-3492), which the district court denied in full on April 23, 2010 (RP 3744). Plaintiffs moved for pre- and post-judgment interest, costs, and attorneys' fees (RP 2981, 3021, 2974). The district court denied plaintiffs' motion for attorneys' fees, and granted in part the motions for pre- and post-judgment interest and costs, as reflected in the judgment (RP 4001, 3451-52).

Defendants timely filed their notice of appeal on May 20, 2010. RP 3750.

B. SUMMARY OF MATERIAL FACTS

1. GENERAL BACKGROUND

When Rayellen[3] purchased the L Bar, Stromei a subagent of the seller; nonetheless, he helped Rayellen effect the purchase at the discounted price of $30/acre (Tr. 3:13, 51, 52, 58). Burns and Stromei agreed that Stromei would live and work on the L Bar in exchange for a monthly salary of $3,500 (beginning in the seventh month of Stromei's employment) and numerous other benefits. (Tr. 2:14, 3:72-74, 6:27-28, 10:28-30, 11:137-138). Further, in return for Stromei's actions in obtaining such a favorable sales price, Rayellen agreed to give Stromei 10-15%[4] of the net profits of any subsequent sale of the ranch. Burns asked attorney John Dansfelser to draft the agreements (one for a10% net profit share; one an employment agreement, Ex. R7). Dansfelser sent the drafts to Stromei and Burns to review. Stromei did not respond to Dansfelser and neither document was executed. (Ex. R7; Tr. 10:66-67).

To further develop the L Bar for resale, Rayellen worked with the Cibola National Forest to exchange the separately owned "checkerboard" sections to

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[3]Prior to a name change, Rayellen was known as "Caprock Pipe and Supply, Inc." For consistency, Defendants will refer to the company as "Rayellen." The references in the transcript vary between "Rayellen" and "Caprock," but they are the same entity.

[4]Defendants testified that Stromei was offered a 10% net profit share (Tr. 4:35); Plaintiffs testified the share was 15% (Tr. 10:29). The jury made no findings in this regard.

create a large uninterrupted tract of land. The exchange was approved on April 11, 2001 (Ex. P8). For his hard work but no additional consideration, Burns raised the net profit to be given to Stromei on the sale of L Bar to 25%. (Tr. 4:55, 10:31-33).

2. Later Draft Agreements And Stromei's Demand for An Equity Share in the Ranch

After Burns increased Stromei's percentage to 25%, Burns requested that attorney Frank M. Bond memorialize their agreement. Bond provided a draft agreement to Burns and Stromei in August 2002 (Ex. F7). Although Stromei had extremely minor changes to this agreement, he elected not to interlineate them and did not sign the document (Tr. 3:88; 11:104-105).

On September 2, 2003, Stromei sent to Burns a proposed agreement stating:

> This letter is to reconfirm our original equity sharing arrangement entered into in March 1989, whereby Rayellen...agreed that Tom Stromei would have a 25% equity interest in the property known as the LBAR Ranch.
>
> It was further agreed that Rayellen...would advance funds for the acquisition, improvement and maintenance of the property for its...75% and Tom Stromei[']s 25% equity interests. Upon future disposition of the property all sums advanced by Rayellen...., on behalf of Stromei plus reasonable interest will be deducted from Stromei[']s gross distributable sale proceeds as repayment of the loans from Rayellen.....

(Ex. R1, emphasis added). Because Stromei claimed an equity (ownership) share in the L Bar, which would have violated the Internal Revenue Code (§ 83), Burns refused to sign Stromei's document. (Tr. 4:181, 12:65-66). Throughout the negotiations between the parties after 2002, Stromei asserted an ownership interest

in the L Bar, demonstrated by his September 2003 proposal (Ex. R1), the "Equity Sharing Agreements" his attorney drafted in 2006 (Exs. 62, 37), Stromei's statements that he had an equity interest (Tr. 7:134), the verified complaint in which Stromei swore he owned equity in the L Bar (Ex. 185 ¶ 9(a)), and the filing of Notices of Lis Pendens (Exs. 186, 187, 188).

After exchanging numerous drafts, Stromei and Rayellen never executed a written agreement related to any compensation Stromei would receive upon the sale of the L Bar.

3. THE PURPORTED SALE TO TRIPLE BAR

In late 2005, Rayellen and Stromei Realty entered into a written "Exclusive Right to Sell Listing Contract" (the "Listing Contract") for the sale of the L Bar providing:

> I hereby agree to pay broker 6% of the selling price for its services...upon the said broker finding a purchaser who is ready, willing and able to complete the purchase as proposed by the owner....

(Ex. X7).

One potential purchaser was John Pacheco, who intended to attempt to "flip" the property by selling it to a third party at closing.[5] For the "flip" to work,

[5]"Flip" means "The day you buy it is the day you sell it, so you're never out-of-pocket any cash, per se." (Tr. 13:63).

Pacheco had to locate a third party purchaser before closing. Pacheco withdrew his purchase offer. (Ex. 191; Tr. 3:16-17).

Stromei Realty located another potential buyer, an entity representing itself as "Triple Bar S Ranch, LLC" ("Triple Bar"). On December 16, 2005, Rayellen and Triple Bar entered into a Purchase and Sale Agreement (Ex. E7) (the "Purchase Agreement"), whereby Triple Bar agreed to purchase the ranch for $43 million, with $5.6 million to be paid at a first closing, $2 million on the first anniversary of the purchase, and the remainder subject to a non-recourse promissory note at 7% interest to be paid within five years at a second closing. (Tr. 2:61, 3:100-101; Ex. E7). Other relevant Purchase Agreement provisions (Ex. E7) included:

- Triple Bar represented that as of December 16, 2005 it was a "Colorado limited liability company" (page 1, first unnumbered paragraph).
- Triple Bar would "deliver to Seller written confirmation from a financial institution...that Buyer has the resources available to...[pay at the first closing the amount of $5,600,000] in a timely manner...." (§ 3.1.1, the "financial assurance letter" provision).
- Triple Bar "represents and warrants to and agrees with Seller, as of the Effective Date[6]" of the Purchase Agreement that "Buyer is a Colorado

[6] The opening paragraph defines "Effective Date" as "December 16, 2005."

limited liability company duly organized, validly existing and in good standing with the State of Colorado and is qualified to do business in New Mexico" (§§ 8, 8.1).

- Triple Bar "has full right, power and authority to carry out its obligations hereunder. The individuals executing this Agreement...have the legal power, right, and actual authority to bind Buyer to the terms hereof...." (§ 8.2). The Agreement was signed for Buyer by Michael Malano, who represented he was the "manager" of Triple Bar. (pp 22-23). Stromei presented Malano to Rayellen as a qualified buyer of the Ranch. (Tr. 5:168-169). No evidence indicates that Malano was ever anything other than the Triple Bar organizer. (Ex. 184).
- Triple Bar warranted: "All of the representations and warranties of Buyer set forth in this Section 8 shall be true upon the Effective Date" (§ 8.5).
- At the first and second closings, Triple Bar would provide "written confirmation of the warranties and representations set forth in Section 8," including documents reflecting that the Buyer had been duly organized as of December 16, 2005 and at the dates of both closings (§ 6.2.1(b)(5); 6.2.2(b)(4)).

On April 10, 2006, Triple Bar postponed the closing set for April 20 to May 5 and agreed to increase the escrow deposit to $500,000, of which $400,000 was to be released to Rayellen on April 20. Ex. E3, ¶¶ 2, 5; Tr. 2:129, 4:166, 6:4-5. The $400,000 was not released to Rayellen on April 20 (Tr. 3:194), contrary to the amendment to the Purchase Agreement. Exs. E3, K4. On April 20 and May 5, 2006, although various Defendants appeared at the title company, the $400,000 was not released and the transaction did not close.[7]

On April 26, 2006, Stromei represented in a fax cover page to Kenyon that "Malano presented the first offer [to purchase the L Bar] on Nov. 3, 05. The original Triple Bar was formed Nov. 2, 05, with John Pacheco – Arizona. Then on Jan. 25, 06 the name of the holder of record was changed to Mike Malano – Colorado address as shown." (Ex. I1, emphasis added). Stromei admitted that his use of the word "formed" was not an accurate representation. (Tr. 10:117-118, 11:118). Plaintiffs' expert testified that it was good practice for Rayellen to take the representations of its broker (Stromei) as true (Tr. 7:114), which is exactly what Kenyon did in relying on the representations in the fax cover sheet from Stromei that Triple Bar had been formed in November 2005 (Tr. 9:41).

[7] In April 2006, Triple Bar sued Rayellen. The parties negotiated a settlement, which gave Triple Bar various dates on which it could close the transaction. Triple Bar never closed on the property. (Ex. M1; Tr. 6:16-28).

It is undisputed that Triple Bar was not authorized to conduct business in Colorado or New Mexico in 2005. (Tr. 11:188; Exs. J1, I1, 184). Stromei also represented that the buyers were "stout," which McVey and Kenyon understood to mean that they were financially well-off (the statement was made in response to questions about whether Triple Bar would be able to conclude the deal); Stromei protested he meant one of them was a large former pro-football player. (Tr. 6:174, 9:100,109, 10:95).

Section 3.1.1 of the Purchase Agreement required Triple Bar to provide Rayellen with a financial assurance letter, confirming it had the financial wherewithal to conclude the transaction. That letter was written by Karen Blandini, who affirmed that she "personally knew the principals of Triple Bar S. Ranch;" she had financed millions of dollars worth of properties for them; she reviewed four years of their financial documents and the Purchase Agreement; if "these principals decide[d]...to close on this contract they have the personal and corporate assets as well as the immediate liquidity to do so"; these principals had $6 million available to close tomorrow and $2 million additional to pay out after one year. (Ex. C7). Blandini understood the only "principals" of Triple Bar were Mike Gullion and Mark Thoeny (Tr. 6:102), as only they (not Pacheco or Malano) were going to finance the transaction (Tr. 6:108). Without Gullion's and Thoeny's participation, the deal would not work. (Tr. 6:115).

It is undisputed that Gullion and Thoeny pulled out of the deal on or before April 19 or 20, prior to the first closing, and asked Pacheco to refund their $500,000. (Tr. 13:26, 36, 53, 81-82). Gullion and Thoeny never intended to close the deal themselves. Instead, they only planned to put up an initial deposit, which would always be refundable (or, using their terminology, would never "go hard"), and the property would be "flipped" to another purchaser at closing. Pacheco was in charge of finding this third party purchaser. (Tr. 13:22-24, 26-28). Specifically, Gullion (whose testimony was uncontroverted) testified:

> Q: How firm was your resolution not to go through with the L-Bar Ranch transaction, as of April 19th or 20th of 2006?
> A: Unmistakable.
> Q: The way I understood your answer, and I'm asking you if this is correct: There's no way that you would have completed the L-Bar Ranch transaction, as of April 19th or 20th, 2006, correct?
> A: Correct.

(Tr. 13:35). *See also* Tr. 13:53 (Gullion was unwilling to close because "Pacheco had not lined up the builders and developers to create the plan to go forward to execute as an end user. Because we did not have all the due diligence material, we simply said, we can't close. We're not going to close. Q: And so...under the circumstances, you were neither ready nor willing to close? A: Correct").

Thoeny similarly testified that he and Guillion put up the refundable earnest money, but they were never going to close on the transaction. In fact, they relied on Pacheco, who always "raved about nobody could ever close on one of his

contracts." (Tr. 13:65). When Thoeny and Gullion pulled out of the deal, no entity ever provided money to close on the transaction. (Tr. 13:68-69, 77).

Triple Bar never had a limited liability operating agreement, the only document which would have revealed the identities of its principals (Gullion and Thoeny were unknown to Rayellen until after Plaintiffs filed this litigation), and which Triple Bar was required (and failed) to provide to Rayellen before or at closing. (Tr. 13:111-113, 129; 2:110; 3:168-170, 12:164). The absence of this operating agreement also caused Guillion to withdraw from the deal. (Tr. 13:36). In short, Gullion and Thoeny never intended to purchase the L Bar and refused to close the transaction. (Tr. 13:36, 51, 53, 81-82).

On May 5, 2006, the date set for the closing by the Purchase Agreement amendment, "we did have a closing of the property by the sellers," but the buyers failed to appear or close. (Tr. 2:107-108).[8] Triple Bar neither submitted the remaining $5.5 million into escrow needed for closing nor provided other closing documents. (Tr. 3:197; 2:110; 12:164).

At trial, the evidence showed that Triple Bar could not fulfill the Purchase Agreement. As of the Purchase Agreement's effective date, Triple Bar was *not* in good standing, duly formed, or authorized to do business (Tr. 11:188). As

[8] Plaintiffs implied Triple Bar failed to close on that date because it agreed to close at First American, and the closing was held at Fidelity. However, there is no record evidence that Triple Bar appeared to close at either agency. (Tr. 108).

plaintiffs' expert testified, "smart lawyers would argue whether...the agreement itself was even valid," since Triple Bar represented it existed on the effective date of the agreement, when it did not. (Tr. 3:180). *See also* Tr. 2:110 (Triple Bar's failure to file articles of organization breached the agreement). Plaintiffs' experts agreed that: because Triple Bar was not in existence or qualified to do business, Triple Bar was in breach (Tr. 3:160); the buyer's statement that Triple Bar was a Colorado limited liability company as of the Purchase Agreement's effective date was a fraudulent misrepresentation (Tr. 7:70-71); and Stromei Realty had a duty of disclosure to Rayellen (Tr. 7:80-81). This duty of disclosure was triggered when Stromei learned in April 2006 that Triple Bar did not exist on its effective date or as of the date on which the financial assurance letter was issued.

Plaintiff's expert further testified that the financial assurance letter (Ex. C7), says the principals of Triple Bar have financial wherewithal, but since there was no such entity, this representation could not be truthful (Tr. 7:72-73, 85); a company not duly formed could not provide a valid financial assurance letter. Thus, because the financial assurance letter provided was fraudulent, Rayellen never received the financial assurance letter required by the Purchase Agreement, § 3.1.1 (Tr. 7:85-86). Further, since Rayellen did not learn of Triple Bar's misrepresentations until well after 10-day objection period to the financial assurance letter expired, it could not have filed a timely objection. (Tr. 7:84).

Defendants' expert similarly testified that the "broker in this case did not produce a ready, willing, and able buyer because the principals....referred to in Ms. Blandini's letter were not ever members of Triple Bar S, LLC, either at the time that the letter was given or ever," and Rayellen never "accepted the purchaser as ready, willing, and able because the financial assurance letter that Ms. Blandini wrote was false in that the people that she referred to as principals were not members of Triple Bar S, and it was false in that Triple Bar S Ranch, LLC, at that time, did not even exist." (Tr. 11:162).

In addition to Triple Bar's irremediable breach of the Agreement (by misrepresenting that as of December 16, 2005, it was an extant limited liability company, an action that could not be remedied *nunc pro tunc*), Triple Bar breached by failing to release the $400,000 in escrow funds to Rayellen on April 20. (Tr. 3:194).

Finally, Triple Bar failed to appear on the date it requested for the closing (2:107-111). Because Gullion and Thoeny admitted that Triple Bar was never a ready, willing and able buyer (Tr. 13:53), Stromei Realty was not entitled to receive a commission on a sale that could never be consummated.

4. DISSOLUTION OF THE MCVEY-BURNS MARRIAGE

Plaintiffs argued that the sale to Triple Bar never concluded because of internal disputes among the Rayellen board (McVey, Burns, and Kenyon),

stemming from the dissolution of the McVey-Burns' marriage. As a result of their separation, McVey and Burns (with Kenyon siding with McVey) disputed who controlled Rayellen. (Tr. 2:90-91). As a result of this dispute, the title company sent Stromei and Rayellen an e-mail on April 19 saying it was unable to determine who had authority to act for the seller, and therefore it was not in a position to close and insure the sale. (Ex. M6). However, the amendment to the Purchase Agreement had vacated the April 20 closing, and on May 5, the sellers closed the property, but the buyers did not. (Tr. 2:107-111; Ex. 11).

ARGUMENT

POINT 1

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT ON THE LISTING CONTRACT BECAUSE STROMEI REALTY FAILED TO PRODUCE A READY, WILLING AND ABLE BUYER AND MISREPRESENTED THE BUYER'S STATUS

Preservation.: Defendants preserved this issue for appellate review. (Tr. 11:189-225, 13:151; RP 3476-3492, 3609-3619).

Standard of Review: "When reviewing the denial of a directed verdict, we must view the evidence in the light most favorable to the prevailing party." *Talbott v. Roswell Hospital Corp.*, 2008-NMCA-114, ¶ 20, 144 N.M. 753, 192 P.3d 267. *See also Page & Wirtz Construction Co. v. Solomon*, 110 N.M. 206, 209, 794 P.2d 349 (1990) ("Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and has been defined as evidence

of substance which establishes facts from which reasonable inferences may be drawn," citations omitted).

Whether Stromei Realty is entitled to a commission under the Listing Contract is governed by, among other things, the terms of the Purchase Agreement between Rayellen and Triple Bar. Under the Listing Contract, a commission was payable if Stromei Realty found a buyer "who is ready, willing and able to complete the purchase as proposed by the owner." The listing price was "$43,000,000.00" in cash "or terms acceptable to seller." (Ex. X7, emphasis added). Thus, the Listing Contract required reference to, and was dependent upon the contingencies stated in the Purchase Agreement. *See Harp v. Gourley*, 68 N.M. 162, 170, 359 P.2d 942 (1961) (a broker may by agreement with the principal make the payment of his commission "dependent upon a stated contingency").

A. Triple Bar Did Not Exist on the Agreement's "Effective Date"

In the Purchase Agreement, Triple Bar represented and warranted that on the Agreement's effective date, December 16, 2005, it was a valid organization. This was wholly untrue; Triple Bar was not formed until after it purportedly contracted for the sale of the L Bar Ranch. NMSA 1978 § 53-19-10 ("A limited liability company is formed when the articles of organization are filed with the commission...."); Colo. Rev. Stat. § 7-80-207 ("A limited liability company is formed when its articles of organization become effective").

This undisputed fact alone is fatal to Plaintiffs' claim. In addition to being a misrepresentation, because Triple Bar did not exist on the effective date, it was impossible for the purchase to form the terms of the Purchase Agreement. The Purchase Agreement required Triple Bar to produce at the first and second closings, "[w]ritten confirmation" that it was "a Colorado limited liability company duly organized, validly existing and in good standing with the State of Colorado and is qualified to do business in New Mexico" "as of the Effective Date" (December 16, 2005), among other dates. Ex. E7, §§ 6.2.1(b)(5), 6.2.2(b)(4), 8, 8.1. Since it is undisputed that Triple Bar was not formed or in good standing on December 16, 2005, it was impossible from the inception for Triple Bar to comply with that condition. The Purchase Agreement further provided that "time is of the essence...with respect to all matters contemplated by this Agreement" and that no waiver "shall be binding unless executed in writing by the party to be bound thereby." *Id.*, § 14.3. Rayellen never waived compliance with these provisions in writing.

Where a condition cannot possibly be performed, the contract cannot bind the parties:

> Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obligated to perform an impossibility....The appellee having bound himself to do the impossible has furnished no consideration. The parties in making a

> contract impossible of performance made no contract at all, and neither have any rights or liabilities under the...instrument.

Sanders v. Freeland, 64 N.M. 149, 152, 325 P.2d 923 (1958).

In this case, the parties entered into a contract that, from the day it was signed, was impossible to perform. That Rayellen was unaware of Triple Bar's misrepresentation does not alter the analysis: the condition was impossible to perform, regardless of Rayellen's knowledge of the impossibility at the time.

At trial, Plaintiffs attempted to avoid this issue, eliciting testimony that generally, so long as entities are formed before closing, a deal is valid. However, this "general" testimony ignores the specific agreement between the parties which required Triple Bar to be in existence on the Agreement's effective date. The witnesses who were asked about the specific agreement were in accord; the failure of Triple Bar to exist on the effective date of the agreement rendered the agreement either voidable or Triple Bar in breach of the agreement from the outset.

Plaintiff then appeared to argue that Section 10, the "remedies" section, required Rayellen to terminate the Agreement if it believed Triple Bar failed to comply with a condition to closing. First, the remedies section addresses breaches before closing and following the first and second closings; it does not address the failure of a condition such as this which can only occur at closing. Second, the remedies section is designed to allow the non-complying party an opportunity, after notice, to comply with the failure of the condition. Here, it was impossible

for Triple Bar to correct its non-compliance with this condition no matter how much notice or opportunity was extended to it. The remedies section cannot help Plaintiff overcome this defect.

B. THE IMPOSSIBILITY/FAILURE OF CONTRACTUAL CONDITIONS RESULTED IN A BUYER WHICH WAS NOT READY, WILLING OR ABLE TO CLOSE

It is undisputed that pursuant to the Listing Contract between the parties (Ex. X7), Rayellen owed a commission only if plaintiffs produced a buyer which was "ready, willing and able to complete the purchase as proposed by the owner." The buyer provided by plaintiffs, Triple Bar, was never ready, willing nor able to purchase the L Bar Ranch on the terms proposed by the owner. Those terms included the existence of a buyer that was an existing entity at the time of contracting and a financial assurance letter for an existing entity, among other conditions.

Under New Mexico law,

> It is well settled that a broker has earned his commission when he produces a prospect who is ready, willing and able to purchase on terms agreeable to the seller....[T]he agent, here, produced a purchaser who was only conditionally ready, willing and able to buy, and the condition never being removed there was no purchaser ready, willing and able to buy entitling the agent to his commission.

Sanders, 64 N.M. at 152-153 (emphasis added). The conditions existing at the time of this contract were never performed because the Purchase Agreement was conditioned upon Triple Bar providing to Rayellen a financial assurance letter.

Triple Bar provided only an *invalid* document, masquerading as a financial assurance letter. The letter provided by Karen Blandini did not fulfill the contract terms because it was for a non-existing entity, discussed the wealth of "principals" (who were unknown to Rayellen) of an entity that had not yet been formed, and failed to note that if these principals were not part of the entity, the financial assurance letter was inapplicable. In short, a financial assurance letter was provided for an entity that did not exist and for two individuals who pulled out of the deal before the first closing date even arrived, salient facts that were not disclosed to Rayellen.

Still another condition, capable of performance but not performed, rendered the commission not payable. Under the amendment to the Purchase Agreement, Triple Bar was required to release the escrowed funds of $400,000 to Rayellen on April 20. These funds were not released on April 20, this condition to the Purchase Agreement was not met, and the Listing Contract (which was subject to this condition) was not fulfilled.

Finally, it became impossible for Triple Bar to fulfill the condition that it close on the transaction when its two funding sources (the alleged "principals") withdrew from the deal and Triple Bar was not able to locate a replacement. Gullion and Thoeny testified, without contradiction, that they never planned to fund the final transaction and they both withdrew by April 20. They also testified

that Pacheco, purportedly the remaining member of Triple Bar, never found a funding source for the "flip" transaction, which therefore could not close. Thus, there is no evidence establishing that Triple Bar had funding to close the transaction.

C. Stromei's Misrepresentations To Rayellen About Triple Bar Preclude Plaintiffs' Claims Under the Listing Contract

In his fax of April 26, 2006, Stromei wrongly assured Rayellen that as of the December 16, 2005 effective date of the Purchase Agreement, Triple Bar was in good standing, when it was not. (Ex. I1). Stromei and others admitted that it was appropriate for Rayellen to rely upon Stromei's representation, and that representation was incorrect. *See supra* at Summary of Facts, B, 3. Under New Mexico law, Stromei's misrepresentation to the principal precludes Stromei Realty from enforcing the Listing Contract. *Canfield v. With*, 35 N.M. 420, 424, 299 P. 351 (1931) ("A broker must act in good faith with his principal, and, if he is guilty of any misrepresentations or deception which induces the principal to contract for the sale of his lands, the broker cannot recover commissions, even though the contract becomes binding upon the vendor," citation omitted). New Mexico law is consistent with the Restatement (Second) Agency § 424 Agents to Buy or to Sell: "Unless otherwise agreed, an agent employed to buy or to sell is subject to a duty to the principal, within the limits set by the principal's directions, to be loyal to the

principal's interests and to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal."

Stromei Realty, having misrepresented Triple Bar's status to Rayellen, cannot benefit from its wrongful action.

POINT 2

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT ON THE ORAL AGREEMENT BECAUSE PLAINTIFFS FAILED TO PROVE A MEETING OF THE MINDS AS TO A MATERIAL TERM

Preservation. Defendants preserved this issue for appellate review. RP 1060, 1985; Tr. 11:189-90, 197-98, 224; 13:151.

Standard of Review. The standard of review is that applicable to the denial of a motion for directed verdict. *See* Point 1, above.

Throughout this case, the parties disagreed about whether Rayellen and Stromei actually fixed on the material terms of the alleged oral agreement. The focus of this issue for purposes of appellate review is whether there was ever mutual consent that Rayellen could recover interest on the expenses it incurred in the acquisition, improvement and maintenance of the ranch for purposes of calculating the "net profit" of which Stromei claimed a percentage; if so, whether the parties agreed as to whether the interest was to be simple or compound and the agreed rate of interest.

Plaintiffs readily and repeatedly conceded that interest was a "material" term but denied that the oral agreement allowed Rayellen to recover any interest. Tr. 2:178; 3:67; 11:15, 98. In contrast, Defendants contended any agreement required Rayellen to recover interest in calculating net profit. Tr. 5:97.

Certified public accountant Jimmy Waechter was the primary witness who testified about the calculation of net profit. Tr. 12:49. Waechter testified that, though there was no written agreement, he included interest in his calculations because interest should be accounted for under generally accepted accounting principles. Tr. 12:59-62. Plaintiffs' expert testified to the contrary. Tr. 7:159-60. The salient point, however, is the absence of any agreement between Stromei and Rayellen whether interest – a material term – would be included in or excluded from the net profit calculation.

Nor was there agreement on the other related key terms of whether interest was to be simple or compound and the interest rate. Waechter used compound interest "because I thought compounding the interest rate annually was the correct way to do it." Tr. 12:102. He used the prime interest rate published in the Wall Street Journal, not because there was any agreement on that rate, but because he thought it was the best rate to use. (Tr. 12:75-76, 98-99, "I didn't have a specific agreement that told me what interest rate to use, so I used prime rate"; "normally, when you talk about prime rate, you are talking about Wall Street Journal prime

rate;" I didn't have a specific agreement to come up with an interest rate, and I thought this would be the most fair interest rate that I could use").

Defendants thus moved for judgment as a matter of law because there was no evidence of a meeting of the minds on a material term of the alleged oral agreement. The court denied the motion. Tr. 11:189-90, 197-98, 224; 13:151. The jury was then instructed that in order to find a contract, it had to find mutual assent. RP 2925.

> For there to be mutual assent the parties must have had the same understanding of the material terms of the agreement....

RP 2932. UJI 13-816, NMRA. *See also Trujillo v. Glen Falls Ins. Co.*, 88 N.M. 279, 281 540 P.2d 209 (1975) ("The first requirement of the law relative to contracts is that there must be a meeting of the minds of the parties, and mutuality,...and in order for the contract to be valid the agreement must ordinarily be expressed plainly and explicitly enough to show what the parties agreed upon," citations omitted).

The jury was given a form of Special Interrogatories and Verdict drafted by Plaintiffs. RP 2900. In it, the jury found Stromei and Rayellen entered into a binding oral contract; the contract was for 25% of the net profit; and Rayellen breached the contract. RP 2900-01. The form then asked the jury to determine whether Rayellen was entitled to interest in calculating net profit and, if so, the interest rate and whether it was simple or compound. RP 2902. The jury answered

"yes" to the question of whether the agreement included interest and "compound" as to the method of calculation, but failed to answer the question as to the rate. Tr. 15:11. After the jury returned its verdict, while counsel and the court discussed the jury's failure to answer that question, a juror spontaneously stated:

> ....Your Honor, we came to an agreement as to Mr. Waechter's testimony that there was no agreed upon interest. He figured all of his figures on compound prime, and that question there was asking simple or compound. And we all came to a majority agreement on compound.

Tr. 15:12 (emphasis added).

The jury thus confirmed the undisputed evidence that "there was no agreed upon interest" (*id.*), which Plaintiffs conceded was a material term. Therefore, there was no evidence of mutual assent on: whether interest should be included as part of the net profit calculation; if so, whether it is simple or compound; or particularly, the interest rate to be used in the calculation. Therefore, reasonable minds could not have concluded that there was mutual assent on a material term of the oral agreement and the court erred in denying Defendants' motion for directed verdict on the oral contract.

POINT 3

THE COURT ERRED IN GRANTING JUDGMENT AS A MATTER OF LAW ON THE DEFENSE OF STATUTE OF FRAUDS BECAUSE PLAINTIFFS CLAIMED AN INTEREST IN LAND.

Preservation. Defendants preserved this issue for appellate review. RP 1060, 1985-86, 2787, 2805, 3478-83, 3609-14, Tr. 13:144-46.

Standard of Review.

> A directed verdict is a drastic measure that is generally disfavored inasmuch as it may interfere with the jury function and intrude on a litigant's right to a trial by jury. Hence, a directed verdict is appropriate only when there are no true issues of fact to be presented to a jury, and it is clear that the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result.

McNeill v. Rice Engineering & Operating, Inc., 2003-NMCA-078, ¶ 31, 133 N.M. 804, 70 P.3d 794.

Defendants' primary defense to the oral agreement was that the claim is barred by the statue of frauds:

> No action shall be brought upon any contract or sale of lands,...or any interest in or concerning them...unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

Beaver v. Brumlow, 2010-NMCA-033, ¶ 16, 148 N.M. 172, 231 P.3d 628.

Defendants contended the alleged agreement concerned an interest in land and, therefore, was subject to the statute; Plaintiffs denied the agreement concerned an interest in land.

In their verified complaint, Plaintiffs alleged that the oral agreement was for "a 25% equity interest in the L Bar Ranch inclusive of the real estate...of the L Bar Ranch." Ex. 185, p.2 (emphasis added). The same verified complaint sought "partition of the L Bar Ranch to protect and preserve the right, title and interest of Plaintiff Thomas L. Stromei therein." Ex. 185, p.18 (emphasis added). Plaintiffs understood that "partition is a division of ownership in the real estate." Tr. 2:174.

Concurrently with the filing of this lawsuit, Plaintiffs filed Notices of Lis Pendens under NMSA 1978, §38-1-4, in all three counties in which the L Bar is located. Exs. 186, 187, 188.

> [A] notice of lis pendens may properly be filed only if plaintiff pleads a cause of action which involves or affects the title to or any interest in or a lien upon specifically described real property.

Superior Constr., Inc. v. Linnerooth, 103 N.M. 716, 719, 712 P.2d 1378 (1986) (emphasis added, citation omitted).

In 2006, Stromei's counsel sent several proposed "Equity Sharing Agreements" to Rayellen (Exs. 62, 37), evidencing Stromei's contention that the oral agreement was for an interest in land.

On September 2, 2003, Stromei signed a letter to Burns, reiterating "our original equity sharing arrangement entered into in March of 1989, whereby Rayellen....agreed...for $1...Stromei would have a 25% equity interest" in the L Bar. Ex. R1. Stromei asserted this equity interest in the land because he wanted capital gains, as opposed to ordinary income tax treatment, on the sale proceeds. Tr. 3:137, 9:114-15, 12:65.

Rayellen's accountant understood this letter asserted an interest in real property to obtain capital gains treatment:

> This letter is – it appears to me it's trying to transfer an equity interest, an ownership interest in the L-Br Ranch to Tom Stromei. And what he's asking [Rayellen] to do is to transfer that 25 percent ownership interest, equity interest, in the L-Bar Ranch to himself for one dollar.

Tr. 12:65. However, Stromei's assertion of an equity interest would not be legal or possible in light of the proposed consideration and the need to amend past tax returns, and Stromei was so advised. Tr. 12:65-66, 99-100.

After Plaintiffs' original verified complaint resulted in a statute of frauds defense (RP 98), Plaintiffs new counsel (RP 235) filed two amended complaints, attempting to recharacterize the oral agreement as one for net profits rather than an equity interest in the L Bar. RP 660, 1018. At trial, Plaintiffs moved for judgment as a matter of law on the statute of frauds defense to the oral agreement. Despite earlier denying summary judgment on the same issue because there were contested issues of fact (RP 656), the court granted Plaintiffs' motion for directed verdict:

> ....I think the place where equity is being mentioned is when...the deal is almost consummated, or real close to it, [Stromei is] seeking to get capital gains treatment on whatever his share will be, but I am going to find that there has never been presented to the jury any testimony or evidence that Mr. Stromei was seeking interest in real property....I'm going to find that this does not fall within the statute of frauds, and I will grant your motion.

Tr. 13:149 (emphasis added).

Plaintiffs urged alternative grounds for their motion: even if the statute of frauds applied, "there is clearly and undisputedly a substantial performance on the part of Tom Stromei." Tr. 13:143. Defendants contended that there was a factual issue as to whether Stromei's performance was attributable to his employment agreement as ranch manager, as opposed to any performance under the oral agreement for an interest in the ranch. Tr. 13:145-46. Defendants' tendered jury instruction stated that, to remove an agreement from the operation of the statute of frauds, part performance requires that the acts which are relied upon be "unequivocally referable to the alleged oral contract," citing *Herrera v. Herrera,* 1999-NMCA-034, ¶ 11, 126 N.M. 705, 974 P.2d 675. *See also Beaver*, ¶¶ 17-22. The trial court did not reach the issue of part performance and refused the tendered instruction.

Stromei's attempt to vary the terms of the oral agreement in his amended complaints and at trial conflicts with his verified complaint, his letter of September 2, 2003, the "Equity Sharing Agreements" circulated by his counsel, and the

Notices of Lis Pendens he filed with the verified complaint. "Conflicts in the evidence, even in the testimony of a single witness, present a fact question for the [fact finder] to decide." *Hernandez v. Mead Foods, Inc.,* 104 N.M. 67, 71-72, 716 P.2d 645, 649-50 (Ct. App. 1986). Here, the trial court erroneously chose to believe some evidence and disregard the rest. A directed verdict is a "drastic measure" (*McNeill*), and the trial court erred in granting Plaintiffs' motion striking the statute of frauds defense.

POINT 4

PLAINTIFFS CANNOT RECOVER UNDER THE ORAL CONTRACT FOR A SHARE OF NET PROFITS BECAUSE SALE OF THE RANCH WAS A CONDITION PRECEDENT WHICH NEVER OCCURRED

Preservation. Defendants preserved this issue for appellate review. RP 1985-1997; Tr. 11:112-113, 189-225; Tr. 13:15; RP 3476-3491; 3609-3618.

Standard of Review. The standard of review is that applicable to the review of the denial of a motion for judgment as a matter of law. *See* Point 1, *supra.*

Taking the evidence in Plaintiffs' favor, Rayellen and Stromei entered into two contracts: (1) the oral "net profit share" agreement and (2) the Listing Contract. The oral agreement with Stromei provided that if and when Rayellen sold the ranch, Rayellen and Stromei would split the net profits, 75/25. In an attempt to reduce the parties' understanding to writing, Stromei's attorney submitted to Rayellen proposed agreements stating that "Rayellen shall have the

right to determine sales prices, terms of sale, and make other such related decisions." Exs. 37, 62.

Under the Listing Contract, Stromei Realty had the exclusive right to list the ranch for sale and was entitled to a commission if it produced a buyer who was unconditionally ready, willing and able to purchase it for $43 million and other terms agreed to by the seller.

Taking the two agreements together, Stromei had no say in the terms of the sale to a purchaser and only if and when the ranch was sold, would the net profits then be split with Stromei. Therefore, the sale of the ranch was necessarily a condition precedent to any liability from Rayellen to Stromei under that oral contract.

> Generally, a condition precedent is an event occurring subsequently to the formation of a valid contract, an event that must occur before there is a right to an immediate performance, before there is a breach of a contractual duty, and before the usual judicial remedies are available.

Wood v. Cunningham, 2006-NMCA-139, ¶ 7, 140 N.M. 699, 147 P.3d 1132, *cert. denied*, 146 N.M. 641 (2009) (quotation and citation omitted). Rayellen never sold the ranch; therefore, the condition precedent to liability under the oral contract never occurred. As a result, the parties had no "further responsibilities, thereby precluding either from actually breaching," because the "condition must occur before there can be a breach of a contractual duty." *Gregory Rockhouse Ranch,*

LLC v. Glenn's Water Well Service, Inc., 2008-NMCA-101, ¶ 41, 144 N.M. 690, 191 P.3d 548 (citation omitted).

Plaintiffs asserted that although the ranch remained unsold, Stromei's claim for breach of the oral agreement stood because "a party may not rely on the non-occurrence of a condition precedent to defeat its liability when it was responsible for the failure of that condition to occur" (RP 2434), citing, e.g., *Gibbs v. Whelan*, 56 N.M. 38, 42, 239 P.2d 727 (1952). They argued the non-occurrence of the condition was excused because Defendants were the cause of the failure of the ranch to sell.

However, for the non-occurrence of the condition to be legally excused by the promisor's conduct, such conduct must amount to a breach of the contract.

> **Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.**
>
> The rule stated in this Section only applies, however, where the lack of cooperation constitutes a breach, either of a duty imposed by the terms of the agreement itself or of a duty imposed by a term supplied by the court. There is no breach if the risk of such a lack of cooperation was assumed by the other party or if the lack of cooperation is justifiable.

RESTATEMENT (SECOND) OF CONTRACTS, § 245. (Emphasis added)

The Purchase Agreement failed because of the buyers' actions; therefore, the failure to sell the ranch was not due to a "breach" by Defendants. As discussed under Point 1, Plaintiffs are not entitled to a commission under the Listing Contract

because they failed to produce an unconditionally ready, willing and able buyer for the ranch. If this Court agrees, it follows that Plaintiffs are not entitled to a share of the net profits from the sale of the ranch because the non-occurrence of the condition was due to Plaintiffs' failure to provide a buyer. Alternatively, even if the buyer was unconditionally ready, willing and able, the failure of the sale was due to the buyer's non-compliance with the conditions of the Purchase Agreement, such as the failure to provide documents and funding to allow the transaction close. Either way, the non-occurrence of the condition in the oral contract, *i.e.*, the sale of the ranch, is not excused and Plaintiffs are not entitled to recover under that contract.

POINT 5

THE COURT'S ADMISSION OF EVIDENCE OF BURNS' ALLEGED EXTRA-MARITAL AFFAIRS WAS ERRONEOUS, HIGHLY PREJUDICIAL AND AN ABUSE OF DISCRETION.

Preservation. Defendants preserved this issue for appellate review. RP 2571, 2312-15, Tr. 1:11-23.

Standard of Review. The admission or exclusion of evidence is reviewed for abuse of discretion. *Ruiz v. Vigil-Giron,* 2008-NMSC-063, ¶ 7, 145 N.M. 280, 196 P.3d 1286.

Defendants moved in limine to exclude to exclude two exhibits (J7, K7) and any evidence of extramarital affairs by Burns because this evidence was not

relevant or, alternatively, more prejudicial than probative. RP 2312. The motion was denied before and during trial. Plaintiffs then repetitively showed the exhibits to the jury and "questioned" several witnesses about them. See Tr. 2:78-79, 4:115-116, 4:127-129, 6:140-141, 6:145-46, 6:150-151, 10:97.

Specifically, plaintiffs repeatedly placed on the computer screen and asked witnesses about the petition for dissolution of marriage filed by McVey (Ex. J7, listing adultery as the grounds) and a document handwritten by McVey (Ex. K7) stating:

> I Lionel Ray Burns do give my word of honor and solemnly swear I will never do anything behind my wife's back concerning talking on the phone to other women or being with other women. If this should occur at any time for any reason I will leave our home & give my wife 1 year to relocate and I will give her 3/4 of all our cash and assets

Defendants contended that this evidence was irrelevant to the issues between Plaintiffs and Defendants and, even if marginally relevant, the high degree of unfair prejudice generated by this evidence far outweighed any possible probative value. RP 2312-14. The evidence could only show that Burns is a "bad actor," and was therefore inadmissible under Rule 11-608(B) ("Specific instances of the conduct of a witness, for purposes of attacking or supporting the witnesses's character for truthfulness...may not be proved by extrinsic evidence.")

Plaintiffs initially argued that they could use this evidence "for purposes of attacking Mr. Burns' character for truthfulness. *See* 11-608(B) NMRA (specific

instances of conduct concerning a witnesses' [sic] character for truthfulness may be inquired into on cross-examination)." RP 2578. They also contended that the intimate details of the breakdown of the Burns/McVey marriage were relevant to "the struggle for control over Rayellen" that caused the failure of the sale of the ranch to Triple Bar. RP 2574. They did not explain how these intimate details of extramarital affairs, as opposed to evidence of the separation and divorce, served a relevant purpose.

At the hearing on the motion in limine, Plaintiffs' counsel reversed position on the evidence's admissibility under Rule 11-608(B), conceding that "Rule 608 doesn't apply here because we are not using these documents to question the truthfulness of Mr. Burns or anybody else." The court nonetheless denied Defendants' motion. Tr. 1:23. *See also* Tr. 6:146-150.

The issue again arose at trial several times, including during Burns' examination. At trial, the court adhered to its earlier ruling, but granted Defendants' request for a limiting instruction, as follows:

> During the testimony of Lionel Burns, I admitted Plaintiffs' exhibits J-7 and K-7....You are instructed that you can consider these exhibits, to the extent you find they should be given weight, for the limited purpose of establishing the nature and circumstances of the marital conflict between Lionel Burns and Jane McVey and possible motives for their actions in this case. You may not consider those exhibits for purposes of establishing a propensity for Lionel Burns to breach agreements or to show that Lionel Burns has bad character. Use of these exhibits for those purposes would be improper.

RP 2962. Plaintiffs then elicited testimony from Burns about the contents of Exhibit K7 and that (1) the "agreement" arose because Burns had committed certain "acts of indiscretion;" (2) Burns breached the "agreement;" (3) McVey filed for divorce on grounds which included "adultery;" and (4) in her divorce petition, McVey alleged Burns violated the "agreement." Tr. 4:127-29.

Essentially, in allowing this evidence to be restated throughout the trial and shown in the exhibits, the jury was repeatedly reminded that Burns cheated on his wife, promised not to do it again, did it again, and she divorced him over his conduct. The court ineffectively cautioned the jury not to consider this as evidence that Burns had a propensity for breaching agreements or is a bad actor. The erroneous admission of evidence can be reversible error despite a limiting instruction where, as here, the limiting instruction "was insufficient to cure the prejudicial impact" of the evidence. *State v. Crislip,* 109 N.M. 351, 355, 785 P.2d 262, 266 (Ct. App.), *cert. denied*, 109 N.M. 262 (1989).

Our Supreme Court has acknowledged the highly prejudicial impact evidence of an illicit relationship can have on a jury's deliberations. In *Bourgeous v. Horizon Healthcare Corp.,* 117 N.M. 434, 872 P.2d 852 (1994), the trial court allowed evidence that one of the defendant's administrators and a physical therapy aide were friends, but excluded evidence of their romantic relationship. The Supreme Court affirmed: "The additional information of the alleged romantic

character of the relationship would not have increased the probative value of the evidence and was far outweighed by its prejudicial effect." *Id.*, 117 N.M. at 440 (emphasis added). *See also Turner v. PV International Corp.*, 765 S.W.2d 455, 471 (Tex. App.), *writ denied*, 778 S.W.2d 865 (1989) (in a commercial suit for breach of contract, fraud and breach of fiduciary duty, the prejudicial effect of admitting evidence of an extramarital affair on the part of one of the partners far outweighed its probative value creating reversible error).

The erroneous admission of the intimate details of the events leading up to the divorce was not cured by the limiting instruction, permeated the trial in testimony and by repeated questions about and showing to the jury exhibits J7 and K7, was highly prejudicial to the Defendants, and constituted an abuse of discretion and reversible error.

POINT 6

THE JUDGMENT CANNOT BE SUPPORTED BY CLAIMS ON WHICH THE JURY AWARDED NO DAMAGES

Preservation. Defendants preserved this issue in its special verdict form awarding damages against the individual Defendants for Plaintiffs' claim of tortious interference with contractual relations and against Rayellen on the claim of breach of the implied covenant of good faith and fair dealing (RP 2827-28). Defendants also preserved the issue in the special verdict form proffered by Defendants, which would have established damages against Rayellen for the claims solely against it,

and asked the jury to set out individual damages percentages for the claims against all Defendants (RP 2823-2831). Alternatively, this is an issue of fundamental error which is subject to review regardless of preservation of error. *Gracia v. Bittner,* 120 N.M. 191, 197, 900 P.2d 351, 357 (1995) (court will review issue, under fundamental error, when the record shows "the total absence of anything in the record showing a right to relief in the person granted relief").

Standard of Review. This issue of law is reviewed de novo. *Hasse Contracting Co. v. KBK Financial, Inc.,* 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641.

A. The Judgment Against the Individuals Cannot Stand Because No Damages Were Awarded on the Tort Claim Against Them

A material variance between the verdict and the judgment requires reversal of the judgment against the individual defendants.

Against Rayellen, Plaintiffs presented claims of breach of the oral contract, promissory estoppel, fraudulent representation, breach of the Listing Contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty (if the jury found a joint venture), and punitive damages. The jury found for Plaintiffs on breach of the oral contract, breach of the Listing Contract, and breach of the implied covenant. The jury found against Plaintiffs on breach of fiduciary duty and punitive damages. It did not reach the issues of promissory estoppel or fraudulent representation.

Against the individual defendants, Plaintiffs presented claims of tortious interference with contractual relations, breach of fiduciary duty if there was a joint venture, and punitive damages. No contract claims were presented against the individual Defendants because it was undisputed that they were not parties to either contract and, therefore, could not be liable for breach. The jury found for Plaintiffs on the claim of tortious interference and against Plaintiffs on breach of fiduciary duty and punitive damages.

Defendants submitted a special verdict form by which the jury could award damages against the individual defendants (Burns, McVey and Kenyon) on tortious interference with contractual relations. RP 2827. They also submitted a special verdict form which broke down, by count, the damages and against which Defendants the damages were awardable (RP 2823-2832), omitting from the form damages against any Defendants as to which the particular claims sought no relief. Plaintiffs submitteds and the court used, a special verdict form in which the jury could award damages only for "breach of the oral contract" or "breach of the listing agreement," or both. RP 2965 (emphasis added). Using that form, the jury awarded damages only for breach of the oral contract and breach of the listing agreement. RP 2965. It awarded no damages on the single claim for which the individual Defendants were found liable -- tortious interference. *Id.* Nonetheless, under Plaintiffs' form, the jury improperly allocated damages on those two

contract claims among Rayellen, Burns, McVey, and Burns, even though contract damages were awardable only against Rayellen. *Id.*

Plaintiffs elected those claims which they presented to the jury. They chose not to ask the jury for damages caused by the individual Defendants' alleged tortious interference. Plaintiffs cannot now contend that these individual Defendants should be liable for the damages the jury awarded for breaches of the two contracts to which they were not parties.

The judgment awarding damages for "breach of the oral contract" and "breach of the listing agreement" against the individual Defendants is inconsistent with the verdict, which did not find these parties liable for breach of contract. *Roebuck v. Drexel University,* 852 F.2d 715, 717 (3d Cir. 1988) ("principles of collateral estoppel and jury supremacy preclude a district court from issuing a judgment at variance with the jury's findings"). The damages awards against the individual Defendants are inconsistent with jury's verdict and cannot stand. *Eckles v. Sharman,* 548 F.2d 905, 911 (10th Cir. 1977).

B. THE JUDGMENT AGAINST RAYELLEN CANNOT BE SUPPORTED BY THE CLAIM OF BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING BECAUSE THE JURY AWARDED NO DAMAGES ON THAT CLAIM.

Plaintiffs asked the jury to determine whether Rayellen was liable for breach of the implied covenant of good faith and fair dealing as to both contracts; the jury found that it was. RP 2902. However, Plaintiffs did not ask the jury to award

damages on those claims. Therefore, this Court need not reach the merits of the issue of whether the claims of breach of good faith and fair dealing, or the claim of tortious interference with contractual relations for that matter, were properly submitted to the jury. Where liability is found but no damages are awarded the appellate court need not review the merits of the claim. *H. T. Coker Constr. Co. v. Whitfield Transp., Inc.,* 85 N.M. 802, 805, 518 P.2d 782, 785 (Ct. App. 1974); *Fontana v. Zymol Enterprises, Inc.,* 95 Conn.App. 606, 615, 897 A.2d 694, 700 (2006); *Whitehall Co. v. Barletta,* 404 Mass. 497, 504, 536 N.E.2d 333, 338 (1989). At the same time, the judgment cannot rest on those claims because no damages were awarded under them.

The judgment against the individuals, who were found liable only on the claim of tortious interference, cannot stand as the jury was not asked to award *damages* as to any claim alleged against them. Nor can the judgment against Rayellen stand on those issues as to which the jury awarded no damages.

POINT 7

THE COURT ERRED IN AWARDING PREJUDGMENT INTEREST BECAUSE DEFENDANTS MADE REASONABLE AND TIMELY SETTLEMENT OFERS

Preservation: Defendants preserved this issue in their response to plaintiffs' motion for prejudgment interest and the oral argument on the motion. (RP 3032-3049; hearing dated December 23, 2009).

Standard or Review: The Court's review is for abuse of discretion. *Sunwest Bank, N.A. v. Colucci*, 117 N.M. 373, 379, 872 P.2d 346 (1994). The district court made no findings of fact with regard to this decision, another basis for setting aside the court's award. The facts which the trial court found in denying plaintiffs' motion for attorneys' fees makes clear that prejudgment interest should also have been denied. (RP 4000-4015).

The court awarded prejudgment interest based upon its mistaken application of the law to the facts pursuant to NMSA 1978, § 56-8-4 (B), under which a court may award interest after considering whether plaintiff caused unreasonable delay in the adjudication of his claims and if defendant made a reasonable and timely offer of settlement. The trial court's award of prejudgment is erroneous based upon its findings that Defendants made a $5 million offer to settle before the first complaint was ever filed (RP 4001-4002, ¶6), and that Defendants participated in mediation in 2007 (two years before trial) in good faith:

> 3. On October 26, 2007, the Court entered its "Order Referring Matter to Mediation"....
>
> 4. ....[T]here is no evidence that Judge Perez believed defendants...participated in the mediation other than in good faith....
>
> 6. At the mediation, plaintiffs at first demanded that the parties settle for $14 million. Thereafter, they reduced their demand to $12 million....In light of the jury's verdict awarding $7.4 million, the plaintiffs' demand was unreasonable and did not require a response. Defendants offered to settle the matter for $5 million before litigation was even filed. Letter dated August 11, 2006 from Leverick to Stevens (denoting plaintiffs' rejection of defendants $5 million settlement

offer, stating "You [counsel for Rayellen] have offered, verbally, a $5,000,000 pay out" to Stromei). [RP 3000-3001]

10. Plaintiffs failed to establish that defendants acted in bad faith with regard to any settlement demands. Before trial, plaintiffs demanded a settlement consisting of $12 million, at least $6 million of which had to be in cash. (Letter dated October 7, 2009 from plaintiffs' counsel to defense counsel, provided to the Court with regard to prejudgment interest briefing). In May 2009, plaintiffs' counsel sent defense counsel a letter making a precondition of settlement that defendants offer at least $6 million, which plaintiffs' counsel announced his client would reject. (Letter dated May 1, 2009 from plaintiffs' counsel to defense counsel, provided to the Court with regard to prejudgment interest briefing).

* * * * *

12. Plaintiffs' demand for an equity interest in the L Bar Ranch, as set forth in all prelitigation offers and plaintiffs' verified Complaint, violated IRC § 83**Error! Reference source not found.**. Their demand that defendants' settle for or provide plaintiffs' with an equity interest would be in violation of federal law.

13. ...There is no credible evidence that the defendants did not participate in mediation in good faith.

(RP 4001-4002, 4010, 4015, emphasis added).

Defendants made offers to settle 11 days before trial, within the time period contemplated by Rule 1-068. Section 56-8-4 (B) is intended to "foster settlement." *Sunwest Bank*, 117 N.M. at 378. Similarly, the purpose of Rule 1-068 is to encourage settlement. *Pope v. The Gap*, 1998-NMCA-103, ¶ 32, 125 N.M. 376, 385, 961 P.2d 1283 (the "primary purpose of Rule 1-068...is to encourage settlement and to avoid protracted litigation"). As both the statute and the rule are intended to serve the same purpose, the time frame for making an offer of settlement is relevant to this analysis. Under Rule 1-068, an offer of settlement is

timely if it is made "at any time more than ten (10) days before the trial begins." 1-068(A), NMRA. The last offer of settlement was made 11 business days prior to trial.

The trial court found that Defendants offered to settle in 2005, participated in mediation in good faith in 2007, and made offers to settle made within ten days of trial. It was therefore error for the district court to award prejudgment interest.

POINT 8

THE AWARD OF POST-JUDGMENT INTEREST AT 15% WAS NOT AUTHORIZED BECAUSE NO DAMAGES WERE AWARDED ON THE CLAIMS BASED ON TORT OR INTENTIONAL CONDUCT

Preservation. This issue was preserved for appellate review. RP 3042. Tr. 12/23/2009 3:10:00.

Standard of Review. This issue of law is reviewed de novo. *Hasse,* ¶ 9. The court has authority to award post-judgment interest only to the extent authorized by statute. *Lopez v. Smith's Management Corp.,* 106 N.M. 416, 418-19, 744 P.2d 544, 546-47 (Ct. App. 1986) (where statute did not authorized award of interest, court had no authority to award it).

Plaintiffs sought an award of post-judgment interest at 15% per annum pursuant to NMSA 1978, § 56-8-4**Error! Reference source not found.**(A) (2), which provides:

> A. Interest shall be allowed on judgments...from entry and shall be calculated at the rate of eight and three-fourths percent per year, unless: ...
>
> (2) the judgment is based on tortious conduct, bad faith or intentional or willful acts, in which case interest shall be computed at the rate of fifteen percent.

With respect to the individual defendants (Burns, McVey, and Kenyon), Plaintiffs relied on the jury's verdict against them for tortious interference with contract. RP 2904, 2982-83. With respect to Rayellen, Plaintiffs relied on the jury's verdict against it for breach of the implied covenant of good faith and fair dealing. *Id.*

However, as noted in Point 6, the jury awarded damages only for "breach of the oral contract" and "breach of the listing agreement" (RP 2965). Plaintiffs did not ask the jury to award, and the jury did not award, any damages on the claims of tortious interference with contract or breach of the implied covenant of good faith and fair dealing. The statute does not authorize post-judgment interest at 15% for breach of contract. It is the claim or claims for which damages are awarded that governs the interest rate:

> The portion of the judgment that awarded damages for bad faith should bear interest at the rate of fifteen percent. It was appropriate, however, for the district court to award damages at eight and three-quarters percent on the remainder of the judgment.
>
> [W]e do not read Section 56-8-4**Error! Reference source not found.**(A) as requiring a single post-judgment interest rate for the entire judgment. If, for example, a portion of a judgment is based on a tort

> cause of action and another portion is based on a contract cause of action, the interest rate on the first portion of the judgment could be fifteen percent and the interest rate on the second portion, eight and three-quarters percent.

Teague-Strebeeck Motors, Inc. v. Chrysler Ins. Co., 1999-NMCA-109, ¶¶ 61-62, 127 N.M. 603, 985 P.2d 1183, *overruled on other grounds*, *Sloan v. State Farm Mut. Auto. Ins. Co.,* 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230.

The statute provides that post-judgment interest "shall" be set at 8.75% per year unless the judgment is based on the conduct described in NMSA 1978, § 56-8-4(A)(2). Since the jury's award of damages was not based on such conduct, neither was the judgment. The rate of 8.75% applies, and the court erred in awarding post-judgment interest at 15% as to any part of the judgment. RP 3452.

CONCLUSION

Defendants request the Court to reverse the judgment below with directions to enter judgment in favor of Defendants on all or some of Plaintiffs' claims or, alternatively, in accordance with the Court's opinion.

STATEMENT REGARDING ORAL ARGUMENT

Defendants request oral argument because this was a relatively long trial with numerous witnesses and exhibits, and the appeal consists of numerous significant issues. Oral argument would provide the opportunity for the Court and counsel to explore and discuss these issues together.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2011, a true and correct copy of the foregoing pleading was sent via U.S. mail, postage prepaid, to Luis G. Stelzner, Robert P. Warburton, Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A., P.O. Box 528, Albuquerque, NM 87103