

1 CRAIG D. HIGGS, ESQ. (Bar No. 48001)
2 chiggs@higgslaw.com
3 HIGGS FLETCHER & MACK LLP
4 401 West "A" Street, Suite 2600
5 San Diego, CA 92101-7913
6 TEL: 619.236.1551
7 FAX: 619.696.1410

8 Arbitrator

9 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE**
10 **CENTRAL JUSTICE DISTRICT**

11 DONALD ENRIGHT, an individual,
12 Plaintiff,

13 v.

14 VIRGINIA DIANE PEYKOFF, an
15 individual; and DOES 1 through 100,
16 inclusive,,
17 Defendant.

CASE NO. 30-2014-00760666-CU-BC-CJC
ARBITRATOR'S DECISION

18 Plaintiff Donald Enright claims a right to payment of a real estate commission pursuant to
19 a Residential Listing Agreement (Exclusive Authorization and Right to Sell) entered into on
20 February 1, 2014 between himself and the defendant Virginia Peykoff regarding the residence at
21 1731 Port Hemley in Newport Beach California. Mr. Enright is entitled to the real estate
22 commission unless, by his conduct, he forfeited his right to it.

23 It is undisputed that Mr. Enright owned a fiduciary duty to Mrs. Peykoff. That duty
24 required Mr. Enright to act in the "highest good faith" and to "disclose all facts necessary for his
25 principal to make an informed and intelligent decision," see Wyatt, George Gall Pacific,
26 Salahutdin and other cases. He breached that duty if he knew, or should have known, that Mrs.
27 Peykoff did not understand that he had not agreed to cancel the Residential Listing Agreement
28 [Exhibit 2] and then failed to correct that misunderstanding.

1 Mr. Enright asserts that there's no evidence that he was aware Mrs. Peykoff did not
2 understand that the Cancellation of Listing form [Exhibit 74] he provided on July 14 concerned
3 only the Lease Listing Agreement [Exhibit 104] and not the Residential Listing Agreement.

4 Mrs. Peykoff requested the "cancellation" in an e-mail dated 7/14/2014, 9:00 A.M., from
5 diane@niagarawater.com:

6 "I'm not buying anything else at this time I'll inform Kenny As for
7 rents Time is being lost as this is move in month for school Hemley
8 is not for lease or sell as we discussed previously Do I need to send
9 you a letter of cancellation? don't know the protocol on this
10 Margate and port westbourne was the rents you suggested I never
11 knew until now that you didn't have westbourne leased at \$7450 as
discussed I lost no rents and had \$3500 'free money' Remember?
So forget Hemley and try to rent the other two if you can. You've
never had trouble doing so in the past so I don't know what's
happening here with the rentals Thanks Diane" (Exhibit 73, Enright
000018 bottom to Enright 000019 top)

12 The Cancellation of Listing form Mr. Enright then provided to Mrs. Peykoff and signed
13 by her pertains only to the lease listing and Mrs. Peykoff never directly communicated she did not
14 understand it did not include the Residential Listing Agreement.

15 Mr. Enright argues that Mrs. Peykoff's emails and calls to him both before and after July
16 14 suggested that the house was only off the market for sale temporarily and not that the
17 Residential Listing Agreement was to be canceled. Indeed, those emails are susceptible to that
18 interpretation as referenced on pages two and three of Mr. Enright's Post Arbitration Brief. For
19 example, an email of July 17 from Mrs. Peykoff's assistant to Mr. Enright says in part,

20 "if you have a buyer for it, then bring the written offer. Have I ever
21 NOT paid you anything I owed?" [Exhibit 79]

22 The stronger evidence is that Mrs. Peykoff wanted the Residential Listing Agreement
23 cancelled. As early as May 25, 2014 Mrs. Peykoff had emailed Mr. Enright stating:

24 "The house has been on the market for almost 7 months...Please
25 take it off the market, release any contract we may have to sell it
and remove the sign."

26 "...Sorry you worked so long on this one and ended up with
27 nothing, but I guess that's the way it goes sometimes, some are easy
28 some are difficult." [Exhibit 47]

1 This language should have alerted Mr. Enright that Mrs. Peykoff might believe
2 the Residential Listing Agreement was to be cancelled.

3 The eventual July 14 email requesting Mr. Enright take action clearly states that Hemley
4 was not for lease or “sell” and asked about a “letter of cancellation,” and states she did not know
5 the “protocol.”

6 The cancellation form of July 14 which Mrs. Peykoff admits she did not read, is titled
7 "Cancellation of Listing". [Exhibit 105] Mrs. Peykoff testified that she thought this document was
8 a cancellation of the Residential Sale Listing Agreement. This form is not a model of clarity and
9 required an explanation of its meaning, especially in view of the communications between the
10 parties. Given her evident confusion, Mr. Enright had a duty to make it clear what this document
11 was meant to accomplish. He did not do so. This was a breach of his fiduciary duty to her. Other
12 communications between the two make it that Mrs. Peykoff believed the Residential Sale Listing
13 Agreement had been canceled was at least was confused. For example, on July 17, 2014, Enright
14 sent an email to Mrs. Peykoff, stating:

15 “As to Hemley, since June, I have been approached at least 15
16 times to see if we would still sell the house...And after asking you
17 at least five times and being told that under no circumstances is that
18 house for sale I have backed off those brokers and buyers...”

19 “...Once you had me remove it for sale in the MLS, it will only be
20 a matter of time before brokers, that are not loyal to me and my
21 long term relationship with you, that they will approach you
22 directly because Don Enright is not allowed (as directly instructed
23 by his client) to offer them the opportunity to buy Hemley...”
24 [Exhibit 76]

25 On July 26, 2014, Mrs. Peykoff sent an email to Mr. Enright stating:

26 “I cannot do business in this way, so yes, I am no long[er] going to
27 do business with you. . . . To make myself perfectly clear, I am no
28 longer your client and you are no longer my realtor...” [Exhibit 86]

29 Additionally, Mr. Enright testified at his deposition:

30 Q: If you go to the next page, you see an e-mail from Mrs.
31 Peykoff earlier that same day [7/14/14]. She says, “Hemley
32 is not for lease or sale as we discussed previously. Do I
33 need to send you a letter of cancellation? I don’t know the
34 protocol on this.” Did you receive that?

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A: Yes.
Q: And you understood she was seeking your advice as to the protocol for cancellation of a listing; right?
A: I don't know what she was asking.
Q: Did you send her an e-mail saying, I don't understand what you're asking?
A: No.
Q: But my question to you is, when a customer gives you some type of expression of their desires and you don't understand it or it's not clear, is it your practice to inquire to clarify it?
A: Yes.

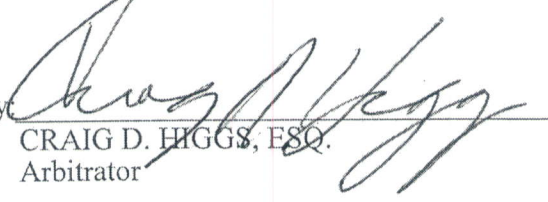
Mr. Enright's continued failure to clarify to Mrs. Peykoff's misunderstanding is fatal to his claim.

Having decided that Mr. Enright breached his fiduciary duty his claim for quantum meruit must also be denied. Once Mrs. Peykoff believed her agreement with Mr. Enright was terminated it cannot be said that she was "requesting plaintiff perform services..." CACI #371 Additionally, quantum meruit is an equitable claim which cannot survive a breach of fiduciary duty.

I find in favor of the defendant and against the plaintiff.

DATED: September 17, 2015

HIGGS FLETCHER & MACK LLP

By 
CRAIG D. HIGGS, ESQ.
Arbitrator

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PROOF OF SERVICE

I am employed in the county of Orange, State of California. I am over the age of eighteen and not a party to the within action, and my business address is: 1851 E. First Street, Suite 1600, Santa Ana, CA 92705

On September 21, 2015, I served the following document: **ARBITRATOR'S DECISION** on the interested parties in the matter of **Donald Enright vs. Virginia D. Peykoff** by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Andrew Couch, Esq.
Law Offices of Andrew Couch
14 Corporate Plaza
Suite 120
Newport Beach, CA 92660
EMail: andrew@andrewcouch.com

Gregory G. Brown, Esq.
Mark M. Higuchi, Esq.
Brown & Charbonneau
420 Exchange
Suite 270
Irvine, CA 92602
EMail: octriallaw@gmail.com
EMail: mhiguchi@bc-llp.com; preno@bc-llp.com

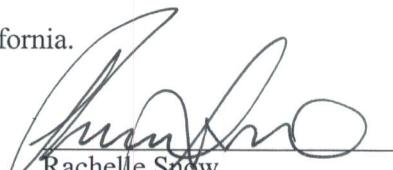
X I am readily familiar with the business' practice for collection and processing of correspondence and mailing with the United States Postal Service; such correspondence would be deposited with the United States Postal Service the same day of deposit with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business.

X By electronic Mail

X (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

 (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **September 21, 2015**, at Santa Ana, California.


Rachelle Snow
Judicate West