UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED February 11, 2019

Endre Glenn Plaintiff – Appellant v. BRENNAN H. MOSS; PIA ANDERSON DORIUS REYNARD & MOSS LLC Defendants - Appelles	No. 18-4033 (D.C. No. 2:15-CV-00165-DN) (D. Utah)

ORDER

Before **TYMKOVICH**, Chief Judge, **McKAY** and **MATHESON**, Circuit Judges.

Appellant's petition for rehearing is denied. Appellant's "Motion to File Original Complaint, and Declaration," which seeks to supplement the record on appeal with documents not filed in district court, is also denied.

Entered for the Court

/S/
ELISABETH A. SHUMAKER, Clerk

FILED January 10, 2019

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Endre Glenn Plaintiff – Appellant v. BRENNAN H. MOSS; PIA ANDERSON DORIUS REYNARD & MOSS LLC Defendants - Appelles	No. 18-4033 (D.C. No. 2:15-CV-00165-DN) (D. Utah)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **McKAY** and **MATHESON**, Circuit Judges.

Endré Glenn, proceeding pro se, appeals from the district court's grant of summary judgment in favor of defendants Brennan H. Moss and the law firm of Pia Anderson Dorius Reynard & Moss on his legal malpractice claim[1]. Mr. Glenn also

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Mr. Glenn appears pro se, we construe his filings liberally, but "this court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005) (brackets and internal quotation marks omitted). "[T]he court cannot take on the responsibility of serving as the litigant's

appeals the denial of his post-judgment motions. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

In 2007, Mr. Glenn entered into a real estate purchase contract (REPC) with the Reeses (the Buyers) to sell a residential property to them. The purchase fell through after the Buyers obtained an unfavorable appraisal of the property and cancelled the contract. The Buyers cited a provision in the REPC allowing for cancellation based upon evaluations and inspections deemed necessary by the Buyers. Since then, Mr. Glenn has filed three lawsuits concerning the cancelled purchase.

First, Mr. Glenn sued the Buyers in Utah state court for breach of contract, breach of good faith and fair dealing, and specific performance (the Buyer Action). Mr. Glenn lost at trial and on appeal. The Utah Supreme Court held that the terms of the real estate contract were unambiguous and the Buyers were able to cancel the contract based upon the evaluations and inspections provision in the REPC. *Glenn v. Reese*, 225 P.3d 185, 192 (Utah 2009).

Second, Mr. Glenn sued Coldwell Banker and his real estate broker, Donna Kane, in Utah federal district court (the Agent Action) for breach of contract, breach of good faith and fair dealing, and breach of fiduciary duty, claiming the provision used by the Buyers to cancel the REPC was non-standard and that Ms. Kane had a duty to point it out to him and advise of its potential implications. The defendants moved for summary judgment, and the district court granted the motion. The court found there was no admissible evidence of damages because they were too speculative; the broker did

---

attorney in constructing arguments and searching the record." Id. (internal quotation marks omitted).

not have a duty to notify Mr. Glenn of the provision at issue; Mr. Glenn was "charged with having read the contract," R. at 630; and he could have countered the provision before accepting the offer. Mr. Glenn appealed, and we affirmed. *Glenn v. Kane*, 494 F. App'x 916, 919 (10th Cir. 2012).

Third, Mr. Glenn filed the underlying action in federal district court against the attorney and his law firm who represented him in the Agent Action. He sued for professional negligence (legal malpractice), breach of fiduciary duty, breach of contract, and breach of good faith and fair dealing. Defendants filed a motion for summary judgment, which the district court granted. Mr. Glenn filed several post- judgment motions seeking a new trial or relief from judgment, which the district court denied. Mr. Glenn now appeals the grant of summary judgment to defendants and the denial of his post-judgment motions.

II. DISCUSSION

A. Orders Denying Extension to File Expert Report and Granting Summary Judgment

1. Legal Background

Mr. Glenn's principal argument on appeal is that the district court erred in declining to grant him an extension of time to submit an expert witness report, which, he claims, would have created a genuine issue of material fact to defeat summary judgment. We review a decision to deny an extension of time for discovery for abuse of discretion. *See Bolden v. City of Topeka*, 441 F.3d 1129, 1149 (10th Cir. 2006); *Davoll v. Webb*, 194 F.3d 1116, 1139 (10th Cir. 1999). "As a general rule, discovery rulings are within the broad discretion of the trial court," *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1386 (10th Cir. 1994), and "will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or

exceeded the bounds of permissible choice in the circumstances," *id.* (internal quotation marks omitted).

Mr. Glenn also challenges the summary judgment order. We review the district court's grant of summary judgment de novo, viewing the evidence and drawing all reasonable inferences in favor of the nonmoving party. *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1251 (10th Cir. 2015). "The court shall grant summary judgment if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

2. **Additional Background**

Mr. Glenn filed his complaint in March 2015. The district court entered a scheduling order setting a January 15, 2016, deadline for written discovery and a February 15, 2016, deadline for fact discovery and submission of expert reports. On February 10, 2016, Mr. Glenn moved for an extension of time to complete discovery, noting that he was waiting on a response to his records request to the Utah Division of Real Estate, which he needed to respond to defendants' timely-served discovery requests. The motion did not mention needing additional time to secure expert witnesses.

Between February 18 and February 23, 2016, more than one month past the deadline for written discovery, Mr. Glenn served written discovery requests on defendants and third parties. The magistrate judge eventually granted in part Mr. Glenn's motion for extension of time and instructed the parties to complete discovery by July 1, 2016. She "caution[ed] both parties to follow the rules of procedure" and "urged [them] to timely comply with [the] Order and the Federal Rules of Civil Procedure for the duration of this ligation." R. at 528.

On July 27, 2016, the magistrate judge held a scheduling conference and entered an amended scheduling order further extending the expert-witness-report deadline to

September 1, 2016, to accommodate Mr. Glenn. On August 16, 2016, Mr. Glenn filed another motion to extend discovery, requesting additional time to submit expert witness reports.

On September 23, 2016, the magistrate judge denied this third request for additional time to conduct discovery, which was filed three weeks after the amended scheduling order was entered. The magistrate judge explained, "In actuality, [Mr. Glenn] seeks to amend the scheduling order in this case, which requires a finding of good cause" under Fed. R. Civ. P. 16, R. at 654.[2] Mr. Glenn's motion for extension of time stated that he was "actively seeking an expert witness to . . . defend against the Defendant's anticipated motion for summary judgment." But it did not explain his inability to secure an expert witness within the already-extended deadlines set by the court sufficient to establish good cause. Supp. R. at 9-10. The magistrate judge concluded, because "[Mr. Glenn] has already had two bites at the apple . . . there is not good cause to amend the recently entered Amended Scheduling Order." R. at 655.

Mr. Glenn objected to this ruling, citing the need for an expert to review deposition transcripts that he had not yet obtained. The district court overruled Mr. Glenn's objection and affirmed the magistrate judge's order, finding that "deadline extensions have been liberally granted to Mr. Glenn in the past due to his status as a pro se litigant" and that Mr. Glenn had failed to "argue or even point out how the [magistrate judge's] Order is clearly erroneous or contrary to law." R. at 1441-42.

On September 30, 2016, even though the magistrate judge had denied Mr. Glenn's motion to amend the scheduling order on September 23, 2016, Mr. Glenn filed an untimely expert witness report, along with another motion to extend the expert witness report deadline. On February 1, 2017, the magistrate judge denied the motion as duplicative of the previous motion.

---

[2] Under Fed. R. Civ. P. 16(b)(4), "[a] schedule may be modified only for good cause and with the judge's consent."

3. Analysis

On appeal, Mr. Glenn challenges the order denying an extension to file an expert witness report and the order granting summary judgment. He points to a deposition transcript that he claims his expert needed to review before submitting his report as the reason for needing an additional extension of time. But the transcript at issue was available by the time of the scheduling conference on July 27, 2016. R. at 1381-82. Mr. Glenn provides no explanation as to why his proposed expert could not have reviewed the transcript well before the September 1 deadline for his expert report, even if the transcript was not yet in a format acceptable for filing. Moreover, the expert report that was eventually produced did not even appear to rely on the transcript.

Mr. Glenn also criticizes the district court's rulings on several motions to compel and to quash and complains about the defendants' and third parties' participation in discovery. But he fails to show good cause sufficient to justify another discovery extension. As noted above, the magistrate judge extended discovery deadlines twice to accommodate Mr. Glenn, allowing him approximately eighteen months from the filing of his complaint to secure expert witnesses.

Because Mr. Glenn "has offered no colorable reason why the discovery deadline should have been extended," *Bolden*, 441 F.3d at 1151, the district court did not abuse its discretion in finding that Mr. Glenn failed to show good cause for a third discovery extension. The expert witness report was properly excluded as untimely and, therefore, it could not create a genuine issue of material fact. Because there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law, the district court properly granted summary judgment to defendants.[3]

B Denial of Post-Judgment Motions

Mr. Glenn filed several duplicative post-judgment motions requesting relief under Fed. R. Civ. P. 59(a) and 60(b)(2) based on newly discovered evidence and under Fed. R. Civ. P. 60(b)(3) based on fraud. We affirm the district court's denial of the post-judgment motions

1. Newly Discovered Evidence

Mr. Glenn styled his "newly discovered evidence" filings as motions for a new trial or to reopen the case under Rule 59(a) and for relief from judgment under Rule 60(b)(2). "Technically, [a Rule 59(a)] motion was improper as no trial was conducted from which a new trial motion could be filed." *Jones v. Nelson*, 484 F.2d 1165, 1167 (10th Cir. 1973). Although the district court analyzed Mr. Glenn's purported Rule 59(a) motion under that rule, "[b]ecause . . . the motion seeks to alter the substantive ruling of the district court, we construe the plaintiff's motion as a motion to alter or amend the judgment pursuant to Rule 59(e)," *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). "A party can seek relief based on newly discovered evidence under either [Rule] 59(e) or 60(b)(2)." *FDIC v. Arciero*, 741 F.3d 1111, 1117 (10th Cir. 2013). "We review the district court's decision under either rule for abuse of discretion." *Id.*

"[I]t is well-settled that the requirements for newly discovered evidence are essentially the same under Rule 59(e) and 60(b)(2)." *Id.* Relief is available under either rule only if (1) the evidence was newly discovered since entry of summary judgment; (2) the moving party was diligent in discovering the new evidence; and (3) the newly discovered evidence would probably produce a different result. *See Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1213 (10th Cir. 2012) (Rule 59(e)); *Dronsejko v. Thornton*, 632 F.3d 658, 670 (10th Cir. 2011) (Rule 60(b)).

Mr. Glenn proffered three affidavits—from the Buyer, the real estate broker, and the appraiser in the original Buyer Action. He claims this was newly discovered evidence showing fraudulent misrepresentation on the part of the Buyers. But these affidavits were part of the state court record in the Buyer Action. Mr. Glenn could have discovered and proffered them well before summary judgment was entered in this case. Because Mr. Glenn cannot meet the newly discovered evidence standard contemplated by Rules 59 and 60, the district court did not abuse its discretion in denying the motions.

---

[3] Mr. Glenn also contends the district court's entry of summary judgment violated his Seventh Amendment right to a jury trial. But as we have explained, summary judgment was appropriate here, and "[t]he Seventh Amendment is not violated by proper entry of summary judgment, because such a ruling means that no triable issue exists to be submitted to a jury." *Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001).

2. Fraud

Mr. Glenn's post-judgment filings also alleged claims under Rule 60(b)(3), which allows for relief from judgment due to "fraud, misrepresentation, or misconduct by an opposing party," Fed. R. Civ. P. 60(b)(3). We review the district court's denial of a Rule 60(b) motion for abuse of discretion. *Zurich N. Am. v.Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005).

In Mr. Glenn's request for relief in the district court, he argued the Buyers behaved fraudulently and materially misrepresented themselves. The district court denied the motions, finding Mr. Glenn failed to "show[] fraud, misrepresentation, or misconduct ***by the defendants*** [in this case] to justify relief from judgment." R. at 1880; *see also id.* at 1831 (same). On appeal, Mr. Glenn has abandoned this argument and instead contends he is entitled to Rule 60(b)(3) relief based on 47 exhibits to his original complaint that "[a]pparently . . . vanished which only benefited the defendant/appellee." Aplt. Br. at 22.

This argument was not raised in the district court. "Generally, [we] will not consider an issue raised for the first time on appeal," *Tele-Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1232 (10th Cir. 1997). "[W]e should not be considered a second-shot forum, a forum where secondary, back-up theories may be mounted for the first time." *Id.* at 1233 (internal quotation marks omitted). Mr. Glenn argues that "extenuating circumstances prevented him from presenting the issue at the trial level" because he "was not aware of 'Fraud upon the Court' until he received the March 13, 2018 Appellate Record where he noticed the complaint he filed on March 15, 2015 did not include the 47 Exhibits filed with the case." Reply Br. at 7.

Even accepting Mr. Glenn's reason for failing to raise this argument in the district court, we conclude he has waived it due to inadequate briefing. Mr. Glenn's new fraud argument, which consists of the wholly unsupported claim that defendants

"ensured this evidence was excluded," Aplt. Br. at 4, and "subverted evidence by removing the 47 exhibits filed with the court," Reply Br. at 7, amounts to no more than "[m]ere conclusory allegations[, which] . . . does not constitute adequate briefing," *MacArthur v. San Juan Cty.*, 495 F.3d 1157, 1160-61 (10th Cir. 2007) (internal quotation marks omitted). Accordingly, the district court did not abuse its discretion in denying Mr. Glenn's Rule 60(b)(3) motions.

III. CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE SUPREME COURT OF THE STATE
OF UTAH

----ooOoo----

Endre' Glenn and Margret Glenn,
Plaintiffs and Appellants,

v.

Robin Reese and Judith Reese
Defendants and Appellees.

No. 20080861

F I LE D
December 11, 2009

Fourth District, Provo Dep't
The Honorable Samuel D. McVey No. 080400977

Attorneys: Jason K. Nelsen, Salt Lake City, for plaintiffs Karra J. Porter, Salt Lake City, for defendants

---

DURHAM, Chief Justice:

INTRODUCTION

¶1 This action stems from a Real Estate Purchase Contract (REPC) executed between Robin and Judith Reese (Buyers) and Endré and Margret Glenn (Sellers) in December 2007. We are asked to determine if the district court erred in refusing to grant summary judgment for the Sellers because the REPC is ambiguous and cannot be interpreted as a matter of law. Specifically, we must decide whether the REPC affords Buyers a means to cancel the REPC because of an appraisal below the purchase price listed in the REPC. Sellers argue that, though the REPC is unambiguous, it only permits cancellation based on an

appraisal obtained by a lender. Buyers argue that the REPC allows them to request and obtain their own appraisal and cancel the REPC based on their dissatisfaction with that appraisal.

¶2 We hold that the REPC is unambiguous and is broad enough to allow cancellation based on an unsatisfactory appraisal obtained by Buyers. Because of this holding, we must also decide if Buyers complied with the REPC's cancellation procedure when they submitted to Sellers two addenda to the REPC. We conclude that Buyers did not breach the REPC and are entitled to summary judgment. We therefore remand to the district court for entry of summary judgment and an award of attorney fees in favor of Buyers.

BACKGROUND

¶3 On December 19, 2007, Buyers offered to purchase Sellers' home (the Property) for $540,000. After some negotiation, the parties executed a REPC. The REPC indicates that Buyers would finance the purchase with $410,000 in cash and $130,000 in a conventional loan from a lender. The REPC also includes two provisions regarding conditions based on an appraisal or evaluation of the Property. First, Section 2.4 of the REPC containes an "Appraisal Condition" that allows Buyers to cancel the REPC if the Property appraises for less than the purchase price. Section 2.4 reads:

> **2.4 Appraisal Condition**. Buyer's obligation to purchase the Property is conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition." If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice.

Second, Section 8 conditions Buyers' obligation to purchase the Property upon approval of certain evaluations, including a physical condition inspection and the availability of homeowner's insurance. Specifically, Section 8(e) conditions purchase upon "[a]ny other [test or evaluation] deemed necessary by buyers." In the event that Buyers are dissatisfied with one of these evaluations, Section 8.2 provides that Buyers may submit to Sellers either a notice of intent to cancel or a written notice of objections. If Buyers submit a notice of objections, Section grants the parties seven calendar days (the Response Period) to resolve these objections. If the parties fail to agree on a method to resolve these objections, Buyer may then cancel the REPC within three days after the Response Period expires.

¶4 On December 27, 2007, Buyers' agent engaged JMS Group Appraising to conduct an appraisal of the Property. The appraisal placed the value of the Property at $80,000 below the purchase price. Because Buyers estimated they could pay cash for the Property if priced at this lower value, they neither applied nor received a loan from a lender. After receiving the appraisal on December 28, 2007, Buyers, through their agent, sent Addendum No. 3 to Sellers on the same day. Addendum No. 3 stated:

1. Purchase price to be $460,000 per appraised value.
2. If seller does not agree to the new purchase price contract will be canceled.

[3]. Earnest Money to be returned to Buyers.

The Addendum gave Sellers until 6:00 p.m. on the following day to accept. Sellers did nothing. After the deadline passed without an answer from Sellers, Buyers submitted Addendum No. 4 on December 31, 2007, which stated:

1. Seller has failed to respond to addendum #3. Buyers are canceling this contract based upon the appraised value coming in at 460,000 and the seller not accepting the value as the purchase price.
2. Earnest money of $5000.00 to be released to Buyers.

Though Sellers did not sign Addendum No. 4, Sellers' broker placed the Property back on the market on January 2, 2008 and sent an Earnest Money Release Form to Buyers' agent on January 4, 2008.

¶5 In March 2008, Sellers filed a complaint against Buyers, which was later amended. In the amended complaint, Sellers asserted causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, and sought specific performance of the REPC as their sole remedy. Both parties filed motions for summary judgment. The district court, at oral argument, denied both motions on the ground that the REPC was ambiguous. Sellers filed a petition for permission to appeal from an interlocutory order, pursuant to Rule 5 of the Utah Rules of Appellate Procedure, contesting the district court's denial of their motion for summary judgment. We granted the petition and have jurisdiction over this interlocutory appeal pursuant to Utah Code section 78A-3-102(3)(j) (2008).

STANDARD OF REVIEW

¶6 The propriety of a grant or denial of summary judgment is a question of law, which we review for correctness. R&R Indus. Park, L.L.C. v. Utah Prop. & Cas. Ins. Guar. Ass'n, 2008 UT 80, ¶ 18, 199 P.3d 917. In doing so, we view "the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Id. (quoting Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600).

ANALYSIS

¶7 The issue presented in this case is whether the district court erred in denying summary judgment on the basis that the REPC is ambiguous. If we conclude the REPC is unambiguous, we may interpret it as a matter of law and then must determine if Section 2.4 of the REPC contains Buyers' only means of cancellation for an appraisal below the purchase price or if Section 8's "other evaluations" is broad enough to allow such a cancellation. Furthermore, we must determine how or if Addendum No. 3 and Addendum No. 4 effected either of these sections. Sellers concede that if the REPC can be interpreted as a matter of law it may be interpreted in favor of Buyers.

¶8 We hold that the REPC is unambiguous and can be interpreted as a matter of law because "other evaluations" under Section 8 includes an appraisal procured by a buyer. We also hold that Addendum No. 3 to the REPC is an offer to modify the REPC, which became a nullity upon Sellers' refusal to accept. Thus, Buyers' Addendum No. 4 successfully cancelled the REPC.

I. THE REPC IS UNAMBIGUOUS AND CAN BE INTERPRETED AS A MATTER OF LAW

¶9 Both Sellers and Buyers argue that the REPC is unambiguous. Specifically, Sellers contend that Section 2.4 contains Buyers' only avenue for cancellation upon receipt of the appraisal below the purchase price and that Section 8 cannot be read to allow cancellation for the unfavorable appraisal. In contrast, Buyers assert that Section 2.4 and Section 8 are mutually exclusive. They argue that Section 2.4 applies only to cancellations based on an appraisal obtained by a lender and Section 8 applies to cancellations based on appraisal obtained by a self-financed buyer.

¶10 Well-accepted rules of contract interpretation require that we examine the language of a contract to determine meaning and intent. Café Rio, Inc. v. Larkin-Gifford-Overton, LLC, 2009 UT 27, ¶ 25, 207 P.3d 1235. Where the language is unambiguous, "the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." Id. (internal quotation marks omitted). We will also "consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none." Id. (ellipses in original) (internal quotation marks omitted). The court considers extrinsic evidence of the parties' intent only if the language of the contract is ambiguous. Id. A contractual term or provision is ambiguous "if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." Id. (internal quotation marks omitted). When determining whether the plain language is ambiguous, "we attempt to harmonize all of the contract's provisions and all of its terms."Cent. Fla. Invs., Inc. v. Parkwest Assocs., 2002 UT 3, ¶ 12, 40 P.3d 599.

¶11 Though Sellers argue that Section 2.4 provides Buyers' only means of cancellation due to an appraisal less than the purchase price, a plain reading of the language in Section 2.4 and Section 8 indicates otherwise. Section 2.4 clearly delineates the method for cancellation based on an unsatisfactory appraisal obtained by a lender. First, a lender must request an appraisal and provide a written notice to the buyer indicating that the property appraised for less than the purchase price. Then, if the buyer wishes to cancel, she must provide a copy of the written appraisal notice to the seller within three days. Thus, it is clear that a party without a lender cannot comply with this provision because it cannot obtain the requisite appraisal notice.

¶12 In this case, Buyers did not comply with Section 2.4 because they did not have a lender. After the home appraised at $80,000 below the purchase price, Buyers felt they could afford to pay the lower appraised value of the home without resorting to a lender. Therefore, they did not apply for a loan, and no lender requested an appraisal on their behalf. Sellers would have us hold that because Buyers did not comply with Section 2.4, no other section of the REPC grants them the right to cancel the contract upon receipt of the unfavorable appraisal. We disagree.

¶13 We hold that the evaluation provision in Section 8 is broad enough to encompass an appraisal obtained by a self- financed buyer. Section 8 reads:

> Buyer's obligation to purchase under this Contract:
> (a) IS conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
> (b) IS conditioned upon Buyer's approval of a physical condition inspection of the Property;
> .....
> (d) IS conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
> (e) IS conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) Any other deemed necessary by buyers.

Under this language, the question is whether an appraisal qualifies as a type of "test" or "evaluation" deemed necessary by the buyer. In its common and ordinary usage, "appraise" means "[t]o determine the value of" or "[t]o estimate the worth or features of." Webster's II New College Dictionary 55 (1995). Additionally, "evaluate" means "[t]o determine or fix the value of" or "[t]o examine carefully."Id. at 388. Furthermore, "appraise" is a synonym in the definition of "evaluate." Id. It is clear that the plain meanings of these terms are so similar as to be used

interchangeably without confusion. Thus, an appraisal is an evaluation under Section 8.

¶14 Accordingly, because Section 8 gives a buyer the contractual right to obtain an appraisal, a buyer also has the corresponding right to cancel the REPC upon dissatisfaction with the appraised value. The language in Section 8 is clearly sufficient to treat an appraisal as an evaluation and to allow a cancellation based on the unsatisfactory appraisal.[1]

¶15 Despite this reasonable interpretation, Sellers maintain that an appraisal is not a type of evaluation

¶16 Because the plain language of the contract allows no other reasonable interpretation, we hold that the REPC is unambiguous and can be interpreted as a matter of law. Furthermore, we hold that the REPC affords Buyers two opportunities to cancel the contract based on an unfavorable appraisal: (1) when

---

[1]To contradict this plain language, Sellers would have us apply two rules of construction; neither changes the outcome. Sellers argue that the rule of ejusdem generis alters the analysis because the general term "evaluations" must be interpreted to refer to evaluations and inspections similar to those types specifically listed in Section 8. See Café Rio, Inc. v. Larkin-Gifford-Overton, LLC, 2009 UT 27, ¶ 25, 207 P.3d 1235. But application of this rule shows that an appraisal, as an "evaluation," is similar to the evaluations and inspections specifically enumerated, namely, "a physical condition inspection of the Property" and "a survey of the Property." Therefore, this rule of construction bolsters our conclusion. Nor are we convinced by Sellers' argument that the specific provision of Section 2.4 governs the general provision of Section 8. Even if the appraisal condition of Section 2.4 is more specific than the appraisal condition of Section 8, Section 2.4 states that "[c]ancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions." Consequently, Section 2.4 allows other provisions, regardless of specificity, to govern. contemplated by Section 8. But Sellers' interpretation would compel us to ignore the plain language of the contract. We decline to do this. As such, under Section 8, the Buyers had the right to request an appraisal and cancel the REPC upon dissatisfaction with that appraisal. Any other interpretation would require a strained reading and judicial contortion exceeding the bounds of reason. Furthermore, this interpretation allows each provision to have effect and does not produce absurd or harsh results.

the appraisal is obtained by a third-party lender as described in Section 2.4; or (2) when the appraisal is obtained by the buyer as described in Section 8. Because Section 2.4 does not govern the appraisal here, Buyers were not required to submit a written notice of appraisal value to Sellers to cancel the contract.[2]

II. ADDENDUM NO. 3 OPERATED AS AN OFFER TO MODIFY THE CONTRACT AND BECAME A NULLITY UPON EXPIRATION OF THE TIME PERIOD LISTED

¶17 Sellers argue that even if Section 8 of the REPC allows Buyers to cancel upon receipt of an unsatisfactory appraisal, Buyers failed to comply with the requirements of Section 8. Specifically, Sellers assert that Buyers had only two options if they found any inspection or evaluation unacceptable: (1) cancel the REPC through a written notice of cancellation; or (2) provide Sellers with a written notice of objections, which would have triggered a seven-day period that allowed Sellers to respond before Buyers could cancel. Sellers further claim that Addendum No. 3 cannot operate as a cancellation because it is not clear and unequivocal. Therefore, according to Sellers, Addendum No. 3 could operate only as a notice of objections and there was consequently a breach of the REPC when Buyers prematurely submitted the unequivocal cancellation in Addendum No. 4. In contrast, Buyers argue that Addendum No. 3 was an offer to renegotiate that became inoperable upon Seller's failure to assent.

¶18 We agree with Buyers; Addendum No. 3 operated as neither a cancellation nor a written notice of objections. Instead, it was an offer to modify the contract and became a nullity upon refusal. Hence, the original terms of

[2]We note that this debate about cancellation based on an appraisal has largely been resolved by the newly revised, state approved REPC form. The revision eliminates Section 2.4 and provides an appraisal condition in Section 8 that allows the buyer to cancel the REPC upon notice from a lender or directly from an appraiser that the property has appraised for less than the purchase price renegotiate that became inoperable upon Sellers' failure to assent.

the contract remained in force until Buyers cancelled the REPC by submitting Addendum No. 4 to Sellers.

¶19 It is generally accepted that a notice of termination or cancellation of a contract must be clear and unequivocal. 17B C.J.S. Contracts § 446 (2009); see Gray v. Bicknell, 86 F.3d 1472, 1479 (8th Cir. 1996) (applying Missouri law); Morris Silverman Mgmt. Corp. v. W. Union Fin. ServS., Inc., 284 F. Supp. 2d 964, 974 (N.D. Ill. 2003); In re Greater Se. Cmty. Hosp. Found., Inc., 267 B.R. 7, 18 (Bankr. D.C. 2001); Stovall v. Publishers Paper Co., 584 P.2d 1375, 1377-78 (Or. 1978); Accu- Weather, Inc. v. Prospect Commc'ns, Inc., 644 A.2d 1251, 1254 (Pa. Super. Ct. 1994). Furthermore, "a notice of rescission must be not only unequivocal but unconditional." Stovall, 584 P.2d at 1378. The focus of any inquiry into the adequacy of cancellation "is on whether the notice is sufficiently clear to apprise the other party of the action being taken." LA-Nevada Transit Co. v. Marathon Oil Co., 985 F.2d 797, 800 (5th Cir. 1993). Furthermore, conduct of the parties may be considered to determine if a clear and unequivocal cancellation has occurred. Morris Silverman, 284 F. Supp. 2d at 974. "Ambiguous conduct and language intended to signal contract termination will be deemed not to have terminated the contract." Accu-Weather, 644 A.2d at 1254 (internal quotation marks omitted). Though we have yet to recognize these principles, neither we nor the parties have found any case law indicating that Utah should not follow these general rules.

¶20 The inclusion of negotiation language in Addendum No. 3 and the conduct of the parties following its delivery illustrate that Addendum No. 3 was not a clear and unequivocal cancellation of the REPC. First, in Addendum No. 3, Buyers communicated their willingness to negotiate as well as their interest in cancellation. The commingling of a wish to cancel with a desire to negotiate and save the contract cannot be seen as an unequivocal notice of cancellation. Stovall,

584 P.2d at 1380 ("By mixing words of termination with words of compromise, negotiations, and present obligation, the . . . [written instrument], when read as a whole, was ambiguous, and as a matter of law did not meet the requirements which must be satisfied for a legally effective notice of the termination of the contract."). If Sellers had chosen to engage in such negotiations, Addendum No. 3 would not have operated to cancel the contract.

¶21 Moreover, Buyers' submission of Addendum No. 4 and Sellers' release of the earnest money after receipt of Addendum No. 4 illustrate that neither party considered the REPC cancelled after Addendum No. 3. If Sellers had considered the contract cancelled after Addendum No. 3 the earnest money should have been returned following the expiration of the negotiation period specified in Addendum No. 3. Similarly, if Buyers had considered Addendum No. 3 sufficient to cancel the REPC as well as their obligations under it, they would not have felt the need to transmit Addendum No. 4. Both parties' conduct after the submission of Addendum No. 3 illustrates that neither considered Addendum No. 3 sufficient to cancel the REPC. Accordingly, we agree with Sellers that Addendum No. 3 is not a clear and unequivocal intent to cancel.

¶22 However, we do not agree with Sellers' argument that Addendum No. 3, if not a cancellation, must be a notice of objections.While Section 8.2 gives Buyers the right to cancel or submit a notice of objections upon an unsatisfactory evaluation, nothing in the contract prevented Buyers from taking an altogether different course of action. In this case, Buyers attempted to renegotiate.

¶23 Parties to a written contract have the right to modify, waive, or make new contractual terms. Softsolutions, Inc. v. Brigham Young Univ., 2000 UT 46, ¶ 34, 1 P.3d 1095. This is true even despite the presence of "express contractual language to the contrary." Id.; see also Rapp v. Mountain States Tel. & Tel. Co.,

606 P.2d 1189, 1191 (Utah 1980) ("It is well-settled law that the parties to a contract may, by mutual consent, alter all or any portion of that contract by agreeing upon a modification thereof."); Cheney v. Rucker, 381 P.2d 86, 89 (Utah 1963) ("It is fundamental that where parties have rights under an existing contract they have exactly the same power to renegotiate terms . . . as they had to make the contract in the first place."). This right to renegotiate was illustrated in an analogous case, Scott v. Majors, 1999 UT App 139, 980 P.2d 214.

¶24 In Scott, the trial court ordered the seller to sell her property according to the terms of a REPC, but deferred ruling on attorney fees, costs and damages. Id. ¶ 2. In an attempt to negotiate these costs and fees, the buyer asked the seller to sign a mutual release agreement providing for $5,000 to the buyer as costs, damages, and attorney fees. Id. ¶ 3. The seller refused to agree and, in a subsequent appeal, argued that the buyer repudiated the contract by conditioning his performance of the REPC on her consent to the mutual release agreement. Id. ¶ 17.The court held that the proposal "was an offer to modify the original contract which [the seller] rejected, leaving the original contract in full force." Id. ¶ 18.

¶25 We agree with this reasoning. Rather than a written notice of objections, Addendum No. 3 was an offer to modify and thus an attempt to renegotiate a contract term. This is evidenced by the language of Addendum No. 3, which reads, in part:

> Seller shall have until 6:00 PM Mountain Time on December 29, 2007 to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Section 23 of the REPC reads:

> **ACCEPTANCE**. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

Because Sellers did not sign the addendum, they failed to accept the offer to modify. Consequently, the offer lapsed and never became part of the contract.

¶26 We hold that Addendum No. 3 was neither a cancellation nor a written notice of objections, but an offer to modify that became a nullity. Buyers therefore retained the right to cancel based on an unsatisfactory evaluation under the REPC until January 5, 2008, the Evaluations & Inspections Deadline. Buyers' submission of Addendum No. 4, an unequivocal notice of intent to cancel, to Sellers on December 31, 2007, complied with Section and thus cancelled the REPC and all Buyers' obligations thereunder.

CONCLUSION

¶27 We conclude that the REPC is unambiguous and can be interpreted as a matter of law. Furthermore, we hold that Section 8 of the REPC is broad enough to include an appraisal obtained by a self-financed buyer. Also, we hold that Addendum No. 3 was an offer to modify the contract that became a nullity upon Seller's refusal to accept. Addendum No. 4 was sufficient to cancel the REPC. We therefore remand to the district court for entry of summary judgment and an award of attorney fees in favor of Buyers.

¶28 Justice Wilkins, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

¶29 Having disqualified himself, Associate Chief Justice Durrant does not participate herein.

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-2010

Appellate Clerks' Office
Telephone (801) 578-3900
Fax (801) 578-3999

December 11, 2008

WALTER T. KEANE
ATTORNEY AT LAW
2150 S 1300 E STE 500
SALT LAKE CITY UT 84106

Re: Glenn v. Reese
Appellate Case No. 20080861
Trial Court No. 080400977

Dear Mr. KEANE:

Enclosed is a copy of the order granting the interlocutory appeal entered by the Utah Supreme Court on December 11, 2008, in the above referenced case.

This order takes the place of a notice of appeal. A docketing statement is not required. However, in accordance with Rule 11, of the Utah Rules of Appellate Procedure you must make arrangements for any necessary transcripts or inform us that no transcripts are required.If transcripts are requested, payment arrangements must be made. See Utah Rules of Appellate Procedure 11. This should be done timely. Once this process is complete, the FOURTH DISTRICT, PROVO DEPT Court will be notified that the record index should be prepared and sent to the Utah Supreme Court. The briefing schedule will be set upon receipt of the record index on appeal.

As of May 15, 2008, pursuant to Utah Supreme Court Standing Order No. 8, any party filing a brief on the merits in the Utah Supreme Court or the Utah Court of Appeals is required to submit a courtesy copy of the brief on compact disk in searchable PDF format in addition to complying with the filing and service requirements stated in the Utah Rules of Appellate Procedure. Any party who lacks the technological capability to comply with this requirement, must file a motion to be excused from compliance at the time that party files its brief on the merits.

Enclosed is a copy of Standing Order No. 8. If you have any questions, please contact me at 578-3904.

Sincerely,

/s/

Merilyn Hammond
Deputy Clerk

Enc.

cc: FOURTH DISTRICT, PROVO DEPT ALAIN C BALMANNO

IN THE UTAH SUPREME COURT

Endre' Glenn and

Margret Glenn,

Plaintiffs and Petitioners

v. Case No. 20080861-SC

Robin Reese and Judith Reese,

Defendants and Respondents.

ORDER

This matter is before the court upon a Petition for Permission to Appeal an Interlocutory Order, filed on October 20, 2008.

IT IS HEREBY ORDERED pursuant to Rule 5 of the Utah Rules of Appellate Procedure, the Petition for Permission to Appeal an Interlocutory Order is granted.

For The Court:

December 11, 2008
Date

/s/
Christine M. Durham
Chief Justice

Walter T. Keane #10333
WALTER. KEANE,P.C.
2150 South 1300 East, Suite 500
Salt Lake City Utah 84106
Phone: 801 990-4422
Fax: 801--606-75331
Email: Walter@WaJterTKeane.com
Attorney for Plaintiffs

FILED
OCT 02, 2008
4TH DISTRICT
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY – PROVO COURTHOUS, STATE OF UTAH

ENDRE' GLENN and MARGARET GLENN vs. ROBIN REESE and JUDITH REESE, Defendants.	**[PROPOSED] ORDER** Case No: 080400977 Judge:: Samuel McVey

This matter coming to be heard on cross motions for summary judgment, all parties present by and through their counsel, the Court being fully informed and after considering oral argument, motions and memoranda IT IS HEREBY ORDERED:

1. That the both the plaintiffs and the defendant motions for summary judgment are denied.

DATED this _2 day of October 2008

BY THE COURT
/s/
HONORABLE SAMUEL MCVEY

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ENDRE GLENN, Plaintiff, v. BRENNAN H. MOSS and PIA ANDERSON DORIUS REYNARD & MOSS, LLC, Defendants.	**MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTIONS FOR NEW TRIAL OR RELIEF FROM JUDGMENT** Case No. 2:15-cv-00165-DN District Judge David Nuffer

This case was dismissed on summary judgment.[7] A previous motion by plaintiff Endre Glenn ("Glenn") to alter judgment or grant relief from judgment was denied.[8] Glenn now has filed two additional post-judgment motions for relief from summary judgment (the "Motions"),[9] which do not improve upon the positions set forth in the prior post-judgment motion. These Motions can be denied without opposition.

Glenn contends that he has discovered new evidence that was not available to him until November 1, 2017, after summary judgment was entered.[10] The evidence at issue consists of declarations from a state court action in which Glenn was the

[7] Memorandum Decision and Order Accepting Report and Recommendations ("Summary Judgment Order"), docket no. 133, filed October 19, 2017

[8] Memorandum Decision and Order Denying Plaintiff's Motion to Alter Judgment or Grant Relief from Judgment ("Prior Post-Judgment Order"), docket no. 138, filed November 29, 2017.

[9] Motion Reopen Case Under FRCP 59(a) Motion New Trial or Grant Relief from Judgment Under FRCP 60(b)(2), 60(b)(3), docket no. 139, filed December 21, 2017 ("Motion No. 139"); Plaintiff's Motion for New Trial Under FRCP 59(a) and/or Grant Relief from Judgment Under FRCP 60(b)(2), 60(b)(3), docket no. 141, filed December 21, 2017 ("Motion No. 141").

[10] Motion No. 139 at 2.

plaintiff.[11] The declarations were considered and rejected on Glenn's prior motion for relief from judgment.[12] The declarations, which Glenn attests he obtained from his former lawyer,[13] were previously discoverable with diligence. Moreover, the declarations are not material or likely to produce a different result. Glenn argues that the declarations show fraud on the part of the buyer in the underlying failed real estate transaction, which is not a claim properly raised in this legal malpractice action.[14] Therefore, the declarations do not compel a new trial under Rule 59(a).[15]

Glenn alternatively requests relief from judgment under Rules 60(b)(2) and 60(b)(3). The Motions do not satisfy Rule 60(b) under either subsection. As explained above, Glenn lacks newly discovered evidence that, with reasonable diligence, could not have been discovered.[16] And although Glenn continues to argue that the buyer in his home sale acted fraudulently, he has not shown fraud, misrepresentation, or misconduct by the defendants to justify relief from judgment.[17]

Glenn once again argues that he has been denied a jury trial.[18] Glenn's claims were dismissed on summary judgment because no genuine dispute of material fact required a trial.[19] It is well established that "[t]he Seventh Amendment is not violated by proper entry of summary judgment because such a ruling means that no triable issue exists to be submitted to a jury."[20]

The Motions do not present a basis for disturbing the summary judgment dismissing Glenn's case. Accordingly, the Motions are denied.

---

[11] Id.; Motion No. 141 at 2
[12] Prior Post-Judgment Order at 1–2
[13] Declaration of Glenn ¶10, docket no. 140, filed December 21, 2017.
[14] Summary Judgment Order at 7 ("Glenn's allegation of fraud against the Buyer at this late date is neither relevant to the actual claims nor supported by the facts.")
[15] Fed. R. Civ. P. 59(a); Joseph v. Terminix Int'l Co., 17 F.3d 1282, 1285 (10th Cir. 1994) (identifying the elements required for a new trial based on new evidence).
[16] Fed. R. Civ. P. 60(b)(2).
[17] Fed. R. Civ. P. 60(b)(3) (requiring fraud "by an opposing party").
[18] Motion No. 141 at 7–8
[19] Fed. R. Civ. P. 56(a).
[20] Shannon v. Graves, 257 F.3d 1164, 1167 (10th Cir. 2001) (citing Fidelity & Deposit Co. v. United States, 187

ORDER

Having reviewed and considered the Motions, and for good cause appearing,

IT IS HEREBY ORDERED that the Motions[21] are DENIED. The case remains dismissed and closed.

Dated January 29, 2018.

BY THE COURT:

/s/

David Nuffer
United States District Judge

[21] Docket no. 139, docket no. 141.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ENDRE GLENN, Plaintiff, v. BRENNAN H. MOSS and PIA ANDERSON DORIUS REYNARD & MOSS, LLC, Defendants.	**MEMORANDUM DECISION AND ORDER:** • **ACCEPTING [119] REPORT AND RECOMMENDATION;** • **GRANTING [125] DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S REPLY TO RESPONSE TO REPORT AND RECOMMENDATION; AND** • **DENYING [131] PLAINTIFF'S MOTION FOR LEAVE TO FILE SUR-REPLY** Case No. 2:15-cv-00165-DN-BCW District Judge David Nuffer Magistrate Judge Brooke C. Wells

Pro se plaintiff Endre Glenn ("Glenn") filed this action against the law firm of Pia Anderson Dorius Reynard & Moss, LLC, and attorney Brennan H. Moss (together, "Pia Anderson"). Pia Anderson represented Glenn in a Utah State court action against Glenn's former real estate agent and brokerage.[1] The Complaint alleges that Pia Anderson mishandled litigation against a real estate agent and brokerage for which Glenn hired the firm.[2] Glenn asserts claims for professional negligence (legal malpractice), breach

[1] Complaint, docket no. 1, filed March 16, 2015.
[2] *Id*

of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing.[3]

The case was referred to United States Magistrate Judge Brooke[4] Wells to handle all matters, including a report and recommendation on dispositive matters.[5] The Magistrate Judge issued a Report and Recommendation (the "R&R")[6] on March 1, 2017 recommending action on four separate but related motions. The R&R recommends:

- GRANTING the Motion for Summary Judgment[7] filed by Pia Anderson (the "Summary Judgment Motion");

- STRIKING the Cross Motion for Summary Judgment[8] filed by Glenn (the "Cross Motion");

- GRANTING IN PART and DENYING IN PART Defendants' Motion to Strike Plaintiff's Untimely Cross Motion for Summary Judgment[9] by striking the Cross Motion but considering the Cross Motion as an opposition to the Summary Judgment Motion; and

- DENYING Defendants' Motion to Extend Deadline to File Memorandum in Opposition to Plaintiff's Cross Motion for Summary Judgment because no response to the stricken Cross Motion is required. [10]

The parties were notified of their right to file objections to the R&R within 14 days of service pursuant to 28 U.S.C. § 636(b) and Federal Rules of Civil Procedure 72(b)(2).[11] Glenn filed an objection to the R&R (the "Objection to R&R"), arguing that his professional negligence and related claims should not be dismissed because: (1) the Magistrate Judge disregarded facts regarding the prior litigation; (2) Glenn's claim in the prior litigation was

---

[3] *Id*
[4] Order Referring Case, docket no. 12, entered July 7, 2017.
[5] 28 U.S.C. § 636(b)(1)(B).
[6] Docket no. 119, filed March 1, 2017
[7] Docket no. 90, filed October 14, 2016.
[8] Docket no. 95, filed October 28, 2016.
[9] Docket no. 100, filed November 18, 2016.
[10] Docket no. 101, filed November 18, 2016.
[11] R&R at 12, docket no. 119.

not speculative as the Magistrate Judge determined; and (3) if the prior litigation was unwinnable, then Pia Anderson had a duty to advise Glenn not to pursue the litigation.[12] Pia Anderson responded to the Objection to the R&R.[13] No further briefing on the R&R is provided under to 28 U. S.C. § 636(b). Glenn nevertheless filed a reply to Pia Anderson's response to the Objection to the R&R,[14] which Pia Anderson moved to strike.[15] Glenn responded with a motion for leave to file a sur-reply,[16] which asserted that Glenn's arguments in reply should be accepted.

The district court must make a de novo determination of those portions of a magistrate judge's report and recommendation to which objections are made[17]. The district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."[18] De novo review has been completed of those portions of the report, proposed findings, and recommendations to which objection was made, including the record that was before the Magistrate Judge and the reasoning set forth in the R&R.[19] On this basis, Glenn's objections are overruled, and the R&R is ACCEPTED.

Because the arguments in Glenn's reply in support of his Objection to the R&R have been considered and rejected, Pia Anderson's motion to strike the reply[20] is DENIED. Because no further briefing on the R&R is

---

[12] Objection to R&R, docket no. 120, filed March 14, 2017
[13] Response to Objection to R&R, docket no 121, filed March 28, 2017
[14] Reply re Objection to R&R, docket no. 123, filed April 10, 2017.
[15] Motion to Strike Reply Brief or, in the Alternative, Motion for Leave to File Sur-reply, docket no. 125, filed April 20, 2017.
[16] Motion for Leave to File Sur-Reply, docket no. 131, filed May 25, 2017 (also filed as a sur-reply brief, docket no. 130, filed May 25, 2017).
[17] 28 U.S.C. § 636(b)(1)(C).
[18] *Id*
[19] 28 U.S.C. § 636(b).
[20] Docket no. 125

required or permitted, Glenn's motion for leave to file a sur- reply in support of his Objection to the R&R[21] is DENIED.

BACKGROUND[22]

In 2007 Glenn owned a home in Murray, Utah, which he sought to sell because he was relocating to the State of Washington.[23] Glenn engaged real estate agent Donna Kane and her brokerage, NRT LLC d/b/a Coldwell Banker Residential Brokerage (collectively, the "Agent"), to list the home. Glenn received an offer on December 18, 2007 from potential buyers Robin and Judith Reese (collectively, the "Buyers") to purchase the home.[24] Robin Reese was at that time a judge in Third District Court, Salt Lake County, State of Utah.[25] The Buyers' offer came in the form of a Real Estate Purchase Contract (the "Purchase Contract") with a purchase price of $540,000.[26] The Purchase Contract was derived from the form Real Estate Purchase Contract then used by Utah Realtors as the industry standard (the "Standard REPC").[27] The Purchase Contract provides in Section 8(e): "Buyer's obligation to purchase under this Contract . . . IS conditioned upon Buyer's approval of the following tests and evaluations of the Property: Any other deemed necessary by buyers."[28]

After obtaining an independent appraisal showing that the property was valued at less than the offered purchase price, the Buyers relied on Section 8(e).[29] The Buyers counter-offered at the lower price of $460,000 and, when that was not

---

[21] Docket no. 131

[22] Material facts are drawn from the undisputed facts in the Summary Judgment Motion and Cross Motion, as well as the documents attached thereto

[23] Summary Judgment Motion ¶ 1; Cross Motion p. 1.

[24] Purchase Contract, Moss Declaration in Support of Summary Judgment Motion, Ex. 2, docket no. 91-2, filed October 14, 2016.

[25] Summary Judgment Motion p. 2; Cross Motion pp. 2–3.

[26] *Id.*

[27] *Id.*

[28] *Id.* § 8(e).

[29] Summary Judgment Motion ¶¶ 5–7; Cross Motion p. 2.

accepted, refused to purchase the home.[30] Glenn denied that Section 8(e) permitted the counter-offer or termination of the Purchase Contract. With market conditions worsening in the face of a well-documented recession impacting the real estate market in 2007 and the following years, Glenn could not sell the home on terms acceptable to him for years.[31]

Glenn sought retribution for the failed sale. Glenn first sued the Buyers (the "Buyer Action") in Utah State court. Glenn asserted claims for breach of contract, breach of the covenant of good faith and fair dealing, and specific performance (fraud was not alleged). After losing in the trial court, Glenn appealed. On appeal, the Supreme Court of Utah held in favor of the Buyers, finding that the Purchase Contract was unambiguous and enforceable as a matter of law, and that the Buyers were able to cancel the Purchase Contract under Section 8(e) based on an unfavorable appraisal.[32]

Glenn next sued the Agent (the "Agent Action") in federal court. Pia Anderson represented Glenn in the action. Glenn argued that the Agent breached contractual and fiduciary duties by failing to advise Glenn of the effect of Section 8(e).[33] On summary judgment Judge Waddoups dismissed Glenn's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty.[34]

Judge Waddoups concluded that the complaint did not state a cause of action and there was no injury alleged that would not be pure speculation.[35] Specifically, "[i]t would be pure speculation to argue as to what [the Buyers'] reaction or their response would have been or what the potential buyer's response would have been if [the Agent] had, in fact, done everything that [Glenn] alleges she should have

---

[30] *Id.*
[31] The home sold in April 2013. Objection to R&R at 6.
[32] *Glenn v. Reese*, 225 P.3d 185, 190 (Utah 2009).
[33] Complaint in Agent Action, Moss Declaration in Support of Summary Judgment Motion, Ex. 1 ("Agent Action Complaint"), docket no. 91-1, filed October 14, 2016.
[34] Hearing Transcript from Proceedings Before the Honorable Clark Waddoups, Case No. 2:10-cv-00726-CW, Moss Declaration in Support of Summary Judgment Motion, Ex. 5 ("Waddoups Transcript"), docket no. 91-5, filed October 14, 2016.
[35] *Id.* at 26:18–22.

done."[36] Judge Waddoups further held that the Agent "was not engaged as legal counsel and was under no duty to give [Glenn] legal advice as to the responsibilities and to the meaning of the contract."[37]

Glenn then sued Pia Anderson in this case (the "Malpractice Action"). Pia Anderson moved for summary judgment on Glenn's claims of professional negligence, breach of fiduciary duty, breach of contract, and breach of the Covenant of good faith and fair dealing.[38] The Summary Judgment Motion spawned a number of related briefs and motions. The Magistrate Judge reviewed the briefing on the motions and recommended granting the Summary Judgment Motion, treating the Cross Motion as an opposition to the Summary Judgment Motion, and denying Pia Anderson's motion for leave to file further briefing on the Cross Motion.[39]

DISCUSSION

Glenn's Motion for Summary Judgment

Glenn has objected to the Magistrate's analysis of the Buyer Action, the Agent Action, and the Malpractice Action (this case). Glenn struggled to sell his Murray, Utah home during the years 2007 to 2013, which is an unfortunate but common experience for that time period. Glenn has failed to show that the blame—or the liability—lies with the Buyer who canceled the sale, the Agent who handled the listing, or Pia Anderson as his litigation counsel in the Agent Action. The Utah Supreme Court's observation about accidents holds equally true for economic losses like Glenn's:

> Not every [loss] that occurs gives rise to a cause of action upon which the party injured may recover damages from someone. Thousands of [losses]

[36] *Id.* at 26:25–27:4.
[37] *Id.* at 27:16–19.
[38] Summary Judgment Motion
[39] R&R, docket no. 119

> occur every day for which no one is liable in damages, and often no one is to blame, not even the ones who are injured.[40]

Pia Anderson is no more responsible for Glenn's loss than the Buyers or the Agent. The Objection to the R&R is overruled on each basis Glenn has asserted.

The Buyer Action (Utah State Court)

Glenn objects to the Magistrate Judge's evaluation of the Buyer Action. Glenn argues that the Magistrate Judge erred by "[d]isregarding the facts and fraudulent misrepresentation of the Buyer Judge Robin Reese." Glenn's allegation of fraud against the Buyer at this late date is neither relevant to the actual claims nor supported by the facts.

The R&R recommends summary judgment against Glenn on his claims against Pia Anderson for their representation of Glenn in the Agent Action. Glenn used different attorneys in the Buyer Action. [41] Whether the Buyers made a fraudulent misrepresentation did not bear directly on Glenn's claims against the Agent in the Agent Action. The Agent Action concerned whether the Agent breached a duty to warn Glenn about Section 8(e) of the Purchase Contract and its potential effects.[42] The Agent would not have been liable for the Buyers' fraudulent misrepresentation, if any. Glenn lost the Buyer Action because Section 8(e) of the Purchase Contract unambiguously permitted the Buyers to cancel the Purchase Contract based on independently acquired appraisal information, which they did.[43] Fraud by the Buyers is a new allegation that was not even asserted in the Buyer Action.[44] The Magistrate Judge did not "disregard" allegations of fraudulent misrepresentation against the Buyers. This basis for objecting to the R&R is rejected.

---

[40] Martin v. Safeway Stores Inc., 565 P.2d 1139, 1142 (Utah 1977).
[41] Objection to R&R pp. 2–3.
[42] Agent Action Complaint.
[43] Glenn v. Reese, 225 P.3d 185, 190 (Utah 2009).
[44] *Id.*

Nor has Glenn offered more than unsupported assumptions for his accusation of fraud against the Buyers.[45] Glenn claims that the Buyer acted on nonpublic information obtained in his judicial capacity by relying on Section 8(e) of the Purchase Contract.[46] There is no evidence that the Buyers, including Judge Reese, had nonpublic information about the Standard REPC generally or the parties' own Purchase Contract specifically. To the contrary, the Purchase Contract and its terms were express, apparent, and available to all parties. If the Buyers benefitted from Judge Reese as a legally trained person reviewing and understanding the Purchase Contract, that does not create culpability or liability.

Glenn had an equal opportunity to review the Purchase Contract and seek legal advice.

The Agent Action (U.S. District Court)

Glenn objects to the Magistrate Judge's finding in the R&R that the Agent Action failed because the case was speculative. The objection states: "Plaintiff's argument is not speculative but based on fraud."

Glenn indeed lost the Agent Action both because he could not show that the Agent breached a duty to advise Glenn on Section 8(e)h[47] and because Glenn's theory of causation was speculative.[48] Glenn could only speculate as to how he and the Buyers—or any other buyer—would have negotiated, agreed upon, and performed on a sale of the home differently if Glenn had been fully advised of Section 8(e) and its effect.[49] Judge Waddoups found Glenn's claims facially deficient.[50] The Magistrate Judge correctly determined, based on Judge Waddoups'

---

[45] Objection to the R&R pp. 1, 5.
[46] *Id.*

[47] Waddoups Transcript at 27:16–19
[48] *Id.* at 26:20–22
[49] *Id.* at 26:24–27:4.
[50] *Id.* at 26:18–22

ruling on the Agent Action, that Pia Anderson could not have salvaged Glenn's claims through further discovery or expert testimony.[51]

Glenn has argued in the Cross Motion,[52] and in his multiple briefs in response to the R&R, that the Standard REPC was unambiguous and unenforceable. Glenn cites to an article published in the Utah Division of Real Estate News, July 2008.[53] In the article, the Utah Division of Real Estate (the "Division") offers an explanation for upcoming revisions to the Standard REPC.[54] After acknowledging that the Standard REPC was used to effectuate "numerous successful real estate transactions," the Division explains: "Some licensees have had to struggle with certain provisions that are contained in the REPC that were either ambiguous, required clarification or otherwise had an undesired or unintended consequence as a result of language that was either currently included or should have been included in the existing state approved REPC."

Glenn draws from this article the conclusion that: (1) the Buyers were privy to the deficiencies in the Standard REPC and fraudulently exploited that information; (2) the Agent should have advised Glenn of the deficiencies in the REPC; and (3) Pia Anderson should have successfully pursued this basis for a claim against the Agent. Glenn's assertion that Section 8(e) created a loophole for the Buyers is unfounded.[55] The Division in no way states that the Standard REPC was unenforceable—a result that would be catastrophic for the presumably thousands of homes sold using the form. The Division's statements advocate revisions to the Standard REPC based on complications that some agents, buyers, and sellers experienced with the form under certain circumstances. The article from the Division does not show that the Standard REPC was unenforceable or that the Agent breached a duty to Glenn by using the form.

---

[51] R&R at 11
[52] Cross Motion p. 3.
[53] Objection to R&R, Ex. A, docket no. 120-1
[54] *Id.*
[55] Objection to R&R p. 3.

But even if the Division had taken the position that the Standard REPC was deficient, such an opinion would have no bearing on the enforcement of Glenn's Purchase Contract. The Standard REPC was a contract form employed by real estate agents in Utah. The form became a contract, and no longer a form, when Glenn and the Buyers personalized, completed, and executed the Purchase Contract. The Purchase Contract's terms are self-contained. The Utah courts concluded that Glenn's Purchase Contract was unambiguous and enforceable.[56]

The Malpractice Action (This Case)

Glenn argues in his Objection to the R&R that "the speculative nature [of the Agent Action] makes the case unwinnable[;] therefore [Pia Anderson] should have appropriately advised [Glenn]."[57]

In other words, if Pia Anderson knew "the case was not viable and unwinnable then he should have advised his client not to pursue the case, rather than incur $20,000 of legal fees."[58] This is a new argument in response to the R&R rather than an objection to the Magistrate Judge's analysis and recommendation. The argument is not a proper objection and is rejected.[59]

Glenn's position is substantively flawed as well. Judge Waddoups and the Magistrate Judge correctly found that the Agent Action fails as a matter of law based on Glenn's inability to prove damages.[60] There were several unanswered questions about Glenn's case—i.e., what would have happened had the Agent handled things differently—but those questions were not answered because they were unanswerable and speculative, not because of how Pia Anderson litigated the case.[61]

---

[56] Glenn v. Reese, 225 P.3d 185, 190 (Utah 2009).
[57] Objection to R&R p. 1.
[58] *Id.* p. 9.
[59] 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2) (providing that "a party may serve and file specific written objections to the proposed findings and recommendations" but not new arguments in support of the decided motion).
[60] R&R at 11.
[61] *Id.*

The Magistrate Judge's recommendation to grant Pia Anderson's Summary Judgment Motion and dismiss Glenn's claims[62] is accepted.

Glenn's Cross Motion for Summary Judgment

Glenn did not specifically object to the Magistrate's R&R with respect to the Cross Motion, Pia Anderson's motion to strike the Cross Motion, or Pia Anderson's motion to extend the deadline for responding to the Cross Motion.[63] The R&R is accepted with respect to these motions. Pia Anderson's Motion to Strike the Cross Motion[64] will be granted in part and denied in part. The Cross Motion is stricken but treated as an opposition to the Summary Judgment Motion. Pia Anderson's motion to extend the deadline for responding to the Cross Motion[65] will be denied because no response to the stricken Cross Motion is required.[66]

Motions in Response to Briefing on R&R

In responding to the R&R, the parties filed two additional motions.

Glenn submitted a reply memorandum in further support of his Objection to the R&R.[67] Pia Anderson moved to strike this reply brief because no reply is permitted on an objection to a report and recommendation and because the reply raises new issues.[68] The motion is granted. The argument and positions raised in the reply brief have been considered and rejected for the reasons stated herein.

---

[62] R&R at 12.
[63] R&R at 11–12.
[64] Docket no. 100
[65] Docket no. 101
[66] Docket no. 101, filed November 18, 2016.
[67] Docket no. 123, filed April 10, 2017.
[68] Motion to Strike Reply Brief, docket no. 125, filed April 20, 2017

Nevertheless, the reply brief is not properly before the court and should be stricken.[69]

Glenn also filed a sur-reply further arguing his position on the R&R[70] together with a motion for leave to file the sur-reply.[71] The motion is denied. The argument and positions raised in the sur-reply have been considered and rejected for the reasons stated herein. Nevertheless, Glenn has had ample opportunity to present his arguments, and the sur-reply will be stricken.

ORDER

IT IS HEREBY ORDERED that the Report and Recommendation[72] is ACCEPTED. Pia Anderson's Motion for Summary Judgment[73] is GRANTED. Pia Anderson's Motion to Strike Glenn's Cross Motion for Summary Judgment[74] is GRANTED IN PART and DENIED IN PART. Glenn's Cross Motion for Summary Judgment[75] is STRICKEN and treated as an opposition to Pia Anderson's Motion for Summary Judgment. Pia Anderson's Motion to Extend Deadline to File Memorandum in Opposition to Plaintiff's Cross Motion for Summary Judgment[76] is DENIED because no response to the stricken cross motion is required. This case is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Pia Anderson's motion to strike Glenn's reply in support of Glenn's objections to the R&R is GRANTED. The reply has been considered and rejected, but it is not properly before the court.

---

[69] 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2) (limiting briefing on a report and recommendation to one objection and one response)
[70] Docket no. 130, filed May 25, 2017.
[71] Docket no. 131, filed May 25, 2017.
[72] Docket no. 119.
[73] Docket no. 90.
[74] Docket no. 100.
[75] Docket no. 95
[76] Docket no. 101

IT IS FURTHER ORDERED that Glenn's motion for leave to file a sur-reply in support of his objections to the R&R is DENIED. No further briefing on the R&R is required or permitted. .

The Clerk is directed to close the case. Any remaining motions not addressed by this Order, including Pia Anderson's Motion in Limine,[77] are rendered moot by the dismissal of Glenn's claims.

Signed October 19, 2017.

BY THE COURT
/s/

David Nuffer
United States District Judge

[77] Docket no. 113, filed January 27, 2017

TABLE OF CONTENTS

U.S. District Court Utah, Central Division Memorandum Decision & Order Denying [135] Plaintiff's Motion To Alter Judgment Or Grant Relief From Judgment November 29, 2017 1

U.S. District Court Utah, Central Division Report & Recommendation On Cross-Motions For Summary Judgment March 1, 2017 3

Plaintiff's Oppositon To Magistrate Judge's Report And Recommendation March 14, 2017 13

U.S. District Court Utah, Central Division ORDER December 21, 2011 29

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ENDRE GLENN, Plaintiff, v. BRENNAN H. MOSS and PIA ANDERSON DORIUS REYNARD & MOSS, LLC, Defendants.	**MEMORANDUM DECISION AND ORDER DENYING [135] PLAINTIFF'S MOTION TO ALTER JUDGMENT OR GRANT RELIEF FROM JUDGMENT** Case No. 2:15-cv-00165-DN District Judge David Nuffer

This case was dismissed on summary judgment.[1] Pro se plaintiff Endre Glenn ("Glenn") has filed a motion seeking to reopen the case under Rules 59(a) and 60(b)(3) of the Federal Rules of Civil Procedure (the "Motion").[2] Glenn argues that he was denied the right to a jury trial and that new evidence compels relief from judgment. The Motion can be denied without opposition. Glenn's claims were dismissed on summary judgment because no genuine dispute of material fact required a trial.[3] It is well established that "[t]he Seventh Amendment is not violated by proper entry of summary judgment because such a ruling means that no triable issue exists to be submitted to a jury."[4]

Even if the case had gone to trial, the purported new evidence does not

[1] Memorandum Decision and Order Accepting Report and Recommendations ("Summary Judgment Order"), docket no. 133, filed October 19, 2017.
[2] Motion to Alter Judgment or Grant Relief from Judgment ("Motion"), docket no. 135, filed November 21, 2017.
[3] Fed. R. Civ. P. 56(a).
[4] Shannon v. Graves, 257 F.3d 1164, 1167 (10th Cir. 2001) (citing Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-20 (1902)).

compel a new trial or hearing. The evidence at issue consists of declarations from a state court action in which Glenn was the plaintiff.[5] Glenn has not satisfied the standard for seeking a new trial under Rule 59.[6] The declarations were previously discoverable with diligence.[7] And the declarations are not material or likely to produce a different result.[8] Glenn argues that the declarations show fraud on the part of the buyer in a failed real estate transaction, which is not a claim properly raised in this legal malpractice action.[9]

The Motion alternatively seeks to set aside judgment under Rule 60(b).[10] Glenn has not shown grounds for relief from the judgment in this case. He lacks "newly discovered evidence that, with reasonable diligence, could not have been discovered."[11] And although Glenn continues to argue that the buyer in his home sale acted fraudulently, he has not shown fraud, misrepresentation, or misconduct by the defendants to justify relief from judgment[12]

ORDER

Having reviewed and considered the Motion, and for good cause appearing, IT IS HEREBY ORDERED that the Motion[13]is DENIED.

Dated November 29, 2017.

BY THE COURT:

/s/

United States District Judge
David Nuffer

---

[5] Motion, Exs. A, B, C, G, and H.
[6] Fed. R. Civ. P. 59(a); Joseph v. Terminix Int'l Co., 17 F.3d 1282, 1285 (10th Cir. 1994) (identifying the elements required for a new trial based on new evidence).
[7] *Id.*
[8] *Id.*
[9] Summary Judgment Order at 7 ("Glenn's allegation of fraud against the Buyer at this late date is neither relevant to the actual claims nor supported by the facts.").
[10] Fed. R. Civ. P. 60(b)
[11] *Id.*
[12] *Id.*
[13] Docket no. 135

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION

ENDRE GLENN,

Plaintiff,
v.

BRENNAN H. MOSS and PIA ANDERSON DORIUS REYNARD & MOSS, LLC,

Defendant.

REPORT AND RECOMMENDATION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Case No. 2:15cv165-DN-BCW

District Judge David Nuffer Magistrate Judge Brooke Wells

Pro Se Plaintiff Endre Glenn ("Plaintiff") filed the Complaint in this case on March 16, 2015, against attorney Brennan H. Moss and the law firm of Pia Anderson Dorius Reynard & Moss ("Defendants").[1] District Judge Dee Benson [2]referred this case to Magistrate Judge Brooke C. Wells pursuant to 28 U.S.C. § 636(b)(1)(B).[3] Before the Court are Defendants' Motion for Summary Judgment[4] and Declaration of Brennan H. Moss in Support of Defendants' Motion for Summary Judgment,[5] Defendants' Motion to Strike Plaintiff's Untimely Cross Motion for Summary Judgment,[6] Defendants' Motion to Extend Deadline to file Memorandum in Opposition to Plaintiff's Cross Motion for Summary Judgment,[7] and Plaintiff's

[1] Docket no. 1 and Docket no. 5.
[2] District Judge Dee Benson recused from this case on November 16, 2016, and the case was reassigned to District Judge David Nuffer. Docket no. 97.
[3] Docket no. 12
[4] Docket no. 90.
[5] Docket no. 91
[6] Docket no. 100
[7] Docket no. 101

Cross Motion for Summary Judgment.[8]

A. DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S UNTIMELY CROSS MOTION FOR SUMMARY JUDGMENT

Defendants' request the Court to strike Plaintiff's Cross Motion for Summary Judgment ("Cross MSJ") based on the fact that it was filed approximately two weeks after the dispositive motion deadline.[9] In response, Plaintiff argues that his Cross MSJ is filed in opposition to Defendants' Motion for Summary Judgment, as well as seeking summary judgment in his favor.[10]

In their motion to strike, Defendants note that Plaintiff has continually failed to meet the deadlines of this Court. Not only has Plaintiff failed to serve his initial disclosures on Defendants,[11] but Plaintiff also failed to timely respond to discovery requests, failed to serve his discovery requests on Defendants by the discovery deadline, failed to file expert reports by the deadline, and now has failed to meet the dispositive motion deadline.[12] In the Court's May 17, 2016 Order, the Court cautioned both parties to follow the rules of procedure that govern all litigants and urged the parties to timely comply with the Court's Order and the Federal Rules of Civil Procedure during this litigation.[13] Plaintiff has failed to adhere to this Court's Order and did not seek an extension of time prior to the expiration of deadline for filing dispositive motions.

Since the deadline has passed and Plaintiff failed to seek leave of the Court to file a late motion for summary judgment, the Court's hands are tied with respect to extending the time for Plaintiff to file a dispositive motion.[14] Accordingly, the Court will not consider Plaintiff's Cross MSJ as a motion for summary judgment.

---

[8] Docket no. 95

[9] *See* Docket no 100.

[10] Docket no. 102

[11] The Court notes that Defendants, who are represented by counsel, also missed the first deadline to exchange initial disclosures. See Docket no. 58, p. 4-5.

[12] *See* Docket no. 100, p. 6.

[13] *See* Docket no. 66.

[14] See Federal Rules of Civil Procedure 6(b) (the Court may, for good cause, extend a deadline with or without motion prior to the expiration of a deadline, but may only extend a deadline once it expires upon a motion and a finding of excusable neglect).

That said, it is clear from Plaintiff's filing that he was unfamiliar or confused about how to properly respond to a motion for summary judgment. In opposing Defendants' motion to strike, Plaintiff states that his Cross MSJ was filed in part as an opposition to Defendants' motion for summary judgment.[15] "[I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires."[16]

Plaintiff's Cross MSJ was timely filed as an opposition to Defendants' motion for summary judgment. Although its form and substance vary from the letter of the procedural rule, this Court will consider Plaintiff's Cross MSJ the "functional equivalent" to an opposition to Defendants' motion for summary judgment.

Therefore, Defendants' Motion to Strike Plaintiff's Cross MSJ is hereby GRANTED-in- PART and DENIED-in-PART.

B. DEFENDANTS' MOTION TO EXTEND DEADLINE TO FILE MEMORANDUM IN OPPOSITION TO PLAINTIFF'S CROSS SUMMARY JUDGMENT

Based on this Court's ruling above on Defendants' Motion to Strike and its review of the parties' filings, the Court does not need additional briefing from the parties in order to decide Defendants' Motion for Summary Judgment. Accordingly, Defendants' Motion to Extend Deadline to File Memorandum in Opposition to Plaintiff's Cross Summary Judgment[17]is DENIED.

C. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendants' Motion for Summary Judgment ("MSJ").[18] Per this Court's decision above, Plaintiff's Cross Motion for Summary Judgment will be construed as Plaintiff's opposition to Defendants'

---

[15] Docket no. 102.
[16] Torres v. Oakland Scavenger Co., 487 U.S. 312, 316-317 (1988).
[17] Docket no. 101
[18] Docket no. 90.

MSJ.[19] The Court finds that the pleadings filed by the parties are sufficient and no hearing on the motion is necessary. For the reasons set for below, the Court recommends that Defendants' Motion for Summary Judgment be GRANTED.

I. BACKGROUND[20]

Plaintiff was attempting to sell his property in 2007. In September 2007, Plaintiff entered into a Listing Agreement with real estate agent, Donna Kane, and her brokerage, NRT LLC d/b/a Coldwell Banker Residential Brokerage (collectively "Coldwell Banker"). On December 18, 2007, Plaintiff received an offer in the form of a real estate purchase contract ("REPC") from the prospective buyers ("Buyers") for a price of $540,000. In Section 8(e) of the REPC, the Buyers obligation to purchase the property was conditioned upon their approval of any tests or evaluations "deemed necessary by buyers" during their due diligence. Thereafter, the Buyers sought to cancel or reduce the purchase price upon finding out the property appraised for $80,000 less than the offer. Plaintiff did not accept Buyer's offer to reduce the price; thus, the Buyers cancelled the contract.

First, Plaintiff sued the Buyers for breach of the REPC, breach of good faith and fair dealing, and specific performance ("Buyer Case"). After Plaintiff lost at the trial level, Plaintiff appealed. On appeal, the Supreme Court of Utah found in favor of Buyers finding that the REPC was unambiguous, and that the Buyers were able to cancel the contract based on an unfavorable appraisal under Section 8(e) of the REPC.[21]

Next, Plaintiff sued Coldwell Banker, for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty ("Agent Case"). Defendants represented Plaintiff in the Agent Case, which is the subject of the Malpractice Case now before the Court. The Listing Agreement required

---

[19] Docket no. 95.

[20] All facts included in this section were taken from the briefs and exhibits filed in conjunction with Defendants' Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment (Opposition). See Docket no. 90, Docket no. 91, and Docket no. 95. The Court also takes judicial notice of other Court decisions entered in Plaintiff's prior cases.

[21] Glenn v. Reese, 225 P.3d 185, 190 (Utah 2009).

Coldwell Banker to adhere to fiduciary duties of loyalty, full disclosure, confidentiality, and reasonable care, and review all offers with Plaintiff. Plaintiff claims that Coldwell Banker breached the Listing Agreement and their fiduciary duty to Plaintiff by failing to properly review the REPC with Plaintiff and failing to notify Plaintiff that Buyers could cancel the contract under Section 8(e)—which he claims is a non-standard provision requiring mention and review with Plaintiff. Plaintiff claims that if Coldwell Banker would have notified him about the effect of Section 8(e) of the REPC, he *could* have addressed the potential problem with terms in a counter offer. Further, he claims that once Coldwell Banker knew the Buyers were countering and/or canceling based on an appraisal, Coldwell Banker should have obtained the Buyer's appraisal to allow Plaintiff to verify the counteroffer, which he may have accepted after verification. According to Plaintiff, based on Coldwell Banker's failure to address Section 8(e) with him, he was damaged because he incurred attorney's fees in attempting to enforce the REPC against Buyers, and he was unable to sell the property after the Buyer's cancelled the sale.

The Agent Case came before the Honorable Judge Waddoups on Coldwell Banker's motion for summary judgment on December 21, 2011.[22] At that hearing, Judge Waddoups questioned how Plaintiff was damaged if Coldwell Banker was in breach. Judge Waddoups found that there was no admissible evidence of damages, and that damages were far too speculative to sustain a cause of action. Further, Judge Waddoups found that Coldwell Banker did not have a duty to specifically point out Section 8(e) of the REPC to Plaintiff or provide Plaintiff with any legal advice as Plaintiff was charged with having read the REPC and had the opportunity to counter at that time.[23] Plaintiff appealed Judge Waddoups decision to the Tenth Circuit.[24] Before the Tenth Circuit, Plaintiff presented new arguments raised for the first time on appeal. The Tenth Circuit held that it would not consider the new arguments, and affirmed Judge Waddoups ruling.

[22] *Glenn v. Kane*, et al., 2:10cv726-CW, Docket no. 42.
[23] It is noted that Plaintiff did counter the Buyer's initial offer by increasing the earnest money, no other changes were proposed. See Docket no. 91-2, p. 7.
[24] *Glenn v. Kane*, 494 Fed.Appx. 916 (10th Cir. 2012)

Now, Plaintiff is suing Defendants, his counsel in the Agent Case, for professional negligence (a.k.a. malpractice), breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing ("Malpractice Case"). Plaintiff's claims are based on the fact that Defendants did not conduct fact or expert discovery in the Agent Case, and claims that the outcome in the Agent Case would be different if Defendants had done so. Defendants claim that the outcome of the underlying case would not have been different based on Judge Waddoups ruling that Plaintiff had failed to state a claim for which relief could be granted, and his finding that Plaintiff was charged with knowledge of the contractual terms and there was no special or additional duties charged to his real estate agent.

II. LEGAL STANDARDS

Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.25[25] "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."[26] In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented.[27] The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party.[28]

III. DISCUSSION

The main cause of action in this case, and the one that the remaining claims stem from, is

---

[25] Fed. R. Civ. P. 56(c).
[26] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) (emphasis in original).
[27] *Anderson,* 477 U.S. at 248 (1986); see also Scott v. Harris, 550 U.S. 372, 380 (2007)("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.")(internal citations and quotations omitted).
[28] *Matushita Elec.* Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288, 1292 (10th Cir. 1991).

the professional negligence claim (a.k.a. malpractice). "In a legal malpractice action, a plaintiff must plead and prove (i) an attorney-client relationship; (ii) a duty of the attorney to the client arising from the relationship; (iii) a breach of that duty; (iv) a causal connection between the breach of duty and the resulting injury to the client; and (v) actual damages."[29] To prove proximate cause, the plaintiff 'must show that absent the attorney's negligence, the underlying suit would have been successful.'"[30] In other words, for the Plaintiff to succeed in his Malpractice Case he must prove a case-within-a-case by showing that, but for the Defendants' negligence, Plaintiff would have won the underlying Agent Case. "Thus, summary judgment is appropriate (i) when the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of a legal standard to the facts, and (ii) when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law."[31]

a. The Underlying Agent Case

As set forth above, Plaintiff lost the Agent Case on summary judgment before Judge Waddoups. Now, this Court must reevaluate Plaintiff's Agent Case based on the facts before the Court and determine whether the outcome would have been different due to the alleged malpractice of Defendants. As explained below, this Court finds that the outcome would not have been different as Plaintiff's claims in the Agent Case fail as a matter of law and not because his counsel failed to properly prosecute his claims.

The underlying Agent Case is based on Plaintiff's claims against Coldwell Banker for breach of contract, breach of implied covenant of good faith and fair dealing, and breach of fiduciary duty. All three claims stem from Plaintiff's claim that Coldwell Banker breached its contractual and fiduciary duties to Plaintiff by "failing to properly review the REPC with Plaintiffs and failing to notify Plaintiffs that the Buyers had inserted non-standard language in the REPC allowing them to

---

[29] *Kranendonk v. Gregory & Swapp, PLLC*, 320 P.3d 689, 693 (Utah Ct. App. 2014) (quoting Harline v. Barker, 912 P.2d 433, 439 (Utah 1996)).
[30] *Id.*
[31] *Harline*, 912 P.2d at 439.

cancel the REPC based on their disapproval of any tests or evaluations."[32] In order to succeed on Plaintiff's claims, Plaintiff must show that Coldwell Banker had a contractual and/or fiduciary duty to notify Plaintiff of Section 8(e) because it was a non- standard provision, that Coldwell Banker breached this duty, and Plaintiff was damaged by the breach.

For each cause of action in the Agent Case, Plaintiff must prove how he was damaged. In Plaintiff's Agent Case complaint, he claims that he was damaged because he was unable to find another buyer, and he incurred approximately $75,000 in attorneys' fees in the Buyer Case.[33] He claims that these damages were the direct and proximate result of Coldwell Banker's breach.[34]

"The general rule of damages is that damages for the breach of a contract cannot be recovered unless they are clearly ascertainable, both in their nature and origin, and unless it is established they are the natural and proximate consequences of the breach and are not contingent or speculative."[35] "It is also well settled that the amount of damages resulting from such a breach must be ascertainable with some degree of certainty and may not be based on mere speculation and conjecture alone."[36]

Plaintiff claims that if Coldwell Banker would have notified him that Buyers could cancel under Section 8(e), he would have been able to counter that provision. And if that would have happened who knows if Buyers would have accepted, rejected or countered. Further, Plaintiff claims that if Coldwell Banker would have obtained a copy of the appraisal from Buyers when they summited the counter offer to reduce the price or cancel, Plaintiff could have verified the appraisal and may have accepted the reduced price offer. All such scenarios rely on multiple levels of speculation and are inadmissible. Without the benefit of hindsight, there is no telling if the Plaintiff would have acted differently than he did if Coldwell Banker

---

[32] *Glenn v. Kane,* 2:10cv726, Docket no. 1 (Complaint), ¶45.
[33] *See id.* at ¶¶ 37 and 40.
[34] *See id.* at ¶ 46.
[35] *General Finance Corp. v. Dillon,* 172 F.2d 924, 930 (10th Cir. 1949) (emphasis added).
[36] *Id*

had specifically told him Buyers could cancel under Section 8(e) or if they had obtained a copy of the appraisal. Any evidence of what Plaintiff claims he would have done now (with the benefit of hindsight) is all based on speculation and conjecture. Without clearly ascertainable damages, Plaintiff's claims in the Agent Case fail as a matter of law.

This is the same conclusion that Judge Waddoups reached in granting summary judgment to Coldwell Banker in the Agent Case. This Court agrees with Judge Waddoups finding that Plaintiff's Agent Case fails as a matter of law based on his inability to prove damages. This inability to prove damages is not Defendants fault, and the Court does not see any way Defendants could have established damages based on the facts of the Agent Case. This Court cannot and will not reach a different result here.

b. The Malpractice Case

Plaintiff claims that, but for his counsel's malpractice in the Agent Case, he would have prevailed. As discussed above, regardless of his counsel's actions in the underlying Agent Case, Plaintiff's claims failed as a matter of law due to the speculative nature of the damages claimed. Thus, as a matter of law in the Malpractice Case, Plaintiff cannot succeed on his malpractice claim because he cannot show that he would have prevailed in the underlying Agent Case. All other claims brought against Defendants by Plaintiff hinge upon Plaintiff's failed malpractice claim. Therefore, no further analysis on Plaintiff's other claims in the Malpractice Case is warranted. Accordingly, summary judgment in favor of Defendants is appropriate.

RECOMMENDATION

For the foregoing reasons, the undersigned hereby RECOMMENDS that

1) Defendants' Motion to Strike Plaintiff's Cross MSJ be GRANTED-in-PART by striking Plaintiff's Cross MSJ as Plaintiff's Motion for Summary Judgment, and

be DENIED-in-PART by allowing Plaintiff's Cross MSJ to stand as an Opposition to Defendants' Motion for Summary Judgment;

2) Defendants' Motion to Extend Deadline to File Memorandum in Opposition to Plaintiff's Cross Summary Judgment[37] be DENIED; and

3) Defendants' Motion for Summary Judgment be GRANTED.

NOTICE

The Court will send copies of this Report and Recommendation to all parties, who are hereby notified of their right to object.[38] The parties must file any objection to this Report and Recommendation within fourteen (14) days of service thereof.[39] Failure to object may constitute waiver of objections upon subsequent review.

DATED this 1 March 2017.

/s/

Brooke C. Wells
United States Magistrate Judge

[37] Docket no. 101.
[38] *See 28 U.S.C.* § 636(b)(1); Fed. R. Civ. P. 72(b).
[39] *Id*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * *

ENDRE GLENN (ProSe) Plaintiffs, vs. Brennan H. Moss (10267) PIA ANDERSON DORIUS REYNARD & MOSS Defendants.	**PLAINTIFF'S OPPOSITON TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION** Case No. 2:15-cv-00165 District Judge Dee Benson Magistrate Brooke C. Wells

* * * * * * *

Pursuant to Federal Rule of Civil Procedure 72(b) and Local Rule 72.1, Plaintiff Endre' Glenn objects to the Magistrate Judge's report and recommendation (R&R) (DKT. 119) filed March 1, 2017.

- Disregarding the facts and fraudulent misrepresentation of the Buyer Judge Robin Reese. Plaintiff's argument is not speculative but based on fraud.

- Disregarding facts and evidence legal Malpractice case which transcends the underlying case because the speculative nature makes the case unwinnable therefore Attorney should have appropriately advised client.

ARGUMENT

A. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

Plaintiff would like to clarify the facts of the case, terms and conditions of the offer. The Plaintiff received an offer on Utah Standard REPC contract (effective August 5, 2003) from Judge Robin Reese for $540,000. The contract terms and conditions included a Loan Application & Fee Deadline of December 21, 2007, and conditioned upon approval of any test or evaluations "deemed" necessary by the buyers (EXHIBIT REPC). Buyer's submitted Addendum No. 3 December 28, 2007 of the contract that stated the purchase price to be $460,000 per appraised value. If the seller does not agree to the new purchase price, contract will be cancelled. Based on the terms and conditions of the REPC, any person would reach the conclusion that the appraisal obtained by the buyers as stated in Addendum No. 3 was an appraisal from a lender. The Seller asked his real estate agent Donna Kane what was the name of the lender who ordered the appraisal, she stated it information was confidential. Buyer's cancelled the contract.

Plaintiff's attorney Walter Keane sued the buyers for Breach of Real Estate Purchase Contract, Breach of Implied Covenant of Good Faith and Fair Dealing, The complaint also included general allegations; the Buyers – not their lender – ordered an appraisal of the Property. Buyers never tendered a "Notice of Appraised Value" as defined in the REPC. His amended complaint also dismissed following defendants Susie Martindale, and Jodi Hansen, REMAX.

Plaintiff retained Attorney Jason K. Nelson to represent him in the Interlocutory appeal to the Utah Supreme Court. The Utah Supreme Court found in favor to the Buyers that REPC was unambiguous, and the Buyers were able to

cancel the contract based on an appraisal under Section 8(e) of the REPC. Chief Justice Nehring noted the following in his opinion:[1]

> We note that this debate about cancellation based on an appraisal has largely been resolved by the newly revised, state approved REPC form. The revision eliminates Section 2.4 and provides an appraisal condition in Section 8 that allows the buyer to cancel the REPC upon notice from a lender or directly from an appraiser that the property has appraised for less than the purchase price.

Contrary to the Utah Supreme Courts opinion the Utah Division of Real Estate said the contract was ambiguous and required clarification in a July 2008 NEWS article about "Real Estate Purchase Contract Undergoes Major Revision stated the following:[2]

> .....Hard working practitioners have acquired practical experience regarding some unfortunate situations that potentially could have been avoided or minimized were the language in the current REPC modified. Some licensees have had to struggle with certain provisions that are contained in the REPC that were either **ambiguous, required clarification** or **otherwise had an undesired or unintended consequence as a result of language that was either currently included or should have been included in the existing state approved REPC**.
>
> Under the leadership the Utah Association of Realtors (UAR), a committee of dedicated industry representatives devoted countless hours and held numerous meetings, resulting in a draft proposal for a revised REPC.

Plaintiff retained attorney Brennan Moss of the law firm Pia, Anderson, and Moss to file suit against Coldwell Banker Residential Brokerage for Breach of Contract, Breach of Implied Covenant of Good Faith, and Fair Dealing, and Breach of Fiduciary Duty. Attorney Brennan Moss was retained because of his ligation experience with large Real Estate Brokerages. Defendant's response to Interrogatory #6 confirmed Brennan Moss experience litigating large real estate entities. Their response to Interrogatory no. 7 shows they were aware of the complications and difficulties of the litigation, including the speculation but

---

[1] *Glenn v. Reese, 225 P.3d. 185, 190 (Utah 2009)*

[2] EXHIBIT A Utah Division of Real Estate News July 2008

proceeded with the litigation in spite of these hurdles knowing the case was not viable and unwinnable[3].

On or about September 2007, the Glenn's were looking to sell their home. They interviewed several real estate agents to help them list their home, find a buyer, review real estate purchase contracts, prepare addenda to real estate purchase contracts, and work through the purchase agreements. After interviewing different real estate agents, the Glenn's decided hire Donna Kane because of her proclaimed "years and years' of experience selling residential homes. They entered into Listing Agreement with Donna Kane, Coldwell Banker Real Estate Brokerage on or about September 13, 2007. The Glenn's relied upon Donna Kane to provide advice with respect to finding a buyer, reviewing offers, and selling the property.

The Utah Supreme Court found that ... [4]

> A real estate agent hired by a vendor is expected to be honest, ethical, and competent and is answerable at law for his or her statuary duty to the public. *Hermansen v. Tasulis 48 P.3d 235 241 (Utah 2002).* Further, although real estate agent is not required to provide legal advise, the agent has a duty to disclose to his principal vital difference in the terms and conditions of a standard real estate purchase contract (REPC), and a REPC submitted by a potential buyer.

Pursuant to the listing agreement, and pursuant to Donna Kane's statutory duty, she had an obligation to provide competent advice regarding offers to purchase the home.

Based on the terms and conditions of the REPC, a common person would reach the conclusion the buyer Judge Robin Reese obtained an appraisal from a lender. He misrepresented the fact that he did not apply for a loan. He never intended to apply for a loan because in his April 2008 offer, he applied for the loan, and provided declaration from the lender "Infinity Mortgage Company" that verified approval[5].

---

[3] Docket No. 95 EXHIBIT XIII
[4] EXHIBIT B. Brennan Moss June 30, 2010 Demand Letter
[5] EXHIBIT C *Reese April 2007 Offer*

The Seller relied on the fraudulent misrepresent-tations, and Buyer subsequently cancelled the contract.

Chief Justice Nehring in his opinion recognized that the current issues would never have occurred because the new REPC (effective August 27, 2008) required the buyer present to the seller "Notice of Appraised Value" from a lender or appraiser. Therefore under the new REPC Judge Reese would have been required to provide proper notice to cancel the agreement. Utah Association of Realtor stated contrary to Utah Supreme Court opinion the contract was ambiguous and required clarification.

For years the Utah Standard REPC has only applied to 50% buyers purchasing real estate property through a lender. Considering the negative impact on the public, the Plaintiff expected they would have acted sooner. Apparently the old standard REPC never contemplated how to handle someone purchasing property with cash or self-financed buyer, and properly terminate a contract. This information was not readily available to the public. Judge Robin Reese exploited this nonpublic information, a deficiency, loophole, error or omission in the Utah Standard Real Estate Purchase contract, and violated the Utah Code of Judicial Conduct by acting on non-public information acquired in his judicial capacity.

According to Utah Courts, Code of Judicial Conduct, Chapter 12, A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

Judge Samuel McVey noted in the September 18, 2008 hearing regarding damages[6].

THE COURT: Have you clients sold their home, or are they still in the home?
MR. KEANE: They have not sold the home.

THE COURT: That would be hard to do now.. Yeah. this is right about when the real estate market tanked, last July 2007.

Since January 2008 through April 2013, the Plaintiff paid monthly loan, maintenance, and utilities to carry the property which doesn't include the lost value

[6] EXHIBIT G *Utah Fourth Judicial District Court, September 18, 2008 Transcript*

of the property because of the buyer's fraudulent misrepresentation, and decision not to follow the terms and conditions of the contract. Had the buyer truly applied for the loan on December 21, 2007, the appraisal would have come from a non-interested third party lender, an arm length transaction, not the buyer who directly benefited from the significantly low appraisal. The Judge exploited an unfair bargaining position.

On December 21, 2011, Honorable Judge Waddoups heard Coldwell Banker's motion for summary judgment. At the hearing, Judge Waddoups found there was no admissible evidence of damages, and the damages were far too speculative to sustain a cause of action. Further, Judge Waddoups found that Donna Kane, Coldwell Banker Residential Brokerage did not have a duty to specifically point out Section 8(e) of the REPC or provide any legal advice as Plaintiff was charged with having read the REPC, and plenty of opportunity to counter at that time.

When the Plaintiff brought the complaint against his real estate broker Donna Kane, and Coldwell Banker Residential Brokerage, and the Court heard the motion for summary judgment, the property was still on the market. The Plaintiff did not sell the property until April 2013. So, the Plaintiff could not quantify damages because his attorney failed to retain a real estate damage expert to quantify those damages as he apparently misled his client.

Though Attorney Brennan Moss raised the following issue in his demand letter to Donna Kane about Coldwell Banker Residential Brokerage obligation to point out vital differences in the terms and conditions of a standard real estate purchase contract and one submitted by a potential buyer, he never raised the issue during the summary judgment hearing.

The Utah Supreme Court found that ... [7]

[7] EXHIBIT B

A real estate agent hired by a vendor is expected to be honest, ethical, and competent an is answerable at law for his or her statuary duty to the public. *Hermansen v. Tasulis 48 P.3d 235 241 (Utah 2002).* Further, although real estate agent is not required to provide legal advise, the agent has a duty to disclose to his principal vital difference in the terms and conditions of a standard real estate purchase contract (REPC), and a REP submitted by a potential buyer.

Also Donna Kane's July 1, 2016 deposition and admission confirmed her obligation to point out this vital difference, and her obligation to be honest, ethical, and competent. According to Susie Martindale's deposition Donna Kane never questioned if buyer applied for a loan or whether the buyer had a lender.

DEPOSITION Donna Kane Coldwell Residential Brokerage[8]

Q: (By Mr. Glenn) · We'll move on to Question ·Number #4. Now, regarding Section 8(e), do you have or do you believe that you had any duty to discuss or explain Section 8(e) of the REPC with the seller? (Transcript Pg 19, Line 5)
A: Yes, I do.

Q: (By Mr. Glenn) · All right. · Shortly after ·you received a call from the seller -- shortly after ·you called the seller, Donna, about the low appraisal, he asked you who appraised the property and you said it was confidential. Please explain why this information is confidential? (Transcript Pg 27, Line 6.)
A: Because I'm not representing the buyer. I ·am representing the seller. · And that information is ·not privy to me.

DEPOSITION Susie Martindale REMAX Masters[9]

Q: If the lender had --- if the buyer has a lender, if the seller asked you who is the lender do you tell him? (Transcript Pg 61 Line 1)
A: Yes.

Since Judge Waddoups found that damages were far too speculative to sustain a cause of action, Attorney Brennan Moss, and law firm, PIA, ANDERSON, REYNARD, AND MOSS should have known if it was a viable, unwinnable case, and advised their client appropriately, instead of running up a $20,000 legal. Over 50% of the charges billed against the account occurred after the December 21, 2011 summary judgment motion.

Utah Supreme Court, and Judge Waddoups discussed the seller's responsibility of reading the contract, and understanding its terms. However, the

[8] Docket No. 95 Cross Motion for Summary Judgment Exhibit XIV
[9] Docket No. 95 Cross Motion for Summary Judgment Exhibit XV

REPC had been effective since August 2003 for practically 5 years. Coldwell Banker Real Estate agent Donna Kane and broker Kevin Larsen each had over 10 years of real estate experience, neither one of them understood the terms and conditions presented in the REPC. Donna Kane finally admitted in her deposition, she should have identified REPC 8(e). The broker Kevin Larsen, testified the buyers cancelled pursuant to 2.4 appraisal condition than section 8(e).[10] Why would the Utah Supreme Court, and U.S. District Judge Waddoups hold the seller to a higher standard of understanding the contract than the professionals whose fiduciary responsibility is to understand terms and conditions contract and appropriately advise their client? It's simply unfair, and unjust to hold the Plaintiff accountable for a poorly drafted ambiguous Utah standard contract that required clarification, or otherwise had an undesired or unintended consequence as a result of language that was either currently included or should have been included in the existing state approved REPC. Judge Reese offer stipulated he would apply for a loan which he did in the April 17, 2007 offer but intentionally avoided in his December 19, 2007 offer[11]. He had no intention to apply for a loan[12]. He intentionally fraudulent misrepresented that fact which irreparably harmed the Plaintiff. Judicial Conduct of Code Chapter 12 required him not to act on this non-public information.

The Plaintiff brings legal malpractice suit against his attorney for professional negligence, breach of fiduciary duty, breach of contract, and breach of implied covenant of good faith and fair dealing. The Plaintiffs claim the Defendant's conducted no fact or expert discovery, the outcome of the case would have been different, and if the Defendant knew the case was not viable and unwinnable then he should have advised his client not to pursue the case, rather than incur $20,000 of legal fees. The Defendant's claim the outcome of the underlying case would not have been different based on Judge Waddoups ruling;

[10] EXHIBIT F Kevin Larsen, Declaration October 20, 2008
[11] EXHIBIT C
[12] EXHIBIT D

Plaintiff failed to state a claim for relief could be granted, Plaintiff read and understood the contractual terms, and there was no special or additional duties charged to his real estate agent.

The failure to state a claim arose because of the Plaintiff's attorney negligence failed to obtain a real estate damage expert, the Plaintiffs property was still on the market. His agent's Kevin Larsen, and Donna Kane read the contract but with 20 years of real estate experience failed to advise their client of the terms and conditions of the contract. Regarding Donna Kane's or Coldwell Banker's responsibility or duties, she admitted to her responsibility to point out section 8(e) of the contract.

II. LEGAL STANDARDS

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[13].

If defendant in a run-of-the-mill civil case moves for summary judgment or for directed verdict based on the lack of proof of a material fact, the judge must ask himself, not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented[14].

[13] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)
[14] Fed.Rules Civ.Proc.Rules 50(a), 56(c),

III. DISCUSSION

Causation is an essential element in any legal malpractice case. When the plaintiff alleges that an attorney mishandled a lawsuit, in order to prove causation the plaintiff must prove that he would have prevailed in the underlying lawsuit. The underlying lawsuit in a legal malpractice case is known as the "case-within-a-case." Such legal malpractice cases are often said to be two cases in one.

The Supreme Court of Virginia held that in a legal malpractice case that involves a case within a case; the plaintiff must present virtually the same evidence that would have been presented in the underlying action. Similarly, the defendant is entitled to present evidence and assert defenses that would have been presented in the underlying action[15].

In an action for legal malpractice, a plaintiff must establish that the defendant failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the attorney's breach of that duty proximately caused the plaintiff to sustain actual and ascertainable damages[16].

A. The Underlying Agent Case

The Magistrate Judge found that the Plaintiff lost summary judgment motion in the case against his real estate agent as a matter of law and not because his counsel failed to properly prosecute his claims.

Coldwell Banker's failure to properly review the REPC with the Plaintiffs and notify them of the ambiguous language of the REPC allowed the buyers to cancel the contract with an undisclosed appraisal the buyer personally obtained, not an appraisal from the lender as he originally agreed in the terms and conditions of the contract. Donna Kane, Coldwell Banker Residential Brokerage acknowledged that they should have pointed out section 8(e) of the REPC. The Plaintiff lost the

[15] Whitley v. Chamouris, 574 S.E.2d 251, 265 Va. 9 (2003)
[16] Hayes v. Bello, 23 Misc. 3d 534, 881 N.Y.S.2d 609 (Sup 2009)

benefit of the sale, and incurred additional maintenance cost to carry the property until it's sold. At the time of Judge Waddoups heard the motion for summary judgment, the carrying costs maintenance on the property was three years. Though Brennan Moss advised the Plaintiff of the need to retain a real estate damage expert, he lied to his client and never retained such an expert.

The buyer Judge Robin Reese never intended to honor the terms and conditions of the contract. He stated on December 21, 2007 he would apply for a loan. He did not apply for the loan and intentionally deceived the Seller about his intentions in entering the contract. When the Seller asked a simple question of his agent who appraised the property? She said it was confidential; that information is not privy to her though Susie Martindale stated REMAX would provide that information if asked by an agent. The fraudulent misrepresentation by the Reese irreparably harmed the Plaintiff. According to Judge Samuael McVae at the September 21, 2008 hearing the market tanked and it was virtually impossible to sell the property. The Plaintiff's claim is not based on speculation of whether or not the Reese would have accepted the offer but their deception and fraudulent misrepresentation in entering the contract when they had no intention of complying with the loan and finance obligation and obtained their own appraisal. The Court said the Plaintiffs read and understood the contract. Well buyer should have applied for the loan as specified in the terms and conditions of the contract by December 21, 2007. Furthermore, Judge Reese knowledge and expertise as a Judge per the Judicial Code of Conduct required him not to act on this non-public information, i.e. ambiguity of the standard Utah Real Estate Purchase contract.

Under Utah law, a plaintiff must prove the following element to establish fraud[17].

(1) That a representation was made;
(2) Concerning a presently existing material fact;
(3) which was false;

[17] *Prince v. Bear River Mutual Ins. Co., 2002 UT 68 ¶ 41, 56 P.3d 524, 536*

(4) which the representor either (a) knew to be false or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation;
(5) for the purpose of inducing the other party to act upon it;
(6) that the other party, acting reasonably and in ignorance of its falsity;
(7) did in fact rely upon it;
(8) and was thereby induced to act;
(9) to his injury and damage

A jury looking at the terms and conditions of the contract would reach the same conclusion, Judge Reese fraudulently (intentionally) misrepresented his actions, a lender appraised the property but according to the trial in Fourth District Court in-fact he obtained his own appraisal, subsequently cancelling the contract under a non-public provision, i.e. that allowed cancellation without providing proper notice of the appraised value. The new standard Utah Real Estate Purchase Contract closed this loophole by revising the language such that after completion of an appraisal by a licensed appraiser, buyer receives written notice from a lender or appraiser the property appraised for less than the purchase price (Notice of Appraised Value") the buyer may cancel REPC by providing written notice to Seller (with a copy of the Notice of Appraised Value)..... Chief Justice Nehring Utah Supreme Court noted in his opinion the resolution of this issue by the new version of the REPC[18].

B. The Malpractice Case

This Court granted the Defendant's "death penalty" discovery sanction against the Plaintiff for failure to produce expert reports pursuant to the scheduling order. The Plaintiff filed the expert report September 30, 2016, three days before the discovery period expired, and more than 15 days before deadline for dispositive motions. The Plaintiff encountered difficulty retaining legal malpractice expert witness because practically all declined representation because one of the parties of the litigation,

[18] EXHIBIT E. (Par 8.2 (a))

the buyer, is a Judge in Utah Third District Court. When the legal malpractice expert witness accepted the case, there was less than 15 days before the expert report was due on September 1, 2016. None of the twelve real estate expert witnesses the Plaintiff interviewed agreed to accept the engagement due to the buyer is a Judge in Utah Third District Court. A discovery sanction must be just, a direct relationship must exist between the improper conduct and the sanction imposed, and the sanction should be no more severe than necessary to satisfy its legitimate purposes. [19]

Sanctions, that adjudicate a claim and preclude presentation of the merits of the case, are often referred to as "death penalty" sanctions. When a trial court strikes a party's pleadings and dismisses its action or renders a default judgment against it for abuse of the discovery process, the court adjudicates the party's claims without regard to their merits but based instead upon the parties' conduct of discovery. "Death penalty" sanctions are harsh and may be imposed as an initial sanction only in the most egregious and exceptional cases "when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules.[20] Generally, courts must impose--not just consider--lesser sanctions before resorting to the "death penalty."[21]

In the Court's May 17, 2016 order cautioned both parties to follow the rules of procedure that govern all litigants and urged parties to timely comply with Courts Order, and Federal Rules of Civil Procedure.[22]. On July 28, 2016 the Court entered an amended scheduling order. Neither order contemplated or warned the Plaintiff of "death penalty discovery sanctions for his non-compliance with the Court Order, or contemplated lesser sanctions. When causation is beyond jury's common understanding, expert testimony is necessary in legal malpractice claim. Sanctions which terminate presentation of the merits of a party's claim "must be reserved for

---

[19] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991)
[20] *GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993)*
[21] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991)
[22] Docket no. 66

circumstances in which the party so abused the rules of procedure, despite imposition of lesser sanctions, that the party's position can be presumed to lack merit.[23]

Though the Court found the Plaintiff's claims failed as a matter of law due to the speculative nature of the damages claimed; The exclusion of the expert witness report raised an important issue. The standard of care provided Attorney Brennan Moss, and law firm PIA ANDERSON DORIUS REYNARD & MOSS LLC fell below the standard of care. According to the expert witness report Defendants committed legal malpractice and were in breach of their fiduciary duties to the Plaintiff, as alleged in the complaint, and discussed in detail in the report.[24]

If the position of the Defendants that the litigation was not viable, per Judge Waddoups order granting summary judgment, i.e. a nonwinnable case, then the Defendant's breached that duty by failing to communicate that fact to their clients. If the case was not viable those problems should have been communicated early, not after Defendant's billed $20,000 in legal fees against the case[25].

Where the attorney's malpractice was itself reckless conduct involving a gross deviation from the applicable standard of care, rather than mere negligence, this fact may support an award of punitive damages against the attorney.[26]

---

[23] Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991)
[24] Docket No. 84
[25] EXHIBIT H
[26] Horn v. Wooser, 2007 WY 120, 165 P.3d 69 (Wyo. 2007)

CONCLUSION

For the foregoing reasons, the Court should reject the Magistrate Judge's Report and Recommendation (Docket No. 119), DENY Defendant's motion for summary judgment, and GRANT summary judgment for the Plaintiff.

Dated this 14 day of March , 2017

Respectfully Submitted,

/ s/
Endré Glenn
Plaintiff (ProSe)

CERTIFICATE OF SERVICE

I hereby certify on 14th day of March 2017 I served the Defendant by United States First Class Mail, postage prepaid at the following address:

William O. Kimball (9460)
PIA ANDERSON DORIUS REYNARD & MOSS LLC
136 E. South Temple, Suite 1900
Salt Lake City, Utah 84111
bkimball@pamhlaw.com

/s/
Endre' Glenn

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH CENTRAL DIVISION

MARGARET GLENN and ENDRE GLENN Plaintiffs, vs. Brennan H. Moss (10267) PIA ANDERSON DORIUS REYNARD & MOSS Defendants.	**ORDER** Case No. 2:15-cv-00165 Judge Clark Waddoups

Before the court is Defendants' motion for summary judgment. For the reasons stated on the record, the motion is GRANTED. (Dkt. No. 14.)

DATED this 21st day of December, 2011.

BY THE COURT:

/s/

Clark Waddoups
United States District Court Judge