



The court held an oral hearing on the motion on January 27, 2017, and at the conclusion of the oral hearing, took the motion under advisement.

Upon consideration of the motion, the evidence presented for the court's consideration, the written and oral arguments of the parties, and the applicable law, the court now renders this written decision.

### **STANDARD OF REVIEW**

The court must grant summary judgment, as requested by a moving party when:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion.”<sup>1</sup>

The court must view the evidence in a light most favorable to the nonmoving party.<sup>2</sup> Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits,

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<sup>1</sup> *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). See *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

<sup>2</sup> *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

depositions, etc.<sup>3</sup> A fact is material when, under the governing substantive law, the facts “might affect the outcome of the suit.”<sup>4</sup>

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present “a sufficient disagreement to require submission to a jury” or is it “so one-sided that the party must prevail as a matter of law”?<sup>5</sup> This threshold inquiry determines whether there are “any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.”<sup>6</sup>

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.<sup>7</sup> This burden requires the movant to “specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.”<sup>8</sup> If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.<sup>9</sup>

However, if the movant satisfies this burden, then the nonmoving party has a “reciprocal burden” to set forth specific facts, beyond the allegations and denials in the pleadings, demonstrating that a “triable issue of fact” remains.<sup>10</sup> The duty of the

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<sup>3</sup> *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

<sup>4</sup> *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

<sup>5</sup> *Id.* at 251-52.

<sup>6</sup> *Id.* at 250.

<sup>7</sup> *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

<sup>8</sup> *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

<sup>9</sup> *Id.* See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

<sup>10</sup> *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

nonmoving party is more than that of resisting the motion's allegations.<sup>11</sup> Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."<sup>12</sup> The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.<sup>13</sup> It may not rely on the pleadings or unsupported allegations.<sup>14</sup>

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."<sup>15</sup> The trial court maintains the sound discretion to admit or exclude relevant evidence.<sup>16</sup> When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.<sup>17</sup>

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that

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<sup>11</sup> *Wells Fargo*, 2013-Ohio-855 at ¶ 25.

<sup>12</sup> (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; See *Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

<sup>13</sup> *Williams*, 2014-Ohio-3778 at ¶ 8. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

<sup>14</sup> *Id.*

<sup>15</sup> See *Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.")

<sup>16</sup> *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

<sup>17</sup> *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

the affiant is competent to testify on the matters in the affidavit.<sup>18</sup> "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."<sup>19</sup> "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."<sup>20</sup> Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."<sup>21</sup>

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."<sup>22</sup> Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).<sup>23</sup>

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."<sup>24</sup> If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."<sup>25</sup>

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<sup>18</sup> Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

<sup>19</sup> *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

<sup>20</sup> *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

<sup>23</sup> *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

<sup>24</sup> *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

<sup>25</sup> *Id.* at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. See *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.<sup>26</sup> Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.<sup>27</sup>

However, even when summary judgment may not be granted in whole, the court must identify which facts are uncontroverted and deemed established for trial, when practicable. Civ.R. 56(D) provides:

"If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."<sup>28</sup>

## FINDINGS OF FACT

Viewing the evidence in a light most favorable to the defendants, the court makes the following findings of fact:

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<sup>26</sup> *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

<sup>27</sup> *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

<sup>28</sup> Civ.R. 56(D).

The plaintiff Semple International, Inc. is a real estate broker that brings buyers and sellers together via real estate auctions.<sup>29</sup> The defendants Wayne E. Eccard and Vickie L. Eccard are individuals who, in 2015, wanted to sell several properties.<sup>30</sup>

On July 31, 2015, the plaintiff entered into an "Exclusive Right To Sell Agreement" (the "Broker Agreement") with the defendants.<sup>31</sup> The Broker Agreement provided that the plaintiff would market and auction certain properties that the defendants owned.<sup>32</sup>

As to the plaintiff's broker commission, the Broker Agreement provided:

"\* \* \* If the price obtained by the Broker at the auction equals or exceeds the reserve amount, but for whatever reason due to the fault of the Seller the closing does not occur, the Seller agrees to reimburse the Broker for all costs of advertising and expenses, plus the commission of ten percent (10%) of the contract price."<sup>33</sup>

Regarding the "reserve amount" referenced in the commission provision, the terms of the Broker Agreement were that the property would be sold "without reserve" to the highest bidder.<sup>34</sup>

The Broker Agreement also included terms regarding the conveyance and status of the title.<sup>35</sup> Under the Broker Agreement's terms:

"\* \* \* The Seller shall be responsible for \* \* \* the cost of removing or discharging any defect, lien or encumbrance required for conveyance of the Property as required by a purchase contract; \* \* \* Title shall be free, clear and unencumbered as of the closing. \* \* \* All persons or entities, including the Seller, who own any portion of the Property

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<sup>29</sup> B. Semple Aff., ¶ 2.

<sup>30</sup> B. Semple Aff., ¶ 2.

<sup>31</sup> Ex. 1 to B. Semple Aff.; B. Semple Aff., ¶ 3; W. Eccard Aff., ¶ 2; V. Eccard Aff., ¶ 2.

<sup>32</sup> Ex. 1 to B. Semple Aff.

<sup>33</sup> Ex. 1 to B. Semple Aff., ¶ 6.

<sup>34</sup> Ex. 1 to B. Semple Aff., ¶ 3.

<sup>35</sup> Ex. 1 to B. Semple Aff., ¶ 15.

and/or have an ownership interest in the Property (dower/ownership rights) are as follows Wayne E. Eccard.<sup>36</sup>

The plaintiff held an auction and obtained a buyer for the defendants' property.<sup>37</sup> On December 14, 2015, the defendants entered into "The Contract To Purchase At Public Auction" ("Purchase Contract") with a prospective buyer of the property.<sup>38</sup> The Purchase Contract provided for a sale of the property for \$111,600.<sup>39</sup> It also provided that the "Seller \* \* \* shall convey title to the Real Estate to Purchaser by General Warranty deed on January 14, 2016, or at such sooner time as the parties mutually agree in writing ("Closing")."<sup>40</sup>

The plaintiff avers that the closing on the defendants' properties did not occur because the defendants had (1) declared bankruptcy under Chapter 7 and were unable to convey the title to the properties to the buyer, and (2) there were \$200,000 in outstanding liens on the properties.<sup>41</sup> The defendants did not previously disclose the bankruptcy or the liens to the plaintiff prior to the auction.<sup>42</sup>

The defendants, on the other hand, argue that the sale was never completed due to reasons beyond their control.<sup>43</sup> The defendants posit that the trustee to their Chapter 7 bankruptcy could have conveyed the properties to the buyer and that the trustee could have negotiated the outstanding liens on the property.<sup>44</sup>

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<sup>36</sup> (Emphasis original.) Ex. 1 to B. Semple Aff., ¶ 15.

<sup>37</sup> B. Semple Aff., ¶ 4; W. Eccard Aff., ¶ 3; V. Eccard Aff., ¶ 3.

<sup>38</sup> Ex. 1 to B. Semple Aff., ¶ 2.

<sup>39</sup> Ex. 2 to B. Semple Aff., ¶ 2.

<sup>40</sup> (Emphasis original.) Ex. 2 to B. Semple Aff.

<sup>41</sup> B. Semple Aff., ¶¶ 9, 11.

<sup>42</sup> B. Semple Aff., ¶¶ 10-11.

<sup>43</sup> W. Eccard Aff., ¶ 3; V. Eccard Aff., ¶ 3.

<sup>44</sup> W. Eccard Aff., ¶¶ 6, 9; V. Eccard Aff., ¶¶ 6, 9.

The plaintiff accrued \$7,467.13 in expenses related to marketing and selling the properties.<sup>45</sup> The defendants paid the plaintiff \$1,500, leaving \$5,967.13 in expenses remaining.<sup>46</sup> The defendants admit that they still owe the plaintiff \$5,967.13.<sup>47</sup>

Additionally, the plaintiff billed the defendants for \$10,080 for the plaintiff's commission on the sale.<sup>48</sup> The defendants have not paid the plaintiff for any commission.<sup>49</sup> The plaintiff claims that the defendants have owed it \$16,047.13 since February 1, 2016.<sup>50</sup>

### LEGAL ANALYSIS

A contract is "generally defined as a promise, or set of promises, actionable upon breach."<sup>51</sup> To prevail on a breach of contract claim, a plaintiff must prove: "(1) the existence of a contract, (2) that the plaintiff fulfilled its contractual obligations, (3) that the defendant failed to fulfill its contractual obligations, and (4) that the plaintiff incurred damages as a result."<sup>52</sup> A plaintiff proves that a defendant has breached a contract by showing the defendant "did not perform one or more of the terms of the contract."<sup>53</sup>

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<sup>45</sup> Ex. 3 to B. Semple Aff.

<sup>46</sup> B. Semple Aff., ¶ 6, Ex. 3 to B. Semple Aff.; W. Eccard Aff., ¶ 4; V. Eccard Aff., ¶ 4.

<sup>47</sup> Answer, ¶ 4.

<sup>48</sup> Ex. 3 to B. Semple Aff.

<sup>49</sup> B. Semple Aff., ¶ 12.

<sup>50</sup> B. Semple Aff., ¶ 13.

<sup>51</sup> *Artisan Mechanical, Inc. v. Beiser*, 12th Dist. Butler No. CA2010-02-039, 2010-Ohio-5427, ¶ 25.

<sup>52</sup> *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 25, citing *S & G Invests., L.L.C. v. United Cos. L.L.C.*, 12th Dist. No. CA2010-03-017, 2010-Ohio-3691, ¶ 12.

<sup>53</sup> *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 117 Ohio App.3d 7, 2008-Ohio-148, 893 N.E.2d 855, ¶ 24 (10th Dist.), quoting *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10, 771 N.E.2d 874 (10th Dist. 2002).

After the plaintiff shows the breach of contract, then the burden shifts to the defendant to assert a defense."<sup>54</sup>

The construction of contracts is a matter of law.<sup>55</sup> If a contract's language and terms are unambiguous, then its interpretation presents no issues of fact for the jury's determination.<sup>56</sup> "However, if the contract is ambiguous or a term cannot be determined from its four corners, summary judgment is inappropriate because a question of fact as to intent or reasonableness exists."<sup>57</sup> Accordingly, when a contract is ambiguous or unclear, "summary judgment should not be granted."<sup>58</sup>

The court's primary objective when construing a contract is "to ascertain and give effect to the intent of the parties."<sup>59</sup> When confronted with an issue of contract

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<sup>54</sup> *Abruzzi's Inc. v. Abruzzi's Pizza, Inc.*, 8th Dist. Cuyahoga No. 73002, 1998 WL 355846, \*3 (July 2, 1998).

<sup>55</sup> *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph one of the syllabus (1978).

<sup>56</sup> *Waterfield Mortg. v. Buckeye State Mut. Ins. Co.*, 2d Dist. Miami No. 93-CA-3, 1994 WL 527594, \*5 (Sept. 30, 1994).

<sup>57</sup> *Waterfield Mortg.*, 1994 WL 527594 at \*5, citing *Inland Refuse Transfer Co. v. Browning-Feris Industries of Ohio, Inc.*, 15 Ohio St.3d 321 (1984). See *Walsh v. Marsh Bldg. Prods., Inc.*, 12th Dist. Warren No. CA2009-10-130, 2010-Ohio-729, ¶ 11 ("If an ambiguity exists, the interpretation of the parties' intent is a question to be determined by the trier of fact.").

<sup>58</sup> *Walsh*, 2010-Ohio-729 at 11.

<sup>59</sup> *Drone Consultants, L.L.C. v. Armstrong*, 12th Dist. Warren Nos. CA2015-11-107, CA2015-11-108, 2016-Ohio-3222, ¶ 14, citing *Baruk v. Heritage Club Homeowners' Assn.*, 12th Dist. Warren No. CA2013-09-086, 2014-Ohio-1585, ¶ 60. See *Lopez v. Citizens Auto Fin.*, 8th Dist. Cuyahoga No. 91184, 2009-Ohio-1082, ¶ 15, citing *Alternatives Unlimited-Special, Inc. v. Ohio Dep't of Edn.*, 168 Ohio App. 3d 592, 2006-Ohio-4779, 861 N.E.2d 163, ¶ 20 (10th Dist.) (holding same).

interpretation, courts examine the contract as a whole.<sup>60</sup> Generally courts presume that the parties' intent resides in the language they chose to employ in the contract.<sup>61</sup>

Courts use the "plain and ordinary meaning" of the language in the contract unless a different meaning "is clearly apparent" from the contract.<sup>62</sup> If the language is clear, then the court is confined to the writing in the contract itself to discern the parties' intent.<sup>63</sup>

"As a matter of law, a contract is unambiguous if it can be given a definite legal meaning."<sup>64</sup> However, the failure to "define a term" in a contract does not "automatically render" it ambiguous, as long as an "ordinary meaning of the term exists."<sup>65</sup> By contrast, a "contract is ambiguous if its provisions are susceptible to two or more reasonable interpretations."<sup>66</sup>

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<sup>60</sup> *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 38. See *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 22 (Citations omitted.) ("Often the intended meaning of a word or phrase may be clear when that word or phrase is considered in the context of other words or phrases in the contract. \* \* \* Thus, the intended meaning of any part of the parties' contract should be determined in light of the whole contract.")

<sup>61</sup> *Pierce Point Cinema 10, L.L.C. v. Perin-Tyler Family Foundation*, 12th Dist. Clermont No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Shifrin v. Forest City Ets., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992). See *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 14, citing *Towne Dev. Grp., Ltd. V. Hutsenpiller Contrs.*, 12th Dist. Butler No. CA2012-09-081, 2013-Ohio-4326, ¶ 17 (holding same).

<sup>62</sup> *Toledo Edison Co.*, 2011-Ohio-2720, ¶ 37.

<sup>63</sup> *Id.* See *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, quoting *Cooper v. Chateau Estate Homes, L.L.C.*, 12th Dist. Warren No. CA2012-07-061, 2010-Ohio-5186, ¶ 12 (a clear and unambiguous contract "requires no interpretation or construction and will be given effect for by the plain language of the contract.")

<sup>64</sup> *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 37, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

<sup>65</sup> (Citations omitted.) *Fahlnush v. Crum-Jones*, 176 Ohio App.3d 328, 2008-Ohio-1953, 891 N.E.2d 1242, ¶ 16 (1st Dist.). See *City of Mansfield v. Select Insurance Co.*, 5th Dist. Richland No. CA-2253, 1984 WL 7531, \*2 (Oct. 22, 1984) ("The rule is well established that words used in a contract of insurance are to be given their natural and usual meaning unless otherwise defined in the contract.")

<sup>66</sup> *Drone Consultants, L.L.C.*, 2016-Ohio-3222 at ¶ 15, citing *Cooper*, 2010-Ohio-5186 at ¶ 12. See *Santana v. Auto Owners Ins. Co.*, 91 Ohio App.3d 490, 494, 632 N.E.2d 1308 (6th Dist. 1993) (Citation omitted.) ("In applying these general contract principles, it is important to emphasize the relationship between the usual meaning of the language used in the contract and

If a party satisfactorily demonstrates a breach of the contract, "damages should place the injured party in as good a position as it would have been absent the breach."<sup>67</sup> To do so, the plaintiff "must present sufficient evidence to show entitlement to damages in an amount which can be ascertained with reasonable certainty."<sup>68</sup>

"A broker's right to a commission is based on contract principles."<sup>69</sup> "When and how a broker becomes entitled to a commission ultimately depends upon [its] contract."<sup>70</sup> Under most brokerage agreements, a real estate broker earns a commission pursuant to an employment contract or listing agreement when the broker "produces a buyer 'ready, willing, and able' to purchase the property for the terms specified by the seller, even if the transaction itself is never consummated."<sup>71</sup> The terms, however, may be changed by the agreement of the parties to the brokerage contract.<sup>72</sup>

In the case at bar, the motion for summary judgment turns upon whether the defendants breached an obligation to pay the plaintiff a 10% commission under the

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the factual situation to which that meaning is to be applied. On the one hand, we must be careful not to find ambiguity merely because the factual situation presents difficulty in applying the common meaning of a word or term used in a contract. 'The fact that contractual language may, on occasion, pose difficult factual applications does not make that language ambiguous.'")

<sup>67</sup> *Garfalo v. Chicago Title Ins. Co.*, 104 App.3d 95, 108, 661 N.E.2d 218 (8th Dist. 1995).

<sup>68</sup> *James v. Sky Bank*, 11th Dist. Trumbull No. 2010-T-0116, 2012-Ohio-3883, ¶ 33, quoting *Tri-State Asphalt Corp. v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 94API07-986, 1995 WL 222160 (Apr. 11, 1995).

<sup>69</sup> *Smith v. Stevens*, 2d Dist. Montgomery No. 15871, 1996 WL 665005, \*2 (Nov. 15, 1996), citing *Suter v. The Farmers Fertilizer Co.*, 100 Ohio St. 403, 408 (1919).

<sup>70</sup> *Athens v. Land Concepts Co., Inc.*, 9th Dist. Lorain No. 10CA009799, 2011-Ohio-1150, ¶ 17, citing *Duane Stanley and Assoc. Realty v. Skrzynski*, 8th Dist. Cuyahoga No. 37066 (Apr. 13, 1978).

<sup>71</sup> *Athens*, 2011-Ohio-1150 at ¶ 17, citing *Harley E. Rouda & Co. v. Springtime Co.*, 49 Ohio App.3d 49, 52-53, 359 N.E.2d 450 (10th Dist. 1975).

<sup>72</sup> *Athens*, 2011-Ohio-1150 at ¶ 17, citing *Harley E Rouda & Co.*, 40 Ohio Ap.3d at 52-53.

Broker Agreement.<sup>73</sup> To prevail on its breach of contract claim, the plaintiff must first show that it had a contract with the defendants.<sup>74</sup> The plaintiff submitted Exhibit 1, which is the Broker Agreement with the defendants. The defendants admit that they entered into this Broker Agreement with the plaintiff to sell multiple properties.<sup>75</sup>

Having shown that a contract exists, the plaintiff must next show that it performed under the contract.<sup>76</sup> The plaintiff successfully marketed the defendants' property and obtained a buyer for the property.<sup>77</sup> The defendants have not disputed that the plaintiff performed its obligations pursuant to the Broker Agreement. As such, this second element for a breach of contract claim has been met.

Next, the plaintiff must prove that the defendants failed to fulfill their contractual obligations.<sup>78</sup> The plaintiff argues that the defendants breached the Broker Agreement by failing to pay it for the costs of advertising and expenses, plus a commission of 10% the contract price for the properties.

The defendants concede that they owe the plaintiff \$5,967.13 for costs in advertising and expenses.<sup>79</sup> As to the commission, however, the defendants counter that they did not breach the Broker Agreement. They maintain there is no breach

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<sup>73</sup> Although the plaintiff's complaint includes two causes of action, one for breach of contract and one for unjust enrichment, the summary judgment motion only discusses the breach of contract claim. Under Civ.R. 56, the plaintiff's burden requires it to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus. Because the plaintiff has not specifically delineated a basis for summary judgment for unjust enrichment, the court declines to consider that cause of action in this decision.

<sup>74</sup> *Lamar Advantage GP Co.*, 2012-Ohio-3319 at ¶ 25, citing *S & G Invests., L.L.C.*, 2010-Ohio-3691 at ¶ 12.

<sup>75</sup> *W. Eccard Aff.*, ¶ 2; *V. Eccard Aff.*, ¶ 2.

<sup>76</sup> *Lamar Advantage GP Co.*, 2012-Ohio-3319 at ¶ 25, citing *S & G Invests., L.L.C.*, 2010-Ohio-3691 at ¶ 12.

<sup>77</sup> *B. Semple Aff.*, ¶¶ 3-5.

<sup>78</sup> *Lamar Advantage GP Co.*, 2012-Ohio-3319 at ¶ 25, citing *S & G Invests., L.L.C.*, 2010-Ohio-3691 at ¶ 12.

<sup>79</sup> Answer, ¶ 4.

because they need only pay the commission if they are at fault for failure of the closing and that they are not at fault.

The plaintiff contends that the defendants are at fault since the closing for sale of the defendants' properties did not occur because the defendants had (1) declared bankruptcy under Chapter 7 and were unable to convey the title to the properties to the buyer and (2) there were \$200,000 in outstanding liens on the properties.<sup>80</sup>

The defendants do not dispute the reasons as to why the closing did not occur. However, they posit that the closing was never completed due to reasons beyond their control.<sup>81</sup> The defendants argue that the trustee to their Chapter 7 bankruptcy could have conveyed the properties to the buyer and that the trustee could have negotiated the outstanding liens on the property.<sup>82</sup> Therefore, the defendants contend that the fault lies with the Chapter 7 bankruptcy trustee, who could have completed the closing but did not.<sup>83</sup> The plaintiff responds that, under the Broker Agreement and Closing Contract, the defendants had obligations regarding the conveyance of the properties that were left unfulfilled and caused the closing to fail, therefore establishing that fault lies with the defendants.

Thus, there remains an issue as to whether the defendants breached the contract by failing to pay the plaintiff a commission.<sup>84</sup> The Broker Agreement provided:

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<sup>80</sup> B. Semple Aff., ¶¶ 9, 11.

<sup>81</sup> W. Eccard Aff., ¶ 3; V. Eccard Aff., ¶ 3.

<sup>82</sup> W. Eccard Aff., ¶¶ 6, 9; V. Eccard Aff., ¶¶ 6, 9.

<sup>83</sup> Defs. Resp., pg. 3.

<sup>84</sup> Of note, even if the language in Paragraph Six had not been included in the Broker Agreement, the Twelfth District Court of Appeals has held that a "broker should not be denied his rightful commission where the parties have signed a contract and the failure to complete the purchase is attributable to one of the principals to the purchase." *Ferguson Realtors v. Butts*, 37 Ohio App.3d 30, 35, 523 N.E.2d 534 (12th Dist. 1987). See *Lentz v. Schnippel*, 71 Ohio App.3d 206, 211-212, 593 N.E.2d 341 (3d Dist. 1991) (explaining that whether a broker is owed a

**“ \* \* \* If the price obtained by the Broker at the auction equals or exceeds the reserve amount, but for whatever reason due to the fault of the Seller the closing does not occur, the Seller agrees to reimburse the Broker for all costs of advertising and expenses, plus the commission of ten percent (10%) of the contract price.”<sup>85</sup>**

Therefore, whether the defendants have an obligation to pay the plaintiff's commission turns on whether (1) the plaintiff secured a buyer for the properties, (2) the properties sold above the reserve rate, and (3) the closing did not occur due to the fault of defendants.

As discussed, it is undisputed that the plaintiff secured a buyer. Next, because there was no reserve rate for the properties under the Broker Agreement, the properties sold above the reserve rate, which would have been \$0.<sup>86</sup> Accordingly, the issue of breach turns upon whether the defendants are “at fault” for the closing's failure.

As mentioned, courts employ the “plain and ordinary meaning” of the language in the contract unless a different meaning “is clearly apparent” from the contract.<sup>87</sup> In this case, the term “at fault” is not specifically defined by the Broker Agreement and therefore the court will use its plain and ordinary meaning. Merriam-Webster defines “fault” as “responsibility for wrongdoing or failure.”<sup>88</sup> Bearing this meaning in mind, the court must determine if the defendants are responsible for a wrongdoing or failure that caused the closing not to occur. To determine this, the court will examine the

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commission depends on whether the broker satisfied the terms of the contract, not whether the transaction was actually completed); *Smith*, 1996 WL 665005 at \*3 (“The right of the broker to recover commission after a contract for sale is entered into by the seller and purchaser survives even if the purchases later fails to consummate the transaction.”).

<sup>85</sup> Ex. 1 to B. Semple Aff., ¶ 6.

<sup>86</sup> The terms of the Broker Agreement were that the property would be sold “without reserve” to the highest bidder, and as such there was no reserve rate. See Ex. 1 to B. Semple Aff., ¶ 3.

<sup>87</sup> *Toledo Edison Co.*, 2011-Ohio-2720, ¶ 37.

<sup>88</sup> *Merriam Webster Dictionary*, <https://www.merriam-webster.com/dictionary/fault> (accessed March 31, 2017).

defendants' contractual obligations elsewhere in their contract, decide whether the defendants satisfied those obligations, and, if not, determine whether their failure to satisfy those obligations caused the closing to fail.

The Broker Agreement required the defendants to pay for the "cost of removing or discharging any defect, lien or encumbrance required for conveyance of the Property as required by a purchase contract."<sup>89</sup> It also provided that the "[t]itle shall be free, clear and unencumbered as of the closing."<sup>90</sup> It is undisputed that the defendants were unable to convey a title free and clear at the closing, as the properties were encumbered by approximately \$200,000 in liens.<sup>91</sup>

The defendants do not deny that there were liens on the properties, nor do they dispute the contract language placing an obligation on them to sell the properties free and clear of such liens. Instead, they place blame on the Chapter 7 bankruptcy trustee, who chose not to negotiate the liens down or otherwise pay them. However, the fact of the matter is that the defendants undertook an obligation in the Broker Agreement to convey title to their properties free and clear of liens, and they did not satisfy that duty, which is one of two reasons the closing did not occur. There was no provision in the Broker Agreement that relieved the defendants of this duty should they find themselves in bankruptcy and with a trustee unwilling to have the liens on their properties removed.<sup>92</sup>

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<sup>89</sup> Ex. 1 to B. Semple Aff., ¶ 15.

<sup>90</sup> Ex. 1 to B. Semple Aff., ¶ 15.

<sup>91</sup> B. Semple Aff., ¶ 11. The defendants have submitted no evidence or affidavit showing that the \$200,000 in liens were not one of the reasons the closing could not move forward.

<sup>92</sup> See *In re Ferncrest Court Partners, Ltd.*, 66 F.3d 778, 781 (6th Cir. 1995) (rejecting the claim that brokers could not receive their commission because the bankruptcy court never approved the sale and, although the brokers secured a contract for the sale, the sale did not consummate).

The Broker Agreement also provided that "[a]ll persons or entities, including the Seller, who own any portion of the Property and/or have an ownership interest in the Property (dower/ownership rights) are as follows Wayne E. Eccard."<sup>93</sup> Furthermore, the Purchase Contract provided that the "Seller \* \* \* shall convey title to the Real Estate to Purchaser by General Warranty deed on January 14, 2016, or at such sooner time as the parties mutually agree in writing ("Closing")."<sup>94</sup> It is undisputed that the defendants were not able to convey the title to their properties at closing.<sup>95</sup>

The defendants do not deny that they were unable to convey titles on their properties at closing. Rather, they again place blame for this failure upon the Chapter 7 trustee, who, for an undisclosed reason, would not convey the titles for the closing. Because the defendants were in bankruptcy, the trustee, not Wayne Eccard, held Mr. Eccard's interest in the properties.<sup>96</sup> The defendants represented that Mr. Eccard was the only person to hold an ownership interest in the properties, when that was not the case, and the defendants also contracted to convey the deeds to the properties, which they did not do.

There was no provision in the Broker Agreement or Purchase Contract that excused the defendants of these obligations should they be in bankruptcy and the trustee did not want to move forward with the closing. To the contrary, the contract provides that if "\* \* \* for whatever reason due to the fault of the Seller the closing does

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<sup>93</sup> Ex. 1 to B. Semple Aff., ¶ 15. Of note, the defendants argued in oral argument that Wayne Eccard's name was typed into this provision after he had already signed the Broker Agreement. However, the defendants did not submit any evidence on summary judgment that would allow the court to find that there exists a genuine issue of material fact as to whether the defendants agreed to this representation.

<sup>94</sup>(Emphasis original.) Ex. 2 to B. Semple Aff.

<sup>95</sup> B. Semple Aff., ¶ 9.

<sup>96</sup> *In re Osterwalder*, 407 B.R. 291, 295 (Bankr. N.D. Ohio 2008).

not occur, the Seller agrees to reimburse the Broker for all costs of advertising and expenses, plus the commission of ten percent (10%) of the contract price.<sup>97</sup> As with the liens, the defendants undertook obligations in the two contracts regarding conveying the properties, and they did not fulfill those obligations. Because the defendants did not satisfy their obligations, the closing for the properties did not occur. Since the defendants' contractual failures led to the failure of the closing, the fault lies with the defendants. Having found that it is the defendants' fault that the closing did not occur, the court concludes that the defendants breached Paragraph Six of the Broker Agreement when they refused to pay the plaintiff the commission of 10% the contract price.

For the fourth element for a breach of contract claim, the plaintiff must show that it incurred damages as a result of the breach.<sup>98</sup> The plaintiff argues it is entitled to \$10,080 in commission, citing the terms of the Broker Agreement and the Purchase Contract. The Purchase Contract set forth the price of the properties as \$111,600.<sup>99</sup> Although \$10,080 is less than 10% of \$111,600, the plaintiff has prayed for \$10,080 and the plaintiff's counsel confirmed again at oral argument that this was the amount of damages desired, although it was not precisely 10%. The plaintiff also submitted an outstanding invoice to the defendants, showing that the defendants had not paid the commission and that these charges have been outstanding since February 1, 2016.<sup>100</sup> Accordingly, the court finds that the plaintiff has satisfied the four elements for its breach of contract claim, including damages. In addition to the \$10,080 owed to the plaintiff as

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<sup>97</sup> (Emphasis added.) Ex. 1 to B. Semple Aff., ¶ 6.

<sup>98</sup> *Lamar Advantage GP Co.*, 2012-Ohio-3319 at ¶ 25, citing *S & G Invests., L.L.C.*, 2010-Ohio-3691 at ¶ 12.

<sup>99</sup> Ex. 2 to B. Semple Aff., ¶ 2

<sup>100</sup> Ex. 3 to B. Semple Aff.

a commission, the defendants also admit that they owe the defendant \$5,967.13 in costs and expenses, for a total in damages of \$16,047.13.

However, the court's inquiry into whether summary judgment should be granted for the plaintiff does not end upon concluding that the elements for breach of contract have been satisfied. Although neither party has raised this issue, R.C. 4735.21 places an additional element of proof upon real estate brokers seeking to enforce their rights to a commission. R.C. 4735.21 provides:

"No right of action shall accrue to any person, partnership, association, or corporation for the collection of compensation for the performance of the acts mentioned in section 4735.01 of the Revised Code, without alleging and proving that such person, partnership, association, or corporation was licensed as a real estate broker or foreign real estate dealer. \* \* \*"<sup>101</sup>

In light of R.C. 4735.21, "Ohio courts have long held that a real estate broker must allege and prove the existence of a valid real estate broker's license as an essential element of any action to recover a real estate commission from a client."<sup>102</sup> Moreover, "Ohio courts have a long history of strictly interpreting this statute."<sup>103</sup> Therefore, R.C. 4735.21 "mandate[s] that a party seeking to recover a real estate commission allege and prove, in addition to the basic elements of the underlying claim,

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<sup>101</sup> (Emphasis added.) R.C. 4735.21.

<sup>102</sup> *Wilkinson v. Escaja*, 7th Dist. Mahoning No. 99-C.A.-310, 2001 WL 315193, \*2 (Mar. 30, 2001), citing *Stanson v. McDonald*, 147 Ohio St. 191, 70 N.E.2d 359 (1946), paragraph one of the syllabus. See *Smith*, 1996 WL 665005 at \*5 (explaining that R.C. 4735.21 "requires an allegation and evidence proving that the plaintiff was a licensed real estate broker when the cause of action arose."); *Group One Realty v. Minnich*, 10th Dist. Franklin No. 96APG11-1563, 1997 WL 284688, \*3 (May 29, 1997), citing *Loss Realty Group v. Verbon*, 6th Dist. Lucas No. L-96-024, 1996 WL 715428 (Dec. 6, 1996) ("Rather, R.C. 4735.21 adds an essential element, namely proof of licensure as a real estate broker, to a claim to collect a real estate commission.").

<sup>103</sup> *Remax v. Mater Realty v. Divito*, 7th Dist. Mahoning No. 99 CA 20, 2000 WL 748125, \*2 (June 1, 2000), citing *Stanson*, 147 Ohio St. at paragraph one of the syllabus. See *Smith*, 1996 WL 665005 at \*4 ("Ohio courts have strictly interpreted this statute [R.C. 4735.21], holding that *only* a licensed real estate broker can maintain an action for its commissions.").

that it was a licensed real estate broker at the time the cause of action arose.<sup>104</sup> Because R.C. 4735.21 sets forth "an essential element of proof necessary to maintain a right of action for a broker's real estate commission," it is not a defense that the defendants can waive by failing to address it in their response to the motion for summary judgment.<sup>105</sup> Indeed, a "party defending a claim is not required to point out to the trial court that there has been a failure of proof" by the plaintiff.<sup>106</sup>

In examining the present case, the plaintiff did not allege anywhere in its complaint that it was a licensed real estate broker at the time this cause of action arose, which would have been in February 2016. In examining the evidence in the record for summary judgment, the plaintiff submitted the affidavit of its owner, Brent Semple, signed on August 25, 2016, in which he averred that the plaintiff "is a licensed real estate broker."<sup>107</sup> However, Mr. Semple did not aver that the plaintiff was a licensed real estate broker at the time the breach of contract action accrued, in February 2016. The plaintiff did not submit any other evidence of its licensure in February 2016.

Because the plaintiff failed to allege and prove that it was a licensed real estate broker at the time its cause of action for breach of contract accrued, the court finds that R.C. 4735.21 is not satisfied. Because R.C. 4735.21 sets forth "an essential element of proof necessary to maintain a right of action for a broker's real estate commission," and

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<sup>104</sup> (Emphasis added.) *Remax Master Realty*, 2000 WL 748125 at \*2, citing *Group One Realty*, 1997 WL 284688. See *Smith*, 1996 WL 665005 at \*4 ("The real estate broker must have been duly licensed at the time when the cause of action arose."); *Loss Realty Group*, 1996 WL 715428 at \*5 ("There must be some evidence in the record, however, that the plaintiff-broker is licensed during the period in which the compensation was allegedly earned.").

<sup>105</sup> *Smith*, 1996 WL 665005 at \*5. See *Loss Realty Group*, 1996 WL 715428 at \*4 citing *Smith*, 1996 WL 665005 at \*2 ("Moreover, in an action to collect a commission by a real estate broker or salesman, proof that the broker or salesman is license is not a defense. Rather it is an essential element of the plaintiff's case and, unless proved, is a complete bar to the actions.").

<sup>106</sup> *Smith*, 1996 WL 665005 at \*5.

<sup>107</sup> B. Semple Aff., ¶ 2.

the plaintiff has not satisfied it, the court finds that it must deny the plaintiff's motion for summary judgment.<sup>108</sup>

In accordance with the above decision, the court finds that the following facts are uncontroverted, which, at the trial for this action, "shall be deemed established"<sup>109</sup>:

On July 31, 2015, the plaintiff entered into an "Exclusive Right To Sell Agreement" (the "Broker Agreement") with the defendants.<sup>110</sup> The Broker Agreement provided that the plaintiff would market and auction certain properties that the defendants owned.<sup>111</sup> The Broker Agreement provided:

"\* \* \* If the price obtained by the Broker at the auction equals or exceeds the reserve amount, but for whatever reason due to the fault of the Seller the closing does not occur, the Seller agrees to reimburse the Broker for all costs of advertising and expenses, plus the commission of ten percent (10%) of the contract price."<sup>112</sup>

The Broker Agreement provided that the property would be sold "without reserve" to the highest bidder.<sup>113</sup> The Broker Agreement provided:

"\* \* \* The Seller shall be responsible for \* \* \* the cost of removing or discharging any defect, lien or encumbrance required for conveyance of the Property as required by a purchase contract; \* \* \* Title shall be free, clear and unencumbered as of the closing. \* \* \* All persons or entities, including the Seller, who own any portion of the Property and/or have an ownership interest in the Property (dower/ownership rights) are as follows Wayne E. Eccard."<sup>114</sup>

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<sup>108</sup> *Smith*, 1996 WL 665005 at \*5. See *Loss Realty Group*, 1996 WL 715428 at \*4 citing *Smith*, 1996 WL 665005 at \*2.

<sup>109</sup> Civ.R. 56(D).

<sup>110</sup> Ex. 1 to B. Semple Aff.; B. Semple Aff., ¶ 3; W. Eccard Aff., ¶ 2; V. Eccard Aff., ¶ 2.

<sup>111</sup> Ex. 1 to B. Semple Aff.

<sup>112</sup> Ex. 1 to B. Semple Aff., ¶ 6.

<sup>113</sup> Ex. 1 to B. Semple Aff., ¶ 3.

<sup>114</sup> (Emphasis original.) Ex. 1 to B. Semple Aff., ¶ 15.

The plaintiff held an auction and obtained a buyer for the defendants' property.<sup>115</sup> On December 14, 2015, the defendants entered into "The Contract To Purchase At Public Auction" ("Purchase Contract") with a prospective buyer of the property.<sup>116</sup>

The Purchase Contract provided for a sale of the property for \$111,600.<sup>117</sup> The Purchase Contract provided that the "Seller \* \* \* shall convey title to the Real Estate to Purchaser by General Warranty deed on January 14, 2016, or at such sooner time as the parties mutually agree in writing ("Closing")."<sup>118</sup>

Because the defendants undertook an obligation in the Broker Agreement to convey title to their properties free and clear of liens, and they did not satisfy that duty, they breached the Broker Agreement with the plaintiff. Moreover, the defendants undertook obligations in the Broker Agreement and Purchase Contract regarding conveying the properties, but they did not fulfill those obligations. The defendants represented that Mr. Eccard was the only person to hold an ownership interest in the properties, when that was not the case, and the defendants also contracted to convey the deeds to the properties, which they did not do.

Because the defendants did not satisfy their contractual obligations, the closing for the properties did not occur. Since the defendants' contractual failures led to the failure of the closing, the fault for the failure of the sale lies with the defendants. As such, under the Broker Agreement the defendants are liable to the plaintiff for "reimburse[ing] the Broker for all costs of advertising and expenses, plus the

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<sup>115</sup> B. Semple Aff., ¶ 4; W. Eccard Aff., ¶ 3; V. Eccard Aff., ¶ 3.

<sup>116</sup> Ex. 1 to B. Semple Aff., ¶ 2.

<sup>117</sup> Ex. 2 to B. Semple Aff., ¶ 2

<sup>118</sup>(Emphasis original.) Ex. 2 to B. Semple Aff.

commission of ten percent (10%) of the contract price."<sup>119</sup> The defendants owe \$10,080 to the plaintiff as a commission, as well as \$5,967.13 for costs and expenses, for a total in damages of \$16,047.13, plus interest.

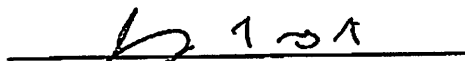
The plaintiff has not established that it was a licensed real estate broker at the time its breach of contract cause of action accrued. As such, the court will hold a trial consistent with this decision to determine whether the plaintiff was licensed as a real estate broker at the time that the plaintiff's cause of action arose.

### CONCLUSION

For the aforementioned reasons, the court finds the plaintiff's motion for summary judgment is not well-taken and hereby denies it. The court will set this case for trial, with the issues at trial to be consistent with this decision.

**IT IS SO ORDERED.**

DATED: 5-2-17

  
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Judge Jerry R. McBride

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<sup>119</sup> Ex. 1 to B. Semple Aff., ¶ 6.