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CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 961332

APR 25 2007

RALPH E. HAGAN and MAUREEN K. HAGAN,

Appellants,

v.

ADAMS PROPERTY ASSOCIATES, INC.

Appellee.

APPENDIX

Joseph W. Kaestner
Patricia A. Phillips
KAESTNER & PITNEY, P.C.
422 East Franklin Street
Richmond, VA 23219
(804) 648-2801

Counsel for Appellants

Alexander N. Simon
ATTORNEY AT LAW
422 Franklin Street
Richmond, VA 23219
(804) 783-8282

Counsel for Appellee

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building

ADAMS PROPERTY ASSOCIATES, INC. Plaintiff

v. At Law Number: 94X-3408

RALPH E. HAGAN

and Defendants

MAUREEN K. HAGAN

AMENDED MOTION FOR JUDGMENT

Comes now Adams Property Associates, Inc., a Virginia corporation, by counsel, and for its amended Motion For Judgment against Ralph E. Hagan and Maureen K. Hagan, states as follows:

1. Defendants are the record owners of real property in the City of Richmond located at 1600 Monument Avenue at the northwest corner of Lombardy Street and Monument Avenue and commonly known as the Stuart Court Apartments, whose legal description is:

> ALL that certain lot of land, in the City of Richmond, Virginia, with the improvements thereon, known as 1600 Monument Avenue, and as Lots Nos. 217, 218, 219, 220, 221 and 222 and quadrant court in the rear of the lots Nos. 217 through 221, all as shown on plat made by T. Crawford Redd & Bro., dated September 10, 1901, and of record in the Clerk's Office of the Chancery Court of the City of Richmond, Virginia, in Plat Book 2, page 168, and being more fully shown as Parcel A on plat by F. T. Seargent, Certified Surveyor, dated November 29, 1972, entitled, "Survey and Map showing Improvements Thereon of Two Parcels of Land Situated on Lombardy Street, in Richmond, Virginia, on which it is described as follows:

filed B/O 6/29/95

BEGINNING at a point marked by a stone on the south line of an alley 20 feet wide which extends from Lombardy Street to Allen Avenue, between Monument Avenue and Grace Street, at the intersection of said alley with the northern end of the curved intersection of Lombardy Street and Monument Avenue, thence extending in a southerly, southwesterly and westerly direction along the curved intersection of Lombardy Street and Monument Avenue, along a curve to the right having a radius of 150 feet a distance 223.54 feet to a stone; thence continuing in a westerly direction along the northern line of Monument Avenue, a distance of 30 feet to an "X" in concrete; thence extending in a northerly direction at right angles to Monument Avenue, along the line between Lots 222 and 223 on said plan, a distance of 150 feet to the said alley 20 feet wide at an "X" on the concrete wall; and thence extending in an easterly direction along the south line of said alley a distance of 180 feet to the point of beginning.

2. Plaintiff is a licensed real estate broker with its office in Richmond, Virginia.

3. On April 30, 1994, Plaintiff and Defendants entered into an exclusive authorization to sell the Stuart Court Apartments providing that Plaintiff is to receive a six percent sales commission if the property is sold any time through April 30, 1995. A true copy of the agreement is attached hereto as Plaintiff's Exhibit 1.

4. Defendants' lawyer, Joseph W. Kaestner, Esquire, has confirmed to the Plaintiff that the sale of Stuart Court Apartments is imminent to either R. T. Tepper, Lynn Parsons or a partnership including Tepper and Parsons. Plaintiff understands that the sale will occur on or about January 2, 1995 for a sale price of $1,085,000; such amount being the balance due on the first deed of trust on the property.

5. Plaintiff's attorney has, on December 20, 1994, sent Joseph W. Kaestner as attorney for Defendants, a true copy of the exclusive authorization to sell and requested information concerning the sale including a copy of the sales contract.

6. Plaintiff's attorney has received no response to his December 20, 1994 correspondence and neither Plaintiff nor Plaintiff's attorney have received any further information concerning the sale by the Defendants or any written acknowledgement of plaintiff's exclusive authorization to sell.

7. Defendants' course of action has led Plaintiff to reasonably believe that defendants will attempt to sell Stuart Court Apartments without paying Plaintiff its commission according to the terms of the exclusive authorization to sell; which course of action is an anticipatory breach of the exclusive authorization to sell agreement by the Defendants.

WHEREFORE, your Plaintiff demands judgment against the Defendants in the sum of $65,100.00 representing six percent of $1,085,000, its reasonable attorney's fees, interest at the judgment rate from January 2, 1995 until paid and its costs in this behalf expended.

COUNT II

8. Plaintiff realleges and restates the allegations of paragraphs one through three herein and incorporates them as the allegations of paragraph eight.

9. On or about December 15, 1994, defendants instructed plaintiff to cease and desist from its activities in selling and marketing Stuart Court Apartments, withdrew Stuart Court

Apartments from sale to the public preparatory to the proposed transfer of the Stuart Court Apartments to R. T. Tepper, Lynn Parsons or a partnership including Tepper and Parsons and prevented plaintiff from selling Stuart Court Apartments, all in violation of the April 30, 1994 Exclusive Authorization to Sell Stuart Court Apartments executed by the parties.

10. Defendants have, since December 15, 1994 continued to prevent plaintiff from selling Stuart Court Apartments in contravention of the April 30, 1994 Exclusive Authorization to Sell.

11. Said actions of the defendants are continuing violations of the terms of paragraph five of the Exclusive Authorization to Sell, obligating defendants to pay plaintiff 5% of the $1,600,000 listing price or $96,000.00.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of $96,000.00, interest from December 15, 1994 until paid and its costs in this behalf expended.

ADAMS PROPERTY ASSOCIATES, INC.

By _____
of counsel

Alexander N. Simon
1 N. Fifth Street, Suite 301
Richmond, Virginia 23219

Certificate of Service

I hereby certify that I sent a true and correct copy of the foregoing motion by first class mail, postage pre-paid, to Joseph W. Kaestner, Esquire, P. O. Box 2462, Richmond, Virginia 23201-2462, this 13th day of June, 1995.

_____

RECEIVED & FILED
CIRCUIT COURT
JUL 27 1995

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building

ADAMS PROPERTY ASSOCIATES, INC.,
Plaintiff,

v. Case No.: 760CL94X03408-00

RALPH E. HAGAN

and

MAUREEN K. HAGAN,
Defendants.

GROUNDS OF DEFENSE TO AMENDED MOTION FOR JUDGMENT

COMES NOW Ralph E. Hagan and Maureen K. Hagan (hereinafter the "Defendants"), by counsel, and respectfully files this Grounds of Defense to the Amended Motion for Judgment filed by Adams Property Associates, Inc (hereinafter the "Plaintiff"), and sets forth the following:

1-2. Defendants admit the allegations contained in paragraphs 1 and 2.

3-4. Defendants deny the allegations contained in paragraphs 3 and 4.

5. Defendants admit the allegations contained in paragraph 5.

6-7. Defendants have insufficient knowledge of the allegations contained in paragraphs 6 and 7, therefore they are denied.

8. Defendants incorporate the responses in paragraphs 1 through 7, in response to the allegations set forth in paragraph 8 of the Amended Motion for Judgment.

9. Defendants deny the allegations contained in paragraph 9.

10. Defendants deny the allegations contained in paragraph 10.

11. Defendants deny the allegations contained in paragraph 11.

WHEREFORE, the Defendants deny any and all allegations contained in the Amended Motion for Judgment not specifically admitted and respectfully move that this action be dismissed and that the Defendants be awarded their costs expended, and that it have such further relief as may be appropriate.

RALPH E. HAGAN
MAUREEN K. HAGAN

BY: _____
Of Counsel

Patricia A. Phillips, Esquire
Joseph W. Kaestner, Esquire
KAESTNER & PITNEY, P.C.
The Imperial Building
422 East Franklin Street, 2nd Floor
Richmond, Virginia 23201-2462

CERTIFICATE

I hereby certify that on this 27th day of July, 1995, a true copy of the foregoing Grounds of Defense was mailed, postage prepaid, to Alexander N. Simon, Esquire, The Virginia Building, One North Fifty Street, Suite 301, Richmond, Virginia 23219.

_____

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND
John Marshall Courts Building

ADAMS PROPERTY ASSOCIATES, INC.,

Plaintiff,

v.

Case No. LX-3408

RALPH E. HAGAN and
MAUREEN K. HAGAN,

Defendants.

RECEIVED IN
CIRCUIT COURT
MAR 2 0 1996
DEVILL M. DEAN, CLERK
By ..... D.C.

STIPULATION

Comes now the parties, by counsel, and stipulate the following evidence for trial of the above styled case on March 27, 1996 at 12:00 noon:

1. Plaintiff is a Virginia licensed real estate broker.

2. Defendants, in April 1994, were owners of real estate in the City of Richmond at 1600 Monument Avenue known as the Stuart Court Apartments ("the property")

3. On April 30, 1994, plaintiff and defendants entered into a standard Virginia Association of Realtors Exclusive Authorization to Sell the property commencing May 1, 1994, and expiring on Midnight April 30,1995. A copy of the contract is attached, and made a part of these stipulations (1).

4. Commencing April 30, 1994, and continuing throughout the better part of 1994, plaintiff expended time and money attempting to sell the property.

TM
3/27/96

5. On or about August 31, 1994 plaintiff received a letter of intent executed by Roy Tepper and Lynn Parsons, a copy of which is attached and made a part of these stipulations (2). The letter of intent was presented to the defendants and the defendants declined to execute the letter.

6. On or about October 31, 1994 plaintiff, having received a verbal offer from Roy Tepper and Lynn Parsons to purchase the property, communicated the offer to the defendants by letter. The offer was not accepted by the defendants. A copy of the letter is attached, and made a part of these stipulations (3).

7. On or about December 1, 1994, B. Tucker Adams, Jr., principal broker in plaintiff, was told by the lawyer for the defendants that a deal had been struck with Roy Tepper and Lynn Parsons to transfer the property. At that time the property was encumbered by a first deed of trust note with a balance of $1,028,000.

8. Adams did not participate in, and was not privy to, any further discussions between Hagan, Tepper and Parsons or their agents.

9. On or about December 1, 1994, as part of an agreement between the defendants, Roy Tepper and Lynn Parsons, The Roy Tepper irrevocable inter vivos trust and the Lynn Parsons irrevocable inter vivos trust commenced making payments on the first deed of trust note, such payments paid interest but did not reduce the principal owing on the first deed of trust note.

10. a) By deed dated April 23, 1995 and notarized April 28, 1995, defendants transferred the property to Hagan, Parsons and Tepper, L.L.C., a newly formed limited liability company whose members are Roy Tepper, Lynn Parsons and the defendants, Ralph

Hagan and Maureen Hagan. A copy of the Quitclaim Deed and Articles of Organization of the L.L.C. are attached, and made a part of these stipulations (4 and 5).

b) By deposition testimony, Lynn Parsons stated that the property transferred to the L.L.C. in December 1994 or January 1995.

c) The limited liability company was formed for the purpose of acquiring the property. The rights, duties and responsibilities of the members of the L.L.C. are governed by an operating agreement among them. A copy of the operating agreement is attached, and made a part of these stipulations (6).

d) Other than an interest in the L.L.C., Hagan received no other consideration for the transfer of the property to the L.L.C..

11 The balance of the first deed of trust note on the property was $1,028,000 in April 1995 when the property was transferred from the defendants to the L.L.C.

12. a) At the deposition of defendant Ralph E. Hagan, he stated that he transferred the property to the limited liability company in return for the assumption of the debt on the property which was $1,028,000.

b) In response to plaintiff's interrogatory number three, defendants stated that they invested their ownership in Stuart Court Apartments in the L.L.C. A copy of the operating agreement for the L.L.C. is attached.

13. No commission of any sort was paid plaintiff upon the transfer of the property to Hagan, Parsons and Tepper, L.L.C.

14. The Roy Tepper irrevocable inter vivos trust and the Lynn Parsons irrevocable inter vivos trust purchased the first deed of trust note on the property in June, 1995, for $775,000.00.

ADAMS PROPERTY ASSOCIATES, INC.

By: _____
Of Counsel

Alexander N. Simon
422 E. Franklin Street
Suite 304
Richmond, Virginia 23219

RALPH E. HAGAN
MAUREEN K. HAGAN

By: _____
Of Counsel

Joseph W. Kaestner
422 E. Franklin Street
Second Floor
Richmond, Virginia 23219

REALTOR®

EXCLUSIVE AUTHORIZATION TO SELL

(This is a legally binding contract; if not understood, seek competent advice before

This AGREEMENT made as of April 30, 19 94, between Ralph E. Hagan (herein called "Owner"), and Adams Property Associates, Inc. (herein called "REALTOR®"), prov

1. Owner grants to REALTOR® the EXCLUSIVE and irrevocable right to sell certain real estate and any improvements thereon w is owned by Owner and which is hereafter described (all herein call "the property") commencing on May 1, 19 94 and expiring at midnight on April 30, 19 95 (herein called "initial period of time"), for the price of One Million Two Hundred Thousand $1,200,000 Dollars ($ 1,200,000.00), payable in c or for such other prices or such other terms and conditions as Owner may subsequently authorize within the initial period of time.

2. REALTOR® agrees to make reasonable efforts to obtain a purchaser or purchasers for the property during the initial period of t

3. The property is located in the City or County of Richmond and is described as follows: 1600 Monument Avenue, Richmond, Virginia metes and bounds Lombardy Street and Monument Avenue

and more commonly known as Stuart Court Apartments (63 apartment units) (street addre

4. If the property is sold or exchanged by REALTOR®, or by Owner with or without the assistance of REALTOR®, within the in period of time, Owner agrees to pay REALTOR® a fee of Six percent (6%) of gross sales amount. If the property is sold or exchanged by REALTOR®, by Owner, or by any other person, to any purch or purchasers to whom the property was shown, offered, or introduced by REALTOR®, or by any licensed broker or salesperson employe or affiliated with REALTOR®, within 360 days after the expiration of the initial period of time, Owner agrees to pay REALTOR® same fee previously mentioned above. However, Owner shall not be obligated to pay such fee to REALTOR® if, after the expiration of the in period of time, Owner enters into an exclusive authorization to sell or exchange the property with a licensed broker or salesperson other t REALTOR®, or a licensed broker or salesperson employed by or affiliated with REALTOR®, and the property is sold or exchanged purs to such exclusive authorization.

5. If Owner should withdraw the property from sale during the initial period of time, or otherwise prevent REALTOR® from selling property during the initial period of time, Owner agrees to pay REALTOR® the same fee mentioned above.

6. If, after a valid contract of purchase of the property is executed by Owner and a purchaser or purchasers, there is a default by purchaser or purchasers which prevents performance of such contract of purchase through no fault of Owner, REALTOR® agrees that Ow will not be liable for the fee of REALTOR® and that REALTOR® will look to such defaulting purchaser or purchasers for compensation rela to such contract. Owner agrees that, if such a default occurs, this exclusive authorization to sell shall remain in effect between Owner and REALTO until its expiration and that payment of the fee of REALTOR® by such defaulting purchaser or purchasers shall not satisfy any obligation wh may arise if, subsequent to such default, another valid contract of purchase of the property is brought about by REALTOR®.

7. Owner agrees that during the initial period of time REALTOR® is authorized to place "FOR SALE" signs on the property, to rem all signs of other brokers or salespersons and to take all appropriate action to bring about a sale of the property. Owner agrees to make property available to REALTOR® and real estate brokers and salespersons employed by or affiliated with REALTOR® at all reasonable ho for the showing of it to prospective purchasers. Owner also agrees to refer to REALTOR® all inquiries or offers which Owner may rece

8. In the event of a sale of the property, Owner agrees to convey the property to any purchaser or purchasers by general warranty d with the usual English covenants of title and free and clear from all encumbrances, tenancies, and liens (for taxes or otherwise), but sub to applicable easements and restrictive covenants of record not adversely affecting the use of the property.

9. Owner hereby authorizes ___ does not authorize X REALTOR® X to place a lock box on the property and ___ to sub pertinent information concerning the listing of the property, including the information contained in the "Information on Residential Propert to the Commercial Multiple Listing Service, to distribute such information to other REALTORS®, and to solicit the cooperat of other REALTORS® in securing a purchaser or purchasers for the property.

10. Owner understands and agrees that in consideration of the use of services and facilities of REALTOR® or the Multiple Listing Ser identified in paragraph 9, Owner agrees that neither REALTOR® nor any agents accompanying purchasers or prospective purchasers, nor Multiple Listing Service, nor the directors, officers and employees thereof, including officials of any parent Board of REALTORS®, shal liable for any vandalism, theft or damage of any nature whatsoever to the Property or its contents during the period of this exclusive autho tion to sell, and Owner waives any and all rights, claims, and causes of action against any of them and holds them harmless for any prope damage or personal injury arising from the use of or access to the Property by any person during the listing period, but excluding property dam or personal injury arising out their own malfeasance.

11. Owner has completed the "Information on Residential Property" form on the reverse side hereof. Owner represents and warra that to the best of Owner's knowledge and belief the information set forth therein is true and correct as of the date hereof. The parties ag that such information is incorporated into and constitutes a part of this exclusive authorization to sell.

12. This exclusive authorization to sell may not be modified or changed except by written instrument executed by the parties, and it sl be construed, interpreted, and applied according to the law of Virginia. It shall be binding upon and shall inure to the benefit of the heirs, perso representatives, successors, and assigns of the parties.

13. Owner understands that he or she has the right to choose any attorney to prepare the deed to the property or to otherwise repre Owner in connection with the sale of the property.

14. In the sale, purchase, exchange, rental, or lease of real property, REALTOR® has the responsibility to offer equal service to all clie and prospects without regard to race, color, religion, sex or national origin.

Witness the following duly authorized signatures and seals:

[SEPARATE ALL COPIES BEFORE SIGNING BELOW]

[illegible] is made during the term or any protection period.

This agreement shall be legally binding upon the undersigned and their respective heirs, personal representatives, duly authorized agents, successors and assigns.

We acknowledge that we have each received a copy hereof.

FIRM: Adams Property Assoc Inc

Accepted by: [signature]

Date 4-30-94

Public ID#: _____

RENEWAL _____ No _____ Yes

RMLS # _____

Owner: Ralph E Hagan — Date: 4/30/94

By: Maureen K. Hagan — Title: Owner — Date: 4/30/94

Owner — Date

By — Title

WHITE - FIRM COPY
YELLOW - RMLS COPY

TEPPER BROTHERS REALTY COMPANY, INC.

PROPERTY MANAGEMENT • SALES • REALTORS
REAL ESTATE SINCE 1938

2111 WEST MAIN STREET • RICHMOND, VIRGINIA 23220
(804) 355-5775 • FAX (804) 353-5514

J. L. PARSONS

R. T. TEPPER

August 31, 1994

Dr. Ralph Hagan
Mrs. Maureen Hagan
C/O Tucker Adams

RE: 1600 Monument Ave., including adjacent lot, 1601-5 W. Grace St.
More commonly known as "Stuart Court Apartments."

Dr. Hagan,

It is the intention of Roy T. Tepper and J. Lynn Parsons to enter into an agreement to "Joint Venture" the above property. Tepper and Parsons will form a partnership with the current owners to successfully own and operate the apartments in a profitable manner.

Tepper and Parsons will fund all monies needed to purchase the existing first deed of trust securing the property. We have talked with Freddie Mac and they are more than willing to allow the purchase of the note. We feel a discount can be negotiated to reduce the principle. Any discount that can be negotiated will be split equally among the partners.

Tepper Brothers Realty Co. Inc. will purchase the current management contract from Adams Property Associates. The purchase price will be set by agreement among Tepper Brothers and Adams Property. Tepper Brothers will assume management of the property no later than October 1, 1994.

Upon settlement, Tepper and Parsons will fund all monies necessary to operate the apartments as well as the current first mortgage payment. Thus, Dr. Hagan will no longer have to come out of pocket to make any payments or pay any bills.

Tepper Brothers Realty will maintain all books and records relavent to to the apartments. Dr. Hagan will receive a monthly statement of all income and expenses incurred during the month. In the event that the apartments do not generate enough income to cover the current months expenses then Tepper and Parsons will advance all funds necessary to cover the account. Tepper and Parsons will correct all defferred maintainence and advance money to cover the repairs in an amount not to exceed $100,000.00.

It is agreed among the parties that Adams Property Associates, Inc. will be paid a commission of $25,000.00 upon the closing of the refinance of the first mortgage.

This letter of intent must be acted upon no later than September 15, 1994. Time being of the essence.

Agreed:

R T Tepper 8/31/94
R.T. Tepper

Dr. Ralph Hagan

J.L. Parsons 8/31/94
J.L. Parsons

Mrs. Maureen Hagan

Adams
PROPERTY
ASSOCIATES
I . N . C

October 31, 1994

Ralph E. Hagan, M.D.
1400 Westwood Avenue Suite 311
Richmond, Virginia 23227-4627

Re: Sale of Stuart Court Apartments

Dear Dr. Hagan:

This is to encourage you to reconsider an offer to purchase Stuart Court Apartments by Lynn Parsons and Roy Tepper for One Million Four Hundred Thousand Dollars ($1,400,000). Their purchase is predicated on transfer of title fee simple. Their concern is that a search of the property title reveals many liens and the purchaser is concerned about the removal of same.

Per copy of this letter, I am requesting that Joe Kaestner advise us as to the correct legal direction we should pursue to satisfy this problem in the event you elect to accept this offer.

Sincerely,

B. Tucker Adams, Jr.

BTAJr/c

cc: Joseph W. Kaéstner, Esquire

8409 Staples Mill Rd., Suite C
Richmond, Virginia 23228

QUITCLAIM DEED

THIS QUITCLAIM DEED, made and entered into this 23 day of April, 1995, by and between DR. RALPH HAGAN AND MAUREEN HAGAN, the Grantors, parties of the first part, and HAGAN, PARSONS & TEPPER, L.L.C., the Grantee, party of the second part, whose registered agent and address is: W. Richard Hairfield, 2111 West Main Street, City of Richmond, Virginia 23219;

WITNESSETH:

That for and in consideration of the sum of Ten Dollars ($10.00), cash in hand paid, the receipt of which is hereby acknowledged by the parties of the first part, the said parties of the first part do hereby quitclaim, release, and convey unto the said Hagan, Parsons & Tepper, L.L.C., Grantee, any and all right, title and interest they may possess in and to the following described real estate, to-wit:

> ALL that certain lot of land, in the City of Richmond, Virginia, with the improvements thereon, known as 1600 Monument Avenue, and as Lots Nos. 217, 218, 219, 220, 221, 222, and 223 and a quadrant court in the rear of the lots Nos. 217 through 221, all on the plan made by Paciulli, Simmons & Associates, Ltd., dated September 23, 1986, Revised October 14, 1986, a copy of which is attached to and made a part of this conveyance and further description with more particularly as follows:

PARCEL A:

BEGINNING at a point marked by a stone on the south line of an alley 19.90 feet wide which extends from Lombardy Street to Allen Avenue, between Monument Avenue and West Grace Street, at the intersection of said alley with the northern end of the curved intersection of Lombardy Street and Monument Avenue, thence extending in a southerly, southwesterly and westerly direction along the curved intersection of Lombardy Street and Monument Avenue, along a curve to the right having a radius of 150 feet a distance of 234.19 feet to a stone; thence continuing

in a westerly direction along the northern line of Monument Avenue, a distance of 60 feet to a found nail in the curb in concrete; thence extending in a northerly direction at right angles to Monument Avenue, along the line between western property line of 223 on said plan, a distance of 150 feet to the said alley 19.90 feet wide at a found rod; and thence extending in an easterly direction along the south line of said alley a distance of 210 feet to the point of beginning;

PARCEL B:

BEGINNING at a stone at the intersection of the southern line of West Grace Street with the western line of Lombardy Street, thence extending westwardly along the southern line of West Grace Street and fronting thereon 70.65 feet to a point thereon opposite the party wall between Nos. 1605 and 1607 West Grace Street, thence from said front extending back southwardly, between lines nearly parallel, the eastern of which is the west line of Lombardy Street, and the western of which passes in part through said party wall, 140 feet to an alley 19.90 feet wide, on which said lots abut 71.60 feet.

BEING the same real estate conveyed to Ralph E. Hagan, et als from Stuart Court Property Corporation, by deed dated May 16, 1978, recorded June 7, 1978, in the Clerk's Office of the Circuit Court of the City of Richmond, Division I, Virginia in Deed Book 737, page 1668.

WITNESS the following signature and seal:

Ralph E Hagan
Dr. Ralph Hagan (SEAL)
DR. RALPH HAGAN

Maureen (SEAL)
MAUREEN HAGAN

ACKNOWLEDGEMENT

STATE OF VIRGINIA,
CITY OF RICHMOND, to-wit:

I, LISA MCCREA, a Notary Public in and for the City of Richmond, State of Virginia, do hereby certify that Dr. Ralph Hagan and Maureen Hagan, whose names are

signed to the above writing bearing the date of the 28TH day of April, 1995, have acknowledged the same before me in my City aforesaid:

Given under my hand this 28TH day of April, 1995.

Lisa S. McCrea
Notary Public

My commission expires: 4-30-98

ARTICLES OF ORGANIZATION

OF

HAGAN, PARSONS & TEPPER, L.L.C.

Pursuant to Virginia Code Section 13.1-1000, et seq., the following information is provided to the STATE CORPORATION COMMISSION OF VIRGINIA for the organization of a Limited Liability Company under the Virginia Limited Liability Company Act:

ARTICLE ONE

The name of the limited liability company shall be HAGAN, PARSONS & TEPPER, L.L.C.

ARTICLE TWO

The initial registered agent, being a member of the limited liability company and a resident of Virginia, and the initial registered office of the limited liability company shall be:

Lynn Parsons
2111 West Main Street
City of Richmond, Virginia 23219.

ARTICLE THREE

The principal office of the limited liability company shall be located at:

2111 West Main Street
City of Richmond, Virginia 23219.

ARTICLE FOUR

The latest date on which the limited liability company is to be dissolved and its affairs wound up is January 1, ~~1995.~~ 2005 → Corrected on 1/19/95 by Hazel Waller, SCC

ARTICLE FIVE

The limited liability company is organized for the purpose of operating and conducting any and all lawful business.

1/15/95
Dated

Scott K. Monroe
Organizer:
Scott K. Monroe, Esq.

Commonwealth of Virginia

STATE CORPORATION COMMISSION

Richmond, January 17, 1995

This is to Certify that the certificate of organization of

HAGAN, PARSONS & TEPPER, L.L.C. ID: S-07028

was this day issued and admitted to record in this office and that the said limited liability company is authorized to transact its business subject to all the laws of the State applicable to the company and its business.

State Corporation Commission

William J. Bridge

Clerk of the Commission

STATE CORPORATION COMMISSION VIRGINIA SIC SEMPER TYRANNIS 1903

HAGAN, PARSONS & TEPPER, L.L.C.

OPERATING AGREEMENT

THIS OPERATING AGREEMENT (the "Agreement") is made as of the _____ day of April, 1995, by and among (I) HAGAN, PARSONS & TEPPER, L.L.C. (hereinafter referred to as the "Company"), a Limited Liability Company duly organized, validly existing and in good standing under the laws of the Commonwealth of Virginia; (ii) RALPH AND MAUREEN HAGAN, as tenants by the entirety with right of survivorship ("Hagan"); (iii) LYNN PARSONS ("Parsons"); and (iv) ROY T. TEPPER ("Tepper"), or their assigns, nominees or third persons over which they have effective control, including, but not limited to any Trust of which they are Trustor, in whole or in part, or corporations or businesses (Hagan, Parsons and Tepper being hereinafter sometimes collectively referred to as the "parties" or the "Members").

WHEREAS, the parties have established the Company entity to acquire, own and operate the Stuart Court Apartments, and 1607 and 1609 West Grace Street in the City of Richmond (hereinafter referred to as the "Property"), or the first deed of trust note on the Property; and,

WHEREAS, the parties hereto believe it is in the best interests of the Company and of the individual members to form a contract that will be agreed to between the parties concerning the ownership and operation of the Property, providing for continuity and harmony in management and certain other matters; and,

WHEREAS, the parties hereto desire to set forth in writing their understandings and agreements.

NOW THEREFORE, in consideration of the foregoing, of the mutual promises hereinafter set forth and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

1.

PURPOSE AND POWERS

1.1 Purpose. The primary purposes of this agreement are:

(1) to govern the ownership and operation of the Company, the establishment of which is made to acquire and own the Property; and

(2) to govern the agreements between the parties concerning the ownership and operation of the Property.

1.2 Powers. The Company shall be empowered to do all things lawful which are necessary or convenient to carry out its business and affairs.

1.3 Fulfillment of Purpose. The parties agree that the sole purpose for the formation of the Company is to acquire, own and operate the Property. Hagan shall, forthwith, transfer all of his interest in the Property to the Company. Fee simple ownership of the Property shall be accomplished by the Company in one of three ways:

(1) By obtaining a Deed to the Property from Ed and Jean Mayne;

(2) By acquiring the first Deed of Trust note on the Property. In the event that the first Deed of Trust note is acquired, the parties shall foreclose on the Property and then transfer the Property to the Company; or

(3) In the event that the parties are unable to acquire the first Deed of Trust on the Property, Hagan agrees to transfer his interest in the property, subject to all encumbrances and liens of record, to the Company, and the Company will then acquire the Property by whatever means it deems

necessary.

2.

FLOW OF DEBT; ENCUMBRANCES

2.1 Flow of Debt. In the event that fee simple title to the Property is acquired through foreclosure, then the debt and cost of acquiring the Property will run from the Company to Parsons and Tepper at the amount of the acquisition cost of the first Deed of Trust note plus the cost of foreclosure, and at an interest rate not greater than that in the first Deed of Trust note. This debt will be secured by a deed of trust on the Property without personal endorsements or guarantees.

In the event that fee simple title is acquired through the purchase of Ed and Jean Mayne's interest, then Tepper and Parsons shall bear the cost of the purchase, and upon purchase, transfer the interest acquired to the Company. They shall receive a note in an amount equal to the purchase price, plus interest at the prevailing commercial mortgage interest rate, secured by a deed of trust on the Property.

2.2 Second and Third Deeds of Trust. Hagan will have a second deed of trust on the Property in an amount of $323,000.00. This second deed of trust will be a non-interest bearing deed of trust and will be due and payable upon the sale of the Property, and will have priority over the payments to anyone other than the holder of the first Deed of Trust note. This second deed of trust will be subordinated to any other deed of trust necessary for the development of the Property.

Parsons and Tepper will be entitled to reimbursement, from the proceeds of the sale of the property, for any sums expended in liquidating the operating debt of the property that esixts on the date of the execution of this agreement. No interste shall be charged on the debt. At their election, the right to reimbursement called for in this paragraph shall be secured by a deed of trust, inferior to that of Hagan.

2.3 Further Contributions. Parsons and Tepper are aware that there are certain unpaid obligations incurred in connection with the Property. The Company shall assume all existing liabilities. Hagan will not be called upon or required to make any additional contributions to the Property or the Company for any reason. However, he may consent to such future contributions.

2.4 Maintenance and Repairs. Parsons and Tepper shall take

all steps necessary to bring the Property into a condition of good repair and shall further take all steps necessary to continually maintain the Property in a state of good repair.

2.5 Outside Debt. Parsons and Tepper shall assume all of the outstanding indebtedness of the Property, including purchase money debt, operating or other debt.

3.

OWNERSHIP INTERESTS; PROFITS AND LOSSES

3.1 Ownership Interest of Members. The Members shall each own an equal one-third interest in the Property. Said ownership interests shall be used in order to calculate the following:

(1) the amount of profits and losses generated by the Company that each member has a right to share in;

(2) the allocation of certain distributions of cash and other assets of the Company that each member has a right to;

(3) the amount of surplus proceeds of the Company upon any sale of the Property;

(4) the amount of proceeds a member is entitled to in case of the resignation of that member from the Company; and

(5) the amount of proceeds that each member is entitled to receive from the Company upon dissolution of the Company.

3.2 Profits and Losses. The profits and losses of the Company shall be allocated among the members in accordance with their respective ownership interests. The profits of the Company shall be determined by the amount of gross rents received during a specified time period, less expenses that are directly attributable to the management of the Property.

3.3 Tax Considerations. The members of the Company shall share equally in any depreciation or benefits accruing or inuring to the Property.

3.4 Accountant. The members of the Company shall employ a certified public accountant, chosen by unanimous consent of all the members, who will determine the fair value of the Property and/or the fair value of each member's respective ownership interest. These values will be employed by the Company for the allocation of profits and losses, distributions to members, or in situations involving resignation of a member, or the dissolution

of the Company.

4.

DISTRIBUTIONS

4.1 Distributions. Distributions of cash or other assets of the Company shall be allocated among the members based upon the value of each member's respective ownership interests.

4.2 Interim Distributions. A member is entitled to receive distributions from the Company before his resignation from the Company and before the dissolution and winding up thereof. Such distributions shall be determined by unanimous consent of all members.

4.3 Distribution in Kind. A member, regardless of the nature of his contribution to the Company, has no right to demand and receive any distribution from the Company in any form other than cash. A member may not be compelled to accept a distribution of any asset in kind from the Company to the extent that the percentage of the asset distributed to him exceeds a percentage of that asset which his membership interest constitutes of all membership interests in the Company.

4.4 Restrictions on Distributions. No distribution may be made by the Company if, after giving effect to the distribution:

(1) the Company would not be able to pay its debts as they became due in the usual course of business; or

(2) the Company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the Company were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of members whose preferential rights are superior to the rights of members receiving the distribution.

4.5 Liability Upon Wrongful Distribution. If a member has received a distribution in violation of this Operating Agreement, then he is liable to the Company for a period of ten (10) years thereafter for the amount of the distribution wrongfully made.

4.6 Right to Distribution. At the time a member becomes entitled to receive a distribution, he has the status of, and is entitled to all remedies available to, a creditor of the Company with respect to the distribution.

5.

RESIGNATION OF MEMBERS

5.1 Resignation of Member. A member may resign from the Company upon not less than six (6) months prior written notice to each member at his or her address as contained in the Company records.

5.2 Buy-Out Provision. Upon an effective resignation, the Company shall purchase all of the resigning member's ownership interest, upon such terms and conditions as the parties may agree. In the event that the parties cannot agree, the resigning member shall receive his interest in the proprty as reflected on the books and records of the property. In addition, the resiging member shall receive payment for all of the secured debt to which he is entitled.

5.3 Avoidance of Dissolution. Upon an effective resignation of a member of the Company as specified above, no automatic dissolution of the Company shall occur. If the remaining members of the Company desire to continue the business of the Company, they may do so by their unanimous consent.

6.

MANAGEMENT AND VOTING

6.1 Management of the Company. Each member of the Company shall be entitled to equal participation in the management decisions and control within the Company except as otherwise provided herein. All members of the Company shall have equal votes.

6.2 Designation of Managers. Parsons and Tepper are hereby designated as managers of the Company, with rights, duties and obligations to be defined as follows:

(1) The managers of the Company are under a duty to the Company to acquire the Property by any of the means set forth in Section 1 above. In accomplishing this task, the managers are obligated to ensure that the Property is secured by the Company free and clear of any and all liens and encumbrances of record to the Company owned by any third party.

(2) The managers shall be required to enter into a contract with the Company regarding the extent of their rights, duties and obligations. This contract will govern more specifically how the Property is to be managed and operated by

the Company once it has been acquired. In addition, this contract shall set a management fee for Parsons and Tepper. This management contract is to be approved unanimously by the members, and shall be incorporated into and made a part of the terms of this Operating Agreement.

6.3 Contract Approval. Once the management contract between Parsons and Tepper and the Company has been agreed upon, Parsons and Tepper shall begin to undertake the tasks of acquiring and managing the Property. As managers, Parsons and Tepper will have the authority to enter into business contracts regarding the operation of the Property for the Company. Any contracts entered into by the managers on behalf of the Company shall be subject to a right of review by any member of the Company. In addition, any member will have a right of review of any records of expenses that have been charged against the Company. Contracts entered into by the managers on behalf of the Company in the ordinary course of business shall not require unanimous approval by all the members of the Company, with the exception of the following, which shall require unanimous consent:

(1) All employment contracts and salaries must be approved unanimously.

(2) Any contract entered into for the sale, encumbrance, or improvement of all or substantially all of the Company assets shall require unanimous consent, with the exception of ordinary maintenance, servicing and repairs, which shall only require majority approval.

7.

AMENDMENT OF OPERATING AGREEMENT OR ARTICLES

7.1 Amendments. All members of the Company must give their unanimous approval to any amendment of this Operating Agreement or the Articles of Organization. Any amendment of the Articles of Organization, including a change of the effective date of dissolution, must also be enacted in accordance with the provisions of Section 13.1-1014 of the Code of Virginia.

8.

LIMITATION OF LIABILITY OF MEMBERS; INDEMNIFICATION

8.1 Limitation of Liability. In the event any proceeding is brought against the Company, or against a member of the

Company acting as an agent of the Company, the Company shall undertake to indemnify and hold harmless the member to the extent of his individual ownership interest in the Company. This includes the following:

(1) The managers of the Company shall have the right of complete indemnification from the Company for any claims against them or against the Company resulting from their management decisions in the ordinary course of business.

(2) Hagan has a right to complete indemnification for any claim regarding either his transfer of interest in the Property, or the termination of any management agreement with Tucker Adams.

(3) The liability of a manager or member shall not be limited as provided in this section if the manager or member engaged in willful misconduct or a knowing violation of the criminal law.

(4) No limitation on or elimination of liability adopted pursuant to this section may be affected by any subsequent amendment of the Articles of Organization or Operating Agreement with respect to any act or omission occurring before such amendment.

9.

TRANSFERABILITY OF INTEREST AND ASSIGNMENTS; ADMISSION OF NEW MEMBERS

9.1 Transfer of Ownership Interest. Each member's ownership interest, including all of the member's rights to profits and losses in the Company and the right to take part in the management of the Company, may not be transferred or assigned to a third party, either in whole or in part, without the unanimous approval and written consent of all the members of the Company. An assignment of an interest in the Company does not of itself dissolve the Company. An assignment does not entitle the assignee to participate in the management and affairs of the Company or to become or exercise any rights of a member. Such an assignment entitles the assignee to receive, to the extent assigned, only any share of profits or losses and distributions to which the assignor would be entitled. A member ceases to be a member upon assignment of any part of his membership interest.

9.2 Right of Assignee to Become Member. An assignee of an interest in the Company may become a member only if the other members unanimously consent. An assignee who has become a member

has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a member under the Articles of Organization and this Operating Agreement. If an assignee of an interest in the Company becomes a member of the Company, the assignor is not released from any liability that he may have to the Company.

9.3 Admission of New Members. A person or entity may become a member of the Company:

(1) In the case of a person acquiring a membership interest directly from the Company, upon the unanimous consent of all members; and

(2) In the case of an assignee of a membership interest, in the manner provided in Section 9.2 of this Agreement (above).

9.4 Time of Admission. The effective time of admission of a member to the Company shall be the later of the date the Company is formed, or the time when the member's admission is reflected in the records of the Company.

10.

DISSOLUTION

10.1 Dissolution Generally. The Company shall be deemed to be dissolved and its affairs would up upon the happening of the first to occur of the following events:

(1) At the time of the effective date of dissolution as specified in the Articles of Organization, or in any amended Articles of Organization;

(2) Upon the unanimous written consent of all its members; or

(3) Upon the entry of a decree of judicial dissolution under Section 13.1-1047 of the Code of Virginia.

In the event of the death, resignation, expulsion, bankruptcy, or dissolution of a member or occurrence of any other event that terminates the continued membership of a member in the Company, no automatic dissolution will occur. The business of the Company may, at that time, be continued by the unanimous consent of the remaining members. If there is only one remaining member upon the happening of such an event, the Company shall be deemed to be automatically dissolved.

10.2 Winding Up. The members who have not wrongfully dissolved the Company shall be entitled to wind up its affairs.

11.

MISCELLANEOUS

11.1 Invalid or Unenforceable Provisions. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provision were omitted.

11.2 Benefit and Burden. This Agreement shall inure to the benefit of, and shall be binding upon, the parties hereto and their legatees, distributees, estates, executors, administrators, personal representatives, successors of interest and assigns, and other legal representatives.

11.3 Gender. The use of any gender herein shall be deemed to be or include the other genders and the use of the singular herein shall be deemed to be or include the plural (and vice versa), whatever is appropriate.

11.4 Changes; Waiver. No change or modification of this Agreement shall be valid unless the same is in writing and signed by each one of the parties hereto. No waiver of any provision of this Agreement shall be valid unless in writing and signed by the person against whom sought to be enforced the failure of any condition, promise, agreement or understanding set forth herein shall not be construed as a waiver or relinquishment of the right to insist upon strict performance of the same or any condition, promise, agreement or understanding at any time in the future.

11.5 Entire Agreement. This Agreement sets forth all of the promises, agreements, conditions, understandings, warranties, and representations among the parties hereto with respect to the ownership and operation of the Property and the operation of the Company. There are no promises, agreements, conditions, understandings, warranties or representations, oral or written, express or implied, among the parties except as set forth herein. Any and all prior agreements among the parties with respect to the ownership and operation of the Property and the operation of the Company are hereby revoked. This Agreement is, and is intended by the parties to be, an integration of any and all prior agreements or understanding, oral or written, with respect to the ownership and operation of the Property and the operation of the Company.

11.6 Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the Commonwealth of Virginia.

11.7 Headings. The headings, subheadings and other captions in this Agreement are for convenience and reference only and shall not be used in interpreting, construing or enforcing any of the provisions of this Agreement.

11.8 Term of Agreement. This Agreement shall be effective as of the date first herein above set forth and shall terminate at such time only when all members shall elect to terminate this Agreement pursuant to any provision of this Agreement or otherwise. Notwithstanding the foregoing, certain sections of this Agreement may terminate prior to the aforesaid termination if such sections provide.

11.9 Arbitration. Any controversy arising under this Agreement shall be settled by the complaining member or members and the Company agreeing on an arbitrator, whose decision shall be binding. If after thirty (30) days the parties cannot agree on an arbitrator, then the Chief Judge of the Circuit Court of the City of Richmond shall appoint an arbitrator. Nothing in this section shall limit the right of any member to petition a Court of competent jurisdiction for temporary equitable relief.

IN WITNESS WHEREOF, the Company has caused this Agreement to be executed by its duly authorized members and its company seal to be affixed hereto, and each member has executed this Agreement under seal, all as of the day and year first written.

THE COMPANY:

HAGAN, PARSONS & TEPPER, L.L.C.

BY:_____

MEMBERS:

_____(SEAL)
RALPH HAGAN

_____ (SEAL)
MAUREEN HAGAN

_____ (SEAL)
LYNN PARSONS

_____ (SEAL)
ROY T. TEPPER

961332

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JUN 25 1996
RICHMOND, VIRGINIA

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

3

4 ADAM PROPERTIES

5 vs.

6 RALPH HAGEN

7

8

9 March 27, 1996

10 Richmond, Virginia

11

12 Complete transcript of the hearing and

13 other incidents in the above, when heard before The

14 Honorable T.J. Markow, Judge.

15

16

17 HALASZ REPORTING
Post Office Box 1644

18 Richmond, Virginia 23218-1644
(804) 741-5215

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1 I N D E X

2 ==========

3 Page

4 BEVERLY TUCKER ADAMS

5 By Mr. Simon 3

6 By Mr. Kaestner 15

7 By Mr. Simon 19

8 RALPH HAGEN

9 By Mr. Kaestner 20

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1
2 THE COURT: All right, are you ready to
3 proceed?
4 MR. SIMON: Yes, Your Honor. Plaintiff
5 has a motion for summary judgment for the Court, and
6 I didn't know if you wanted to hear argument on that
7 or go straight to evidence and take it under
8 advisement.
9 THE COURT: I don't want to take anything
10 under advisement, but let's hear the evidence, I
11 guess. We're here for a merit hearing, right?
12 MR. SIMON: Yes, Your Honor, and we have
13 submitted the stipulation.
14 THE COURT: Was what?
15 MR. SIMON: The stimulation that's been
16 submitted covers 95 percent of the evidence, and plus
17 plaintiff's case will merely be to supplement a few
18 items of stipulation.
19 Mr. Adams.
20 THE COURT: Approach the bench if you
21 would, sir, raise your right-hand.
22
23
24
25

1 BEVERLY TUCKER ADAMS, called by the plaintiff,
2 first being duly sworn, testified as follows:
3
4 EXAMINATION BY MR. SIMON:
5
6 Q Good afternoon, Mr. Adams, please state
7 your full name.
8 A Beverly Tucker Adams, Jr.
9 Q And what you do for a living?
10 A I'm a real estate broker in the
11 Commonwealth of Virginia, and I specialize in
12 commercial real estate.
13 Q And are you the principal broker and
14 principal owner of the --
15 THE COURT: Put the thing up to your
16 mouth.
17 Q Are you the principal broker and the
18 principal owner of Adams Property Associates, Inc.,
19 the plaintiff here today?
20 A That is correct.
21 Q And how long have you been involved in
22 commercial real estate in Virginia?
23 A Twenty-five years.
24 Q And very briefly, who have you been
25 involved with over that 25 years?

1 A Spent ten years with Harrison and Bates,
2 Inc., spent about six years with Virginia Landmark,
3 couple of years with Kennery and Cooke.
4 Q And now you have your own firm?
5 A That's correct.
6 Q And in all that time, commercial real
7 estate has been the major portion of your activity?
8 A That's correct.
9 Q And has all that been in the Richmond
10 area?
11 A That has been in the Richmond area.
12 Q Now, as a commercial real estate broker,
13 did there come a time that you entered into a listing
14 agreement that's been stipulated here with Dr. and
15 Mrs. Hagen?
16 A Yes.
17 Q Now, after that time, did there come a
18 time when you had discussions with Mr. Parsons about
19 purchasing the Stuart Court Apartments?
20 A Yes, I did.
21 Q Now, how did that first conversation with
22 Mr. Parsons and you come about?
23 A Mr. Parsons called me in response to a
24 newspaper ad that I had run in the Richmond Newspaper
25 advertising the property for sale. He called and

1 requested information.
2 Q Okay, now, there are several matters
3 stipulated here regarding your further conversations
4 with Mr. Parsons, so we won't ask you about these.
5 But moving on to the time frame of the end of October
6 of 1994, and if you will look at stipulation number
7 6, it talks about an offer from Mr. Parsons to
8 purchase the property.
9 The stipulation says a verbal offer from
10 Roy Tepper and Lynn Parsons. Who made that offer to
11 you?
12 A Both Mr. Parsons and Mr. Tepper.
13 Q Both of them did?
14 A That's correct, yes.
15 Q And was that in your office, was it their
16 office, how did that come about?
17 A It was first over the telephone, and then
18 I met with Mr. Parsons and Mr. Tepper, and we
19 collectively went to visit Dr. Hagen to discuss that
20 offer.
21 Q Now, again submitted as part of the
22 stipulation is a letter you wrote to Dr. Hagen which
23 refers to the fact that the offer was for one million
24 four hundred thousand dollars. What response did you
25 get from Dr. Hagen to that offer?

1 A Dr. Hagen rejected the offer.
2 Q Okay. How many exchanges of real estate
3 have you been involved with as a broker or a salesman
4 in the 25 years you've been involved with commercial
5 real estate in Virginia?
6 A Probably a dozen.
7 Q Now, using your experience as a broker
8 and the ones you have been involved with --
9 MR. KAESTNER: Judge, is the plaintiff
10 being offered as an expert witness? If he's being
11 offered as an expert witness, if he's not being
12 offered as an expert I object, because this is
13 clearly hearsay.
14 THE COURT: Why is it hearsay?
15 MR. KAESTNER: It's hearsay because he's
16 testifying as to his experience, Judge.
17 THE COURT: Why is that hearsay?
18 MR. KAESTNER: That's hearsay because it
19 has nothing to do with this particular transaction.
20 This is not an exchange, a transaction between two
21 real estate brokers, this is an exchange between Dr.
22 Hagen --
23 THE COURT: I don't think it's hearsay,
24 but I don't know why it's even relevant.
25 MR. SIMON: The only reason it is

1 relevant is to put into the record the fact that on
2 an exchange it is customary in the Richmond area that
3 consideration for an exchange, the brokerage fees
4 paid on the full amount of the exchange, which I
5 think everyone knows here today, but I do want that
6 put on the record.
7 The listing agreement which is admitted
8 in the stipulation says exchange. I was just putting
9 into the record the fact that it's customary that
10 when you have an exchange of property, the commission
11 is paid on the full amount of the exchange.
12 THE COURT: Why is the custom significant
13 at all? This is a contract --
14 MR. SIMON: Yes, Your Honor.
15 THE COURT: -- between a and b.
16 MR. SIMON: It's merely to buttress the
17 fact.
18 THE COURT: But it doesn't buttress
19 anything. I mean it may be the custom that brokers
20 ask for and get these things and love to get their
21 commissions, I don't attest that, but it may or may
22 not be the custom with regard to customers or the
23 client or the seller.
24 I mean how would the customer in the
25 trade be something applicable to a particular seller

1 and his understanding of the contract? Unless this
2 is a person who buys and sells and does this all the
3 time.
4 MR. SIMON: Well --
5 THE COURT: What I guess I'm saying, the
6 custom between you and me as lawyers, we may know
7 what deals are when you do a particular service for
8 me or vice versa, because we are in that particular
9 trade. But there's no evidence that the buyer, I
10 mean the seller here is involved in that trade, is
11 it?
12 MR. SIMON: Well, absolutely, the
13 evidence has been stipulated to.
14 THE COURT: That what?
15 MR. SIMON: That he's involved in this
16 exchange.
17 THE COURT: In this exchange, but that
18 doesn't mean that the custom is anything he knows
19 about, is it?
20 MR. SIMON: Well, the purpose of the
21 evidence was to explain why the exchange language is
22 in this contract, and we stipulated to that.
23 THE COURT: I don't question that.
24 That's a question of law as to what it means, I
25 think. I don't think it's a actual question, is it?

1 I have a concern that I think you're hinting at, and
2 that is assume that the exchange, that this is an
3 exchange and that your client is entitled to a fee or
4 a commission. What is that commission?
5 Obviously that's a significant issue that
6 has to be resolved here, but I'm not sure that custom
7 in the trade is relevant to that issue.
8 MR. SIMON: Well, this Court is
9 interpreting what exchange means.
10 THE COURT: What an exchange means is one
11 question, and then the question assuming that it is
12 an exchange and that contract applies or the listing
13 agreement applies, what fee does your client get or
14 what commission does your client get?
15 MR. SIMON: Right, and the client of
16 inquiry, since it's been stipulated that what the
17 defendant got was the assumption of the first deed of
18 trust for one million, 28, and it's been stipulated
19 in addition to that he took back a note which is a
20 second for 323, then all Mr. Adams testified to is
21 that when you have an assumption amount and when you
22 have taken back a note --
23 THE COURT: Well, that substitutes
24 conversation or the consideration.
25 MR. SIMON: That's right and that the six

1 percent is paid on that.
2 THE COURT: That's a legal issue. I
3 don't think that's a factual question about what the
4 custom is, but go along and let him testify to it,
5 and if you get it in the record, somewhere along the
6 line somebody is probably going to ultimately decide
7 this question.
8 I don't think it's relevant and I'm not
9 going to consider what he says in my interpretation
10 of the contract, but I think you ought to make the
11 record anyway.
12 Q Mr. Adams, focusing on this particular
13 case, it's been stipulated that the defendants had
14 the L.L.C. which purchased the property assume a
15 first deed of trust note in the sum of $1,028,000,
16 and it's also been stipulated that the defendants at
17 the same time received a second deed of trust note in
18 the sum of $3233,000.
19 With those facts stipulated and before
20 you, and as a real estate broker, what sum is the six
21 percent commission in the listing agreement paid on?
22 A The sum collective of those two entities,
23 sir, the assumption and the resulting second deed of
24 trust.
25 Q The total of that amount?

1 A The total, the sum total, yes.
2 Q Thank you.
3 Now, moving to December of 1994, who was
4 representing as a lawyer the interests of the
5 defendant?
6 THE COURT: When is this?
7 MR. SIMON: December first of 1994.
8 Q Who was the defendant's lawyer who was
9 representing their interest in regard to the Stuart
10 Court Apartments?
11 A Mr. Kaestner.
12 Q And did he at that point represent to you
13 that when he talked to you regarding the Stuart Court
14 Apartments, he was representing the defendants and
15 speaking for them as their lawyer?
16 A Yes.
17 Q Okay, now, casting your mind back to the
18 first part of December, 1994, did you have any
19 discussions with Mr. Kaestner as the defendant's
20 lawyer regarding the anticipated transfer of this
21 property to Mr. Parsons, Mr. Tepper or some entity
22 involved in Mr. Parsons and Mr. Tepper?
23 A Yes, I had such a conversation.
24 Q When was that conversation?
25 A About that time.

1 Q Early part of December?
2 A I believe so.
3 Q And where was that conversation?
4 A In Mr. Kaestner's office.
5 Q Okay, now, what was that conversation?
6 A Mr. Kaestner instructed me to cease any
7 further marketing of the property. He felt confident
8 that the transaction was going to be concluded with
9 Mr. Parsons and Mr. Tepper and for me to cease any
10 and all action concerning the sale of that property.
11 Q Did he directly tell you that?
12 A Yes.
13 Q What did you say?
14 A I asked him what about my commission.
15 Q And what did Mr. Kaestner tell you?
16 A He said don't worry about the commission,
17 I will take care of that.
18 Q Was he speaking as the lawyer for the
19 defendant at that time?
20 A I believe he was.
21 Q Did he tell you at any time he was not
22 representing the defendants?
23 A He never told me that.
24 Q Okay, when you first were involved with
25 Stuart Court Apartments and Dr. Hagen, who was Dr.

1 Hagen lawyer?
2 A Mr. Kaestner.
3 Q And at all times from that time forward
4 has Mr. Kaestner been Dr. Hagen lawyer?
5 A To the best of my knowledge he has.
6 Q Has any other lawyer approached you for
7 Dr. and Mrs. Hagen and said Joe Kaestner doesn't
8 represent them, I represent them now?
9 A That never occurred.
10 Q Now, when did you and Dr. and Mrs. Hagen
11 first have dealings with regard to Stuart Court
12 Apartments? That was spring of '82 I believe.
13 Excuse me, let me change that, not '82,
14 either '89 or '90, I'm sorry.
15 Q And from that time of the spring of '89
16 or '90 at that time Mr. Kaestner represented Dr. and
17 Mrs. Hagen?
18 A That's correct.
19 Q So your answer saying from that time
20 forward means from the spring of '89 or '90 up until
21 today, is that correct?
22 A To the best of my knowledge.
23 Q Okay.
24 MR. SIMON: No further question, Your
25 Honor.

1 THE COURT: Cross-examination?
2 MR. KAESTNER: Briefly.
3
4 CROSS-EXAMINATION BY MR. KAESTNER:
5
6 Q Sometime December of 1994, January of
7 1995 you were paid $19,000 by Mr. Tepper and Mr.
8 Parson, were you not, after this transaction
9 concluded?
10 A Mr. Kaestner, I believe it was 15, it
11 may have been 19, but I was.
12 Q Now, you're familiar with the
13 stipulations that have been filed in this case.
14 I direct your attention, if you would, to
15 stipulation number five in this case. Stipulation
16 number five in this case concerns a letter dated
17 August 31st of 1994. Let me show you a copy of that
18 letter.
19 You received a copy of that letter, did
20 you not?
21 A Yes.
22 Q And the terms set out in that letter were
23 acceptable to you, were they not? You recommended
24 them to Dr. and Mrs. Hagen, did you not?
25 A No, sir, I did not.

1 Q You did not?
2 Let me show you, if I could, this letter
3 from you dated December 13, 1994.
4 Would you like to reconsider your answer?
5 A Okay, what is your question, Mr.
6 Kaestner?
7 Q First of all, did you write that letter?
8 A Yes.
9 THE COURT: What is the date?
10 MR. KAESTNER: It's not part of the
11 stipulation.
12 Q And did you send that letter to Dr.
13 Hagen, Mr. Parsons and Mr. Tepper?
14 A I believe I did so, yes.
15 Q And but ultimately Dr. Hagen rejected.
16 If I could have both letters. Ultimately Dr. Hagen
17 rejected the offer that has been made in the August
18 31st letter, did he not?
19 A Yes.
20 Q Then you had continued discussions, and
21 in October of 1994 you communicated another offer,
22 which is part of stipulation number 6 in this case,
23 offering to purchase the property for $14,000, did
24 you not, mr. Adams?
25 A $14,000?

1 Q One million, 400 thousand dollars
2 THE COURT: Any objection to this?
3 MR.SIMON: The September 13 letter?
4 THE COURT: Yes.
5 MR. SIMON: No, Your Honor.
6 A That's correct.
7 THE COURT: That would be defendant's
8 one.
9 Q And the purchase or the offer to purchase
10 for a million four was also rejected, was it not?
11 A It was.
12 Q Now, you've testified that Dr. Hagen
13 received a note for $323,000. Have you ever seen a
14 copy of this note?
15 A No.
16 MR. SIMON: Your Honor, I didn't object
17 quickly enough. That is completely irrelevant. It's
18 stipulated. They never produced a copy to me. It's
19 totally irrelevant.
20 THE COURT: If it's stipulated, what
21 difference does it make whether he saw it?
22 MR. SIMON: If you look at the operating
23 agreement, which I finally got a hold of --
24 MR. KAESTNER: The operating agreement?
25 This is no note.

1 MR. SIMON: This operating agreement,
2 paragraph 2.2 indicates that upon the sale of the
3 property, Dr. Hagen will be paid $323,000, and that
4 portion of the operating agreement was secured by a
5 deed of trust in the amount of $323,000.
6 So yes, we've stipulated it, but I want
7 to make sure that the Court understands what we've
8 stipulated. We stipulated that the contract between
9 the parties is secured by a deed of trust and is the
10 contract between the parties that calls for the
11 payment of that sum upon sale of the property. And
12 that's what paragraph 2.2 covers.
13 MR. KAESTNER: I have no further
14 questions.
15 MR. SIMON: Your Honor, the time for
16 argument as to what that means, the Court is capable
17 of understanding what that means and I am not going
18 to argue that point.
19
20
21
22
23
24
25

1 REDIRECT EXAMINATION BY MR. SIMON:
2
3 Q One question, Mr. Adams, that may led to
4 a second one or not.
5 You were asked about having been paid 15
6 or 19 thousand dollars, you don't remember, by Mr.
7 Parsons. Do you remember being asked that just
8 recently?
9 A Yes, I do.
10 Q What were you paid for?
11 A Adams Property Associates had a signed,
12 fully executed management contract to lease and
13 manage Stuart Court Apartments, and they were
14 purchasing that contract from me.
15 Q Did that payment have anything to do with
16 a commission on the sale of this property?
17 A No, sir, it did not.
18 Q And when you say it was paid for the
19 management contract, was that for your company to
20 give up its rights to collect for rents and take six
21 percent of those rents?
22 A Precisely.
23 Q No further questions.
24 THE COURT: All right, sir, you may step
25 down.

1 MR. SIMON: Your Honor, that plus the
2 stipulation is plaintiff's evidence.
3 THE COURT: All right, do you have any
4 evidence, Mr. Kaestner?
5 MR. KAESTNER: Very briefly. Dr. Hagen
6 THE COURT: Come forward, sir and let me
7 swear you in.
8
9
10 RALPH HAGEN, M.D., called by the defendant,
11 first being duly sworn, testified as follows:
12
13 DIRECT EXAMINATION BY MR. KAESTNER:
14
15 Q Would you give us your name, please?
16 A Ralph Hagen.
17 Q And what do you do for a living?
18 A Neurosurgeon.
19 Q How long have you been a neurosurgeon?
20 A I finished my residency in 1967.
21 Q And you've been practicing neurosurgery
22 ever since?
23 A Correct.
24 Q And you practice here in the city of
25 Richmond?

1 A Correct.
2 Q And you own a parcel of real estate known
3 as the Stuart Court Apartments, is that correct?
4 A Correct.
5 Q And in 1994 what was the financial
6 condition of the Stuart Court Apartments?
7 A Very bad.
8 Q Why was that?
9 A I had had a previous bankruptcy and was
10 not able to get any refinancing, and I was in the
11 situation in which Freddie Mac was in the process of
12 initiating foreclosure proceedings.
13 Q And did you explore the sale of this
14 property?
15 A I did.
16 Q And did Mr. Adams produce a purchaser who
17 was ready, willing and able to pay the purchase price
18 that you required?
19 A No. We had several offers, one which was
20 for $705,00, which was less than the mortgages on it,
21 and another one which wanted me to let it go to
22 foreclosure and then they would try to get it.
23 And then we had a offer from Mr. Parsons
24 which included things, there were some liens and
25 stuff had to be off it, and at that time I felt it

1 would be possible to get off it. So that will led to
2 other avenues for consideration.
3 Q And did you attempt to refinance the
4 property?
5 A I tried to refinance the property. I
6 submitted things to people and got nowhere.
7 Q Did there come a time when you, when a
8 limited liability company was formed?
9 A Correct.
10 Q And what was your investment in that
11 company?
12 A Nothing except my part of my interest in
13 the building.
14 MR. SIMON: Your Honor, we have a
15 stipulation as to approximately what the investment
16 was. I'm letting Mr. Kaestner go on at length about
17 some things.
18 THE COURT: If it's already stipulated,
19 let's not go into it.
20 MR. KAESTNER: Sure.
21 Q Did you have any discussions with Mr.
22 Adams concerning any commissions he deemed himself
23 entitled to upon the transfer of the policy to the
24 L.L.C?
25 A No, I did not.

1 Q I have no further questions.
2 MR. SIMON: No questions, Your Honor.
3 THE COURT: All right, sir, you may step
4 down.
5 Anything else?
6 MR. KAESTNER: Yes, just some portions
7 from the deposition of Tucker Adams.
8 THE COURT: All right.
9 MR. SIMON: You're not offering it on
10 cross, you're offering it into evidence?
11 MR. KAESTNER: That's correct.
12 MR. SIMON I haven't seen this today,
13 what are we looking at?
14 MR. KAESTNER: We're looking at page 28,
15 line 24 going over to page 39, page 38 line 34.
16 Question: "You indicated earlier that
17 your management agreement was terminated sometime in
18 in 1994."
19 Answer: "That's correct."
20 Question: "And it was done in the form
21 of a one-sentence letter, is that correct? "
22 Answer: "The written instruction I got
23 was from Dr. Hagen. The one sentence letter that I
24 followed up to you because my instructions were not
25 to do anything without you clarifying, and I did

1 that. And at that point you told me to do nothing.
2 And at that point I got something in writing from Dr.
3 Hagen that told me to go ahead and give it to them."
4 MR. SIMON: Your Honor, I'm going to
5 object as to the relevance. I could object on the
6 basis I have not been shown this prior to today
7 despite our local rules of court, but quite frankly
8 this is solely dealing with the fact that he got a
9 letter from Dr. Hagen saying you can't manage the
10 building anymore, turn over everything to Mr.
11 Parsons, which is not an issue in this case. I
12 object to it for relevance.
13 THE COURT: Overruled, go ahead.
14 MR. KAESTNER: That would be the
15 defendant's case, Judge.
16 THE COURT: All right, any rebuttal?
17 MR. SIMON: If I could look at this for
18 one minute, Your Honor, and see what this says.
19 No, Your Honor.
20 THE COURT: All right, do you want to
21 argue?
22 MR. SIMON: Yes.
23 THE COURT: All right.
24 MR. SIMON: Your Honor, this is
25 fortunately one of those cases where except for a few

1 facts that have been admitted into evidence today,
2 everything's been stipulated, and thus the Court
3 knows exactly what happened here.
4 But I will go through a few of the most
5 important things and relate that up to why the
6 defendants owe a six percent commission to my client.
7 What is stipulated is that the defendants
8 owned a piece of property, the Stuart Court
9 Apartments in April of 1994. Time goes on, they
10 entered into a standard exclusive listing agreement
11 with my plaintiff.
12 THE COURT: '84?
13 MR. SIMON: '94, it's attached to the
14 stipulation. It has a standard language that upon
15 sale or exchange, the plaintiff gets six percent of
16 the amount of sale or exchange. Then in paragraph
17 five it has additional standard language, and it says
18 if the owner withdraws the property from sale during
19 the initial period of time or otherwise prevent
20 realtor from selling the property during the initial
21 period of time, owner agrees to pay realtor the same
22 fee mentioned above.
23 Well, we then get to later on in the
24 summer. Mr. Parsons contacts my client out of a
25 newspaper ad that my client put in. They try to

1 negotiate something. The first deal falls through.
2 It was not accepted by the defendants.
3 The second deal in October of 1994 is
4 also not accepted by the defendants. Very shortly
5 thereafter in the beginning of December, 1994,
6 another deal is made. Mr. Kaestner tells my client a
7 deal has been made with Tepper and Parsons, back off,
8 don't do anything further.
9 What was that arrangement? Well, that
10 deal was not for transfer of the property to some
11 alter ego of the Hagens as Mr. Kaestner would have us
12 try to focus on so that there was maybe just a
13 transfer for purposes of title of ownership but not
14 in realty.
15 No, that isn't what happened. What
16 happened was the defendants owned the Stuart Court
17 Apartments, they transferred it to a new entity, a
18 limited liable company, two-thirds of which is owned
19 by Mr. Parsons and Mr. Tepper.
20 And what do defendants get in return?
21 They get the assumption by the limited liability
22 company. If you would look at section 2.3 of the
23 operating agreement which is attached to the
24 stipulation, the assumption by the limited liability
25 company of all existing liabilities on the property.

1 Well, again it's stipulated what are the
2 existing liabilities on the property. A first deed
3 of trust in the amount of one million, twenty-eight
4 thousand dollars. So you have an assumption of a
5 first of a million, 28, then you look up on the
6 operating agreement, and the operating agreement
7 defines Mr. and Mrs. Hagen as Hagen, so whether it
8 says Hagen singular, it means the defendants.
9 If you look at the original definition in
10 the operating agreement, take back a second deed of
11 trust of the $323,000. What do they also get? They
12 also get to keep a one-third interest in the limited
13 liability company which owns the property.
14 Now, we submit the difficulties and
15 impossibilities of valuing that one-third interest
16 meaning that the exchange here was for one million,
17 twenty-eight thousand dollars assumption of first,
18 second of 323. That's a fairly garden variety sort
19 of transaction, assumption of the first and a take
20 back of the second. That's a total of $1,355,000.
21 That's the sum of which six percent is owed.
22 Those facts are not in dispute. They're
23 stipulated. It's only the conclusion, and I submit
24 there can't be any other conclusion, because the
25 contract itself which these parties entered into says

1 sale or exchange.
2 If for some reason this Court said well,
3 we don't really think that this is an exchange in the
4 way that maybe this listing agreement meant exchange,
5 and we seriously and strongly would take issue about
6 it. If the Court felt that way and held that way,
7 the Court would then have to look at paragraph five
8 of this same listing agreement and say well, if it
9 wasn't an exchange, it is clear that my client was
10 told don't do anything further. The owner prevented
11 the realtor from selling the property to anybody
12 else.
13 Why was he prevented from selling it to
14 anybody else? Because the owner wanted to make a
15 deal with Tepper and Parsons, and he made a deal with
16 Tepper and Parsons and he has a right to make a deal
17 with Tepper and Parsons. But if he's going to make
18 that deal, then he's got to pay the six percent.
19 If for some reason the Court holds that
20 that wasn't the deal, that wasn't the type of
21 exchange contemplated here, then paragraph five of
22 the listing agreement says you took away the rights
23 of my client to continue working to sell this to
24 somebody else, because you transferred it to a
25 limited liability property controlled by Tepper and

1 Parsons. The defendant's can't have it both ways.
2 THE COURT: What do you get then?
3 MR. SIMON: The paragraph itself says pay
4 realtor the same fee mentioned above.
5 THE COURT: Which means what?
6 MR. SIMON: Six percent of the listing
7 price of $1,600,000.
8 Now, this is not -- $1,600,000 is
9 initialed by the Hagens, it's written in their own
10 writing. They stuck with that figure and they wanted
11 that figure.
12 THE COURT: Let me ask you, this, isn't
13 that sort of circular?
14 If, in paragraph five, it says that if
15 the owner should withdraw the property from the
16 realtor, then the realtor gets the same fee mentioned
17 above, and I guess above means in paragraph four,
18 right?
19 MR. SIMON: Paragraph four, or which
20 refers back to paragraph one, which sets out --
21 THE COURT: I don't know, it says six
22 percent of the gross sales amount, right? Which is
23 paragraph four.
24 MR. SIMON: Well, but if he withdraws it,
25 the defendants are trying to say there is no sale or

1 exchange here. All I'm saying is if there no sale or
2 exchange, then --
3 THE COURT: Then you go on to paragraph
4 five.
5 MR. SIMON: That's right.
6 THE COURT: And interpreting paragraph
7 five, paragraph five says you get six percent of the
8 fee mentioned above. Excuse me, not six percent, but
9 you get the fee mentioned above, which is six percent
10 of the gross sales amount, which is above this
11 paragraph four. Right?
12 MR. SIMON: Well --
13 THE COURT: What else could it be? What
14 does above mean?
15 MR. SIMON: I would say paragraph one,
16 because defendants argue there is no gross sales
17 amount. Defendant's argument --
18 THE COURT: Wait a minute now. How could
19 you get paragraph one? Paragraph one doesn't talk
20 about the fee, does it?
21 MR. SIMON: Yes, it does -- excuse me,
22 paragraph one and four. You have to read them
23 together, is six percent of what. If there's no sale
24 --
25 THE COURT: That's what I am saying, of

1 the gross sales amount, and there is no gross sales
2 amount unless you have a sale, right?
3 MR. SIMON: But what the contract says is
4 if my client is not allowed to sell the property,
5 then he gets the fee as if it was sold.
6 THE COURT: That doesn't say that.
7 That's wishful thinking rather than what it says.
8 MR. SIMON: Agrees to pay the realtor the
9 same fee mentioned above.
10 THE COURT: That's right, and the only
11 fee that I'm seeing is mentioned above is in
12 paragraph four, not one.
13 MR. SIMON: Which is six percent.
14 THE COURT: Of the gross sales price.
15 MR. SIMON: But if there's no gross sales
16 price, you have to go to paragraph one.
17 THE COURT: That's why I prefaced all of
18 my questions with you is this is circular, isn't it.
19 MR. SIMON: I don't think it's circular,
20 I'm somehow missing the court's reason that it's
21 circular.
22 THE COURT: Mr. Simon, take off your
23 advocates hat now and your wishful thinking that you
24 have up here now. Tell me, go through this rationale
25 with me. Paragraph five says, and factually let's

1 assume I agree with you and say okay, paragraph five
2 is triggered here because Kaestner in December met
3 with your client and told him don't do anything more
4 toward obtaining a buyer, right?
5 MR. SIMON: Yes, Your Honor.
6 THE COURT: So that triggers paragraph
7 five, or it might trigger paragraph five, okay?
8 MR. SIMON: Yes, Your Honor.
9 THE COURT: We're together on that?
10 Okay, so paragraph five is applicable and says in
11 that case then owner agrees to pay your client the
12 same fee mentioned above, fee meaning commission, I
13 assume. Right?
14 MR. SIMON: Yes, Your Honor.
15 THE COURT: Then we go over, the only
16 place that I see that that's even implicated is in
17 paragraph four, unless you see something else. But
18 fees is discussed in paragraph four, not paragraph
19 one.
20 Am I right?
21 MR. SIMON: The six percent, yes, Your
22 Honor, is typed in in paragraph four, and that sets
23 what the percentage is, correct.
24 THE COURT: Six percent of gross sales
25 amount. That would imply that there is a sale. Your

1 problem is is it doesn't make sense if you construe
2 it that way, but that's what's written here. It
3 doesn't have to make sense, it's just what the
4 parties say.
5 MR. SIMON: With all due respect, Your
6 Honor, what I would submit is that any contract has
7 to be taken in its various parts, the one part has to
8 be looked at in relation to what else is in it. And
9 the Court has the look at the contract to make sense
10 of the entire agreement.
11 THE COURT: No, I don't have to do that.
12 I have got to try to do that if it can be done.
13 MR. SIMON: Yes, Your Honor.
14 THE COURT: If it can't be, then I've got
15 to say it doesn't make sense.
16 MR. SIMON: Yes, Your Honor.
17 THE COURT: You parties entered into a
18 non-sensical contract, I can do that too.
19 MR. SIMON: Yes, Your Honor, you can do
20 what you wish with that regard.
21 THE COURT: No, no, I don't do what I'm
22 wishing, but just general principal of contract
23 interpretation you have got to try to make the parts
24 fit together to make sense if you can. And if you
25 can't do that, you have just got to say it doesn't

1 work period.
2 MR. SIMON: That's correct, and I would
3 submit that when you're talking about six percent of
4 the same fee mentioned above -- excuse me, the same
5 fee mentioned above, there are two portions to the
6 fee, one is the percentage, the other is what is that
7 percentage taken on.
8 I don't think there's any conflict here
9 or doubt as to the fact that it's six percent.
10 THE COURT: Of something.
11 MR. SIMON: Six percent of something. So
12 paragraph five has to be read when it says above, it
13 has to be read with both paragraphs that speak to the
14 fee. Paragraph four speaks to the percentage,
15 paragraph one speaks to the amount you're trying to
16 get for the building.
17 THE COURT: The listing fee.
18 MR. SIMON: Yes. Paragraph five refers
19 to what does my client get if the building isn't sold
20 but it's yanked off the market by the defendants.
21 THE COURT: Right.
22 MR. SIMON: So the only way you can
23 interpret paragraph five is by saying six percent of
24 what. If you look at paragraph four, it can't be six
25 percent of gross sales amount, because if it's yanked

1 off the market, there is no gross sales amount. So
2 the other figure that is in here on which six percent
3 would operate is the one million six, because the
4 whole purpose of paragraph five is to say if you
5 don't allow my client to sell the property, then
6 you're going to have to pay what you would pay. And
7 if there are no gross sales amount, it's got to be
8 the six percent of 1.6 million, which is the figure
9 put in there by the defendants.
10 THE COURT: All right, sir.
11 MR. SIMON: The above refers to both
12 portions, paragraph four and paragraph one. And that
13 is count two of our amended motion for judgment
14 refers to that.
15 I submit that the Court doesn't need to
16 reach that, but count one is --
17 THE COURT: Because you think there is a
18 transfer?
19 MR. SIMON: There is a sale or exchange.
20 THE COURT: There is clearly a transfer.
21 MR. SIMON: There is clearly a transfer.
22 The defendants are saying there's no sale of
23 exchange. And if the assumption of a $1,028,000 and
24 a second for $323,000 and a one-third interest in a
25 limited liability company isn't consideration for a

1 sale or exchange, then nothing is.
2 THE COURT: Let me ask you this. Is this
3 an exchange? Debate the question. I don't debate
4 the question about whether it's a sale or not, but is
5 it an exchange.
6 MR. SIMON: I've been debating in my own
7 mind whether it's a sale or an exchange. It's one or
8 the other, and I'm not sure which.
9 THE COURT: Is it an exchange? It seems
10 to me it's probably not, and events change in the
11 sense that oh, I normally would think of an exchange,
12 and I think is normally considered by folks in this
13 business, exchange is a swapping black acre for white
14 acre, isn't that right?
15 MR. SIMON: That's correct, and there's
16 -- often realtors get complicated as deals go is
17 often what the tax people call boot, which is
18 something else in addition. You get black acre for
19 white acre plus a $200,000 note plus $100,000 in
20 cash.
21 And what we have here structured by the
22 defendants is a fairly complicated one along those
23 lines, but still fairly garden variety.
24 THE COURT: Maybe not an exchange, but
25 there may be a sale. I'm not focusing on that, I'm

1 trying to get it in my mind in your contention is
2 this is an exchange.
3 MR. SIMON: Our contention is it's a sale
4 or exchange, and that's why we have pled it that way.
5 I think --
6 THE COURT: Which one do you contend it
7 is?
8 MR. SIMON: I contend, Your Honor, that
9 --
10 THE COURT: It doesn't help me much, Mr.
11 Simon, to say take your pick, Judge. I want you to
12 tell me what you think it is. I may not agree with
13 you. It can't be both, can it?
14 MR. SIMON: I would answer that by saying
15 that the facts are clear and the label you put on it,
16 whether you call that label a sale or exchange, is
17 not relevant for interpretation to the contract.
18 THE COURT: I think it's rather important
19 because people use terms. They put terms on things.
20 We lawyers, that's our business, that's our craft.
21 These people did that in their contract.
22 They put a term on it.
23 MR. SIMON: Yes, Your Honor.
24 THE COURT: It can't be both, it can't
25 be both under the language of the contract. It

1 contemplates that a commission is triggered if one of
2 two things happens, one there's a sale, or two,
3 there's an exchange, not both.
4 MR. SIMON: Yes, Your Honor, but since
5 the contract says one or the other, I submit the
6 Court does not have to say to put it in pigeon hole A
7 or B.
8 To give you an example, if this had said
9 sale or lease as an example, then, and there would be
10 a large difference in price between what you get on a
11 sale and what you get on a lease. And this Court may
12 have to say okay, was it a sale or lease. It's got
13 to fit in.
14 But in this case it says sale or
15 exchange. This is obviously either a sale or
16 exchange. I would submit that in one sense it is an
17 exchange and --
18 THE COURT: Are you saying it can be
19 both?
20 MR. SIMON: Yes, Your Honor, because it's
21 the exchange of black acre for a one-third interest
22 in a limited liability company, a $323,000 deed of
23 trust and the assumption of a million in change. So
24 that is an exchange.
25 But it's also a sale. Why is it a sale?

1 THE COURT: Why isn't it just a flat out
2 sale?
3 MR. SIMON: It's also a sale because the
4 property transferred --
5 THE COURT: In exchange for value?
6 MR. SIMON: In exchange for value. The
7 only reason I would say it might also be an exchange
8 is because of that one-third interest in the limited
9 liability company, which is clearly the assumption of
10 the first, and a $323,000 second with that of the
11 estate sale.
12 And I don't think the Court needs to
13 reach that question, because if a contract doesn't
14 say sale or exchange.
15 And finally, I would point out to the
16 Court that the defendants not only are bound by the
17 contract, and not only bound by what they have done
18 and what they have stipulated to, but they're bound
19 by their own lawyers actions to my client that the
20 commission is being paid.
21 THE COURT: That what?
22 MR. SIMON: That he would be paid a
23 commission.
24 Now, that conversation did not specify a
25 dollar amount, but then you have to look to the

1 documents to figure out what is that dollar amount.
2 And I think the documents are pretty clear, it's for
3 $1,028,000 and $323,000.
4 THE COURT: All right.
5 MR. KAESTNER: That doesn't agree with my
6 view of what occurred in this case was something that
7 was not contemplated by the parties to the contract.
8 It's always been what occurred in this
9 case was that Dr. Hagen made an investment. He
10 invested a piece of real estate, the other two
11 persons invested cash and the three of them formed a
12 limited liability company, and that no sale or
13 exchange occurred.
14 Why isn't it a sale?
15 It's not a sale because this was clearly
16 a contribution of an asset in formation of limited
17 liability.
18 That certainly is what it is. Why is it
19 not a sale? I'm giving you black acre in exchange
20 for an interest in this limited liability company.
21 Because we do not normally contemplate
22 investment capital formation investments in the
23 formation of partnerships, we do not contemplate
24 those as sales.
25 THE COURT: I don't understand, why don't

1 we? Sale as I understand it is simply a transfer of
2 one thing in exchange for another. That's a sale,
3 isn't it?
4 MR. KAESTNER: No, Judge, it's not.
5 Because I reflect back, the only place that I could
6 actually come up with some law on this whole area was
7 turning to what's treated as -- let's treat it as a
8 sale, what's treated as exchange, what's treated as a
9 transfer, if you would, was internal revenue code and
10 tax regulations.
11 So we took a look to see would the
12 internal revenue code treat this as a sale at the
13 time that the L.L.C, was created and Dr. Hagen
14 invested his property.
15 The internal revenue code doesn't treat
16 it as that. The internal revenue code treats it as a
17 contribution of capital, and it fixes a value on
18 that. And if the property is sold, the profit's
19 made, then there's a taxable event.
20 So this was in fact the formation of a
21 limited liability company where Dr. Hagen invested an
22 asset, the asset that he invested in Stuart Court
23 where Mr. Parsons and Tepper invested capital.
24 THE COURT: Why do you have to do that?
25 Why do you have to determine that from an IRS

1 standpoint?
2 MR. KAESTNER: Because it determines if
3 you're taxed in a current year or whether you'll tax
4 them in the future.
5 THE COURT: The tax is based on the
6 receipt of income, right?
7 MR. KAESTNER: That's correct.
8 THE COURT: You didn't have any income?
9 MR. KAESTNER: That's right, you just
10 traded one thing for another.
11 THE COURT: But why does that mean it's
12 not a sale?
13 MR. KAESTNER: Because not all trades are
14 sales.
15 THE COURT: Maybe not a trade, by why
16 isn't it a sale? I don't think that you even have to
17 reach that question for tax purposes.
18 MR. KAESTNER: It's not a sale because we
19 have received nothing for it.
20 THE COURT: Of course he received
21 something for it. It just isn't income.
22 MR. KAESTNER: Judge, I mean you
23 understand the point I'm attempting to make. You
24 understand, I'm sure, the point I'm attempting to
25 make.

1 THE COURT: I'm not sure I am.
2 MR. KAESTNER: If I form a corporation
3 with Mr. Simon and the two of us decide we're going
4 to sell widgets together, and he puts in ten dollars
5 and I put in ten dollars, and we both sell a share of
6 the stock in this corporation, I think that's sale.
7 You're telling me that is a sale and I'm telling you
8 that I think that's investment and that I get an
9 indicia of ownership in the entity of which I've
10 invested does not make it a sale. It's only not a
11 sale because I'm merely getting the indicia of
12 ownership --
13 THE COURT: He got more than that. He
14 got somebody else who agreed either LLC to take over
15 the debt. That's more than just a receipt of an
16 indicia of ownership, right?
17 MR. KAESTNER: That was part -- well,
18 yeah, he got somebody else to agree to take over the
19 debt, but that was the indicia, that was as a result
20 of his capital contribution.
21 In other words, if Mr. Simon and I form a
22 corporation and he decides that he wants to invest
23 $100,000 but I only have ten, and we both contribute
24 our ten and he contributes his hundred thousand
25 dollars. And he says but look, I want a note back

1 for that one thousand dollars because that's going to
2 be repaid in a different way. That note doesn't
3 constitute a sale to him nor does that $10,000.
4 THE COURT: That's an exchange for
5 consideration, is it not?
6 MR. KAESTNER: But it's not a sale. Not
7 all exchanges are sales. Sale contemplates something
8 different. Sale contemplates that at the moment --
9 THE COURT: But it is an exchange,
10 right?
11 MR. KAESTNER: No, it's not an exchange.
12 THE COURT: You just said it was.
13 MR. KAESTNER: No, it is the delivery of
14 an indicia of ownership. What an exchange is is also
15 something that's been treated in the internal revenue
16 code, and the internal revenue code treats that as a
17 transfer of property or rights for money or sum or
18 for promise to pay money for some property is a sale
19 or exchange.
20 Sales and exchanges are property
21 generally resulting in taxable gains and taxable
22 loss. There have been any number of cases which deal
23 with that, and they construe exchange as being to
24 barter, swap, to part with, give or transferring
25 equivalent. That's what exchange means within the

1 meaning of the law.
2 Capital formation or the formation of the
3 corporation in the investment of corporations the
4 investment of entities is not a sale or exchange.
5 That's why it's contemplated. The fact that it
6 wasn't contemplated between parties isn't really in
7 evidence before the Court.
8 If you take a look at the August 31st
9 letter, that's stipulation number five, you will see
10 the next --
11 THE COURT: The what now?
12 MR. KAESTNER: Stipulation number five,
13 August 31st letter, and the September 13th letter
14 that I introduced as defendant's Exhibit number one,
15 you will see that in this letter Mr. Parsons is
16 saying we'll enter into this joint venture and you
17 Mr. Adams will be paid a commission of a thousand
18 dollars.
19 Mr. Adams' response to that on September
20 13th and on September is 3th Mr. Adams says
21 everything is fair, but we want to see if we can get
22 the place refinanced.
23 Now, that is in my view an indicia, an
24 indication that even Mr. Adams and certainly Mr.
25 Tepper, certainly Dr. Hagen did not view this

1 transaction as being covered by the exclusive listing
2 agreement. They realized that what they were doing
3 was something quite different.
4 What they were doing was in fact creating
5 a new entity and that there was going to be a capital
6 formation in the form of a contribution of property
7 by Dr. Hagen, and the in the form of liquid cash by
8 Mr. Tepper and Mr. Parsons. Because of that, they
9 were making an alternative provision for Mr. Adams,
10 because there was a contemplation on their part that
11 it was not covered by this agreement.
12 And Mr. Adams in his letter of September
13 13th appears to acquiesce or acknowledge that. So
14 again, Judge, I simply, because you get a piece of
15 paper in return for something doesn't mean you sold
16 anything. I believe the corporations can be formed
17 and limited liability partnerships can be formed, and
18 when people contribute capital or assets and get back
19 an indicia of ownership for that they have not sold
20 anything. That's not what the concept of sale means.
21 THE COURT: Let's assume that they
22 didn't. Why then have you not triggered paragraph
23 Five?
24 MR. KAESTNER: Paragraph number five
25 isn't triggered for two reasons, first --

1 THE COURT: What?
2 MR. KAESTNER: It is not triggered for
3 two reasons. First of all, if I have not triggered
4 paragraph four by creating this new entity, then by
5 again something outside of the contemplation of
6 partition Dr. Hagen lost the ability to transfer the
7 asset. At the point that Dr. Hagen contributed the
8 asset to the formation of the L.L.C. the asset
9 becomes the property of the L.L.C. and Dr. Hagen by
10 an event not contemplated by the parties loses the
11 ability to transfer the asset.
12 THE COURT: That's precisely what five
13 says, isn't it?
14 MR. KAESTNER" Yes, and Dr. Hagen could
15 have lost.
16 THE COURT: He's withdrawn the property
17 from sale?
18 MR. KAESTNER: He hasn't withdrawn it, he
19 has simply lost his ability. I see what you're
20 saying, Judge, yes.
21 THE COURT: That's tenuous at best.
22 MR. KAESTNER: Let me take it one step
23 further. Let's suppose that in August, October,
24 November, December, October through December of 1994
25 Dr. Hagen was filthy rich and had not been involved

1 with the bankruptcy. And let's suppose that he
2 voluntarily declined to pay the mortgage on the
3 property and Fannie Mae foreclosed.
4 Mr. Adams, to accept Mr. Adams' argument
5 with respect to paragraph number five, Dr. Hagen
6 would owe a commission despite the foreclosure,
7 because by voluntary act he withdrew the property
8 from sale.
9 That's not what's contemplated here.
10 What is contemplated here is look, if you make money
11 as a result of what I do for you, right now you owe
12 me money.
13 The Court was focusing on paragraph
14 number four. I would like to talk about paragraph
15 number four, because in my view paragraph four is the
16 critical paragraph in this document.
17 Paragraph number four has printed part
18 and has a typed-in part. The typed-in part was the
19 part that was typed in by the parties and agreed to
20 by the parties. And that express the limitation,
21 that says you get six percent of the gross sales
22 price, not six percent of the gross sales or
23 exchange, not six percent of the consideration paid
24 on transfer.
25 It limits itself to x-percent of the

1 gross sales price. So I would suggest to the Court
2 that paragraph four makes perfect sense, that
3 paragraph four is a limitation on the terms used
4 elsewhere in the typed-in portions and limitation on
5 the printed forms on paragraph four, and that was
6 contemplated by the parties as clearly expressed in
7 the August 31st and in the September 13th letter
8 where it was frankly recognized by the parties that
9 if we weren't going to have a sale, we were going to
10 have to make other arrangements.
11 And the offer of $25,000 commission was
12 an offer that was apparently acceptable to Mr. Adams
13 based upon his September 13th letter.
14 THE COURT: But that was rejected, wasn't
15 it?
16 MR. KAESTNER: And that was rejected. As
17 a matter of fact, Mr. Adams never brought, and it's
18 been stipulated, never brought to Dr. Hagen an offer
19 that was acceptable within the terms of the listing
20 agreement.
21 There was, even the 1.4 million dollars
22 that he will buy it, and that was the 1.4 million
23 dollar offer. The purchase was made two months
24 later, that was made in October. Even that 1.4
25 million dollar outright purchase and outright sale

1 was rejected by Dr. Hagen.
2 So again, Judge, I don't think that we
3 have here the formation of an enterprise and the
4 contribution of capital in the formation of that
5 enterprise. But we don't have something that in my
6 view falls within the scope of this contract.
7 THE COURT: All right, thank you.
8 Any rebuttal?
9 MR. SIMON: Briefly, Your Honor.
10 IRS rulings on what a sale or exchange or
11 what you pay tax on has nothing to do with what's
12 before this Court. The IRS has all sorts of rules
13 about when you pay tax and when you don't pay tax.
14 That's not what you're to consider.
15 The question is what this contract says
16 what was done by the parties. Also regarding IRS
17 argument, Mr. Kaestner is making a mistake even.
18 Because what he's talking about is the section of
19 IRS code called section 351 which says if you
20 exchange your assets, you're an individual, and
21 you're a hair dresser and you go ahead and all of a
22 sudden take the assets of this hairdresser shop and
23 become hairdresser incorporated, there's no tax paid
24 on that, so that has nothing to do with this.
25 If Dr. Hagen, Mr. Parsons and Mr. Tepper

1 had each owned this property one-third and one-third
2 and one-third as tenants in common and then they
3 formed a partnership to own it one-third, one-third,
4 one-third, then for IRS purpose, section 351 would be
5 triggered and they'd say okay, that's not taxable
6 because you're just changing the form of ownership
7 and you pay taxes when a partnership sells it.
8 That wasn't what was done here at all.
9 So number one, the IRS rulings don't control whether
10 there's a sale or exchange of the contract. Number
11 two, the IRS rulings they're citing are just plain
12 wrong. They don't apply to this.
13 And finally,this business about the
14 limitation in that September 13th letter or August
15 31st letter of $25,000, if anything that tends to
16 show that they show that Mr. Adams was entitled to a
17 fee. He said he would agree to reduce his fee to
18 that amount to make the deal go.
19 The defendants said no, we're not going
20 to make this deal. You can't hold Mr. Adams a deal
21 that he was willing to go forward to make the whole
22 thing fly when the defendants slammed the door and
23 said no, we won't have anything to do with this. So
24 that's irrelevant to this case.
25 And Mr. Kaestner's argument, oh, well,

1 you don't get, you don't pay a commission when all
2 you do is get a piece of paper. Hagen got a lot more
3 than a piece of paper. They got the assumption of
4 over $1 million on a first, they got a second offer
5 $323,000. That's a very valuable piece of paper.
6 THE COURT: All right. I will let you
7 know something.
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1
2 CERTIFICATE OF COURT REPORTER
3
4 I, Cynthia G. Shortlidge, hereby certify
5 that I was the Court Reporter on March 27, 1996 at
6 the time of the hearing herein; further, that the
7 foregoing is a true and accurate record of the
8 testimony and other incidents of the hearing herein.
9 Given under my hand this 30th day of
10 May, 1996.
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16 Cynthia G. Shortlidge
17 Cynthia G. Shortlidge, RPR
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Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

ADAMS PROPERTY ASSOCIATES, INC. PLAINTIFF

v. LX-3408-3

RALPH E. HAGAN 19 W. RUNSWICK DRIVE,RICHMOND,VA. 23233
and
MAUREEN H. HAGAN 19 W. RUNSWICK DRIVE, RICHMOND,VA. 23233 DEFENDANTS

O R D E R

The parties appeared on March 27, 1996, for trial by the court on the issues joined and evidence was presented and argument was heard.

The court finds that plaintiff, a real estate broker, entered a listing contract with the defendants relating to the property known as the Stuart Court Apartments located at 1600 Monument Avenue. Plaintiff was to earn a commission if "The property was sold or exchanged . . . " within the contract term.

Prior to expiration of the listing, defendants transferred the property to a limited liability company in exchange for the company's assumption of the existing mortgage, a one-third ownership of the company and the company's promise to pay them $323,000 upon sale of the property. The total value of this transaction is $1,355,000.

Defendants claim that the transaction did not constitute a "sale or exchange" which would result in a 6% commission to plaintiff.

The court finds that the defendants' transfer of title in exchange for consideration was a sale of the property and that the

plaintiff is entitled to a commission of 6% of $1,355,000 or $81,3000.

It is therefore ORDERED that the plaintiff, Adams Property Associates, Inc., shall have judgment against the defendants Ralph E. Hagan and Maureen K. Hagan, for $81,300 plus interest from April 23, 1995, until paid and its costs. Defendants' objections are noted. Copies of this order were this day mailed to counsel of record.

Enter 4-2-96

Judge

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN FINDING THAT THE CONTRIBUTION OF HAGAN'S PROPERTY TO A LIMITED LIABILITY COMPANY OF WHICH HE WAS A MEMBER CONSTITUTED A "SALE" WITHIN THE TERMS OF THE CONTRACT BETWEEN THE PARTIES.

II. THE TRIAL COURT ERRED IN AWARDING ADAMS COMMISSION ON THE AGGREGATE SUM OF $1,355,000.