

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JERRY D. PALMISANO and THERESA
IRVIN PALMISANO,

Plaintiffs,

v.

WINDERMERE REAL
ESTATE/NORTHWEST, INC., a Washington
corporation, and DEBBIE J. HEARD,

Defendants.

NO. 10-2-26702-6 SEA

FIRST AMENDED ANSWER,
AFFIRMATIVE DEFENSES, AND
COUNTERCLAIMS OF
DEFENDANTS WINDERMERE REAL
ESTATE/NORTHWEST, INC. AND
DEBBIE J. HEARD

COME NOW Defendants WINDERMERE REAL ESTATE/NORTHWEST, INC. (“Windermere”), and its licensed broker Debbie J. Heard (collectively the “Windermere Defendants”), by and through its attorneys, David C. Daniel and the Demco Law Firm, P.S., and hereby submit this First Amended Answer the Plaintiffs’ Complaint. Windermere hereby objects to the allegations set forth in the complaint to the extent Plaintiffs fail to state the claims as short and plain statements as required by CR 8.

The following paragraph numbers are intended to correspond with the paragraph numbers set forth in the Plaintiffs’ Complaint. “Insufficient knowledge” as stated herein shall mean “responding defendants have insufficient knowledge and information upon which to form an answer and therefore deny the allegation.”

I. ANSWER TO COMPLAINT

1.1 Insufficient knowledge.

1.2 Admit.

1.3 Admit.

2.1 Insufficient knowledge.

2.2 Admit.

3.1 Deny.

3.2 Deny.

3.3 Deny.

3.4 Deny.

3.5 Deny.

3.6 Deny.

3.6 (Second 3.6 in Complaint) Deny.

4.1 Deny.

5.1 Deny.

5.2 Deny.

1 **II. AFFIRMATIVE DEFENSES**

2 By way of further answer to the Plaintiffs' Complaint, and as affirmative defenses to the
3 same, the answering Defendants allege the following:

- 4 1. Failure to state a claim upon which relief can be granted;
- 5 2. Actual and/or constructive notice;
- 6 3. Breach of contract;
- 7 4. Bad faith;
- 8 5. Contributory negligence and/or comparative fault;
- 9 6. Waiver and estoppel;
- 10 7. Accord and satisfaction;
- 11 8. Assumption of the risk;
- 12 9. License;
- 13 10. Payment;
- 14 11. Release.

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17 **III. PRAYER FOR RELIEF ON COMPLAINT**

18 NOW THEREFORE, the Windermere Defendants seek the following relief from the Court
19 with respect to the Plaintiffs' claims set forth in the Complaint:

- 20 1. A defense judgment and a dismissal of all claims against Windermere with prejudice;
- 21 2. An award of all statutory costs;
- 22 3. An award of attorney fees and litigation expenses to the extent available by law or by
23 contract; and
- 24 4. For such other relief as the court may deem just and equitable.
- 25
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IV. COUNTERCLAIMS

1
2 1. The Windermere Defendants (as defined above) bring counterclaims against the
3 Plaintiffs for breach of contract, for damages, reimbursement, and commission owing. The
4 Windermere Defendants hereby incorporate all statements of jurisdiction, venue, and identity of
5 the parties as set forth in the Plaintiffs' Complaint.

6 2. The Windermere Defendants executed with Plaintiffs a Listing Agreement on or
7 about August 6, 2009 (the "Listing Agreement").

8 3. The Windermere Defendants also executed an addendum to the Listing
9 Agreement on or about August 6, 2009 (the "Listing Addendum") which called for an advance of
10 funds by Defendant Debbie Heard to Plaintiffs in the amount of \$2,377.58 (the "Advance").

11 4. The Listing Addendum states that the Advance was reimbursable to Debbie Heard
12 "at closing through Escrow", or "in the event the listing should be cancelled by Sellers for any
13 reason." The Listing Addendum further provides that "[p]ayment will be made when Title is
14 transferred at any time."

15 5. Debbie Heard advanced funds to the Plaintiffs in the amount of \$2,377.58,
16 pursuant to the Listing Addendum.

17 6. Debbie Heard, through her listing and marketing efforts in a quickly declining
18 real estate market, procured significant interest in the Property and two bona fide offers on the
19 Property. Plaintiffs refused to meet with Debbie Heard to review and consider either offer.

20 7. Plaintiffs refused to respond in any way to the first offer made.

21 8. Although Plaintiffs refused to meet with Ms. Heard and discuss the second offer,
22 Plaintiffs chose to respond to the second offer by submitting a one-page, last minute response,
23 which did not include their initials on every page of their proposed "counteroffer." Ms. Heard
24 advised them that their minimal last-minute response would likely be perceived by the buyer as a
25 lack of interest by the Seller in the offer. Those buyers never responded.
26

1 9. Plaintiffs blamed Windermere and Ms. Heard for not procuring better offers on
2 the Property. Plaintiffs verbally stated their intention to cancel their listing with Windermere and
3 re-list the Property with another broker. However, upon recognizing that “cancellation” of the
4 Listing Agreement would trigger an obligation to immediately repay the funds advanced by Ms.
5 Heard, the Plaintiffs balked at cancellation and proceeded to idly await expiration of the listing.
6 They displayed no further interest in selling the Property from that point forward, but refused to
7 cancel the listing in a bad-faith effort to avoid the repayment obligation to Ms. Heard.

8 10. Plaintiffs committed acts which materially impaired the Windermere Defendants’
9 ability to market and sell the Property under the terms of the Listing Agreement.

10 11. Plaintiffs refusal to review or consider bona fide offers with Windermere and Ms.
11 Heard, and their minimal effort to even respond to such offers with a bona fide counteroffer in a
12 good faith effort to sell the Property, constituted a breach of the Listing Agreement. The same
13 constituted an effective cancellation of the Listing Agreement as the Windermere Defendants
14 cannot sell the Property without the Sellers’ good faith participation.

15 12. Plaintiffs further refusal to “cancel” the Listing Agreement in writing due to their
16 perception that they could avoid a repayment obligation to Ms. Heard, itself constituted a
17 cancellation and breach of the Listing Agreement.

18 13. Plaintiffs have not repaid the funds advanced and are in breach of contract,
19 causing damages to the Windermere Defendants.

20 14. The Windermere Defendants are not in breach of contract.

21 15. Plaintiffs are liable to Ms. Heard for full reimbursement on the Advance, plus
22 interest accrued on the sum certain thereof.

23 16. Plaintiffs are liable to the Windermere Defendants for a real estate broker
24 commission payable according to the terms of the Listing Agreement, in the amount of
25 \$27,720.00, plus interest accrued on the sum certain thereof.
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1 17. The Listing Agreement contains an attorney fee provision entitling the prevailing
2 party to an attorney fee award relating to claims brought to enforce the terms of the Listing
3 Agreement.

4 **V. PRAYER FOR RELIEF ON COUNTERCLAIMS**

5 NOW THEREFORE, the Windermere Defendants and Debbie Heard seek the following
6 relief from the Court with respect to the Counterclaims of these Defendants:

7 1. A judgment in favor of the Windermere Defendants and Debbie Heard and a
8 finding of breach of contract on all counts against the Plaintiffs;

9 2. An award of damages for reimbursement of the Advance, plus prejudgment
10 interest at the statutory rate as that amount of damages is a sum certain of \$2,377.58 from the
11 time of breach;

12 3. An award of damages for the real estate broker commission owing on the Listing
13 Agreement, plus prejudgment interest at the statutory rate as that amount of damages is a sum
14 certain of \$27,720.00 from the time of breach;

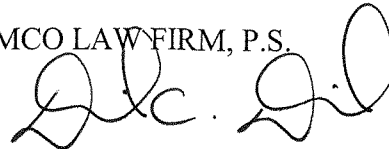
15 4. An award of all statutory costs;

16 5. An award of contractual attorney fees and litigation expenses as allowed by the
17 Listing Agreement or by law; and

18 6. For such other relief as the court may deem just and equitable.

19 DATED this 15th day of November, 2010.

20 DEMCO LAW FIRM, P.S.



21 By _____
22 David C. Daniel, WSBA #34410
23 Attorneys for Defendants

24 **DECLARATION OF SERVICE**

25 I certify under penalty of perjury under the laws of the
26 State of Washington that I caused to be mailed or
delivered [] the original [X] a copy of this document and
all attachments to the regular office or residence of
Jerry + Theresa Palmisano on this
5 day of November, 2010.

x _____
