IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Roome v. Kaiser,*
2024 BCSC 940

Date: 20240530
Docket: S20025
Registry: Duncan

Between:

Shannon Roome

Plaintiff

And

Calvin Todd Kaiser
Cal Kaiser Personal Real Estate Corporation
and Calvin Todd Kaiser doing business as
Cal Kaiser Personal Real Estate Corporation

Defendants

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the Plaintiff:	M. Selly J. Bocksnick
Counsel for the Defendants:	A. LaCroix
Place and Date of Trial:	Duncan, B.C. October 4-6, 10-11 and 13, 2023
Place and Date of Judgment:	Duncan, B.C. May 30, 2024

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I. Introduction

[1] Shannon Roome and Calvin Kaiser are both experienced real estate agents in the Cowichan Valley. In April 2019, they discussed the possibility of combining their efforts which would allow each of them to focus on what they considered were their respective strengths in the industry.

[2] Those discussions culminated in a written agreement dated April 26, 2019 (the "Agreement") which set out the terms on which Ms. Roome would provide her services to Mr. Kaiser.

[3] Given the uncertainty created by the COVID-19 pandemic, in April 2020, Mr. Kaiser terminated the Agreement, initially taking the position that he had cause to do so. However, at the close of the parties' evidence, he withdrew that position, and admitted that his termination amounted to a breach of the Agreement.

[4] Accordingly, the issue to be determined at trial is the damages to which Ms. Roome is entitled as a result of Mr. Kaiser's breach, including whether she took reasonable steps to mitigate those damages.

[5] Also in dispute is whether Mr. Kaiser is personally liable for any damages that Ms. Roome may have incurred.

II. The Witnesses

[6] In assessing credibility, I rely on the principles as set out in the often-cited passages of Justice O'Halloran in *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357, and of Justice Dillon in *Bradshaw* v. *Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.

[7] Related to, but distinct from, credibility is reliability. Credibility concerns the veracity of a witness; reliability involves the accuracy of the witness's testimony. Accuracy engages consideration of the ability of the witness to observe, recall and recount what occurred: *R.* v. *Khan*, 2015 BCCA 320 at para. 44.

[8] In this case, several witnesses gave evidence. Doyle Childs, Jody Hill, and Clint Steigenberger gave evidence on behalf of Ms. Roome. Emma Kaiser, Jessica Perry, and Pierre Campagne gave evidence on behalf of Mr. Kaiser. Ms. Roome and Mr. Kaiser also gave evidence on their own behalf.

[9] Other than the parties, some of the witnesses' evidence was of limited value: Ms. Kaiser and Ms. Perry's evidence primarily addressed Ms. Roome's performance under the Agreement. Ms. Hill testified about Ms. Roome's performance and ability generally. Given Mr. Kaiser's concession at the close of evidence, Ms. Roome's performance was not an issue at this trial.

[10] While Mr. Steigenberger and Mr. Campagne were able to provide insight into to the real estate industry in general, parts of their evidence relating to the negotiations of their own contracts and specific work were of less value. To the extent their evidence was relevant, both witnesses were credible. However, neither seemed to recall the events or issues on which they gave evidence with any great certainty.

[11] As I discuss in more detail below, Mr. Childs provided valuable insight into specific discussions between Mr. Kaiser and Ms. Roome in the aftermath of the termination of the Agreement. Mr. Childs was a forthright witness who, in my view, gave his evidence in a sincere manner.

[12] Ultimately, however, this matter will be determined on the basis of contract interpretation and Ms. Roome's post-termination efforts to mitigate her damages. For the most part, those issues can be, and should be, determined on the basis of the parties' evidence alone. While I have considered all of the witnesses' evidence, the most significant evidence came from them.

[13] Ms. Roome was a thoughtful and considered witness. On both direct and cross-examination, she took time to consider each question and provided a thoughtful answer, without being obstructionist. She conceded points on cross-examination, where appropriate. For example, in respect of mitigation, she easily

conceded many instances in which she could have earned commissions had she accepted post-termination employment as a buying agent for Mr. Kaiser. Despite the litigation, she remained civil and complementary of Mr. Kaiser when appropriate.

[14] Ms. Roome was very organized and clearly made an effort to compile information accurately. As a result, she was clear about specific transactions, dates and the sequence of events when the parties entered into the Agreement, during the term of the Agreement, and post-termination. Her evidence was consistent on both direct and cross-examinations.

[15] Ms. Roome is an entirely credible and reliable witness. I accept all of her evidence without hesitation.

[16] Mr. Kaiser appeared to be reasonably organized and had recall of specific transactions. He conceded that several relatively minor errors were made in the calculation of Ms. Roome's remuneration.

[17] However, unlike Ms. Roome, his evidence was less thoughtful. His positions were inconsistent on significant points. For example, he maintained several times throughout his evidence that the Agreement was "open" and that its terms were a "moving target" which could be changed "on the fly", if necessary. In submissions, he argues the opposite: that neither party was at liberty to vary the terms of the Agreement for the first two years of the relationship. It is difficult to reconcile that disconnect between his evidence and his submissions.

[18] As another example, his evidence about Ms. Roome was uneven and appeared to be molded to fit the point he was trying to make. For example, he was highly complementary about Ms. Roome's ability to attract clients when discussing her ability to mitigate damages, but critical of her inability to attract clients during the term of the Agreement. At times, it seemed his criticism of Ms. Roome, who he sought out to work with him, was gratuitous.

[19] While I do not discount Mr. Kaiser as a credible witness, in my view, he tended to give his evidence in a manner that was most favourable to his position.

[20] I generally prefer Ms. Roome's evidence.

III. Background

[21] I have considered all of the evidence, including the oral evidence of the parties and the documentary evidence, before me. However, in these reasons, I do not purport to canvass all the details of the evidence that was advanced, except as they specially relate to an issue in dispute. A summary of the key points of the evidence is set out below.

A. The Parties

[22] In 2005, Ms. Roome began her practice as a licensed real estate agent in Duncan with RE/MAX. She worked there for eight years. In 2013, she transferred her practice to Pemberton Holmes and worked there for another six years.

[23] During those 14 years in the industry, Ms. Roome built a reputation and brand in the community, primarily through her strong connections and solid client base in the area and through the high level of service she provides to her clients.

[24] Mr. Kaiser is also an experienced real estate agent in the area, having practised for nearly 30 years. He is a well-known "rainmaker" and has been in the top 1% of the top-grossing realtors and has been the top-grossing realtor in the Cowichan Valley for the previous few years.

[25] Prior to 2019, his ability to achieve those levels of commissions was assisted, in part, by operating his practice through a dual agency arrangement. Under that arrangement, he was able to attract listings for which he earned commissions as a listing agent, and for which the other realtors at his office earned commissions representing buyers. When dual agency was banned in British Columbia in mid-2018, the two agents that had been working with Mr. Kaiser left the practice. His office manager, who also acted as a real estate agent, also left, leaving Mr. Kaiser to cover all of the agent's work on his own.

B. The Agreement

[26] By the spring of 2019, the increased workload was taking a toll on Mr. Kaiser. He approached Ms. Roome to discuss the possibility of a working relationship in which she would perform a variety of roles including recruiting, hiring, and managing agents to create a "team" and providing coverage by attending to Mr. Kaiser's client's needs, which would allow him to take some time off. As Ms. Roome described the latter role, Mr. Kaiser wanted someone to "follow him with a broom" to ensure all tasks on client files were maintained.

[27] Ms. Roome saw the proposal as an opportunity to focus on her natural strengths including her organization skills and high quality of customer services and client retention, while allowing Mr. Kaiser to focus on his strength in generating business. While excited by that opportunity, Ms. Roome testified that she was not prepared to "dismantle" her business at Pemberton Holmes unless she was guaranteed at least a two-year deal.

[28] During their negotiations, Ms. Roome prepared what she referred to as a modelling spreadsheet in which she set out incomes she and Mr. Kaiser could expect under various remuneration models. Ms. Roome provided, and Mr. Kaiser had the opportunity to review, the modelling spreadsheet during the negotiations leading up to the Agreement.

[29] On April 26, 2019, Ms. Roome and Mr. Kaiser entered into the Agreement which set out the parties' expectations and the remuneration payable to Ms. Roome. The remuneration included:

a) Base salary of $4,000 per month;

b) Commission split of 40% and 60% to Ms. Roome and Mr. Kaiser, respectively on business brought in by Ms. Roome; and

c) 8% of "Cal's gross commission" to $1 million and 10% on "Cal's gross commissions over $1,000,000".

C. Termination of the Agreement

[30] Given Mr. Kaiser's concession that his termination amounted to a breach of the Agreement, it is unnecessary to review Ms. Roome's performance under the Agreement.

[31] Citing the uncertainty resulting from the COVID-19 pandemic, on April 6, 2020, Mr. Kaiser advised Ms. Roome that he would not continue to pay her, starting immediately. The Agreement was terminated on that date.

[32] He eventually did pay Ms. Roome the $4,000 monthly salary for April 2020 and the 8% on commissions to April 15, 2020. He did not make any other payments after that date.

IV. Issues

[33] As noted, the issue to be determined is the damages that Ms. Roome may be entitled to, if any, as a result of the breach of the Agreement. That issue, in turn, will be determined by the answers to the following:

a) What was the term of the Agreement? Specifically, was the Agreement for a two-year fixed term or was it a contract of indefinite duration?

b) What remuneration was Ms. Roome entitled to under the Agreement? Specifically:

   i. What constitutes "business brought in" on which 40% was payable, and

   ii. What constitutes "Cal's Gross commission" on which 8% was payable?

c) Did Ms. Roome take reasonable steps to mitigate her damages?

[34] If damages are payable, who is liable to pay those damages?

V. Discussion and Analysis

A. Legal Framework

[35] Of the issues to be determined, the first two, the term of the Agreement and the remuneration to which Ms. Roome was entitled, are matters of contract interpretation.

[36] In *Sattva Capital Corp. v. Creston Moly Corp,* 2014 SCC 53, [*Sattva*] the Supreme Court of Canada re-visited the approach to contract interpretation, which it then described as a "practical, common sense approach not determined by technical rules of construction". It confirmed that in interpreting a contract, the decision maker "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract": *Sattva* at para. 47.

[37] However, it clarified that the surrounding circumstances "must never be allowed to overwhelm the words of [the] agreement". It held that "[w]hile the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement": *Sattva* at para. 57.

[38] To that end, the Court also confirmed the continued application of the parol evidence rule, which precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract which has been wholly reduced to writing. It noted that the parol evidence rule precludes, among other things, evidence of the subjective intentions of the parties: *Sattva* at para. 59.

[39] Post-*Sattva* decisions have confirmed that it continues to be the case that where words of an agreement are unambiguous, "extrinsic evidence is not permissible to alter, vary, interpret, or contradict the word[s] in the contract": *Sandhu* v. *Sidhu*, 2019 BCSC 514 at para. 40, affirmed 2019 BCCA 465.

[40] That the contract as a whole must be considered is consistent with pre-*Sattva* jurisprudence including the decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, in which the Supreme Court of Canada also noted at para. 64:

> The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context.

B. Discussion and Analysis

1. What Remuneration was Ms. Roome Entitled to Under the Agreement?

[41] In addition to the payment of her Re/Max and real estate board fees, Ms. Roome was entitled to remuneration in the three separate categories set out in the Agreement. I will consider each of those categories below.

a. "Base salary of $4,000 per month"

[42] There is no dispute about the meaning of this unambiguous provision.

[43] Ms. Roome was entitled to payment of $4,000 for each month of the Agreement.

b. "Business brought in by [Ms. Roome] either Listing or Selling shall be split accordingly 40% to [Ms. Roome] and 60% to [Mr. Kaiser]"

[44] The issue regarding this provision is whether "business brought in", for which Ms. Roome was to be paid 40%, includes both (a) that business transacted from Ms. Roome's pre-existing book of business and (b) the business she transacted that was not part of her own book of business. Ms. Roome argues that it includes both categories of business. Mr. Kaiser argues that it includes only the former category.

[45] On this analysis, I start with the express language set out in the Agreement – "Business brought in by Shannon" [added emphasis]. Notably, the parties did not

use more general language such as “Business in which Shannon is involved”, “Business transacted by Shannon”, or “Deals completed by Shannon”.

[46] More notable is that the parties expressly clarified what Ms. Roome would “bring in”. Specifically, the written terms of the Agreement provide that “[Ms. Roome] will be expected to bring in a minimum of $100,000 [gross commission income] per calendar year from her personal database” [Added emphasis.]. On cross-examination, Ms. Roome confirmed that the $100,000 was the amount she thought she could “bring”, before picking up some business from Mr. Kaiser.

[47] In my view, the specific language (business “brought in”) of the Agreement, together with the parties’ express clarification that Ms. Roome would “bring in” a minimum of $100,000 “from her personal database” render this clause unambiguous: the parties’ clear intention was that “business brought in” would be limited to that business transacted from Ms. Roome’s pre-existing book of business.

[48] Because the provision is not ambiguous, resorting to the factual matrix is not required. However, if I am wrong, the parties’ pre-Agreement discussions also provide context.

[49] There is no suggestion that Ms. Roome would not also transact deals that she did not “bring in”. However, by both parties’ accounts and as reflected in the written Agreement, her primary responsibilities were to maximize the function of the team, provide coverage for Mr. Kaiser’s clients, and improve the administrative function. Indeed, the only reference to her transacting deals other than for business she brought in was in respect of transactions conducted on behalf of Mr. Kaiser. By the express terms of the Agreement, Ms. Roome was to be compensated for transactions she did not “bring in” through the fixed monthly salary and by her 8% share of “Cal’s gross commission”.

[50] In light of that role and the overall compensation structure, I accept that Ms. Roome’s remuneration based on the business she “brought in” is limited to that business that Ms. Roome had already established.

[51] Before turning from this provision, I will address Ms. Roome's observation that notwithstanding his position at trial, in fact, Mr. Kaiser paid her on the basis of 40% of both the business she brought in and the business she transacted that was not part of her pre-existing book. She argues that payment is evidence of the parties' intention regarding this provision.

[52] Mr. Kaiser disagrees. He maintains that regardless of what he did pay, when they entered into the Agreement, the parties intended that the 40% was to be based on Ms. Roome's pre-existing book of business, i.e., the business she brought in. He says his payment in excess of that amount was simply him relenting to her request at the time.

[53] In *Shewchuk* v. *Blackmont Capital Inc.*, 2016 ONCA 912, the Court concluded that, unless a contract remains ambiguous after considering its text and factual matrix, the parties' post-contract conduct is not admissible as part of the "factual matrix" to assess the intended scope of the contract. It explained:

> [41] In my view, subsequent conduct must be distinguished from the factual matrix. In *Sattva*, the Supreme Court stated at para. 58 that the factual matrix "consist[s] only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (citation omitted and emphasis added). Thus, the scope of the factual matrix is temporally limited to evidence of facts known to the contracting parties contemporaneously with the execution of the contract. It follows that subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix: [citations omitted].

[54] At paras 43 – 45, the Court explained the dangers associated with reliance on evidence of subsequent conduct, including that the parties' behaviour may change over time. It also noted:

> [44] Another danger is that evidence of subsequent conduct may itself be ambiguous. For example, as this court observed in *Canada Square Corp. v. Versafood Services Ltd*. (1981), 1981 CanLII 1893 (ON CA), 34 O.R. (2d) 250 (C.A.), at p. 261 quoting from the writing of Professor Stephen Waddams, "the fact that a party does not enforce his strict legal rights does not mean that he never had them." As a consequence of the potential ambiguity inherent in subsequent conduct, "some courts have gone so far as to assert that evidence of subsequent conduct will carry little weight unless it

> is unequivocal": see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis, 2016), at p. 105. [Added emphasis.]

[55] Given the enumerated dangers, the Court concluded that "[e]vidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix" [added emphasis.]: *Shewchuk* at para. 46

[56] In this case, I have found that the provision is not ambiguous: "Business brought in by [Ms. Roome]" is limited to the business transacted from Ms. Roome's pre-existing book of business. Accordingly, resort to the manner in which Mr. Kaiser subsequently calculated Ms. Roome's remuneration is inadmissible.

c. "8% of Cal's Gross commission…up to $1,000,000… and 10% on Cal's gross commission over $1,000,000"

[57] The issue in respect of this clause is the meaning of "Cal's gross commission".

[58] Ms. Roome argues that "Cal's gross commissions":

a) are not limited to the commissions earned by Mr. Kaiser personally, but include all commissions earned by all the other members of the "team"; and

b) include the commissions on the business she brought in, and on which she was entitled to be paid 40%.

[59] Ms. Roome argues that broad interpretation reflects the parties' intention that she focus on the team's growth and success, through her recruitment and management of agents and through her coverage and support for Mr. Kaiser's business, both of which were prioritized over her personal sales. She also says it was, in fact, the manner in which she was paid prior to her termination.

[60] Mr. Kaiser disputes that interpretation, which he says is neither consistent with the express narrow wording of the provision, nor with commercial sense. Moreover, he argues that, when read as a whole, the Agreement does not support Ms. Roome's expansive view of what constitutes "Cal's gross commissions".

[61] I will begin the analysis with the first of Ms. Roome's arguments.

Do "Cal's gross commissions" include all team commissions?

[62] As the starting point, the Agreement expressly states that Ms. Roome was entitled to 8% or 10% of "Cal's Gross commissions on all business written from the commencement of [the] [A]greement". [Added emphasis.] There is no reference to the "team's gross commissions" or the "agency's gross commissions", as Ms. Roome suggests should be read into the Agreement.

[63] Ms. Roome notes that in the past, Mr. Kaiser had almost single-handedly attracted all of the business for the agency. There was no reason to expect that would not be the case after the post-Agreement team was established. Accordingly, she argues that it is impossible to distinguish "Cal" from the "team" or the "team" from "Cal".

[64] I reject that argument.

[65] To be clear, I accept Mr. Kaiser's significance to the agency's ability to obtain listings and earn commissions. Mr. Kaiser refers to himself as a rainmaker and (somewhat immodestly) does not dismiss his importance to the agency's success. There is no question that his immodesty is warranted.

[66] In my view, however, Mr. Kaiser's importance is an insufficient basis on which to expand the scope of the word "Cal" to mean something more than the individual. To the extent that the parties intended to include commissions earned by members of the team other than "Cal", they could have expressly done so. To accede to Ms. Roome's argument would be to stretch the express reference to the individual "Cal" further than can be reasonably justified.

[67] Ms. Roome's modelling spreadsheet does not assist her position as she suggests. While I accept that the parties discussed its content, they did not incorporate any aspect of the modelling spreadsheet into the written Agreement. That being the case, the parol evidence precludes its admission to vary the

reference to “Cal” to “the team” or to add the words “and the team”. At most, the modelling spreadsheet represents Ms. Roome’s subjective intentions regarding the payment structure. That subjective intention is inadmissible: *Sattva* at para. 59.

[68] In any event, even if admissible, the modelling spreadsheet does not support Ms. Roome’s interpretation. Like the Agreement, nothing in the spreadsheet expressly references the “team” (or “Cal” for that matter). Nor is it clear that the projections are based on the team’s commissions. On the contrary, the projections appear to reference Mr. Kaiser’s commissions. Those projections contemplate a total income of between $892,500 and $1,300,000, a range that is consistent with the approximate range of Mr. Kaiser’s income in the prior three years ($880,000 in 2016, $1,000,000 in 2017 and $1.4 million in 2018).

[69] Finally, it is significant that Mr. Kaiser would not receive the team’s commission – the other team members would. Ms. Roome’s broad interpretation would require Mr. Kaiser to pay her based on amounts he did not receive. That interpretation makes no commercial sense and does not favour Ms. Roome’s position on this issue.

[70] In light of the above, the suggestion that Mr. Kaiser agreed to pay Ms. Roome based on the team’s commissions is untenable. Given the clear and unambiguous language of the Agreement, there is no basis to conclude that “Cal’s gross commissions” means anything other than commissions personally earned by Mr. Kaiser.

Do “Cal’s gross commissions” include the 60% Mr. Kaiser earned on “Business brought in by [Ms. Roome]?

[71] I also reject the second aspect of Ms. Roome’s argument – that “Cal’s gross commission” includes the 60% commission Mr. Kaiser earned on the business that Ms. Roome brought in.

[72] Just as the words “Cal’s gross commission” are not expressly expanded in the Agreement to include team commission, nor are they limited to excluding the

commissions Mr. Kaiser earned on Ms. Roome's business. That express reading of the provision, in isolation, appears to support Ms. Roome's position.

[73] However, the provision cannot be read in isolation; rather, it "should be considered in harmony with the rest of the contract and in light of its purposes and commercial context": *Tercon Contractors* at para. 64.

[74] As a whole, the Agreement sets out the sources from which Ms. Roome was to earn income and the specific amount that she was to earn from each of those three sources: (i) the $4,000 monthly salary, (ii) 40% from the business that she brought in, and (iii) 8% of Mr. Kaiser's gross commissions. By structuring the Agreement in the manner they did, the parties' intentions are clear – Ms. Roome was to receive 40% of the commission on the business she brought in and 8% of the commissions on the business she transacted, but did not bring in.

[75] By Ms. Roome's interpretation, Ms. Roome would earn 40% from the deals she brought in, plus an additional 8% of Mr. Kaiser's 60%, or 4.8%, of those same transactions. Her total compensation for the business she brought in would be 44.8%; not the 40% that the parties agreed upon for that category of business.

[76] In my view, Ms. Roome's interpretation is inconsistent with the intention of the parties when the Agreement is read as a whole. By contrast, Mr. Kaiser's more limited interpretation of "Cal's gross commission" is consistent with what I have found is the parties' overall intention regarding payment.

[77] Based on the above, I find that "Cal's gross commissions" are limited to Mr. Kaiser's individual commissions, not including the 60% he earned from the business that Ms. Roome brought in from her pre-existing book of business.

2. What was the Term of the Agreement?

[78] The term of a personal services agreement will inform the parties rights and obligations on its termination and, more specifically, the amount of notice that a terminated party will be entitled to on termination.

[79] Contracts of indeterminate length are deemed to be terminated on reasonable notice: *Rapatax (1987) Inc.* v. *Cantax Corporation Ltd.*, 1997 ABCA 86 at para. 15.

[80] By contrast, subject to the duty to mitigate, a party providing services under a fixed-term contract is entitled to compensation to the end of the agreed term: *Jacks* v. *Victoria Amateur Swimming Club*, 2005 BCSC 778 at para. 19.

[81] A court must assess the wording of the contract, together with the actions and intentions of the parties, to determine whether a contract is, in fact, a fixed-term contract: *Jacks* at para. 19.

[82] In this case, while not a term, the Agreement is titled "Two year working agreement between Shannon Roome and Cal Kaiser". The parties agree that under the "Two year working agreement", neither party was at liberty to vary the terms of the Agreement for the first two years of the relationship.[1] They also agree that it was not the intention that their relationship would terminate after two years, but would, or could, continue but perhaps on different terms. Both parties hoped that it did.

[83] Mr. Kaiser argues that the parties' mutual intention to continue the relationship after two years makes this a contract of indefinite term. To find otherwise, that is, that the Agreement was a fixed term contract, would mean that Ms. Roome would work with him for two years, and then leave. That was neither party's intention.

[84] Ms. Roome agrees that the parties did not necessarily intend that the relationship would end after two years. However, she argues that the reference to a "Two year working agreement" has significance beyond setting out the period of time during which the terms would not be varied. She argues that the language is indicative of the parties' agreement that their relationship would continue for <u>at least</u> two years.

[1] As noted in the "Credibility and Reliability" section, although Mr. Kaiser testified that, in his view, the parties could change the terms of the Agreement, in submissions, he took the position the Agreement did not allow for that change.

[85] In my view, Ms. Roome's interpretation is consistent with the circumstances known to the parties when they entered into the Agreement. At that time, Ms. Roome had to rebuild her practice just six years earlier and was not prepared to have to immediately start over again if the relationship with Mr. Kaiser did not work out. Accordingly, she was only willing to take on the risk of giving up her real estate practice and embarking on a relationship with Mr. Kaiser with a guarantee for a two-year period.

[86] In other words, not only did the two-year term provide both parties with certainty of the rights and obligations of the parties, but it also provided Ms. Roome with certainty that she would have a position with Mr. Kaiser for at least two years. I find that was the intention of the parties.

[87] In reaching that conclusion, I acknowledge that it was the parties' hope, if not intention, that their working relationship would extend past two years. In that way, the relationship was not, strictly speaking, "fixed" at two years. However, as both this Court and the Court of Appeal have found, the possibility of a renewal is not necessarily a sufficient basis to conclude that a contract is of an indefinite nature: *Jacks* at para. 24, citing *Rossmo* v. *Vancouver (City) Police Board*, 2003 BCCA 677.

[88] Given the circumstances at the time, I am satisfied that the Agreement was for a two-fixed term, regardless of the party's shared hope that it would continue after that time.

[89] In any event, even if not properly construed as a fixed-term contract, I am satisfied that the two-year term reflects the parties' intention to define the minimum notice period for termination.

[90] By either characterization, Ms. Roome was entitled to a notice of termination at the end of the two-year period, being April 26, 2021.

3. Did Ms. Roome Take Reasonable Steps to Mitigate Her Damages?

a. Facts and Evidence

[91] After terminating the Agreement on April 6, 2020, Mr. Kaiser suggested that Ms. Roome continue to work for the agency, but solely as a buyer's agent on a 50/50 commission split. Ms. Roome rejected that offer. She reasoned that if she was going to go back to pure sales, she would be better off on her own and retaining 100% of the commissions for herself.

[92] On April 18, 2020, she suggested that she shift away from realtor duties and take on the managing broker position. As the next opportunity to take the managing broker examination that she needed to obtain the appropriate licencing, she suggested taking on that role in September 2020.

[93] Mr. Kaiser agreed and within a couple of hours "offered" (Ms. Roome's word) her that position, saying he had spoken to his business partner, Doyle Childs. Mr. Kaiser was not able to provide any more details of the position.

[94] By email dated April 22, 2020, Ms. Roome set out a plan for the period leading up to her employment as managing broker in September 2020. In it, she proposed that (a) she would be paid in accordance with the Agreement until the end of April 2020, (b) after April 2020, she would take "a sabbatical for a few months to care for [her]self and [her] family" and during which she would prepare for and transition to the managing broker role in September 2020, (c) Mr. Kaiser would continue to hold her licence and publicly maintain her presence on the team; and (d) she would refer her clients to Mr. Kaiser on a 50/50 split.

[95] By email response sent the same day, Mr. Kaiser unequivocally rejected the proposal of a "long term sabbatical", noting that he could not afford to pay her fees during that time. He reiterated his preference that Ms. Roome start working on a split commission basis, in which case he would cover her overhead. He did not expressly respond to Ms. Roome's reference to the managing broker role.

[96] After April 22, 2020, the parties continued to have various communications in respect of their business.

[97] On May 29, 2020, Mr. Childs contacted Ms. Roome to gauge her interest in taking over the managing owner duties – a different position than the managing broker role she had discussed with Mr. Kaiser. Mr. Childs was not aware that Mr. Kaiser had done so. Ms. Roome first realized then that Mr. Kaiser did not have the authority to offer her the mortgage broker position.

[98] On June 26, 2020, Ms. Roome contacted the managing broker at Pemberton Holmes and took steps to transfer her licence there. In furtherance of transitioning her practice, she ordered real estate signs. However, in September, Ms. Roome temporarily suspended her licence, citing the deterioration in her mental health resulting from the termination and having the "financial rug pulled out from under [her]".

[99] She entered into a referral agreement with Elizabeth Bieberger, another agent at Pemberton Holmes as she took time to recover. Under that agreement, Ms. Roome received 25% of the commissions earned on the referrals. Ms. Roome earned roughly $20,000 under that arrangement.

[100] Unfortunately, Ms. Roome's mental health continued to decline and she never returned to practice as a real estate agent. Eventually, she took on employment at a local fabric store earning minimum wage for four hours per week.

b. Legal Framework

[101] Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case: *Southcott Estates Inc. v. Toronto Catholic District School Board,* [2012] 2 S.C.R. 51 at para. 25.

[102] It is common ground that the duty to mitigate damages flowing from a breach of contract exists even in the case of fixed-term contracts: *Neilson* v. *Vancouver Hockey Club Ltd.*, (1998) 25 B.C.L.R. (2d) 235, 1988 CanLII 3051 (BC CA).

[103] It remains the case that the burden is on the defendant to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was

possible: *Red Deer College* v. *Michaels*, [1976] 2 S.C.R. 324 at 330; *Southcott Estates* at para. 24.

c. Position of the Parties

[104] In this case, Mr. Kaiser argues that Ms. Roome's duty to mitigate commenced immediately on the termination of the Agreement in April 2020. He says that she had plenty of opportunity to do so, either by accepting his offer to work as a buying agent or by transferring back to Pemberton Holmes. Given the post-COVID increase in the real estate market, he argues that she would have been able to significantly reduce her damages in either scenario.

[105] Ms. Roome argues she took steps to mitigate, first by her proposal to take on the managing broker role at the agency; second, when Mr. Kaiser ultimately rejected that proposal, by taking steps to move her practice back to Pemberton Holmes; and, finally, by entering into the referral agreement with Ms. Bieberger and taking on employment for which she was capable.

d. Analysis

Was it Unreasonable for Ms. Roome to Fail to Take Any Steps to Find Alternate Employment from April 6 to May 29, 2020?

[106] As set out above, Ms. Roome's post-termination proposal for the managing broker position included a term that she could take a sabbatical prior to September 2020. Mr. Kaiser was immediately clear that he did not agree to her taking any time off, but that she should continue to work as a buyer's agent.

[107] Given his unequivocal communication, I accept that an agreement that included a "sabbatical", or any absence from work after April 6, 2020, was never concluded. That being the case, Mr. Kaiser argues that Ms. Roome's duty to mitigate arose immediately when he terminated the Agreement on April 6, 2020.

[108] I reject that argument.

[109] Despite his advice that he did not agree to a sabbatical, Mr. Kaiser did nothing to disabuse Ms. Roome of the notion that she would be employed as the managing broker in September. In fact, the offer was insincere, perhaps disingenuous, and resulted in providing false assurances to Ms. Roome.

[110] The insincere nature of the offer is evident in his written submissions. In it, Mr. Kaiser justifies telling Ms. Roome that he had spoken to Mr. Childs, explaining "he had, but the year prior". In a similarly insincere manner, Mr. Kaiser maintains that the managing broker role was available. He explains that "he was prepared to [have her assume the role], but understood there were a few things to sort out first – she had to pass her exam, [Mr. Childs] had to formally approve the arrangements and he had to transition [the person who had then been employed in that position] out".

[111] He did not advise Ms. Roome of any of those significant pre-conditions when he made the "offer".

[112] In reality, it was not open to Mr. Kaiser to offer Ms. Roome the managing broker position. His actions had the effect of lulling Ms. Roome into believing that she would be employed in September 2020. That being the case, there was no need for her to consider other sources of income.

[113] That only changed on May 29, 2020 when Ms. Roome spoke with Mr. Doyle and it then became apparent to her that, despite Mr. Kaiser's offer, the position was not necessarily available to her. Until then, she thought she had a position in September. Having led Ms. Roome to believe that was the case, it does not lie with Mr. Kaiser to now assert that Ms. Roome should have sought to find alternate employment before May 29, 2020.

[114] Ms. Roome's failure to look for or obtain another source of income prior to May 29, 2020 does not amount to a failure to mitigate.

Was It Unreasonable for Ms. Roome to Reject Mr. Kaiser's Offer of Employment as a Buyer's Agent?

[115] By Mr. Kaiser's calculations, had Ms. Roome accepted his offer to act as a buyer's agent post-termination, she would have earned roughly $60,000 during the summer of 2020. That number would have been around $145,000 to the end of April 2021, the end of the term of the Agreement.

[116] Especially in light of those calculations, the issue is whether it was unreasonable for Ms. Roome to reject Mr. Kaiser's alternate proposal to work solely as a buying agent, either immediately after he terminated the Agreement or on May 29, 2020, the date by which it was clear that she would not be employed as the agency's managing broker.

[117] I cannot conclude that it was.

[118] First, prior to entering into the Agreement with Mr. Kaiser, Ms. Roome was working as a real estate agent primarily on the buyer's side. As Ms. Roome testified, if she was going to go back to a pure sales agent position, she could do so on her own earning 100% of the commission (albeit with associated costs), rather than the 50% split that Mr. Kaiser offered.

[119] Simply put, there was very little about the offer that provided any incentive to Ms. Roome to accept.

[120] Moreover, it was only with hindsight that Mr. Kaiser has been able to calculate what Ms. Roome could have earned had she taken on the buyer's agent role with him. While the eventual rise in the real estate market was clearer by June 2020, that was not the case in April 2020 when the offer was made. At the time, COVID-19 had only recently been declared a global pandemic, there was a government-imposed "lock-down" in place, and there was very little certainty the effect the pandemic would have on the economy, in general, or the real estate market in particular.

[121] Mr. Kaiser himself was uncertain about his ability to even pay Ms. Roome's real estate fees, stating in his April 22, 2020 email to her:

> This is an unprecedented time, and there has to be drastic change in the way we do business. The way we did things has been altered significantly for the time being and potentially forever.

[122] I am satisfied that, given the nature of the position that was offered and the uncertainty of the market, it was not unreasonable for Ms. Roome to reject Mr. Kaiser's offer in April 2020.

[123] I come to the same conclusion for the period after May 29, 2020.

[124] While it was more clear by the summer that the real estate market was not in peril (and, in fact, was significantly more active than it had been), it was also clear that the parties' relationship was. Mr. Kaiser's argument that Ms. Roome should have nonetheless accepted employment with him, even if remunerative, ignores the significance of the "intangible element of mutual trust, commensurate with the nature of the employment, that flows like a current in the employment relationship". That element is a factor in assessing an employee's obligation to mitigate by accepting offers of re-employment: *Frederickson* v. *Newtech Dental Laboratory Inc.*, 2015 BCCA 357 at para. 23.

[125] In *Cox* v. *Robertson*, 1999 BCCA 640, the Court also considered the status of the relationship between an employer and employer in assessing whether an employee's failure to accept an offer of re-employment was reasonable. As did the Court in *Frederickson,* it referred to the decision in *Farquhar v. Butler Brothers Supplies Ltd*. (1988), 23 B.C.L.R. (2d) 89 (C.A.), stating:

> [11] Probably the leading case on mitigation by re-employment is the judgment of this court in *Farquhar v. Butler Brothers Supplies Ltd.* (*supra*) where the Court stated, at p. 94, that in mitigation of losses, an employee is only required to take such steps as a reasonable person would take. Each case, of course, will be different, but it is clear that while an employee may be under a duty to accept re-employment on a temporary basis in some circumstances, such obligation will arise infrequently because "[v]ery often the relationship ... will have become so frayed that a reasonable person would not expect both sides to work together again in harmony..." (per Lambert J.A., writing for the Court, at 94).

[126] In *Cox*, Chief Justice McEachern (as he then was) recognized the practical difficulty of litigation ongoing, or claims ongoing, while a person is employed:

> [16] … it is noted that the plaintiff did not rush to litigation. As Mr. Justice Donald mentioned in argument, it is almost amusing, and highly artificial, to say that these two persons should be expected to work closely and professionally together on the same mouths in the morning and then attend examinations for discovery in afternoon and then continue to work harmoniously again the next day, all the while preparing for a summary trial.

[127] In the circumstances of those cases, the Courts in *Frederickson* and *Cox* concluded that the employee did not fail to mitigate damages by failing to accept an offer of re-employment.

[128] I am of the view that the same conclusion is warranted in this case.

[129] I accept that Mr. Kaiser terminated the Agreement in reaction to the uncertainty of the COVID-19 pandemic. While his panicked reaction may be understandable, he made the decision without consulting Ms. Roome. Instead, he consulted with the administrative office staff. Given her role as office manager, Ms. Roome understandably felt undermined by that process.

[130] Moreover, while citing the uncertainty of the pandemic as the basis for the termination, Mr. Kaiser failed to consider the uncertainty that Ms. Roome also faced. Rather, although he eventually paid Ms. Roome her base salary for March and April, his initial reaction was to stop paying her immediately. He gave no consideration to her suggestion that they simply defer those payments.

[131] The manner in which he terminated the Agreement may have been enough for some employees to lose trust in Mr. Kaiser's willingness to deal with them in a considerable, if not compassionate, manner. However, perhaps given the circumstances, Ms. Roome remained willing to negotiate an alternate relationship with him. It cannot be said that the trust had been irrevocably broken at that point.

[132] That began to change, however, when Mr. Kaiser also rejected Ms. Roome's proposal that would allow her to continue to work. In my view, that proposal was a balanced approach to the uncertainty that both parties faced at the time. While Mr. Kaiser was not, of course, obliged to accept that proposal, in my view, his refusal to

seriously consider it was enough too break down the trust that Ms. Roome had in that relationship.

[133] Any residual trust was further eroded when Ms. Roome learned from Mr. Childs that, despite Mr. Kaiser's offer to employ her as the managing broker in September 2020, he had no ability to do so.

[134] As Ms. Roome put it in her June 22, 2020 email to Mr. Kaiser:

> "What has sent this over the deep end is me finding out from [Mr. Childs] that there was never any intention, or ability to offer me the Brokers that [sic] position in Sept AND that offer insincerely made since you knew that when you offered it to me…"

[135] As noted above, I find that Mr. Kaiser's "offer" of employment was insincere. Worse, it was made in very uncertain economic times, when Ms. Roome needed some assurance of employment. I accept that the circumstances are such that it was reasonable for Ms. Roome to lose trust and confidence that Mr. Kaiser would treat her fairly and with transparency in the future.

[136] In fact, by June 15, 2020, Ms. Roome had retained counsel and advised Mr. Kaiser that she "had no choice but to proceed with next steps as advised by [him or her]". At that point, there could be no doubt that any confidence and trust that Ms. Roome had in Mr. Kaiser had deteriorated.

[137] Mr. Kaiser does not appear to disagree. As he wrote in a June 15, 2020 e-mail to Ms. Roome, "I have also determined that since your absence that we are two strong personalities that probably don't work really well together."

[138] In the circumstances, where there had been a clear breakdown in the relationship culminating in the threat, and ultimate commencement, of legal proceedings, I cannot conclude that a reasonable person in Ms. Roome's position should have accepted Mr. Kaiser's offer.

[139] Her failure to do so does not amount to a breach of her duty to mitigate.

Was It Unreasonable to take Three Months to Transfer Back to Pemberton Holmes?

[140] After learning on May 29 that the managing broker position was not available to her, on June 29, 2020, Ms. Roome took initial steps to transfer her licence back to Pemberton Holmes. She testified that because she was not moving a "functioning business", she had to rebuild a website, obtain new signage, and take other steps to rebuild her practice that she had "dismantled" to work with Mr. Kaiser.

[141] Mr. Kaiser testified that moving from one brokerage to another is a simple process that only requires a day or two to file a form with the regulator and obtain the approval of the managing broker (the latter of which Ms. Roome had). Mr. Childs testified that he had recently made a similar move and was able to be "up and running" in one day.

[142] Despite taking some initial steps, Ms. Roome testified that, in July 2020, her mental health had deteriorated to the point that she needed time to recuperate.

[143] In this case, I accept that the technical requirements to move from one brokerage to another are significantly less than the three months it took Ms. Roome to transition back to Pemberton Holmes. However, those technical requirements are not the only requirements – practical logistics such as setting up a website, obtaining and distributing marketing materials, and contacting clients are also required.

[144] Regarding those logistics, Mr. Child's evidence that he was able to be "up and running" in a day is inconsistent with his evidence that it took him a week to contact his clients. Presumably, Mr. Childs made his own decision to leave and had the opportunity to plan accordingly. Ms. Roome, on the other hand, was effectively blind-sided by the realization that she did not have the managing broker position she thought was available, and did not have the benefit of any pre-planning.

[145] In the circumstances, quite apart from the decline in her mental health, I do not consider that it was unreasonable for Ms. Roome to take three months after May 29, 2020 to arrange her affairs to transfer her licence to Pemberton Holmes.

[146] It does not amount to a breach of her obligation to mitigate.

Was It Unreasonable for Ms. Roome to Wind up Her Real Estate Practice in September 2020?

[147] As noted, after September 2020, Ms. Roome did not return to her real estate practice citing issues relating to her mental health. Those issues, she says, relate directly to the termination and "having the financial rug pulled out for under [her]."

[148] On that point, I accept, as Mr. Kaiser argues, that the state of Ms. Roome's mental health does not relieve her from the duty to mitigate in these circumstances where those issues were not reasonably foreseeable: *Turczinski* v. *Dupont Heating and Cooling Ltd.*, (2004) 191 O.A.C. 350 (CA), 2004 CanLII 35549 (ON CA) at paras 45 – 46.

[149] Moreover, there was no medical evidence on which to base a finding that the termination affected Ms. Roome's ability to mitigate.

[150] In my view, it was not reasonable for Ms. Roome to fail to resume employment as a real estate agent with Pemberton Holmes in September 2020. By then, it was clear that there was a boom in the real estate market, she had ample time to contact people in her database and conduct the marketing she required to restart her business, and, having worked at Pemberton Holmes, was not going into an uncertain environment.

[151] Her failure to resume her role as a real estate agent at Pemberton Holmes in September 2020 amounts to a failure to mitigate.

[152] The income she could have earned at Pemberton Holmes between September 1, 2020 and April 25, 2021 must be reduced from the damages she suffered as a result of Mr. Kaiser's breach of the Agreement.

[153] Had she taken employment at Pemberton Holmes, she would not have entered into the referral agreement with Ms. Bieberger nor would she have taken the

job at the fabric store. Those amounts are not to be deducted as amounts earned in mitigation.

4. Calculation of Damages

[154] Given Mr. Kaiser's breach of the Agreement, I have found that Ms. Roome is entitled to damages calculated as:

a) The amount Ms. Roome would have earned under the Agreement for the period April 6, 2020 (the date of breach) to April 25, 2021 (the last day of the two-year fixed-term Agreement)

less:

b) The amount Ms. Roome could have earned as a real estate agent at Pemberton Holmes in the period September 1, 2020 to April 25, 2021.

[155] However, the amount of those potential earnings disclosed at trial is only partially established and the parties' submissions concerning the quantum of potential earnings do not reflect my findings.

[156] Therefore, pursuant to Rules 18-1(1) and (2) of the *Supreme Court Civil Rules*, I direct an inquiry to be conducted by the Registrar to determine the above amounts so that the resulting damages can determined.

[157] To provide some guidance to the Registrar, but without limiting the evidence and case authorities to be considered at the inquiry, the Registrar shall consider the following:

a) In determining the amount Ms. Roome would have earned under the Agreement for the period April 6, 2020 to April 25, 2021, the Registrar shall consider:

   i. Ms. Roome's base salary of $4,000 per month;

   ii. The "Business brought in by [Ms. Roome] either Listing or Selling", to which Ms. Roome was entitled 40%, is limited to the business

transacted from Ms. Roome's book of business that pre-existed on the date of the Agreement on April 26, 2019. It does not include the business she would have or could have transacted that was not part of her pre-existing book of business;

iii. "Cal's Gross commissions", to which Ms. Roome was entitled 8% up to $1 million and 10% over $1 million:

(1) are limited to the commissions earned by Mr. Kaiser or his PREC personally. They do not include any commissions earned agents other than Mr. Kaiser or his PREC, and

(2) do not include that portion of Mr. Kaiser's commissions on the business Ms. Roome brought in;

b) In determining the amount Ms. Roome would have earned under the Agreement for the period April 6, 2020 to April 25, 2021, the Registrar may consider:

i. Mr. Kaiser's historical commissions, including the commissions earned during the term of the Agreement;

ii. Other agents' historic commissions, including the commissions earned during the term of the Agreement;

iii. reliable evidence regarding positive and negative contingencies that Ms. Roome would have earned those amounts in the period April 6, 2020 to April 25, 2021; and

c) In determining the amount Ms. Roome could have earned as a real estate agent at Pemberton Holmes in the period September 1, 2020 to April 25, 2021, the Registrar may consider:

i. the commissions Ms. Roome earned as a real estate agent at Pemberton Holmes in the period prior to the date of the Agreement on April 26, 2019;

ii. the referrals made to Ms. Bieberger in the period after September 2020;

iii. reasonable expenses that may have affected Ms. Roome's net earnings at Pemberton Holmes (e.g. marketing costs and office fees); and

iv. reliable evidence regarding positive and negative contingencies that Ms. Roome would have earned those amounts or incurred those expenses between September 1, 2020, and April 25, 2021.

[158] The parties shall schedule a pre-hearing conference before the Registrar to address procedures and timelines in respect of the inquiries.

[159] On completion of the inquiry, the Registrar shall issue a certificate of the damages, if any, owing to Ms. Roome, which shall be binding on the parties.

5. Who is Liable to Pay Damages?

[160] Section 27(1)(c) of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCBCA*] provides that a company must display its name on all its contracts. The purpose of that requirement is to alert those with whom it is doing business of its status and, in particular, its limited liability: *Rich Van Electric Ltd.* v. *Dhaliwal*, 2009 BCSC 1383 at para. 96.

[161] Pursuant to s. 158(1) of the *BCBCA*, a director or officer of a company who knowingly permits the company to contravene section 27(1) (a), (b) or (c) is personally liable to indemnify, among others, a person who supplies services to the company who suffers loss or damage as a result of being misled by that contravention.

[162] Without referring to those specific provisions, in *Pageant Media Ltd. v. Piche*, 2013 BCCA 537, the Court considered the personal liability of the president and chairperson of a corporation for the corporation's breach of a contract that he executed on its behalf. It notes, "[t]here is an overwhelming body of law that states

that a person who signs a contract as an agent for a limited liability company has the onus to advise the third party of this fact, or runs the risk of being personally liable". It goes on to review that law at paras. 41 – 44 and concludes at para. 45 as follows:

> The point is also stated by G.H.L. Fridman, Q.C. in *Canadian Agency Law*, 2d ed (Markham, Ont.: LexisNexis, 2012) at 151:
>
> > An agent who in his own name enters into a written contract, not under seal, on behalf of a principal, will be personally liable on such contract unless "he indicates to the party with whom he is dealing that he is in fact acting only as agent for another". The onus is on the agent to indicate that he is contracting as an agent. If the agent fails to make this clear, he will be personally liable.

[163] In this case, the "Two year working agreement" was made between "Shannon Roome and Cal Kaiser". Under its terms, "Cal" agreed to cover Ms. Roome's fees, certain of the remuneration was based on "Cal's" gross commissions and Ms. Roome was expected to work for clients on "Cals" [sic] behalf. The Agreement was signed by "Cal Kaiser".

[164] There is no reference to Cal Kaiser Personal Real Estate Corporation at all. Nor is there any evidence that Mr. Kaiser advised Ms. Roome that he was contracting with her on behalf of his PREC, that Ms. Roome was aware that he purported to do so, or even that the parties discussed the PREC's involvement at all.

[165] Based on the above, I am satisfied that Mr. Kaiser is the proper person to be named in the action. He is personally liable for the damages that the Registrar determines are owed to Ms. Roome.

[166] The claim against Cal Kaiser Personal Real Estate Corporation is dismissed.

VI. Costs

[167] In my view, Ms. Roome was the successful party. Accordingly, she is entitled to costs.

[168] However, if, after the Registrar's certificate has been issued, either of the parties wishes to address costs, they are at liberty to do so as follows:

a) Any party wishing to claim costs may make written submissions not exceeding five pages, footnoting citations with pinpoint references. Any submissions are to be filed and served within 30 days of the issuance of the Registrar's certificate;

b) The party against whom costs are claimed may file and serve written responsive submissions not exceeding three pages, footnoting citations with pinpoint references, within 14 days of the service of the submissions of the claiming party; and

c) Written reply submissions not exceeding two pages may be filed and served within one week of service of the opposing party's submissions.

"Ahmad J."