

1 UNITED STATES BANKRUPTCY COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 In re) Bankruptcy Case
4) No. 95-34447DDM
5 CENTURY 21 HERD AND CO. REALTORS,)
6 INC., a California Corporation,) Chapter 7
7 Debtor.)
8)
9 ROBERT M. DAMIR, Chapter 7 Trustee,) Adversary Proceeding
10) No. 97-3498DM
11 Plaintiff,)
12)
13 v.)
14)
15 MELANIE HILDEBRAND, NIEL)
16 HILDEBRAND, CHARLES COLLIVER,)
17 CENTURY 21 ALLIANCE, A California)
18 Corporation, and DOES 1 through 20,)
19 inclusive,)
20)
21 Defendants.)
22)

23 MEMORANDUM DECISION

24 I. INTRODUCTION

25 Trial in this matter was held on March 8 and 9, 1999.
26 Plaintiff appeared and was represented by Michael B. Bassi, Esq.
27 and Dena M. Roche, Esq.; defendants appeared and were represented
28 by James S. Mori, Esq.

As more particularly explained below, the court will award judgment to plaintiff, Robert M. Damir, the Chapter 7 Trustee ("Trustee"), against defendant Hilfsco, Inc. ("Alliance")¹ in the amount of \$26,508.78; against Niel Hildebrand in the sum of \$4,000; and against Melanie Hildebrand and Niel Hildebrand jointly and severally, in the sum of \$17,391.66. Charles Colliver is entitled to judgment in his favor.

II. DISCUSSION²

1 Century 21 Herd and Co. Realtors, Inc. ("Herd") is the debtor
2 in this Chapter 7 case, having filed a voluntary petition in this
3 court on November 28, 1995. Its three corporate shareholders and
4 its officers are defendants Melanie Hildebrand, Niel Hildebrand
5 and Charles Colliver (collectively the "Individual Defendants").

6 Herd did business as a licensed real estate sales brokerage
7 in Daly City, California. Melanie Hildebrand and Niel Hildebrand
8 have been affiliated with Herd since shortly after its formation
9 in the early 1980's. Charles Colliver became affiliated with it
10 in 1990 or 1991. Each of the Individual Defendants is a licensed
11 California real estate broker.

12 The Individual Defendants, as well as several licensed real
13 estate sales agents, served as independent contractors to Herd.
14 More specifically, Melanie Hildebrand and Niel Hildebrand were
15 parties to personal service contracts (Exs. 140 and 141,
16 respectively) (the "personal service contracts"). Those personal
17 service contracts reaffirm that Melanie and Niel Hildebrand were
18 not employees of Herd but rather were independent contractors.
19 This is consistent with how real estate offices frequently conduct
20 their business.

21 Faced with cash flow problems and increasing debt, including
22 rent, professional fees and exposure to litigation, the Individual
23 Defendants decided to terminate Herd's business effective April
24 15, 1995. At that time Herd had at least ten listings with
25 property owners appointing Herd the listing agent to sell those
26 properties (the "Herd Listings"). Herd was also broker of record
27 on two sales agreements whereby it was the selling agent, acting
28 on behalf of buyers of the two properties (the "Herd Sales").³

1 Although Herd appeared as broker of record, either by way of
2 the listing agreement or the subsequent sales contracts in the
3 Herd Listings and the Herd Sales, when the escrows closed after
4 Herd had terminated its active business, commissions were paid to
5 Alliance. Trustee seeks recovery from Alliance of the "company
6 dollar," that is, the amount of commissions he contends were
7 earned by Herd after payment of franchise fees, advertising fees,
8 and commission "splits" to individual licensed real estate agents
9 handling the particular Herd Sales.

10 The court is satisfied from the expert testimony of Leo
11 Saunders that the Herd Listings and the Herd Sales had value to
12 Herd. Further evidence that Herd itself had a record of treating
13 its listings as assets of value as is reflected in litigation
14 previously brought against Zonia and Fernando Fasquelle, who had
15 formerly been principals of Alliance. Paragraphs 6 and 7 of the
16 personal service contracts are also consistent with the notion
17 that listings were owned by Herd (rather than the individual
18 broker) and had value.

19 Escrows on the Herd Listings and the Herd Sales closed after
20 Herd terminated its business activity, and as noted above, the
21 commissions were paid to Alliance. Except with respect to 38
22 Holloway Avenue, San Francisco, California, defendants did not
23 present any evidence that Alliance or the Individual Defendants
24 contributed any effort to bring about the consummation of the
25 subject transactions. On the 38 Holloway Avenue sale, Alliance
26 did provide valuable services after April 15, 1995, and therefore
27 its obligation to Herd will be reduced to a reasonable referral
28 fee. Thus, there was no consideration flowing to Herd, and

1 Alliance was the fraudulent transferee of the "company dollar" for
2 these twelve transactions.⁴

3 Mr. Saunders opines that in each of the foregoing instances,
4 Herd should have either received all of the company dollar or a
5 25% referral fee based upon the gross commission paid to Alliance.
6 Trustee has not provided the court with any analysis as to which
7 of the two figures would be appropriate, even though in some
8 instances the company dollar is less than the referral fee and in
9 some instances it is larger. However, consistent with the fact
10 that Alliance took these twelve contractual opportunities from
11 Herd and did not pay for them, the imposition of referral fee is
12 inappropriate and the court will award the Trustee judgment for
13 the company dollar transferred in fraud of creditors, except as to
14 38 Holloway Avenue. Thus, judgment will be entered against
15 Alliance in the sum of \$14,658.61 based upon the transactions
16 involving the following properties and amounts retained by it:

17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<u>Real Property</u>	<u>Company Dollar</u>
282 Sunshine Dr. Pacifica, CA	\$ 2,299.08
48 Oakmont Dr. Daly City, CA	\$ 634.57
36 Shasta Ln. Pacifica, CA	\$ 500.00
38 Holloway Ave. San Francisco, CA	\$ 1,110.00 (25% referral fee on gross commission)
66 Colby St. San Francisco, CA	\$ 2,292.64
110 N. Mayfair Daly City, CA	\$ 1,127.00
8 Dunsmuir St. San Francisco, CA	\$ 2,178.99
323 El Dorado Daly City, CA	\$ 500.00
35 Vista Ct. So. San Francisco, CA	\$ 2,190.75
205 Mariposa Ave. Daly City, CA	\$ 377.16
3925 Savannah Ct. So. San Francisco, CA	\$ 779.60
3924 Geddes Ct. So. San Francisco, CA	\$ 668.82
	\$14,658.61

A separate set of transactions challenged by Trustee include sales similar to the Herd Listings and Herd Sales. In these twenty transactions (reduced to eighteen during trial) (the "Alliance Sales"),⁵ after Herd closed its doors listing agreements or sales contracts were signed by a broker or agent purporting to act on behalf of Alliance. The agreements and contracts were signed before May 18, or 19, 1995, the earliest date on which the Trustee argues that the particular real estate professional's

1 license was transferred on the records of the California
2 Department of Real Estate ("DRE"). For the Alliance Sales the
3 Trustee contends, his expert Mr. Saunders opines, and the court
4 agrees, that a real estate sales person (licensed as an agent but
5 not as a broker) cannot act for any real estate agency other than
6 the one with which that sales person's license is "hung," meaning
7 the office in which the sales person is licensed to do business
8 according to the DRE. Defendants contend that the critical date
9 is the date the licensee physically transferred the license from
10 one office to another, and thus any listing agreements or sales
11 contracts signed after April 15, belong solely to Alliance.

12 The law is very uncertain here and the vagueness or lack of
13 applicable regulations must necessarily give way to practical
14 considerations. Absent any clear indication for the DRE,
15 California courts, or California law, Mr. Saunders' expert
16 testimony, unrebutted by any convincing testimony from defendants,
17 will be accepted. He opines that in practice a 25% referral fee
18 on the gross commission paid to Alliance would be an appropriate
19 compensation to Herd. However, the Trustee's theory of the case
20 is that Alliance is liable as a fraudulent transferee, not on the
21 basis of an implied contract or referral fee. Thus, the award in
22 his favor will be limited to the lesser of the "company dollar" or
23 25% of the gross commission paid. Further, as to the property at
24 701-703 Prospect Avenue, San Mateo, California, Melanie Hildebrand
25 was paid voluntarily by seller after expiration of the listing
26 agreement. It would be inappropriate, therefore, to charge
27 Alliance with any liability for this sale.

28 Judgment will be entered against Alliance in the additional

1 sum of \$11,850.17 based upon the Alliance Sales involving the
2 following properties and the amounts shown:

	<u>Real Property Sold</u>	<u>Lesser of Company Dollar or Referral Fee</u>
3		
4		
5	282 Sunshine Dr. Pacifica, CA	\$ 1,313.76
6		
7	48 Oakmont Dr. Daly City, CA	\$ 634.57
8		
9	534 Arch St. San Francisco, CA	\$ 1,345.00
10		
11	163 East Vista Daly City, CA	\$ 1,247.50
12		
13	1826 32nd Ave. San Francisco, CA	\$ 338.47
14		
15	1404 Eddington Ln. Daly City, CA	\$ 1,218.75
16		
17	340 Justin Dr. San Francisco, CA	\$ 634.34
18		
19	4949A Harrington San Francisco, CA	\$ 445.31
20		
21	1024 Gilman Dr. Colma, CA	\$ 500.00
22		
23	310 Victoria San Francisco, CA	\$ 415.23
24		
25	382 Imperial Way #7 Daly City, CA	\$ 547.92
26		
27	171 Wilits Dr. Daly City, CA	\$ 246.77
28		
	1451 Madrone Way San Pablo, CA	\$ 94.30
	1831 46th Ave. San Francisco, CA	\$ 632.96
	2270 Sloat Blvd. San Francisco, CA	\$ 837.01
	650 Paris St. San Francisco, CA	\$ 776.58

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<u>Real Property Sold</u>	<u>Lesser of Company Dollar or Referral Fee</u>
325 Santa Barbara St. Daly City, CA	\$ <u>621.70</u> \$11,850.17
* * *	* *

Trustee also contends that each of the Individual Defendants is liable because of the personal service contracts signed by Melanie Hildebrand and Niel Hildebrand, or the so-called "assessment" policy that binds Charles Colliver. The evidence is inadequate for the court to find that such an assessment policy was agreed to by any of the Individual Defendants. Voluntary contributions made by any of the three shareholders at times when Herd needed funds do not rise to the level of a legal obligation to pay money when the debts of Herd could not be satisfied. Thus, Charles Colliver is not liable for any assessment now on account of any personal service contract or otherwise.

Melanie Hildebrand and Niel Hildebrand each signed personal service contracts that obligate them to pay their share of office overhead expenses, including office rent, clerical and bookkeeping expense, utilities and telephone. Since the Trustee has not offered evidence of actual claims on file, the court must rely on the schedules of unsecured priority and nonpriority debt (Ex. 163-11 to 163-14). Those scheduled claims that fall within the general overhead category include taxes and obligations for goods and service to various parties, as follows:

<u>Creditor</u>	<u>Amount</u>
Lee Buffington San Mateo County Tax Collector	\$ 1,266.00
Century 21 NAF	\$ 375.00
Century 21 San Francisco	\$ 680.00
Dataquick	\$ 188.04
First National Bank	\$ 553.68
Liccardo, Rossi, et al.	\$ 575.00
Steven L. Pollok	\$ 5,463.28
She, Labaugh, et al.	\$ 195.66
Henry Trim	\$ 225.00
Westlake Development Corp.	<u>\$ 7,870.00</u>
	\$17,391.66

Excluded from the foregoing are scheduled obligations to Thomas Finnegan Realtor, Inc. for \$36,150.76 and Taber for \$5,500. Those claims arise from litigation against Herd and fall outside of general office overhead. There is no proof that Melanie Hildebrand or Niel Hildebrand agreed to pay these obligations of Herd.

Trustee contends that the individual defendants should be liable for their respective shares of \$63,493.98, their "Principals Take-Home Dollar" is set forth in Exhibit 3. To reach this result would be grossly unfair. First, in each instance the Individual Defendants acted as listing or selling agent and were entitled to their commission for the services they rendered. Stated otherwise, but for their services as listing or selling agent, there would have been no commission in the first place.

That being said, Melanie Hildebrand and Niel Hildebrand must

1 be held accountable for their share of overhead and expenses.
2 Their retention of 100% of the actual office commission earned by
3 Herd (less only a \$200 transaction fee in some instances) is
4 grossly unfair to creditors, violates the spirit and the letter of
5 the personal service contracts, constitutes a fraud on creditors
6 and a breach of fiduciary duty by these two corporate officers in
7 the face of Herd's insolvency. Trustee is entitled to judgment
8 against Niel Hildebrand and Melanie Hildebrand, jointly and
9 severally, in the amount of \$17,391.66 as set forth above.

10 * * * * *

11 Finally, Trustee contends that the Individual Defendants must
12 return to the estate excessive management fees they were paid in
13 the weeks prior to Herd's closing its doors. Specifically,
14 Charles Colliver received \$2,500, Melanie Hildebrand received
15 \$6,000 and Niel Hildebrand received \$4,000 and Trustee, without
16 specific proof, wants the court to order a refund of all of those
17 fees that are "excessive."

18 The evidence establishes that Melanie Hildebrand and Charles
19 Colliver serviced in a management capacity with Herd until it
20 closed and were entitled to be paid their management fees. The
21 court cannot say that those fees were either unearned or
22 excessive. At worst payment may have been on account of
23 antecedent debt, but the Trustee did not cast his action as a
24 preference action. His attempt to recover from those individuals
25 on a fraudulent transfer theory must fail because their management
26 services were of reasonably equivalent value to the amount paid
27 for them.

28 Niel Hildebrand did not perform management services for Herd

1 in 1995, nor is there any evidence that he was owed any deferred
2 management fees. Thus the payment to him of \$4,000 within days of
3 Herd's cessation of business constituted fraudulent transfers and
4 Trustee may have judgment against him for \$4,000.

5 * * * * *

6 The Trustee has asked that the defendants be held liable for
7 actual fraud under 11 U.S.C. § 548(a)(1), but no proof has been
8 offered to carry Trustee's burden. The court's oral granting of
9 defendants Fed.R.Bankr.P. 7052(c) motion during trial need not be
10 discussed further here. The Trustee also seeks punitive damages
11 but has not provided any evidence to justify such an award.

12 III. DISPOSITION

13 Within twenty (20) days from the date of service of this
14 Memorandum Decision, counsel for Trustee should submit a form of
15 judgment against defendants (together with the Trustee's costs)
16 consistent with the foregoing. Counsel for Trustee should comply
17 with B.L.R. 9022-1 and 9022-2.

18 Dated: March __, 1999

19

Dennis Montali
United States Bankruptcy Judge

20

21 1. The caption names Hilfasco, Inc. as "Century 21 Alliance." It
22 is undisputed that the correct corporate name is Hilfasco, Inc.
and its d/b/a is Century 21 Alliance.

23 2. The following discussion constitutes the court's findings of
24 fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

24

25 3. The locations of the properties and other relevant data
26 concerning the respective transactions, the dates the listing
27 agreements were signed, the dates the applicable sales contracts
were signed, the dates escrow closed, etc. are set forth in
28 plaintiff's Exhibit 1.

28

1 4. Defendants have not contested that at the time of the transfer
2 of the Herd listings and the contractual rights evidenced by the
3 Herd Sales that Herd was insolvent. Further, there is no dispute
4 that the taking over of these rights were "transfers" for purposes
5 of 11 U.S.C. § 548.

6 5. The locations of the properties and other relevant data
7 concerning the respective transactions, the dates the listing
8 agreements were signed, the dates the applicable sales contracts
9 were signed, the dates escrow closed, etc., are set forth in
10 plaintiff's Exhibit 2.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28