

STATE OF MICHIGAN
COURT OF APPEALS

COMMUNITY COMMERCIAL REALTY, LTD.,

Plaintiff-Appellant,

v

HI-WAY SHORE LIQUOR STORE, INC d/b/a HI-WAY SHORE LIQUOR STORE, HANNA D. GUMMA, a/k/a JOHN GUMMA, AND REHAB GUMMA,

Defendants-Appellees.

UNPUBLISHED

September 12, 2000

No. 207132

Wayne Circuit Court

LC No. 94-424479-CH

Before: Whitbeck, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff Community Commercial Realty, Ltd. (CCR), a commercial real estate broker, appeals as of right the trial court's judgment of no cause of action in its suit to compel defendants Hi-Way Shore Liquor Store, Inc., d/b/a Hi-Way Shore Liquor Store, Hanna "John" Gumma, and his wife Rehab Gumma to pay it a commission for a commercial real estate transaction. We affirm.

I. Basic Facts And Procedural History

A. Background

In 1994, Hanna and Rehab Gumma owned several pieces of land in the city of Detroit. Hi-Way Shore Liquor Store, Inc. owned and operated the party store business that occupied the building on one parcel of land that the Gummas owned. In March of that year, Hanna Gumma, a shareholder in and president of Hi-Way Shore Liquor Store, Inc., executed a three-month, exclusive listing agreement for the business and property with Century 21 East, Incorporated (Century 21) that expired in June 1994. Two months later Hanna Gumma (Gumma) executed a listing agreement with CCR for the same business and property. Rehab Gumma never agreed to have CCR or Bahura list the real estate she owned jointly with her husband. The Gummas sold the real property, including the building Hi-Way occupied, but not the business itself, to Paul Chamberlain in May 1994, for \$320,000. Neither Hi-Way

Shore Liquor Store, Inc. nor the Gummas paid CCR a commission for this sale, which is the foundation for this lawsuit. Apparently, no one purchased the business and it closed some time around 1995.

B. CCR's Case

Najib Bahura is a licensed real estate broker and sole owner of CCR. He specializes in selling party stores and, having emigrated to the United States from Iraq in 1951 as a young man, he has had extensive business contact with the Chaldean community in Michigan. According to Bahura, who has more than thirty years' experience in business, he "never solicit[s] listing[s]," and instead relies on a network of business people, lawyers, and others to refer clients to him. In his approximation, no other Detroit-area broker sold more party stores than he did in the period spanning 1987 through 1997.

In April 1994, Roumel Sheena contacted Bahura about locating a party store for Sheena's father to purchase. Sheena, who was Gumma's accountant and also employed Gumma's daughter, suggested that Bahura contact Gumma about his business, and Bahura did so. When Sheena made this referral he was not aware of an agreement between Hi-Way and Gumma and Century 21 and, although he learned of the agreement later, he was not sure when.

According to Bahura, in his initial conversation with Gumma, Gumma stated that his corporation owned both the store and the land. Gumma indicated that he had heard of Bahura and that he was only interested in listing properties when he was the exclusive broker for one year at a commission rate of ten percent of the sale price. After several telephone conversations, Gumma then said that he was interested in selling and invited Bahura to visit the store.

Bahura said that he visited the store that same day or the next day, April 21, 1994, in the early afternoon. After looking around the property, he introduced himself to Gumma. Although the men made small talk in Chaldean, they never discussed business in Chaldean; instead, they used English. Gumma gave Bahura information about the property, its size, the volume of business, the number of employees, the price of utilities and other expenses, and told Bahura that he was interested in purchasing a specific party store at another location. Gumma reportedly told Bahura that he had the authority to sell and sign the agreement, meaning he could sell both the land and business, and that he would inform Sheena to allow Bahura to look at store records; Gumma did not mention anything about an existing lease, which would have suggested that Hi-Way did not also own the land and building where it operated the party store.

Before he left the store, Bahura said, he spent about forty-five minutes explaining his listing agreement with Gumma and estimated that the store and property were worth \$300,000 combined. Gumma, who never expressed any confusion regarding the terms or language in the listing agreement, said that he was interested in selling, but asked Bahura to list the store and property at \$340,000 to leave room for negotiation. Gumma mentioned that he would be willing to settle for less and accept a relatively long, five to seven year land contract if necessary; Gumma declined an opportunity to consult with someone else about the listing agreement before signing it.

The listing agreement, which identified Hi-Way Shore Liquor Store, Inc. as the seller, suggested that Hi-Way Shore Liquor Store, Inc. owned both the land and the business because both were for sale. Bahura believed that the agreement only bound the corporation, not the Gummas individually. Bahura said that Gumma never told him that the property stretched across more than one street address; he thought 8826 North Chrysler Freeway was the address of the business up for sale. In his own words, Bahura made a “mistake” by failing to fill-in the blank in the listing agreement that would have identified the property being sold. The agreement stated that the property was for sale at \$170,000 and the business was for sale for \$170,000, and Gumma would accept at least \$45,000 as a down payment on each; the separate pricing for the property and business did not indicate to Bahura that they might be owned separately and Bahura did not make it a practice to verify ownership of property by looking at deeds before signing listing agreements. The men left some spaces in the listing agreement blank because Gumma did not have the necessary papers at the time or, even if they discussed the necessary information, Bahura did not think it essential to write the information. As Bahura had explained to Gumma, the agreement fixed CCR’s commission at ten percent of the sale price regardless of who actually sold the property and even if it was leased or exchanged. Before signing the listing agreement, Gumma told Bahura that he was authorized to sell the land and the business.

Gumma did not, according to Bahura, ever tell him that anyone else was interested in brokering a sale, much less that he had a listing agreement with another broker. Had he done so, Bahura said:

I’ll have given him my card and I would have tell him, Mr. Gumma, either call me after this one expires or call the broker. And if he . . . agrees to cancel your listing, and then send me a copy to me, confirmation that it’s canceled. Then, this is my card, give me a call.

Bahura never would have agreed to list Gumma’s property had he known about the Century 21 agreement because he would not want “to create problems” and he already had enough business. He did not check the computerized listings of property sales in the Detroit-area to determine if another broker had a listing agreement with Hi-Way or the Gummas at any time and did not wait until he obtained the missing information regarding the store before signing the agreement. However, Bahura also said that he asked Gumma if he was working with another broker and Gumma replied, “Najib, I was going to sell it ten years ago. . . . [N]ow, I have opportunity to buy another business and I want to sell it.” Although Bahura never specifically said whether Gumma told him about Century 21, Bahura claimed that he never told Gumma that he could cancel the CCR agreement by calling or writing to him.

After Gumma signed the agreement, Bahura said, he spoke with twenty to thirty prospective buyers. He took Yousif Romayha [sic: Rani Yousif?] and one or two other people to see the business, and his business associate brought another person to see it. In May 1994, before Romayha or anyone else made an offer, Gumma told Bahura that he was not interested in selling the store because he was going to lease it to his brother or son, at which time Bahura reminded him that CCR would still be entitled to its commission. Bahura only learned that Gumma had sold the property for \$320,000 when he saw a magazine article in July 1994. When Bahura contacted Gumma, Gumma apologized and said

that the transaction occurred quickly. Gumma did not pay CCR the \$32,000 commission Bahura expected.

C. The Defense

As did Bahura, Gumma emigrated from Iraq to the United States as a young man. Although a long-time businessman, Gumma said that he has a difficult time reading and understanding English. His son David confirmed that Gumma had a difficult time reading English but spoke the language somewhat better.

According to Gumma, Bahura contacted him by telephone to gauge his interest in selling the business. Bahura visited the store that same day around 11:00 a.m., the busiest time of the day and while there was only one other employee working, and began talking about his success as a broker. Because he was interested, Gumma told Bahura that he only wanted to sell the business, not the property, and that he and his wife owned the property individually. Between attending to customers, but at the very outset of their contact, Gumma

told [Bahura] my store is listed with Wahib Machini, Century 21 [sic: Mashini, the Century 21 agent]. Same time I was talking to him, I went to the office. I bring the copy and I give it to him in his hand, then I turn my back to my customer. He told me don't worry. We deal with all companies. You know, I sell it, give me my commission. If I don't sell it, no money. He keep saying that – I hear that from him several times. And I told him, I have a buyer.

Gumma did not think it was acceptable to have two listing agreements, but Bahura told him “several times” that he could cancel the listing agreement, presumably the agreement with CCR, at any time; however, this statement may have related to Gumma's claim that Bahura said he could cancel the Century 21 agreement. In any event, Gumma claimed that he believed Bahura's representation that there was nothing wrong with having two listing agreements. Gumma stated that had he understood that there was no cancellation provision in the CCR agreement and that it also permitted CCR to put a for-sale sign in the business he never would have signed it. Gumma trusted Bahura because they were both Chaldean and Bahura said that he knew Gumma's family.

Gumma admitted that he used an expression to the effect that “everything was for sale at the right price except for the wife and kids” but he did not tell Bahura that Hi-Way owned the real property, that the property was for sale, or that he was desperate to sell the business. Although Bahura did not pressure him into signing the agreement, Bahura never indicated that he could take time to consult with a lawyer or have a family member look at the agreement. Gumma, however, did tell Bahura that he had found some people interested in buying the store and he wanted the agreement to reflect that if he actually sold to those people Bahura would not earn a commission and Bahura said that he added that language to the agreement.

Gumma estimated that Bahura was in the store for about thirty to forty minutes and they talked for about ten minutes but Bahura did not, in that time, explain CCR's listing agreement to him. Gumma

also claimed that he did not completely understand the listing agreement and that he did not witness Bahura fill in the blanks in the agreement, such as the purchase prices for the land and property. According to Gumma, the men did not fully discuss the terms of a sale including whether Gumma would have to pay Bahura a commission if he even leased or exchanged the business and whether he was selling the land. Nor did Bahura explain to Gumma that by signing the agreement as president of Hi-Way he was representing that he was authorized to sell the building and property, even though Gumma had told him that he had a difficult time understanding English and none of his children were available to interpret for him.

Raid Kakos (formerly Assoofy) was working in the store when Bahura visited and generally corroborated Gumma's version of what occurred during Bahura's visit. He confirmed that Bahura came into the store at about 11:00 a.m. Kakos saw Gumma go into the back room and return with papers, which he handed to Bahura. From a few feet away, Kakos heard Gumma tell Bahura that he had an agreement with Wahib Mashini, the Century 21 agent, and that he had found someone interested in buying the store. Kakos, who did not know of the Century 21 agreement, heard the men discussing Mashini in Chaldean and Bahura said to Gumma, "[D]on't worry. Anybody sell it, you know, get his property of commission" and that he worked with "all company. If they sell it, if you sell it . . . we don't care." Although there is a word for "commission" in Chaldean, Kakos never heard either man mention it. He never saw Bahura hand any papers to Gumma or heard Gumma tell Bahura that the corporation owned the property; the corporation did not, in fact, own the property. Kakos did not see Gumma sign any papers nor did he hear the men discussing the expenses and profits from the business.

Wahib Mashini explained that at the end of April 1994 he received a fax consisting of the Century 21 agreement, a blurred document that looked like it said "CCP" on the top, and a handwritten but evidently unsigned note purporting to cancel the Century 21 agreement. He tore up the note because he believed that Century 21 had the exclusive right to list Hi-Way. Although he was not certain, he believed that the fax was from Bahura, who was trying to take over the listing. Mashini did not believe that Gumma tried to cancel the contract, but did not know if it was possible that Sheena could have sent a fax to him on Gumma's behalf. Although Bahura flatly denied sending this fax to Mashini, he did admit that he had access to a fax machine at work during this time period.

In May 1994 Paul Chamberlain contacted Gumma and convinced Gumma and his wife to sell the land and building. At about that time, Gumma said, he attempted to cancel the agreements with Century 21 and CCR because he did not want them to go to the trouble of looking for additional buyers. Gumma believed that he did not owe CCR a commission for the sale because Bahura did not participate in the transaction with Chamberlain and Gumma was not certain whether he owed Century 21 a commission.

At around the same time he found Chamberlain, Gumma asked Sheena, his accountant, to type a letter canceling the listing agreement with CCR because he did not have a typewriter. He also gave Sheena a copy of the Century 21 listing agreement and may have mistakenly asked him to fax it to Bahura when he asked Sheena to fax the letter to Bahura; Gumma's fax machine was broken at the time. Sheena recalled that Gumma asked him to write a letter to Century 21 in May 1994 to cancel that listing agreement, which he did as a favor to his client. The letter actually stated that it was for Bahura's

attention at Century 21, even though Bahura did not work there. Sheena believed that Gumma may have told him that he wanted to cancel the agreement because he had found a buyer, but was not certain. The copy of the letter in the lower court record indicates that someone sent it from Sheena's fax machine on June 7, 1994, according to the time and date stamp at the top of the letter.

Gumma testified that Bahura visited him after Sheena sent the letter and advised him not to sell the property without the business. Gumma interpreted a later conversation the two men had, in which Bahura said that he would have nothing to do with the transaction if the Gummas only sold the property and not the business, as canceling the listing agreement.

D. The Trial Court's Factual Findings

The trial court initially found that Gumma has somewhat limited skills in reading and understanding English, but that he had considerable experience in business. As a result, the trial court concluded that he "understood generally the terms of the listing agreements" after consulting with Sheena, Bahura, and Mashini. Additionally, the trial court found that Gumma had an opportunity to discuss the CCR listing agreement with his attorney, children, or others, but simply chose not to do so.

Despite Gumma's claim that he only intended to sell his business through CCR, the trial court determined that he wanted CCR to list both the property and business. The trial court rejected Gumma's assertion that the CCR listing agreement incorrectly identified the selling price of the property and business as \$170,000 each when he intended to sell the business for \$340,000 as "incredible." In particular, the trial court noted that there was no evidence on the record that the business, alone, had any value near \$340,000. The trial court also noted that, if Gumma only intended to sell the business through CCR, it would make no sense for Gumma to try to contact Bahura to tell him to stop seeking a buyer for the business after Chamberlain only purchased the property, not the store inventory or liquor license.

The trial court also rejected Gumma's argument that the CCR listing agreement was not enforceable because he signed it as president of the corporation when Rehab Gumma did not sign it and Gumma, himself, did not sign it in his individual capacity. Rather, the trial court found that Gumma's statement to Bahura that he owned Hi-Way's building, the underlying property, and the business itself as a representation that he was acting not only as an agent of the corporation but as an agent of the property owners as well. Thus, trial court concluded that the agreement was binding on Gumma as the president of Hi-Way and as his wife's agent.

The trial court found Bahura's testimony with respect to his efforts to find a purchaser for the property not credit-worthy in comparison to Rani Yousif's believable testimony that he was never interested in buying the business. In the trial court's view, Bahura did nothing more than "ask around" to see if anyone was interested in purchasing the business and the property. However, the trial court noted, CCR's listing agreement with Hi-Way and Gumma did not require him to engage in any particular effort to earn a commission.

The trial court's next grouping of findings are the basis for CCR's appeal. The trial court stated:

Fifth, and finally, Mr. Gumma asserts that the CCR Listing Agreement was not a binding contract for the following reasons: (1) the prior existing Century 21 Listing Agreement was in full force and effect; (2) that he informed Mr. Bahura of the existence of the prior agreement and gave Mr. Bahura a copy of the Century 21 Agreement; (3) that Mr. Bahura stated that he would take care of the Century 21 Listing Agreement; and (4) that the Century 21 Listing Agreement was not terminated at the time of the sale of the property to Mr. Chamberlain. Raid Kakos, one of the party store employees, testified that he saw Mr. Gumma hand Mr. Bahura a document and heard them discussing Mr. Mashini.

Mr. Mashini testified that in late April, 1994 someone sent him a facsimile of his Century 21 Listing Agreement along with a copy of the CCR Listing Agreement and a note saying the Century 21 agreement was canceled. Mr. Bahura testified he had access to a facsimile machine. This court finds that Mr. Bahura did know of the existence of the Century 21 Exclusive Listing Agreement, that he knew the terms and conditions of Mr. Gumma's Century 21 Listing Agreement and that the Century 21 Listing Agreement was in force and effect at the time of the sale of the property to Mr. Chamberlain.

As a result of Mr. Bahura's knowledge of this pre-existing exclusive Listing Agreement, Mr. Bahura also knew that the CCR Listing Agreement was fraudulent and that Mr. Mashini was entitled to a sales commission on the property and he was not. Mr. Bahura knew that merely sending a facsimile CCR Listing Agreement to Mr. Mashini, with a note signed by him, did not revoke the Century 21 Listing Agreement. A court of equity will not enforce a contract which was obtained under false pretenses, as this one clearly was. Thus, this court will not enforce the CCR Listing Agreement since it was entered into by Mr. Bahura with full knowledge that it did not supersede the Century 21 Listing Agreement and because he falsely represented that he would cancel the preexisting Listing Agreement.

The trial court next indicated that it would not accept CCR's argument that Hi-Way and Gumma were liable in tort for Gumma's misrepresentation that Hi-Way owned the property because "this misrepresentation of the ownership of the property does not invalidate the listing agreement, is not material to the legality of the contract, and therefore is not a separate cause of action under these facts."

II. Bahura's Knowledge Of The Century 21 Listing Agreement

A. Standard Of Review

CCR first argues that the trial court's finding that Bahura knew of the Century 21 listing agreement was clearly erroneous. This Court reviews a trial court's findings of fact in a bench trial for clear error. MCR 2.613(C). "Generally speaking, factual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made." *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600

NW2d 384 (1999). However, “if the trial court’s account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse.” *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990); see also *id.* at 804 (a trial court’s factual findings are “presumptively correct” and “the burden is on the appellant to persuade the reviewing court that a mistake has been committed, failing which the appellate court may not overturn the trial court’s findings.”).

B. Credibility And Harmless Error

CCR contends that trial court’s findings supporting its conclusion that Bahura knew about the Century 21 agreement before having Gumma sign the CCR agreement were clearly erroneous for three reasons: (1) Gumma did not remember if he gave Bahura a copy of the agreement at the store; (2) there was no evidence that Bahura faxed the CCR agreement to Mashini; and (3) there was no testimony that someone, much less Bahura, signed the handwritten note faxed with the agreements to Mashini, contrary to the trial court’s conclusion.

The record does not bear out CCR’s first argument. Although CCR correctly quoted Gumma’s trial testimony that he did not remember if he gave the Century 21 listing agreement to Bahura, but he “[p]robably did,” Gumma still testified several times that he did actually give a copy of the agreement to Bahura. For example, Gumma testified that he “told him [Bahura] my store is listed with Wahib Machini, Century 21 [sic: Mashini]. Same time I was talking to him, I went to the office. I bring the copy and I give it to him in his hand, then I turn my back to my customer.” He also said, “[B]efore I sign, I told him – I show him first thing agreement between me and Century 21.” Gumma reiterated this point a third time, saying, “I told him [Bahura], you know, it’s listed. First it, before I do anything, I walk – I ask him – I told him this store is listed with Century 21, Mr. Mashini. I walk around to the store, I mean to the opposite side. I grab a sheet of paper and I tell him, this is the purchase agreement [sic] between me and Century 21, Mr. Mashini.” Each of these statements clearly support the trial court’s finding that Bahura saw a copy of the listing agreement.

Much of CCR’s argument on this point as well as the other issues on appeal revolve around what it considers Bahura’s “impeccable credibility.” However, there was testimony at trial that he was not, *indisputably*, the upstanding citizen and completely credible person CCR represents him to be. For example, Sheena, who was also a member of the Chaldean community, “heard a few negative comments about Mr. Bahura,” after he referred Gumma to Bahura; some of the comments related to Bahura’s truthfulness when obtaining listings. Rani Yousif, the potential but uninterested purchaser Bahura took to see the store, had other business relations with CCR and Bahura. Yousif said that he stopped a \$5,000 check to CCR because Bahura was “going to rip me off with it,” which Bahura denied. In light of this evidence, it was within the trial court’s province to determine whether Gumma’s testimony concerning whether Bahura saw the other listing agreement was credible. MCR 2.613(C).

We also note that English was not Gumma’s first language. As a result, by having the ability to observe him testifying, the trial court was in the best position to determine whether this single inconsistency revealed any fault in Gumma’s credibility on this point or was merely a product of his language skills. Furthermore, Kakos’ testimony that he saw Gumma retrieve a paper and hand it to

Bahura while discussing Mashini in Chaldean, which the trial court noted in its written opinion, lends additional support to this finding. We conclude that the trial court did not clearly err in this regard.

Nor does the record support CCR's second argument, that there was no evidence that Bahura was the anonymous individual who attempted to cancel the Century 21 listing agreement with the anonymous note by fax. This finding is largely irrelevant to the trial court's implicit conclusion that Bahura knew about the Century 21 agreement *at the time Gumma signed with CCR* because Mashini received the fax sometime *after* Gumma signed the CCR agreement.

CCR is correct in suggesting that Mashini's conclusion that Bahura sent the fax was merely speculative. However, CCR's argument fails to recognize that circumstantial evidence is evidence nonetheless and "may be sufficient to establish a case." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Here, there was circumstantial evidence that Bahura sent the fax to Mashini. For example, Bahura had access to a fax machine, he had a copy of both the CCR and Century 21 listing agreements, the commission was a motive for attempting to cancel the Century 21 agreement, and he reportedly told Gumma that he knew Mashini and could cancel the Century 21 agreement at any time. Sheena also testified that he did not fax a letter for Gumma until May and Mashini claimed that he received the letter a month earlier. Moreover, Mashini never said that he received the letter Sheena helped draft for Gumma.

This evidence, alone, would not necessarily be strong enough to support a conclusion that Bahura knew about the Century 21 agreement. However, this evidence did not stand alone. The trial court had other evidence that Bahura knew about the Century 21 agreement, discussed above, in order to support its conclusion of fraud. The trial court only used its finding on this point to address the overall equity of enforcing the contract. Accordingly, the record generally supports the trial court's finding and, given its purely circumstantial basis, the trial court did not rely on this finding to an inappropriate extent. Thus, we conclude that the trial court did not err when making this finding.

CCR's third point does have a limited amount of merit. The record does not support the trial court's conclusion that Bahura signed the handwritten note faxed to Mashini. When testifying, Mashini never directly said whether he saw a signature on the handwritten note, much less that it was Bahura's signature. However, in light of Mashini's repeated testimony that he did not know who sent him the fax, it is reasonable to infer that Bahura's name did not appear on that note or on any other place in the documents sent to Mashini that would demonstrate that Bahura sent the fax. Accordingly, the trial court did err when it concluded that Bahura signed the note faxed to Mashini.

However, this error does not require reversing the trial court's judgment. See MCR 2.613(A). This was but one of many points the trial court identified to support its conclusion that Bahura fraudulently obtained the listing agreement for CCR because he knew about Century 21's exclusive agreement. Therefore, this erroneous finding regarding the signature was not critical to the trial court's overall decision. See generally *In re Approximately Forty Acres In Tallmadge Twp*, 223 Mich App 454, 463-464; 566 NW2d 652 (1997) (a trial court's statements, even if assumed incorrect, do not warrant reversing a judgment if they were not "essential to its decision"). Accordingly, we conclude that this single, small factual error does not warrant reversing the judgment of no cause of action.

III. The Credibility Of Defense Testimony

A. Standard Of Review

CCR argues that the trial court committed error requiring reversal when it concluded that the defendants had a meritorious defense and contends that testimony offered for the defense was internally inconsistent, incredible, and implausible on its face. The clearly erroneous standard of review, MCR 2.613(C), applies to this issue as well. See *Beason*, *supra* at 804.

B. The Factual Basis For The Trial Court's Ultimate Legal Conclusion

CCR's argument on appeal is essentially a complete restatement of its arguments in the trial court attacking the credibility of every witness who testified on behalf of Gumma and Hi-Way because their testimony created a picture of "total deceit." For example, CCR challenges the veracity of Mashini and Gumma's testimony that Gumma did not understand English very well, even though Gumma's son David corroborated their claims and the transcripts clearly reveal that he did struggle with the language at least at an appreciable level. Again, CCR claims that Bahura was the most credible witness because he was held in such high esteem by the business community he never would have risked sullyng his reputation by engaging in unethical conduct.

As noted above, Bahura's reputation may not be as sterling as CCR represents and his trial testimony was contradicted on some points, suggesting that he is not always truthful. For example, Bahura referred to Yousif as a potential buyer and Yousif said he never was interested in buying Hi-Way because it was in the city of Detroit and he was looking for a business in the suburbs. CCR even suggests that Gumma bribed Mashini to testify on his behalf, although it terms this a "financial accommodation . . . to preclude the rightful payment by Mr. Gumma of a commission" to CCR. We find that there is *no* evidence on the record that Gumma bribed Mashini.

CCR also fails to tie any of these alleged inconsistencies in witness testimony to the trial court's specific factual findings, which makes it difficult to determine which of the many findings the trial court made, including findings favorable to CCR, CCR contends are insupportable. However, in *Beason*, *supra* at 803, the Michigan Supreme Court made the point that an appellate court must look at the trial court's findings in light of the whole record to determine whether those findings were "plausible." The Court, quoting *Anderson v Bessemer City*, 470 US 564, 575; 105 S Ct 1504; 84 L Ed 2d 518 (1985), then noted that

the trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; *or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it.* Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. [*Id.* at 804 (emphasis supplied).]

Accordingly, CCR is correct that *if* the defense was completely inconsistent and implausible this Court might have grounds to reverse the judgment.

Nevertheless, there is nothing so outrageous, unusual, or inconceivable about Gumma's description of Bahura's visit to the store that a reasonable factfinder would be forced to reject Gumma's testimony and fraud defense completely. See generally *People v Lemmon*, 456 Mich 625, 642-645; 576 NW2d 129 (1998), quoting *United States v Sanchez*, 969 F2d 1409, 1414 (CA 2, 1992), *United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992), and *United States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985) (testimony might be implausible if it was "seriously 'impeached,'" "defies physical realities," or is rife with "uncertainties and discrepancies").

For instance, there was no evidence that Gumma was anywhere but at the store during the visit when he purportedly gave Bahura a copy of the Century 21 agreement. Nor was there any proof of a conspiracy between Gumma, Kakos, and Mashini. Kakos even testified that he no longer worked for Gumma, that he was not a member of Gumma's family, and that he had no financial interest in the outcome of the case. Thus, the trial court's decision to rule in favor of Gumma and Hi-Way was not so poorly supported by credible evidence that we can reverse its legal conclusion. *Zine, supra*.

Moreover, an exchange between CCR's counsel and the trial court at the hearing on the motion to set aside the judgment plainly indicates that the trial court was aware of the flaws in the testimony and took those flaws into account when making its findings of fact as a whole. This exchange commenced when CCR's counsel asked the trial court to consider any witness' deposition testimony to be more credible than his or her in-court testimony if they were inconsistent. CCR's counsel reasoned that the witnesses' memories of relevant events were sharper at the depositions because they took place more than a year before trial and the witnesses were less "sandpapered," meaning prepared to testify by counsel.

THE COURT: I disagree. Witnesses are prepared before depositions just like they are before trial.

MR. SARNACKI: They don't – they don't know, your Honor.

THE COURT: They're not any more sandpapered at trial than they are at deposition.

MR. SARNACKI: Oh, yes, they are. They can go over – they can go over with their attorney, and they can grab that transcript and say, you screwed up on this answer at the deposition, at trial you better say this, or you better talk to your buddy and make sure both of you –

THE COURT: You're assuming that people are lying. Quite frankly, I do think Mr. Gumma lacked a lot of credibility, but your client also lacked credibility. They each contradicted themselves time and time and time again. And quite frankly, my decision was much more on the evidence given by the other witnesses, rather than either Mr.

Gumma or Mr. Bahura, because it was the other witnesses who were much more credible, including Mr. Mashini who was very credible. There isn't any evidence that he engaged in any conspiracy with Mr. Gumma.

I mean, I watched him testifying. I don't find any reason for him to lie. You're right. He's never gotten any money under the contract. I mean, if anything, he would come in here and be upset with Mr. Gumma and not be willing to testify in his favor because Mr. Gumma never paid him, under a valid listing, which he should have done.

MR. SARNACKI: I think that begs the question, why wasn't he upset exactly, your Honor.

THE COURT: I'm not saying he wasn't [sic] upset. I just said I think he testified truthfully. He has nothing to gain from testifying falsely for Mr. Gumma. And, I think he was just credible. He was just telling the truth.

MR. SARNACKI: Or he's being paid by some other means, your Honor.

THE COURT: There's no evidence of that. You're just slandering his character for nothing. The man appeared to be very credible. You're just coming out and saying he's lying for no reason whatsoever. I don't think that that is a fair thing to do to this witne[ss.]

I believe the Century 21 listing agreement is valid. There's no evidence – there was no evidence at trial to say it was not valid. Both Mr. Mashini and Mr. Gumma agreed that it was valid and acknowledged it. And Mr. Bahura even knew about it. He even said it in his dep[osition].

* * *

THE COURT: Did you – I mean, I'm not going to go through every piece of evidence. I listed [sic: listened] to this for four days. I read everything. I read every exhibit. I'm not – I don't think that my decision was against the great weight of the evidence, and I don't think it's based on mistaken facts.

As I said, your client was no[t] credible. And Mr. Bahura's Affidavit here is completely impeached by Mrs. Palaggolo [sic]. . . . Her Affidavit totally contradicts it. And I think it's sort of typical of why I find your client not credible. He said he talked to her and she said all these things. She submitted an Affidavit that she didn't say any of these things.

But, I don't think I made a mistake and I think my decision was based upon the evidence.

So, your Motion's denied.

The trial court's findings of fact in its opinion and order acknowledged Gumma's questionable credibility, the weaknesses in the defense, and Bahura's standing in the business community. With these problems in mind, the only logical explanation for the trial court's ultimate decision is that it properly rested its final determination on the witnesses' credibility to decide close factual questions as it stated in the motion hearing. MCR 2.613(C). Therefore, we conclude that CCR has failed to sustain its burden of persuasion on this issue. *Beason, supra* at 804.

IV. The Century 21 Listing Agreement And The Statute Of Frauds

A. Standard Of Review

In its final argument on appeal, CCR argues that the trial court erred as a matter of law when it concluded that the Century 21 listing agreement was valid because the trial court failed to consider that this agreement did not conform to the statute of frauds. "This Court reviews de novo questions of law such as whether the statute of frauds bars enforcement of a purported contract." *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

B. The Statute Of Fraud's Writing And Signature Requirements

At trial, Gumma and Hi-Way claimed that the CCR contract was not enforceable because they were induced to enter into it by Bahura's fraudulent representation that he could cancel the Century 21 listing agreement. See *UAW-GM Human Resources Center v KSL Recreation Corp*, 228 Mich App 486, 503; 579 NW2d 411 (1998), quoting 3 Corbin, Contracts, § 580, 431 ("Fraud . . . makes a contract voidable at the instance of the innocent party."). The trial court agreed and found that Bahura knew that he could not cancel the Century 21 agreement when he told Gumma that he could do so. On appeal, CCR claims that the trial court erred because the Century 21 agreement was not legally binding. In particular, CCR claims that the Century 21 agreement violated the statute of frauds because Mashini never signed it as an agent of Century 21. The implication is that if the Century 21 agreement was not valid, then Bahura's representation that he could cancel the Century 21 listing agreement was not false. See generally *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (a false statement is one of the six elements of fraud).

The statute of frauds states that "[a]n agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate," MCL 566.132(1)(e); MSA 26.922(1)(e), must be "in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise" or it is "void," MCL 566.132(1); MSA 26.922(1) (emphasis supplied). The copy of the written Century 21 listing agreement in the lower court record is difficult to read. However, in the lower, left corner of the first page there appears to be a line where someone wrote the words "Century 21 East, Inc." Underneath that line it says "Broker," suggesting that Century 21 was the broker and, therefore, a party to the agreement. Below there, in capital letters, is the name "Wahib Mashini" over the word "By." This signature is very similar to the larger and clearer signature on the "Century 21 Seller Service Pledge" affixed to the listing agreement.

The clear import of the arrangement of these separate lines, and their individual titles, on the listing agreement is that Mashini was signing for Century 21 as its agent; Mashini's signature was intended to bind Century 21 to its obligations under the agreement. Contrary to CCR's argument, Mashini did not need to sign the listing agreement "Wahib Mashini, agent for Century 21" when the form for the agreement made that agency relationship clear. As the Michigan Supreme Court said long-ago in another case dealing with the validity of a commission agreement for a real estate broker under the statute of frauds, "[Because] the name of the corporation appears in the body of the instrument, the signature of its agent need not further set up the corporate name *nor the fact that he signs as agent* of the corporation." *Archbold v Industrial Land Co*, 264 Mich 289, 291; 249 NW2d 858 (1933) (emphasis supplied).

Further, there is no evidence whatsoever that Mashini was acting in some capacity other than as Century 21's authorized agent when he signed the Century 21 listing agreement. Where else or how else Century 21's agent should have signed the listing agreement to make it legally valid is not clear from the agreement itself or from the statute of frauds. If there are other defects with the Century 21 listing agreement, CCR does not identify them in its brief on appeal. This contract appears valid on its face and we conclude, therefore, that the trial court did not err by finding that Bahura's knowledge of this binding contract made his representation that he could cancel the contract false and made the CCR agreement fraudulent.

Affirmed.

/s/ William C. Whitbeck

/s/ Helene N. White

/s/ Kurtis T. Wilder