THE REALTY ASSOCIATION and WILLIAM L. BERKLEY,	)	
Plaintiffs/Appellees,	)	
v.	)	Appeal No. M1997-00168-COA-R3-CV
RICHTER/DIAL BUILDERS, INC., and DOUG RICHTER,	)	Williamson Chancery No. 23503
Defendants/Appellants.	)	

COURT OF APPEALS OF TENNESSEE

APPEAL FROM THE CHANCERY COURT FOR WILLIAMSON COUNTY

AT FRANKLIN, TENNESSEE

THE HONORABLE HENRY D. BELL, CHANCELLOR

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AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

WILLIAM B. CAIN, JUDGE

O P I N I O N

This is an action for breach of contract tried in chancery court without a jury. The chancellor rendered judgment for the plaintiffs and the defendants have appealed. We reverse in part and affirm in part the decision of the trial court.

I. BACKGROUND

The Huntington Ridge Townhouse Development commenced in mid 1973 on property in the City of Nashville, Davidson County, Tennessee, as recorded in record book 4675, page 9, Register's Office, Davidson County, Tennessee. Portions of the project were completed by the construction and sale of townhouses. However, economic downturn brought the project to a halt leaving eighty of the platted lots undeveloped, except for water and sewer line installation and roadway excavations. The developer went into bankruptcy and the bankruptcy trustee sought to sell the eighty undeveloped lots.

The plaintiff, The Realty Association, is a corporate licensed real estate brokerage firm. The plaintiff, William L. Berkley, is a licensed real estate broker acting in this case for and on behalf of The Realty Association. The defendant, Doug Richter, was in the business of real estate development in Davidson County and was an officer and fifty percent shareholder in Richter/Dial Builders, Inc., a Tennessee corporation engaged in real estate development and building.

In 1993, Mr. Berkley learned that the undeveloped lots in the Huntington Ridge Development were for sale by the bankruptcy trustee at a distressed price. He then sought a developer who might be interested in joining with him in the purchase and development of these lots. He contacted Mr. Richter but would not disclose the ownership and location of the Huntington lots without protecting his own future participation in the building venture. On December 9, 1993, "William L. Berkley for Realty Associates and . . . Doug Richter . . . for The Richter Company, Inc. d/b/a Richter/Dial Builders, Inc." executed what was called a "non-disclosure/circumventure agreement" providing in pertinent part as follows:

> I. The parties agree that neither they nor their partner, nor any corporation, division, subsidiary, employee, agent, or consultant associated with them will make contact with, deal with or otherwise become involved in the Huntington Ridge Town-Home Venture with any banking or lending institution, trust, corporate or individual representatives of a bank, lending institution, trust corporation or individual, lender or borrower, buyer or seller, introduced by the party or their associates, without permission of the introducing party. This agreement is binding upon the parties, associates, attorneys, accountants, agents, heirs, assignees, and designees.

A proposed "real estate sale and escrow agreement" was executed by Mr. Richter as secretary of Richter/Dial Builders, Inc. and submitted to the trustee in bankruptcy. This proposal to purchase the eighty undeveloped lots for a total

of $80,000 was rejected by the trustee in bankruptcy because of a provision giving the buyer thirty days to ascertain whether or not eighty townhouses could be built on the subject property. After the rejection of this offer, Mr. Berkley for Realty Associates and Mr. Richter for Richter/Dial Builders, Inc. entered into the agreement upon which this law suit is predicated and which is in words and figures as follows:

> Upon acquisition of the property herein described, Doug Richter for Richter/Dial Builders, Inc. agrees to pay William L. Berkley for Realty Associates a co-broker fee of 1.5% of the re-sale/new purchase price of each new townhome (to be built) on the 80 t[o]wnhouse lots of Huntin[g]ton Ridge Townhomes.
>
> This agreement and the parties' obligations hereunder may not be assigned without written notice to William L. Berkley for Realty Associates by certified mail ninety days prior to the effective date of any contemplated assignment. Should an assignment be forthcoming to any third party, Richter/Dial Builders, Inc. agrees and contracts to severance compensation to William L. Berkley for Realty Associates in the amount of One Thousand Five Hundred Dollars ($1,500.00) per lot to be paid in full prior to the effective date of any assignment by Richter/Dial Builders, Inc. Consideration of which this proposal of Huntington Ridge Townhouses prepared by William L. Berkley and is the subject of this Agreement negotiated and contracted by and between the parties, receipt of which is hereby acknowledged.
>
> If one or more of the provisions of this Agreement is held invalid unenforceable or illegal in any respect, the remainder of this Agreement shall remain valid and in full force and effect.
>
> This agreement shall be binding on the parties hereto, their successors, administrators, executors, heirs, but no assigns . . . .

The preceding agreement between the parties was executed December 21, 1993. On January 10, 1994, an offer was made by Richter/Dial Builders to the trustee in bankruptcy to purchase the eighty lots on the same terms and conditions as the previously rejected offer except that the provision allowing for ascertainment by the buyer that eighty townhouses could be built on the property was deleted and Realty Associates was to receive a five percent selling broker commission. This offer was accepted by the trustee in bankruptcy.

The trustee in bankruptcy conveyed the property to Richter/Dial Builders who immediately employed Alley & Associates Consulting Engineers to investigate the status of the property and such actions as would be required by metropolitan government before construction of units could begin. On January

27, 1994, Alley & Associates delivered to Richter/Dial Builders an extensive report relative to utility services, codes, planning commission requirements and public works requirements.

On March 17, 1994, counsel representing Richter/Dial Builders forwarded to Mr. Berkley a letter which provided the following:

> On or about December 21, 1993, you, individually and/or on behalf of Realty Associates, entered into certain agreements with my client, Mr. Doug Richter and Richter/Dial Builders, Inc. and/or the Richter Company, Inc. These several agreements related to the sale of 80 Deminimus Pud Lots, said lots being part of the Huntington Ridge Townhouse Development. My client was, to say the least, quite disturbed when he found out that although the Contract for Sale called for 80 lots, there are only 74 lots that are buildable. Six lots have been reserved by Planning and Zoning for the construction of a retention pond for drainage purposes.
>
> This deficiency in the number of lots has been discussed with the Trustee and counsel for the Trustee with the idea in mind of reducing the total sale price for the property due to the fact that they cannot build on six lots and, consequently, they will suffer a distinct monetary loss from this project. It is the position of my client that you have mislead him with your representation that there were 80 buildable lots. It is further the position of my client that you failed to properly represent the property in question, and your misrepresentation is the basic cause of his monetary loss.
>
> My client is proceeding with the purchase of the property for which you will receive your commission; however, we do take the position that you are not entitled to the additional commissions on the property as the lots are sold as set forth in an Agreement dated December 21, 1993.
>
> The purpose of this letter is to inform you of the position of my client in this matter and to further advise you that it is our position that you, in essence, breached that Agreement through your misrepresentations, and, consequently, the said Agreement is no longer in effect.

On April 14, 1994, Mr. Berkley responded to the above communication as follows:

> Your letter dated March 17, 1994 wherein your client, Doug Richter advises that he was misled and therefore because of that, I breached the Agreement between us dated December 21, 1993. This is <u>completely</u> false and denied. Furthermore, I expect to be compensated as set forth in the Agreement.

Following this letter, Richter/Dial Builders proceeded to build residential units on many of the lots in issue and to option and assign various of the lots to other

builders without paying to Berkley or Realty Associates, any sums of money in accordance with the December 21, 1993 agreement.

II. THE LITIGATION

On August 11, 1995, The Realty Association and Mr. Berkley brought suit against Richter/Dial Builders and Mr. Richter, individually, alleging breach of the December 21, 1993 contract and resulting damages. The defendants answered separately asserting that the plaintiffs were guilty of fraudulent misrepresentations concerning the property, including the following assertions:

> Plaintiff Berkley misrepresented the stage of development of the property as a whole, representing that the property was ready for vertical development, when in fact the property was far short of that developmental stage and faced numerous problems requiring extensive work before such stage could be achieved. These problems and developmental issues included, inter alia, work necessary to regrade the property and pave roadways; work to locate and repair water lines; work to repair, flush, clean and disinfect sewer lines; an undisclosed obligation for Defendant Richter/Dial Builders, Inc., to pay homeowner fees on each prospective unit prior to construction; problems with storm drainage on the property; work to prepare and submit redesign plans and to obtain the approval of the planning commission for such plans; work necessary to complete access to electrical service; and title issues.

Because of these alleged fraudulent misrepresentations, the defendants asserted that the contract of December 21, 1993 was invalid and unenforceable. In his individual answer, Mr. Richter also asserted that he had no personal liability since he had signed the contract solely in his capacity as officer and agent for the corporation, Richter/Dial Builders, Inc.

With the issues thus drawn, the parties engaged in extensive discovery and on December 23, 1996, the defendants moved for leave to file an amended answer and a counterclaim. The proposed amended answer asserted the same alleged misrepresentations by the plaintiffs as had been asserted in the original answer of the defendants. The proposed counterclaim, relying on the same facts as previously alleged, sought recovery of damages for fraudulent and negligent misrepresentation. In the proposed amended answer and counterclaim, the defendants for the first time demanded trial by jury.

By order entered January 13, 1997, the chancellor granted the defendants' motion to amend in order to further assert affirmative defenses. The chancellor also granted the motion for leave to add a counterclaim but

conditioned the grant of leave to file a counterclaim on the defendants posting a bond in the amount of $175,000 within twenty days of the date of this order. The defendants declined to file the necessary $175,000 bond and the case was tried without a jury on March 12th and 13th, 1997 upon the issues drawn by the complaint of the plaintiffs and the answer and affirmative defenses interposed by the defendants.

The chancellor took the case under advisement and, on March 21, 1997, issued the following decree:

> This breach of contract action came on to be heard on March 12, 1997 before the Honorable Henry Denmark Bell without the intervention of a jury. Having taken the case under advisement and upon due consideration of the pleadings, testimony of witnesses in open court the exhibits and the entire record, the court finds the issues joined, other than as to the Plaintiffs' attorney's fee claim, in favor of the Plaintiffs and assesses damages for breach and reputation (sic) of contract in the amount of $119,323.00 together with interest as computed in trial exhibit #16 in the amount of $4,531.84 as of the trial date.
>
> IT ACCORDINGLY ORDERED, ADJUDGED AND DECREED that Plaintiff's have and recover of Douglas Richter and Richter Dial Builders, Inc., jointly and severally, the sum of $123,854.84 together with interest thereon as 10% per annum from and after March 12, 1997 and court costs for all of which let execution issues.

On April 17, 1997, the defendants filed a motion to alter or amend the judgment and for a new trial which was denied by the chancellor on April 23, 1997. On April 29, 1997, the plaintiffs filed a motion asking the chancellor to make specific findings as to allegations of fraud and misrepresentation. On May 1, 1997, the chancellor entered the following order in response thereto:

> In response to plaintiff's motion the court makes the following special finding.
>
> The court's conclusion that plaintiffs are entitled to damages for breach and repudiation of contract involved finding and concluding that affirmative defenses of fraudulent and negligent misrepresentation were not supported by credible evidence. The issues resolved as to these affirmative defenses are identical to the issues tendered in defendants' proposed counterclaim.

The defendants filed their timely notice of appeal.

III. STANDARD OF APPELLATE REVIEW

In cases tried without the intervention of a jury, the findings of fact by

the trial court are reviewed *de novo* on appeal, accompanied by a presumption of correctness unless the evidence preponderates against those findings. Questions of law are reviewed on appeal *de novo* with no presumption of correctness. Tenn. R. App. P. 13(d); *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 15 (Tenn. 1997). In cases where the trial court has made no findings of fact, there is nothing upon which the presumption of correctness contained in Rule 13(d) can attach and, accordingly, review on appeal is *de novo* without a presumption. *Devorak v. Patterson*, 907 S.W.2d 815, 818 (Tenn. Ct. App. 1995); *Archer v. Archer*, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995); *Goodman v. Memphis Park Comm'n*, 851 S.W.2d 165, 166 (Tenn. Ct. App. 1992). As the chancellor has the opportunity to observe the manner and demeanor of the witnesses as they testified, the weight, faith and credit to be given to such testimony lies in the first instance with the chancellor whose judgment as to credibility is given great weight on appeal. *Taylor v. Trans Aero Corp.*, 924 S.W.2d 109, 112 (Tenn. Ct. App. 1995); *Devorak*, 907 S.W.2d at 819.

IV. ISSUE ON APPEAL

The defendants first complain that the trial court erred in conditioning their right to assert counterclaims upon the posting of a bond in the amount of $175,000. In its order of January 13, 1997, the chancellor granted the defendants' motion to amend its answer to assert further affirmative defenses. This grant was unconditional. In the same motion, the defendants had moved to add a counterclaim asserting fraudulent and negligent misrepresentations on the part of the plaintiffs-counter/defendants and a right to recover damages because of same. It was this counterclaim that was the subject of the $175,000 bond condition imposed by the trial court.

Clearly, if such a condition had been placed upon the right of the defendants to amend their answer, such would have been error. *Gardiner v. Word*, 731 S.W.2d 889 (Tenn. 1987). The determinative question, however, involves the $175,000 bond condition placed upon the application to file a counterclaim which included, for the first time in the case, the demand for trial by jury. The proposed counterclaim raises no additional facts not already encompassed in the affirmative defenses relative to alleged misrepresentations. The factual issues that were tried in the case under the original complaint and the answer and affirmative defenses asserted in the answer are exactly the same issues of fact that would have been tried under the proposed counterclaim.

The right to trial by jury is constitutional and jealously guarded. *Caudill v. Mrs. Grissoms Salads, Inc.*, 541 S.W.2d 101 (Tenn. 1976). The

method by which any party must demand a right to trial by jury, however, is controlled by the provisions of Rule 38 of the Tennessee Rules of Civil Procedure. Rule 38.02 provides as follows: "Any party may demand a trial by jury of any issue triable of right by jury by demanding the same in any pleading specified in Rule 7.01 or by endorsing the demand upon such pleading when it is filed, or by written demand filed with the clerk, with notice to all parties, within fifteen (15) days after the service of the last pleading raising an issue of fact."

All issues of fact in this case were raised by the complaint and the answers and affirmative defenses asserted therein. The proposed counterclaim added nothing to the factual issues in the case but only asserted that those same facts laid a basis for a finding of negligent misrepresentation. As the proposed counterclaim did not even tender an issue of fact, it is not a vehicle that can be used belatedly to support a right to trial by jury. *Trimble v. Sonitrol of Memphis, Inc.*, 723 S.W.2d 633, 639-40 (Tenn. Ct. App. 1986).

Furthermore, if conditioning the right to file the counterclaim on posting of a $175,000 bond was error, it was harmless error since the issues raised by the proposed counterclaim were already well within the affirmative defenses asserted by the defendants in their respective answers. The more serious question involves the jury trial demand contained in the counterclaim but since the counterclaim was not "the last pleading raising an issue of fact" within the meaning of Rule 38.02, Tenn. R. Civ. P., the trial court did not err in denying trial by jury. *See* 5 Moore's Federal Practice, section 38.41; *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045 (9th Cir. 1974); *Hardeman County Bank v. Stallings*, 917 S.W.2d 695, 700 (Tenn. Ct. App. 1995); *Trimble,* 723 S.W.2d at 639-40.

The defendants next assert that the trial court erred in holding Mr. Richter personably liable for the breach of the December 23, 1993 co-broker agreement. This action is for breach of contract wherein Mr. Richter individually is named as a defendant and Richter/Dial Builders, Inc. is also named as a defendant. Neither pleading nor proof seeks to pierce the corporate veil of Richter/Dial Builders, Inc. The preponderance of the evidence establishes that Mr. Richter signed the contract in issue solely in a representative capacity.

The contract itself states that "Doug Richter for Richter/Dial Builders, Inc. agrees to pay William L. Berkley for Realty Associates a co-broker fee." It further provides "should an assignment be forthcoming to any third party,

Richter/Dial Builders, Inc. agrees and contracts to severance compensation to William L. Berkley for Realty Associates in the amount of $1,500 . . . per lot to be paid in full prior to the effective date of any assignment by Richter/Dial Builders, Inc." The agreement is signed by "Doug Richter, for Richter/Dial Builders, Inc." The record establishes that the contract was prepared by William L. Berkley with the assistance of his attorney. Mr. Berkley testified as follows:

> Q. In fact, the obligation which is described in the third sentence is for you on behalf of Realty Associates and Mr. Richter for Richter, slash, Dial Builders, Inc. to co-broker –
>
> A. Uh-huh.
>
> Q. – right? Those were words that you and your lawyer selected?
>
> A. Uh-huh.
>
> Q. And you and your lawyer selected the words "Doug Richter for Richter/Dial Builders, Incorporated" in the second and third sentence? I'm sorry, first and second line.
>
> A. It speaks for itself, sir.
>
> . . . .
>
> Q. And Mr. Richter (sic), can you read his signature and what that says?
>
> A. Yes, yes.
>
> Q. "Doug Richter for Richter, slash, Dial Builders"?
>
> A. I suppose that's what it says.

As in *Anderson v. Davis*, 34 Tenn. App. 116, 234 S.W.2d 368 (Tenn. Ct. App. 1950), the contract in issue binds only the corporation Richter/Dial Builders, Inc, and not Doug Richter individually. In this respect, the judgment of the trial court will be reversed.

Next, the defendants attack the enforceability of the co-broker agreement alleging that: 1) the parties never formed an enforceable contract; 2) there was no meeting of the minds; 3) the co-broker agreement fails for lack of mutuality; and 4) the co-broker agreement is unenforceable for failure of consideration. Resolution of these questions depends upon the language of the written instrument and the contemporaneous conduct of the parties as reflected almost entirely by the testimony of Mr. Berkley and Mr. Richter. To the extent that such involves a comparison of the credibility of Mr. Berkley and Mr. Richter, the trial court chose to believe Mr. Berkley and this credibility determination

weighs heavy in appellate review. *Taylor v. Trans Aero Corp.*, 924 S.W.2d 109, 112 (Tenn. Ct. App. 1995).

The testimony shows, with little controversy, that Mr. Berkley was aware of the availability of the undeveloped lots in Huntington Ridge Townhomes and Mr. Richter was not. Mr. Berkley approached Mr. Richter about future development of Huntington Ridge and Mr. Richter was interested. Mr. Berkley refused to disclose anything about Huntington Ridge until Mr. Richter agreed, in writing, to the "non-disclosure/circumventure agreement" restricting Mr. Richter's ability to deal with Huntington Ridge except through Mr. Berkley. Both Mr. Richter and Mr. Berkley signed this agreement after which they together visited the Huntington Ridge property. Mr. Richter testified:

> Q. What happened after you finished your site visit with Mr. Berkley? What was the next significant event in this?
>
> A. I was sufficiently informed and impressed with the property to want to buy it. I asked about submitting a contract, and he said that he would like to submit a contract, but in order to do that, he was going to need to sell – he would want to sell the units. After we constructed the units, after they were finished, Mr. Berkley would sell them. And that was the next event.
>
> Q. Did you and Mr. Berkley discuss possible commission arrangements for the work that he was going to perform?
>
> A. We did.
>
> Q. What did he demand of you?
>
> A. He asked for 6 percent. He asked that we as the company provide a furnished model, that we as the company provide those items that are in the model such as fax machines and copy machines and telephones and that we supply the sales and collateral material.
>
> Q. Was that an acceptable arrangement to you?
>
> A. It is with the exception of the real estate commission. We do supply sales staff inside or outside our company. We furnish models, telephones, fax machines but not at the commission rate that he was looking to achieve.
>
> Q. Did you make a counter-proposal to Mr. Berkley?
>
> A. Yes, we bounced back and forth. We negotiated back and forth. And I was impressed with his sales skills. I mean, he found a piece of property, he found a transaction that was doable, and I found myself thinking this is an opportunity. We in the past have co-brokered properties, worked with agencies that co-broker properties, and if he

> were willing to do it for the same that others had done it for or willing to do it for the same that we currently were doing it for, then he would be the man. We would like for him to do it.
>
> Q. Did you get back to Mr. Berkley a percentage number that you are willing to pay in real estate commissions?
>
> A. Yes, 1 ½ percent.

Clearly, the evidence establishes all of the elements of a binding, bilateral contract. *Johnson v. Central Nat'l Ins. Co.*, 210 Tenn. 24, 356 S.W.2d 277, 281 (1962)*; American Lead Pencil Co. v. Nashville C. & St. L. Ry.*, 124 Tenn. 57, 134 S.W. 613, 615 (1911); *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 735 (Tenn. Ct. App. 1989). Therefore, the action of the chancellor in this respect is affirmed.

The defendants next assert that the letter of March 17, 1994 from attorneys for Richter/Dial Builders, Inc. to Mr. Berkley effectively cancelled the December 21, 1993 contract because of the alleged misrepresentations of Mr. Berkley. The chancellor held to the contrary and we affirm. The issue turns again almost entirely on a comparison of credibility between Mr. Richter and Mr. Berkley with the chancellor choosing to believe Mr. Berkley in a decision that is supported by the preponderance of the evidence.

The proof shows that at the time Mr. Richter signed the December 23, 1993 contract on behalf of Richter/Dial Builders, Inc., Mr. Berkley informed him in writing:

> The community was approved for construction in 1972. To date, 145 townhouses have been completed and sold. Eighty lots remain for development and construction.
>
> The original developers installed water and sewer lines throughout the community and completed excavation for drives and building locations, however existence, size and condition is to be confirmed.

Mr. Richter was an experienced residential builder who was aware that the property infrastructure needed work and that code requirements were more stringent than they had been in 1972. The chancellor concluded that Richter/Dial Builders' "affirmative defenses of fraudulent and negligent misrepresentation were not supported by credible evidence." It would be more accurate to say that such affirmative defenses are not supported by a preponderance of the evidence.

Finally, the defendants assert that the trial court erred in awarding

damages for the lots which were still owned by Richter/Dial Builders. The issue is without merit. Richter/Dial Builders unilaterally terminated the contract under which Mr. Berkley was entitled to commissions. The chancellor held and we agree that such termination was in breach of the contract as the affirmative defenses of misrepresentation were not supported by a preponderance of the evidence. It is "a valid principle of contract law, that a party may not refuse payment to the other party for non-performance when the refusing party has deprived the other party of the opportunity to perform. *Pacesetter Properties, Inc. v. Hardaway*, 635 S.W.2d 382, 388 (Tenn. Ct. App. 1981). The evidence is undisputed that Richter/Dial Builders, for substantial consideration, optioned 41 lots in Huntington Ridge Townhouses to Westminster Homes for development by Westminster Homes and did not further intend to develop these lots. This action triggered the $1,500 per lot severance pay due and owing to Mr. Berkley for Realty Associates as provided in the December 23, 1993 contract. The chancellor so held and we affirm.

V. CONCLUSION

The action of the chancellor in conditioning the right to file a counter-claim was at best harmless error under the facts of this case. The proposed counterclaim did not raise an issue of fact and thus did not provide a proper vehicle for an initial demand for trial by jury. The chancellor erred in rendering judgment against Mr. Richter individually since the clear preponderance of the evidence established that Mr. Richter signed the contract in issue only in a representative capacity for Richter/Dial Builders. In all other respects, a preponderance of the evidence supports the decision of the trial judge in rendering judgment against Richter/Dial Builders and in favor of the plaintiffs in the amount of $123,854.84, together with interest at 10% per annum from and after March 12, 1997. The plaintiffs assert that the appeal in this case is frivolous and seek damages under Tennessee Code Annotated section 27-1-122. The appeal is not frivolous and the application is denied.

The case is thus reversed in part, affirmed in part, and remanded to the trial court for such further proceedings as are necessary. Costs of the appeal are assessed against Richter/Dial Builders, Inc.

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WILLIAM B. CAIN, JUDGE

CONCUR:

_____
BEN H. CANTRELL, P.J., M.S.

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PATRICIA J. COTTRELL, JUDGE