

**CITATION:** Neiman v. Duffmits Holdings Inc., 2010 ONSC 4643  
**COURT FILE NO.:** CV-09-382471  
**DATE:** 20100825

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** **ARKADI NEIMAN ET AL.**, Plaintiffs/Respondents  
**DUFFMITS HOLDINGS INC.**, Defendant/Moving Party

**BEFORE:** G.R. Strathy J.

**COUNSEL:** *Irving Marks and Dominique Michaud*, for the Defendant/Moving Party  
*J. Gardner Hodder*, for the Plaintiff/Respondent

**DATE HEARD:** August 12, 2010

2010 ONSC 4643 (CanLII)

**ENDORSEMENT**

[1] The issue on this motion is whether this action should be stayed because the plaintiff Arkadi Neiman (“Neiman”) was not licensed under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C, (“*REBBA*”). For the reasons that follow, I have concluded that the action should not be stayed and that the issue should be left for determination at trial.

Relief Sought

[2] This is a motion by the defendant Duffmits Holdings Inc. (“Duffmits”) for an order:

- (a) under rule 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 and s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, staying this action pursuant to s. 9 of *REBBA* on the ground that the claim is statute-barred and, as such, is frivolous, vexatious and an abuse of process;
- (b) under rule 21.01(1)(b) of the *Rules*, striking the portions of the statement of claim relating to a claim for unjust enrichment, on the ground that the claim discloses no reasonable cause of action;

(c) striking certain portions of the affidavit of the plaintiff Alexander Bimman (“Bimman”), sworn in opposition to the motion, on the ground that it contains evidence that is inadmissible on the rule 21.01(1)(b) motion and irrelevant to the motion to stay.

### Background Facts

[3] The plaintiff Neiman is the principal of the plaintiff 1050838 Ontario Ltd. (“105”). Neither Neiman nor 105 is registered under *REBBA*.

[4] The plaintiff Bimman is the principal of the plaintiff Bimman R.E. Services Inc. (“BRESI”). Bimman is a registered real estate broker and BRESI is a registered brokerage. Both are licensed under *REBBA*.

[5] The defendant Duffmits is the owner of a property located at 2401 Dufferin Street, Toronto (the “Property”).

[6] Pharma Plus Drugmarts Ltd. (“Pharma Plus”) is the operator of a retail pharmacy chain.

[7] In early 2005, Pharma Plus retained BRESI to locate and evaluate potential sites for Pharma Plus stores.

[8] Bimman deposes that in September 2006, he and Neiman entered into a partnership agreement to acquire and develop a commercial property with the intention of leasing it to Pharma Plus.

[9] After examining several sites, they selected the Property as suitable.

[10] On about August 11, 2006, 105 entered into an agreement of purchase and sale with Duffmits, agreeing to buy the Property for \$3.05 million. The agreement of purchase and sale described the purchaser to be 105 “in trust for a company to be incorporated.”

[11] Bimman, on behalf of BRESI, was the broker for this purchase. Bimman disclosed to Duffmits that he had an interest in the transaction and that he would be directly or indirectly acquiring an interest in the Property. He also disclosed that he had a partnership with the purchaser with regard to the development of the Property.

[12] Around this same time, Neiman and Bimman were negotiating with Pharma Plus with a view to entering into a lease to Pharma Plus after they had acquired and developed the Property. These negotiations culminated in a letter of intent, dated August 14, 2006 (the “Letter of Intent”), executed on behalf of Pharma Plus, proposing to lease a building to be constructed on the premises for a term of 15 years. The Letter of Intent was addressed to Bimman and BRESI. It was superseded by a revised letter dated October 5, 2006.

[13] Thus, by mid-August, 2006, Neiman and Bimman, together with their two companies, had put together the two key ingredients of the deal contemplated by their partnership plan. On

the one hand, they had an agreement of purchase and sale, pursuant to which they were going to acquire the Property from Duffmits, and on the other hand they had a commitment from Pharma Plus to lease a 12,000 square foot building that would be constructed on the Property.

[14] Before the closing of the agreement of purchase and sale, Neiman and Bimman informed Duffmits of the Letter of Intent they had signed with Pharma Plus. They suggested that Duffmits might consider keeping the Property and leasing it to Pharma Plus. Duffmits was interested in the proposal, because it had previously considered leasing the property to Pharma Plus but had been unable to negotiate acceptable rental terms. In order for this proposal to work, of course, 105 would have to relinquish its rights to the Property under the agreement of purchase and sale.

[15] An agreement was reached to this effect. The conditional period in the agreement of purchase and sale was allowed to expire. Neiman entered into an agreement with Duffmits, dated December 7, 2006 (the "Agreement"), to assist in the negotiation of the lease with Pharma Plus. The agreement stated that "in connection with the possible introduction by you of [Pharma Plus] to lease a minimum of 10,000 square feet at [the Property] ..." Duffmits would pay a fee to Neiman of \$500,000 plus G.S.T. in the event a binding lease was arranged. The fee was to be paid according to the following schedule:

- (a) \$175,000.00 was payable upon the execution by both landlord and tenant of an unconditional lease. If there were conditions to be met, then no portion of the fee was payable until those conditions were waived;
- (b) \$175,000.00 of the fee would be paid upon Pharma Plus taking possession of the premises; and
- (c) the balance of the fee would be paid upon Pharma Plus opening for business at the leased premises.

[16] The Agreement also set out basic terms of the lease arrangement with Pharma Plus that Neiman would assist in negotiating, including an average net rent of \$500,000 per year over a 15 year term and a tenant improvement allowance of \$20.00 per square foot.

[17] Neiman and Bimman then proceeded to finalize the arrangements with Pharma Plus which, in early 2008, executed a lease agreement that was satisfactory to Duffmits. The lease was conditional on site plan approval by the City of Toronto. Eventually building permits were obtained and Pharma Plus took possession of the pharmacy, opening for business on July 6, 2009. All amounts then became payable by Duffmits to Neiman.

[18] Duffmits paid \$75,000 to Neiman on account of its obligations under the Agreement, but has refused to pay the balance of \$425,000. That claim is the subject of this action. In the alternative, Neiman, Bimman, and their respective corporations claim damages in that amount for unjust enrichment, alleging that Duffmits unfairly profited from the work carried out by Neiman on behalf of the partnership with Bimman.

The Issue

[19] The issue is whether the Neiman’s claim is barred by s. 9 of *REBBA*. That section provides:

No action shall be brought for commission or other remuneration for services in connection with a trade in real estate unless at the time of rendering the services the person bringing the action was registered or exempt from registration under this Act and the court may stay any such action upon motion.

[20] The section applies to claims for remuneration for “services in connection with a trade in real estate.” A “trade” is defined in s. 1(1) as including

... a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for purchase and sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition, acquisition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt, and the verb “trade” has a corresponding meaning;

[21] A person who trades, for their own account, in respect of their own interest in real estate is not required to register under *REBBA* except in certain circumstances. This exception is contained in s. 5(1)(h):

... registration shall not be required in respect of any trade in real estate by,

...

(h) a person, on the person’s own account, in respect of the person’s interest in real estate unless,

(i) the trade results from an offer of the person to act or a request that the person act in connection with the trade or any other trade, for or on behalf of the other party or one of the other parties to the trade, or

(ii) the interest of the person in the real estate was acquired after the offer or request referred to in subclause (i) whether or not the trade is the result of the offer or request;

Discussion

[22] Duffmits’ position is that Neiman’s claim as pleaded is based on the Agreement between it and Neiman. It says that the Agreement, by its clear language, is an agreement to provide “services in connection with a trade in real estate” and that the amount claimed in this action is

“remuneration” for such services. Duffmits says that the parol evidence rule prohibits Neiman from introducing evidence to alter or vary the terms of the Agreement. It says that Neiman and the other plaintiffs obviously had their reasons to structure the transaction as they did and that they cannot now rewrite the terms to avoid the consequences of *REBBA*.

[23] Duffmits also says that there is no basis for a claim for unjust enrichment, because even if it has been enriched at the expense of the plaintiffs, there is a juristic reason for the enrichment – namely, s. 9 of *REBBA*.

[24] There is no dispute that a partnership cannot trade in real estate unless it is registered under *REBBA*<sup>1</sup> and in order for the partnership to be registered each partner must be registered. Thus, none of Neiman, 105, or the Neiman/Bimman partnership was entitled to trade in real estate. Nor is there any dispute that under s. 9 of *REBBA* any action for a commission or other remuneration for services in connection with a trade in real estate is barred unless brought by a person who is registered.

[25] Section 9 of *REBBA* has been consistently enforced by the courts: *Market Leadership Inc. v. Loretta Foods Ltd.* (2005), 206 O.A.C. 327, [2005] O.J. No. 5430 (C.A.), app. for leave to appeal dismissed, [2006] S.C.C.A. No. 61; *Maroney v. Tebbutt*, [2000] O.J. No. 4157 (S.C.J.); *M.J.K. Consultants Inc. v. Citibank Canada*, [1993] O.J. No. 2175 (Gen. Div.). In *Market Leadership Inc. v. Loretta Foods Ltd.*, above, the Court of Appeal confirmed, at para. 41, that a compensation agreement in connection of a leasing transaction, carried out by an unregistered corporation and an individual, was barred by what was then s. 22 of *REBBA*:

Moreover, and importantly, a leasing transaction concerning the Alpen lands is a "trade in real estate" within the meaning of s. 22 of the Act. Because neither Market Leadership nor Anthony Guido was registered as a broker or salesperson under the Act and neither enjoyed the benefit of any registration exemption under the Act, a claim for compensation in relation to the Alpen lease extension is barred under s. 22 of the Act.

[26] While this may appear to result in unfairness in particular cases, because the plaintiff may have invested substantial time and effort on the defendant’s behalf, yet the defendant receives a windfall, the objective of the statute is the protection of the public by regulating those who engage in the real estate business: *Maroney v. Tebbutt*, above, at paras. 13-15. As Rosenberg J., as he then was, said in *M.J.K. Consultants Inc. v. Citibank Canada*, above, at para. 12:

On the basis that this motion comes to me, that is on the assumption for the purpose of this motion that all of the facts alleged by the plaintiff are true, it would appear that the plaintiff has been unfairly treated. That is not for the court to consider at this stage because, in the trial, if it were allowed to proceed, the defendants would deny many, if not all, of the allegations of the plaintiff. The court cannot decide a case such as this on the basis of sympathy for the plaintiff, but on the law as the legislature

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<sup>1</sup> See s. 4 of *REBBA*.

has intended it to be and the legislation which they have passed in pursuance thereof. In my view, the whole purpose of the legislation would be defeated if, in a situation such as this where the remuneration was calculated as a percentage of the sale price and conditional on the sale going through, the Act could be avoided by calling such services "consulting fees". If that were the case, then the protection that the legislature intended would be ineffective.

[27] On the other hand, the statute only bars an action "for commission or other remuneration for services in connection with a trade in real estate." It is therefore important to examine the nature of the claim. It is also important to determine whether the trade is one exempted by s. 5(1)(h), where the person is trading for his or her own account.

[28] The first issue was examined by Smith J. in *McClure v. Backstein*, [1985] O.J. No. 1052 (H.C.J.), aff'd [1986] O.J. No. 467 (C.A.). In that case, the plaintiff had entered into an agreement to purchase a property for \$510,000, with a deposit of \$5,000. He proposed to develop the property as a commercial plaza, using a company he had incorporated. He had no funds to speak of and the agreement was conditional on obtaining financing. He did have two prime tenants in mind, Tim Hortons and Harvey's, and he thought that these would attract other tenants. He was able to interest the defendant and proposed a partnership, but the defendant wanted to own the property outright. The parties entered into an agreement whereby the plaintiff agreed to assign his rights under the agreement for \$100,000 plus repayment of the deposit. The consideration was to be paid as follows: \$25,000 on completion of the purchase, \$25,000 on the first tenant taking occupancy and the balance once the premises had been sufficiently occupied, either by the rental of 12,000 square feet or payment of at least \$120,000 annual rent.

[29] The agreement between the parties required the plaintiff to develop the site and to "procure offers to lease for the premises and [that he] shall perform all necessary functions in order to permit tenants to occupy the premises, including all negotiations with tenants, all discussions with architects, all discussions with contractors, and the supervision of any and all construction of improvements that shall be made to the premises."

[30] The defendant in that case relied on what was then s. 22 of *REBBA*, which was in substantially the same form as s. 9 of the current statute.

[31] In rejecting this defence, Smith J. observed that although the services to be performed by the plaintiff included procuring offers to lease, there was other consideration for the payment in question, including the assignment of the agreement of purchase and sale. He stated at paras. 31-32:

In my opinion it cannot be argued that under the guise of a purchase and a subsequent assignment the plaintiff traded in real estate. I do not feel that this licensing statute was designed to protect sophisticated commercial investor owners from commercial developer investors. To the extent, however, that a developer attempts to find lessees for others

without more, then he may conceivably and perhaps even probably run afoul the legislation.

In this case, the plaintiff intended to be a co-owner or co-developer. I have no reason to doubt the plaintiff's evidence in this regard. The defendant preferred to go it alone as was his right, of course. The plaintiff was already the owner, having in hand an executed agreement, albeit a conditional one, with a stated monetary consideration that had been paid. He proceeded to assign the agreement for a stipulated sum and in the process obligated himself to perform certain services, which included the procurement of offers to purchase [sic], but extended also to discussions with architects, contractors and in this case, the plaintiff intended to be a co-owner or co-developer. I have no reason to doubt the plaintiff's evidence in this regard. The defendant preferred to go it alone as was his right, of course. The plaintiff was already the owner, having in hand an executed agreement, albeit a conditional one, with a stated monetary consideration that had been paid. He proceeded to assign the agreement for a stipulated sum and in the process obligated himself to perform certain services, which included the procurement of offers to purchase, but extended also to discussions with architects, contractors and to supervision of improvements and so on. The consideration was expressly stated to be for the assignment as well as all the other services. The plaintiff cannot, in my view, in these circumstances, be said to have been trading within the meaning of the Act as contended by the defendant. To hold otherwise would be unduly restrictive of legitimate business activities that need no statutory protection and were not contemplated by the framers of the legislation.<sup>2</sup>

[32] The decision was affirmed by the Court of Appeal: *McClure v. Backstein*, [1986] O.J. No. 467, with a short endorsement:

We are of the view that the *Real Estate and Business Brokers Act* of Ontario, R.S.O. 1980, has no application to the particular facts of this case. In the result, the appeal is dismissed with costs.

[33] The decision in *McClure v. Backstein* was referred to by the Court of Appeal in *Bozzo v. Giampaolo* (2005), 31 R.P.R. (4<sup>th</sup>) 212, [2005] O.J. No. 2062. In that case, the parties had entered into a joint venture to purchase a property. The plaintiff was to have a 25% interest and the defendant 75%. The defendant later decided that he wanted the entire interest in the property, so it was agreed that the property would be purchased by a company owned by the defendant and the defendant would pay the plaintiff 25% on any sale of the property.

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<sup>2</sup> The repetition in this paragraph is contained in the Q.L. report.

[34] The defendant argued that the 25% payment claimed by the plaintiff was a commission and that as the plaintiff was not registered, the claim was barred. The Court of Appeal rejected this submission, based on the exemption contained in s. 5(h) of *REBBA* – at para. 9:

In our view, it is clear that Abbas was dealing with its own interest as of the April 25, 1989 agreement. Pursuant to s. 5(h), there is no requirement to register under *REBBA* when one is acting on one's own behalf. See also *McClure v. Backstein*, [1985] O.J. No. 1052, affirmed 37 A.C.W.S. (2d) 447, [1986] O.J. No. 467. This is the agreement upon which Abbas founded its action for breach of contract and upon which the trial judge made the \$3.8 million award. Abbas received no funds and had no interest other than its 25% pursuant to the agreement. Accordingly, it fell under the exception provided for in s. 5(h) of *REBBA*.

[35] *McClure v. Backstein* was not a s. 5(1)(h) case, because both the trial judge and the Court of Appeal found that the circumstances took it outside *REBBA*. The payment claimed was not for services in connection with a “trade in real estate.” As in this case, the plaintiff had found a profitable deal, which he essentially sold to the defendant, committing himself to do the necessary work (including procuring tenants) to ensure that the deal came to fruition as promised. As in this case, the deal had an aspect that might, viewed on its own, fall within the statutory provision, but it had other aspects that clearly did not.

[36] In *Bozzo v. Giampaolo*, the plaintiff was dealing with his own interest in the property and his claim was therefore excluded from the operation of *REBBA* by virtue of s. 5(1)(h).

[37] On the motion before me there was some debate about the meaning of the exceptions to the exception contained in s. 5(1)(h)(i) and (ii) of *REBBA*. In my view, the former means that a person must be registered if he or she offers to act, or is asked to act, for another person in connection with a trade or another trade, and a trade in the former person’s interest in real estate results. The latter means that a person must be registered if he or she offers to act, or is asked to act for another party in connection with trading in real estate and subsequently acquires an interest in real estate which is conveyed to that other party. In other words, a person can trade in their own property, but they cannot trade in their own property with a person who has hired them to trade in real estate unless they are registered.

[38] Both *McClure v. Backstein* and *Bozzo v. Giampaolo* make it clear that the Court must scrutinize the nature of the plaintiff’s interest in the transaction and the nature of the “services” provided to determine whether it falls within *REBBA* and, if so, whether the exceptions in s. 5(1)(h) apply.

[39] The plaintiff also relies upon *Strangier v. Liebeck* (1975), 5 O.R. (2d) 767, [1974] O.J. No. 2126 (H.C.J.). In that case, the plaintiff, who resided in West Germany, claimed a commission on the sale of certain property owned by the defendant. The defendant pleaded, among other things, a defence based on the equivalent of s. 9 of *REBBA* and asked that the action be stayed. Lacourcière J., as he then was, declined to grant a stay, stating, at p. 769 that “the

Court's discretion to stay an action should not be exercised summarily without clear and unqualified proof that the plaintiff falls within the ambit of the section." He found that it had not been established that Ontario law applied and it was also possible that the plaintiff qualified for one of the exemptions contained in the statute. He therefore made the following endorsement at p. 770: "[a]pplicability of section 33 of *Real Estate & Business Brokers Act* is not absolutely clear and beyond doubt and I prefer not to deal summarily with the claim by granting a stay at this stage of the action. Application for stay will be dismissed."

[40] Duffmits' response to these authorities, and to the plaintiff's arguments, is that the Agreement, as pleaded, was reduced to writing and the Agreement is clearly one that falls within s. 9 of *REBBA*. I will set out the relevant portions of the amended statement of claim:

16. Duffmits was interested [in the opportunity to keep the Property, building a pharmacy for Pharma Plus, and entering into a lucrative long term lease with Pharma Plus to be negotiated by Bimman and Neiman]. Duffmits had previously attempted to negotiate with Pharma Plus, and the maximum proposed leasing price they obtained from Pharma Plus was \$25 per square foot. The price negotiated by Bimman and Neiman and evidenced by the LOI [Letter of Intent] was \$45 per square foot.

17. Bimman and Neiman met with Duffmits' representatives, who agreed to purchase 105's opportunity to enter into the lease with Pharma Plus. This necessitated re-acquiring the property from 105. Since that transaction had not yet closed, the parties agreed simply to let the conditional period expire, thereby putting an end to the Agreement of Purchase and Sale.

18. The oral agreement was later reduced to writing. On or about December 7, 2006, Duffmits entered into a written agreement ... with Neiman whereby Neiman, on behalf of 105 in partnership with BRESI, agreed to arrange an introduction between Duffmits and Pharma Plus, substitute Duffmits for 105 in the LOI and the lease contemplated by the LOI and assist in negotiating other terms of the lease arrangement, which was now to be between Pharma Plus as commercial tenant and Duffmits as landlord.

19. The real consideration, however, for which Duffmits agreed to pay \$500,000.00 plus GST ("the Fee") was that 105 would transfer to Duffmits its interest in the Pharma Plus Letter of Intent pertaining to the Property as well as 105's right to acquire the Property.

[41] Duffmits says that Neiman himself pleads that the Agreement was reduced to writing. Contrary to what is pleaded, the Agreement describes the consideration for the \$500,000 fee as the introduction of Pharma Plus and the negotiation of a lease agreement between Pharma Plus and Duffmits. There is no reference to the surrender of 105's rights under the agreement of

purchase and sale, nor to the transfer of the rights of Bimman and BRESI under the Letter of Intent. Neiman is the only plaintiff who is a party to the Agreement.

[42] Duffmits says that evidence adduced by Neiman through the affidavit of Bimman, concerning the events giving rise to the Agreement, should be struck because it offends the parol evidence rule and is also scandalous. It says that regard should only be had to the Agreement itself, which is clearly in breach of s. 9 of *REBBA*.

[43] The nature of the parol evidence rule, and of one of its most important exceptions, was stated by the Court of Appeal in *Gutierrez v. Tropic International Limited et al.* (2002), 63 O.R. (3d) 63 at para 19, [2002] O.J. No. 3079:

Under the parol evidence rule, when the language of a written contract is clear and unambiguous, extrinsic evidence is not admissible to vary, qualify, add to, or subtract from, the words of the written contract. (See *Chitty on Contracts*, 28th ed., vol. 1, General Principles (London: Sweet & Maxwell, 1999) at p. 624 and *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.* (1995), 26 O.R. (3d) 321, 23 B.L.R. (2d) 1 (C.A.)) However, the rule is not absolute. It admits of numerous exceptions, including where it is alleged that evidence of a distinct collateral agreement exists, which does not contradict, and is not inconsistent with, the written contract (see *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515, 2 D.L.R. (3d) 600 and *Bank of Montreal v. Bauer*, [1980] 2 S.C.R. 102, 110 D.L.R. (3d) 424).

[44] In this case, the plaintiff does not seek to vary the terms of the Agreement with respect to the obligation of the defendant to pay the fee claimed. He simply says that there were other agreements, collateral to the Agreement and not inconsistent with it, that were part of the overall agreement between the parties and that explain the consideration that was given in exchange for the fee.

[45] In my view, this case has some similarity to *McClure v. Backstein*, above. Neiman, Bimman and their companies had put together a “deal” which they were prepared to exploit themselves. The deal included the Letter of Intent from Pharma Plus and the agreement for the purchase of the Property. To make the deal work they would have had to develop the property and finalize the lease with Pharma Plus. Fundamentally, they agreed to sell the deal to Duffmits and to carry out the necessary negotiations with Pharma Plus to finalize the lease, for which they already had negotiated a framework in the Letter of Intent. As was the case in *McClure v. Backstein*, there was still work to be done, including negotiation of the lease. There is certainly an argument, however, that Neiman was dealing with his own property, on his own behalf and on behalf of his partner.

[46] The parties acknowledge that a request for a stay is discretionary, under both s. 9 of *REBBA* and under s. 106 of the *Courts of Justice Act*. I prefer to follow the course adopted by Lacourcière J. in *Strangier v. Liebeck*, above, and to refuse a stay. It is preferable that there be a

full evidentiary record to permit a determination of whether the statutory bar is applicable. That evidentiary record would enable the judge to examine the true nature of Neiman's claim, the relationship between Neiman and the other plaintiffs and the relationship between the plaintiffs and Duffmits. That evidence would enable the court to determine whether Neiman's claim is, in substance, one that can only be made by a licensed broker or whether it falls outside the scope and purpose of *REBBA*.

[47] In light of my conclusion on this issue, it is not necessary to address Duffmits' submission that the unjust enrichment claim discloses no cause of action. Counsel for Duffmits acknowledged that that submission hinged on the argument that s. 9 of *REBBA* is a defence to Neiman's claim.

Conclusion

[48] For these reasons, the motion is dismissed, with costs. If counsel are unable to agree on costs, written submissions, no more than 5 pages in length (excluding the costs outline) may be made to me care of Judges' Administration. The plaintiff's submissions may be made within 10 days and the defendant shall have 10 days within which to respond.

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G.R. Strathy J.

**DATE:** August 25, 2010