

Who's broker wins in renegeed real estate lawsuits?

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May a buyer's broker successfully maintain a direct lawsuit against a seller who has renegeed on a real estate transaction? Response: it depends.

The Appellate Division of the Supreme Court (only the Court of Appeals is a higher State Court) for the First Department (covering New York and Bronx Counties) has recently issued its decision in *B.P. VANCE REAL ESTATE, INC. v. Tamir* on July 12, 2007, 42 A.D.3rd 839 N.Y.S.2d 494.

The Sellers list a condominium for sale at the Essex House and hires a Listing broker to represent them. There is no written commission agreement between Sellers and Listing broker but an oral agreement to pay a commission is made. (not violative of the Statute of Frauds requiring a writing as the Listing broker is licensed in New York).

The prospective purchaser's broker (B.P. Vance Real Estate, Inc.) introduces a client to the Sellers through the Listing broker. The Listing broker and purchaser's broker orally agree to a split of the commission.

The Sellers and purchaser agree to all the relevant and material terms to be part of the real estate contract.

The Sellers refuse to go forward with the contract, withdraw the property from the market only to sell the property a few months later for a higher price. The Listing broker chooses not to sue the Sellers. The purchaser's broker claims it has produced a buyer ready, willing and able to purchase the condominium and has been the procuring cause in the real estate transaction, even if no contract is signed.

The Court (unanimously) dismissed the broker's complaint and granted summary judgment to the Sellers. The Court noted that "parties to a brokerage agreement are free to add whatever conditions they may wish to their agreement, including a condition that the contract of sale actually be consummated before the broker is deemed to have earned his commission."

The decision did not specify whether such a condition was included in the oral agreement. Nevertheless, the Court continued:

"Inasmuch as plaintiff obtained the listing in question as a signatory to the Universal Co-Brokerage Agreement of the Real Estate Board of New York (REBNY), any common-law right plaintiff might otherwise have had to claim commissions was limited by any terms of that agreement defining the brokers' entitlement to commissions.

The REBNY agreement specifically provided that the REBNY broker's commissions would only be earned upon execution of a contract of sale, the passage of title, and the listing broker's receipt of its commission. Under these circumstances, plaintiff cannot prevail on its claim based upon a theory of implied contract, the terms of which would contravene the limitations contained in the REBNY brokers' agreement."

As noted by the Court, the broker B.P. Vance sued on an implied contract theory, as there was no direct express contract (oral or written) between Sellers and purchaser's broker.

It is advisable for a Seller to expressly condition his or her payment of a broker's commission on the closing of the transaction (except, perhaps, if Seller willfully defaults). Absent such an express condition, the purchaser's broker will argue it is unjust to deny it a commission.

Here, the Seller escaped liability by the Court's reasoning that the Mandatory Co-Brokerage Uniform Agreement controlled this transaction as both brokers were members of the Real Estate Board of New York (REBNY).

An expert in the real estate field, attorney Adam Leitman Bailey, who represented B.P. Vance in the action offers that the REBNY Uniform Agreement affects the relationship between brokers but not broker and Seller, or broker and purchaser and should not have been the basis for the decision.

The safe course of conduct by a Seller is to execute a written commission agreement of exclusivity with the Seller's broker reciting that a commission is only payable upon a closing of the transaction. Under such circumstances, there are many cases that find that a buyer's broker has no cause of action and no right to a commission directly from a Seller where there is a written agreement. All doubts of a suit by a buyer's broker, as was done here, would be avoided.

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