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Getting a Brokerage Commission Paid

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Brokers who deal with commercial properties are increasingly being denied their duly earned commissions. Given the multi-million transactions that are often involved in the world of commercial real estate in New York City, these commissions can be considerable and worth fighting over.

Many of the commission disputes commonly involve the following facts: 1) the broker claims the commission has no exclusive agreement; 2) he or she introduced the buyer or renter to the property; and 3) the owner or seller had never discussed commission terms. This common scenario results from the fact that brokerage agreements can be, and often are, oral and hence there are no term sheets spelling out the commission percentage.

Therefore, while each particular controversy will turn on its specific facts, there are certain basis principles and strategies that can be gleaned from a review of the case law that can help brokers protect their rights to a commission.

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The Basics

Under the common law, a broker is entitled to a commission when he procures a buyer who is ready, willing and able to take title on the seller's terms, regardless of whether the sale actually takes place. *B.P. Vance Real Estate, Inc. v. Tamir*.[1] "A real estate broker is entitled to recover a commission upon establishing that he or she (1) is duly licensed, (2) had a contract, express or implied, with the party to be charged with paying the commission, and (3) was the procuring cause of the sale." *Marciano v. Ran Oil Company East, LLC*[2] quoting from *Stanzoni Realty Corp. v. Landmark Props. of Suffolk, Ltd*.[3]

With regard to the second prong of the test, "the contract of employment may be established either by proof of an express original agreement that the services should be rendered, or by facts showing, in the absence of such express agreement, a conscious appropriation of the labors of the broker" *Sibbald v. Bethlehem Iron Co*.[4] Furthermore, a brokerage agreement need not be exclusive; a broker can earn a commission by showing that he was the procuring cause of the completed transaction. *Friedland Realty v. Piazza*.[5] And, the agreement need not be in writing to be effective. Brokerage agreements are an exception to the Statute of Frauds General Obligation Law §5-701.

The Court of Appeals has instructed that a broker is the procuring cause of a transaction when he has established a "direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation" *Greene v. Hellman*.[6]

Somewhat incongruously, however, to qualify for a commission, the broker does not have to be involved in the negotiation for the sale or the completion thereof. It is sufficient that the broker creates an "amicable atmosphere" by "which negotiations proceeded and generated a claim of circumstances that proximately led to the deal." *Hentze-Dor Real Estate, Inc. v. D'Allessio*.[7]

Strategies

Of course, this is easier said than done. So the broker should employ to the following strategies to protect his right to receive a duly earned commission.

Strategy I: To be the procuring cause the broker must demonstrate through words and deeds that he actively participated in the consummation of the transaction. When there is no written exclusive agreement for a broker to rely upon, disputes over a commission may boil down to a "he said/he said" stand-off. Thus, the broker must show to the reviewing court that he was an integral part of the negotiations that led to the consummation of the transaction. For example, in *Sioni & Partners, LLC v. Vaak Properties, LLC*,[8] a case where the broker had an exclusive agreement, the court nonetheless found that the company was the procuring cause of a transaction when it "called the property to the buyer's attention and introduced the buyer to defendant, it also provided information about the property to the buyer, arranged for the buyer to visit the property, and brought about the ultimate purchase price."

Similarly, in *Sutton and Edwards, Inc. v. 68-60 Austin Street Realty Corp.*,[9] the Appellate Division granted summary judgment to a commercial broker on his claim for a commission in connection with leasing of space to North Shore Hospital. In so ruling, the court looked to the fact that "[t]he plaintiff presented exhaustive documentary proof of its role in identifying the subject property as suitable for the hospital's needs and in negotiating the terms of the final lease entered into by the hospital and the appellants."

Moreover, in *Joseph P. Day Realty Corp. v. Chera*,[10] the Appellate Division reinstated a broker's complaint against the lessor relative to a leasing made to Beth Israel Medical Center (BI) when the broker (i) arranged a conference call with the defendants and their attorney informing them of BI's interest in the leasing space in the building, (ii) a defendant discussed with the broker the rent he was seeking and approved BI as an acceptable tenant, (iii) provided comparables to formulate the going rate, (iv) participated in weekly negotiations leading to an offer letter and (v) attended a meeting between the defendants and BI to resolve the disputes necessary to execute the lease. These factors led the court to conclude that regardless of the fact that no written agreement for a commission was in place, the broker "acted as a catalyst in the resulting lease," and the defendants accepted the fruits of the broker's labors in obtaining the lease.

The take-away from these cases is that it is critical for the broker to actively participate in as many phases of the transaction as possible and to meticulously maintain a paper-trail of all his activities. Thus, after showing a client a property, the broker should send the client an email summarizing the inspection as well as inspections for any other properties shown that day. Comparables should

not be simply printed out and handed to the client. Instead, send an email with the necessary attachments and ask if more follow up is needed.

In addition, after meeting with a client or the seller's agent or landlord to discuss a property or specific aspects of a transaction, follow with an email documenting that the meeting took place and summarize what was discussed, making sure, of course, to highlight your participation. These simple steps are the key to success because as *Sioni, Sutton* and *Edwards* and *Joseph P. Day* all teach, courts place strong weight on documentary evidence that illustrates how the broker inserted himself into the deal and led to its consummation. By the same token, the courts will look to the absence of active participation or a paper-trail in denying a brokerage claim.

For instance, in *Douglas Elliman LLC v. Cocoran Group Marketing*,[11] Douglas Elliman was listed as an additional broker on a contemplated sale of two cooperative units where Corcoran was the selling agent. The husband and wife who were supposed to buy the units defaulted. Some 12 months later, the husband's father, through his limited liability company purchased the units. Douglas Elliman sought a commission arguing that it should be considered a procuring cause of the sale. The Appellate Division disagreed finding that Douglas Elliman had no common law rights because of a "lack of contact by Douglas Elliman or its real estate agent with [the purchaser], or any purchaser; the agent did not show [the purchaser] the units; the lack of any attempted negotiations; and the lapse of approximately twelve months after the initial deal failed."

In like manner, in *Good Life Realty, Inc. v. Massey Knakal Realty of Manhattan, LLC*,[12] the Appellate Division found that the broker was not the procuring cause of a sale of a cooperative unit when the broker "did not introduce the buyer to the seller, did not show the unit to the buyer, did not negotiate the sales price, did not personally see the unit, did not attend the closing, and had no contact with the broker exclusively responsible for listing the property."

Moreover, in *Loeb Partners Realty v. Sears Assocs., P.C.*,[13] the plaintiff broker learned of the availability of the space from the defendant tenant. The tenant, in turn, had been informed of the availability of the space from its attorney and the landlord's leasing agent. The attorney and leasing agent showed the tenant the space. Subsequently, the plaintiff sent the tenant a two-page lease proposal but did nothing else. Several months later, a lease was finally consummated as a result of extensive negotiations between the attorney and the leasing agent. The lease, a long and complex document, differed greatly from the plaintiff's two-page proposal. Under these facts, the Appellate Division ruled that plaintiff's broker was not the procuring cause of the lease.

Finally, in *Hirschfeld Properties, Inc. v. Juliano*,[14] another leasing situation, the plaintiff broker "did nothing more than submit two pieces of papers to defendants with respect to space that defendants were already discussing with the landlord." The court found that plaintiff was not the procuring cause of the lease.

In these cases, the brokers clearly believed that they had earned an entitlement to a commission. However, their inability to demonstrate their active involvement and/or a sufficient paper-trail doomed their right to a commission.

Strategy II: Demonstrate an amicable atmosphere, trust no one, and vigilantly monitor the progress of a transaction. Given the frailties of human nature, competing brokers or purchasers or sellers may act to cut the broker out of a deal. Thus, it is imperative that brokers keep monitoring the progress of a transaction after they have been told that the deal did not go through. This requires making additional phone calls to the affected parties, emails to them, and reviewing listing sites. Also critical, it entails trying to ascertain whether any future contract of sales or brokerage agreement contains an indemnification clause.

For example, in *Buck v. Cimino*,[15] Caroline Van Ess (who was a licensee real estate broker) came to the plaintiff broker's office and met with an agent. She told him she was looking for a home in a particular area. The agent showed her several properties, one of which was that of defendant Robert Cimino. After viewing the property from the outside, Van Ess told the agent that she wanted to see the inside. The broker contacted Cimino, indicating that a potential purchaser was available. The agent also inquired of the current asking price. Arrangements to view the interior were set, but did not go forward. Nonetheless, the agent and Van Ess walked the grounds and the agent filled in Van Ess on the number of rooms of the house, property taxes, the size of the lot, and the like. Subsequently, Van Ess told the agent that she was not interested in the Cimino property or any others that were shown to her. However, approximately two weeks later, the plaintiff found that Van Ess had agreed to purchase the Cimino home. Notably, the contract of sale contained a handwritten provision whereby Van Ess agreed to indemnify the Ciminos against any claim made for a brokerage commission. The broker sued and the lower court dismissed the complaint. The Appellate Division modified finding that "plaintiff may be credited with setting in motion the chain of circumstances that proximately led to sale."

In amiable atmosphere cases, it is all the more imperative for the broker to have adequate documentation to demonstrate that he was responsible for bringing the parties together. Courts will do equity so long as the broker provides a sufficient basis for the court to do so.

Strategy III: Find out the commission rates. While it would appear that establishing a rate of commission would be among the first matters discussed, it is often left for another day. Therefore, difficulties can arise where a brokerage agreement is silent on the rate of commission or if the agreement is implied. But as the court explained in *Kaplan-Belo Assoc. v. Cheng*,[16] "where agreement is silent as to the specific amount of commission, the [broker] is entitled to a commission that is fair and reasonable." A fair and reasonable commission represents the customary rate in the community where the services are rendered. Despite these rulings, brokers' cases would be strengthened by demonstrating a commission amount agreed to.

Conclusion

In the high stakes world of commercial real estate, the broker needs to be especially careful to document by both words and deeds how he was the procuring cause of a deal or created an amicable atmosphere that led to the deal. Active, documented participation is a must to ensure that in the event of a dispute, the broker can prove to the court that he is entitled to a duly earned commission.

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Endnotes:
1. 42 A.D.3d 343 (1st Dept. 2007).
2. 63 A.D.3d 1118, 1119 (2d Dept. 2009).
3. 19 A.D.3d 582, 583 (2d Dept. 2005).
4. 83 N.Y. 378, 380 (1881).
5. 273 A.D.2d 351 (2d Dept. 2000).
6. 51 N.Y.2d 197, 206 (1980).
7. 40 A.D.3d 813, 816 (2d Dept. 2007).
8. 93 A.D.3d 414, 417 (1st Dept. 2010).
9. 70 A.D.3d 810,811 (2d Dept. 2010).
10. 308 A.D.2d 148, 153 (1st Dept. 2003).
11. 93 A.D.3d 539 (1st Dept. 2012).
12. 93 A.D.3d 490, 491 (1st Dept. 2012).
13. 288 A.D.2d 110 (1st Dept. 2001).
14. 3 A.D.3d 399, 400 (1st Dept. 2004).
15. 243 A.D.2d 681, 684-685 (2d Dept. 1997).
16. 258 A.D.2d 622 (2d Dept. 1999).