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Door Partly Closes for Buyer's Brokers Seeking Fee

BY ADAM LEITMAN BAILEY AND JESSICA D. SCHERER

As a result of the Statute of Fraud's brokerage commission exception, real estate owners should not engage or utilize the services of a real estate broker or enter into any transaction involving a real estate agent without a written agreement declaring that a commission shall only be due when ownership passes to the buyer.

Despite practitioners' much-repeated advice and warnings and the steep financial self interest of both seller and broker, the forces of the real estate market dictate the consummation of too many deals without signed commission agreements.

Adam Leitman Bailey

Jessica D. Scherer

Case Law

Instead, owners and brokers have used the courts to referee and to enforce commission agreements. According to a Westlaw search, 2,099 reported decisions have considered brokerage commission issues since the 1886 decision in Pratt v. Patterson Ex'rs, 3 W.N.C. 161, 112 Pa. 475, 3 A. 858 (Pa. 1886), the oldest reported brokerage decision.1 Amazingly, the lack of written agreements dictating the parties' rights and the reliance on oral brokerage agreements to determine disputed commissions has led to 1,745, or 83 percent of those published decisions. Even more remarkable is the number of brokerage questions that remain unanswered.

Of the several different relationships generally formed during a typical real estate transaction, the one least explored by New York courts is that which may be found to exist between a seller and a buyer's broker. Although often engaged in their own exclusive relationships on opposite sides of the closing table,2 it is not difficult to imagine scenarios under which these two particular parties form a connection of their own, which can later turn sour in the event of a failed sale. For over a century, real estate broker jurisprudence has painstakingly but consistently defined the rights and duties attendant to all other parties to a failed real estate transaction: buyer and seller are governed by the Statute of Frauds,3 brokers and their respective clients are not,4 and co-brokerage arrangements can take on various, potentially enforceable forms.

The Appellate Division, First Department, recently closed the door to a significant number of potential litigants in the gray area between sellers and buyers' brokers. In B.P. Vance Real Estate Inc. v. Tamir, 42 AD3d 343, 839 NYS2d 494 (1st Dept. 2007), a buyer and seller, through their respective brokers, negotiated the sale of an apartment in the prestigious Essex House on Central Park South. No written agreements existed among any party to the transaction, including the seller and listing broker. Despite having agreed upon all material terms typically encountered in a residential transaction, no contract was ever signed by the seller, who ultimately withdrew his property from the market and sold it months later to a different buyer and at a higher price. Although arguably entitled, the seller's broker did not sue his client for the commission he earned; B.P. Vance, believing that its entitlement to commission should not be dependent upon the co-broker's inaction and in the absence of any express exclusivity arrangement, proceeded against the seller directly for its share of the commission. (Disclosure: Adam Leitman Bailey PC represented plaintiff-appellant in 'B.P. Vance Real Estate Inc. v. Tamir.')

It should be noted that the common law is remarkably lenient and has never conditioned the earning of a brokerage commission upon an actual passage of title.5 What this means is that even where a closing does not occur, a broker may still sue for and win a commission if she can show that she merely produced a buyer who was at all times ready, willing and able to close on the seller's terms.6 While admittedly subjective, the result of this particular inquiry frequently carries a shocking consequence: the seller, who is more often responsible for the entire commission and has an absolute right to back out of a deal where no contract has yet been signed, may still find itself on the hook for a brokerage commission even in the absence of a sale.

Compounding this seeming anomaly is the line of cases which holds that even where there is an express closing precondition in a contract between the seller and his listing broker, the latter will still be entitled to its commission, if it can show that the failure to consummate the sale lies with the seller.7 This exception holds true regardless of whether or not the seller's withdrawal of the property from the market was made in bad faith.8

B.P. Vance's Theory

Thus, the theory presented by B.P. Vance was that, through the joint effort of both brokers, neither of which was exclusively engaged through an express written agreement, a buyer was produced who was at all times ready to close on terms dictated by the seller. Under the common law, which would govern in the absence of any written contracts containing a closing condition precedent, this should have been sufficient for both brokers to have earned their respective commissions despite the seller's withdrawal from the deal. However, the seller's broker had no incentive to sue for its share of the commission, which would have caused a rift between itself and its client who, it must be remembered, later sold the property at a higher price.

B.P. Vance alleged that it would be wholly unjust to deny its entitlement to commission under these circumstances. Such a denial would effectively declare that a buyer's broker has no right to a commission independent of the rights of its co-broker, despite the fact that it may have worked equally hard, or feasibly even harder, in securing a meeting of the minds between buyer and seller. Equity demanded that an implied contract be

found to have existed between B.P. Vance and the withdrawing seller, with all of its attendant fiduciary duties, so that the former could recover its commission from the latter.

Co-Brokerage Agreement

In denying B.P. Vance's requested relief, the First Department reasoned that, inasmuch as the two brokers involved in the failed transaction were members of the Real Estate Board of New York (REBNY), they were necessarily governed by the Mandatory Co-Brokerage Uniform Agreement, which conditions the sharing of a commission between co-brokers on a closing and actual passage of title.9 For reasons that were not explained by the court, this agreement between the brokers supplanted the applicability of common-law standards to the underlying transaction and precluded any finding of privity or fiduciary duty as between B.P. Vance and the seller.10

The REBNY Mandatory Co-Brokerage Uniform Agreement on its face does not purport to offer any protection to buyers or sellers directly, but only guides the co-brokerage relationship. Specifically, the provision relied upon by the First Department provides that a buyer's broker may not sue a listing broker for her share of a commission unless: (1) a sales contract is executed; (2) title to the underlying property passes; and (3) the seller's broker refuses to give the buyer's broker her respective share of a commission actually paid. B.P. Vance was not suing the seller's broker, however, and in fact could not have done so since the seller's broker, for reasons of its own, did not seek to recover any commission from the failed transaction. B.P. Vance was denied relief based upon these preconditions nonetheless.

The applicability of the REBNY Mandatory Co-Brokerage Uniform Agreement to preclude a finding in favor of a buyer's broker on the facts presented in B.P. Vance seems dubious at best, and ultimately raises more questions than it answers. If the closing precondition contained in an agreement between co-brokers can now be relied upon by buyers and sellers who did not bother to negotiate such protection on their own behalf, what then is the applicability of the line of cases holding that even where the closing precondition is expressly provided by the parties, it will be nullified if it can be shown that the failure to close is the fault of the seller?

Logic dictates that if the First Department is willing to hold that a closing precondition between any two parties to a transaction will protect everyone in the transaction, then any recognized exceptions to the applicability of the precondition should also be fair game. Therefore, even assuming for the sake of argument that the court was correct in its assumption that a closing had to occur before either broker became entitled to commission due to the REBNY agreement, B.P. Vance was arguably still entitled to relief, if it could show that the reason that condition was not met was because the seller withdrew the property from the market. This remains an open but very important question.

'Sonnenschein' Case

Notably, the Court of Appeals dealt with similar issues in the case of Sonnenschein v. Douglas Elliman-Gibbons & Ives, 96 NY2d 369; 753 NE2d 857; 729 NYS2d 62 (2001). Sonnenschein was disposed of on other grounds, but the Court's decision makes perfectly clear that, under the right circumstances, privity of contract and fiduciary duties can exist between a seller and a buyer's broker, even in situations where the seller has an exclusively engaged broker of his own.

In Sonnenschein, the sellers engaged an exclusive listing broker, and then made a side commission agreement directly with the buyer's broker, who brought them a buyer but later showed that same buyer a superior apartment in the seller's building. The buyer chose the superior apartment, and the seller sued the buyer's broker for breach of fiduciary duty based on their side agreement. The Court of Appeals did not reach the question of whether a breach of fiduciary duty actually occurred, simply because it was not willing to find as a threshold matter that a buyer's broker should stop showing properties prior to any contract of sale being signed. Nevertheless, the Court of Appeals implicitly held that the existence of a fiduciary relationship between a seller and buyer's broker was distinctly possible.11

Sonnenschein undoubtedly opened the proverbial door for liability between sellers and buyer's brokers, but with B.P. Vance, the Appellate Division slammed that door shut for REBNY-member brokers in the First Department.12

Conclusion

The net effect of the B.P. Vance decision is a sweeping blow to buyer's brokers in Manhattan and the Bronx, and it adds a firm layer of protection to sellers in those boroughs, who are already well insulated by the protections offered under the Statute of Frauds. Buyers' brokers and sellers must remain wary, however, since a myriad of open questions remain. For example, it is unclear what the courts would do in a situation where the underlying property was for sale by its owner without a selling broker, or where only one broker was a member of REBNY. Of course, two REBNY member brokers outside of the First Department might also find themselves in a B.P. Vance-like conundrum and, under the Court of Appeals' holding in Sonnenschein, the other Appellate Divisions could easily decide such cases differently. Thus, the question of whether a buyer's broker rightfully can claim a commission from the seller after a failed deal lives for another day.

It should be underscored that a buyer's broker has no cause of action and no right to a commission directly from a seller when the seller and seller's broker have an exclusive written brokerage agreement. This past summer and coincidentally five days after the B.P. Vance decision, the Second Department reaffirmed this rule of law in RWSP Realty, LLC v. Agusta, 42 AD3d 490, 840 NYS2d 608 (2nd Dept. 2007), finding where a seller and its listing broker are engaged in an expressly exclusive relationship, a buyer's broker has no grounds to sue the seller for commission.

For everyone outside the First Department and some within it, the lot remains barren and full of mines. Before or at the time of negotiating a contract for the sale of real estate, the careful practitioner should ensure the signing of a satisfactory, exclusive brokerage commission agreement requiring a closing and passage of title as a condition precedent for an earned commission. This is the surest way to make certain that an exclusive relationship between a broker and her client stays that way.

Adam Leitman Bailey is the founding partner of Adam Leitman Bailey PC and Jessica D. Scherer is an associate in the firm's Supreme Court Litigation Group.

Endnotes:

1. The referenced data has been provided using numbers from the Westlaw Databases. Since the first decision in 1886, there were 2,099 published decisions reported that consider brokerage commissions to date.

2. It has repeatedly held that where a seller and his or her listing broker are engaged in an expressly exclusive relationship, a buyer's broker has no grounds to sue the seller for commission. See e.g., RWSP Realty, LLC v. Agusta, 42 AD3d 490, 840 NYS2d 608 (2nd Dept. 2007). This article's focus is upon the relatively few cases where such an agreement is plainly lacking or has been supplanted by subsequent party actions.

3. General Obligations Law Â§5-703.

4. General Obligations Law Â§5-701(a)(10).

5. See e.g., Lane - The Real Estate Department Store Inc. v. Lawlet Corp., 28 NY2d 36; 268 NE2d 635; 319 NYS2d 836 (1971).

6. See e.g., Trylon Realty Corp. v. DiMartini, 34 NY2d 899; 316 NE2d 718; 359 NYS2d 284 (1974).

7. Roberts v. H. Gin Realty Corp., 185 AD2d 209; 586 NYS2d 264 (1st Dept. 1992).

8. Trylon, supra.

9. See, The Mandatory Co-Brokerage Uniform Agreement at Â¶5.

10. B.P. Vance, supra, 42 AD3d at 344.

11. 96 NY2d at 375.

12. It must be noted here that virtually all of the largest and most reputable brokerage firms in New York are members of REBNY.