New York Law Journal
TRENDS
REAL ESTATE
Wednesday, October 8, 2014
ALM

# Clarified Rules for Earning Brokerage Commissions

BY ADAM LEITMAN BAILEY & JEFFREY METZ

After years of uncertainty and fact-based decisions, the Appellate Division, First Department, in a thoughtful decision authored by Justice Rolando Acosta, clarified the guidelines for earning a real estate broker's commission in Manhattan and the Bronx. This article devotes considerable time to Acosta's decision and examines the controlling case law in the other departments. Our goal is to guide brokers and practitioners when doing business throughout the state of New York.

**Guidelines**

In *SPRE Realty v. Dienst*, 1 the court announced guidelines for the entitlement to a brokerage commission where the broker did not negotiate the final contract. According to Acosta, these guidelines were necessary because the "litigants, and the bar, deserve a greater level of certainty…to reduce the confusion that has arisen from the more nebulous terminology"2 of prior case law.

First, a real estate broker will be deemed to have earned a commission when he produces a buyer who is ready, willing and able to purchase at the terms set by the seller. Second, a broker will not earn a commission by merely calling the property to the attention of the buyer. Third, the broker must be the "procuring cause" of the transaction, meaning "'there must be a direct and proximate link, as distinguished from one that is indirect and remote,' between the introduction by the broker and the consummation of the transaction." 3

Fourth, rejecting past precedent and reasoning from sister appellate courts, the standard requires something beyond a broker's "mere creation of an 'amicable atmosphere' or an 'amicable frame of mind' that might have led to the ultimate transaction."4 Fifth, nevertheless, the broker does not have to be the dominant force in conducting the ensuing negotiations to completion of the sale. Sixth, a buyer cannot use a bad faith termination of the broker to "escape payment of the commission." 5 Seventh, a determination must be made whether the completed transaction "was fundamentally different"6 from the transaction the first broker presented to the seller.

*Adam Leitman Bailey* *Jeffrey Metz*

**The First Department**

In SPRE Realty, the court broke from its sister departments and rejected the "amicable atmosphere" test. Rejecting "the more nebulous terminology heretofore employed by the departments of the Appellate Division," 7 the court ruled that the "direct and proximate link standard articulated by the Court of Appeals governs determination of circumstances under which a broker constitutes a procuring cause within the First Department." 8

The question in SPRE was whether the broker had stated a cause of action entitling her to receive a commission after she had "expended significant effort locating an apartment for buyers who abandoned the transaction and purchased another apartment in the same building 18 months later." 9

As detailed in the complaint, the broker, pursuant to an oral agreement that she would receive a commission after finding a suitable residence for the defendants, first showed the defendants several residences before introducing them to a condominium development that was under construction. The broker brought the defendants to the project to view renderings and, when the defendants expressed interest, the broker negotiated a price of $11,500,000 with the sponsor as well as the specific design elements that the defendants required. A contract was prepared and reviewed by counsel for the sponsor and the defendants. The broker also found a renowned architect for the defendants.

Notwithstanding the broker's efforts, the defendants pulled out of the deal, allegedly having changed their minds. Months later, the broker asked defendants if there was any renewed interest in purchasing a residence. Defendants responded in the negative. During this time the broker also assisted one of the defendants in a search for commercial property. During their encounters, the broker was repeatedly informed that defendants were no longer seeking a home and had no interest in the condominium development. However, several months later, defendants purchased a different duplex at the condominium development.

Acosta found that the proper standard to utilize in determining whether the broker was the procuring cause was the "direct and proximate link" test set forth in *Greene v. Hellman,* 10 because "[t]he Court of Appeals has not sanctioned the 'amicable atmosphere' or 'amicable frame of mind' language."11 At most, Acosta explained, the high court had affirmed, without opinion, *Eugene J. Busher v. Galbreath-Ruffin Realty*, 12 a First Department case which held that the broker was the procuring cause where he or she "generated a chain of circumstances which proximately led to a lease transaction."13

Therefore, the First Department announced:
We regard to the "amicable atmosphere" and "amicable frame of mind" standards as somewhat broader and more amorphous than the requirement of a "direct and proximate link," or even a requirement that the broker "generated a chain of circumstances which proximately led to a transaction's consummation."14

The First Department also noted that reliance on an amicable atmosphere standard "seems to ignore the proximity element of the 'direct and proximate link' test."15 As a result, the First Department rejected the "amicable atmosphere" and "amicable frame of mind" standards because they are not precise enough terms by which to determine whether a broker is the procuring cause of a transaction. Nevertheless, the court added: "[a]t the same time, a broker need not negotiate the transaction's final terms or be present at the closing." 16

Applying the direct and proximate standard, the court found that the complaint's allegations detailing the broker's efforts over an 18-month period were

sufficient to withstand dismissal so that the question of whether the broker was the procuring cause was a question to be decided based on the evidence adduced at trial. However, the court also provided a map for additional means of recovery.

**Additional Bases for Recovery**

The remainder of SPRE reveals the First Department's condemnation of the defendants' treatment of the plaintiff. The court pointedly noted that "[e]ven if SPRE is unable to prove that it was the procuring cause of defendants' purchase, it may be able to prove that defendants terminated its activities in bad faith and as a mere device to escape the payment of the commission."17

The court found that whether the defendants withdrew from the first transaction in bad faith "will depend on when the defendants renewed their interest in 397 West and recommenced negotiations with the developer of the property."18 This key issue, the court concluded, could not be determined at the pleading stage.

In addition, the court stated that it could not "conclude that the completed transaction was fundamentally different from the abandoned transaction."19 Notwithstanding that the units defendants purchased were less than half the price of the original units, the court noted that both sets of units were substantially identical and that defendants purchased the second units during the economic downturn.

More telling, the court found that there was a question of fact as to whether plaintiff was entitled to a commission for the abandoned units, stating that "[a] broker may be entitled to a commission where the buyer authorizes the broker to submit an offer to the seller but subsequently fails to execute or arbitrarily refuses to enter into a contract of sale."20 In that regard, the court explained that a signed contract was not necessary to assign liability so long as the broker could establish that it had an implied contract with the purchasers, a contract of sale was drawn on terms the purchaser authorized the broker to offer, and that the refusal to purchase was arbitrary.

**Rulings in Other Departments**

In *Hentze-Dor Real Estate v. D'Allesio,* 21 the Second Department held that a broker may still earn a commission when he or she "created an amicable atmosphere in which negotiations proceeded or that [the broker] generated a chain of circumstances that proximately led to the sale."22

*Talk of the Town Realty v. Geneve*, 23 the most recent Second Department case on the subject, cited to the Hentze-Dor test as to when the broker, who is not involved in the negotiations leading to the sale, may receive a commission. The court, however, did not rely on the "amicable atmosphere" component in denying the defendant summary judgment in that case.

In Talk of the Town, plaintiff, a real estate brokerage firm, claimed that its broker, Simon Yermash, had procured Anna Shchiglik and Mark Kotliar as purchasers of residential property notwithstanding that the property was ultimately sold to Shchiglik and Kotliar by another broker. The question was whether the seller owed plaintiff a commission.

The seller moved for summary judgment dismissing the complaint. Sellers argued that the property was on a multiple listing at $799,000; Yermash and Shchiglik toured the property for 30 minutes where one of the sellers was present to answer questions; Shchiglik expressed her interest to Kotliar and told Yermash to submit an offer for $699,000; Yermash indicated that the offer was too low and that he would not submit it; the purchasers then cut ties with him. 24

One month later another broker showed Kotliar the property. Kotliar noted Yermash's previous involvement, but was told that the previous listing had expired and therefore Yermash was no longer authorized to complete the sale. The purchasers then tendered an offer at $715,000, which was countered, and the property was sold for $730,000.

The Second Department found that the defendant had established prima facie evidence that plaintiff was not the procuring cause at the sale. However, the court did not grant the seller summary judgment, finding that "plaintiff raised a triable issue of fact as to whether it generated a chain of circumstances that proximately led to the sale." 25

The court explained that Yermash had, in fact, submitted an offer of $699,000 on behalf of the purchasers so that there was the open question of whether the $699,000 was a viable offer within the negotiable range in light of the ultimate sale price of $730,000.26 Another issue, the court found, was whether Yermash submitted the $699,000 offer when the property was placed on the multiple listing service.27

The court, moreover, looked to the fact that the sellers "refused to sign the sales contract unless it contained a clause warranting that Fillmore [the second broker] was the only broker and that the purchasers agreed to indemnify them in the event of breach of the warranty."28 Thus, the court also found that "[d]isputed fact issues existed as to whether…the defendants improperly warranted that the broker from Fillmore was the only broker involved in the sale."29

In *Spalt v. Lager Associates*, 30 the Third Department provided a slightly different take on the amicable atmosphere test. There, the plaintiff, a licensed real estate broker, sued various defendants to recover a commission claimed to have been earned on a multiyear, multimillion dollar lease of the Gertz department store building.

The Gertz Building was owned by Benar Holding Company and managed by Streg, Inc. Stanley Gertz, the president of Streg and an officer and principal shareholder of Benar, had been trying to lease space in the building to the Office of General Services (OGS). Plaintiff was working with OGS, and found out about the Gertz Building vacancy. Plaintiff then met with Gertz who, on behalf of Benar and Streg, hired him to find a tenant for the building. Plaintiff was also authorized to negotiate on their behalf with OGS. Plaintiff made varied and numerous efforts to market the property. Eventually, however, Benar entered into a joint venture named Lager with Michael Lazar. Lager eventually entered into a lease for the space and Lazar's associate, not plaintiff, received a commission.

The Third Department, denying defendants summary judgment dismissing the complaint, stated the following:

[Plaintiff's] prior arrangement with Gertz to find a tenant for the Gertz Building, the fact that OGS displayed no interest in the property until it was approached by plaintiff, the latter's involvement in arranging tours and meetings between the negotiating parties, Gertz and OGS, and the interlocking relationship between Benar, of which Gertz is a principal, and Lager, the eventual lessor, could support a jury's finding that plaintiff brought together the minds of the defendants and OGS."31

Hence, the court ruled that "[e]ven though plaintiff did not know which state agencies ultimately became tenants of the Gertz Building, because OGS is indeed the party that entered into the lease in question, plaintiff arguably created the amicable atmosphere and set in motion the chain of events that proximately led to its consummation."32

*The Fourth Department in Cappuccilli v. Krupp Equity,* 33 has also accepted the test that if the broker "does not participate in the negotiations, he must at least show that he created an amicable atmosphere in which negotiations went forward and that he generated a chain of circumstances which proximately led to the sale." 34

**Conclusion**

Among the most important tools of the real estate practitioner is the ability to give clear definite counsel based on a specific set of facts. Such clarity allows us to advise our clients to settle, sue, negotiate or abandon a claim. For Manhattan and the Bronx, we now have a roadmap for collecting a brokerage commission. Although the rest of New York is flush with appellate opinions on earning a commission when the broker has not participated in the deal from the beginning to end, we are forced to utilize the test based on the nebulous language of whether the broker created an amicable atmosphere in which negotiations went forward or generated a chain of circumstances proximately leading to the sale or lease.

**ENDNOTES:**

1. 119 A.D.3d 93, 93-98 (1st Dept. 2014).
2. Id. at 96.
3. Id. at 95 (quoting *Greene v. Hellman*, 51 N.Y.2d

197, 206 (1980)).
4. Id. (quoting Sholom & Zuckerbrot Realty Corp. v. Citibank, 205 A.D.2d 336, 338-39 (1st Dept. 1994)).
5. Id. at 97 (internal quotation marks omitted).
6. Id.
7. Id. at 96.
8. Id. (internal quotation marks omitted).
9. Id. at 93.
10. 51 N.Y.2d 197, 206 (1980).
11. SPRE, 119 A.D.3d at 96.
12. 22 A.D.2d 879 (1st Dept. 1964), aff'd 15 N.Y.2d 992 (1965).
13. Id. at 879.
14. SPRE, 119 A.D.3d at 96.
15. Id.
16. Id.
17. Id. at 97 (internal quotation marks omitted).
18. Id.
19. Id. (citation omitted).
20. Id. at 97-98 (citation omitted).
21. 40 A.D.3d 813 (2d Dept. 2007).
22. Id. at 815 (internal quotation marks omitted).
23. 109 A.D.3d 981 (2d Dept. 2013).
24. Id. at 982.
25. Id. at 983.
26. Id. at 983-84.
27. Id.
28. Id. at 983.
29. Id.
30. 177 A.D.2d 879 (3d Dept. 1991).
31. Id. at 881-82 (internal citations omitted).
32. Id. at 882.
33. 269 A.D.2d 822 (4th Dept. 2000).
34. Id. at 822 (internal quotation marks omitted).