

REAL ESTATE BROKERAGE AGREEMENTS

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THE BACKGROUND

Most practitioners, even those who do not specialize in real estate law, will have occasion to deal with real estate brokers. The most critical aspect of this relationship is the nature of the agreement by which a broker is engaged, an agreement which should not be as arcane as it is often thought to be.

Initially, observe the most basic prerequisite that there can be no action for a broker's commission unless the part seeking the commission is licensed. Real Property Law §442-D.¹

However, even before the question of any action need be contemplated, if a broker is to be entitled to a commission there must be established an agreement, express or implied, written or oral. Clearly, if the agreement is in writing and expresses all the terms of the engagement, it will be controlling. While ordinarily a contract to pay compensation for services rendered in negotiating the purchase or lease of any real property must be in writing, the rule is not applicable to a licensed real estate broker or salesman, so long as the agreement is not otherwise violative of the Statute of Frauds.²

The law with respect to establishing the existence of a verbal contract, express or implied, is well established as to contracts generally, and the same principles will apply, generally, to the creation of an express or implied brokerage agreement. Whether there is a commission payable is a matter of understanding between the owner and the broker.³ In any event, though, there must be a valid agreement, express or implied. An interloper has no standing.

1. "§442-d. Actions for commissions; license prerequisite
No person, copartnership or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose."
2. General Obligation Law, §5-701(10).
Salahuddin v. Benjamin, 42 A.D. 2d 522, 344 N.Y.S. 2d 368; *Lane-Real Estate v. Lawlett Corp.*, 28 N.Y. 2d 36, 319 N.Y.S. 2d 836; *Greiner-Maltz Co. v. Stevens*, 66 Misc. 79, 319 N.Y.S. 2d 512. See also, *Tradeways, Inc. v. Chrysler Corp.*, 342 F.2d 350, cert. den. 382 U.S. 832, 86 S.Ct. 71, 15 L.Ed. 2d 75.
3. *Greiner-Maltz Co. v. Stevens*, supra.; *Naum v. Wiltsie*, 271 App. Div. 169, 63 N.Y.S.2d 578; *McVickar v. Roche*, 74 App. Div. 397, 77 N.Y.S. 501.

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If an owner gives a listing to a broker, knowing the broker to be such, an implied contract can be spelled out with nothing more. It is implied that when the owner gives the listing to the broker, it is intended that the owner will pay the broker a commission in the event that the broker procures a purchaser ready, willing and able to purchase the property for the price and upon the terms and conditions stated in the listing.

The amount of commission, in the absence of express agreement, is "reasonable" compensation — in most instances the rate established as a guideline by the local real estate board. This formulation, however, presupposes that the rates of the local real estate board have been accepted by the custom of the community. Where there may have been a recent change in the commission rate, it is questionable if such increased rate would be binding upon an owner under an implied contract without substantiating evidence that the rate constituted reasonable compensation.

With the general principles of contract law applicable to brokers, it is not essential, in the absence of express agreement to the contrary, that the seller and buyer consummate their title closing, or even enter into an executory contract of sale in order for the broker to validate his claim for a commission. The terms of the hiring, as always, in the absence of agreement to the contrary, are to procure a purchaser who is ready, willing and able, and the broker performs his end of the bargain even though the seller and buyer are thereafter unable to agree on the express language of the contract of sale.⁴ (Of course, where the parties cannot agree upon contract language, the broker will have a heavy burden attempting to prove that his buyer truly was "ready, willing and able".)

On the other hand, if the prospective purchaser withdraws from an oral bargain before the contract of sale is signed, the broker has not earned his commission because then it cannot be said that the purchaser procured by the broker was actually ready to buy the property.⁵ Obviously, where a contract is executed by a seller and purchaser, the issue of "ready, willing and able" is no longer a factor.

A contract between seller and purchaser sometimes becomes executed in a situation wherein the seller refuses to recognize the broker who negotiated the transaction. Under these circumstances, if the broker can show an agreement of hiring which, as previously noted, may be express or implied, verbal or written, he may nevertheless establish a valid claim for commission if he can show that he was the "procuring cause" of the transaction. Stated another way, the broker can recover if he was the effectuating instrumentality, as distinguished from the planter of seeds. The law as to procuring cause is well established, although the applicability to any given state of facts is oftentimes exceedingly difficult.⁶

4. *Potter v. Salina-Genesee Corporation*, 8 A.D.2d 998, 188 N.Y.S.2d 584; *Tannenbaum v. Boehm*, 202 N.Y.293.

5. *Weisenberger v. Mayers*, 281 App.Div. 171, 117 N.Y.S.2d 557; *Kampf v. Dreyer*, 119 App. Div. 134; *Mills v. 630 Park Associates*, 184 N.Y.S.2d 48.

6. *Re Fox*, 126 N.Y.S.2d 158; *Donovan v. Weed*, 182 N.Y.43; *Gunther v. Douglas L. Elliman & Co., Inc.*, 279 App. Div.860, *aff'd no op.* 304 N.Y. 635; *O'Riordan v. North Shore Realities*, 6 Misc.2d 103; *Emil v. Hamburg Heaven, Inc.* 16 A.D.2d 778; *Bloomer v. Eily*, 231 N.Y.S.2d 458.

If the broker has brought the parties together, and then the parties, with a conscious acceptance of the broker's services and before the crystallization of the deal, take over the final negotiations and work out the rest of the deal themselves without the broker, the broker does not forfeit his right to commission.⁷

None of the foregoing is to imply that all a broker need do is introduce the seller and the buyer. Nor is it sufficient for the broker to merely point out the property to a prospective purchaser.⁸ On the contrary, he must actually work out the deal. Again, however, there is an exception. If the seller, who is to pay the commission, informs the broker that henceforth the seller will deal directly with the purchaser, the broker may acquiesce and still be entitled to his fee. In effect, the broker is being recognized as the "procuring cause". Worthy of observation is that the Court of Appeals has ruled that conversations between broker and customer are admissible to show procuring cause without violating the hearsay rule.⁹

TERMS OF A WRITTEN AGREEMENT

Mindful of the vulnerability of a seller with respect to claims for brokerage commission, lawyers have endeavored to protect their seller clients by various means. In many, if not in most, situations, the lawyer has no knowledge of the transaction until an appointment is made for the execution of a contract of sale, by which time in many cases the broker will have earned his commission. The seller's attorney, in an attempt to protect his client, obtains an agreement from the broker to the effect that the brokerage commission shall be deemed earned "when, and if title actually closes". This type of provision will not exonerate the seller from liability for commission if it turns out that the title is unmarketable.¹⁰

Where seller and purchaser have not entered into a written contract of sale, the broker must show that there has been an agreement between seller and buyer as to the "essential terms" of the transaction. This means that if that

7. Fanning v. Magi, 127 N.Y.S.2d 152, aff'd 282 A.D. 1067; Karlin v. Heller, 137 Misc. 261; Salzano v. Pellillo, 4 A.D. 2d 789, Annotation 46 A.L.R. 2d 848, 851.
8. Munson v. Tilley, 45 A.D.2d 806, 357 N.Y.S.2d 57; Egan Real Estate, Inc. v. McGraw, 40 A.D.2d 339 N.Y.S.2d 870.
9. Lockhart v. Hamlin, 190 N.Y. 132.
10. Stern & Gepo Realty Corporation, 289 N.Y. 274; Gent v. Midtown Holdings Corp., 10 A.D.2d 901.

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which two parties have agreed upon verbally will, were it to be reduced to writing, make an enforceable agreement, with nothing left for future discussion, then the parties have agreed to the "essential terms". This is another way of saying that the broker must procure a buyer who is ready, willing and able to buy on the terms which seller prescribed to the broker.¹¹

Contracts of sale almost invariably name the broker who brought about the sale, stating that the seller agrees to pay the commission. Although such a provision is some evidence of an agreement between seller and broker, it does not in and of itself give rise to any contract right in favor of the broker.

When a prospective seller of real property plans to submit a listing of his property to various brokers he can, and should include in the listing phraseology embodying the terms of hiring of the broker. A typical example reads as follows:

"Brokers receiving these particulars do so on the following understanding: The submission of these particulars is not a hiring or employment. Offering is subject without prior notice to withdrawal, change in price and prior sale. No responsibility for errors or inaccuracy in information. Commission —% to be earned as, if and when title actually closes, on terms and conditions, in all respects, satisfactory to seller and seller's counsel, and not before. No commission if failure to close title for any reason whatsoever including unmarketability. Owner may terminate negotiations with any prospect for any reason whatsoever and no matter what the sale of negotiations may be. No variance or termination of terms of this offering may be made except in writing by owner."

Where this method is employed, the broker should be requested to sign the seller's copy of the listing immediately upon delivery of the listing.

To protect a client by taking into account the various fact patterns which occur and the case law interpretations thereof, counsel for a seller of property should have a comprehensive form of broker's agreement. A recommended form which has proven to be quite successful for a considerable number of years in an active real estate practice appears at the end of this article.

In this suggested form, paragraph 5 provides for the eventuality that a contract of sale may not be executed. That a seller may be exonerated from liability in the event of his own arbitrary action in refusing to enter into a contract of sale has been sustained by the Courts.¹²

The possibility that title may not close is covered in paragraph 6. This provision denying a broker's commission in the event of failure of title to close has been sustained by the Court of Appeals.¹³

11. *Tanenbaum v. Boehm*, supra; *Oliver Williams v. Nielson*, 206 Misc. 172; *Cohn v. Reich*, 106, Misc. 504.

12. *Douglas L. Elliman & Co., Inc. v. Sterling Garage, Inc.*, 279 App.Div. 20, aff'd without op 304 N.Y. 846; *William Wenger v. Harry Lefrak, et al.*, 305 N.Y. 656.

13. *Amied v. Wesnofske*, 255 N.Y. 156.

Finally, in these times of tight mortgage money, purchasers are seeking V.A. and F.H.A. mortgages with ever increasing frequency. This then causes the seller to obligate himself to pay "points" — which may vary from week to week. Because it is usually the broker who steers the purchaser to the mortgage company, or financial institution, particularly in the V.A. or F.H.A. situation, it will often be wise for the seller to insist that the broker pay all "points" out of his commission.

The provisions of paragraph 7 of the agreement are intended to take care of situations wherein a large parcel of land is sold and, because there is a bad title to a very small portion thereof, the seller reduces the price in order to induce the purchaser to close title. It is also intended to be applicable to any other situation whereby the price becomes reduced between contract and title closing.

This then becomes a guessing game between broker and seller. If points are going up, the seller is well advised to have the broker's promise to pay the points, with, of course, an increased commission to accommodate the possible point spread. On the other hand, however, if points appear stable or declining, an agreement whereby the broker pays the points could prove to be a windfall for the broker with no benefit to the seller.

One new wrinkle in this area is the so called "warehousing fee" which many mortgage companies are charging the seller. Instead of calling it a point, they give it a different name and cite it as a necessity to offset their own increased money costs. Until the validity of this device is adjudicated, counsel will encounter a demand that his seller pay the fee. Consequently, he should consider shifting this burden to the broker as well, if at all possible.

A suggested clause whereby the broker covers these additional costs would provide;

"The broker acknowledges and agrees that any and all 'points' and 'warehousing fees' which are or would otherwise have been the responsibility of the seller shall be paid by the broker simultaneous with the closing."

It is hoped that the foregoing offers some guidance to aid the typical practitioner with the preparation of an agreement more protective of his client's rights than the typical agreement proffered by the average real estate broker.

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BROKERAGE AGREEMENT

BROKER:
OWNER:
PROSPECTIVE PURCHASER:
PREMISES:

DATE:

The above owner and broker mutually agree with each other as follows:

1. This agreement is in accordance with the terms of the original hiring and constitutes the entire and only agreement between the owner and broker affecting the above premises. No modification of this agreement shall be valid unless made by an instrument in writing signed by both the owner and broker.
2. The broker represents that the broker is and has been a duly licensed real estate broker under the laws of the State of New York during all of the times that said broker has been negotiating a possible sale of the above premises.
3. Said broker represents that he is the sole broker who has been negotiating the possible sale of the above premises to the above prospective purchaser and said broker agrees to indemnify and save harmless the owner from any and all claims of any other broker in connection therewith.

4. The total amount of commission shall be
DOLLARS, and said sum shall be deemed to have been earned by said broker as, if and when and only in the event that title to all of the premises described in the proposed contract of sale shall actually pass from the owner to said prospective purchaser.

5. If for any reason whatsoever, including the owner's fault or arbitrary action, a contract for the sale of said premises shall not be actually executed by both the owner and said prospective purchaser, no commission shall be deemed to have been earned and the broker shall not be entitled to any payment whatsoever.

6. If a contract for the sale of said premises shall be actually executed by both the owner and said prospective purchaser, and if for any reason whatsoever, including unmarketability of title, title shall not actually pass, or if the owner shall return the down payment in accordance with the provisions of the contract between seller and buyer requiring the owner so to do, then in either or any of such events the broker shall not be deemed to have earned nor shall he be entitled to receive any compensation whatever, and in either or any of

such events the owner is hereby released from any and all claims of every nature and kind which the broker may have against the owner hereunder (provided that the owner shall not have willfully refused to convey such title as he owner may have, should the purchaser at the time of title closing be willing to accept the same without deduction on account of the purchase price, but with proper safeguards against said owner's liability to be set forth in the closing deed.)

7. If for any reason (and authority is hereby given to the owner to amend such contract of sale accordingly) title shall actually be taken by said prospective purchaser with a reduction in the purchase price, then the aforesaid commission shall be reduced by a sum of money which shall be proportionate to the reduction of price allowed.

8. The broker acknowledges that he did not have, does not have and will not have an exclusive brokerage for the sale of said premises by said owner.

WITNESS:

(Owner)

(Broker)

JOB REFERRAL SERVICES

Information on persons seeking employment and job openings are posted on a special bulletin board in the Association Headquarters.

Resumes of attorneys, paralegals, legal secretaries, stenographers, etc., are also available for inspection at the Information Desk.

