

Does a Broker's Failure to Have a Written Commission Agreement Doom Its Commission Claim Under the Statute of Frauds?

by Barry S. Goodman

You are about to close on the sale of commercial real estate for your client when a real estate broker suddenly appears, making a claim for a commission. Although your client, the seller, advises you that he talked to the broker, he does not recall whether they confirmed in writing that the broker would be paid a commission for introducing the seller to the buyer.

In New Jersey, under the statute of frauds, does the agreement have to be in writing for the real estate broker to have a valid commission claim? Is the broker entitled to be paid a commission if there only was an oral understanding concerning the payment of a commission? Can a broker avoid the statute of frauds by claiming the seller tortiously interfered with the broker's right to earn a commission? If there was no agreement concerning the amount of commission to be paid, can the broker sue for *quantum meruit*?

Whether you handle real estate transactions or represent real estate brokers, the answers to these questions are critical in determining if a broker has the right to payment where there is a dispute concerning whether the broker satisfied the requirements to claim a commission under the statute of frauds.

Requirements of the Statute of Frauds

The statute of frauds in New Jersey requires that a real estate broker must memorialize in writing any agreement to be paid a commission for the sale of real estate in order for the agreement to be enforceable. N.J.S.A. 25:1-16, which is the section in the statute of frauds dealing with real estate brokers, has three provisions that govern whether or not a real estate broker is entitled to be paid a commission.

Under N.J.S.A. 25:1-16(b), a real estate broker who acts as an agent or broker on behalf of a buyer or seller regarding the transfer of an interest in real estate, which includes any lease interest for less than three years, is entitled to be paid a commission only if the broker's authority is "given or recognized in a writing signed by a principal or the principal's authorized

agent" before or after the property is transferred, and the "writing states either the amount or the rate of commission."¹

The only exception to Section 16(b) is where a broker acts pursuant to an oral agreement that falls within the requirements of N.J.S.A. 25:1-16(d). Under Section 16(d), a broker who acts pursuant to an oral agreement with a principal is entitled to be paid a commission if two requirements are met. First, the broker must serve the principal with a written notice stating that "its terms are those of the prior oral agreement including the rate or amount of commission to be paid" within five days after making the oral agreement with the principal and before the transfer or sale of the real estate. Second, the broker must either effect the transfer or sale, or in good faith enter into "negotiations with a prospective party who later effects a transfer or sale" before the principal provides the broker with any written rejection of the oral agreement between the parties.

Finally, N.J.S.A. 25:16(e) sets forth the specific requirements for service of the notice by a real estate broker under the statute of frauds. The notice must "be served either personally, or by registered or certified mail, at the last known address of the person to be served."

Courts Usually Require Strict Compliance

Courts in New Jersey generally have held that, "[t]o the extent a broker wishes to rely on the protections of the statute of frauds to claim entitlement to a commission, he or she must strictly comply with the statute's requirements."² As a result, in order for a real estate broker to claim a commission based upon any contractual theory, the broker must adhere to the strict requirements of the statute of frauds.

In one case, *C&J Colonial Realty v. Poughkeepsie Savings Bank*,³ the Appellate Division held that a series of correspondence between the broker and the owner concerning the commission was insufficient to satisfy the statute of frauds because there never was a clear understanding regarding the amount of the commission to be paid or the basis of the payment. Under

such circumstances, a court cannot simply impose a 'reasonable commission' where the broker has asserted a contract claim, since the statute of frauds has not been satisfied.

Similarly, several cases have held that a broker attempting to confirm an oral agreement within five days not only must send the written notice within that time period, but also must include the rate or amount of commission the parties agreed would be paid, and clearly state that the written notice is confirming the earlier agreement.⁴

A real estate broker also must comply with the requirements concerning the method of serving the written notice, in order to satisfy the statute of frauds and claim an entitlement to a commission based upon an agreement. As a result, since the statute requires the notice be served personally or by registered or certified mail, service by ordinary mail or fax has been held to be insufficient to satisfy the statute.⁵

However, at least one case has broadly interpreted the writing that is necessary to satisfy the statute of frauds. The New Jersey Supreme Court has held that an advertisement that includes language along the lines of "broker protected" constitutes a written offer and, when a real estate broker acts on that offer by producing a buyer for the seller, the requirements of Section 16(b) were satisfied by the broker.⁶

Avoiding the Statute of Frauds by Alleging *Quantum Meruit*

Although a real estate broker typically must satisfy the statute of frauds in order to prevail on a claim for a commission, the broker may file suit based upon quasi-contractual theories if the broker has made a good faith attempt to comply with the statute.

Thus, in *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*,⁷ where a real estate broker made a good faith attempt to comply with the statute of frauds, the Appellate Division

held that the broker could pursue a commission claim based upon *quantum meruit*, even though the broker did not satisfy all of the requirements of the statute of frauds. In *Coldwell Banker*, the broker had timely faxed written confirmation of the oral agreement to the owner within five days, and then mailed a copy of the letter to the owner. In addition, the leasing agent for the owner acknowledged receipt of the notice without questioning it. The Court held that the broker had, in good faith, attempted to meet the requirements of the statute of frauds, even though the broker had not properly served the notice "either personally, or by registered or certified mail," as the statute requires.⁸

Further support for the broker's claim in *Coldwell Banker* was the fact that the lease specifically represented that the broker had negotiated and consummated the transaction, and that the owner would pay any real estate brokerage commission. The broker, therefore, was permitted to pursue its claim for *quantum meruit*, even though it was barred from pursuing a contractual claim because it had not fully complied with the statute of frauds.

However, in *McCann v. Biss*⁹ the New Jersey Supreme Court rejected a real estate broker's attempt to sue the seller under a theory of *quantum meruit* because the broker did not have any writing signed by the seller and never attempted to serve the seller with notice about any alleged oral agreement, as required under the statute of frauds. The Court held that the broker simply could not rely upon an "open listing" with the seller as the basis for a claim to be paid a commission where there was no writing with the seller or other attempt by the broker to comply with the statute of frauds.

Brokers Can Assert Independent Tort Theories Against a Principal

Even where a real estate broker cannot pursue a commission because the broker has not complied with the statute

of frauds, the broker is entitled to allege independent tort theories to recover the commission. In the seminal case on this issue, *Louis Schlesinger Co. v. Wilson*,¹⁰ there only was an oral agreement between the owner and the broker with regard to the sale of the property. The Court held that the broker could not pursue a contractual theory because the broker had not satisfied the statute of frauds. However, the broker was permitted to pursue its commission based upon a tortious interference claim because the owner failed to advise the broker that the owner had granted a different buyer an option to purchase the property, and actually represented that the property could be sold to the buyer procured by the broker. As a result, the broker was entitled to sue the owner for damages resulting from the owner's deceit.

Certain *Quantum Meruit* Claims are Permitted Against Buyers

Although a real estate broker must comply with the statute of frauds to file a commission claim based upon a contractual theory against the broker's principal, the New Jersey Supreme Court held, in *Weichert Co. Realtors v. Ryan*,¹¹ that the broker did not have to satisfy the statute of frauds, and could pursue a claim for *quantum meruit* against the buyer where the buyer, who was not the broker's principal, had agreed to pay a commission but there was no agreement with regard to the amount of commission to be paid. Although the broker had written to the buyer requesting a 10 percent commission, the buyer never agreed to that amount, always acknowledged that the broker would be compensated and accepted the broker's services knowing commission was expected. The Court held "a broker seeking recovery on a theory on *quantum meruit* must establish that the services were performed with an expectation that the beneficiary would pay for them, and under circumstances that should have put the beneficiary on notice

that the plaintiff [the broker] expected to be paid."¹² Under these circumstances, the broker would be entitled to the reasonable value of the services it provided.

Conclusion

Whether you are handling a real estate transaction in which a broker is making a claim for a commission or you are representing a real estate broker, it is important to first analyze whether or not the broker has a writing that satisfies the statute of frauds. If not, you will have to determine if the broker has any independent tort or *quantum meruit* claim for the commission.

Correctly analyzing these issues will prevent problems at the closing, or allow you to provide proper advice to any real estate broker you represent who claims to be entitled to a commission. ☺

Endnotes

1. For purposes of N.J.S.A. 25:1-16(b), "the interest of a mortgagee or lienor is not an interest in real estate," and therefore this section of the statute of frauds is inapplicable to such a mortgagee or lienor.
2. *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382, 396 (App. Div. 2004).
3. *C&J Colonial Realty, Inc. v. Poughkeepsie Savings Bank, FSB*, 355 N.J. Super. 444 (App. Div. 2002).
4. *See, e.g., R.A. Intile Realty Co. Inc. v. Raho*, 259 N.J. Super. 438 (Law Div. 1992); *Myers v. Buff*, 45 N.J. Super. 318 (App. Div. 1957).
5. *See Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382, 391 (App. Div. 2004); *R.A. Intile Realty Co. Inc. v. Raho*, 215 N.J. Super. 438 (Law Div. 1992).
6. *National Newark & Essex Bank v. Housing Auth. of the City of Newark*, 75 N.J. 497 (1978).
7. *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*,

368 N.J. Super. 382 (App. Div. 2004).

8. *Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W. L.L.C.*, 368 N.J. Super. 382 (App. Div. 2004).
9. *McCann v. Biss*, 65 N.J. 301 (1974).
10. *Louis Schlesinger Co. v. Wilson*, 22 N.J. 576 (1956).
11. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427 (1992).
12. *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 438 (1992).

Barry S. Goodman, a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the general counsel for the New Jersey Association of REALTORS®.