

Broker in failed deal can't get commission

by Eric T. Berkman

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A real estate broker who located a buyer willing to pay the asking price for a plot of commercial property was not entitled to a commission after the seller rejected the offer because it was contingent on the buyer's need to obtain financing and certain other conditions, a Superior Court judge has ruled.

The conditions were not referenced in a vaguely worded listing agreement between the seller and broker.

The broker argued that he still earned the commission because he found a suitable buyer, and the seller thwarted the deal.

But Judge Richard T. Moses disagreed, finding there was no ready, willing and able buyer under the terms fixed by the owner, as required by the Supreme Judicial Court's 1975 *Tristram's Landing, Inc. v. Wait* decision, and that nothing in the listing agreement exempted the broker from that requirement.

"[A] broker is in a better position than the seller to protect [the right to a commission] by including in the brokerage contract 'a provision that the broker is entitled to his commission when it produces a ready, willing and able buyer whom the seller, for whatever reason, refuses to accept,'" Moses wrote, quoting the SJC's 1985 decision in *Capezuto v. John Hancock Mut. Life Ins. Co.* "In the case at bar, the ... listing agreement fails to contain any language [to that effect]."

Moses added that the broker's claim for a commission also failed because no purchase and sale agreement incorporating the conditions was executed prior to the seller's rejection of the offer.

"[I]n order to take advantage of the *Tristram's Landing* exception as to a seller thwarting the sale, the seller must have agreed to sell the property to the broker's client and a binding purchase and sale agreement executed," the judge said.

Moses did rule, however, that the broker's claim that the seller breached the listing agreement by removing the property from the market before the agreement expired could proceed to trial.

The 18-page decision is *Brenner, et al. v. Marchione, et al.*, Lawyers Weekly No. 12-021-11. The full text of the ruling can be ordered [by clicking here](#).

Necessary clarification

Michael A. Kelly of Providence, R.I., who represented the seller, said the decision and the cases it cites, especially *Tristram's Landing*, send a warning to brokers that their agreements "have to be very, very specific."

"Unless a broker's agreement is carefully and artfully drafted, it can very well be that a broker who presents what he or she believes to be a reasonable offer may not, in fact, recover a broker's fee," he said.

The ruling also makes it clear that a seller is under no obligation to accept an offer and pay a commission unless the offer is in strict conformance with the terms of the listing agreement.

Had the listing agreement in *Brenner* included language to the effect that if the broker secured an offer containing the usual customary terms for property of like kind, the broker may have been able to prevail, given that such transactions are frequently financed, Kelly said.

"On the other hand, real estate owners who are selling property should pay very close attention to the listing agreement so they don't end up in a situation where, for whatever reason, they don't accept an offer and end up having to pay a commission with no sale," he said.

William G. Mullen III, legal counsel and director of risk management for the Greater Boston Association of Realtors, said the case "reaffirms *Tristram's Landing*, sending a message that a broker in a commercial setting needs to ensure he or she specifically understands the terms the seller wants and what the conditions will be."

In *Brenner*, a detailed 13-page addendum of conditions was incorporated into the listing agreement by the time the broker started working with a subsequent buyer, said Mullen, who was not involved in the litigation.

"Had they had that with the first buyer and the first buyer only needed financing, [the case] may have come out differently," Mullen said. "But for the first buyer, there were too many unknown contingencies to have a meeting of the minds."

Real estate lawyer Daniel J. Pasquarello of Brennan, Dain, Le Ray, Wiest, Torpy & Garner in Boston agreed, calling the ruling a "straightforward application" of *Tristram's Landing*.

"The SJC intended to place the burden in these situations on the broker, even though it can be easily negotiated otherwise," said Pasquarello, who also was not involved in the case.

Broker's counsel Michael Franco of Beauregard, Burke & Franco in New Bedford declined to comment, citing ongoing litigation in the matter.

Rejected offers

In May 2008, plaintiff George Brenner, a real estate broker, entered an open listing agreement with defendant Frank Marchione, trustee for co-defendant Catahoula Realty Trust. Under the agreement, the trust would list a commercial property in Fall River for \$3 million, with Brenner's agency as a non-exclusive broker.

The agreement, which was to last for 180 days, contained a provision that it would be extended 180 days and that the seller could terminate the agreement with 30 days' notice.

It also provided that if Brenner procured a buyer who is "ready, willing and able" to purchase the property, he would receive a 6 percent fee. Should the trust remove the property from the market before the agreement expired, Brenner would get a fee of 3 percent of the listing price.

The listing agreement described the property in vague terms. It contained no provisions regarding lease terms for a restaurant planned for the site; there were no building specifications in connection with the development project; and there was no indication as to what fixtures, if any, would equip anything that was to be constructed.

In November 2008, prospective buyer Ankit Patel made an offer to purchase the property for \$3 million, contingent upon securing \$2.4 million in financing.

Patel's offer also specified that the sale would include a completed gas station, convenience store, Chinese restaurant/lease and Dunkin Donuts franchising agreement with a drive-through. The offer was contingent on Patel being able to purchase all business supplies from vendors of his choice.

The seller rejected the offer. The seller's attorney then prepared a 13-page, single-spaced addendum detailing much more specifically the terms that would need to be agreed upon to achieve a binding agreement with a potential buyer.

The following January, prospective buyer Messias Pedro verbally offered to purchase the site for \$5 million, subsequently upping the offer to \$5.275 million. The trust's attorney drafted a purchase and sale agreement, but the agreement was never executed.

Marchione informed Brenner on Feb. 4, 2009, that the trust was terminating the listing agreement.

Brenner subsequently sued the seller in Superior Court for breach of contract, alleging that he was owed commissions in connection with both the Patel and Pedro offers and that he was owed a fee in connection with the seller removing the property from the market before the listing agreement expired.

Unready, unwilling and unable

Moses said the SJC specified in *Tristram's Landing* that a broker does not earn a commission unless the broker produces a buyer ready, willing and able to purchase *on the terms fixed by the owner*, the buyer and seller enter a binding purchase and sale agreement, and the deal closes.

The judge noted that a broker is also entitled to a commission if a sale falls through because of the seller's interference or wrongful actions.

Turning to the specifics of *Brenner*, Moses described the listing agreement as "an invitation for a lawsuit" that could not possibly produce an offer that lined up with the seller's own requirements.

The agreement "describes at best, the skeletal frameworks of a potential transaction," Moses said. "Furthermore, it is clear that Brenner knew or, as a competent broker, should have known that the listing agreement did not contain all essential terms for a sale ... [it failed] to provide sufficient information to a prospective buyer as to precisely what was being sold and what conditions the sale was subject to."

Considering the Patel offer specifically, the judge rejected Brenner's argument that, given Marchione's testimony that he was not inclined to sell the property for \$3 million when the offer was submitted, Brenner was entitled to a commission.

"This testimony does not save the day since the ... record does not establish [that there was a ready, willing and able buyer and a binding purchase-and-sale agreement as required by] *Tristram's Landing*."

Similarly, Moses rejected Brenner's claim that language in the listing agreement enabled him to get around the *Tristram's Landing* requirements.

While the SJC had previously held that brokers can avoid those requirements by incorporating into their brokerage contracts a provision that they are entitled to a commission if they produce a ready, willing and able buyer whom the seller — for whatever reason — refuses to accept, the listing agreement in *Brenner* contained no such language, the judge said.

Furthermore, Moses said, "there is no evidence that a buyer was found on terms acceptable to the seller."

The judge further found that Brenner was not entitled to a commission in connection with the Pedro offer. While Brenner argued that the drafting of a P&S for \$5.275 million demonstrated the seller's intent to sell for that amount, Moses noted that the agreement was never executed.

"Even if [the seller] considered lowering its asking price, until such terms were memorialized in writing and accepted by Pedro, the [seller] was free to withdraw its offer to sell at a reduced price," Moses said.

For more information about the judge mentioned in this story, visit the Judge Center at www.judgecenter.com.

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CASE: *Brenner, et al. v. Marchione, et al.*, Lawyers Weekly No. 12-021-11

COURT: Superior Court

ISSUE: Was a real estate broker who located a buyer willing to pay the asking price for a piece of commercial property entitled to a commission after the seller rejected the offer because it was contingent on the buyer's need to obtain financing and certain other conditions?

DECISION: No

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