

By David Doyle and Todd Goldberg - Lessons learned in the commercial real estate brokerage agreement world*

October 27, 2011 - Spotlights

Two people sign a brokerage agreement. The broker agrees to use best efforts to procure tenants. The owner agrees to pay a brokerage commission for tenants procured if a lease is signed while the agreement remains in effect or within 60 days thereafter. The owner reserves the right to terminate the agreement at any time on 30 days notice. Three years later, the owner terminates the agreement by giving the required notice, and eighteen months after that, the owner signs a lease with a new tenant and the broker claims a commission. When the owner refuses to pay, the broker sues.

Straightforward facts. The owner terminated the agreement and the lease was signed beyond the 60 day tail period, so the owner owes nothing. Slam dunk, right? Not so fast.

At trial, the jury decides: (1) the brokerage agreement was terminated, (2) the owner did not terminate the brokerage agreement in bad faith (i.e., in an attempt to avoid payment of a commission), and (3) the broker is entitled to compensation.

How can this be? The owner had a written agreement that clearly described the conditions that needed to be satisfied in order for a commission to be paid to the broker. The owner probably insisted on the written agreement to avoid fee arguments such as this. The agreement had been properly terminated. The lease was not signed before termination or in the 60 day tail period. No one argued that there was anything ambiguous about the agreement. The jury confirmed that the agreement's conditions for earning a commission had not been met. Isn't that enough? Apparently not - the jury found for the broker. Why? Let's flesh out the story and add a few more facts:

- * Once the negotiations for the lease began, the negotiations never suffered a complete breakdown - nothing that would have signaled a clear end to the original lease negotiation and the start of a completely new negotiation;
- * After terminating the agreement, the owner sent a lease proposal directly to another broker working with the tenant. Among other things, that proposal recognized the tenant broker and the owner's broker as the only two brokers involved with the lease and said that the owner would pay a brokerage fee to be shared between the two brokers; and
- * The final, signed lease stated that those two brokers were the only brokers involved in the lease transaction.

Let's recap. The broker introduces the tenant to the owner while the broker is the owner's exclusive broker. Although the owner terminates the brokerage agreement, the owner later says it will pay the broker a fee. Lease negotiations ensue and continue until the lease terms are agreed upon and the lease is signed. The lease gives the owner a new revenue stream, and but for the timing of the transaction, it seems like everything the owner wanted from the original brokerage agreement occurred. However, the owner refuses to pay the broker. The owner claims it has no agreement to

pay and no obligation to pay.

Mass. law says otherwise.

The jury awarded compensation on the basis of quantum meruit, not contract. Loosely translated from the Latin, quantum meruit means "as much as is deserved" and is an obligation created by law to prevent injustice and unjust enrichment. The owner appealed the jury decision, but the Appeals Court agreed with the jury. The Appeals Court also provided some clarifications, including that to recover on the theory of quantum meruit, the claimant must prove three things:

- (1) the claimant conferred a measurable benefit upon another;
- (2) the claimant reasonably expected compensation from the party benefitted; and
- (3) when the party benefitted accepted the benefit, it did so with knowledge that the claimant had a reasonable expectation of payment.

From the 10,000 foot level, the jury had no trouble seeing that the broker had done its job and that the owner had benefited from the broker's actions. The jury also had no trouble finding that the broker expected payment and that its expectation was reasonable, perhaps due to the post-brokerage agreement references to the broker in the proposal and the final lease.

Unfortunately for the owner, and likely due to the owner's steadfast refusal to pay any amount, the jury awarded the brokers a substantial fee.

Could the result have been different? Could the owner have avoided this result? Probably. What if the owner admitted a fee was payable, but then argued about the value of the broker's services instead? Though the brokerage agreement was terminated, it still serves as evidence of the agreement between the owner and broker about the value of the broker's services. If the owner wanted a lease soon, not a year and a half after it terminated the agreement, and the value of the broker's services to it was time sensitive, it needed to say so. What if the commission schedule decreased substantially as time passed? What if the agreement recited that if lease negotiations extend beyond an "X"-day window of opportunity, the commission payable would be reduced "Y" for every "Z" days? What if the owner had shown the jury that it accepted a lesser rent, but only on its good faith belief that it could do so without affecting its profitability because it no longer needed to pay a broker's commission?

There are a number of things that could have been done to improve the owner's and broker's positions, both at the agreement-signing stage and subsequently during the litigation stage, that might have led to a different result. Whether you are a property owner or a broker, it's important to review your commission agreements to make sure your expectations are properly documented. Was the 60 day tail period realistic for the broker? To better protect the broker, the tail period could have been defined as 60 days plus the period while lease negotiations are ongoing. Is time of the essence to the owner? In the wake of this decision, should owners consider adding a waiver of claims of quantum meruit and unjust enrichment that survives termination to their brokerage agreements?

Unfortunately for this owner, it got greedy. It took the benefit of the new lease and tried to get it for free. We all know however, there is no such thing as a free lunch. A costly lesson learned.

*In the interest of full disclosure, and with some pride, we note that our partner, Richard Michaud, represented the brokers in the litigation that inspired this article. See *Finard & Co., LLC v. Sitt Asset Mgmt.*, 79 Mass. App. Ct. 226, 945 N.E.2d 404, review denied, 460 Mass. 1103, 949 N.E.2d 924 (2011)

David Doyle and Todd Goldberg, partners with Bernkopf Goodman LLP, Boston.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540