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The Plight of the Buyer's Broker

Roger Bernhardt

Stevenson Real Estate Servs., Inc. v CB Richard Ellis Real Estate Servs.,

From the meager facts given in the opinion in *Stevenson Real Estate Servs., Inc. v CB Richard Ellis Real Estate Servs., Inc.* (2006) 138 CA4th 1215, 42 CR3d 235, reported on p 322, it appears that plaintiff Stevenson had a lot of hurdles to overcome on its claim for a commission. Stevenson alleged that it had been employed by Vision to locate property for Vision to lease, it had located property, Vision had leased it, but that instead of receiving half of the commission that the listing broker, Ellis, had received, Stevenson had been pushed out of the deal by Vision's principals, Deluxe and Rank, and its share given to a different broker, Insignia.

When a broker is the procuring cause of a lease, it ought to be easy for it to collect a commission. Stevenson's problem was, however, that it apparently had no written commission agreement (or so I assume in light of the fact that its single cause of action sounded in tort—interference with prospective economic advantage—rather than in contract).

California is a little schizophrenic about the need for brokers to have written agreements. Unlike the common law and some jurisdictions—which do not require a writing because a broker's agreement is not one for the conveying of property—we do apply our statute of frauds to listings. Nor do we permit any quantum meruit or estoppel exceptions to the writing requirement. See *Phillippe v Shapell Indus., Inc.* (1987) 43 C3d 1247, 241 CR 22; *Wm. E. Doud & Co. v Smith* (1967) 256 CA2d 552, 559, 64 CR 222; *Carey v Cusack* (1966) 245 CA2d 57, 54 CR 244. On the other hand, we do allow a broker to sue in tort for interference with prospective economic advantage, even when the contract that was interfered with was unenforceable under the statute of frauds because it was not in writing. See *Buckaloo v Johnson* (1975) 14 C3d 815, 122 CR 745.

But the tort of interference is a hard one to prove. It requires showing an “independent wrong” over and above the killing of the plaintiff's good deal (*Stevenson*, 138 CA4th at 1220); the defendant has to do more than just tell the principal to pay someone else instead. That was the next hurdle that Stevenson had to overcome: What independent wrong could it show that Insignia committed besides stealing its commission?

Stevenson's answer was that Insignia's conduct violated the rules of professional conduct of the American Industrial Real Estate Association (AIR), which said brokers shouldn't do that to each other. But that was problematic in several respects. First, can violation of trade association rules qualify as the independent wrong when it may not be an actionable wrong in the first place (*i.e.*, it is doubtful that one broker can sue another based solely on the violation of their trade association rules)? The court's response was that such rules could constitute a standard and be independently actionable (even if only via arbitration within the association)—but that just carried the matter on to the second difficulty: Neither Stevenson nor Insignia was a member of that particular association; apparently, only the listing broker belonged. Thus, can a nonmember

complain that a member violated rules that seem neither to apply to nor protect the nonmember? The court seemed to let Stevenson get around that difficulty only through a procedural fluke: No party had put the full text of those rules in their pleadings or had them properly judicially noticed. That is going to be a large issue when and if the parties finally get to the trial phase.

I spoke with Neil Kalin, Assistant General Counsel for the California Association of Realtors (CAR), who pointed out that, in this regard, the AIR rule involved in *Stevenson* reads differently than the National Association of Realtors (NAR) Code of Ethics and Standards of Practice. The AIR provision (as quoted by the court) prohibits an “associate” from inserting himself or herself “into a transaction or potential transaction initiated by another associate” and “using tactics calculated to interfere with the first associate’s *relationship* with the client,” whereas the NAR Code provides that Realtors (*i.e.*, members of the NAR/CAR) should not “take any action inconsistent with *exclusive* representation or exclusive brokerage agreements that other Realtors have with clients.” (Emphasis added.) It looks like there is a violation of the NAR Code only when the aggrieved broker has an exclusive agreement and is also an NAR member. On the other hand, NAR Standard of Practice 16–4 says “Realtors shall not solicit a listing which is currently listed exclusively with another *broker*” (emphasis added), which seems to drop the requirement that the offended broker belong to the NAR. It is not clear to me whether Stevenson would have been as successful had this involved the NAR rather than the AIR.

Neil also pointed out that there are also Multiple Listing Service (MLS) rules, with sanctions behind them, that might apply if the brokers involved had utilized the MLS process, even if one or both of them were not NAR members. But the MLS rules (at least the “Model” version promulgated by the CAR, found on the CAR website at <http://www.car.org/index.php?id=NjE1>) do not cover commission stealing; they merely refer to the broader NAR Code, adding that the MLS code only applies to (Rule 14.1) “any violation of the NAR Code of Ethics *while a member of any Association of Realtors.*” (Emphasis added.) Since there are special provisions in the MLS rules for the arbitration of disputes between association and nonassociation disputants, this hardly furnishes much light on the question of who all are covered by these standards so as to be guilty of an “independent” wrong.

Amidst all this hypertechnical clutter, one feature is clear: Stevenson’s troubles arose because it had not gotten Vision to sign anything. Any broker can answer the question of why it didn’t: Because the commission was intended to come from the landlord, the tenant-client didn’t want to sign anything that might make it liable; Stevenson saw little value in demanding a signature from someone who was not going to have to pay. Indeed, it may surprise many to learn that there is even a form for buyer-broker (or tenant-broker) agreements. But there is, and it should be given consideration more often.

The CAR has three buyer-broker forms:

1. Buyer Broker Agreement (Non-Exclusive/Not For Compensation) (BBNN);
2. Buyer Broker Agreement Non-Exclusive (Right to Represent) (BBNE); and
3. Buyer Broker Agreement Exclusive (Right to Represent) (BBE).

The latter two forms provide for the buyer to compensate its agent, but add that any amount received from the seller will be credited against what the buyer may owe. (The nonexclusive variant differs from the exclusive variant in that the broker must also be the procuring cause to claim an entitlement.)

The noncompensation form (#1) is completely silent on the matter of any commission; implicit is the obvious expectation that payment will come from the seller or the seller's broker. Even if Stevenson had gotten Vision to sign that agreement, it would not have solved its statute of frauds problem, *i.e.*, it would not have given Stevenson a contract cause of action against Vision: There would be a signature—but no promise to pay. In fact, that form might have made it even harder for Stevenson to prove its tort claim against the other parties in light of the clear omission of any provision for compensation and the inclusion of an integration clause—where was the prospective economic advantage?

Vision's signature on either one of the other two (compensation) forms (#2 or #3) would have made a real difference to Stevenson's contract claim. Stevenson then probably would not need to pursue a tort claim; but if for some reason it did, having Vision's signature on the exclusive version would have helped the most in light of the NAR Code's protection only for brokers with exclusives, as well as saving Stevenson from having to prove that it was the procuring cause.

In general, buyers and tenants would probably be more willing to sign agreements with their brokers if the forms assured them that the commissions were owed only by the seller or the landlord, and not by them. It would not be hard to draft forms that said that. But it wouldn't do any good: There is just no way for A to agree with B that C owes B money. Such wording would not give the broker a contract claim against either the buyer or seller. The present form—making the buyer liable to the extent that the seller does not pay—is probably as good as you can get.