

Finder's Fees

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This article will address whether a person who is not licensed as a broker or salesperson under New York law can receive compensation in the form of a "Finder's Fee" in connection with a real estate transaction.

What is a Finder's Fee?

"Finder's Fees" are commonplace in the investment and banking businesses. A finder is usually a person or entity which brings together parties who ultimately enter into a transaction and the finder receives fees or a participating interest in the entities formed as a result of the introductions. For example, when a person introduces a company to an underwriter and the underwriter elects to do an initial public offering for the enterprise, the person who makes the introduction to the underwriting firm is often compensated as a "finder". When concepts about finder's fee arrangements are applied to real estate, the first consideration by the finder is to seek compensation without violating the law. The finder often attempts to recast the nature of the services. Introducing a buyer to a seller or a renter to a landlord becomes a consulting arrangement.

What Does the Law Require?

New York, like most states, requires that any compensation paid to a person in connection with a real property transaction be paid solely to a licensed real estate broker or a licensed salesperson. The applicable provision of the law is set forth in §442-d of the Real Property Law which states:

"No person, co-partnership, limited liability company 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."

Opposing Forces

The goal of New York law, as is the goal in most states, is to ensure that the general public is protected from unqualified or unscrupulous persons who are not qualified to be licensed to handle real estate transactions. The purpose of the person who is a finder is to avoid being regulated or to engage in activity for which they are not qualified and

to thereby find a way to receive compensation in commercial or residential transactions without obtaining a license to do so. Typically this is done with a consulting agreement or other arrangement intended to avoid the application of the Law.

How the Courts Interpret New York Real Property Law Section 442-d

On June 27, 2012, the New York State Court of Appeals, the State's highest court, rendered a decision denying a motion to reargue in the matter of *Futersak v. Perl* refusing to permit a finder to reargue his case or further appeal an appellate court decision. On May 31, 2011 the Appellate Division, Second Department, entered an important decision in which both the New York State Association of Realtors® and the Real Estate Board of New York, Inc. had submitted *Amicus Curiae* (Friends of the Court) briefs.

The decision emphatically states that §442-d precludes an individual from pursuing the receipt of a finder's fee in a real estate transaction.

What Was Futersak v. Perl About?

Sam Futersak sued Sheldon Perl in the Nassau County Supreme Court. Perl sold a parcel of commercial real estate which Futersak previously located for Perl when Futersak was acting as a finder. Futersak wanted to buy the property himself but did not have the funds and knew that Perl was well capitalized. Futersak alleged that Perl's corporation was to make the purchase and Futersak was to retain a 15% ownership interest in any net profit realized from Perl's purchase and the resale of the property. Futersak alleged that he was functioning as a finder and not a broker. He acknowledged that he was not licensed under Article 12-A of the Real Property Law.

Perl, on the other hand, indicated that Futersak was acting as a real estate broker and that he was unlicensed. At the trial court level (Supreme Court Nassau County), the Court determined that Futersak was a "finder" and entitled to a commission. Perl then appealed to the Appellate Division and received the support of NYSAR, REBNY and others. Perl asserted that Real Property Law §442-d precluded Futersak from collection of a commission. The Appellate Court (923 N.Y.S. 2d 728) agreed and stated:

"It is undisputed that the plaintiff was not a licensed real estate broker or salesperson on the date the cause of action allegedly arose. In support of their motion for summary judgment upon the ground that the plaintiff's recovery is barred pursuant to Real Property Law 442-d, the appellants [Perl, et al.] demonstrated that the subject property was the dominant feature of the transaction at issue and that the plaintiff [Futersak] was attempting to collect a fee for services facilitating the purchase and sale of that property."

The Court then went on to state, "contrary to the Supreme Court's conclusion, this prohibition applies even if the services rendered are characterized as those of a "finder"."

Confusion between Kickbacks and Finder's Fees

In 2008 the United States Department of Justice Antitrust Division inquired of the New York State Department of State as to whether or not it was permissible for a real estate broker to pay a rebate to a client or a customer or whether §442 of the Real Property Law prohibits a real estate agent from doing so. In an opinion by Whitney A. Clark, Associate Attorney of the State of New York Department of State, Division of Licensing Services, addressed to the Department of Justice, the Department of State stated:

"Real Property Law Section 442 prohibits real estate brokers from sharing commissions obtained as a result of a real estate transaction with individuals or corporations who are unlicensed. The purpose of this prohibition is to prevent licensees from compensating unlicensed individuals for services rendered that would otherwise require a real estate license. Insofar as the statutory intent of Real Property Law Section 442 is to discourage unlicensed activity, offering cash or promotional gifts, such as a cash rebate, in order to attract a new customer or client does not run afoul of the statute."

What about Lawyers?

In some instances lawyers ask for a finder's fee, referral fee or a commission in a real estate transaction in which they have provided services that are comparable to those of a finder. Even though they do not act in an agency capacity, a lawyer can receive a commission in a real estate transaction because of §442-f of the Real Property Law. This provision states:

"The provisions of this article (Article 12-A) shall not apply to receivers, referees, administrators, executors, guardians or other persons appointed by or acting under the judgment or order of any court; or public officers while performing their official duties, or attorneys at law."

Accordingly, even though a lawyer is not licensed as a real estate broker or a real estate salesman, the attorney is entitled to receive a commission for engaging in any licensed activity in connection with a real property transaction. While lawyers cannot do so ethically under their own ethics rules if they are also acting as counsel for one of the parties in the transaction, in many instances, where the attorney acts solely in a referral capacity and is not engaged in the representation of any of the parties, it is permissible for an attorney to receive a fee that is comparable to a finder's fee, referral fee or

commission. (New York State Bar Association Committee on Professional Ethics Opinion 919 dated April 13, 2012)

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