Commissions: Procuring Cause Standard
of "Amicable Atmosphere" and Unjust Enrichment Affirmed Once Again

By John Dolgetta, Esq.

On August 8, 2018, the Appellate Division, Second Department, affirmed the right of the plaintiff, Gluck & Co. Realtors, LLC [*see* *Gluck & Co. Realtors, LLC v Burger King Corp.*,164 AD3d 562 (2nd Dept, 2018), at https://bit.ly/2C1SdfE] to receive a commission in connection with the lease of commercial space where the plaintiff introduced a tenant to the defendants, the owners of the property ultimately leased by the tenant. The plaintiff commenced the action to recover the commission alleging that it performed brokerage services for the defendants.

The Facts in *Gluck*

The tenant was a franchisee of Burger King Corporation and at trial the plaintiff's president testified that "…she was negotiating the terms of a lease with a broker for Burger King, which had to approve the location before the subject property could be leased to [the] franchisee…." However, when the plaintiff presented the defendants with a commission agreement for signature, the defendants terminated the plaintiff's services. Therefore, no formal commission agreement was ever entered into by the parties. The defendants argued that the plaintiff did not act as its agent in connection with this leasing transaction. The defendants also argued that even if they were found to have provided brokerage services, the plaintiff should not receive any commission because an employee of plaintiff, who was not a licensed broker under Real Property Law Section 442-d, engaged unlawfully in real estate brokerage activities. Ultimately, the Supreme Court found in favor of the plaintiff and awarded the plaintiff a judgment in the amount of $55,810.88. The defendants appealed the decision of the trial court to the Appellate Division, Second Department.

Implied Contract, Procuring Cause and the "Amicable Atmosphere" Standard

It is well established under New York case law that "in the absence of an agreement to the contrary, a real estate broker will be deemed to have earned his commission when he [or she] produces a buyer who is *ready, willing and able* [emphasis added] to purchase at the terms set by the seller" (*see* *Lane-Real Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36, 42 [1971] at https://bit.ly/2C5xiIA). Further, under existing case law, a real estate broker is entitled to a commission where the broker can establish "…that it (1) is duly licensed, (2) had a contract, express or implied, with the party to be charged with paying the commission, and (3) was the procuring cause of the transaction [citations omitted]." The above standards are fact intensive and will usually involve a careful review of the circumstances and evidence surrounding each case.

In *Gluck*, in establishing that the first prong had been met, the Appellate Division found that the plaintiff provided credible evidence at trial that its employee did not engage in brokerage services and that since the plaintiff was, in fact, licensed at the time, it provided the brokerage services on behalf of the defendant.

The Appellate Division also held that plaintiff established that there existed an "implied contract" to provide the defendants with brokerage services satisfying the second prong of the commission test. It is well-settled in real estate agency law in New York that there is no requirement for a commission agreement to be in writing, which is an exception to the Statute of Frauds (a legal principle dictating that agreements be in writing). A broker may be entitled to a commission based upon the actions of the parties or even a verbal agreement. While it is strongly recommended to have a written or "express" agreement, at times, as was the case in *Gluck*, a defendant may refuse to sign one or the parties may elect not to enter into a formal agreement.

While the first two prongs of the above test are more objective, and easier to establish based on the evidence, or lack thereof, the third prong is the one that is usually more difficult to prove. In *Gluck*, the Appellate Division held that the plaintiff was also able to show at trial that it was the "procuring cause" of the transaction. The Court, citing several cases, stated that in order for a broker to establish that it was the "procuring cause" of a transaction, a broker "…must establish that there was a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation" [*see* *Douglas Elliman, LLC v Silver*, 136 AD3d 658 (2nd Dept, 2016) at https://bit.ly/2EgLn8K; *see* *Talk of the Town Realty v Geneve*, 109 AD3d 981 (2nd Dept, 2013) at https://bit.ly/2A0EdBr].

The Appellate Court further held that "[w]hile the plaintiff was not involved in the negotiations leading up to the completion of the deal between [the landlord] and [the tenant], it established that it created an ***amicable atmosphere*** [emphasis added] in which negotiations proceeded, and that it generated a chain of circumstances that proximately led to the transaction (*see* *Saunders Ventures, Inc. v Catcove Group, Inc.*, 151 AD3d 991 (2nd Dept, 2017) at https://bit.ly/2Nwi0yK)." It important to note that the Second, Third and Fourth Department have adopted and relied upon the "amicable atmosphere" standard. However, the First Department, which includes New York City, has specifically refused to rely on this standard in its decision issued in *SPRE Realty, Ltd. v Dienst* (*see* 2014 NY Slip Op 03642 [119 AD3d 93] (1st Dept, 2014) at https://bit.ly/2PmRwBr).

The First Department relies on *SPRE Realty, Ltd. v Dienst*

The Court in *Dienst* specifically refused to adopt the standard of "an amicable atmosphere", and focused instead on the "direct and proximate link" standard. In its opinion the Court noted that the Court of Appeals did not affirm or sanction the "amicable atmosphere" or "amicable frame of mind" language. The Court explained its reasoning in *Dienst* as follows:

> "We regard the ʻamicable atmosphereʹ and ʻamicable frame of mindʹ standards as somewhat broader and more amorphous than the requirement of a ʻdirect and proximate link,ʹ or even a requirement that the broker ʻgenerated a chain of circumstances which proximately ledʹ to a transaction's consummation. Although courts have attempted to harmonize the continued use of the ʻamicableʹ phrases discussed above with Court of Appeals precedent articulating the ʻdirect and proximate linkʹ standard, the former phrases are not precise enough terms by which to determine whether a broker is the procuring cause of a transaction. Reliance on the creation of an 'amicable atmosphere in which negotiations went forward' seems

> to ignore the proximity element of the 'direct and proximate link' test. Furthermore, we think that this continued deviation from the standard set forth by the Court of Appeals in Greene (*Greene v Hellman*, 51 NY2d 197, 205 [1980]) [*see* https://bit.ly/2Pjp8QK] has led to some confusion. Yet litigants, and the bar, deserve a greater level of certainty."

The First Department further went on to state that "…in order to reduce the confusion that has arisen from the more nebulous terminology heretofore employed by the Departments of the Appellate Division, we reiterate that the 'direct and proximate link' standard articulated in *Greene* governs determinations of circumstances under which a broker constitutes a procuring cause within the First Department. This standard requires something beyond a broker's mere creation of an 'amicable atmosphere' or an 'amicable frame of mind' that might have led to the ultimate transaction. At the same time, a broker need not negotiate the transaction's final terms or be present at the closing [citations omitted]."

Although the First Department does not seem to recognize the "amicable atmosphere" standard, the other Departments continue to rely on this standard and it is again cited and affirmed in *Gluck*. Therefore, until the issue is specifically decided on by the Court of Appeals, there seems to be a split in the Departments of which one must be aware. In addition, while the First Department's rationale seems to proffer that the "amicable atmosphere" standard should not be relied upon, it is clear that it should be definitely considered and applied in all circumstances in conjunction with, and not in opposition to, a determination of whether there exists a "direct and proximate link."

Commissions are Due Where There is Bad Faith and Unjust Enrichment

The Appellate Division in *Gluck* further held that even when a broker cannot satisfy the three-prong test above, a broker may still be able to recover a commission where there is evidence of bad faith on the part of the defendant or if the broker performed services for which the broker should be paid. With regard to bad faith by the defendant, the Appellate Division held that "[e]ven if the plaintiff were not the procuring cause of the transaction, it would still be entitled to recover a commission, as the evidence established that [the defendants] terminated the plaintiff's activities in bad faith and as a mere last-minute device to escape the payment of the commission [citations omitted]." Therefore, where a defendant terminates a relationship in an effort to avoid payment of a commission, the defendant will be held liable.

As for a recovery based on unjust enrichment, the Appellate Division held that "…even assuming that there was no contract, express or implied, between the parties, the plaintiff would be entitled to recover for its services in quantum meruit in order to avoid the unjust enrichment of [the defendants]." The Court explained that "[t]he plaintiff established that it performed services in good faith, that [the defendants] accepted the services, that it expected to be compensated therefor, and the reasonable value of the services [citations omitted]." "Quantum meruit" is a Latin phrase meaning "as much as is deserved" and it is an equitable remedy. Courts, in their equity jurisdiction, may enter judgment for the fair value of the services rendered in favor of a party even where there is no implied or express contract and it prevents a party from becoming "unjustly enriched" from receiving the services of the party claiming payment therefor.

The *Gluck* decision highlights the importance of brokers being aware of what their rights are with respect to commissions. This and other decisions stress the importance of "precedent", a term which has recently been in focus in connection with the Supreme Court appointment process. It is clear that even when litigating an issue in the same State, different courts will rely on the "precedent" established in the specific courts or Departments (as would be the case in New York), even where other courts or Departments have issued a decision to the contrary.

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