Get it in Writing or Else! Business Broker or "Finder's" Agreements

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The economy relies on brokers to connect parties with mutual business interests and needs, whether it is the sale of real estate, procurement of insurance, or joint investment. The broker plays a very important role in connecting these parties, but she also takes on substantial risk that once the parties are connected, the broker will be forgotten, leaving the parties to conduct their business without paying a “finder's fee” to the broker for initiating the relationship. To mitigate this potential risk, many jurisdictions, including New York and Massachusetts, require fee agreements for brokers to be in writing so that all parties are clear about the terms of the arrangement.

The Statute of Frauds laws in both New York and Massachusetts specifically declare a finder's fee agreement void if it is not memorialized in writing. New York's Section 5-701(a)(10) applies to agreements for “services rendered… in negotiating… a business opportunity.” “Negotiating” includes “procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.”[1]

N.Y. G.O.L. § 5-701(10) has been litigated in connection with fees for real estate deals, joint investments[2] and mergers.[3] The writing requirement may be satisfied by piecing together emails that separately contain the material terms of a fee agreement; however, basing a right to compensation on emails is risky, as further discussed below. Instead, brokers should definitively set forth the terms of their fee agreements in a single signed writing whenever possible. Well-intended promises exchanged by the parties that are not memorialized in writing result in a substantial risk to the broker. A written agreement that clearly articulates these promises will mitigate these risks.

In *Alkholi, et al. v. Macklowe Inv. Properties, LLC, LLC*, No. 17-CV-16 (PKC), 2020 WL 2571011 (S.D.N.Y. May 21, 2020), *aff'd sub nom*, 858 F. App'x 388 (2d Cir. 2021), plaintiffs Hamza Alkholi and Ahmed Halawani pled breach of a written agreement or, in the alternative, of an oral agreement, against Macklowe Investment Properties, Inc. (MIP). The alleged agreement concerned a purported joint venture for the acquisition and development of part of 432 Park Avenue in Manhattan (the Project).[4]

MIP first contacted Alkholi and suggested a joint venture in which Alkholi would receive a 2% fee of “capital raise” and would connect MIP with other potential investors. MIP then emailed Alkholi: “I think a 2% fee will work… You have permission to speak to your potential partners.” MIP did not mention who would pay the fee. Alkholi then sent MIP a list of potential investors. MIP subsequently emailed Alkholi's partner Halawani that “the 2% placement fee… will be a 'deal' cost included in the total capitalization.” Halawani responded to this message from MIP with: “good enough…”[5]

The joint venture between the plaintiffs and MIP never materialized. The plaintiffs then filed suit, claiming that MIP's emails constituted an agreement that “Plaintiffs would receive, in return for securing the necessary capital, a fee equal to 2.0% of the capital raised.” Plaintiffs alternatively alleged “the emails evidence the binding oral contract between them.”[6]

In applying N.Y. G.O.L. § 5-701(10), the court focused on the ambiguity surrounding the issue of which party would pay the fee in the agreement.[7] The court held that the parties did not sufficiently memorialize in writing that MIP would pay the brokering fee, rejecting the plaintiffs' argument that Halawani's email to MIP stating that the proposed fee would be “good enough” demonstrated written assent as to who would pay. The court further held that MIP's “silence” in response to the plaintiffs' email did not “establish the existence of writings… that show that MIP was to be the

obligor of the 2% fee."[8]

In New York, a court will not imply an undefined material term into an agreement that is not in writing.[9] Alleged oral communications or other "silent" insinuations will not resolve an ambiguity as to the material term of compensation.[10] "An email sent by a party, under which the sending party's name is typed, can constitute a [signed] writing;" however, a court will not speculate as to the material term of compensation where the terms of compensation are not clear and in writing.[11]

Likewise, Massachusetts' Statute of Frauds requires that finder's fee agreements must be in writing.[12] Mass. Gen. Laws Ch. 259, § 7's writing requirement applies broadly to "any agreement to pay compensation for service as a broker or finder or for service rendered in **negotiating** the purchase… of a business… or an interest therein."[13] Under the Massachusetts Statute, the term "negotiating" is comprehensive and includes such preliminary contractual actions as "identifying prospective parties, providing information concerning prospective parties, procuring an introduction to a party."[14]

While not litigated as often as its New York counterpart, the Massachusetts finder's fee provision described above is at least as broad in scope as the New York law.[15] "A "finder" has been defined by Massachusetts courts as one who "merely identifies a business opportunity" for another.[16] Finders, or anyone in the business of facilitating business between parties in Massachusetts, must set forth all material terms, especially compensation, in one signed written agreement.[17]

The business broker is a vital player in our economy. When capital is connected with the ideas to put it to work, chances are, there is a broker involved. Brokers risk losing their commissions if they rely upon emails to suffice as agreements that establish material terms, including compensation. Brokers, or anyone in the business of facilitating business between parties, in Massachusetts or New York, should include all material terms, especially compensation, in one signed written agreement to ensure payment and to avoid future litigation.

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[1] N.Y. Gen. Oblig. Law § 5-701(a)(10).

2 See *Alkholi v. Macklowe Inv. Properties, LLC*, 2020 WL 2571011 (S.D.N.Y. May 21, 2020).

[3] *Vioni v. Am. Cap. Strategies Ltd.*, 2009 WL 174937 (S.D.N.Y. Jan. 23, 2009)

4 See *Alkholi, LLC,* 2020 WL 2571011, at *1.

[5] *I0-d.*, at *2 (One name added to the list of potential investors was Aklholi's co-plaintiff in this action, Ahmed Halawani. Thereafter Alkholi and Halawani effectively functioned as partners on the Project.).

[6] *Id.*

[7] *Id.*, at *5. ("The question presented on this motion is whether the signed and unsigned writings, taken together, include an obligation on the party of MIP to pay plaintiffs a placement fee out of its own funds.")

[8] *Id.* at 7.

[9] *Id.* at 9.

[10] *Id.* at 7.

[11] See e.g., *Springwell Corp. v. Falcon Drilling Co.*, 16 F. Supp. 2d 300, 305-306 (S.D.N.Y. 1998) ("[C]ourts have dismissed quantum meruit claims under the Statute of Frauds where the writings relied upon failed to establish that

the defendant actually agreed to pay a finder's fee, or where the writings left ambiguity as to whether the agreement's terms covered the transaction upon which a fee was claimed.").

[12] Mass. Gen. Laws Ch. 259, § 7

[13] *Id.* (emphasis added).

[14] *Id.*

[15] A key distinction being the Massachusetts's provision's exception for contracts involving compensation for real estate brokers, which are not required to be reduced to writing. See e.g., *Huang v. Ma*, 491 Mass. 235, 239 (2023) ("Oral agreements with [real estate] brokers are permitted.").

[16] *Wallach v. Huang,* 2005 WL 2524398, at *2 (Mass. Super. Aug. 29, 2005) (quoting *Bonin v. Chestnut Hill Towers Realty Co*., 14 Mass. App. Ct. 63, 75 (1982)); see also *Adelson v. Hananel*, 2009 WL 5905389, at *6 (D. Mass. Feb. 24, 2009) ("The plain language of the statute is specific that it applies to 'any' agreement to pay compensation for such [finders] services.").

[17] Mass. Gen. Laws Ch. 259, § 7.

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