Broker gets fee despite no lease

by Eric T. Berkman

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A commercial landlord whose bad faith caused a rental agreement with a prospective tenant to fall through before the lease was signed still owed the broker a commission, a Superior Court judge has decided.

The landlord encouraged the agent to market vacant space in his shopping center to medical groups despite knowing that an existing tenant, a supermarket, objected to having such tenants as neighbors. After the agent located a dental practice to rent the space, the landlord convinced the supermarket to expand into the premises instead at twice the rent. He did so without giving the agent an opportunity to broker that deal, prompting the broker to sue for breach of her listing agreement.

The landlord argued that under the Supreme Judicial Court's 1975 decision in *Tristram's Landing, Inc. v. Wait*, which established the requirements for a broker to earn a commission, he owed the agent nothing because he never signed a written contract with the dental practice.

But Judge Shannon Frison disagreed.

"It is true that [the plaintiff agent] did not ultimately provide the tenant for the space, which she was hired to do. But her failure to seal the deal with [the prospective tenant] was directly and solely due to the actions of the [defendant landlord]," Frison wrote in entering judgment for the plaintiff.

"Although [the landlord] reserved the right to accept or reject all offers in the listing agreement, he may not actively work against [the agent] by using her efforts to obtain a bona fide new tenant to leverage an existing tenant into the space without allowing [the agent] to broker that deal," Frison added.

The 14-page decision is *Ria K. McNamara, Inc. v. Forecast Shrewsbury Limited Partnership, et al.*, Lawyers Weekly No. 12-055-13. The full text of the ruling can be ordered by clicking here.

'Surprising' 93A ruling

Plaintiff's counsel Michael Magerer of Needham said he was unaware of any other cases in the four decades following *Tristram's Landing* in which a court awarded an aggrieved broker a commission despite the lack of a written agreement between buyer and seller or landlord and tenant.

In *Tristram's Landing*, the SJC ruled that a broker is entitled to a commission when a seller's wrongful act or interference prevents the consummation of a sale, as long as there is a written contract. Magerer noted that subsequent decisions suggested that even without a contract, a broker can get a commission if a seller engages in bad faith and there is evidence that the seller tried to profit off a broker's efforts without paying.

While Magerer said he was pleased that the judge awarded his client a commission, he was disappointed that she ruled for the defendant on his client's Chapter 93A claim. He said he plans to move for reconsideration pending certain procedural determinations.

Kenneth J. Goldberg, a Brockton real estate lawyer who was not involved in the case, called it the "classic scenario" in which a landlord's misconduct prevents a deal from being completed despite a meeting of the minds with the tenant.

"The property owner and the prospective tenant had more than an agreement in principle; they had a fully negotiated lease with only one thing left to do — get it signed," he said.

Given such circumstances, Goldberg said, it is "interesting" that the judge emphasized the landlord's bad faith in supporting the plaintiff's contract claim while rejecting her Chapter 93A claim.

"The general rule is that conduct in disregard of known contractual arrangements and intended to

secure benefits for the breaching party constitutes an unfair act or practice … because it violates the covenant of good faith and fair dealing inherent in every contract," Goldberg said. "One can only speculate, but perhaps the long and extended course of dealing between the parties and the broker's extensive knowledge of how the landlord conducted business mitigated [his misconduct]."

Michael C. Fee, a Boston attorney who litigates commercial real estate disputes and who also was not involved in *McNamara*, said he, too, was surprised that the plaintiff did not prevail under Chapter 93. Fee said it was difficult to figure out what the difference would be between *McNamara* and a case that that constitutes a 93A violation, "unless there was some technical failure to make demand under Chapter 93A, Section 11 or something like that. You don't usually have this kind of extensive extrinsic record to point to when trying to prove fraud."

More broadly, the Pierce & Mandell attorney said, "people who represent brokers will be studying their cases pretty carefully to try to fit their own factual patterns within the type of conduct that was found to be in bad faith in this instance."

Scott J. Clifford of Epstein, Lipsey & Clifford in Hanover represented the defendant. He could not be reached for comment prior to deadline.

Trading up

Defendant Jefferson Shrewsbury Limited Partnership owned "Q Plaza," a retail shopping center in Shrewsbury. Beginning in the 1990s, plaintiff Ria McNamara, a licensed real estate broker, provided services to the defendant and its principal, Joshua Katzen.

A Trader Joe's supermarket leased space in Q Plaza. For several years, Katzen had unsuccessfully tried to convince the store to expand into a space next door that was occupied by a financially troubled Ski Market.

In the summer of 2006, Katzen called the plaintiff and told her that Trader Joe's was not interested in taking over the Ski Market space and asked her to find another tenant.

Katzen and the plaintiff then negotiated a listing agreement under which he agreed to refer all inquiries and offers to her and to provide complete, accurate information. The plaintiff was also given the sole, exclusive right to market the property and was to be listed as the broker by name in any lease agreement for the space.

The agreement further provided that the plaintiff would receive 100 percent of her commission upon the tenant paying rent.

Katzen apparently knew at the time that Trader Joe's objected, for business reasons, to having medical-use tenants operating within 250 feet of its location.

Nonetheless, in June 2008, Katzen emailed the plaintiff and suggested that she put up a "Medical Space for Lease" sign on the Route 9 side of the plaza to get the attention of doctors traveling to the nearby University of Massachusetts Medical Center.

The plaintiff did so and, within a year, located a potential tenant, New England Dental Group, or NEDG.

The plaintiff negotiated lease terms between the two parties in August 2009, and in early September Katzen said he could "live with" NEDG's proposal. Two weeks later, he confirmed that he would "make the deal."

By Oct. 21, 2009, the plaintiff presented Katzen a final lease for signature. But Katzen responded that Trader Joe's had asked for two weeks "to decide on their right of refusal." Trader Joe's did not, in fact, have such a right in its lease.

Meanwhile, at some point that month, Katzen had told Trader Joe's that he had a medical-use tenant ready to take over the Ski Market space and that if the supermarket wanted the space instead, "now is the time; otherwise it is gone."

Trader Joe's took the space and amended its lease to include the new premises at twice the per-square-foot rental rate that NEDG would have paid. Katzen never gave the plaintiff the opportunity to broker the Trader Joe's lease amendment.

The plaintiff ultimately sued the defendant in Superior Court alleging breach of the listing agreement, fraud and violation of Chapter 93A.

Bad faith

In her findings, Frison rejected the defendant's argument that, under *Tristram's Landing,* the plaintiff had no right to a commission absent a signed lease agreement.

Instead, the judge noted that there are exceptions to the rule, citing to the SJC's 1985 decision in *John G. Capezzuto v. John Hancock Mutual Life Insurance Company*. In that case, the SJC stated that a written agreement might not be necessary when the seller engages in "bad faith dealing or some other misconduct" that prevents an agreement or which suggests "a purpose on the part of the [seller] to obtain without payment a profit from the [broker's] exertions."

And in its 1987 decision in *Barbara M. Bump v. Robert Robbins*, the Appeals Court recognized that a broker's heightened risk of working without getting paid should not come without any legal protection from sellers, the judge continued.

In *McNamara,* the judge found by a preponderance of the evidence that Katzen did, in fact, breach the listing agreement and then sought to profit from the plaintiff's work without paying a commission.

"[The plaintiff] performed all duties required of her by the Listing Agreement over the course of more than three years," the judge said. "[H]er failure to seal the deal with NEDG was directly and solely due to the actions of the lessor."

In fact, she said, Katzen's actions constituted "precisely the type of bad faith dealing and misconduct contemplated by the exceptions to the [*Tristram's Landing*] rule."

Additionally, Frison said, even if Katzen preferred a Trader Joe's expansion over a new NEDG tenancy, he had an obligation under his listing agreement to allow the plaintiff to broker that deal and receive a reduced 50-percent commission, as Katzen acknowledged had been their practice relating to existing tenants.

"Katzen did not do that, and thereby breached the Listing Agreement between him and [the plaintiff]," Frison concluded, entering judgment for the plaintiff on her contractual claim while rejecting her fraud and 93A claims.

CASE: *Ria K. McNamara, Inc. v. Forecast Shrewsbury Limited Partnership, et al.*, Lawyers Weekly No. 12-055-13

COURT: Superior Court

ISSUE: Did a commercial landlord whose misconduct caused a rental agreement with a prospective tenant to fall through before the lease was signed still owe the broker a commission?

DECISION: Yes

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