

Brokerage Commissions

[redux]



COUNSEL'S CORNER

Dean A. Smith Sales, Inc. (out of Pflugerville – what is the right way to pronounce *Pflugerville* anyway) entered into a listing agreement with Metal Systems, Inc. Dean, as broker, was engaged in 2008 to sell Metal's business for \$4.5 million, which amount included real estate owned by Metal.

Two years later Dean sued Metal for \$160k in damages. The trial court ruled for Metal. Dean appealed.

The Listing Agreement stated that Dean was to receive a 7% commission if real estate was included. Evidently, although not specifically stated, when Metal learned that Dean did not have a TREC issued real estate brokerage license Metal refused to pay.

One can only assume that real estate was included in the deal. And the license issue was the cause of the non-payment.

Dean first argued that the transaction did not involve real estate, so no TREC license was required. However, the listing agreement stated otherwise.

Argument Number Two was that there was an oral amendment to the written listing agreement, removing real estate from it. Dean Smith submitted an affidavit stating that

“I never had any expectation of a commission for the sale of real estate . . . The sale . . . was expected to be a stock transfer . . . The sales price listed in the contract was based on the value of the business without any real estate.”

The Court of Appeals used Dean's own Listing Agreement against him to refute this contention.

The Court then evaluated the Texas Real Estate License Act regarding commission claims. Section 1101.806(b) of the TRELA states that a party may not

collect a real estate commission unless the party proves it was a license holder at the time the act [for which a commission became payable] was commenced.

And so the Court of Appeals concluded: (a) a listing agreement was signed; (b) the listing agreement provided for the disposition of real estate (and fairly, other assets too); (c) real estate services were provided by Dean as defined by the TRELA; and (d) Dean did not hold a brokerage license issued by TREC.

Do you recall last month's article about *quantum meruit*? Well, of great interest to me anyway, the Court teased us with that as Argument Number Three, but then dismissed it on a technicality.

So, Metal Systems, Inc. wins again, and Dean A. Smith Sales, Inc. loses again.

See *Dean A. Smith Sales, Inc. v. Metal Systems, Inc.*; 05-11-01449-CV; Texas Court of Appeals 5th District, Dallas; March 11, 2013.

Lessons learned:

1. If you want to get paid a commission for a deal involving real estate, you'd better have a TREC brokerage license. And a written commission agreement too. Which describes the property with specificity.
2. Business brokers not holding TREC licenses might be wise to engage TREC brokers for the real estate component of the deal.
3. When you read this I will likely be in Poland and Ukraine. As I write, Kiev is suffering 20 inches of additional snow. Hope all my faithful readers had a great Easter / Passover, and perhaps next time I'll report on real estate developments in Warsaw.

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