PROTECTING YOUR FEES

A Primer for Leasing Brokers

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STEPS TO TAKE BEFORE A DISPUTE ARISES

1. **Oral Brokerage Agreements**

   Email, Email, Email
   
   Any phone, in-person conversation or third-party communication should be documented by email.
   
   Taping Telephone Conversations. One party consent in 38 States including New York.

   - Duly Licensed
   - An Express or Implied Contract with the Party to be Charged with paying the Commission
   - Was the Procuring Cause of the Sale
The Broker’s actions establish a “direct and proximate link” between the Owner and the Lessee.

A remote link such as a bare introduction of the parties or the failure to take part or attempt to take part in the negotiations of the parties together with the passage of time will preclude a Broker from establishing his right to a commission.
The Appellate Division reinstated a broker’s complaint against the lessor relative to a leasing made to Beth Israel Medicare Center (BI) when the Broker

- Arranged a conference call with the defendants and their attorney informing them of BI’s interest in the leasing space in the building,
- A defendant discussed with the broker the rent he was seeking and approved BI as an acceptable tenant,
- Provided comparables to formulate the going rate,
- Participated in weekly negotiations leading to an offer letter; and
- Attended a meeting between the defendants and BI to resolve the disputes necessary to execute the lease.

These factors led the court to conclude that regardless of the fact that no written agreement for a commission was in place, the broker “acted as a catalyst in the resulting lease,” and the defendants accepted the fruits of the broker’s labors in obtaining the lease.
The Broker only did the following:

- Disclosed the address of the leasehold to the lessee
- Submitted a two page lease proposal
- Allowed the attorneys for the parties to take over all aspects of the transaction
- The Broker did not do the following:
  - Send emails on a regular basis asking the status of the transaction and offering to act as an intermediary between the Owner and the Lessee.
  - Did not provide directly to the Owner financial information about the Lessee or provide the Lessee with specific information about the space.
  - The Court found that as the Broker did nothing more than submit a two page lease proposal without a written agreement, they would not be considered the procuring cause.
An exclusive agreement with the Owner that sets forth the following precludes the need to establish procuring cause.

- Term of Agreement
- Exclusivity
- Tail Provision
- Mutual Attorneys’ Fees Provision
- Venue for Disputes
  - Courts
  - AAA
  - REBNY Arbitration

Broker should try to get an addendum that is separately signed or initialed entitling the Broker to a commission if the lease is converted into a sale and if there is a renewal on terms that are substantially the same as those set forth in the option provision of the lease.
Mechanic’s Lien – Only available in the following situations:
- A commercial lease of over 3 years
- A written brokerage contract acting on behalf of the Owner
- Must be filed with 8 months of execution
- Must be accurate as to the amount of commissions owed – do not exaggerate.

Affidavit of Entitlement – This does not create a lien on the property
- Must represent Seller
- Must be filed in the County the property is located prior to the execution of the Lease
- Good for one year
- Has no greater enforceability than a breach of contract lawsuit, however, it is a misunderstood device that sometimes leads to resolution of disputes.
DUAL REPRESENTATION

Issue of fiduciary duties to the parties

Owner’s Broker should sign off on dual representation at the time the broker is retained

Lessee should also be advised of the dual representation and consent should be obtained

It should be clear to all parties as to whether the dual representation affects the commissions to be charged which are generally the responsibility of the Owner
Profile

Howard Rubin represents leading commercial real estate brokers in New York as well as closely held companies in a variety of industries. He provides general counsel, acting as a sounding board for new ideas and developments related to his clients' respective businesses, and provides transaction and litigation services. Howard finds practical solutions to his clients' challenges.

He has written and lectured extensively in the areas of real estate brokerage law, secured transactions, corporate issues and commercial litigation. Additionally he serves on the committees of numerous charitable organizations, including as President of the Citrin Foundation and as a member of the Real Estate Board of New York.

Years of Selection


About Howard Rubin

Admitted: 1978, NYS
Professional Webpage: www.goetzfitz.com/professionals/howard-m-rubin
Honors & Awards:
MICKEY MANTLE COMMUNITY SERVICE AWARD 2007
AV Preeminent in Martindale-Hubbell
Bar/Professional Activity:
OUTSTANDING SERVICE TO ADVANCE COMMUNITY GOALS IN NYC
Pro Bono/Community Service:
Board of Advisors, Sterling National Bank; Member, Real Estate Board of New York
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Scholarly Lectures & Writings:
Author of numerous articles on issues effecting the real estate brokerage industry. Lecturer on business succession issues, author, Real Estate Weekly, REAL ESTATE BROKERAGE 2007
Representative Clients:
Eastern Consolidated, GMAC Real Estate, Coldwell Banker, HAKS Engineers, Beverly Feldman Designs, H.D. Smith Drug Wholesalers, Signature Bank and Jolie Apparel Group
Other Outstanding Achievements:
Member, AAA Board of Neutral Arbitrators, Real Estate Issues, 2013 advisory board, American Cancer Association, 2008

Attorney Profile
Top Rated Closely Held Business Attorney in New York, NY

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