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Forget Hobson, It's Now "A Scheerer's Choice"

NC Court Allows Recovery Of Commissions Without A Written Agreement, But At What Cost?

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Joshua B. Durham

Many of you, like me, have probably thought for years that in order to collect a commission, you had to have a written agreement. After all, North Carolina Administrative Code, Title 21, Regulation 58A.0104(a) clearly provides that:

Every agreement for brokerage services between a broker and an owner of the property to be the subject of a transaction must be in writing and signed by the parties from the time of its formation. Every agreement for brokerage services between a broker and a buyer or tenant shall be express and shall be reduced to writing and signed by the parties thereto not later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another.

A trial judge in Haywood County even thought the same way, throwing out a broker's claim for commission last year because the broker had no written agreement.

Our Court of Appeals, however, just overruled that judge, stating that agreements to compensate a broker do not have to be in writing. The case, Scheerer v. Fisher, provides a nice new safety net for brokers who, for whatever reason, are unable to get their client to sign a brokerage agreement. Like all safety nets, though, let's hope you never have to use it.

THE FACTS*

The plaintiff, David Scheerer, is a licensed real estate agent, and in 2007 he notified the defendant, Jack Fisher, that certain mountain properties were for sale. Scheerer and Fisher had a prior professional relationship, and Fisher asked Scheerer to begin investigating the costs of developing the properties and to begin negotiating with the sellers. Fisher, on behalf of his LLC, entered into contracts to purchase the properties for \$20 million. One of the contracts provided that the seller would pay Scheerer a two percent commission. Fisher also orally agreed to pay Scheerer a two percent commission for serving as his buyer's agent. The case does not explain what efforts, if any, Scheerer made to obtain a written buyer's agency agreement.

Fisher and his LLC later rescinded the purchase contracts and, unbeknownst to Scheerer, began negotiating with a third party for the third party to purchase the properties and then to assign the new contracts to Fisher. Fisher formed a new LLC, and this new LLC ultimately purchased the properties. Neither Fisher nor his LLCs paid Scheerer any commission.

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THE RULINGS

Scheerer asserted two claims against Fisher. First, Scheerer alleged that Fisher breached an oral agreement to pay the commission. Second, Scheerer alleged that Fisher was liable in quantum meruit, which is an implied contract. If one party renders services for another under circumstances in which a contract could be implied, even though an actual contract might not have been formed, the party may be able to recover under a quantum meruit theory.

Fisher moved to dismiss the lawsuit, claiming that since Scheerer did not have a written agreement setting forth Fisher's liability for a commission, Scheerer had no valid case. The trial court agreed, holding that 58A.0104(a) served as a "statute of frauds." In the trial court's view, no claim based on an oral contract or an implied agreement could survive, because the law required the agreements to be in writing.

Scheerer appealed the decision to the North Carolina Court of Appeals, and, earlier this year, the Court of Appeals ruled in his favor. In doing so, the Court cited cases from as far back as 1901 that held that agreements to compensate brokers need not be in writing. Though such cases were decided long before 58A.0104(a), the Court noted that such cases had never been overruled. Equally important was the fact that 58A.0104(a) does not say that oral contracts are void, or that a broker could not bring suit to enforce an oral agreement. This is in stark contrast to laws in other states such as Virginia, California, and Texas, which expressly prohibit suits such as Scheerer's. As a result, the Court of Appeals reinstated Scheerer's claims and sent the case back to Haywood County for trial.

WHAT THIS MEANS FOR YOU

Scheerer claimed that Fisher misled him and took steps to deprive Scheerer of a commission. As such, it is easy to think that the Court was more concerned with a just result. Indeed, Patrick K. Hetrick, Professor of Law at the Norman Adrian Wiggins School of Law at Campbell University, and co-author of the North Carolina Real Estate Manual, said "it appears that there is the possibility of a concerted scheme to eliminate payment of \$400,000 to this broker." In such an event, he said "I would prefer to root for the broker. The Commission regulation is a good one in terms of the average couple trying to sell their home. I don't think it is appropriate to intervene in a matter where experienced parties dealt with each other in a major land transaction."

The Court's decision, though, applies to all transactions, not just the complicated ones. In other words, in what might otherwise be a simple home purchase, you can now seek commissions even though you did not get a signed agreement. That is what I call your new safety net. But you face a Hobson's choice, or a "Scheerer's choice," in determining whether to use it.

On the one hand, you may choose to do nothing and let the matter go. This is generally a difficult and painful decision, especially when you have so much time and energy invested in the matter. On the other, you may now pursue the client for a commission. According to Hetrick, though, you will have to incur significant attorney's fees to

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“vindicate a claim that would have been clear” had the agreement been in writing. While you might ultimately prevail in court, you could still get in trouble with the North Carolina Real Estate Commission. In fact, the Court of Appeals recognized that Scheerer “may be subject to discipline by the Commission for allegedly entering into an oral agreement for brokerage services.”

Of course, such unattractive options are easily avoided if 58A.0104(a) is satisfied and the brokerage agreement is put in writing. That is why the best advice is to ensure that you practice so well that you do not ultimately need this new safety net, and why Hetrick sees 58A.0104(a) “as providing a standard of wisdom and preventive law.”

*Before the case was originally dismissed, the only version of facts before the trial court was the plaintiff’s version. This summary of facts is from that version.

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