

“Divine Mitigation and the Statute of Frauds: *A broker’s prayer is answered – Part I*”

An interesting recent opinion issued by the Virginia Supreme Court in February 2010 is certain to impact principal-agent relationships and the payment of real estate commissions in commercial and residential transactions. In *C. Porter Vaughan, Inc. Realtors v. Most Rev. Francis X. DiLorenzo, Bishop of the Catholic Diocese of Richmond*, 279 Va. 449, 689 S.E.2d 656 (2010), the Supreme Court concluded that the statute of frauds was not a bar to an oral agreement to pay a real estate broker’s commission in a commercial real estate transaction.

C. Porter Vaughan, Inc. Realtors (“Vaughan”) alleged in its amended complaint that Bishop DiLorenzo on behalf of the Catholic Diocese of Richmond (“Seller”) engaged Vaughan to act as a real estate broker in the offering of certain property for sale. The amended complaint asserted that Vaughan marketed the property to several potential purchasers, including the VCU Real Estate Foundation which was the ultimate purchaser. The opinion concedes that no formal written listing agreement was entered into between Seller, as principal, and Vaughan, as agent. Instead, Vaughan supports its alleged claims upon an “oral real estate brokerage agreement,” which it argues is evidenced in part by: (i) a course of correspondence between Seller, its agents and Vaughan’s agent; and, (ii) an interim contract for sale of the property to a third party, which was ultimately terminated – but, which included an express provision governing the Seller’s obligation to pay Vaughan a commission. In response to the amended complaint, the Seller asserted certain defenses, including a defense based upon the Statute of Frauds. Specifically, the Seller argued that multiple correspondence signed by it or its agents and addressed to Vaughan’s agent, together with the interim third party sales contract, were insufficient to overcome the otherwise applicable bar to enforcement of a real estate brokerage agreement under the Statute of Frauds.

The applicable Statute of Frauds (Va. Code §11-2, *et seq.*) essentially requires that certain kinds of enumerated contracts must be in writing, and be executed by the party to be charged or his agent, in order to be enforceable. The applicable statute provides in pertinent part:

“ Unless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought in any of the following cases...(7) Upon any agreement or contract for services to be performed in the sale of real estate by a party defined in § 54.1-2100 [*real estate broker*] or § 54.1-2101 [*real estate salesperson*]....”

The purpose of this section of the Statute of Frauds has always been to protect parties to real estate transactions from unscrupulous brokers and salespersons, by requiring that the terms of certain contracts or agreements involving compensation for licensed services in real estate transactions must be in writing signed by the obligated party in order to be enforceable. Virginia Code §11-2(7) specifically requires that agreements relating to the payment of commission to licensed real estate brokers or salespersons must be in writing and signed by the principal in order to be enforceable by the broker/salesperson. This provision of the Statute of Frauds appears somewhat inconsistent with the otherwise applicable provisions of Virginia Code §§54.1-2136 (*preconditions to brokerage relationship*) and 54.1-2137 (*commencement and*

termination of brokerage relationships) – neither of which requires any mandatory writing of a brokerage relationship. It is curious, though, that the Virginia Code and regulations of the Real Estate Board require certain written disclosures to be made in writing with regards to the “existence” of the brokerage relationship (Va. Code §54.1-2138, *et seq.* and 18 VAC 135-20-280(3) and 18 VAC 135-20-290(1)). The provisions of Virginia Code §54.1-2140 are also noteworthy, and provide that the payment or mere promise of payment or compensation to a real estate broker does not create a brokerage relationship.

Justice Lemons noted in the Supreme Court’s opinion that the case contemplated the application of the Statute of Frauds not to an oral contract for the sale of real property, but to an oral real estate brokerage agreement. Citing related authority, including *Drake v. Livesay*, 231 Va. 117, 341 S.E.2d 186 (1986) and *Murphy v. Nolte & Co., Inc.*, 226 Va. 76, 307 S.E.2d 242 (1983), the Supreme Court concluded that neither the letters alone, nor the terminated third party sales agreement, were separately a sufficient “memorandum” to overcome the requirements of the Statute of Frauds. However, the cumulative effect of both combined were sufficient to remove the oral agreement from the operation of the Statute of Frauds. Therefore, Vaughan was permitted to proceed to trial upon these claims of an oral brokerage agreement without regard to the otherwise applicable prohibition under the Statute of Frauds. Some commentators have noted that recent decisions from Virginia courts reflect a trend towards limiting or removing the bar to enforcement generally associated with the Statute of Frauds. This case seems to confirm the inherent limitations to modern application of the Statute of Frauds.

In the lower court, the demurrer filed by the Seller was sustained – that procedural posture in the proceedings is noteworthy. At the demurrer stage, no substantial evidence is introduced. The function of a demurrer is to test whether a complaint states a cause of action upon which relief can be granted; and, a demurrer admits as true all allegations of material facts which are well pleaded in the complaint. In deciding whether to grant a demurrer, the trial court is required to accept the truth of all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from the alleged facts.

The demurrer to Vaughan’s claims, which was sustained in the circuit court proceedings, was reversed by the Supreme Court; and, the case has been remanded to the trial court for further proceedings. A jury trial has been scheduled for February 2011 in the City of Richmond. Part II of this article will follow, once a final disposition of the case has been achieved.