

# Exclusive Broker Contracts may be Illusive

BY MATTHEW A. GENS

**B**OSTON — A word of advice for Massachusetts real estate brokers: without careful drafting, what you might think is an ironclad “exclusive” brokerage arrangement does not provide you the protection to receive your commission you might think it does.

If you want to ensure that your agreement entitles you to a commission when the owner himself sells his property without broker involvement, you need to make that explicit in the agreement. Otherwise, a

court will assume that you did not negotiate for this, and you will not be paid.

This default rule that denies commissions for sales by the owner is actually a very old rule, but the fact that a Massachusetts Appeals Court decision recently reiterated this standard indicates that many brokers may not be aware of it.

The Appeals Court in *Murphy & McManus, LLC v. CBR Institute for Biomedical Research, Inc.* (Case No. 11-P-1821, 2013 Westlaw 1403299), found that the word “exclusive” used in the brokerage agreement might have made the broker an exclusive *agent* for the owner of the property. However, it “did not create for [the broker] an exclusive right to *sell* the property,” the court wrote in an unpublished decision.

What this meant is that while the owner could not use a different broker, the owner was free to find a buyer itself without broker involvement. Citing a series of decades-old cases, the Appeals Court in *Murphy & McManus* affirmed the lower court’s denial of a brokerage commission to the broker when the property owner itself found a buyer. “[A] contract employing a broker as an exclusive agent ‘does not preclude the owner from selling to a purchaser of his own procuring.’” *Des Rivieres v. Sullivan*, 247 Mass. 443, 447 (1924).

So what does a broker have to do to ensure that he obtains a commission in the



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event that the owner sells without broker involvement? Two things. First, as the Appeals Court noted, “[t]o create an exclusive brokerage, particularly one under which the owner must pay a commission if, within the fixed term, the owner himself sells the property, the parties must expressly and unambiguously indicate such an intent in the contract.”

This is easier than it sounds. Just do not assume that use of the word “exclusive” in the brokerage agreement achieves this goal. Use your imagination, but when in doubt, spell it out. Make it clear that even in the event that the owner finds its own buyer, you are entitled to a commission.

Second, make sure that the agreement is bilateral in nature rather than unilateral. These are fancy words, but it is a simple concept. As the Appeals Court explained, when the contract only provides that the broker is to be paid a commission upon finding a buyer, this is a unilateral contract. The broker’s finding a buyer is what is known as a “condition,” and the owner is free to revoke the agreement by finding a buyer, before the broker can meet that condition. *See Bartlett v. Keith*, 325 Mass. 265, 267 (1950).

By contrast, a so-called bilateral agreement is not as easily dispensed with, because the contract imposes immediate obligations on the broker as well, and it is not dependent upon a condition to be

enforceable. A bilateral contract in the broker context is “an exchange of promises” that “require[s] performance by broker and seller.” *Samuel Nichols, Inc. v. Molway*, 25 Mass. App. Ct. 913, 913 (1987).

In other words, “the broker must be more than a passive recipient of the grant of exclusive agency; the broker must agree to do something, such as advertising the property and making diligent effort to find a buyer on the seller’s terms.” *Id.* If the brokerage agreement makes clear that the broker is obligated to make reasonable efforts to sell the property, and that the exclusive nature of the arrangement is done in consideration of that, then the agreement will likely be found bilateral.

To sum up, then, truly exclusive rights of sale in brokerage agreements is a very old concept, but the fact that brokers are still walking away from deals disappointed indicates that this sort of a refresher is helpful.

Make sure that the agreement says you get paid even if the owner finds the buyer. Make sure that you yourself have immediate obligations under the agreement. Otherwise, the only exclusive right you will find yourself possessing as a broker is the right not to receive the commission to which you thought you were entitled. ■

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