# A Commission After Termination: A Different Take

For many years, REALTORS® have had to deal with the situation in which a seller unilaterally terminates a listing prior to the end of its term and before the REALTOR® has procured a ready, willing and able buyer. In the past, if the REALTOR® challenged the termination and claimed a breach of contract, sellers have had success claiming that there has been no breach of contract because the REALTOR® had not yet provided a ready, willing and able buyer. A recent decision by the Court of Appeals may give future sellers and their counsel pause before taking that position.

The facts of the case are fairly straightforward. The broker and the seller entered into an exclusive listing agreement on July 13, 2010. Under the terms of the exclusive listing agreement, the broker agreed to use commercially reasonable efforts to sell the seller's motel, to present the property to other real estate companies and to engage in marketing efforts to expose the property. The term of the listing agreement was for one year. The exclusive listing agreement also provided that in the event anyone with whom the broker had contact during the term of the listing agreement purchased the property during the following six months, the broker was to receive a five percent commission.

A couple of months into the listing agreement, the seller sent a letter to the broker advising the broker that it no longer wished to sell the motel. In response, the broker provided its own letter, indicating that it would end its marketing efforts during the remainder of the one-year term of the exclusive listing agreement and in order to protect itself during the six-month protection period, listed the eight people with whom the broker had contact. The letter provided:

> **While I do not terminate Exclusive Listing Agreements, I will cease our efforts toward marketing and selling the Howard Johnson- Traverse City, MI, through the remainder of the initial term of the Agreement, ending July 13, 2011. The secondary term of the Exclusive Listing Agreement expires six (6) months thereafter.**

In April 2011, eleven months after the initial date of the exclusive listing agreement, the seller sold the property to a third party with whom the broker had no contact. The broker sued the seller to recover the commission specified in the exclusive listing agreement.

As usual, the seller contended that the listing agreement had been terminated and that the termination was not a breach of the exclusive listing agreement because the broker had failed to provide any consideration, *i.e.*, the broker had failed to procure a ready, willing and able buyer and had no role in finding the eventual buyer of the property. The trial court found that the seller had sold the property within the initial twelve-month term of the listing agreement. The trial court found further that the seller's and broker's exchange of letters did not modify the listing agreement and that thus the broker was entitled to a commission.

On appeal, the seller again contended that the broker was not entitled to any commission, as the broker had not provided any consideration as of the time the seller attempted to terminate the listing agreement two months into its twelve-month term. In addition, the seller argued that regardless of the broker's intent with respect to the letters, the seller had the right to unilaterally revoke the agreement.

The Court of Appeals first noted that an exclusive listing agreement that has been supported by consideration may not be revoked by the listing party, *i.e.*, the seller. This, of course, has long been the law of Michigan. The difficulty for brokers has been in establishing exactly what is required in order for there to be deemed to have been sufficient "consideration." The Court of Appeals listed the three requirements which must be in place in order to make a listing agreement irrevocable: (1) a provision for exclusive sales rights (*i.e.*, it is expressly an exclusive listing agreement); (2) the term (length) of the agreement is reasonable; and (3) the broker has substantially performed its duties as promised "although the broker is not required to furnish an actual purchaser." The Court of Appeals then applied the three requirements to the present case. The broker's exclusive sales rights were set forth in the agreement. The one-year term of the agreement was not challenged by the seller as being unreasonable. Finally, the Court of Appeals determined that the broker had substantially performed the duties it owed to the seller. In finding the broker had provided sufficient "consideration," the Court held:

> **In the agreement, the [broker] promised to use commercially reasonable efforts to sell the property, to present the property to other licensed real estate companies upon request, and to engage in marketing efforts to expose the property. [Broker] did in fact make reasonable efforts to sell the property until [seller] informed it that [seller] no longer wished to sell. As such, [seller] could not have terminated the agreement through revocation, because the agreement was irrevocable.**

This case has at least two very important find-



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ings that should be noted by REALTORS® and their lawyers. First, the Court of Appeals expressly held that a broker with an exclusive listing agreement need not furnish an actual purchaser in order to recover a commission. Second, the Court held that the reasonable marketing efforts promised in an exclusive listing agreement are sufficient to provide consideration so as to make the listing agreement irrevocable.

As a side note, the seller in this case had also contended that the broker had to prove his costs in marketing the property in order to recover damages. The Court of Appeals rejected that claim in one sentence stating that an unambiguous contract provision stating a commission rate is sufficient to entitle a broker to damages.

This case is an unpublished decision of the Court of Appeals. Thus, it is not binding on a circuit court. However, it does provide a powerfully persuasive argument inasmuch as the Court of Appeals sets forth the rules in this situation in very straightforward and simple terms.

## ONE FOR THE APPRAISERS

A relatively recent Court of Appeals decision involved a professional malpractice claim by Capital Bancorp against an appraiser. The defendant appraiser had appraised a 20-unit motel and a residence located on one parcel for Capital Bancorp in 2002. Capital Bancorp requested the appraisal in anticipation of a loan to the Lankas, who were going to develop the motel and the residence as separate units. Capital Bancorp intended to finance the motel and the residence separately with a separate mortgage on each. Thus, Capital Bancorp specifically requested that the appraiser not value the property as a single parcel but, rather appraise it as separate units. There was testimony that both the bank and the appraiser knew that appraising the property as separate units would increase the value. The appraiser completed the report valuing the motel and the residence separately with a total value of $801,000. Capital Bancorp loaned the Lankas $600,750. The loan was to mature on March 11, 2005.

The Lankas did not pay off the loan on March 11, 2005. Instead, Capital Bancorp issued a new note with a maturity date of May 11, 2005, and then another note with a maturity date of May 11, 2006. Capital Bancorp's policy was to obtain a new appraisal upon any refinance. In this case, it did not obtain a new appraisal until September 4, 2007. A different appraiser in 2007 valued the motel and the residence as a single parcel and reached a total value of $350,000. A third appraiser reviewed both the 2002 and 2007 appraisals in October 2007. The third appraiser provided a report stating that in 2002, the property should have been appraised as a single parcel and not separate units, and noting that the defendant appraiser was not licensed to appraise anything larger than four units.

Capital Bancorp sued the defendant appraiser on April 23, 2008, claiming professional malpractice. The defendant appraiser responded that Capital Bancorp's claim was barred by the two-year statute of limitations on professional malpractice claims against appraisers.

It was undisputed by the parties that the two-year statute of limitations had run. However, Capital Bancorp claimed that is was entitled to relief from the two-year statute of limitations based upon an exception in the statute of limitations which permits someone to sue after two years but "within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later," (*i.e.*, two years or six months after the claims should have been discovered). Capital Bancorp claimed that it filed suit within six months after discovering the alleged professional malpractice by the defendant appraiser.

The Court of Appeals held that the burden was on Capital Bancorp to prove it filed suit within six months after the time it should have discovered the alleged malpractice and that Capital Bancorp could not sustain its burden. The Court of Appeals noted that the Lankas loan was refinanced several times after it first matured on March 11, 2005, and that Capital Bancorp did not have the property reappraised until 2007. Even after having the property appraised in 2007, Capital Bancorp waited seven months after the 2007 appraisal before filing suit. The Court of Appeals found that Capital Bancorp should have known prior to being told by the 2007 appraiser that the property appraised as separate units would have a higher value than the property appraised as a single unit. Further, Capital Bancorp could not explain how why it did not know that the defendant appraiser lacked the requisite qualifications to appraise the property when defendant's appraisal report to Capital Bancorp had explicitly stated that the appraiser was licensed and not certified. The Court found that Capital Bancorp's own inaction prevented it from discovering any claim against the defendant appraiser, and thus that it has been appropriate for the trial court to dismiss the claim.

This case may prove useful to appraisers who face claims based on appraisal reports they provided more than two years ago. Assuming that the claim is based upon some alleged glaring error by the appraiser, the entity making the claim should not be able to avoid the two-year statute of limitations based upon the so-called "discovery exception." **MAR**

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