

## COLLECTING A COMMISSION – MAKING SURE YOU GET PAID

While the form and process of a “typical” real estate transaction may have changed dramatically over the past few years due to short sales and REO sales, the rules by which a REALTOR® becomes entitled to a commission have not changed. This article discusses commission agreements and how and when a REALTOR® is entitled to collect a commission.

### I. Requirements Of A Listing Agreement.

A. The Michigan Statute of Frauds requires that all commission agreements must be in writing. MCL 566.132. A commission based solely on an oral agreement is unenforceable under the Statute of Frauds. *Mead v Rehm*, 256 Mich 488 (1932).

B. An agreement to share compensation between brokers need not be in writing. *Benzos v Borisoff*, 339 Mich 12 (1954); *Schultes Real Estate Co Inc. v Curis*, 169 Mich App 378 (1988).

C. Listing agreements, unlike purchase agreements, do not need to be signed by every owner of the property to be enforceable. *Slater Management Corp v Nash*, 212 Mich App 30 (1995) (purchase agreements must be signed by all owners); *Max Broock, Inc v Walker*, 349 Mich 63 (1957) (wife’s signature not required on listing agreement). The spouse is obligated to pay a commission on a listing agreement even if the other spouse does not become a party to the listing agreement.

D. The specific terms of a commission agreement control the transaction. *Hawkins v Smithson*, 181 Mich App 649 (1989); *Craib v Committee on Nat’l Missions of the United Presbyterian Church*, 62 Mich 617, 623 (1975). While one agreement might entitle a broker to a commission even if the property is sold without the broker’s direct involvement; another might require that the broker is not entitled to a commission unless he has an active role in negotiating the transaction.

E. The parties to a listing agreement must have the capacity to enter into the agreement. Neither a minor nor a mentally incapacitated adult would be bound by a listing agreement. For example, if a seller who has a conservator enters into a listing agreement, Michigan courts have determined that absent the conservator’s signature, the seller is not bound by the listing agreement. *Eerdmans v Maki*, 226 Mich App 360 (1997).

F. The Occupational Code provides that a “service provision agreement” must be fully completed by the REALTOR® before it is signed by the sellers. R 339.22305(1). The Occupational Code further requires that all “service provision agreements” contain a definite expiration date and a non-discrimination clause. R 339.223305(2); MCL 339.2515. At the time of the signing of the listing agreement, the REALTOR® must give the owners a true, executed copy of the service provision agreement. R 339.223305(1).

G. A written listing contract is not always required so long as there is a writing in which the seller is obligated to pay a commission. *Real Estate One v Heller*, Court of Appeals, Docket No. 267041. The broker in this case was unable to produce a listing contract, but sought to enforce a provision in a lease agreement that provided:

In the event this property is offered for sale, Tenant(s) has first right to refusal to purchase it at a price to be determined at that time and the Landlord/Seller will pay a commission of six percent.

The Court ruled in favor of the seller, finding that the REALTOR® had never actually listed the property for sale or received offers from anyone else and had done nothing to market the property. The Court of Appeals reversed finding that the broker was a third-party beneficiary of a commission provision in the lease which was unambiguous in providing for payment of a six percent commission in the event the tenant purchased the property.

## **II. Title Protection.**

A. The protection period clause in a listing agreement requires that a commission be paid even if the property is sold after the listing agreement expires. The Michigan Court of Appeals has held that such protection period clauses are enforceable. *Hawkins v Smithson*, 181 Mich App 649 (1989).

B. Typically, protection period clauses state that the broker is entitled to commission if the property is sold to any party with whom the broker had negotiations during the listing period or viewed the property during the listing period. Many listing agreements provide in the protection period clause that if the seller lists the property with a different broker after the first listing expires, the protection period does not apply.

C. If a listing agreement expires and there is a protection period, the seller may be required to pay two (2) commissions if he enters into another listing agreement which overlaps with the protection period. The obligation of the seller to pay the second listing broker a commission does not automatically excuse him from paying the first listing broker.

## **III. Termination Of Listing Agreement.**

A. Most listing agreements can be revoked by the seller at any time during the listing period prior to the broker producing a ready, willing and able buyer.

B. There are two exceptions to the rule: (1) when the revocation is made in bad faith with the intent to deprive the broker of a commission; or (2) if the broker has provided valuable consideration to the seller. *Schostak v First Liquidating Corp*, 320 Mich 406 (1948); *Seelye v Broad*, 379 Mich 289 (1967).

C. The question of what constitutes sufficient consideration to make a listing agreement irrevocable must be answered on a case by case basis. It has been held that showing the property to ten customers is insufficient to make the agreement irrevocable. *Stoffer v Friedman*, 11 Mich App 532 (1968). It has also been held that where a broker paid for the preparation and mailing of a promotion brochure about the property, there was sufficient consideration to prohibit the seller from revoking the listing agreement for a reasonable period of time. *Ladd v Teichman*, 359 Mich 587 (1960). Also it has been held that where a broker spent over \$5,000 promoting and advising the seller's property, it was entitled to a commission upon the owner's cancellation of the exclusive listing agreement. *HM Seldon Co v Carson*, 11 Mich App 613 (1968).

D. A recent decision by the Michigan Court of Appeals in *Michigan Motel Brokers Inc v Doud Boys, LLC*, Court of Appeals Docket No. 308616 (Dec 6, 2012) specifically addresses when a seller has the power to unilaterally revoke an exclusive listing agreement. The Court held that to make a listing agreement irrevocable there are the following three requirements: (1) a provision for exclusive sales rights; (2) a reasonable time limit (*i.e.*, reasonable term for the agreement); and (3) substantial performance of the brokers duties as promised, although the broker is not required to furnish an actual purchaser. The Court of Appeals found that the broker provided consideration through the use of commercially reasonable efforts to sell the property, to present the property to other license real estate companies upon request and to engage in marketing efforts to expose the property. The listing agreement was deemed irrevocable and the seller was required to pay a commission to the broker when the seller sold the property during what would have been the term of the listing agreement which the seller had breached. The Court also found the broker was not required to prove damages (*i.e.*, costs incurred by the broker) other than the entitlement to a specific commission.

#### **IV. Earning Commissions.**

A. If a commission agreement does not specify how and when a commission is earned, Courts have held that a broker earns a commission when it produces a buyer who is ready, willing and able to purchase the property under the price and terms set forth in the listing agreement or upon different terms acceptable to the seller. *Rich v Emerson Dumont Distributing Corp*, 55 Mich App 142 lev den, 393 Mich 766 (1974).

B. Generally, brokers are entitled to commissions if a buyer has presented a full price and terms offer, even if the seller refuses to accept the offer. The question then becomes "what is a full price and terms offer?" While such a determination must be made on a case by case basis, generally a broker has not produced a ready, willing and able buyer for purposes of earning commission if the offer to purchase includes contingencies. *Crystal-Anderson and Associates v Kelly*, unpublished opinion per curiam of the Court of Appeals, decided March 15, 1990 (Docket No. 112406) (offer was lower than list price and contingent upon sale of buyer's house); *Aulgur v Aulgur*, unpublished opinion per curiam of Court of Appeals, decided February

9, 1985 (Docket No. 89351) lev den 431 Mich 875 (1988) (contingent upon closing by specific date).

C. Even if the buyer presents a “full price and terms offer,” the Michigan Court of Appeals has held that a listing is not an “offer” that can be accepted by the buyer. *Eerdmans v Maki*, 226 Mich App 360 (1997).

D. The Court may find that a broker has not produced a “full price and terms offer” for purposes of earning a commission if the offer includes material contingencies. This was the issue in *Gil Henry & Assoc Inc v General Aluminum Mfg Co*, unpublished opinion per curiam Court of Appeals issued May 24, 2005 (Docket No. 251849). The issue is whether the listing broker was entitled to a commission for producing a purchase offer that was not accepted by the seller.

1. The listing contract at issue in this case had provided:

If [broker] or anyone including [seller] are able to secure a purchaser at the price recited above, or in the alternative, on terms satisfactory to [seller] . . . [seller] will promptly consummate such transaction and [seller] will pay [broker] a ten percent commission.

2. The seller admitted the broker had produced a full price offer, but argued that the offer had “many significant conditions that reduced the offer price.”

3. According to the seller these “significant conditions” were:

1. Seller to pay for buyer’s title insurance;
2. Seller to pay for a survey of the property;
3. Offer contingent upon a phase 1 environmental assessment of buyer’s costs;
4. Seller to pay for phase 2 environmental assessment if necessary;
5. Seller to warrant title; and
6. Buyer may terminate agreement if found it “too expensive to establish a separate utility connection.”

4. The trial court and the Court of Appeals found in favor of the broker. The Court of Appeals found that the terms of the listing contract were unambiguous and that the broker had procured an offer at the price recited in the listing contract.

**V. Liens Or Lis Pendens.**

A. Commercial brokers may lien a property to secure payment of their sales or leasing commission.

B. REALTORS® may not file a lis pendens or otherwise lien a property to secure payment of their commission on a residential sale. A REALTOR® who files such a claim could be faced with a slander of title claim. *Olsen v Kidman*, 120 Utah 443; 235 P2d 510 (1951); *Patten Corp v Canadian Lakes Dev Corp*, 788 FSupp 975 (1991).

**VI. Suing For A Commission.**

A. To sue for a commission, a person must be a licensed real estate broker.

B. MCL 339.2512a provides:

A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract.

In other words, in filing a complaint with a court for a commission, a real estate broker must specifically allege that they were properly licensed at the time of the act or the contract upon which they claim a commission.

C. A real estate salesperson may only receive compensation from the broker with whom they are affiliated for real estate services. Thus, a real estate salesperson may not maintain a civil action against a seller or buyer for a commission without the participation of their broker.

**VII. Conclusion.**

Each REALTOR® should carefully review the terms of their listing agreement by which they are entitled to receive a commission. Their ability to enforce a commission agreement is almost solely based on the terms of the listing agreement.