FINDER'S FEES:
WHAT YOU SHOULD KNOW!

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FINDER'S FEES
Simple Strategies to Protect Your Returns

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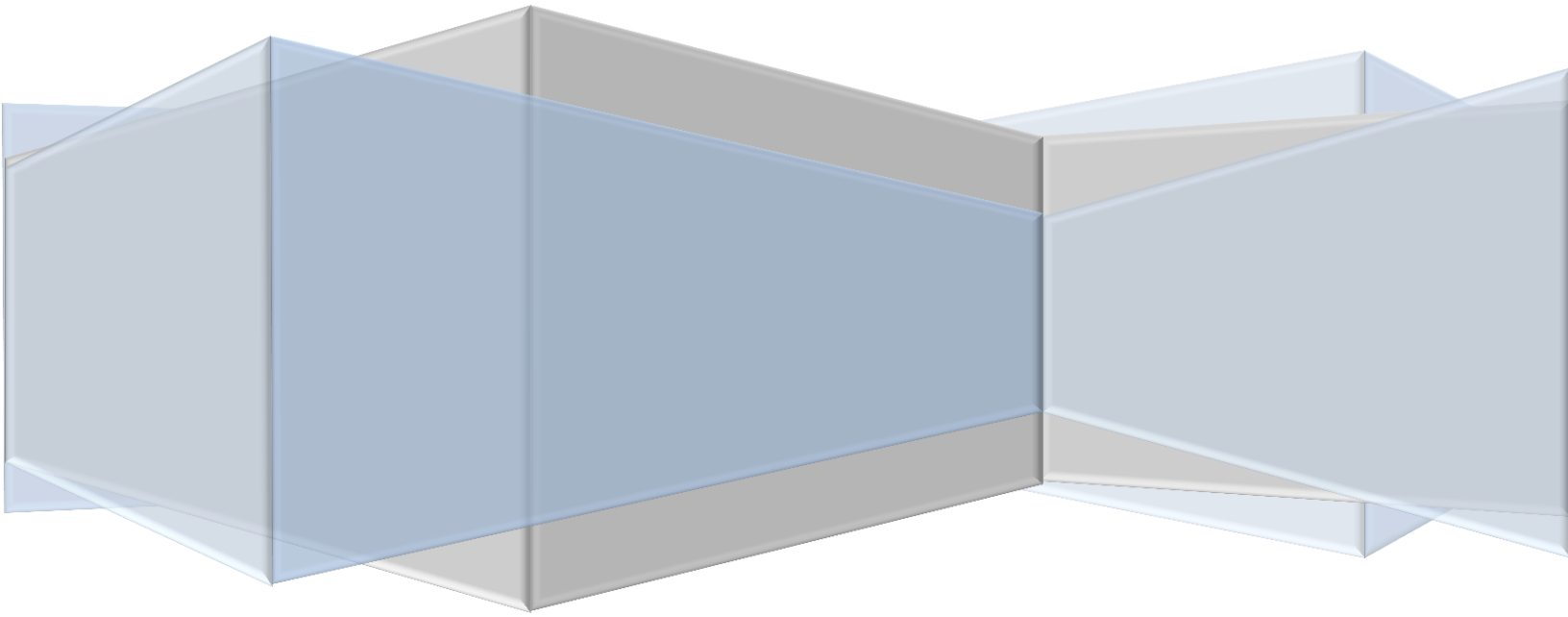

FINDER'S FEES

Simple Methods to Protect Your Returns

by Michelle A. Maratto, Esq.[1]

1. What is a Finder's Fee?

A "finder" is one employed to bring two or more parties together so that they can meet to do their own negotiating and make their own bargains.[1] Finders act to "find" potential buyers or sellers, stimulate interest, and bring parties together.[2] But they have neither the obligation nor the power to negotiate a transaction.[3] Nevertheless, while they perform some related functions, it is critical to distinguish a broker from a finder.

2. Distinction between a Finder and a Broker.

While they perform some related functions, a broker should nevertheless be distinguished from a finder. This distinction is based on the quality and quantity of the services performed.[4] Thus, unlike a finder, a broker ordinarily must shepherd the parties into consummating the agreement, rather than simply introducing the bargaining parties to one another.

Also, unlike a finder, in New York a broker carries a defined, fiduciary duty to act in the best and more involved interests of the principal.[5] Thus, a court may find that a principal's relationship with its

[1] *Southack v. Lane*, 32 Misc. 141 (1st Dept. App. Term 1900).

[2] *Train v. Ardshiel Associates, Inc.*, 635 F. Supp. 274 (S.D.N.Y. 1986), judgment aff'd, 805 F.2d 391 (2d Cir. 1986) (applying New York law).

[3] *Northeast General Corp. v. Wellington Advertising, Inc.*, 82 N.Y.2d 158 (1993).

[4] *Train*, 635 F. Supp. at 274.

[5] *Northeast General Corp.*, , 82 N.Y.2d at 158 (finder-seller agreement did not create a relationship of trust between the parties by operation of law so as to produce a fiduciary-like obligation on the finder, and thus the seller could not

"broker", is really a relationship with a finder in instances where the individual has duties limited to only finding business for acquisition in exchange for a finder's fee absent any contractual obligations of trust and confidence.[6]

3. How Finders Can Get In To Trouble If They Are Doing Unlicensed Real Estate Brokerage.

Here is where things get tricky. As we saw above, a finder and a broker are, generally, different animals. If, however, the acquisition of real property is the dominant feature of the contract at issue, then the court is highly likely to consider a fee in dispute as one for real estate brokerage, not for finding a deal. And New York Courts are clear that only licensed real estate brokers can recover a real estate brokerage fee.

In one case[7], one of the parties to the transaction sought to avoid paying a finder's fee to the alleged-finder on a purchase of property, arguing that the finder was not a real estate agent, and thus not entitled to receive the fee. The court held that the plaintiff, who was not a duly licensed real estate broker, was statutorily prohibited from bringing a breach of contract action to recover a finder's fee of 15% of net profit realized from the defendants' purchase and sale of real property.[8]

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withhold a fee after the finder failed to reveal to the seller that the prospect which the finder had brought to the seller had a reputation for taking actions in business dealings that could be detrimental to the seller, even though the seller was in fact damaged by the prospect's actions; the seller failed to bargain for and specify a fiduciary-like relationship in the agreement).

[6] *J.O.P. Consulting Group, LLC v. McCawley Precision Machine Corp.*, 272 A.D.2d 82 (1st Dept. 2000); *Trump v. Corcoran Group, Inc.*, 240 A.D.2d 159 (1st Dept. 1997). *See also, Stiefvater Real Estate, Inc. v. Himbaugh*, 42 A.D.3d 525 (2d Dept. 2007) (affirming trial court's finding that the fee was a finder's fee, and not a broker's fee, due to "the plaintiff's limited role as a finder, rather than as an agent acting in a fiduciary capacity").

[7] *Futersak v. Perl*, 84 A.D.3d 1309 (2d Dept. 2011); leave to appeal denied, 19 N.Y.3d 938 (2012).

[8] Specifically, the Court referred to Real Property Law § 440(1), which states that the term:

> "'real estate broker' means any person, firm, limited liability company or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage, other than a residential mortgage loan, as defined in section five hundred ninety of the banking law, or other incumbrance upon or transfer of real estate, or is engaged in the business of a tenant relocator, or who, notwithstanding any other provision of law, performs any of the above stated functions with respect to the resale of

In such case, it did not matter that the written agreement drafted by the parties to the transaction explicitly referred to the finder being compensated as a "finder". It did not matter that there was nothing in the agreement, explicit or implied, that the finder was an agent of the parties. It did not matter that the finder had no explicit or implied power to bind the parties to the transaction. Nor did it matter that the finder did not have the power to negotiate the transaction, nor to do anything except find and introduce parties. All that mattered to the court was that the underlying transaction involved the sale of certain real property, and plaintiff was attempting to collect a fee for facilitating the purchase and sale of that property.

Courts have further held that in order for a non-licensed real estate broker to demonstrate his entitlement to a finder's fee in a transaction that includes a real estate component to the deal, that the acquisition of real property be merely incidental to the underlying transaction, or that the services rendered be for any purpose other than facilitating the acquisition of real property.[9]

In another case, the defendant sought to obtain mortgage financing for a proposed 30–unit condominium to be developed on certain real property that it owned. The defendant subsequently discussed with the plaintiff, "a Finder", the prospect of its assisting in the procurement of a mortgage loan. The defendant and the plaintiff entered into a Master Fee Agreement, which set forth the fees to be provided to the plaintiff were the plaintiff to secure a loan commitment for the defendant. The defendant established that the negotiation of the loan was the dominant feature of the parties' agreements. Although the plaintiff's principal was a licensed real estate broker, the plaintiff, an unlicensed limited liability

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> condominium property originally sold pursuant to the provisions of the general business law governing real estate syndication offerings. In the sale of lots pursuant to the provisions of article nine-A of this chapter, the term 'real estate broker' shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate. …. In connection with the sale of a business the term 'real estate broker' shall not include a person, firm or corporation registered pursuant to the provisions of article twenty-three-A of the general business law or federal securities laws.

[9] *Ling v. Bode*, 94 A.D.3d 951 (2d Dept. 2012).

corporation, was barred from receiving a commission or fee for services relating to the procurement of the loan.[10]

4. Finder's Fee must be in Writing in New York.

In New York State, the New York Statute of Frauds[11] requires that an agreement to recover a finder's fee must be in writing.[12] As such, in order to recover on a breach of contract claim for a finder's fee, you must demonstrate that the agreement was reduced to writing.

5. An Email May Constitute a Writing Sufficient to Support a Finder's Fee.

Emails may constitute "signed writings" within the meaning of the aforementioned statute where a party's name at the end of his e-mail "signified his intent to authenticate the contents."[13]

In one appellate case, for example, where the defendant did not sign a brokerage agreement proffered by the plaintiff setting forth the details of the plaintiff's commission, the plaintiff still won the case because the Court held that the chain of emails between the parties constituted a

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[10] *JCP Properties v. Equity Land*, 102 A.D.3d 745 (AD2d, 2013).

[11] General Obligations Law § 5-701(a) (10) (i.e., the New York Statute of Frauds) states that:

> [e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:[i]s a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.

[12] The statute of frauds applies to claims for fees by finders. *See, e.g., Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260 (1977); *Intercontinental Planning, Limited v. Daystrom, Inc.*, 24 N.Y.2d 372 (1969) (decided under predecessor statute to N.Y. Gen. Oblig. Law § 5-701); *Hardy-Latham v. Wellons*, 415 F.2d 674 (4th Cir. 1968) (applying New York law).

[13] *Stevens v. Publicis, S.A.*, 50 A.D.3d 253, 254-55 (1st Dept. 2008).

subscription by the defendant to the brokerage agreement. Specifically, the various revisions, notations and email comments relating to the substance of the brokerage agreement demonstrated that the plaintiff and that the defendant were in regular contact, and had discussed and agreed to the essential terms. The Court found that if:

> (i) the plaintiff incorporated those revisions and sent the final copy back to the defendant's agent, and
>
> (ii) the defendant assented to these revisions and did not reject, protest or correct any of the provisions in the last version of the agreement,

than the agreement complied with the statute of frauds and was enforceable.[14]

6. Lessons for Venture Capital Firms when bringing investors together on a real estate deal.

(1) Always have a written agreement between yourself and the investor you are working with.

As lawyers, we are so often surprised to see that sophisticated parties do not have their finder's agreement reduced to writing. However, people get busy, and they often do not want to sidetrack the momentum of a deal with papering the details. Unfortunately, ignoring the details and not reducing the agreement with the investors to a writing can cost you big-dearly in the end.

(2) Save emails.

Sometimes those trying to get out of paying a finder's fee will say that the deal completed was not the deal that was originally found, and thus the finder is not entitled to a fee. They will allege that the deal ultimately transacted was too remote in time from the finder's introduction, or that the terms were so

[14] *Newmark v. 2615 East 17 Street Realty LLC*, 80 A.D.3d 476 (1st Dept. 2011).

different as to create a different deal.[15] Email is a great way to dispel these kind of attempts at diversion. If the parties continued to talk about a deal, that would tend to prove that it was the same deal.

(3) Get a real estate broker's license.

A real estate broker's license is not the hardest thing in the world to procure or maintain, and if doing so can protect large fees, why not have your group licensed for real estate brokerage if that is what you are doing anyway? Be careful – because having an individual broker on your staff will not suffice.

(4) You might also consider becoming a partner with the cash investor.

If you are part of the deal as an equity owner, then your interests might be better protected. You move from an ancillary party to the deal to a primary party.

[15] *Simon v. Electrospace*, 28 N.Y.2d 136 (1971).

MORE INFORMATION

Itkowitz PLLC is a boutique law firm in New York City that serves the commercial real estate and business communities, and our practice encompasses sophisticated commercial litigation, trials and transactions. We litigate complex lawsuits, from inception through trial, both jury and non-jury, and appeals, in State and Federal Courts. We handle all types of commercial real estate deals, including purchases and sales, leasing for both landlords and tenants, and lending transactions. We also represent parties in all sorts of business matters. We are based in Manhattan.

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