



Recovering a Broker's Commission Without a Written Contract

Sometimes, in a transaction, commercial property brokers may not be paid the commissions that they believe they've earned. Hopefully the broker has a written contract that will protect against this, but sometimes he/she won't. As lawyers, we say it all the time: "Put it in writing." But, while it is nice to have agreements memorialized in writing, it is not always done, nor is it always required. The key take-away from this article is that any party to a real property sale or lease should know that in Nevada, in certain circumstances, there does not need to be a written contract for a broker to be entitled to payment for his/her services. For parties to a deal, this can lead to a frustrating lack of definition and finality, but, for brokers, it's critical to their livelihood.

Let's assume Sam wants to sell a commercial lot at a busy intersection. There is interest not only from potential buyers, but also brokers. Sam talks with a handful of potential seller's brokers to assist him, Bill being the most attentive of the bunch. Bill is quite reputable and has handled many similar deals in the past. Sam uses Bill's services, and over time, Bill becomes the only broker working for Sam. But, whenever Bill presents Sam with a written broker's agreement, Sam is busy, out of town, or otherwise not inclined to sign. Still, Sam repeatedly assures Bill that "he's his man" and he'll make sure Bill gets paid when the property is sold. Sam and Bill have a handshake deal.

Bill works with various potential buyers, many of whom have their own brokers. After months of effort, Bill decides that one of those buyers, Carl, is a serious enough candidate to meet Sam. The parties meet for lunch and Carl brings his own broker, Darleen, who has a written broker's agreement with Carl, so there is no confusion: Bill is Sam's broker, and Darleen is Carl's. The parties discuss the property generally and end the lunch on a good note. Over the next few weeks, Bill and Darleen work on the due diligence and otherwise exchange information related to the potential deal. Ultimately, Sam and Carl are happy with the final terms and go into contract. However, when the closing occurs, Sam doesn't account for any commission to Bill. Given the purchase price of the property, Bill feels he's been shorted six digits. No matter what he tells Sam, the response is always the same: "Show me a contract and you'll get paid." Now what? Bill needs an attorney.

In this case, if there were a written contract, there wouldn't be much to fight about – Sam better pay. But when there isn't, Bill still has several legal options to recover from Sam. Three are most often employed: First, a broker can bring an unjust enrichment claim. This claim is based on the argument that a broker is entitled to be compensated for the *benefit* that another party received.¹ Second, a broker can bring a *quantum meruit* claim. This claim is based on the theory that a broker is entitled to be paid for *services* provided at the specific request of the seller and that benefitted the seller.² Third, in Nevada and some other jurisdictions, a broker can bring a unique sub-species of a *quantum meruit* claim. This claim is based on the same theory, but requires different proof; it is often referred to by the legal doctrine that governs it, the procuring cause doctrine.³

Which theory best applies to any specific set of facts will require a consultation with an attorney, but parties to a deal and their brokers can and should take steps to protect themselves before that is necessary. Short of a written contract, sellers and buyers should keep *records* of who is doing what for whom. If they feel like a broker is trying to sneak into the deal by simply being in the right room at the right time, they need to make their position clear, in writing. On the other hand, brokers should keep written records of who is asking them to do what and why. They need to have as much *written evidence* of their efforts, and more importantly, the seller's or buyer's requests for those efforts, as possible. Sure, there was a sale, but what did the broker do to make that happen? Did he/she introduce the seller to the buyer? If so, what proof is there? Calendar entries? Meeting notes? Text messages or e-mails? Maybe even a restaurant receipt? Whatever it is, the more evidence the better. To assist with framing what evidence is important, I provide a checklist of the proof required for each of the claims discussed above:

UNJUST ENRICHMENT

1. The broker conferred a benefit upon the seller;
2. The seller appreciated the benefit; and
3. The seller accepted and retained the benefit under circumstances such that it would be inequitable for the seller to retain without paying for it.

QUANTUM MERUIT

1. The broker acted pursuant to either an express or implied request for services from the seller;
2. The broker rendered services that were intended to benefit the seller;
3. The seller benefitted from the broker's services;
4. The seller did not compensate the broker for the value of such services; and
5. The broker is therefore entitled to the reasonable value of the services.

PROCURING CAUSE

1. An employment contract existed; and
2. The broker was the procuring cause of the sale (or lease, etc.).

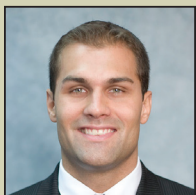
Of course, if you are or expect to be a party to a real property sale or lease of any type, in any role, you should keep these principles in mind, but always consult an attorney for your own specific legal advice.

(Endnotes)

¹ *LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 755-756, 942 P.2d 182, 187 (1997); *Custom Teleconnect, Inc. v. Int'l Tele-Services, Inc.*, 254 F. Supp. 2d 1173, 1181 (D. Nev. 2003).

² *Day v. Alta Bates Med. Ctr.*, 98 Cal.App.4th 243, 248 (Cal.Ct.App.1st 2002); *Flamingo Realty, Inc. v. Mid-West Dev., Inc.*, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994).

³ *Atwell v. Southwest Secs.*, 107 Nev. 820, 823, 820 P.2d 766, 768 (1991).



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Justin Carley's practice is concentrated in commercial litigation, with an emphasis on contract disputes that are typically related to real property, entity control, business conflicts, securities, and a variety of financial issues, among other topics. He is experienced in federal and state litigation, AAA and other private arbitration, and a variety of forms of mediation and alternative dispute resolution. This experience includes prosecuting and defending actions seeking monetary damages, injunctive relief, declaratory relief, appointment of receivers, deficiency judgments, and other remedies, both before and after judgment. Justin's recent case load deals primarily with the high-rise condominium and condominium/hotel markets in Las Vegas, Nevada, but also includes a substantial amount of other real property litigation.

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