CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Sanowicz v Bacal *2/26/15*

Breach of Contract; Broker/Agent relationship; B & P Code 10137

Sanowicz was a real estate agent employed at John Bruce Nelson & Associates (JBN), a licensed real estate agency, at the time he met Bacal, who was then working at Keller Williams (KW), also a licensed California real estate agency. While Sanowicz was an agent at JBN, he and Bacal represented, respectively, the potential buyer and seller of a particular parcel of real property. Although that transaction did not close, they kept in contact and eventually Bacal suggested to Sanowicz that they form a "joint venture" in which they jointly would work on real estate transactions. At one point in their collaboration, Sanowicz left JBN and moved to work at KW, at the instigation of Bacal. One of Sanowicz's clients was a celebrity who was looking to purchase residential real property. Bacal encouraged Sanowicz to tell potential sellers that he had a celebrity interested in purchasing a property like theirs. Bacal used this representation to create new "representation relationships" with potential sellers of "A class estate properties in exclusive areas of Los Angeles."

Sanowicz and Bacal entered into oral and written agreements that they would share equally any commissions earned, and did actually share some commissions. Three written agreements of this nature were exhibits to the first amended complaint. Each was signed by both Sanowicz and Bacal and concerned a particular parcel of residential real property.

Sanowicz also alleged that in or around September 2010, Sanowicz met Joseph Lam who was interested in selling a property at 777 Sarbonne Road, Los Angeles (Sarbonne). Sanowicz then introduced Bacal to Lam with the express understanding and oral agreement that Sanowicz and Bacal would split the commission earned on the sale of Sarbonne. On October 11, 2010, while both were at KW, they entered into a written agreement, on a California Association of Realtors Referral Fee Agreement form, to equally divide any commissions earned on the sale of Sarbonne if Lam were to sell Sarbonne within two years of the date of their agreement. No signature of a licensed real estate broker appears on this document.

Bacal left KW (for Sotheby's) in April or May 2012. Sanowicz alleged Bacal moved to a new broker so that he could consummate the sale of Sarbonne without Sanowicz's knowledge. Sanowicz specifically described Sotheby's as participating in the sale of the Sarbonne property. Sanowicz further alleged that Bacal falsely represented to him that Bacal was not continuing to work on the Sarbonne project even though Bacal "was going into escrow on Sarbonne the very next day" after he made that claim. Sanowicz alleged that Sarbonne was

sold by Sotheby's and Bacal (as broker and agent respectively) for approximately $14,000,000, with escrow closing on July 16, 2012. This was within two years of the date of the original contract between Sanowicz and Bacal to share commissions on the sale of this property.

In June 2012, prior to the sale of Sarbonne, Sanowicz asked Bacal to disclose what "joint projects" he continued to work on and "to document his prior arrangements with Sanowicz on the sharing of commissions." In response, Bacal identified "a few projects and represented he was not working on others." Based on these discussions, Sanowicz and Bacal entered into compensation sharing agreements on still other projects. Sanowicz claims in his complaint that there were additional property transactions on which Bacal earned commissions which are subject to the commission sharing agreements but which Bacal concealed from Sanowicz, with the result that Bacal owed Sanowicz additional commission income.

Sanowicz seeks one half of the $210,000 agent's commission Bacal received on the sale of Sarbonne, with interest. In addition, Sanowicz seeks one half of the commissions earned on other sales made as required by their joint venture agreements.

The first amended complaint contained several causes of action: (1) for breach of fiduciary duty based on Bacal allegedly inducing Sanowicz to move from JBN to KW on the promise to share contacts and commissions and based on

their partnership and "joint enterprise" arrangements; (2) for fraud for making the representations that induced Sanowicz to move to KW and to lull Sanowicz into not demanding that they enter into a new joint venture agreement "that addressed the move to Sotheby's;" (3) for negligent misrepresentation; (4) for breach of contract to pay the half of commissions earned under their agreement on the Sarbonne transaction; and for other claims.

Bacal filed timely general and special demurrers to the first amended complaint, asserting similar defects were present as to the original complaint. He demurred generally on the grounds that each claim failed to state a cause of action, and specially, asserting that each claim was fatally uncertain.

Bacal's principal legal contention was that Business and Professions Code section 10137, which provides that it is unlawful for a real estate agent to accept compensation from any person other than the real estate broker under whom he or she is licensed, makes illegal the agreements alleged between Sanowicz and Bacal. On this premise, Bacal contended that all of Sanowicz's claims for relief were barred by statute and could not survive the general demurrer, nor could the complaint be amended to state a valid claim for relief.

On October 3, 2013, the trial court issued its ruling by minute order, finding the demurrer to the First Amended Complaint was sustained without leave to amend. "Under Business and Professions Code section 10137, a licensed real estate salesperson cannot contract in his/her own name, nor accept

compensation from a person other than the broker under whom he/she is licensed. (See *Grand v. Griesinger* (1958) 160 Cal.App.2d 397, 406.) The case was ordered dismissed with prejudice.

The Second District began its opinion by reciting Business and Professions Code section 10137 which provides: "It is unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real estate salesperson licensed under the broker employing or compensating him or her; provided, however, that a licensed real estate broker may pay a commission to a broker of another State. [¶] No real estate salesperson shall be employed by or accept compensation from any person other than the broker under whom he or she is at the time licensed. [¶] It is unlawful for any licensed real estate salesperson to pay any compensation for performing any of the acts within the scope of this chapter to any real estate licensee except through the broker under whom he or she is at the time licensed."

Sanowicz contends that this statute does not apply under the factual circumstances alleged in the first amended complaint because the commission sharing arrangements between him and Bacal were merely agreements between two properly licensed agents working for the same broker "as agents for that broker." Sanowicz further contends that several of these arrangements were in writing, while others were oral. Thus, he argues that the statutory provision mandating that commissions be paid to brokers does not bar payments pursuant

to commission sharing arrangements once the broker has received the commission.

Bacal's contrary contention, accepted by the trial court, is that section 10137 mandates that the broker be a party to every commission transaction and that the absence of the broker's signature on the commission sharing agreements in the record is fatal. Implicit in the ruling below is that agreements among agents to share commissions are illegal if not in writing and signed by the supervising broker.

Sanowicz relies on the statutory language, which on its face does not preclude the written or oral commission sharing arrangements he alleges he and Bacal made. Bacal's rejoinder is premised on the second paragraph of section 10137 which clearly forbids a real estate agent from paying to, or accepting any compensation from, any person other than a broker, as well as on the third paragraph of that section which makes it unlawful for any agent to pay any compensation to any other person "except through the broker under whom he or she is at the time licensed." For legal authority for his contention, Bacal relies on *Grand v. Greisinger,* 160 Cal.App.2d 397, which he contends holds that "ONLY a contracting 'broker' may sue or be sued for commissions, PERIOD." (Emphasis Bacal's.)

Grand v. Greisinger, 160 Cal.App.2d 397, explains the broker-agent relationship in the following terms. "The entire statutory scheme requires the

broker . . . to supervise the activities of his real estate agents. . . . [¶] It is evident that brokers and agents belong in distinctly different categories and the broker, because of his superior knowledge, experience and proven stability is authorized to deal with the public, contract with its members and collect money from them; the salesman, on the other hand, is strictly the agent of the broker. He cannot contract in his own name, nor accept compensation from any person *other than the broker under whom he is licensed*; it is a misdemeanor for anyone . . . to pay or deliver to anyone other than the broker compensation for services within the scope of the act." (*Schaffter v. Creative Capital Leasing Group, LLC* (2008) 166 Cal.App.4th 745, 757.)

Sanowicz does not dispute the nature of the broker-client relationship and the need for written contracts in that relationship, or the restrictions on to whom the commissions on real estate transactions are paid—initially. Instead, Sanowicz argues that Bacal misinterprets the scope of section 10137, instead contending that section 10137 does not apply to commission sharing arrangements in and among the licensed broker and any licensed agents working for that broker, or between licensed real estate agents themselves—so long as the restrictions on the manner of payment are maintained. In support of his contention Sanowicz argues, "it is undisputed that at all relevant times, both parties were licensed real estate agents;" they were both working for a licensed broker when they entered into the agreements at issue; the work for which Sanowicz seeks to implement that commission sharing agreement was made while he was working at KW; and there is nothing in section 10137 that makes

their agreement illegal. Sanowicz further contends that section 10137 only requires that the payment be made "through the broker under whom the agent is at the time licensed."

Bacal responds by pointing out that the first amended complaint does not allege that any licensed real estate broker at KW ever consented to the commission sharing arrangement between Sanowicz and Bacal and that this requirement is evidenced on the face of the exhibits which Sanowicz attached to the second iteration of his complaint. From the absence of any written commission sharing agreement which is also signed by a KW broker, Bacal argues that each of the six causes of action is subject to (a general) demurrer. "No amount of amendment can cure those legal deficiencies.

In reply, Sanowicz argues that the "protected class" in a residential real estate sales transaction is the client, the seller or purchaser of the home, rather than the broker or the agent, and that it would be error to interpret section 10137 to validate one agent's efforts to keep commissions from another agent with whom the former promised to share those commission as that would be a misapplication of the statute to a group it was not intended to protect (real estate agents as opposed to the sellers and buyers of real property) and would result in unjustly enriching persons who had made promises which are not contrary to law, citing *Norwood v. Judd* (1949) 93 Cal.App.2d 276, 288-289. Thus, Sanowicz argues, the statute must be interpreted to promote a fair result, or at least not to preclude one.

The Justices of the Second District point out that it is well established that (1) the agreement "authorizing or employing a broker to purchase or sell real estate" is invalid if it is not in writing (Civ. Code, § 1624, subd. (a)(4); *Iusi v. Chase* (1959) 169 Cal.App.2d 83, 86; *Colburn v. Sessin* (1949) 94 Cal.App.2d 4); (2) contracts among brokers or between brokers and agents are not subject to the statute of frauds (Civ. Code, § 1624, subd. (a)(4); *Grant v. Marinell* (1980) 112 Cal.App.3d 617, 619); (3) only a broker may recover a commission on the sale of real property (*Iusi v. Chase* 169 Cal.App.2d at p. 86); (4) a broker may not share his commission with an unlicensed person (§ 10137); (5) an agent may not accept compensation from anyone other than the broker under whom he or she is at the time licensed (§ 10137); (6) a broker can only compensate licensed agents employed by him or her (*Firpo v. Murphy* (1925) 72 Cal.App. 249); and (7) no agent may pay any part of a commission received "except through the broker under whom he or she is at the time licensed" (§ 10137).

These restrictions, while broad, are not as encompassing as Bacal contends. Thus, (1) a broker may share commissions with the unlicensed principal in the transaction because the principal is not performing acts for which a real estate license is required (*Williams v. Kinsey* (1946) 74 Cal.App.2d 583, 592-593); (2) when an unlicensed person performs both activities that require a license and activities that do not require a license, he or she may recover for the latter if that portion of the contract is severable and there is separate legal consideration for the severed portion of the agreement (see *Mailand v. Burckle* (1978) 20 Cal.3d 367,

384); and (3) the statute of frauds does not bar recovery by an agent of commissions due him or her based on an oral contract (Civ. Code, § 1624, subd. (a)(4); *Gorham v. Heiman* (1891) 90 Cal. 346)

Bacal relies on three key circumstances in support of his contention: (1) the absence of the broker's signature on the commission sharing writings; (2) the absence from the first amended complaint of an allegation that the broker had approved the purported agreements between the agents to share commissions; and (3) *Grand v. Griesinger,*160 Cal.App.2d 397, which he contends states that only a broker may sue for real estate commissions.

The Second DCA points out, however, that the gravamen of Sanowicz's complaint is not a suit to collect the commission *due* to the broker. Instead, Sanowicz is suing to collect a portion of the commissions *already paid* to the broker; it is based on the allegation that the commissions already have been paid to the broker KW that Sanowicz seeks to enforce the commission sharing arrangements which he alleges he had made with Bacal (with the knowledge and consent of KW). Sanowicz also alleges that the commission on the Sarbonne sale has already been paid to Sotheby's. He is suing to collect "his portion" of commissions already paid to brokers based on the commission sharing arrangement he and Bacal made before Bacal left KW for Sotheby's with respect to Sarbonne, and on other commission sharing arrangements made. *Grand v. Griesinger*, 160 Cal.App.2d 397, the case upon which Bacal relies, does not address this issue. Instead, that case was concerned with the scope of

unsupervised contact between agents and the public in the context of a real estate commissioner disciplinary proceeding. Neither party has cited a case which addresses the application of section 10137 to the sharing of commissions among real estate agents, nor did the court's independent research locate a case directly on point.

Accordingly, the Court turned to examine the statute itself. In doing so, it noted that if its language is clear and unambiguous there is no need for judicial construction. ". . .we are guided by the well-established principle that our function is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law.' The court is to determine such intent by first focusing on the words used by the Legislature, giving them their ordinary meaning. (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333)

As relevant to this matter, the statute addresses the rules on payment of compensation by brokers to agents—and by agents. It closely limits these activities, but it does not forbid them entirely. In stating that an agent may pay commission to another licensee, the Legislature did not limit the payee to a licensed broker; instead it required that any such payment be made "through the broker" thus permitting payments to be made to licensed real estate professionals, whether agents or brokers. What the Legislature limited was the manner of payment, requiring that any such payments must be "through the broker under whom he or she is at the time licensed." (§ 10137.) As the Legislature did not forbid commission sharing arrangements between agents (or

between brokers, or between brokers and agents), there is no support for the general demurrer argument upon which Bacal prevailed below.

The Justices note that they address the correctness of the trial court's ruling rather than its reasoning (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252), and will reverse if they find that there is a reasonable possibility the complaint can be cured by amendment (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074). The Appellate Court found that Sanowicz may be able to add allegations to the complaint to overcome the defects discussed. It holds that sustaining the general demurrer without leave to amend based on the trial court's construction of section 10137 was an abuse of discretion.

The judgment is reversed and the cause is remanded to the trial court which will have the discretion to consider plaintiff's request for leave to amend in light of the disposition of this case on appeal. Sanowicz is to recover his costs on appeal.

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