

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR KENT COUNTY**

**CHABBOTT PETROSKY** )  
**COMMERCIAL REALTORS, LTD,** )

Plaintiff, )

v. )

C.A. No. 01C-10-011 HDR

**ROBERT J. PETERSON, and** )  
**BONNIE S. PETERSON,** )

Defendants. )

Submitted: August 20, 2003  
Decided: September 12, 2003

David J. Weidman, Esq., Hudson, Jones, Jaywork & Fisher, Georgetown, Delaware,  
for the Plaintiff.

Constantine F. Malmberg, Esq., Young & Malmberg, Dover, Delaware, for the  
Defendants.

**OPINION**

**Decision After Trial**

RIDGELY, President Judge

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In this case defendants Robert and Bonnie Peterson signed a 90-day exclusive listing agreement for the sale of their commercial property by Chabbott Petrosky Commercial Realtors (“Chabbott Petrosky”). Chabbott Petrosky produced a potential buyer who eventually entered into a long-term lease of the property instead of purchasing the property. The parties never entered into a listing agreement for lease of the property, and never reached a complete agreement regarding Chabbott Petrosky’s commission on the lease. Chabbott Petrosky filed suit to recover the anticipated commission. This is the Court’s opinion following a bench trial on July 28, 2003.

**A. Background**

Robert and Bonnie Peterson are the owners of a commercial property at 677 North duPont Highway in Dover. On June 20, 2000, the Petersons were approached by George Chabbott of Chabbott Petrosky and subsequently signed a 90-day exclusive listing agreement for the sale of the property. The listing price was \$750,000. When he approached the Petersons, Mr. Chabbott indicated that he had identified a potential buyer. That first prospect did not generate an offer, but on August 15, 2000 Delaware Food Ventures made an offer of \$665,000 to purchase the property through Chabbott Petrosky. This was followed by a counteroffer of \$700,000 by the Petersons on August 16. Also on August 16, the documents reflect that the parties apparently proposed a long term lease agreement.<sup>1</sup> Following additional negotiation, the Petersons signed a letter of intent to enter the long term

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<sup>1</sup> See Exhibit C.

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lease on August 29, 2000, and on October 31, 2000 the parties executed the lease agreement for a 20 year term with two five year renewal options. The rent was \$70,000 per year for lease years 1-5 following the Construction Period and increased in five year increments thereafter.

Mr. Chabbott testified that on August 29, 2000, he discussed the commission on a long term lease as opposed to an outright sale and agreed to accept the amount Chabbott Petrosky had originally expected from the sale price of the land, which was \$35,000 (five percent of the counteroffer of \$700,000). The Petersons, however, proposed five installments of \$7,000 over four years, which Chabbott rejected; the Petersons later offered three percent interest over the term of payment, which Chabbott also rejected.

Throughout this period, Chabbott Petrosky maintained the escrow account on behalf of Delaware Food Ventures and the Petersons, producing checks for rental payments and forwarding them to the Petersons through April, 2001.

**B. Contentions of the Parties**

Chabbott Petrosky contends that the contract under which Plaintiff should recover damages should be construed as an oral modification of the original written exclusive listing agreement. Plaintiff further contends that the parties reached a meeting of the minds on the commission amount of \$35,000 during the discussions of August 29, 2000.

Defendants contend that there was no agreement to pay a commission in the amount of \$35,000. Instead, the Petersons contend that the proposed five payments of \$7,000 over four years was a counter offer because the terms of payment were

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critical to the agreement. The payment terms were critical to the offer because, in the case of a sale, the Petersons would have received the proceeds at the consummation of the deal; in the case of the long term lease, the immediate return is far less and payments are received over a minimum of 20 years. Defendants also argue that there was no written listing agreement for marketing the property for long-term lease as required by the Delaware Real Estate Commission.

**C. Legal Standard**

The Delaware Real Estate Commission Regulation 7.1.1 requires that “[l]isting agreements for the rental, sale, lease or exchange of real property, whether exclusive, co-exclusive or open shall be in writing and shall be signed by the seller or owner.”<sup>2</sup> This regulation was validly promulgated by the Commission to protect the general public from the “unsafe practice” of using an oral listing agreement.<sup>3</sup> A broker, having neglected the statutory demand for a written listing contract, cannot recover a commission in *quantum meruit*.<sup>4</sup> Therefore, “a signed listing agreement remains the ‘sole vehicle’ upon which a broker can predicate recovery of a real estate commission in Delaware.”<sup>5</sup>

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<sup>2</sup> Delaware Real Estate Commission Regulation 7.1.1, CDR 24-2900 (2003).

<sup>3</sup> *Hursey Porter & Assoc. v. Bounds*, 1994 Del. Super. LEXIS 583 at \*22 (Del. Super. Ct. 1994), citing *Amato & Stella Assoc. v. Florida North Investments*, 678 F.Supp. 445 (D. Del. 1988).

<sup>4</sup> *Century 21 Schaeffer Assoc. Realtors, Inc. v. Elsmere Realty Co.*, 1999 Del. Super. LEXIS 169 (Del. Super. Ct. 1999) citing *Amato & Stella* at 449.

<sup>5</sup> *Hursey Porter* at \*31.

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**D. Analysis**

Chabbott Petrosky and the Petersons entered into a valid exclusive listing agreement for the sale of the Petersons' property. However, there was no sale of the property. Delaware Real Estate Commission Regulation 7.1.1 requires a written listing agreement, signed by the owner of the property, for either sale or lease transactions. Listing agreements for the sale of real estate provide for a commission to be paid to a broker in terms of a flat percentage of the gross consideration; in this case, five percent. A listing agreement to offer a property for lease contains different types of terms, most notably provisions for the payment of the commission over the life of the lease and contingencies for early lease termination. Without a written agreement between the parties, the court would be forced to create an agreement in its entirety.<sup>6</sup>

The Court finds that there was no written listing agreement for the lease of the Petersons' property. Chabbott Petrosky, therefore, cannot recover a commission on the long-term lease agreement.

However, the regulation requiring a written listing agreement does not address consulting fees and financial management services. Chabbott Petrosky is entitled to compensation for activities as the Petersons' agent in managing the escrow account and forwarding rent payments; and for consultation services during

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<sup>6</sup> Interestingly, Chabbott Petrosky's expert witness incorporates into his firm's listing agreement terms for a commission in the event of a lease agreement instead of a sale. The listing agreement here did not.

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the negotiation of the terms of the lease agreement.<sup>7</sup> These are services that all parties understood would be undertaken for compensation. Chabbott Petrosky's Schedule of Commissions includes "Property Management Services" at the rate of 5% of gross rental collected and a schedule of hourly consulting fees.<sup>8</sup> The evidence before the court appears to indicate that Chabbott managed monthly rental payments of \$2916.66 for four months (January 31, 2001 through April 30, 2001). Plaintiff is entitled to five percent of the rental payments over four months, or \$583.33 plus compensation for his consultation on an hourly basis. On the present record I conclude that the compensation for the consultation services should be \$5,000.

Accordingly, judgment is entered in favor of plaintiff and against the defendants in the amount of \$5,583.33 plus interest at the legal rate from April 30, 2001.

**IT IS SO ORDERED.**

/s/ Henry duPont Ridgely

President Judge

dk

oc: Prothonotary

xc: Order distribution

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<sup>7</sup> See, e.g., Exhibit H, letter from Chabbott to Petersons outlining areas of concern in the lease agreements; Exhibit D notations. Trial testimony of Chabbott and Defendants also highlighted Chabbott's role in developing the lease agreement.

<sup>8</sup> See Exhibit R.