Sales rep can sue for commissions

Despite expiration of written contract

By: Eric T. Berkman March 12, 2014

A sales representative could sue a technology company for unpaid commissions on sales allegedly generated after a written contract between the two had expired, a Superior Court judge has determined.

The defendant technology company argued that the plaintiff sales representative should be considered a "broker" within the meaning of G.L.c. 259, §7, a Statute of Frauds provision that requires a signed, written contract for agreements to compensate brokers for their services.

But Judge Robert L. Ullmann disagreed.

"Although the difference between being a 'broker' and being a 'sales representative' is not always clear, the terms are not synonyms," Ullmann wrote in denying the defendant's motion to dismiss. "Indeed, the Legislature distinguishes between 'broker' and 'salesman' in the licensing of real estate professionals, and imposes separate requirements upon them. If the Legislature had intended to sweep the broad category of all sales representatives within the scope of [Section 7], it would have added the words 'sales representative' to the words 'broker' and 'finder' in the statute."

The 10-page decision is *Spectrum Sales, Inc. v. Cobham Defense Electronic Systems, Inc.*, Lawyers Weekly No. 12-020-14. The full text of the ruling can be ordered by clicking here.

Clarification of the law

Plaintiff's counsel Dana A. Zakarian of Nystrom, Beckman & Paris in Boston called the ruling a "significant victory" for independent sales representatives in Massachusetts.

"The court has clarified the law, … and in doing so, the court has ruled that companies cannot hide behind the [Statute of Frauds] to avoid paying sales representatives," he said.

Aside from the issue of whether a sales representative should be considered a broker, the decision is also important in that it recognizes the inequity of applying the Statute of Frauds in a situation like the one in *Spectrum*, Zakarian said.

"The purpose of the statute is to prevent fraud, and when there's a one-off relationship, the chances of a party remembering [an arrangement] differently or making it up is much higher," he said. "In a case like this, with a 19-year history [between the plaintiff and defendant], the chance of fraud is much more remote."

David J. Shlansky of Waltham, attorney for the defendant, said the sales representative in the suit should have been considered a broker because it was clearly bringing parties together to negotiate directly.

"That, in our view, is quintessentially what brokers and finders do," he said. "Whether a technical new category of sales representative makes sense generally, it's not applicable to these facts."

Still, Shlansky was more concerned by the judge's reliance on the Appeals Court's 1987 *Pappas Indus. Parks v. Psarros* decision in finding that, even if the plaintiff could be considered a broker, public policy considerations demanded that the Statute of Frauds not apply in *Spectrum*.

In *Pappas*, the Appeals Court held that the Statute of Frauds does not bar enforcement of an unwritten agreement in situations in which the risk of fraud is diminished and, at the same time, it would be inequitable not to enforce such an agreement.

"I think [a decision like this] could lead to a situation where the Statute of Frauds is vastly weakened," Shlansky said. "It becomes a policy consideration in the mix instead of a strict bar to the enforcement of things that categorically do not meet the requirements of a written agreement when one is required."

Business litigator Michael C. Fee of Pierce & Mandell in Boston said the fact-driven ruling should not be read to expand or clarify circumstances under which courts might recognize an exception to the Statute of Frauds.

"Here, there was a prior 20-year contractual relationship between the parties, and based on some alleged reasonable reliance, the plaintiff sought sales commissions consistent with its prior agreements," Fee said. "This judge found the circumstances distinguishable from instances in which brokers or finders without a written agreement are barred by statute from recovering a one-time fee."

Other judges in different factual contexts might see things differently, he added.

Reasonable reliance?

From 1990 through 2008, plaintiff Spectrum Sales served as sales representative in certain geographic territories to defendant Cobham Defense Electronic Systems. According to their written contract, the plaintiff, as its sole compensation, was to receive commissions on sales of Cobham's products.

In 2009, the parties signed a new sales representative agreement that replaced the prior one. A year later, the defendant notified the plaintiff that the 2009 agreement would be terminated as of Dec. 31, 2010, and be replaced with a set of new "adviser" agreements specific to each Cobham division.

The termination date was extended twice before the contract was ultimately terminated on July 1, 2011.

On Sept. 14, 2011, Cobham's vice president of finance allegedly notified the plaintiff in writing that, absent a new contract, it should not undertake any activity on the defendant's behalf.

In response, the plaintiff reached out to the sales executives at Cobham that it had been dealing with, who purportedly told the plaintiff to keep working, assuring the plaintiff that it would be paid for its services.

The plaintiff continued selling Cobham products, and on Feb. 17, 2012, it entered into an advisor agreement with the defendant's "NURAD" division, but not its other divisions.

The defendant allegedly failed to pay the plaintiff commissions on sales of NURAD division products between July 1, 2011, when the 2009 agreement terminated, and Feb. 17, 2012, when the NURAD division adviser agreement took effect. Additionally, according to the plaintiff, the defendant paid no commissions on sales of other Cobham products between July 1, 2011, and July 12, 2012.

The plaintiff sued the defendant in Superior Court, bringing claims of quantum meruit and promissory estoppel. The plaintiff also brought a Chapter 93A claim, asserting that the defendant's actions constituted unfair and deceptive business practices.

The defendant filed a motion to dismiss, arguing that sales representatives are considered "brokers" within the meaning of the Statute of Frauds, and thus any unwritten agreement to pay commissions could not be enforced.

Plain language

Ullmann rejected the defendant's argument, noting that the Legislature distinguishes between brokers and sales representatives in the context of licensing real estate professionals. That shows that, had the Legislature intended to categorize sales

representatives as brokers for Statute of Frauds purposes, it would have included the term "sales representative" in the statute, the judge said.

Meanwhile, Ullmann found the defendant's reliance on the Appeals Court's 2002 *Cantell v. Hill Holliday Connors* decision misplaced. In that case, the Appeals Court found that a "headhunter" company that brought together employers and prospective employees to negotiate employment contracts was both a "broker" and a "finder" for the purposes of Section 7.

As written in *Pappas*, the purpose of the Statute of Frauds is to prevent "cooked up" claims of agreement, "sometimes fathered by wish, sometimes imagined in light of subsequent events, and sometimes simply conjured up," the judge said.

"The factual allegations in this case … stand in sharp contrast to the facts in *Cantell*," Ullmann wrote. "Spectrum is not claiming a one-time finder's fee, but an amount in sales commissions that can readily be determined based upon a written agreement that was in effect for 19 years [and] there is no evidence that they ever entered into an agreement that used the word 'broker' to describe Spectrum's role."

Ullmann also found that even if Spectrum were a broker or finder, its case would still fit within the equitable exception to the Statute of Frauds outlined in *Pappas*.

In that case, the Appeals Court pointed to reasonable reliance and change of position by the party seeking to enforce an unwritten agreement — and continuing assent of the party against whom enforcement was sought — as factors that could justify an exception to the statute.

"The factual allegations in this case … put this case squarely within [that] category of exceptions," Ullmann said, noting that the amount of commissions the plaintiff claimed it was owed could be easily determined by the 7.5 percent commission rate subject to a written contract for more than 20 years.

CASE: *Spectrum Sales, Inc. v. Cobham Defense Electronic Systems, Inc.*, Lawyers Weekly No. 12-020-14

COURT: Middlesex Superior Court

ISSUE: Could a sales representative sue a technology company for unpaid sales commissions allegedly generated after their written contract had expired?

DECISION: Yes