

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

RODDY, INCORPORATED

Plaintiff

: MAY TERM, 2001

: No. 1566

v.

:

THACKRAY CRANE RENTAL, INCORPORATED

Defendant

: Control No. 070553

**O R D E R**

AND NOW, this 10th day of September 2001, upon consideration of defendant's Preliminary Objections to the Complaint, the plaintiff's opposition, the respective memoranda, all other matters of record and after oral argument, and in accord with the Opinion being issued contemporaneously with this Order, it is hereby **ORDERED** that the Preliminary Objections are **Sustained** and the Complaint is **Dismissed**.

It is further **ORDERED** that defendant's Motion to Strike the Demand for Costs and Attorney Fees is **Granted**.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**

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Plaintiff	
	: No. 1566
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	:
THACKRAY CRANE RENTAL, INCORPORATED	
Defendant	: Control No. 070553



**O P I N I O N**

**Albert W. Sheppard, Jr., J. .... September 10, 2001**

This matter arises from an alleged breach of an oral agreement involving the procurement of commercial real estate properties for subsequent sale in exchange for a broker’s commission. Defendant, Thackray Crane Rental, Inc. (“Thackray”), has filed Preliminary Objections, setting forth a demurrer to the Complaint of plaintiff, Roddy, Inc. (“Roddy”), and moving to strike the demand for attorney fees.

For the reasons set forth, the Preliminary Objections are sustained and the Complaint is dismissed.

## BACKGROUND

The operative facts, as pleaded in the Complaint, are as follows.<sup>1</sup> Roddy is an industrial and commercial real estate broker, licensed to do business under the laws of the Commonwealth of Pennsylvania, with a principal place of business located at 3220 Tillman Drive, Bensalem, Pennsylvania, 19020. Compl., ¶ 1. Thackray is a company licensed to do business under the laws of the Commonwealth of Pennsylvania, with a principal place of business located at 2071 Byberry Road, Philadelphia, Pennsylvania, 19116. *Id.* at ¶ 2.

The parties had engaged in a course of business dealing pursuant to which Roddy, at the request of Thackray, brought properties for sale to the attention of and for possible purchase by Thackray. *Id.* at ¶ 4. Thackray, in turn, agreed that if it purchased any property which was introduced by Roddy, Roddy would be considered the agent responsible for consummating the sale of the property and would be entitled to a real estate commission. *Id.* at ¶ 5. Furthermore, in the event that Roddy was the only real estate agent involved in the transaction, Roddy would be entitled to a commission of six percent (6%) of the gross sale price. *Id.* In the event that another real estate agent participated in the transaction as the exclusive agent for the seller, then Roddy would share the real estate commission with that agent. *Id.* The parties' agreement and course of dealing was oral in nature and was never reduced to writing. *Id.* at ¶ 16.

On February 29, 2000, Roddy, in reliance on its purported agreement with Thackray, brought to Thackray's attention a certain piece of real estate owned by International Paper Company located at 2100 Byberry Road, Philadelphia, Pennsylvania (the "Byberry Road property"). *Id.* at ¶ 7. Roddy provided

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<sup>1</sup>The facts are accepted as true for purposes of ruling on preliminary objections. *See Tucker v. Philadelphia Daily News*, 757 A.2d 938, 941-42 (Pa.Super.Ct. 2000)

Thackray with the particulars on the Byberry Road property and expended its efforts to assist with Thackray's interest in purchasing the property. Id. at ¶ 8. At that time, Roddy advised, and Thackray acknowledged, that there were no other exclusive real estate agents engaged to sell the property and that if Thackray elected to purchase the Byberry Road property, Roddy would be acting as the sole agent and would be paid a commission of six percent (6%) of the gross sale price upon completion of the purchase. Id. at ¶ 9. Thereafter, Thackray informed Roddy that the property was not suitable for its purposes. Id. at ¶ 10.

Then, on October 23, 2000, Roddy learned through a newspaper article in the Philadelphia Inquirer that Thackray had purchased the Byberry Road property through another real estate agent, The Flynn Company. Id. at ¶ 11. Roddy also learned that Thackray, secretly and without notifying Roddy, had entered into an agreement with the Flynn Company through an authorized agent, who is also a member of the Thackray family, whereby Thackray agreed to purchase the property for \$3,000,000 from International Paper with the Flynn Company acting as its broker. Id. at ¶ 12. The agreement between Thackray and the Flynn Company was purportedly made in an attempt to deprive Roddy of the fee to which it was allegedly entitled for procuring a purchaser for the property. Id. at ¶ 13.

Within this context, Roddy filed its Complaint on May 17, 2001. Specifically, Roddy alleges that it was deprived of its commission in the amount of \$198,000.00 that it would have otherwise received had Thackray honored its agreement with Roddy and purchased the Byberry Road property with Roddy acting as the sole agent. Id. at 15. On June 7, 2001, Thackray filed Preliminary Objections, setting forth a demurrer to the Complaint and moving to strike the demand for costs and

attorney fees. Specifically, Thackray asserts the following:

(1) that the newly amended Real Estate Licensing and Registration Act (RELRA), codified at 63 P.S. §§ 455.101 et seq., prevents recovery of a brokerage commission since no written agreement exists between the parties;

(2) that the alleged oral agreement is illegal, unenforceable and void ab initio because it is not in writing as required by the RELRA;

(3) that Roddy was not the procuring cause of the sale of the Byberry Road property since Thackray had informed Roddy that the property was not suitable for its purposes, months before it purchased the same property.

Prelim. Objs., ¶¶ 10-23. In its Reply Memorandum, Thackray also asserts that the agreement between itself and Roddy is illusory and unenforceable since it contemplates that a third party (the prospective seller) would be obligated to pay Roddy, and that that seller was not a party to the alleged agreement between Thackray and Roddy. Reply Mem., at 2.

## **DISCUSSION**

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows for preliminary objections based on legal insufficiency of a pleading or a demurrer. When reviewing preliminary objections in the form of a demurrer, “all well-pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct. 2000). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained only where “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief.” Bourke v. Kazara, 746 A.2d 642, 643 (Pa.Super.Ct. 2000)(citation omitted).

Moreover,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa.Super.Ct. 1999).

Defendant first argues that plaintiff is not entitled to recover a broker's commission since the putative agreement was oral, in contravention of specific provisions of the newly amended RELRA, requiring a written agreement between the broker and a consumer or principal. This court agrees.

The RELRA "establishes specific standards of conduct and licensing which pertain to all persons engaged in the sale or transfer of real property within this Commonwealth." Meyer v. Gwynedd Development Group, 756 A.2d 67, 69 (Pa.Super.Ct. 2000). See also 63 P.S. § 455.301 (relating the application of the Act). "A principal purpose of the Act is to protect buyers and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse by persons engaged in the business." Meyer, 756 A.2d at 69 (citing Kalins v. Commonwealth, State Real Estate Comm'n., 92 Pa.Comm. 569, 577, 500 A.2d 200, 203 (1985)).

In 1998, the Pennsylvania legislature revised the RELRA to add new provisions regarding a licensed broker's agreement with a consumer or principal. One such provision states, in pertinent part, that:

(1) A licensee may not perform a service for a consumer of real estate services for a fee, commission or other valuable consideration paid by or on behalf of the consumer unless the nature of the service and the fee to be charged are set forth in a written agreement between the broker and the consumer that is signed by the consumer. This paragraph shall not prohibit a licensee from performing services before such an agreement is signed, but the licensee is not entitled to recover a fee, commission or other valuable consideration in the absence of such a signed agreement.

(2) Notwithstanding paragraph (1), an open listing agreement or a nonexclusive agreement for a licensee to act as a buyer/tenant agent may be oral if the seller or buyer is provided with a written memorandum stating the terms of the agreement.

(3) Nothing in this subsection shall require a transaction licensee or subagent who is cooperating with the listing broker to obtain a written agreement from the seller.

(4) A subagent or transaction licensee who is cooperating with the listing broker for a fee paid by the listing broker or seller shall provide the buyer, prior to performing any services, with a written disclosure statement signed by the buyer, describing the nature of the services to be performed by the subagent or transaction licensee. . . .

63 P.S. § 455.606a(b)(emphasis added). Another provision sets forth that an agreement between a broker and a principal, or any agreement between a broker and a consumer whereby the consumer is or may be required to pay a fee, commission or other valuable consideration, must be in writing and shall contain specific information. 63 P.S. § 455.608a. The explicit language of these provisions demonstrates that the Pennsylvania legislature now requires that broker agreements must be in writing, or at least include a written memorandum stating the agreement's terms.

Contrary to plaintiff's position, this court finds that these RELRA provisions are applicable and defendant is allowed to use these provisions in a defensive manner through its Preliminary Objections, since defendant is not seeking to impose liability on plaintiff. Plaintiff relies on Nazmack Development Corp. v. Eisenhart Real Estate, 4 Pa. D. & C.4th 207 (C.P. York Oct. 26, 1989), which involved a broker's complaint for breach of an **oral** exclusive listing agreement and was challenged by way of preliminary objections as violating specific sections of the RELRA and the Pennsylvania Code.<sup>2</sup> The court overruled

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<sup>2</sup>Specifically, the objections claimed in Nazmack included alleged violations of section 455.604(10) of the RELRA (requiring specification of a definite termination date) and 49 Pa.Code §§ 35.281 (requiring a written agreement) and 35.332 (listing the requisite elements in an exclusive listing agreement).

the objections, stating that “[a] thorough reading of the [RELRA] shows that its provisions are not to affect the substantive law of contracts, but rather provide guidelines, enforced solely by the Real Estate Commission after an administrative hearing, for the actions of brokers.” *Id.* at 210. The court also stated that “[t]his reading of the act is borne out by several recent Pennsylvania cases upholding the validity of oral listing contracts.” *Id.* Plaintiff also relies on McWilliams v. Brittingham, 38 Pa. D. & C. 2d 342 (C.P. Chester July 20, 1965), which overruled preliminary objection on the grounds that the RELRA did not render an exclusive agency contract illegal and unenforceable because the plaintiff failed to comply with certain provisions of the Act. *Id.* at 347. Rather, the court determined that “the purpose of the act . . . is to police real estate brokerage operations, and not to change the substantive law of contracts or agency . . .”. *Id.* at 346. However, both of these cases pre-date the 1998 amendment of the RELRA. The cases are further distinguishable in that in McWilliams there was a fully executed contract and Nazmack involved an exclusive listing agreement.

Under the RELRA, civil actions for the recovery of compensation for acts or services performed in the context of the real estate business are permitted, provided that the person is a duly licensed broker or salesperson. 63 P.S. § 455.302. Additionally, recent cases have used specific provisions of the RELRA as a defense to a claim for a real estate commission. *See Meyer*, 756 A.2d at 72-73 (affirming summary judgment in favor of builder on the ground that the director was a “builder-owner salesperson” and needed a license under the RELRA in order to sue for a real estate commission); Golibart v. Reamer, 415 Pa.Super. 623, 625, 610 A.2d 56, 57 (1992)(person hired to help find investors in real estate development project could not recover fee because he was not a licensed real estate broker).

Here, plaintiff explicitly alleges that its agreement with defendant was based on a course of dealing and a long-standing oral agreement which was not reduced to a specific writing. Compl., ¶ 16. Additionally, several of plaintiff's allegations indicate that defendant is a purchaser or possible purchaser of real estate properties. Compl., ¶¶ 4, 8, 9. Plaintiff also explicitly alleges that defendant actually purchased the Byberry Road property, but defendant deprived plaintiff of its real estate commission on the sale of that property. *Id.* at ¶¶ 11-15. As such, defendant would fit in the common sense definitions of "buyer" or "consumer," which indicates that the new provisions of the RELRA are applicable to the present case and that the agreement between the parties must be in writing. Thus, absent a writing in compliance with the newly amended RELRA, plaintiff cannot recover its broker's fee.

For these reasons, the Preliminary Objections to the Complaint are sustained. The court need not now address defendant's alternative grounds for dismissing the Complaint.<sup>3</sup>

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<sup>3</sup>Assuming *arguendo* that a real estate broker may recover his commission if the agreement is oral under case law pre-dating the amendment of the RELRA, plaintiff's allegations fail to demonstrate its entitlement to a commission. Our Supreme Court noted the principles applicable when it stated:

"(1) a broker cannot recover a commission, even though he brought the seller and buyer together, unless he can prove a contract of employment, express or implied, oral or written, between himself and the buyer (or seller) or an acceptance and ratification of his acts by the buyer (or seller); (2) in the absence of an exclusive agency, if the actions of a broker constitute the efficient cause of the production of a buyer (or seller), he is generally entitled to his commission even though the sale was finally concluded and completed by the seller (or buyer) himself, or another broker; (3) the mere fact that the broker has carried on negotiations with a prospective buyer (or seller) does not entitle the broker to a commission unless his efforts constituted 'the efficient procuring cause of the sale'; (4) where the prospective buyer (or seller) and the seller (or buyer) or the broker-agent fail to reach an agreement and there is a break in their negotiations, and, at a later date, the property is sold to (or bought by) the same prospective

Moreover, plaintiff is not entitled to costs and attorney fees, in that it has failed to allege an agreement for these fees, statutory grounds for these fees or some other established exception. Under the general rule, attorney fees' cannot be recovered from an adverse party, "absent an express statutory authorization, a clear agreement by the parties or some other established exception." Merlino v. Delaware County, 728 A.2d 949, 951 (Pa. 1999). Counsel fees may be awarded "as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." 42 Pa.C.S.A. § 2503(7). Fees may also be awarded where "the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith." 42 Pa. C.S.A. § 2509(9). Attorney fees are generally not recoverable for a mere breach of contract action. Gorzelsky v. Leckey, 402 Pa.Super. 246, 251, 586 A.2d 952, 955 (1991). Here, the gist of plaintiff's Complaint is nothing more than a breach of contract claim. Moreover, the single allegation that Thackray's conduct with the Flynn Company was fraudulent in nature (see Compl., ¶ 13) is not sufficient to establish entitlement for attorney fees and does not provide grounds for those fees under the various provisions of 42 Pa.C.S.A. § 2503. Further, it is insufficient to

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Footnote 3 - continued

buyer, the original broker is not entitled to a commission."

Axilbund v. McAllister, 407 Pa. 46, 55-56, 180 A.2d 244, 249 (1962)(citations and footnotes omitted). See also, Strout Realty, Inc. v. Haverstock, 382 Pa.Super. 340, 343-44, 555 A.2d 210, 212 (1989)(noting these same principles).

Here, plaintiff alleges that on February 29, 2000, it brought the Byberry Road property to Thackray's attention. Compl., ¶ 7. Further, plaintiff alleges that Thackray then informed Roddy that the property was not suitable for its purposes. Id. at ¶ 10. Then, in late October, 2000, Thackray purchased the property through another real estate agent, the Flynn Company. Id. at ¶¶ 11-12. These allegations demonstrate that plaintiff falls under the fourth principle noted in Axilbund, and that plaintiff would not be entitled to a commission on this sale.

state a cause state a cause of action for fraud. Accordingly, defendant's Motion to Strike the request for attorney fees is granted.

### **CONCLUSION**

For the reasons set forth, this court sustains defendant's Preliminary Objections<sup>4</sup> and grants the Motion to Strike the Request for Costs and Attorney Fees. A contemporaneous Order consistent with this Opinion will be issued.

### **BY THE COURT**

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**ALBERT W. SHEPPARD, JR., J.**

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<sup>4</sup>This court acknowledges that in most instances the opportunity to amend should be liberally afforded plaintiff in instances where preliminary objections are sustained. However, in this instance, there appears to be no reasonable basis to call for an amended complaint.