

## Broker Who Procures Bona Fide Buyer Denied Commission Where Tenant Exercises Right of First Refusal

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In a case the court called an "issue of first impression," the Appellate Division recently held that a real estate broker who procures a bona fide offer for the purchase of real estate is not entitled to a commission where the tenant then exercises its right of first refusal to purchase the property. The decision in *Pollack and SP Realty Advisors, LLC v. Quick Quality Restaurants, Inc.* raises serious issues for brokers who spend considerable time and energy procuring a buyer since they then may be denied a commission where a tenant exercises a right of first refusal basically on the same terms as the offer that was presented by the broker.

In *Pollack*, the owner had entered into a lease with Quick Quality Restaurants, Inc., at the Butler Plaza Shopping Center. The lease provided the tenant with a right of first refusal if the owner decided to sell the property.

Seth Pollack, a licensed real estate broker and principal of SP Realty Advisors, LLC, then spoke to the owner about selling Butler Plaza and the owner made it clear that, if Pollack found a buyer, any brokerage commission would have to be paid by the buyer. Pollack subsequently found a potential buyer, Levin Properties, LLC, and Pollack and Levin agreed that Levin would pay a commission of 1.5% of the purchase price. This was confirmed in an email. The owner and Levin entered into a sales contract for \$14.5 million that identified Pollack as the broker and provided that the buyer would pay the commission pursuant to a separate agreement. However, the tenant exercised its right of first refusal. Although the tenant, who in effect was stepping into the shoes of Levin, did not know who the broker was or the amount of the commission that the buyer was going to pay, the tenant was aware that a broker had procured the offer and was to be paid a commission by the buyer.

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Notwithstanding this knowledge, the sales contract between the owner and tenant was on the same terms as the Levin contract, except the tenant did not agree to pay the commission to Pollack.

When the commission was not paid at the closing, Pollack sued. The trial court held that Pollack was not entitled to a commission and Pollack appealed.

The Appellate Division affirmed the trial court's finding, holding that, under these facts, there was no basis to require the tenant to pay a commission to Pollack. In so doing, the court rejected Pollack's arguments that he was a third-party beneficiary of the sales contract between the tenant and seller, Pollack had any basis to sue under the right of first refusal in the lease, there was any implied covenant of good faith and fair dealing between the tenant and Pollack, the statute of frauds had been satisfied, and Pollack was entitled to compensation under a theory of quantum meruit for the value of his services.

The court correctly noted that there are no published cases in New Jersey dealing with a brokerage commission in the context of the right of first refusal. However, it is interesting that the court did not analyze New Jersey case law where a broker who procures a tenant is being paid a commission as rent is paid but the property then is sold. In this scenario, the New Jersey Supreme Court has held that a buyer may be presumed to undertake the obligation to pay the broker's commission where the buyer was aware of the seller's duty to pay the commission.

Pollack has filed a petition with the New Jersey Supreme Court requesting that it overturn the Appellate Division's decision. Whether or not the Supreme Court agrees to hear this matter, brokers should be extremely careful about agreeing to find a buyer where the seller is not paying the commission and there is a right of first refusal that can be exercised by a tenant. In such a situation, it is recommended that there be a written agreement with the seller that the broker will be paid a commission regardless of whether or not the tenant exercises the right of first refusal. Otherwise, the broker's efforts to find a buyer may go uncompensated.