



## **Real Estate Client Alert**

### **NJ Appellate Division Decision Highlights Substance over Form in Interpretation of Exclusive Listing Agreement for Development Project**

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On February 11, 2013, the New Jersey Appellate Division decided R.J. Brunelli & Co., Inc. v. Briad Development East, LLC, A-5712-10T2. The decision highlights the Appellate Division's adoption of a "substance over the form" rationale in its interpretation of exclusive listing agreements for development projects. This is particularly relevant in today's changing residential and commercial development markets where the marketing or development strategy contemplated at the initial stage of the listing changes due to changes in the economic or zoning landscape.

Here, the broker was initially engaged to list and market land as a residential and commercial mixed-use development. The listing agreement focused primarily on commissions to be paid based on the commercial leasing opportunity, which was the most lucrative, and the residential component was secondary. Recognizing the amount of time and work that would be required to market the development, and the possibility the broker would be paid nothing if the landowner decided not to develop the property for a mixed-use, the agreement also contained alternative provisions requiring payment of a 3% commission on a sale of the property (regardless of whether the broker was the procuring cause of the sale) or if the property was contributed to a joint venture. The "contribution provision" contemplated the commission would be paid when closings on the residential space began.

Ultimately, the land was contributed to a joint venture but because of zoning issues, the development from a mixed to purely commercial use. The broker was then prevented from proceeding with further marketing of the project. As such, the landowner refused to pay the 3% for the contribution to the joint venture since the development was exclusively commercial and no residential closings occurred.

Despite the language in the listing agreement, the Appellate Division held the agreement should be construed to entitle the broker to commissions despite the fact that there was no

residential development since that was “generally consistent with the contract terms as a whole and with the parties’ intentions.” Accordingly, the court avoided an unjust result choosing to interpret the agreement’s overall purpose rather than its literal terms which it found ambiguous under the circumstances.

#### About the Author



[Marc Singer](#) concentrates his practice in real estate litigation, professional liability counseling and litigation and business litigation. He has handled numerous matters in both the state and federal trial and appellate courts, as well as before arbitrators and mediators. Marc has successfully represented and counseled real estate brokers, lawyers, accountants and other professionals in large exposure malpractice actions involving complex liability, damages and apportionment issues. He successfully defended a large regional accounting firm and its shareholder against multi-million dollar claims of fraud and negligence arising out of their involvement in several real estate ventures.

Marc also has extensive experience in representing real estate brokerage firms, their agents and title insurers in professional liability claims arising out of residential and commercial brokerage and sale agreements and regulatory matters. He has been active in the real estate brokerage industry since the 1980’s and often lectures on issues affecting the industry. [msinger@saiber.com](mailto:msinger@saiber.com)