

Your Listing Agreement Is Your Paycheck: Lessons for Commercial Brokers from a Recent Appellate Division Decision

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A recent New Jersey Appellate Division decision underscores a practical point for commercial brokers: when a listing agreement defines when a commission is earned, the broker need not prove procuring cause. In Crimkav Corp. t/a The Blau & Berg Company v. Getty Industries LLC and Alma Realty Corp., the Appellate Division affirmed a \$1,744,877.36 judgment for the broker (\$634,347 in commissions, \$650,013 in contractual prejudgment interest, and \$460,516 in attorneys' fees and costs) entered jointly and severally against the property owner and property manager after an eight-day bench trial before the Honorable Cynthia D. Santomauro, J.S.C.

Because this is an unpublished opinion, it is non-precedential under Rule 1:36-3. Nonetheless, the decision offers concrete, practical guidance for commercial brokers structuring listing agreements and protecting commission rights.

The Dispute

The broker held an exclusive right to lease and sell a Paterson, NJ warehouse described as approximately 750,000 square feet, for a term running from October 19 through December 31, 2018. A handwritten notation on the agreement stated that the "exclusive is for 80,000 sf vacant space and mezz space on corner of Thomas St. & Getty Ave." Certain provisions were struck, including clauses covering expansions or "taking of additional space" and an automatic renewal; the opinion states it was unclear who struck them. Six-month tail, referral-of-inquiries, fee-shifting, and 1.5%-per-month interest provisions remained intact.

The broker actively marketed both Unit D (approximately 88,000 square feet, then vacant) and Unit A (approximately 80,000 square feet, to become available later), including through marketing materials, a banner, property showings, and correspondence. The eventual tenant, GTI, learned of the property around December 21, 2018, possibly through City of Paterson officials. On January 15, 2019, the owner leased Unit D to GTI, with Unit A designated as "additional space" to be delivered later; Unit A was never delivered because other tenants occupied it. The lease was signed 15 days after the listing expired but within the six-month tail period. The owner refused to pay any commission.

Key Holdings

- **Scope of the listing.** The owner's striking the "additional space" clause did not remove Unit A from the listing. The unstruck language describing the property as approximately 750,000 square feet and referencing "any portion thereof" created an ambiguity

permitting consideration of testimony, emails, and text messages concerning the parties' intent. The trial court found, and the Appellate Division agreed, that the broker was engaged to market the entire property. The commission was earned upon lease execution, not upon delivery, even though the owner never delivered Unit A. The Appellate Division deferred to the trial judge's findings that the broker's witnesses were credible and the owner's principals were not.

- **Procuring cause not required.** Because the listing agreement's tail clause defined when a commission was earned, the court did not need to reach the efficient procuring cause doctrine. As courts have recognized, tail clauses generally require payment for transactions consummated during the extension period without requiring the broker to prove procuring cause.
- **Tail clause notice satisfied.** The tail clause required only written disclosure of the prospective tenant's identity and not a formal post-expiration protection letter. The owner's January 9, 2019 email forwarding a draft lease to the broker, together with testimony from the owner's principal that he received a call about GTI in December 2018, established timely notice. Even if City of Paterson officials introduced GTI, the agreement permitted an introduction by any broker, agent, firm, corporation, or third party. The referral-of-inquiries clause also required the owner to forward the City's December 2018 inquiry to the broker because the listing was still in effect.
- **Prejudgment interest.** Interest ran through the date of judgment and was not stopped when the owner deposited approximately \$1 million into a court-ordered escrow, which the owner chose not to place in an interest-bearing account. As the court noted, the broker could not use those funds either. A *lis pendens* filed during the owner's sale negotiations was lifted after the pretrial escrow order.
- **Attorneys' fees upheld.** The fee-shifting clause in the listing agreement supported the full award of attorneys' fees and costs.

Practical Steps for Commercial Brokers

- When drafting a listing agreement, be sure to define the property and all leasable units precisely. Review the client's edits and cross-outs for internal consistency with the property description and other unstruck provisions.
- Negotiate a tail clause that covers introductions by "any broker or third party" and requires only written disclosure of the prospect's identity as the notice trigger.
- Send a written list of all prospects before the listing expires or within the contractual notice window, even if the agreement does not require a formal protection letter.
- Tie the commission to lease execution, not to occupancy, delivery, or rent commencement.
- Include a referral-of-inquiries clause requiring the owner to direct all inquiries to the broker during the listing term.
- Include fee-shifting and contractual interest provisions to help the broker recover the cost of enforcement.
- Document all marketing activity throughout the listing term to support credibility at trial.
- Calendar the tail expiration date to keep track of when this important period concludes.
- Consult counsel about available remedies to secure a commission when a property sale is pending; in Crimkay, the court ordered sale proceeds escrowed as security.

- Have every responsible entity, such as the owner and any property manager, sign the listing agreement; in Crimkav, the judgment ran jointly and severally against both the owner and the property manager.

Takeaways

Crimkav Corp. v. Getty Industries confirms that a well-drafted listing agreement is a commercial broker's most important tool for getting paid. When the contract clearly defines the commission trigger and includes a properly structured tail clause, the broker does not need to win a fact-sensitive procuring-cause fight. The time to protect a commission is when the listing agreement is signed, not after a deal closes and the owner refuses to pay. As with many things in life, "If you fail to plan, you are planning to fail."

This alert provides a general overview of issues relating to commercial broker commission rights and listing agreement protections. Please contact Michael Shortt at Saiber LLC if you have any questions about structuring listing agreements, enforcing commission rights, or managing disputes involving commercial real estate brokerage relationships.