י"ט חשון תשע"ח
November 8, 2017

Psak Din (Decision): Schiff v. Chester

The Beth Din of America (the "Beth Din"), having been chosen by the parties as arbitrators pursuant to an arbitration agreement dated as of September 29, 2016, a copy of which is attached hereto, between Jeff Schiff, with an address at 500 Gregory Avenue, Monsey, New York 10952 ("Plaintiff") and Daryl Chester, with an address at 10 Prestoria Street, Monroe, New York 10926 ("Defendant") to resolve differences and disputes regarding a brokerage fee allegedly owed, and having heard all parties testify as to the facts of the dispute, having read their material submissions, and having given said matters due consideration, hereby decides as follows:

Facts

Plaintiff and Defendant both worked at Tussel Realty Corporation, a commercial realty brokerage firm in New York, where Plaintiff was a licensed salesperson and Defendant was a licensed broker. Defendant had considerably more experience working in the industry than Plaintiff. Starting in mid-2015, Defendant approached Plaintiff about working with him to find properties in the Miami, Florida market for a large overseas buyer that was interested in expanding its U.S. residential property portfolio (the "Buyer"). Defendant was charged with the task of locating properties for purchase, and Buyer ultimately purchased three properties with, according to Plaintiff, the involvement of Plaintiff: 11 Dickerson Street in April 2016 ("Dickerson Street"); 577 Hillside Court in March 2016 ("Hillside Ct") and 75 Beverly Place in June 2016 ("Beverly Place").

Throughout their dealings, Plaintiff and Defendant never reached any agreement regarding how they would split brokerage commissions amongst themselves. Plaintiff claims, and was able to provide some documentation demonstrating, that upon the closing of Dickerson Street, Defendant received a commission of $168,000 and that Defendant received a $300,000 commission upon the sale of Beverly Place. Plaintiff claims that upon the closing of Hillside Court, Defendant received a commission of $68,000, although the full commission should have been approximately $200,000. Rather than hold up the deal and jeopardize it with potential litigation, Defendant agreed to take the $68,000 that was being offered, and Buyer paid $140,000 as a "token of appreciation" for his efforts. Based on these amounts, the commissions earned on the three properties totaled $676,000.

Plaintiff Claims

Plaintiff claims that but for his involvement none of these purchases would have occurred. He asserts that he spent many hours and much energy facilitating these purchases, and that he was only absent from the closings themselves because Defendant purposefully blocked him from any continued involvement in the transactions.

According to Plaintiff, several times during the period of their business relationship he personally broached the subject with Defendant of how they would split brokerage commissions. He claims that Defendant always declined to commit to any particular payment schedule, and instead encouraged Plaintiff to focus on getting deals done rather than worrying about commission splits.

Plaintiff claims that he was an equal partner with Defendant in this venture, and that he is entitled to 50% of the commissions, or $338,000.[1] In addition, Plaintiff demands that Defendant report any future deals closed based on introductions made by Plaintiff, and that he be paid 50% of all commissions earned on those deals.

Defendant's Claims

Defendant claims that Plaintiff's involvement in procuring these deals was "minute" and that the closings took place after Plaintiff was no longer working with Defendant. With respect to some of the deals, Defendant goes so far as to say that Plaintiff "did nothing" or "did not make even one phone call" and that he certainly was not the procuring cause. Defendant acknowledges that Plaintiff did work for him that was related to his efforts to do deals in Miami for Buyer, but claims that he did so gratis and viewed it as a mentorship opportunity, and that there was never any expectation that he would be compensated for his work.

Defendant also claims that the additional "token of appreciation" he received on the Hillside Court transaction was due only to his close relationship with Buyer, and that this portion of his earnings should not be considered a commission.

Finally, Defendant argues that any award in favor of Plaintiff should be reduced by $16,782.48, which reflects one-half of the costs incurred by Defendant relating to the brokering of these deals during the time Plaintiff and Defendant were working together.

Analysis

Jewish law obligates the beneficiary of work to provide compensation even in the absence of a prior agreement to do so.[2] When no prior arrangement was made regarding the worker's compensation, he is entitled to be compensated "*ke-pachot she-ba-po'alim,*" the lowest accepted wage for that work, that can be found in that area. Thus, Plaintiff is entitled to the lowest level of a wage that a comparable person would accept for comparable work.[3] Accordingly, our determination of the amount Plaintiff is owed for his work depends heavily on what would customarily be paid for the type of work that was performed.

Based on the extensive testimony of the parties before the Beth Din, and after examining the correspondence between the parties that was presented to the Beth Din in the form of copies of texts and emails, it is clear to us that Plaintiff performed significant work as part of his joint efforts with Defendant to broker deals in Miami for Buyer. Plaintiff contacted potential sellers and developed relationships with them, and took active steps to broker the transactions.

At the hearing and in his submitted briefs, Defendant argues that Plaintiff is not legally entitled to any compensation despite any work that he did, since under New York law a brokerage commission is not due unless the broker seeking the commission was the "procuring cause" of the sale. But the "procuring cause" standard typically applies to direct actions by a broker for a commission, rather than cases in which commissions are shared among brokers and salespersons. It is true, as Defendant argues, that New York courts have sometimes applied this standard to cases involving the sharing of commissions among brokers and salespersons. But at least one of the cases cited by Defendant for this proposition acknowledges that, "the contract between the salesperson and the broker and the contract between the broker and the principal are separate contracts, and the terms of those contracts, including the conditions for payment of a

[1] At the hearing, Plaintiff asserted a total claim of $338,500, based on an assumption that the commissions totaled $677,000. This was based on the assertion that the commission from Dickerson Street was $169,000, but Defendant claims the actual commission was $168,000. We find it likely this is the correct number.
[2] Bava Mezia 101a and Shulchan Arukh Choshen Mishpat 375.
[3] Bava Mezia 76a and Shulchan Arukh, Choshen Mishpat 332:1. See also Pitchei Choshen Hilkhot Sekhirut 8:4.

commission, are determined by the respective parties and the parties' intent."[4] In our case, Plaintiff may have indeed been the "procuring cause" of the transactions, but even if he was not, Plaintiff and Defendant clearly intended to collaborate with one another, essentially to go into business together. It is unreasonable to conclude that they planned a zero sum game where one of them or the other would take home the entire commission, depending on who was the "procuring cause."

So Plaintiff's expectations that he would earn a percentage of the commissions were reasonable based on the customs of the marketplace in which Plaintiff and Defendant both operated. This conclusion is also supported by the conversations we had with two experienced brokers in the New York market (utilizing a process for ex parte investigation that was discussed with the parties) who represented to us that even given the disparities in age and experience of the parties, it would be highly unusual for a salesperson to perform free work for a broker with an expectation of no compensation or only minimal compensation.

The difficult question is how to valuate Plaintiff's efforts in the absence of an agreement between the parties. While it is clear to us that Plaintiff viewed himself as a partner of Defendant, and not as Defendant's unpaid mentee, we reject Plaintiff's claim that he is entitled to an equal share of the commissions earned.

Based on our conversations with the aforementioned experienced brokers, splitting brokerage commissions is the predominant form of compensation for referrals by one brokerage professional to another, and for work done by a brokerage professional alongside another brokerage professional. Common percentages that brokers agree upon range between 10% and 25%, and up to 50% for relationships that represent true equal partnerships. Significantly, portions of brokerage commissions are shared in many cases based solely on a referral, even when the referring professional does not do any "legwork" to make the deal actually happen.

Of course, the percentage appropriate in a particular case depends on the negotiation between the professionals that should take place before the work is done. In our case, where there was no such negotiation, the best we can do is to speculate on the various factors that might be used to determine *pachot she-ba-po'alim* given the particulars of this case. After reviewing the different factors, the Beth Din is convinced that Plaintiff's work should be valued higher than a very minimum 10% split. Among these factors is the fact that Plaintiff did much more than a simple referral. He spent time locating properties and cultivating relationships with the sellers and their brokers. In short, he did the things that a broker would do to close a deal. We also note, as an equitable consideration in favor of Plaintiff, that Plaintiff did attempt to clarify how the commissions would be split ahead of time, and it was Defendant who demurred Plaintiff's numerous approaches. While 25% might be a fair number, we are mindful of the burden that halakha imposes on a claimant (*hamozi me-chaveiro alav ha-raaya*), which in this case means that doubts should be resolved against him (*yado al ha-tachtona*). We conclude that a rate of 20% is the most equitable based on *peshara kerova le-din* (equity) and the circumstances of this case.

As a factual matter, we accept Plaintiff's account of the amounts of commissions actually earned (except for the $1,000 difference in the accounts of Plaintiff and Defendant regarding the Dickerson Street commission).

Regarding Defendant's claim that the second deal's compensation was really a present from the company Defendant represented, it is difficult to resolve this issue with absolute certainty. On the one hand, this amount seems to have been rightfully earned as a broker's commission, and Buyer's decision to pay it on its own account was akin to a decision to absorb this cost of the transaction in order to save the deal. On the other hand, we do not know for sure to what extent Buyer felt a legal or moral imperative to pay the amount once the deal had closed, and it is hard to imagine that Defendant's longstanding relationship with Buyer was not a considerable factor in Buyer's decision to make this payment. We believe the most

[4] Greendlinger v. Donaue Real Estate, Inc., 798 N.Y.S. 2d 344 (Kings.Co. S.Ct. 2004).

equitable resolution of this issue is to split the amount based on *peshara kerova le-din*, and award Plaintiff two-thirds of the amount he would have received under this *psak* if the entire amount paid to Defendant by Buyer were regarded as a commission.[5]

Regarding Defendant's claim that the third deal happened after the relationship between the parties dissolved, thus not entitling Plaintiff to any compensation for that deal, Beth Din rejects that claim. Plaintiff deserves to be paid for his past efforts which resulted in the consummation of this deal. It was not necessary for him to be in a business relationship with Defendant at the time of the closing for him to deserve compensation for his work.

The Beth Din also rejects Defendant's claim for a credit in the amount of $16,782.48 for a share of the expenses incurred. Defendant was essentially the principal of the operation, and Plaintiff was a worker entitled to a commission share. The parties were not equal partners.

Based on the foregoing, Defendant is ordered to pay Plaintiff the amount of $125,866.66[6] within thirty days of the date of this *psak*.

All other claims are hereby denied. Any request for modification of this award by the arbitration panel shall be in accordance with the rules and procedures of the Beth Din of America, the provisions set forth herein, and the arbitration agreement of the parties. The obligations set forth herein shall be enforceable in any court of competent jurisdiction, in accordance with the rules and procedures of the Beth Din of America and the arbitration agreement. Any provision of this agreement may be modified with the written consent of both parties. Except as otherwise indicated, all of the provisions of this decision shall take effect immediately.

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[5] Various authorities suggest different formulas for arriving at a decision based on peshara kerova le-din. Shu"t Shevut Yaakov (2:145) writes that application of peshara kerova le-din depends on a rough assessment by the dayan as to what is most equitable in any given case. Fundamentally, we accept Plaintiff's claim on this issue, but with some reservation, leading us to discount the claim by 1/3.

[6] This is based on 20% of commissions totaling $629,333 ($168,000 + $68,000 + 300,000, plus $93,333.33 (2/3 of Buyer's $140,000)).

IN WITNESS WHEREOF, we hereby sign and affirm this Order as of the date written above.

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Rabbi AA, Esq.	Rabbi BB, Esq.	Rabbi CC