

## **Court Finds Oral Commission Agreement May Be Enforceable**

The Michigan Court of Appeals recently determined that the statute of frauds does not bar a commission claim based upon promissory estoppel.

### **The Facts**

North American Brokers, LLC and Mark Ratliff ("Brokers") worked with St. John Providence to develop a concept that required a particular type of property. The Brokers believed that the Latson School property, which Howell Public Schools had for sale, suited their concept. The property had a for-sale sign that indicated it was "broker protected." The Brokers approached St. John Providence about the property. Howell Public Schools and St. John Providence eventually reached a purchase agreement through another real estate agency. In the end, the Brokers received no commission.



The Brokers sued Howell Public Schools and St. John Providence, alleging a variety of claims, including a count of promissory estoppel. Instead of filing an answer to the complaint, Howell Public Schools immediately filed a motion for summary disposition to dismiss the action, arguing that the statute of frauds and governmental immunity barred the Brokers' claims. A motion for summary disposition is a way for a defendant to win a lawsuit early on, without having to litigate the entire case. St. John Providence was not a party at this point.

### **The Statute of Frauds**

A statute of frauds is a statute passed by the Michigan State Legislature, that requires certain contracts to be in writing, and signed by the parties who are to be bound by them, in order to be enforceable. The purpose of the statute of frauds is to prevent injury from fraudulent conduct. On the one hand, parties should have the right to freely enter into contracts, without having to reduce the contract to a signed writing. On the other hand, some contracts are so susceptible to fraud, that the Legislature has determined that it is good public policy to require the parties to the transaction to put the contract in writing, and sign the contract, in order for the contract to be enforceable. This means certain oral contracts will not be enforced.

The Michigan statute of frauds addresses broker commissions. It states:

In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise: ...

An agreement, promise or contract to pay a commission for or upon the sale of an interest in real estate.

The Michigan statute of frauds covers certain other types of contracts including, for example, an agreement, that by its terms, is not to be performed within one year; a special promise to answer for the debt, default or misdoings of another person; a promise or commitment by a financial institution to lend money, grant or extend credit, or make any other financial accommodations; or an agreement, promise of undertaking made upon consideration of marriage, except mutual promises to marry.

## **When Will Courts Refuse to Strictly Enforce the Statute of Frauds?**

As a general rule, the Legislature passes laws, and the courts interpret those laws. The statute of frauds is an example. One court noted, "the role of the judiciary is to apply the statute of frauds as written, without second guessing the wisdom of the Legislature."

Notwithstanding this, the Michigan Supreme Court has determined that, under certain circumstances, equitable doctrines such as promissory estoppel have developed to avoid the arbitrary and unjust results required by an overly mechanistic application of the statute of frauds. Some courts have refused to strictly enforce the statute of frauds because, based upon the facts before them, they determine that it would be inequitable to do so.

### **What is Promissory Estoppel?**

Promissory estoppel is a judicially created, equitable exception to the Legislative statute of frauds. The elements of promissory estoppel are: (1) a promise; (2) the party making the promise should have expected the promise to cause the party relying on the promise, to act in a definite and substantial manner; (3) that person did in fact rely on the promise by acting in accordance with its terms; (4) the promise must be enforced to avoid injustice.

In other words, even though a contract for payment of a commission is not in a signed writing, it would be inequitable and unfair not to enforce the promise if it induced conduct by the broker who relied upon the promise. The for-sale sign on the Latson property was not a signed writing for the purposes of the statute of frauds. However, the Brokers alleged that the "broker protected" sign was a promise that induced them to cultivate St. John Providence as a buyer of the property and, based upon the doctrine of promissory estoppel, Brokers should be entitled to a commission.

### **What Did the Court Decide?**

While questioning the wisdom of the judicially created promissory estoppel exception to the statute of frauds, the Michigan Appellate Court agreed with the Brokers and reluctantly applied it. The Court felt bound to follow decisions of the Michigan Supreme Court. According to the appellate court, "It is a fundamental principle that only the Michigan Supreme Court has the authority to overrule one of its prior decisions." The Appellate Court felt it did not have the power to overrule the Michigan Supreme Court's determination that promissory estoppel is an exception to the statute of frauds.

In this case, the Brokers pleaded a claim of promissory estoppel. Because promissory estoppel remains an exception to the statute of frauds, the Appellate Court decided that the Brokers were entitled to pursue their promissory estoppel claim at the trial court level.

In a remarkable footnote to its holding, the court stated:

While we acknowledge that our opinion reaches the *correct* result under our present legal framework, it is the *wrong* result. We urge the Michigan Supreme Court to grant leave to address the issue presented in this case. The judicially created doctrine of promissory estoppel, as

applied to the facts of this case, subsumes the statute of frauds and makes the statute of frauds irrelevant.

### **Takeaway**

As a general rule, the Michigan statute of frauds provides that an agreement to pay a real estate broker commission is void, unless it is in writing and signed by the party promising payment. While the judicially created promissory estoppel exception to the statute of frauds persists, best practice and law requires all real estate commission agreements to be in a signed writing. Expecting that an oral promise to pay a real estate commission will be upheld by a court, is a risky proposition.

The information contained herein does not attempt to give specific legal advice. For advice in particular situations, the services of a competent real estate attorney should be obtained. These materials are the exclusive property of Gregg A. Nathanson, Esq., and no reprint or other use of the information contained herein is permitted without Mr. Nathanson's express prior written authorization. Gregg Nathanson may be contacted by email: [gregg.nathanson@couzens.com](mailto:gregg.nathanson@couzens.com), telephone 248-489-8600, or regular mail: Couzens Lansky, 39395 W. 12 Mile, Suite 200, Farmington Hills, Michigan 48331.

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