

COURT CRUSHES OWNER'S DISCOUNTED PRESENT VALUE ARGUMENT

By Judith I. Johannsen

In the wonderful world of banking, if you were to buy a \$100 Series EE savings bond today it would cost you \$50, and when that bond reached maturity, it would then be worth \$100. So, even though you bought a \$100 savings bond, it's not actually worth \$100 in today's money; rather, its value today is a discounted present value of \$50.

That very same discounted present value logic was used by an attorney trying to get his client out of his obligation under a listing agreement he had signed to pay a real estate commission to the broker who secured a tenant that signed a twenty-year lease.

The story goes like this. A property owner signed an open listing agreement with a real estate broker. This agreement obligated the owner to pay the broker a commission, in three installments, based on the total fixed annual rent for the twenty-year lease term, if the broker secured a tenant.

The broker found a tenant who entered into a ground lease with the owner, and pursuant to the lease, the fixed total rent for the property was \$1,251,275.00, triggering a commission of approximately \$75,076.00.

The broker sent an invoice for the commission to the owner's attorney, but the attorney did not respond. The broker then sent another invoice and a letter requesting payment. The attorney sent the first installment of the commission, but disputed the bill claiming the broker should have reduced the future value of the lease to its present value and then computed the commission.

The broker sent an invoice for the second installment of its commission, but no further payment was received. The broker believed the full balance of the commission, approximately \$55,056, and not a discounted present value amount, was still due, so he brought suit to collect his commission.

The owner's attorney did what attorneys do – he picked apart the listing agreement and tried to make the broker wrong.

First, the attorney denied that the broker had procured the tenant. The trial court found the broker's testimony and his evidence overwhelmingly convincing that he had indeed found the tenant and had performed pursuant to the listing agreement.

Next, the attorney claimed that even if the broker had found the tenant, the listing agreement's commission payment provision was ambiguous and should be construed against the broker. The original agreement provided for the commission to be paid annually, but the parties later agreed that 33% was to be paid when the lease was signed, when all contingencies were met and the first month's rent had been paid, 33% was to be paid six months after the first payment, and 34% was to be paid one year after the first payment. The court found nothing vague or ambiguous in the parties' agreed-upon provision.

The most surprising argument, however, was when the owner's attorney declared that if the broker's commission was not discounted to present value, it was unconscionable and, therefore, unenforceable.

To refute the owner's claim that what was owed was the discounted present value of the commission, the tenant's lawyer brought out a Howitzer, a witness more credible than credible – a commercial real estate broker who also happened to be the Chairman of the Connecticut Real Estate Commission. This broker testified that real estate commissions are freely negotiable, that the amount of the commission earned and owed in this transaction was not unusual, and that he had never heard of a commission such as this being reduced to its present value.

The trial court held in favor of the real estate broker, finding that the commission for brokering a twenty-year lease should be based on the aggregate face value of all future payments over the twenty-year term and was not limited to six per cent of the discounted present value of future payments. The court ruled that the

property owner owed the broker not only the remaining amount of the commission, but also attorney's fees and interest.

The property owner appealed but the outcome was the same – the appellate court affirmed that the owner's mere assertion that the listing agreement was unconscionable and unenforceable could not make it so and a real estate broker who finds a tenant ready, willing and able to lease a premises on an owner's terms is entitled to a commission pursuant to their listing agreement, not through a discounted present value analysis.

Judith I. Johannsen is Assistant Counsel for the Connecticut Association of Realtors®, Inc.

Connecticut Association of REALTORS®, Inc. is Connecticut's largest professional trade association representing over 18,500 real estate professionals engaged in all aspects of the real estate business. Founded in 1920, the Connecticut Association of REALTORS®, Inc. is dedicated to enhancing the ability of its members to conduct their business successfully while maintaining the preservation of private property rights. Use of the term "REALTOR®" is exclusive to the members of the REALTOR® Association and signifies their allegiance to a strict Code of Ethics.