

# NEW JERSEY SUPREME COURT DECISION AIDS BROKERS – REBusinessOnline

by



Brian Mills, Esq.

Brian A. Mills

Commercial real estate brokers received some assistance from the New Jersey Supreme Court protecting their right to lease renewal commissions following a sale of the property for which the broker had a listing agreement. This is an important decision because following a sale, brokers no longer have privity, a legal prerequisite to enforcing a contract right, with the owner. The new decision relaxes the privity requirement and provides direction for brokers who wish to protect their right to the valuable income provided by renewal commissions.

This decision, *Pagano Company v. 48 South Franklin Turnpike, LLC*, 198 N.J. 107 (2009), softened the prior ruling on the issue (*VRG Corp. v. GKN Realty Corp.* 135 N.J. 539 ((1994)) which gave buyers of leased properties a clear path to avoiding responsibility for commissions after purchasing a property.

The *VRG* court deemed the obligation to pay renewal commissions “personal” meaning it does not “run with the land” the same way an undischarged mortgage would. As such, buyers are not responsible for renewal commissions absent an “affirmative assumption” of the obligation.

The *Pagano* ruling did not expressly reverse *VRG*, rather it broadened the circumstances under which a purchaser is said to have “affirmatively assumed” the commission. Accordingly, it is incumbent upon brokers to understand the ruling in order to position themselves favorably with respect to this important issue.

The *Pagano* Court relied on a provision in the listing agreement stating it is “binding on successors and assigns” coupled with express references to the listing agreement in the leases, sufficient to find the buyer “affirmatively assumed” the responsibility to pay renewal commissions — even though the buyer never provided with the listing agreement.

The ruling is limited however, providing “it would be grossly onerous and unfair to hold that in all contracts, a buyer impliedly agrees with the broker that he will pay the

commission” and leaves the door wide open to future litigation of this issue. Attorneys will certainly use the Court’s rationale to fashion their transactions in such a way to avoid responsibility for the very benefit the Court was trying to protect.

Brokers can hope the next ruling will follow the reasoning in another case where a plaintiff attempted to deny a broker his commission on the grounds that it is a “personal” obligation and not tied to the land:

*If plaintiffs are correct in arguing that the commission is not [due and payable] then the following anomalous result will occur: the mortgage and judgment creditors will be fully satisfied; the sellers will be freed of their responsibility to pay those debts and the [broker]... will receive nothing... [T]hat result strikes one's conscience as inequitable. Cohen v. Estate of Sheridan, 218 N.J.Super. 565, (N.J.Super.Ch.,1987).*

To be clear, no decision has ruled a broker is not entitled to renewal commissions; only that the new owner is not responsible to pay the seller’s broker. With *Pagano* as a precedent for protecting brokers, perhaps if presented with a case for commissions against a seller that no longer owns the property, the Court will rule that of the three potential ways to resolve this issue: (1) the seller pays renewal commission on a property it does not own; (2) the broker is denied compensation it earned because of something totally beyond its control; or (3) the buyer pays commissions on lease renewals for which it receives rents, it is most fair to hold the buyer responsible unless the seller “affirmatively assumes” the obligation.

For the time being, however, because “affirmative assumption” is almost completely beyond the broker’s control, brokers should consider requesting permission from their clients to record the commission agreement against the property the same way a lender records its mortgage. This would absolutely ensure renewal commissions become the responsibility of the buyer. The landlord may agree because it unambiguously relieves it of responsibility for renewal commissions following a sale of the property. If an owner refuses to permit recording of the listing agreement, brokers should, at a minimum, be sure their listing agreements are expressly “binding on successors and assigns” and if possible, should seek to either be identified as a broker in the lease or, preferably, have the listing agreement referenced in the lease.

— *Brian A. Mills is a partner with the firm Maselli Warren, PC., which has offices in Princeton, New Jersey, and Newtown, Pennsylvania. Mills handles both sales and leasing commercial real estate transactions.*