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When You Need a Broker's License to Collect A Commission

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A question that has plagued the world of real estate since state licensing for brokers first came on the scene was recently re-examined in the most interesting case of *Venturi & Company v Pacific Malibu Development Corp.* There, *Venturi* sued *Pacific Malibu*, a developer, under a California contract to recover a real estate brokerage commissions for work done in obtaining financing for a high-end resort in the Bahamas. The Los Angeles Superior Court granted *Pacific Malibu's* Motion for Summary Judgment, holding that *Venturi* could not collect a commission because it was not licensed by the California Department of Real Estate. *Venturi* appealed, arguing that it did not need a license to be paid for what it did.

By a contract entered June 2003, *Venturi* agreed with *Pacific Malibu*, the developer of the Bahamian resort project, to serve as: "financial advisor and find financing for the . . . project through a private placement of equity, preferred stock, debt securities, or a combination of those financial instruments." The contract termed these various types of financing which *Venturi* was hired to find as "Securities." *Venturi* would be compensated according to the contract thusly: first, a \$30,000 Monthly Advisory Fee payable upon completion of a "Placement" of these Securities, and second, a "Success Fee," paid upon consummation of such Securities Placement. In other words, when the financing money was obtained, *Venturi* would be paid this additional Success Fee, which could vary from 1% to 5% of the total financing obtained.

The resort was to be built in Lower Exuma, located in the Bahamas. Exuma is a District of the Bahamas consisting of some 360 separate islands, or Cays, and Lower Exuma is connected to Grand Exuma (at 37 miles in length, the largest of the Cays) by a small bridge. Cays are small, low-lying, sandy islands formed on the surface of coral reefs, found in many places including the Carribean, the Great Barrier Reef, and in other tropical locales in the Atlantic, Pacific and Indian Oceans. Interestingly, Exuma was settled in the 1780's by American Loyalists who were fleeing the U.S. Revolutionary War, and who, accordingly, named their largest city Georgetown, after George III, the then-reigning Monarch of England. I digress to tell you these things about the locale of the proposed resort that is the subject of the *Venturi* case so you get in the proper mood and imagine (while you read on) the light tropical breezes, sandy beaches, spectacular clear water and balmy humid air - perhaps you would like to make a Gin and Tonic now. We can wait until you get back from the kitchen.

Returning to the dispute, after signing the contract, *Venturi* made contact with some 60 potential financing sources. *Pacific Malibu*, the developer, terminated the contract in 2005, but not before *Venturi* obtained a signed Term Sheet (a proposal for financing) from a potential financier, the Talisker Group. The Talisker Group went ahead and provided financing, but did so after *Pacific Malibu* terminated *Venturi's* contract. *Venturi* demanded payment of the Monthly Fee and the Success Fee based on *Venturi's* introduction of the Talisker Group to *Pacific Malibu* during the term of the contract. *Pacific Malibu* refused to pay *Venturi*, who sued to collect its claimed Monthly and Success Fees.

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Pacific Malibu relied on California Bus. & Prof. Code, § 10136 – providing that only a licensed real estate broker may receive compensation for real estate brokerage services. *Pacific Malibu* convinced the Superior Court to grant its Motion for Summary Judgment based on this statute and the Superior Court found that the services provided by *Venturi* for which it sought compensation from *Pacific Malibu* required licensure as a California Real Estate Broker, which *Venturi* lacked, in order to be compensated. *Venturi* appealed and the California Second District Court of Appeal, hearing appeals from Superior Courts in the Los Angeles area, issued its opinion which we examine here to learn more about this seemingly perennial question of when a broker's license is required to collect a fee.

Section 10136 defines a “real estate broker” as someone who:

“does . . . one or more of the following acts for another . . . (a) . . . solicits prospective sellers or purchasers[] of . . . or negotiates the purchase, sale or exchange of real property . . . (d) Solicits borrowers or lenders for or negotiates loans . . . or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property”

The Court reviewed the services to be provided by *Venturi* under its contract with the developer, *Pacific Malibu*. First, *Venturi's* agreement to help find financing was something which, under Section 10136, *Venturi* needed to be licensed as a real estate broker in order to be compensated for doing. But, the Court noted, other services to be provided by *Venturi* as listed in the contract did not require a broker's license. These included: 1) reviewing costs and financial requirements for the resort project; 2) preparing informational materials for seeking financing; 3) formulating a marketing strategy to secure financing, and; 4) financial advice and investment banking services. The Court noted that this therefore was a situation where: “the contract called for [*Venturi*] to provide a range of services, some apparently requiring a broker's license, others seemingly not.”

Interestingly, evidence before the trial court indicated that a Managing Principal of *Venturi*, Ms. Janet Venturi (“Janet”), was actually licensed as a Real Estate Salesperson at the time the Talisker Group had signed a Term Sheet. But, under California law, being licensed as a Real Estate Salesperson alone did not entitle Janet to a commission. The evidence before the Superior Court had not identified the Real Estate Broker under whom Janet would have been supervised as a Salesperson. Bringing in a new Broker did not satisfy the requirements because the Broker had to be initially involved in the deal and to sign off on the original contract. A Salesperson cannot function alone without a Broker to attach to (or, ‘hang her license with’) pursuant to California law – a mistake which is made surprisingly many more times than you might imagine.

But, *Venturi* wanted to recover for **all** services that it performed, not just for the services for which a Real Estate Broker's license was required. The Court discussed case law which allowed recovery of compensation for services which did not require a Real Estate Broker's license and also discussed whether the contract was, in effect, severable, so that compensation could be paid for **some** of the services performed without a Broker's license, but, as to others which clearly required licensure, no compensation could be recovered. Although the licensed Salesperson may negotiate the listing agreement with the property owner, all listings must be in the name of the Broker. Under California law

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only a Broker (and not solely a Salesperson) can enter into a listing agreement or other employment agreement that provides for compensation.

Failing that, *Venturi* then argued that its other Principal, Matthew Venturi (“Matthew”), held a Securities license instead of a Broker’s license and that should be good enough. The Court rejected this argument as well because, although Matthew had passed two Securities license examinations, one in 1979 and one in 1999, he failed to offer evidence that passing the two exams was the same as actually being licensed, and, separately, that the exemption from the California law Broker’s licensing requirement for a Securities licensee applied only to pools of promissory notes, but there was no evidence these were involved in financing for the resort.

The Appellate Court said “Yes,” some of the services performed by *Venturi* could and should be paid for by *Pacific Malibu* because some services did not require a Broker’s license to recover compensation, and the Appellate Court sent the case back to the Superior Court to determine what services could be compensated for without licensure.

The moral of our story as the Appellate Court sent the case back for further findings - assuring that the parties would incur many more attorneys’ fee dollars - is that the licensing requirements for California Real Estate Brokers are alive and well and are fully enforceable to prevent unlicensed persons from obtaining compensation for services requiring a license. If you are going to provide significant services with the expectation of compensation in connecting with selling, buying or financing real estate under California law, you had better understand the requirements of Real Estate licensure and meet all those requirements – that is, if you want to get paid for your hard work!

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