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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-217514 **DATE:** November 25, 1985

MATTER OF: A. F. Madayag - Reimbursement of Real Estate Broker's Fee

DIGEST:

An employee, incident to a change of official duty station, sold his residence in California to a purchaser who was a licensed real estate broker. The broker's commission, as provided in the contract of sale, was deducted from the selling price. The provision in the contract of sale for payment of a commission failed to satisfy the requirements of the California statute of frauds since it did not show the fact of employment of the broker by the seller. The payment of the commission, therefore, was not a legally enforceable obligation and the employee may not be reimbursed for the commission.

This decision is in response to a request from the Acting Chief Counsel of the Federal Aviation Administration (FAA) for a decision concerning the entitlement of Mr. A.F. Madayag to reimbursement of a real estate broker's fee he agreed to pay a broker who purchased his residence at his former duty station. For reasons explained below, we hold that Mr. Madayag is not entitled to the reimbursement he seeks.

We have not been provided with the original documents, only a summary of the facts. The Acting Chief Counsel has informed us that Mr. Madayag put his house on the market in anticipation of his transfer from the Huntington Beach, California area to the FAA Central Region. He entered into a 90 day non-exclusive listing agreement, but the house had not been sold at the expiration of that period. Several days later he contacted a real estate broker to arrange for her services in connection with renting the

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house. Immediately after inspecting the house, however, the broker decided to purchase it for her own use. A purchase agreement was executed which included a separate provision, quoting from the FAA's letter, which provided that:

> "Sellers agree to pay a listing and selling commission to the buyer who is alicensed [sic] real estate broker in the State of California in the amount of 6% of 260,00 [sic] which will be credited to the down payment upon closing of the escrow."

The Acting Chief Counsel informs us that the broker did not actually provide any separate services in connection with the sale of the residence, nor did the parties agree that she would.

Mr. Madayag makes his claim under paragraph 2-6.2a of the Federal Travel Regulations, FPMR 101-7 (September 1981) incorp. by ref., 41 C.F.R. § 101-7.003 (1983) (FTR), which provides for reimbursement of a broker's fee or a real estate commission paid by the employee for services in selling his residence. Paragraph 2.6.1 of the FTR provides that, in connection with the allowances authorized by Chapter 6, the employee will be reimbursed for only those expenses required to be paid by him. These regulations were issued pursuant to 5 U.S.C. § 5724a(a)(4), which contains similar language.

In accordance with these provisions, we have held that a broker's commission may be reimbursed only where the employee has incurred a legally enforceable obligation. See Mathew Biondich, B-197893, June 4, 1980, and cases cited therein. In determining whether an obligation is legally enforceable in this situation we look to the State law. Patricia A. Wales, 61 Comp. Gen. 96 (1981).

The Acting Chief Counsel has identified two issues that he believes should be considered in determining whether Mr. Madayag incurred a legally enforceable obligation under California law. The first is whether this situation satisfies the California rule that an obligation to pay a real estate commission is enforceable only if it is contained in a writing which unequivocally shows the fact of the employment of the broker seeking to recover the commission. The second issue is whether the broker's

actions satisfy the rule in California that in order to earn a commission, the broker must be the procuring cause of the sale of the property.

Section 1624, of the California Civil Code, provides in part as follows:

> "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:
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> * * * * *
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> "5. An agreement authorizing or employing an agent, broker or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where such lease is for a longer period than one year, for compensation or a commission, * * *"

To satisfy this statutory requirement, which is part of the statute of frauds, the writing need not be a formal, complete contract nor does it have to contain reference to a commission or a promise to pay a commision. However, it must show the authority of a broker to act for the owner of the property in negotiating a sale. See Beazell v. Schrader, 30 Cal. Reptr. 534, 381 P.2d 390 (Cal. Sup. Ct. 1963); Lathrop v. Gauger, 274 P.2d 730 (Cal. Dist. Ct. App. 1954), Herring v. Fisher, 242 P.2d 963 (Cal. Dist. Ct. App. 1952). Simply put, a real estate broker, in order to recover a commission, must show that the owner has recognized him in writing as the owner's agent. Morrill v. Barneson, 86 P.2d 924 (Cal. Dist. Ct. App. 1939).

This showing is of primary importance. In Pacific Southwest Development Corporation v. Western Pacific Railroad Company, 301 P.2d 825, 829 (Cal. Sup. Ct. 1956), the Supreme Court of California stated that "[t]he chief element required to be shown in writing is the fact of employment of the broker to act for the principal in the transaction." The Court went on to state that "[t]he authorities require that a writing 'subscribed by the party to be charged, or his agent' must unequivocally show the

fact of employment of the broker seeking to recover a real estate commission." See also Franklin v. Hansen, 30 Cal. Rptr. 530, 381 P.2d 386 (Cal. Sup. Ct. 1963).

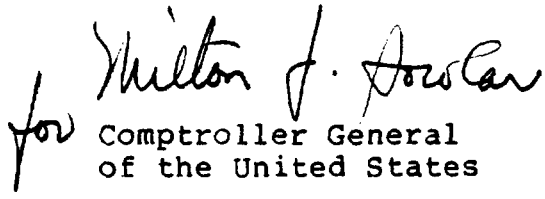
The statement in the contract of sale for Mr. Madayag's residence, that he would pay the broker a 6 percent commission, does not make any reference to the employment of that broker. As a result, the writing does not meet the requirements of the statute of frauds and consequently the broker could not successfully maintain an action against Mr. Madayag for a commission. We hold, therefore, that, since Mr. Madayag would not have been legally liable for payment of the commission, he may not be reimbursed.

Since we have decided, on the first issue raised by the FAA Acting Chief Counsel, that there was no enforceable obligation to pay a commission, we do not find it necessary to discuss the second issue he raises, namely, whether the broker performed acts which would cause her to be entitled to a commission. The requirement for a writing showing the fact of a broker's employment is so predominant that unless it is present, the broker cannot recover either under an oral contract or in quantum meruit. Augustine v. Trucco, 268 P.2d 780 (Cal. Dist. Ct. App. 1954); Beazell v.Schrader, 30 Cal. Rptr. 534, 381 P.2d. 390 (Cal. Sup. Ct. 1963). Thus, in Augustine, the California District Court of Appeal stated that "[t]he procurement of a purchaser is not such performance as will entitle a broker to recover a commission in the absence of a compliance with the requirements of section 1624." 268 P. 2d at 786.

The Acting Chief Counsel correctly points out that in 47 Comp. Gen. 559 (1968) we held that an employee who had entered into an oral arrangement with a licensed broker to sell his residence at his old duty station for the customary commission was entitled to reimbursement of the commission he paid when the broker decided to buy the house himself. In that case, however, we determined that the employee had orally agreed to pay the broker a 6 percent commission, had induced the broker to buy the property and had, in fact, borne the cost of the commission himself, since the selling price was the same as the amount of the appraisal. That case does not deal with the enforceability of the obligation to pay the commission. Therefore, it is not precedent for reimbursing this claim where the provision in the contract of sale for payment of a broker's commission did not satisfy the statute of frauds.

The facts of Mr. Madayag's situation more closely parallel the facts we considered in Robert W. Pearson, B-180986, September 18, 1974. In that case we denied reimbursement of a broker's commission to an employee who sold his home to a licensed broker. There was no evidence of any agreement by the employee to employ the broker as his agent and we denied his claim on the grounds that he had not shown a legal obligation to pay a commission to the broker in connection with the sale of his residence to the broker himself or to any purchaser.

Not only do the facts presented to us fail to show that Mr. Madayag paid the commission pursuant to an agreement legally enforceable under California law, they also fail to show that Mr. Madayag had any sort of agreement to employ this broker, regardless of its enforceability. In light of the above, we hold that Mr. Madayag is not entitled to the reimbursement he seeks.



for Comptroller General
of the United States