Trends in Litigation, Part 3: Oral Contracts and Quasi-Contracts
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Adrienne Koch's third in her a four-part series that examines how litigation can shape the evolution of best practices in the real estate industry. This article focuses on circumstances in which contractual or contract-like liability can arise even in the absence of a written contract, and the importance of a drafting approach to avoid surprises.

This article is the third in a four-part series that examines how litigation—and, more specifically, its results—can shape the evolution of best practices in the real estate industry. The first article discussed some of the hazards of statutes of limitations; the second counseled caution in drafting “good guy guaranties” in light of certain developments in the case law.

This third article will focus on circumstances in which contractual or contract-like liability can arise even in the absence of a written contract, and the corresponding importance of a comprehensive drafting approach in order to avoid surprises.

The Issue

Real estate deals tend to be heavily papered. A single transaction or project may involve joint venture partners, buyers and sellers, lessors and lessees, brokers and others—giving rise to relationships that are governed by what can literally amount to stacks of complex agreements. But even in the context of such transactions, claims are sometimes asserted based on alleged rights that are not set forth in those agreements.

How can this be? Aren’t most contracts involving real estate required by law to be in writing? Not really. A contract to convey an interest in real property (other than a lease for less than one year) must be in writing under General Obligations Law §5-703. However, numerous transactions relating to real estate fall outside the scope of this rule because no interest in the property itself changes hands. See, e.g., *Kefalas v. Pappas*, 226 A.D.3d 757, 761 (2d Dept. 2024).

A contract to compensate someone “for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein” must also be in writing—unless that person is “an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.” General Obligations Law §5-701(a)(10). These rules leave room for quite a bit of debate, and the potential for mischief.

An Illustration

A recent case from the Appellate Division, First Department illustrates this point. In *GlobalX, Inc. v. Hogwarts Capital, LLC*, 226 A.D.3d 535 (1st Dept. 2024), the plaintiff broker claimed to be due a brokerage commission "under an implied or oral brokerage arrangement."

It was undisputed that the underlying transaction—a sale of real property—did not close. It was also undisputed that the agreement governing that transaction (the PSA) provided that any brokerage commission would be due "at closing." But the broker was not a party to the PSA. More importantly (as it turns out), the PSA specified that the broker's right to a fee would be governed by a "separate agreement" between the broker and the defendants. 226 A.D.3d at 535-36.

The broker claimed that the "separate agreement" was an oral one, and that under that oral agreement it was entitled to a commission even though the deal did not close. *Id.* at 536. The lower court denied the defendants' motion to dismiss that claim, and the Appellate Division affirmed.

It reasoned that because there was undisputedly no written agreement other than the PSA, the "separate agreement" governing the broker's entitlement to a fee had to be an oral one. *Id*. at 535-36. While it will ultimately be the broker's burden to prove the terms of that oral agreement (including, most importantly, that those terms required the defendants to pay a commission even though the sale did not close), the broker's claim survives at least long enough to get to discovery on that point.

At the same time, the Appellate Division held that the lower court erred in declining to dismiss certain other claims in which the broker sought to recover its commission on alternative theories of fraud, unjust enrichment, and quantum meruit. If the contract claim succeeds, the other claims are duplicative; if it fails, however, those claims cannot be used to circumvent its flaws. *Id*. at 536-37.

The defendants in *GlobalX* obviously lost on a major point: they now have to litigate over the terms of an oral agreement. But they did get the benefit of a separate rule that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 23 (2005).

In the absence of a contract, a quasi-contract claim can survive if (a) one party received a benefit under circumstances that make it against equity and good conscience for it to retain that benefit without paying for it (giving rise to a claim for unjust enrichment—see *Bedford-Carp Constr., Inc. v. Brooklyn Union Gas Co.*, 219 A.D.3d 1293, 1294-95 (2d Dept. 2023)); or (b) the party from whom payment is sought knowingly accepted services that were rendered in good faith with the expectation of payment (giving rise to a claim for quantum meruit—see *Murray v. Bickerton*, 225 A.D.3d 1086, 1087 (3d Dept. 2024)).

But where the subject matter is covered by a contract, claims in quasi-contract for unjust enrichment or quantum meruit are routinely dismissed—even if the plaintiff's claims are barred or unsupported by the terms of the contract (such that, if left only to the contract, the plaintiff will have no claim). See *111 W. 57th Inv. LLC v. 111 W57 Mezz Inv. LLC*, 220 A.D.3d 435, 437 (1st Dept. 2023).

In other words, a party who actually has a contract is limited to its recovery under the contract's terms, and may not pursue a quasi-contract claim simply because its contract will not support the recovery it seeks.

The Take-Away

The plaintiff-broker in *GlobalX* only needed the court to uphold one of its theories of liability to proceed with its claim for a commission. As a result, the fact that the existence of an unwritten contract precluded its claims for unjust enrichment and quantum meruit was undoubtedly cold comfort for the defendants.

GlobalX nevertheless demonstrates the importance of clear, written agreements. If the parties to that case had truly intended that the broker would not receive a commission unless the sale closed (as the defendants argued), they could have so specified in a written agreement. Such an agreement would have precluded any claim for unjust enrichment or quantum meruit—just as the Appellate Division found the parties' unwritten agreement did. It would, however, also have made the parties' rights clear, rather than leaving them to try to prove or disprove the terms of an unwritten agreement.

GlobalX presented an unusual situation. But it is far from uncommon for parties to real estate transactions to assert claims for unjust enrichment, quantum meruit, or other forms of quasi-contractual relief, especially where their written agreements are unclear or incomplete.

The clearer and more comprehensive the governing written agreements are, the less room they leave for such claims. This, in turn, enables the parties to avoid surprises down the road—which is exactly the point of having a written agreement in the first place.

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