

A man who wanted to sell his home executed a written listing agreement with a real estate broker. The agreement was signed by both parties and gave the broker the exclusive right to sell the home for 60 days. It also gave her the right to receive a commission for up to 30 days after the exclusivity period had terminated if the home sold to a buyer with whom the broker had negotiated during the exclusivity period. A clause in the agreement provided that any modifications must be in writing.

Two weeks later, the parties orally agreed to extend the exclusivity period by 60 days (for a total of 120 days). The 120-day exclusivity period ended without a sale. Twenty days later, a buyer with whom the broker had negotiated while the exclusivity period was still in force offered to purchase the home. The man accepted the offer and concluded the sale but refused to pay the broker a commission.

If the broker sues the man for breach of contract, will she be likely to prevail?

- A. No, because the parties waived the right to modify the written agreement.
- B. No, because the parol evidence rule will prevent proof of the parties' oral agreement.
- C. Yes, because the original agreement is not subject to the statute of frauds.
- D. Yes, because the parties' oral agreement was an effective modification of their written agreement.

Explanation:

"No oral modification" (NOM) clause

Common law

(contracts for services or real estate)

- NOM clause enforceable only if modification must be in writing under statute of frauds

UCC

(contracts for sale of goods)

- All parties are merchants – NOM clause always enforceable
- ≥ 1 party is nonmerchant – NOM clause in merchant's form must be separately signed by nonmerchant(s) to be enforceable

UCC = Uniform Commercial Code.

At **common law**, a prior **written contract** can be **modified by** a subsequent **oral agreement** unless the modified contract falls within the [statute of frauds](#). This is true **even if** the written contract contains a "**no oral modification**" (**NOM**) **clause** purporting to require that any modification be in writing (**Choice A**). That is because of the common-law principle that the parties to a contract should not be deterred from changing their minds. However, any modification (oral or written) must still be supported by consideration to be enforceable.

Here, the parties orally agreed to extend the exclusivity period by 60 days. Although the written agreement contained a NOM clause, the modified exclusivity period did *not* need to be evidenced by a writing since no statute of frauds provision applies.* And since there was consideration—60 more days of exclusivity in exchange for 60 more days of service—the parties' oral agreement effectively modified their written agreement.

The terms of the modified contract are found partly in the original written agreement and partly in the modifying oral agreement. As a result, the broker had the right to receive a commission for up to 30 days after the 120-day exclusivity period had ended if the home sold to a buyer with whom she had negotiated during that period—which it did. Therefore, the broker will likely prevail.

*Contracts to pay a real estate broker a commission ordinarily fall outside the land-contract provision of the statute of frauds. Some jurisdictions have added a provision to their statute of frauds requiring such contracts to be in writing, but that is not the case here.

(Choice B) The parol evidence rule generally prevents proof of prior or contemporaneous agreements that modify or contradict the terms of a written contract. But this rule does not prevent proof of subsequent agreements between the parties—eg, the oral agreement entered after the written listing agreement was executed.

(Choice C) The agreement to pay the real estate broker a commission is not subject to the statute of frauds. Nevertheless, the broker can only prevail if the oral modification agreement also falls outside of the statute of frauds.

Educational objective:

Common law ignores "no oral modification" clauses and allows written contracts to be modified by subsequent oral agreements unless the modified contract falls within the statute of frauds.

References

- Restatement (Second) of Contracts § 149 (Am. Law Inst. 1981) (oral modifications).

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