

VERDICTS & SETTLEMENTS

Broker sues to collect fee in sale of business

\$1,175,000 Arbitration Award

Pittsburgh-based The Advisor Group Inc. (“TAG”) sought an unpaid fee from former owners of ColonialWebb Contractors for assisting with sale of the company. TAG had an October 2008 written agreement with ColonialWebb whereby TAG was to: research buyers, secure confidentiality agreements from buyers, prepare a comprehensive profile of ColonialWebb and arrange meetings and facilitate communications with potential buyers of ColonialWebb through signing of a letter of intent and closing. TAG was entitled to a fee of 1.25 percent of sale proceeds.

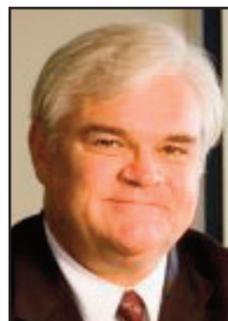
Stock sale of ColonialWebb to publicly traded Comfort Systems USA (“Comfort”) closed in July 2010. TAG was not involved in the July closing. ColonialWebb cut off communications with TAG in early March 2010, days after a meeting TAG arranged between ColonialWebb and Comfort in Richmond. TAG learned of the closing from SEC public records.

In August 2010, TAG contacted ColonialWebb’s former board chairman and majority shareholder, who had signed the October 2008 agreement, to request payment. ColonialWebb and its former chairman refused, claiming TAG did not “introduce or identify” Comfort as a buyer, as required by the agreement; the TAG agreement was terminated in a telephone call from ColonialWebb’s board chairman to TAG following the March 2010 meeting and, the chairman claimed, in a letter he sent to TAG to confirm the call; TAG waived its 1.25 percent fee in the “termination” telephone call; and, finally, TAG performed poorly, breached the agreement and was not involved in the final negotiations and closing.

TAG denied being terminated, either in the telephone call from ColonialWebb’s chairman or in a follow-up “termination” letter. TAG’s principal testified ColonialWebb’s chairman did in fact telephone him following the March meeting; however, TAG claimed termination was not discussed and that no letter was received after the call. TAG’s principal testified ColonialWebb’s chairman had said ColonialWebb was not going forward with sale to Comfort but had offered to “pay TAG something” for its efforts, which TAG refused. ColonialWebb’s chairman testified he sent the confirming “termination” letter as an attachment to an email; however, he could not produce the email or any documentary evidence it was sent.

TAG introduced calendars, emails and documents showing TAG’s activities from October 2008 forward. TAG introduced written materials it prepared in 2008 and delivered to Comfort. The evidence showed TAG obtained a confidentiality agreement from Comfort in October 2008 and furnished ColonialWebb’s private information to Comfort only after that agreement was in place. TAG proved it arranged the first face-to-face meeting between the heads of Houston-based Comfort and ColonialWebb in December 2008.

Unbeknownst to TAG, in March 2010, ColonialWebb hired “new” advisors following the March 2010 Richmond meeting, and these advisors continued through closing. A representative of the new advisors testified at the hearing that the final closed deal was structured differently from what was on the table in March. TAG’s position was that the basic framework and essential terms of the deal



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had coalesced during the March meeting and TAG was not in breach when ColonialWebb breached its contract with TAG. TAG maintained it would have and could have continued to perform through closing had ColonialWebb not breached.

In a written award, the arbitrator found TAG had performed as agreed. The award

stated ColonialWebb failed to carry its burden of establishing the agreement was terminated or that TAG waived the 1.25 percent fee.

The arbitrator awarded TAG all sums due under the contract: \$713,750 (1.25 percent of \$57,100,000 cash sale proceeds), plus \$302,500 (1.25 percent of \$24,200,000 in notes, payable upon receipt), plus 1.25 percent of future earnout payments. The arbitrator awarded TAG an additional \$136,000 as attorney fees.

The three-day arbitration hearing was held in Norfolk in the offices of ColonialWebb’s counsel. Nine witnesses testified. No depositions were taken and there was no formal discovery. The parties did exchange position statements, witness lists and proposed exhibits before the hearing.

Immediately following conclusion of the evidence and arguments, the arbitrator met with principals for both sides and advised he would suspend his deliberations and decision one week to allow them an opportunity to attempt to resolve the matter. The parties were not able to resolve the matter in the ensuing week.

All sums presently due have been paid. A circuit court action is filed to confirm the award and secure future payments.

[11-T-116]

Type of action: Breach of contract

Name of case: The Advisor Group Inc. v. ColonialWebb Contractors

Tried before: Arbitration

Arbitrator: Honorable Thomas S. Shadrick (Ret.)

Date: May 13, 2011

Verdict or settlement: Arbitration award

Amount: \$1,175,000 (plus attorneys’ fees of \$136,000)

Attorney for plaintiff: M. Mallory MantiPLY, Spilman Thomas & Battle, PLLC, Roanoke, VA

Attorney for defendant: Robert W. McFarland, McGuireWoods LLP, Norfolk, VA