

## UNINTENTIONAL DUAL AGENCY – HOW FAR CAN YOU GO TO CLOSE THE DEAL?

### I. INTRODUCTION

Most REALTORS® are well-aware of the fact that they cannot act as a dual agent without the informed consent of both parties. Without such informed consent, the REALTOR® forfeits his or her right to a commission, regardless of whether anyone suffered any harm as a result of the nonconsensual dual agency. But of course a REALTOR® can only seek the necessary consents if the REALTOR® knows that he is acting as a dual agent. Now and then there are nonconsensual dual agency cases involving situations in which the broker believed he was only an agent for one party, but is alleged to also have been an agent for the other party, based upon some action taken by the broker during the course of the transaction. Hopefully by examining some of the cases around the country where this claim has been made, REALTORS® will be better able to avoid this situation in their own dealings.

### II. DISCUSSION

#### A. Intentional Dual Agency

Before examining several unintentional dual agency cases, it maybe helpful to briefly review the law as it relates to traditional dual agency. As stated previously, all REALTORS® who desire to work as dual agents must get the informed consent of both parties. Dual agency without informed consent of both parties is a breach of fiduciary duty. Dual agency without informed consent of both parties is also a violation of the Occupational Code. MCL 339.2512. Where a broker has acted as a dual agent without the full knowledge and consent of both parties, any purchase contract negotiated by the agent is voidable at the

option of either the buyer or seller who did not have knowledge of the dual agency. A broker who has acted for both buyer and seller is not entitled to a commission from either.

## **B. Unintentional Dual Agency**

As stated above, claims are sometimes made that a broker's efforts to assist a customer or to otherwise "close" the deal, created a nonconsensual dual agency situation. If in fact the broker is deemed to have unknowingly and unintentionally created an agency relationship with the other side in a transaction, then the REALTOR® will be deemed to have been acting as a dual agent. Since the REALTOR® did not believe he was acting as a dual agent, he will not have obtained the necessary consents to the dual agency relationship. Since the dual agency was not consensual, the REALTOR® will be deemed to have forfeited his right to a commission. It should come as no surprise then that claims involving "unintentional" dual agency are often made in cases where the broker has sued his or her client for a commission owed.

In *Douglas Elliman LLC v Tretter*, 922 NYS2d 74 (2011), for example, the listing broker sued the sellers for \$70,000 commission owed in connection with the sale of their \$1.4 million New York apartment. The sellers responded by arguing that the listing agent had assumed the role of agent for the buyers through her words and actions, thereby forfeiting her right to a commission. Specifically, the sellers pointed to the fact that, in addition to showing the buyers the sellers' New York apartment, the listing agent had also shown the buyers a number of other apartments available for purchase.

The court rejected the sellers' argument, finding as a matter of law that the listing broker had not acted as a dual agent. The court found that under New York law, absent an

agreement to the contrary, the listing broker owed no duty to the sellers to refrain from showing the buyers other properties available for purchase in addition to the sellers' apartment. (It is not at all certain that a Michigan court would find that the law in Michigan is quite so clear, thus Michigan REALTORS® should use listing agreements that explicitly provide that the listing broker may show potential buyers other properties.)

In *Nichols v Minnick*, 885 NE2d 1 (Ind 2008), the seller of commercial real estate brought an action against the listing broker, seeking the return of the commission on sale of the property. The seller had sold the business via installment contract pursuant to which the buyer was to pay \$25,000 down and, in addition, pay the \$22,500 commission owed by the seller to the listing broker. Unbeknownst to the seller, the listing broker had loaned the buyer \$15,000 toward the down payment and had also agreed to delay receipt of payment of his \$22,500 commission. Instead of paying the broker his commission, the buyer had given the broker a promissory note for the commission amount.

The trial court found that the listing broker had breached his fiduciary duty to the seller by failing to disclose the purchaser's financial weakness. The trial court concluded, however, that the broker had not forfeited his right to a commission because the listing broker's action "was not a serious violation of a duty of loyalty or seriously disobedient conduct."

The trial court appears to have been heavily influenced by the fact that there was no evidence of any other willing buyer and that the seller had "reason to know" of the relationship between the listing broker and the buyer. On appeal, the Indiana Supreme Court, while agreeing with the trial court's characterization of the listing broker's actions, found that the trial court had incorrectly concluded that the broker had not forfeited his right

to a commission. As a matter of law, the appellate court ruled, a fiduciary is required to return any benefit from failure to disclose any material information. Interestingly, the appellate court went on to hold that the seller's remedy was not money damages, but instead the promissory note for the commission amount that the broker had received from the buyer. The court concluded by remarking that "if [the buyer's promissory note] proves to be uncollectible, that merely reflects the fact that [the listing broker] did not benefit from his breach."

In *Likens v Prickett's Properties, Inc*, 943 NE2d 816 (Ind App 2011), the sellers in a failed transaction sued the buyers' broker, who had contacted the sellers directly and advised them on the transaction, thereby allegedly creating a "constructive" agency relationship with the sellers.

The buyers' broker had actually contacted the sellers directly (and not through the listing broker) to encourage the sellers to accept his buyer-clients' offer. At the time, the listing broker had another offer that he was trying to encourage his seller-clients to accept.

Excerpts from buyers' broker's emails to the sellers include:

I know I work differently from other realtors -- I try to satisfy both sides and keep the experience of buying or selling enjoyable.

\* \* \*

I know how to read and write contracts to keep this even for both parties. I'm not sure why other agents can't try to be helpful.

\* \* \*

I'll be getting together with [my buyers] later today to write the offer. Again, thank you for the opportunity to be of service.

The purchase agreement called for a delayed closing. The buyers took possession prior to closing and were to pay \$2,000/month rent until the closing. The closing never happened, the financial information that the buyers provided turned out to be fraudulent, and the buyers eventually defaulted on their rent payment.

The sellers sued the buyers and the buyers' broker on a number of different theories, including breach of fiduciary duty. The buyers' broker argued that he was entitled to summary disposition on the breach of fiduciary duty claim because he had not acted as the sellers' agent.

The trial court held that no agency relationship existed between the sellers and the buyers' broker, and the Indiana Court of Appeals affirmed that decision. In reaching this conclusion, the Indiana court relied heavily on an Indiana statute providing that a real estate agent has an agency relationship with the individual with whom he is working unless there is a written agreement to the contrary. (Michigan law has no similar statutory provision and thus a Michigan court faced with these same facts might have a more difficult time finding that there was no agency relationship between the buyer's broker and the seller.)

In *Wilkins Square LLLP v WC Pinkard & Co, Inc*, 18 A3d 878 (Md App 2011), the listing broker sued the seller of an office building in Baltimore for a \$200,000 commission on a \$13 million sale. The seller argued that the listing broker had acted as an undisclosed dual agent in the transaction and had thus forfeited its right to a commission. Specifically, the seller pointed to the fact that while the listing broker did not have an agency contract with the buyer at the time of the negotiations on the office building, the listing broker had had a prior agency contract with the buyer.

Under the listing broker's prior agency contract with the buyer, the broker had been paid to identify potential investment properties in the Baltimore/Washington D.C. area. The broker's contract with the buyer had terminated about 45 days after the broker's listing agreement with the seller was signed. During this 45-day overlap, the broker had mentioned its seller's office building to its then buyer-client and provided the buyer-client with certain property information. The buyer submitted its initial offer on the seller's office building a month later, at which time the listing broker first advised its seller-client of its prior agency relationship with the buyer.

The court found that the broker's agreement to present properties to the buyer was not in conflict with its fiduciary obligations to the seller under the listing agreement:

Stated another way, [the listing broker] never acted as [buyer's] agent with respect to the sale of the [Property], and thus could not have been a dual agent for the purpose of that transaction. In fact, the most logical inference to be drawn from the evidence presented is that [the listing broker], in recommending that [the buyer] look at the Property, was acting in its capacity as listing agent for the Property, and thus seeking to advance the interest of [the seller]. At the very least, we cannot say that this evidence was sufficient to require a finding of dual agency as a matter of law.

In *Daubman v CBS Real Estate Co*, 580 NW2d 552 (Neb 1998), sellers (lawyers) sued their listing broker for return of \$9,000 commission paid in connection with the sale of their home. After being advised by a broker that she knew potential buyers that might be interested in their home, the sellers had signed a one-party listing. Sellers argued that agent's efforts thereafter to help buyers get financing approved created an agency relationship between the listing agent and the buyer. The trial court agreed with the sellers, finding that:

'When the [buyers'] financial condition was shown to be precarious, the [listing broker] took several steps to keep the transaction alive for the [buyers]'; that she put her interests and the interests of the [buyers] ahead of the [sellers'] interests.

The appellate court reversed the trial court, noting that the listing broker's "every effort" to consummate the sale with the buyer was exactly what the listing broker was obligated to do:

The evidence does not show that when [the listing broker] made the arrangements, she was aware of any desire of the [sellers] not to complete the sale within the time limits prescribed by the purchase agreement. Undoubtedly, [the listing broker] had a considerable interest in obtaining her commission. We find no cases suggesting that an agent's desire to obtain an agreed upon commission is a breach of his or her fiduciary duty.

In *L Byron Culver & Associates v Jaoudi Industrial & Trading Corp*, 1 Cal App 4<sup>th</sup> 300 (1991), a buyer's agent with a one-party commission agreement with the seller sued the seller for a \$52,000 commission on a \$1.7 million land sale. The seller responded by arguing that the buyer's agent was an undisclosed dual agent. When the buyer's broker denied having an agency relationship with seller, the seller pointed to the fact that broker had advised the seller how to handle the claim from another potential buyer – *i.e.*, the buyer's broker had advised seller to close quickly and quietly before the other potential buyer filed a *lis pendens*. The trial court found for the seller and the California appellate court agreed, noting further that the seller had believed that the broker was acting as his agent. The California appellate court found that because the broker "substantially represented the interests" of both the buyer and the seller without disclosure of dual agency, the broker was not entitled to a commission.

### III. CONCLUSION

Under Michigan law, an agency relationship can be created even in the absence of a written agency agreement. It is, therefore, possible for a REALTOR®, through his words and actions, to unintentionally create an agency relationship with someone the REALTOR® believes is only a customer.

In order to avoid an “unintentional” dual agency relationship, REALTORS® should always use agency disclosure forms. REALTORS® shall also use listing contracts and buyer broker contracts that include provisions which discuss the possibility of dual agency and the fact that the broker will not disclose any information learned through agency relationships with other parties. In addition, unless the REALTOR® is in fact a dual agent or transaction coordinator, he should never portray his role as a “middleman” or otherwise suggest that he is serving in a neutral role. A REALTOR® should never pressure a client to close a transaction if the client has indicated that he wants out of the deal.

Finally, to avoid any appearance of impropriety, a REALTOR® should never assist the other side in a transaction without the client’s knowledge. A seller who discovers after the fact that his listing broker assisted the buyer in obtaining financing may become suspicious about his broker’s loyalties, while a seller who has been aware of those efforts from the start will likely conclude that such efforts are being made simply to facilitate the sale.