



BROKER'S DUE DILIGENCE

By Jim Hochman

Two recent problems crossed my desk last month which were costly to the listing broker. Each could have been avoided with some early title work.

I. IS IT MOM OR IS IT POP, OR IS IT BOTH? WHO OWNS THE PROPERTY?

My client happily listed a large multi-family property; had “Pop,” the owner, sign the exclusive listing and marketed the property for sale, producing three strong offers (near the list price) within the first month of the listing term. My client anticipated a happy client’s enthusiastic response, and perhaps a quick closing.

The owner’s response was different: “Your listing is not valid, my wife owns a 50 percent interest, she didn’t sign the listing agreement, and she may not want to sell the property.” Perhaps Mom and Pop might just sell the property to one of the buyers my client produced after the claimed void listing was in-fact terminated.

Could this problem, (i.e. a reference to an otherwise valid listing agreement and commission claim) have been avoided? Of course it could have been avoided – if the broker spent a few moments (likely on line with the County Recorder of Deeds) looking at the most recent deed to see who the grantee or grantees were, and then drafting the listing agreement with all owners (co-owners) named. The broker shall then have each other sign the listing agreement. That might have been 10 minutes well spent. My client also would have protected himself with a warranty of authority in the listing agreement itself:

“The party or parties executing this agreement each warrant to Broker that he/she/it/they are the owners of the Property or are authorized by the party or parties holding legal title to the Property to bind the owner to this agreement and to sell the Property.”

With this seemingly benign language, my client would have at least had a claim against Pop for breach of warranty if Mom refused to sell – a claim for damages in the amount of the lost commissions. A few moments spent on title work – *before* marketing the property, would have been time well spent.

II. MY CLIENT WANTS THE PROPERTY, BUT WHO OWNS IT?

In this buyer representation scenario, my hard working clients found an old retail property adjacent to vacant land, just before perfect for a housing development. After obtaining a commission agreement from the owner, an LOI led to a contract and almost to a quick closing. Imagine all parties’ surprise when the putative owner found that it did not hold title to the second (vacant) parcel. Could the unpleasant surprise have been avoided? Of course it could have – if the broker had checked the title before negotiations commenced.

The seller and buyer proceeded on Parcel 1, and the buyer was able to make a deal with the owner of Parcel 2. The owner of Parcel 1 refused to pay a fee on the sale of Parcel 2, explaining, “If I am not the seller, why would I pay a fee on sales proceeds that I do not receive?” The owner of Parcel 2 refused to sign a commission agreement, and the buyer representation agreement had no “teeth” to claim the balance of this fee from the buyer.

The result was a partial fee and money lost because the broker didn’t do his own advance title work. That broker might also have protected himself with this language in the Buyer Representation Agreement:

“Principal and Broker agree that Broker’s commission is to be paid by the owner of any property acquired by principal. Principal agrees that it shall not execute any agreement to acquire any property during the term hereof unless and until the owner or the owner’s agent agrees, in writing, to pay the broker a commission computed as ___% of the gross sale price.”

The Broker might have also protected himself with inserting the language quoted in Part I of this article in his commission agreement with the Owner of Parcel 1.

Lesson learned? Of course! You can’t play tennis without a racquet and a ball, and a court reserved. Don’t start to work without your own equipment: a comprehensive listing or commission agreement with a warranty of ownership, and the knowledge that you are dealing with all the property owners.

Are these somewhat obvious issues? In hindsight, perhaps they are. It’s clear that brokers should “look” at the title before they “leap” into the deal. ■