Caveat Emptor and Why You Shouldn't Sue That Real Estate Broker

By Dennis C. Valet

When the discovery of a latent defect in a newly purchased home triggers a severe case of buyer's remorse, the real estate brokers involved in the transaction often find themselves in the crosshairs. The erroneous expectation is that these licensed professionals — hired for the purpose of bringing two parties together in a meeting of the minds — are the guarantors of a problem-free transaction. In reality, a real estate broker's liability is limited to the duties owed to the complaining party. Some of these duties are derived from general common law negligence and agency principles, while others are specific to real estate brokers by way of statutes, regulations and administrative decisions. Because consumers tend to purchase or rent a home only a handful of times in their life, their familiarity with the rules governing these agency relationships is often lacking. So, when is it really your real estate broker's fault?

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The three most common causes of action alleged against real estate brokers by consumers are negligence, breach of fiduciary duty and fraud. Each can generally be boiled down to the common legal question: did the broker have a duty to do (or refrain from doing) what the complainant alleges?

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The first step in analyzing liability is determining whether the broker has an agency relationship with the complainant. There are five agency relationships possible within a transaction pursuant to statute: A Buyer's Agent, a Seller's Agent, a Broker's Agent, a Dual Agent, and a Dual Agent with Designated Sales Agent. RPL §443 defines each of these agencies, and for the most part they are what they sound like. The tricky part, however, is the fact that purchasers often see more than one home during their search, often with the same broker, and each of those showings may entail a different agency relationship with that broker than the last. In fact, RPL §443 specifically informs a consumer that "[t]hroughout the transaction [they] may receive more than one disclosure form." If a real estate broker shows three houses to the same prospective buyer in one day, that broker may be a Buyer's Agent at one property, a Seller's Agent at another, and a Dual Agent at the third. The byproduct of this fluid agency is a consumer (and sometimes a broker) who may not understand whose interest the broker is supposed to represent. Section 443 of the Real Property Law attempts to eliminate this problem by requiring brokers to inform the parties of their agency relationship using a standardized agency disclosure form. In practice, this disclosure form, even if used correctly, does not truly illuminate the various duties owed by the broker to the consumer.

The disclosure form specifically defines the duties owed to the various parties based upon the agency at hand. For example, "[a] seller's agent has, without limitation, the following fiduciary duties to the seller: reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account." When dealing with a buyer who is not his principal, a "seller's agent should (a) exercise reasonable skill and care in performance of the agent's duties; (b) deal honestly, fairly and in good faith; and (c) disclose all facts known to the agent materially affecting the value or desirability of the property…" While RPL §443 seems to define exactly what duties are owed and to whom, courts have painstakingly carved out exceptions and expansions on a case by case basis.

For example, with regard to the seemingly simple concept of undivided loyalty, the Court of Appeals in *Sonnenschein v. Douglas Elliman*[i] and its progeny, *Douglas Elliman v. Tretter*,[ii] pulled back on just how far that undivided loyalty must extend. In both cases, a Seller's Agent who owed a duty of undivided loyalty to the seller took prospective buyers to see other properties after showing those prospective buyers the seller's home. The seller alleged that this breached the duty of undivided loyalty as the broker showed the prospective buyers competing homes which they could purchase instead of the seller's home. The Court of Appeals held that the realities of real estate brokerage, which necessarily involves simultaneously representing multiple principals with competing interests, preclude a rule that would limit brokers to a true duty of undivided loyalty. The court was careful to note, however, that this was only the default rule and that the parties were free to craft whatever duties they believed would serve their relationship best.

In one of the few examples dealing directly with a claim of negligence by

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More Help for Distressed Homeowners

By Irwin S. Izen

Recently signed legislation (Senate Bill 8141) has amended section 2401 of the NYS Public Authorities Law, to provide for the New York Mortgage Agency to both create and administer the New York Community Restoration Fund to assist homeowners who are either delinquent on their mortgage payments, or are in danger of going into default because of economic hardship.

The State of New York Mortgage Agency (SONYMA) was created as a public authority back in 1970 to provide mortgages for eligible home buyers. The mortgages offered initially were well below "market" rates, but as conventional rates have gone down, the attractiveness of SONYMA mortgages has declined. Nonetheless, SONYMA mortgages are income restricted and aimed at low to moderate income earners. If the homeowner sold the SONYMA financed home within the "recapture" period, a portion of the "net" profit from the sale was to be repaid to SONYMA.

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Now with the creation of a "Community Restoration Fund," the same government agency will be charged with assisting homeowners adversely affected by The National Mortgage Crisis, who are in danger of defaulting on their home mortgages because of "economic hardship."

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No doubt the term "economic hardship" was purposely used to "mirror" the financial hardship claimed under HAMP (Home Affordable Modification Program) guidelines, but no formal definition is provided for in the statute. If a homeowner can demonstrate economic hardship, under Agency (SONYMA) guidelines, then assistance ranging from modification of the existing mortgage, to funding for rehabilitation, to transferring title and renting back the home is available. Defining "economic hardship" in line with SONYMA guidelines will necessitate an application for assistance and trained personnel assisting in this task, however how this application is processed and the timeframe involved will determine the true success of the program.

The funding available through this program will no doubt increase the proliferation of mortgage modification counseling and entities, only with more scrutiny as to funding requests. Another unintended consequence will be the formation of new not for profit entities applying for funding to implement the acquisition, restoration and administration of the funds as they wrestle with novel ideas geared towards keeping the homeowner in their home.

I see the potential for creating "mortgage" administration service firms to aid defaulting homeowners. With "eligible institutions" receiving community rehabilitation funds, these institutions can negotiate with existing mortgagees on modification or purchasing the underlying mortgage and then working on a rental payment for the homeowner to remain. Money will be available for acquisition, rehabilitation and maintenance of the property with strict record keeping and compliance requirements. The restoration of the community and the prevention of further neighborhood deterioration can be accomplished by finding ways to make it more affordable to keep homeowners in their homes and assisting these homeowners in maintaining their properties. There will be the need for property inspections and other compliance reporting on how funds are spent.

A similar mechanism is currently in place at the county level through the use of "Land Banks" as authorized

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The Value of An IME: To Hold or not to Hold (Continued from page 17)

question of whether a plaintiff sustained a "serious injury" as defined by the Insurance Law Section 5102(d), an IME is an extraordinarily powerful and, often necessary, tool for a defense attorney. It is essential if the intention is to move for summary judgment on threshold grounds. However, we do not need an IME physician to tell us that a limb is missing in a case where the plaintiff's leg was amputated in the accident. We also do not need an IME physician to tell us that plaintiff has limitations in his neck after a multi-level cervical fusion surgery. And we certainly don't need an IME physician to tell us that the plaintiff's injuries are causally related to the subject accident because he wasn't informed about the plaintiff's 10 prior accidents or provided with the plaintiff's voluminous pre-accident medical treatment records.

Of course, the impropriety of conduct at these examinations can be seen on both sides. On one hand, there can be the shifty, career IME physician. On the other hand, there can be the obstructionist, opportunistic IME watchdog. In addition to carefully choosing an independent expert physician in only those cases where one deems it beneficial and necessary to do so, the appearance of, and the recording by, IME watchdogs, i.e. non-legal representatives of plaintiffs, at the IME should also be closely scrutinized and objected to. Recently, the Appellate Division, First Department, in the case of *Kattaria v. Rosado*, 2017 N.Y. Slip Op 00091, affirmed the trial's court's decision which granted defendant's motion directing that the plaintiff resubmit to a medical examination by defendant's designated physician, post-note of issue, without the presence of a non-legal representative. The court held that the plaintiff failed to demonstrate "special and unusual circumstances" warranting the non-legal representative's presence at the examination (*Id*). A formal, written objection to the appearance of a non-party representative at the IME, and to the recording of the IME, should be served with every Answer so that it will be no surprise to his attorney that the watchdog and his camera are not welcome at the examination.

An IME can make or break the defense of a case. Just keep in mind that in several cases, it breaks the defense. It is ill advised to reflexively conduct an IME in every case. This should be a calculated decision. If you decide to go forward with an IME, be selective about your physician, and keep in mind there are good arguments against allowing a non-legal representative to monitor or record the examination. In his article entitled "A Pragmatic Approach to Retaining and Presenting Expert Witnesses: Picking All-Stars and Avoiding Busts," Ladd A. Hirsch, Esq. put it best when he compared the decision about whether to retain an expert to the "refrain heard with some frequency when sports fans and commentators discuss their teams during the off season." ("A Pragmatic Approach to Retaining and Presenting Expert Witnesses: Picking All-Stars and Avoiding Busts," by Ladd A. Hirsch [2012]). Often, "[t]he best trades are those that are never made" (*Id*).

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a third party, the Richmond County Civil Court in *McDermott v. Related Assets, LLC*[iii] held that RPL §443 imposed a duty upon the broker to conduct a search of New York City's public record to determine if a property had sewer hookup instead of relying on the representations of the seller. That standard of reasonable care, however, has not found broad support in the Supreme Court.

With respect to third parties, negligence and fraudulent misrepresentation intersect due to RPL §443's duty to "disclose all facts known to the agent materially affecting the value or desirability of the property." On its face, this statute appears to derogate the common law doctrine of *caveat emptor*, which imposes liability in an arm's length transaction only in the event of active concealment, by expanding the circumstances in which a broker must actively disclose information to third parties. However, in *Ader v. Guzman*,[iv] the Second Department held that the duties established in RPL §443 do not "alter the application of the common law of agency."

If a specific duty is important to a consumer, the lesson is clear. They are best served by memorializing their expectations in a written agreement or risk a legal reality which may be different than their own. Buyer beware.

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[i] 96 NY2d 369 (2001).
[ii] 20 NY3d 875 (2012).
[iii] 45 Misc3d 1205(A) (Civil Court, Richmond Cnty., Sept. 16, 2004).
[iv] 135 AD3d 668 (2nd Dept. 2016).

Before E-Discovery Begins: Interrogatories or Depositions? (Continued from page 8)

Require the custodian to submit the interrogatory responses online using a commercial system which permits you to integrate the interrogatory responses with your case management system.

Social media

Social media are web-based and mobile technologies that enable interactive online dialogue. They include the nearly infinite variety of internet forums, blogs and websites permitting users to post and access content including text, music, photographs, and recorded or live-streamed videos. Facebook, launched in 2004, is the most ubiquitous of the social networking platforms, which include MySpace, LinkedIn, and many similar services in the United States and overseas.

The basic features common to all social media are a visible profile for each user, a list of "friends," sections containing "postings," and some kind of privacy controls that allow users to choose who may view their profiles or contact them.

Twitter, started in 2006, is a real-time social networking and microblogging service that lets users broadcast to selected persons, or to the world, what they are doing and thinking at any moment — within a 140-character limit for each "tweet."[i]

Social media in litigation

Since the purpose of social media is to share personal information about activities, lifestyle, and state of mind, courts are regularly allowing parties access to social media accounts in cases which those factors are relevant such as matrimonial actions, personal injury claims, and employment litigation.[ii]

While there can be no reasonable expectation of privacy in information voluntarily posted online and available to anyone with a computer, where a Facebook public profile showed nothing inconsistent with the claims of a party, at least one federal court has held that there is no general right to information restricted from public view by the party. [iii]

You will have to evaluate on a case-by-case basis whether gaining access to online content justifies the cost and effort. Just remember that it may be considered prima facie evidence of professional incompetence not to serve a Litigation Hold Notice[iv] together with the summons and complaint in any civil action.

More on the specifics of social media discovery next issue.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. Mr. Yannacone can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.

[i] See In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d), _ F.Supp.2d _, 2011 WL 5508991 (E.D.Va. Nov. 10, 2011).
[ii] Romano v. Steelcase Inc., 30 Misc.3d 426, 428, 907 N.Y.S.2d 650, 652 (S.Ct.Suff.Cty. 2010)
[iii] *Tominspk* v. *Detroit Metropolitan Airport*, Slip Copy, 2012 WL 179320 (E.D.Mich. Jan. 18, 2012).
[iv] See, "E-Discovery: The litigation hold notice", *The Suffolk Lawyer*, www.scba.org, Vol 32 No. 3, November 2016, pp. 20, 27