

REAL ESTATE

Direct Negotiations in Co-Brokered Flat Fee MLS Real Estate Impermissible by Regulation

By Andrew Lieb

Flat fee MLS is a trend where a homeowner can pay a small fee (typically around \$300), to list their For Sale By Owner home (referred to herein as “FSBO”), on the Multiple Listing Service (referred to herein as “MLS”). As a result, the homeowner can enjoy the best of both worlds in avoiding an approximate 4 to 6 percent commission, while nonetheless exposing their property to all of the clients and customers of licensed real estate brokers/brokerage firms throughout the region. However, the FSBO homeowner cannot directly place their home on the MLS on Long Island, but instead must pay a flat fee MLS vendor, who is also a real estate broker/brokerage firm (referred to herein as “MLS vendor”) for the privilege of using the MLS because only licensees of the service can list on the MLS.

Due to the involvement of the MLS vendor, a FSBO is not really a FSBO at all, but instead the FSBO is a seller who is represented by such MLS vendor. Specifically, the rules of the Multiple Listing Services of Long Island, Inc.¹ (referred to herein as “MLSLI”) state, at part 300, that “[t]he Service shall only accept written exclusive listings.” Therefore, the act of the MLS vendor

placing such FSBO seller’s property on the MLS also works a representation that the MLS vendor has an exclusive listing with the FSBO seller (i.e., apparent agency). So, who does a selling agent (a/k/a procuring agent) in a cooperative brokerage scenario, under the MLS, call to access the property and negotiate a deal?

On Long Island, MLS vendors typically have their sellers sign forms that permit direct contact by the selling agent. In such, the MLS vendor seems to be attempting to remove all aspects of representation beyond the act of listing the property on the MLS and therefore appears to preserve the concept of a FSBO. These forms cause selling agents to directly contact FSBO sellers that utilized MLS vendors, which violates 19 NYCRR §175.8.

To reiterate, a FSBO seller who is using a flat fee MLS service is not an actual FSBO, but instead such a seller is represented by the MLS vendor.

19 NYCRR §175.8 states as follows: Negotiating with party to exclusive listing contract no real estate broker shall negotiate the sale, exchange or lease of any property directly with an owner or lessor if



Andrew Lieb

he knows that such owner, or lessor, has an existing written contract granting exclusive authority in connection with such property with another broker.

In applying 19 NYCRR §175.8 to the Long Island brokerage industry, which exists on the MLSLI Stratus

System, MLSLI Rule 300 results in all selling agents possessing knowledge that every FSBO seller on the MLS “has an existing written contract granting exclusive authority in connection with such property with another broker,” which is the contingency set forth in 19 NYCRR §175.8 for the effectiveness of the restriction. Therefore, the selling agent cannot “negotiate the sale, exchange or lease of any property directly with an owner,” the FSBO owner, pursuant to the restriction embodied at 19 NYCRR §175.8.

Nonetheless, confusion exists because 19 NYCRR §175.24(c) has been misinterpreted to permit the forms used by the MLS vendors in permitting direct negotiations. In fact, the MLSLI Rules endorse such forms and therefore expose licensed real estate brokers/brokerage firms to license law violations by the Department of State. Specifically, 19 NYCRR §175.24

states as follows:

Exclusive listings—residential property (c) If an exclusive listing of residential property is obtained by a broker who is a member of a multiple listing service, the listing agreement shall provide that the homeowner shall have the option of having all negotiated offers to purchase the listed residential property submitted either through the listing broker or submitted through the selling broker.

A cursory review of 19 NYCRR §175.24(c) indicates that a seller can waive the restrictions of 19 NYCRR §175.8 and permit direct negotiations, as is the practice on Long Island. In fact, the MLSLI Rules exacerbate this confusion by following such misplaced interpretation, at part 701, which states:

Arrangements with the seller for the showing of or negotiations concerning the listed property filed with Multiple Listing shall be conducted through the Listing Broker except when the Listing Broker gives the Cooperating Broker specific authority to negotiate directly...

Additionally, part 704 of the Rules of the MLSLI, continue this confusion, by stating:

(Continued on page 25)

Direct Negotiations Impermissible by Regulations (Continued from page 12)

In the event that the listing agreement authorizes the other Participants to negotiate directly...

However, a precise review of the intersection of 19 NYCRR §175.8 and 19 NYCRR §175.24(c) demonstrates that the regulations discuss completely different temporal periods in a real estate transaction and 19 NYCRR 175.24(c) does not provide a seller with the option of permitting direct negotiations without their exclusive agent's involvement (whether a flat fee MLS FSBO or not)². To explain, whereas 19 NYCRR §175.8 utilizes the term "negotiate," 19 NYCRR §175.24(c) utilizes the term "negotiated." Therefore, 19 NYCRR §175.8's restriction concerns the act of negotiating presently whereas 19 NYCRR

§175.24(c)'s option concerns post-negotiated communications. In such, a selling agent on a flat fee MLS FSBO must negotiate all offers through the MLS vendor or be subject to the possibility of a license law violation.

It is advised that all selling agents only contact licensed real estate brokers/brokerage firms who have property listed on the MLS and never contact the seller directly until negotiations are concluded.

Real estate brokers/brokerage firms are licensed and regulated by the Department of State, New York, pursuant to Article 12-A of the RPL. Some such real estate brokers/brokerage firms incorrectly look to the National Association of Realtors or their local boards for guidance in their profession-

al compliance. Nonetheless, the Code of Ethics and Standards of Practice of the National Association of Realtors states, in pertinent part, as follows: "[w]hile the Code of Ethics establishes obligations that may be higher than those mandated by law, in any instance where the Code of Ethics and the law conflict, the obligations of the law must take precedence." Consequently, MLSLI Rules 701 and 704, including any similar requirements of a local NAR Board, are rendered ineffective by the obligations of the law. Therefore, it's time to go rewrite those MLSLI Rules so that they comply with 19 NYCRR §175.8 and then for the MLS vendors to make new forms.

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¹ <http://links.mlsstratus.com/mlsrules/mlsrules.pdf>

² Its noted that RPL §443(4)(a) provides that "[t]he obligations of a seller's agent are also subject to any specific provisions set forth in an agreement between the agent and the seller." As a consequence, the restriction found at 19 NYCRR §175.8 potentially may be expressly waived by the seller, but no such express waiver is set forth anywhere in the MLSLI Rules and more so, no such express waiver is set forth within the sample language of the MLSLI Real Property Exclusive Right to Sell agreement.