New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
FEBRUARY 29, 2016 NJLJ.COM

Brokers Beware: NJ Real Estate License Act Has Strict Requirements

By Joshua S. Bauchner, Esq.

Most real estate brokers know to put their client's interests first. And, most do. However, even the most ethically conscientious broker may not be aware of the strict statutory requirements imposed by the New Jersey Real Estate License Act. These requirements govern, among other things, entry into both a brokerage agreement and a dual agency relationship whereby a broker represents both seller and buyer. The penalty for failure to comply is severe: forfeiture of the commission, and possible sanctions by the State Real Estate Commission.

"[T]he law is well settled that a real estate broker is in a fiduciary relationship toward the [principal] whom he represents and owes him a duty of 'good faith' and 'absolute fidelity.'" *Silverman v. Bresnahan*, 35 N.J. Super. 390, 395 (App. Div. 1955). The New Jersey Real Estate License Act, N.J.S.A. 45:15-1, et seq., provides strict guidance concerning that fiduciary relationship requiring, inter alia: "a *written* agreement between a brokerage firm and a party describing the terms under which that firm will perform brokerage services as specified in N.J.S.A. 45:15-3." N.J.A.C. 11:5-6.9(a)(1) (emphasis added).

Joshua S. Bauchner is a partner with Ansell Grimm & Aaron, PC and a member of its litigation and bankruptcy departments.

Licensees are required to "comply with all requirements of this section when involved in: 1. Transactions which involve the sale of residential real estate containing one to four dwelling units or the sale of vacant one-family lots…." N.J.A.C. 11:5-6.9(d)(1). The Statute of Frauds similarly requires a broker to obtain a "writing signed by the principal" specifying "the amount or the rate of commission" for a commission agreement to be enforceable. N.J.S.A. 25:1-16(b). A broker risks forfeiting her entire commission if she fails to comply with these provisions. *See Coldwell Banker Commercial/Feist & Feist Realty Corp. v. Blancke P.W.*, 368 N.J. Super. 382, 391 (App. Div. 2004).

Because a signed, written agreement is required by law, a party may not pursue quasi-contractual or equitable claims. N.J.A.C. 11:5-6.9(a)(1); N.J.S.A. 25:1-16(b). In *McCann v. Biss*, the New Jersey Supreme Court held that a broker may not circumvent the strict requirements imposed by the Real Estate License Act and the Statute of Frauds by asserting causes of action to obtain a commission to which it was not entitled as a matter of law:

> We are of the opinion that, as a general proposition, a broker, who may not recover commissions from a seller directly by reason of the statute of frauds, may not accomplish the same result indirectly by a claim against the seller for wrongful interference with the broker's reasonable expectancy of economic benefit. That expected benefit has to be the payment of commission by the seller, but the basis thereof is in turn the oral agreement between broker and seller which is void and unenforceable by reason of the statute. Such a claim actually seeks to enforce the oral agreement, amounts to an effort to evade the statute, and like a claim in quantum meruit, would substantially undercut the law and its spirit. It cannot be allowed.

McCann v. Biss, 65 N.J. 301, 310 (1974). In doing so, the *McCann* court

PHOTO BY FOLOTLIA

expressly rejected causes of action for tortious interference and quantum meruit and its reasoning forecloses analogous claims for unjust enrichment, equitable lien, attachment and an injunction. Simply put, even if a broker consummates the transaction without insult or injury, there is no way to circumvent breaches of the act's requirements to secure a commission on equitable grounds.

The strict statutory requirements found in the New Jersey Real Estate License Act also prohibit any real estate licensee from acting for more than one party in a real estate transaction without the informed consent of all parties. N.J.S.A. 45:15-17(b); N.J.A.C. 11:5-6.9(h). In addition to the threat of sanctions by the State Real Estate Commission, the act further prohibits the licensee from "[c]ollecting a commission as a real estate broker in a transaction, when at the same time representing either party in a transaction in a different capacity for a consideration." N.J.S.A. 45:15-17(i); N.J.A.C. 11:5-7.1(a). *See also Silverman v. Bresnahan*, 35 N.J. Super. 390, 395 (App. Div. 1955) (failure to obtain informed consent to dual agency constitutes breach of fiduciary duty and forfeiture of commission); *Coldwell Banker Commercial Real Estate Services v. Wilson*, 700 F. Supp. 1340, 1347 (D.N.J. 1988) ("The law of New Jersey is clear that a broker who violates N.J.S.A. 45:15–17(i) may not collect his commission earned in violation of the statute.").

Thus, to establish a dual agency relationship whereby a single broker represents both the seller and buyer in a real estate transaction, it must satisfy strict statutory prerequisites. First, the broker must obtain informed consent to the dual agency:

> "Informed consent to dual agency" means the *written authorization* by a party for the brokerage firm which represents them as their agent in a real estate transaction to also represent the other party to that transaction as an agent. Informed consent can only be obtained after the brokerage firm has disclosed to the consenting party all material facts which might reasonably impact on that party's decision to authorize dual agency, including the extent of the conflicts of interests involved and the specific ways in which each consenting party will receive less than full agency representation from the dual agent. In order to obtain informed consent it is also necessary for the licensee to first advise the consenting party of the other business relationships offered by that licensee and of those not offered by that licensee, and of that party's right to consult an attorney.

N.J.A.C. 11:5-6.9(a)(4) (emphasis added).

Second, the broker must obtain the signature of each party to confirm its informed consent to the dual agency:

> (b) Prior to acting as a dual agent, a brokerage firm must have the written informed consent of the parties to the transaction. Informed consent is not acquired through distribution of the Consumer Information Statement on New Jersey Real Estate Relationships as required by (e) and (k) below alone. *At a minimum, licensees must also secure the signature of the party on a separate writing which confirms the party's informed consent to the licensee acting as a Disclosed Dual Agent for that party*. Such a writing may be part of, or an attachment to a brokerage agreement.

N.J.A.C. 11:5-6.9(b) (emphasis added).

In *Coldwell Banker*, the court concluded that "the uncontroverted facts demonstrate that the plaintiff impermissibly sought to extract compensation from parties on opposite sides of a single, unitary transaction in clear violation of N.J.S.A. 45:15-17(i)." In fashioning the appropriate sanction for this misconduct, the court reasoned that any contract between the broker and the parties entitling the broker to a commission was "formed in violation of a statute [and] void as against public policy." 700 F. Supp. at 1347. *See also Winding Brook Realty v. Platzer*, 166 N.J. Super. 575 (Super. Ct. 1979), *aff'd* 173 N.J. Super. 472 (App. Div. 1980) (finding purported commission agreement was void as against public policy where broker violated provisions of N.J.S.A. 45:15-17). Again, the statutory violation results in forfeiture of the commission as a matter of law, regardless of whether the parties to the transaction are satisfied.

As is apparent, being a good salesman and an ethical broker are not enough. It is also critical for a broker to understand his obligations and, correspondingly, his client's rights. ■