

# **Buyers' (or Sellers') Agents Beware: Yes, The Home Is Located In ...**

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On February 28, 2007 an important decision was issued by Manhattan Supreme Court Justice Rolando T. Acosta in the matter of Blumenthal-Levy v. Coldwell Banker Hunt Kennedy, relating to representations that Buyer's Agents make to their clients. This decision points out the importance of Buyer's Agents ensuring that statements or representations they make are accurate. Although this decision comes at a very early stage (i.e. the summary judgment phase) in the lawsuit between the client/buyer Hilary Blumenthal-Levy (the "Plaintiff") and her real estate agent, Elayne Reimer, and brokerage firm, Coldwell Banker Hunt Kennedy (collectively referred to as "Defendant"), it is imperative that brokers and agents follow the progression of this case through to the end. The ultimate decision has potential implications about how a Buyer's Agent should handle certain situations, especially being careful about what representations and information are provided to the client.

## **The Facts of the Case**

The facts of the case, as the decision points out, are very "straight forward." The Plaintiff was looking for an apartment in New York City that was located in a certain upper Eastside school district. The Plaintiff alleges in an affidavit that she engaged the services of the Defendant to assist her in locating the apartment. The parties entered into a verbal agreement whereby the Plaintiff engaged the Defendant to exclusively represent the Plaintiff in negotiating the purchase of an apartment.

In her allegations, the Plaintiff made it clear to the Defendant that she was looking for an apartment in one of two specific school districts and that she was "rel[ying] on the expertise" of the Defendant to find her such an apartment. The Defendant ultimately showed the Plaintiff two apartments and allegedly "guaranteed" and "assured" her that the apartment was indeed located in the right school district.

The Plaintiff eventually entered into a Contract of Sale with the owner of one of the apartments. After entering into the Contract, the Plaintiff discovered, on May 11, 2006, that the apartment was not located in the correct school district but rather located in what is known as a "lottery zone." Unfortunately, this type of "lottery" does not provide for a chance to win large sums of money. This "lottery zone", instead, is a system "whereby her children would be placed in

any Upper Eastside school and with no guarantee that her children would [even] be in the same school district." The Plaintiff also entered into a Listing Agreement with the Defendant on April 19, 2006, prior to discovering that the apartment was not located in the correct school district, for the sale of her existing New York City apartment.

The Plaintiff eventually commenced this lawsuit against the Defendant. As the decision points out, the Plaintiff sued the Defendant under "five different causes of action: fraud (first); negligent misrepresentation (second); breach of fiduciary duty (third); breach of contract (fourth) and rescission of the April 19, 2006 Listing Agreement (fifth)." Justice Acosta, in connection with his decision on the summary judgment motion, dismissed two of the above causes of action, fraud and breach of fiduciary duty, and allowed the case to move forward on the claims of negligent misrepresentation, breach of contract and rescission.

### **The Defendant's Actions Did Not Amount to "Fraud"**

Justice Acosta did not believe that the actions of the Defendant rose to the level of being fraudulent. In a fraud action the Plaintiff "must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Here there was no evidence presented in the affidavits that the Defendant knew the apartment was not located in the correct school district. Rather, the evidence showed that the Defendant believed that the apartment was indeed located in the correct school district. Evidence presented by the Defendant established that the New York City Department of Education website "seemed" to indicate that the apartment was in the correct school district.

### **Was There a Breach of Fiduciary Duty?**

Justice Acosta also dismissed the action based on the theory of breach of fiduciary duty. Justice Acosta, citing several cases, explained that a "fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise and knowledge." He further explained that "a claim for breach of fiduciary duty must be separate, distinct and independent of the contract itself."

In other words, for a claim under a theory of breach of fiduciary duty to be successful, a plaintiff must show that the broker or agent has an independent obligation and duty to represent the interests of her client. If there were no contract at all, the broker would still be duty bound to locate the correct school district for the client. Justice Acosta basically held that the issue of the correct

school district was one which was a “specifically” negotiated term of the “oral contract” and that the Defendant was under no independent duty to locate the “correct” school district. Justice Acosta states that “[t]he claim exist[s] only because it was specifically bargained for in the oral agreement.”

### **The Oral Contract: Breach of Contract Claim Allowed**

Justice Acosta allowed the breach of contract claim to move forward. The Plaintiff alleged that “she entered into an oral real estate agreement with Defendant, which provided, that: (1) Defendant would act as her agent on an exclusive basis to find and negotiate for the purchase of a three bedroom apartment within [certain] Public School District[s]...in the Upper East Side of Manhattan; and (2) that [Defendant] would be paid a commission of three percent of the sales price of the new apartment...” Although this decision does not ultimately determine whether or not there exists such an oral contract (the lawsuit is only at the summary judgment phase), the Court reinforced the fact that “an oral contract is enforceable” citing a recent decision published in the New York Law Journal on January 19, 2007 (*See Cohen v. Seinfeld*).

Justice Acosta decided to allow the breach of contract claim to move forward. As long as there are “triable issues of fact” as to whether an oral contract exists then the cause of action must be allowed to move forward. Both the Plaintiff and Defendant will have the opportunity to present evidence at trial relating to this claim.

### **Negligent Misrepresentation: Duty to Use Reasonable Care**

The Court also decided in favor of the Plaintiff in connection with her cause of action based on negligent misrepresentation. The Court noted:

“‘[t]o recover on a theory of negligent misrepresentation, a plaintiff must establish that the defendant had a duty to use reasonable care to impart correct information because of some special relationship between the parties, that the information was incorrect or false, and that the plaintiff reasonably relied upon the information provided.’ ‘There may be liability ...where there is a relationship between the parties such that there is an awareness that the information provided is to be relied upon for a particular purpose by a known party in furtherance of that purpose, and some conduct by the declarant linking it to the relying party and evincing the declarant’s understanding of their reliance.’” (Citations omitted).

It is clear that there are “triable issues of fact” that must be proven or disproven at trial with regard to whether the Plaintiff hired the Defendant

specifically for purposes of assisting her in locating an apartment in a specific school district, and more importantly, whether the Defendant used reasonable care in determining whether or not the apartment was located in the correct school district. The “right” school district has become an important factor in the current marketing of residences. The issue is, however, a person specific issue. Each case must be assessed independently.

### **Duty of Disclosure in the New York City Market**

This case is also a good example of the confusion which exists in the New York City marketplace. In Manhattan in particular, most residences are either cooperative apartments or condominiums. Single family residences and two to four family residences which are covered under §443 of the Real Property Law, are a rarity in Manhattan. In this instance, the agent had no written disclosure agreement indicating whether or not the agent was the agent of the seller or the agent of the buyer. Use of the Agency Relationship Disclosure Form also highlights to the consumer and to the licensee the obligation of the licensee to disclose “any facts which affect the value or desirability of the property....” What will be determined at trial in this case is whether or not there was a clear understanding about the agent’s duties to identify an apartment in a particular school district. Evidence will also be taken as to whether or not in the sale of the apartment in question, the agent was acting as the agent of the buyer or as an agent of the seller. While New York Law permits an oral exclusive agreement, the benefits of having a written agreement and an acknowledgment of the nature of the agency relationship, whether in the New York City market or elsewhere, is highlighted by this case.

The Manhattan market, and much of the New York City market which is comprised of the five boroughs, is very different from the Westchester and other local suburban markets. In the NYC marketplace there are many cooperative apartments and condominiums in structures having more than four units. Those residential units are exempted under Section 443(1)f which states that the law does not refer to "(ii) condominium or cooperative apartments in a building containing more than four units." This case points out the dangers of not using the Disclosure Form even when it may not be required in instances where cooperatives or condominiums are involved.

### **Beware and Be Careful!**

A real estate licensee must carefully assess each client independently and ensure that the information given to each client and customer pertains specifically to the client, to his or her own needs and desires. This case is still at an early stage in the litigation process. Once the parties go to trial, the evidence may establish that the Defendant did use reasonable care, that there was no oral

contract or that the Plaintiff may not be able to rescind the Listing Agreement based upon the evidence presented. Whatever the outcome, it is important that licensees understand the pitfalls that may exist when they disseminate false or erroneous information.

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