

Understated Taxes – Overstated Square Footage!

Real Estate In-Depth September 2007

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In a market environment in which having a larger size home with lower taxes can be a significant marketing advantage, Realtors must be particularly cautious about overstating the size of a residence or understating the applicable taxes. Complaints are often lodged against real estate agents about such misrepresentations. Misrepresentations have significant consequences both from a regulatory perspective and from the perspective of litigation liability.

Misrepresentations

A real estate licensee is required to be honest and fair in dealing with everyone in a transaction, i.e. both clients and non-clients. When a misrepresentation is made it violates that obligation of honesty and fair dealing.

What Must an Unhappy Buyer Prove?

The standards for a consumer to win a lawsuit against a broker arising from a misstatement of fact require that the buyer be able to prove the following elements:

- a) The broker made a misstatement (whether oral or written) or failed to meet the broker's obligation under Section 443 of the Real Property Law to disclose a fact known to the broker which affected the value or desirability of the property;
- b) the broker either knew or should have known that the statement was false or that the information should have been disclosed as required by law;
- c) the buyer relied on the statements made by the licensee; and
- d) the buyer was damaged as a result of the buyer's reliance upon the broker's statement.

Unintentional misrepresentations are no protection for a broker. A broker is required to be competent and trustworthy.

Common Mistakes by Brokers

Brokers have been held liable for overstating the size of the residence, understating taxes, hidden termite infestation, nondisclosure of common driveways or other unseen conditions (shared septic systems, shared wells, etc.), easements (the high tension wires about to be built across the property), zoning and similar issues.

The most common however, are the issues of square footage of a residence or the real estate taxes which are payable by the new buyer.

Square Footage

The American National Standards Institute (ANSI) in 1996, established protocol Z765-2003 and provides procedures for measuring and calculating the square footage of single family dwellings, townhouses, etc. The National Association of Realtors adopted these standards, but they are optional. Real property assessors, appraisers and real estate brokers all use different standards for measuring the square footage of a residence.

For example, many owners want a broker to reflect in the listing, the square footage of all finished space. This is particularly true with respect to basement areas. The ANSI standards likely to be used by appraisers exclude garages even if they are fully finished and the standards make a strong distinction between living space which is below-grade. "Above-grade" and "floor area" under the ANSI standards is the sum of all finished square footage entirely above ground level. Anything which is below-grade relates to areas which are wholly or partly below ground level. ANSI requires that any portion of a residence below-grade must be measured separately and are not includible in the finished floor area. The local tax assessor is likely to use totally different standards. A real estate broker measuring a residence room by room will no doubt arrive at figures which differ substantially from the Building Department's records or an appraisal report.

Attics, Lofts and Low Ceilings

What about residences with ceilings less than seven (7) feet high? What about rooms with sloped ceilings? Should a loft or finished attic be counted? Does it matter if it has a conventional stairway? If the loft or attic can only be reached by climbing a ladder should it be considered part of the finished floor area?

Appraisers often use the ANSI standards which also require that the residence be measured from the exterior walls of the residence. Accordingly, they may measure the exterior dimensions of the residence and calculate from that perspective. But what about overhangs or a two (2) story entrance foyer or cathedral ceilings? What looks like a 40 x 60 foot residence from the outside may have open ceilings which technically reduce the number of square feet in the residence.

What Should a Realtor Do?

In order for a Realtor to conduct himself in accordance with the License Law, i.e. "to be honest and fair in his dealings", the Realtor should use a verifiable approach. That approach is for the Realtor to use the square footage set forth in the records of the Building Department with an asterisk indicating "as per Building Department".

Real Property Taxes

Real estate licensees may understate the real estate taxes applicable to a property although such mistakes are often inadvertent. With veteran exemptions, STAR exemptions, disability exemptions, sewer district charges, water district charges and similar additions and subtractions to the mil rate applicable to the assessed valuation, it is easy for a real estate licensee to either overstate or understate taxes. The Westchester-Putnam Multiple Listing Service Board of Directors recently adopted a policy that requires listing Participants to report the gross tax amount, exclusive of any exemptions.

What is a Realtor's Obligation?

When a licensee takes a listing it is generally the licensee's responsibility to verify public information provided by a seller. Real estate taxes are readily verifiable. As a licensed real estate salesperson or broker, the listing agent must independently verify the taxes. When reflecting same in the listing, the data should support the obligation that the agent exercised "reasonable skill and care in the performance of the agent's duties" (Section 443 of the Real Property Law).

The MLS compilation and broker's brochures often attempt to disclaim liability. Words such as "data believed accurate/not warranted" are commonly seen. A disclaimer however, may not be sufficient if it can be proven that the listing agent was negligent in not verifying the taxes reflected in the listing form. The failure to do so is likely to be construed by the Department of State as a breach of the listing agent's duties to the owner and to the public.

It is required therefore, that each Realtor report the gross taxes. A Realtor should not assume that the buyer will be eligible for a STAR exemption or other tax reduction. Moreover, when verifying the taxes with the local assessor's office, a Realtor should inquire about whether the taxes quoted are "gross" or "net." There is often little consistency from one assessor's policies to another.

Consequences of Inaccurate Taxes or Square Footage

When a real estate licensee does not follow the path of safety and understates the taxes and/or overstates the square footage in a residence, serious consequences can accrue:

1. The licensee and principal broker can be charged with incompetence and untrustworthiness.
2. The purchaser has a valid cause of action against the owner for the misrepresentations made by the owner's agent.
3. The purchaser has a valid cause of action against the licensee for negligent misrepresentation (Remember, a mistake is not a basis for relieving the agent from liability!).
4. The purchaser is likely to recover damages against the agent and the owner. If the misrepresentation is outrageous in its inaccuracy, the purchaser may have grounds to rescind the transaction.

5. A finding by the Department of State of incompetence and untrustworthiness by a licensee will usually result in a determination by an Administrative Law Judge that the commission collected by the broker was an "unearned commission." If such a finding is made, the Judge can require the commission to be refunded by the broker.