New York High Court Rules on Buyer-Brokerage in Rivkin v. Century 21 Teran Realty, LLC, et al.

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On April 24, 2008 the unanimous opinion of the New York State Court of Appeals, the State's highest court, was rendered in the case of Oleg Rivkin v. Century 21 Teran Realty, LLC, et al. The underlying case had worked its way through the Federal Court System and resulted in an appeal to the United States Court of Appeals for the Second Circuit. The Federal Appeals Court requested a determination by New York's highest court as to what the law is in New York with respect to the obligations of a buyer-agent to inform a buyer-client who is interested in a particular property, that other salespersons affiliated with the same firm, are making offers on behalf of other principals in connection with the very same property.

Facts

Just before the Memorial Day weekend in 2004, Oleg Rivkin ("Rivkin"), a resident of New Jersey, contacted Joshua Luborsky ("Luborsky"), an associate broker at Century 21 Teran Realty, LLC ("C-21 Teran"). At the time, C-21 Teran was co-owned by Andrew Peck and Chloe Dresser and had 16 affiliated salespersons and 4 associate brokers. Rivkin was seeking a lakefront property and was forwarded information by Luborsky about a lakeside property in Ellenville, New York which had been listed for $100,000.00 through another Century 21 franchisee. Almost immediately, Rivkin directed Luborsky to communicate a $75,000.00 verbal offer to the listing agent. Luborsky did so and Rivkin arranged to meet at the site approximately 3 days later on the Friday before the Memorial Day weekend. When he viewed the property, Rivkin determined that the property was "fantastic" but that the building was "fairly worthless". In response to questioning from Rivkin, Luborsky made Rivkin aware that the property had only been on the market for several weeks, that other offers had been placed with no counteroffers from the seller and that a counteroffer was likely to Rivkin's $75,000.00 opening bid. Rivkin signed a written binder which Luborsky forwarded to the listing agent and Rivkin wrote a check to C-21 Teran for $1,500.00 as a deposit. He also received the New York State required §443 form, "Disclosure Regarding Real Estate Agency Relationships".

The property was ultimately acquired by Robert and Susanne Martin, a couple who began to work with Chloe Dresser, one of C-21 Teran's co-owners on May 20, 2004 (before Rivkin's first contact with Luborsky). The Martins made a full price offer when they saw the property. On the Sunday of the Memorial Day weekend they signed a written binder for that amount. Rivkin continued to pursue Luborsky regarding why he was not receiving a counteroffer from the seller and in one of those conversations revealed to Luborsky that he would pay full price if necessary. On Saturday, May 29, 2004, the day before the Martins made their written offer, Rivkin called the listing agent

directly, to ask whether his written binder had been received. The listing agent confirmed receipt of Rivkin's offer and indicated that she did not expect a response to Rivkin's offer before the day following the Memorial Day weekend, Tuesday, June 1, 2004. On Sunday, Rivkin called Luborsky to inquire about his offer. Luborsky told him that the property was being shown over the weekend and that other offers had been received but that he did not know the particulars. Rivkin reminded Luborsky that he wanted the opportunity to raise his offer.

On the Tuesday following the Memorial Day weekend, Rivkin e-mailed Luborsky indicating that he wanted to know the status of his offer. Shortly thereafter, Luborsky picked up a voicemail message from the listing agent informing Luborsky that the sellers had accepted another offer. When this information was communicated to Rivkin, Rivkin presumed that the listing broker had "acted inappropriately" by steering the sale to one of its own clients. Late that evening, Rivkin telephoned one of the sellers to make sure that his $75,000 offer had been conveyed. Carol Botnick, the seller, confirmed that she had received the offer, indicated that there was no counteroffer because Mr. Rivkin's offer was "too low" and instructed Rivkin to direct his communications to the broker. The next day, Wednesday, June 2, 2004, Rivkin again called the listing agent instead of Luborsky. The listing agent informed Rivkin that the full price offer had come from a client working with C-21 Teran. Rivkin then presented an offer for $101,000.00 with a well-water contingency. That same day, the listing agent informed Chloe Dresser that the sellers had verbally accepted the Martins $100,000 offer and had rejected Rivkin's $101,000 offer. Luborsky then informed Rivkin that his offer had been rejected and Rivkin responded that evening that he would offer $105,000 with no contingencies. On Thursday, June 3, 2004, Rivkin again called the listing broker to confirm that he was making a $105,000 non-contingent offer. The sellers again turned down Rivkin's higher offer. Rivkin expressed suspicion that Chloe Dresser's partner, Andrew Peck, was the buyer. Rivkin's attorneys immediately therafter wrote to Peck indicating that the events were a demonstration of a "blatant breach by [Teran] of its fiduciary duty to…Rivkin".

C-21 Teran's System

C-21 Teran had no system in place for tracking whether its own agents were presenting multiple offers from buyers bidding on the same property. Until her co-owner Peck received the letter from Rivkin's attorneys, Chloe Dresser had no idea that Luborsky had even presented a competing offer for the same property which the Martins were to purchase. Peck was similarly unaware that Luborsky and Dresser were representing different buyers bidding on the same property.

The Lawsuit

Rivkin brought a Federal Court action because he was a New Jersey resident, seeking damages stemming from his loss of the opportunity to purchase the Ellenville, New York property. He asserted a claim for breach of fiduciary duty. The District Judge dismissed Rivkin's case on November 17, 2005, and noted that there was not a single case in New York which addressed circumstances in which two persons affiliated with the same real estate brokerage agency could or could not "absent full disclosure, represent competing buyers for a piece of property".

Rivkin appealed to the Second Circuit Court of Appeals which similarly observed that New York Law was unclear on this point. The Federal Court therefore referred the matter to the New York State Court of Appeals certifying to the following question:

> **"Did any or all of [defendants] breach a fiduciary duty to Rivkin by failing to disclose, in any form, [defendants'] representation of a competing buyer for the property Rivkin sought to buy?".**

Therafter, the New York Court of Appeals agreed to accept the referral of this question from the Federal Court and the matter was briefed by the parties with an amicus curiae (friend of the court) brief submitted by the New York State Association of Realtors.

The Decision of the High Court

The New York State Court of Appeals answered the question which was certified to it as follows:

> **"…[U]nless a real estate brokerage firm and principal specifically agree otherwise, the firm is not obligated to insure that its affiliated licensees forego making offers on behalf of other buyers for property on which the principal has already bid. Disclosure and consent are not prerequisites to a competing offer in this circumstance. An individual agent, however, may not represent multiple buyers bidding on the same property without making disclosure and obtaining consent."**
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> **"Accordingly, the certified question should be answered in the negative."**

How Important is this Decision?

A ruling in this decision in favor of Rivkin that C-21 Teran had breached its fiduciary duty would have resulted in significant chaos and would have likely produced a crushing blow to buyer-agency in New York State. If Rivkin was correct, every buyer-agent would have had to on a real time basis, determine from every other agent affiliated with his or her firm, whether offers were being submitted by other buyer-clients on the same property in which a buyer-client was interested.

The Court carefully analyzed the law with respect to seller agency and reviewed the decisions in two prior Court of Appeals cases, Dubbs v. Stribling, 96 N.Y.2d 337 (2001) and Sonnenschein v. Douglas Elliman-Gibbons & Ives, 96 N.Y.2d 369 (2001) which had ruled that a seller's agent could show multiple properties listed by the selling agent to prospective buyers, without limitation.

The Court also reviewed Rivkin's assertion that the §443 Disclosure Form requires a buyer's agent to give to a buyer client fiduciary duties of "reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and a duty to account." (Real Property Law §443). Rivkin emphasized the words "solely", "undivided" and "without limitation" alleging that a brokerage firm could not represent multiple bidders for the same property without disclosure and consent.

The New York State High Court disagreed and stated so. The Court stated that the objective in adopting §443 of the Real Property Law was the Legislature's desire to distinguish whether a broker was acting on behalf of a buyer or seller or acting as a dual agent in a particular transaction, "not whether a brokerage firm might represent multiple buyers (or sellers) with competing interests". The Court affirmed that a listing agent:

> **"…cannot be expected to decline a prospective purchaser's request to see another property listed for sale with that broker. Any other rule would unreasonably restrain a broker from simultaneously representing two or more principals with similar properties for fear of violating a fiduciary obligation in the event a buyer chose the property of one principal over that of another".**

As to buyers, the Court adopted the position taken by the New York State Association of Realtors in its amicus brief and stated,

> **"…[I]n today's real estate marketplace buyers are routinely represented by buyer's agents, and real estate licensees are commonly affiliated with mega-brokerage firms featuring multiple licensees and offices"…"Would-be buyers are very well aware that they are competing with other potential buyers, including those represented by other agents affiliated with the firm that they have retained."**

Is Anything New?

The High Court's decision clearly affirms the right of a buyer-broker to be in competition with other buyer-brokers and buyer-clients of the same firm when the buyer-broker's client makes an offer on a property. What is new is that an individual agent "may not represent multiple buyers bidding on the same property without making disclosure and obtaining consent".

This last reference makes it clear that if an individual agent presents an offer on behalf of a buyer-client, that agent cannot make an offer with respect to the same property on behalf of a second buyer-client without obtaining the consent of both buyer-clients.

It should be noted that this is not "dual agency". Dual agency is limited to circumstances in which an agent is representing both a seller and buyer or a landlord and tenant in the same transaction. The circumstances described reflect a "conflict of interest" and not dual agency.

What if a Buyer-Client Refuses to Permit His or Her Agent to Present an Offer on Behalf of Another Buyer-Client?

Informed consent means just that. If a buyer-client does not want his or her buyer-agent to represent the interest of another buyer-client regarding the same property, that buyer-client has the right to not consent. Under such circumstances, the buyer-agent could refer the second buyer-client to another agent within the office or refer the second buyer-client to another brokerage entity. If there is a conflict of interest, the agent cannot act without obtaining consent from both principals.

Must Consent Be In Writing?

The Court of Appeals decision does not state that the consent of conflicting principals must be obtained in writing. It states that it cannot be obtained without the agent "making disclosure and obtaining consent." For an agent however to proceed on the basis of oral authorization when a conflict of interest exists would be perilous at best. The likelihood of an unhappy or disgruntled buyer-client could produce harsh consequences. New York cases have indicated that in order to obtain consent the disclosures made by the agent must "lay bare the truth in all of its stark reality".[1] That means that the agent must communicate to both principals the dangers of proceeding with a waiver of the conflict of interest and the potential consequences of same. Having an acknowledgement from the principals indicating that the consequences have been explained should be considered basic to an agent's willingness to proceed in such circumstances.

[1] This is common reference to the disclosure standard previously established by the New York Court of Appeals in Wendt v. Fischer, 243 N.Y. 439, 443-444 (1926): "The disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance…".