Public Open Houses, an Opportunity for Error

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By Edward I. Sumber, Board Counsel

While broker to broker open houses are clearly an appropriate way to introduce a property to cooperating brokers, public open houses have been the subject of numerous articles over the past decade either lauding or rejecting their efficacy. If you are a broker who utilizes public open houses for marketing purposes, extreme caution should be used in order to ensure regulatory compliance and the protection of the homeowner.

Issues

Many licensees are unaware of their obligations under Section 443 of the Agency Relationship Disclosure Law and the nuances which are applicable to open houses. Moreover, adequately staffing an open house in order to ensure the protection of a client's possessions is essential. Real estate agents have also been made the targets of criminals with no intent to purchase property but rather to cause harm to or steal from agents who are monitoring the open house.

Regulatory Issues

On August 18, 1995, the New York State Department of State Division of Licensing Services issued an opinion that stated that visitors at an open house were not involved in "substantive contact" which would require the issuance of the Agency Relationship Disclosure Form required under Section 443 of the Real Property Law. An exception to that statement were circumstances in which the individuals who visited the open house expressed an interest in discussing the terms of an offer, or having the agent sitting at the open house assist that prospective buyer in identifying other suitable property. During recent months, there has been some concern that the Department of State may change its position so as to request that brokers provide an Agency Relationship Disclosure Form to each person who attends an open house. That concern has been favorably resolved through the efforts of the New York State Association of REALTORS®. The August 18, 1995 policy statement stands.

Department of State v. Matherson (2375 DOS 07)

Decided on December 24, 2007 this case became the subject of a 2009 second quarter alert in the New York State Association of REALTORS® "LegalLines". The alert addressed how a broker, Geoffrey Matherson of Coldwell Banker Matherson, a West Islip broker, was fined and determined to have been "engaged in self-dealing and a fraudulent practice and having demonstrated incompetency and untrustworthiness"

because Matherson used a sign-in book for a guest registry at open houses which included the following text:

> **"By registering below you are consenting to receive phone calls from our affiliates regarding our services. In addition, if you purchase this home, you agree that you will purchase it through Coldwell Banker Matherson."**

Unfortunately, Mr. Matherson went beyond the use of his sign-in book, and its enforcement, by affirmatively communicating to prospective purchasers and their brokers that working with another broker would result in additional costs to the consumer. Further, Matherson threatened legal action if the buyers attempted to proceed by making an offer through a "buyer's broker".

Analysis and Decision

DOS Administrative Law Judge Patrice M. LeMelle made a determination that Matherson had breached his fundamental duty to deal honestly and fairly with the public. Judge LeMelle indicated that Matherson's actions constituted "self-dealing" addressing the fundamental duties of a fiduciary under Section 443 of the Real Property Law, i.e. good faith, undivided loyalty and full and fair disclosure. Judge LeMelle indicated that Matherson had failed to discuss his practices with his sellers and in fact, violated the terms of his Exclusive Right to Sell Agreement which contemplated that buyers who had their own agents would be compensated. Matherson offered a different (reduced) rate to cooperating brokers. The court noted that there was no indication that the sellers had approved Matherson's practice of discouraging buyers from being represented by their own agents. As a result, Matherson did not "insure the transaction of the business of the agency to the best advantage of the principal and as such demonstrated untrustworthiness and incompetency."

In addressing the concept of "self-dealing", the court noted that the basic Law of Agency prevents an agent from "acting for the agent's own self interest in a transaction to the detriment of the principals." Judge LeMelle further stated that "[a]n agent is prohibited by law from advancing a secret, personal interest of his own that is adverse to the interests of his principals in the discharge of the agency." The court noted that in using the guest registry form creating legal obligations for attendees of the open house, Matherson "did not insure the transaction of the business of the agency to the best advantage of the principal and as such, demonstrated untrustworthiness and incompetency".

In the harshest part of the decision, Judge LeMelle found that Matherson had engaged in a "fraudulent practice" by making phone calls and using a form discouraging the use of other brokers. The Judge found Matherson had acted fraudulently. He was characterized as having acted in a "dishonest and misleading" manner.

Highly Competitive Environment

Our industry is just beginning to emerge from one of the longest and most intense contractions in the past half century. Competition for commissions remains intense. The circumstances never, however, justify a breach of fiduciary duty on the part of a listing agent, inappropriate conduct at open houses or failure to strictly comply with the Agency Relationship Disclosure requirements under Section 443 of the Real Property Law. The Matherson case is a clear signal from the Department of State that it will not tolerate practices perceived by brokers to be "aggressive marketing" which in fact provide a disservice to the consumer.

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