

## Anticipating Better Times: Multiple Offers Will Return

By: John Dolgetta, Esq.

The real estate market is slowly becoming more stable and will undoubtedly become stronger in the coming months. Stronger market activity, the risk of rising interest rates, the eventual loosening of lender requirements and the increasing popularity of FHA loans will likely cause more buyers to enter into the market to take advantage of the lower prices of real estate. As a result, an increasing number of buyers will bring back into focus the obligations of brokers when multiple offers become more prevalent once again and are presented on the same property. NYSAR points out that the rights and obligations of sellers, buyers and brokers are governed by four areas: 1) the REALTOR® Code of Ethics, 2) the Law of Agency, 3) License Law and Regulations and 4) Tort Law (*See Broker's Duty Regarding Multiple Offers*, published by NYSAR). The purpose of this article is to outline the obligations of brokers in light of multiple offers.

### Obligations under the Realtor® Code of Ethics

Under the Realtor® Code of Ethics the basic rule is that a Listing Agent must submit and present all offers to his or her seller or landlord-client. Unless specifically instructed by the seller (or waived by the seller in writing) not to present more than one offer at a time, every agent has a duty to submit all offers to the homeowner principal (the "principal") as quickly as possible after receipt of the offer from another Realtor®. However, the listing agent no longer is required to market the property if an offer has been accepted by a seller or landlord client. The Code of Ethics Standards of Practice 1-6 and 1-7 provide as follows:

**"1-6 REALTORS® shall submit offers and counter-offers objectively and as quickly as possible.**

**1-7 When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless seller/landlord has waived this obligation in writing. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease."**

A broker must always be aware of his or her fiduciary duties and ethical obligations. Under Article 1 of the Realtor® Code of Ethics, Realtors® are required and "...pledge themselves to protect and promote the interest of their client." The obligation of the Realtor® to promote "absolute fidelity to the client's interest is primary."

## **The Duties of the Broker under the Law of Agency, Regulations and Tort Law**

The Law of Agency requires that the agent honor three specific fiduciary duties to the principal, (a) the duty of good faith and loyalty, (b) reasonable care and diligence and (c) the duty of disclosure of pertinent information. In addition, the agent is required to deal with third parties honestly and fairly (and with integrity). Section 441(c) of the Real Property Law requires a real estate licensee to be “trustworthy and competent.”

In addition to the duties of licensees enumerated above, licensees must refrain from making misrepresentations or engaging in any fraudulent behavior which will expose them to civil liability and lawsuits. Supervising brokers must be wary of salespersons engaging in negligent acts. Each salesperson must understand that the interests of the principal must always be placed first and foremost. Any action undertaken by the agent or any decision made must be with the full informed consent of the principal.

### **Multiple Offers: Legal Requirements**

If a Listing Agent is presented with two or more offers on a specific property, all offers should be presented together or as soon as possible upon receipt of same from a prospective buyer or cooperating broker. It is inappropriate for a broker to make a choice on behalf of the principal as to which offers will or will not be presented. Again, the seller-client must be presented with all of the information so that he or she is able to make an informed decision as to which offer he or she will or will not accept. If a licensee presents an offer from within one's own brokerage firm in a more favorable light than one from a cooperating broker's firm, not only is such activity a breach of ethics but a violation of the broker's fiduciary obligations. An agent must present his or her principal with “all available opportunities.” (See *Broker's Duty Regarding Multiple Offers*, published by NYSAR). No licensee is permitted to withhold offers or indicate to a Buyer's Agent that his or her buyer-client's offer will be held as a “back up offer.” There is no such thing as a “back up offer” and this too is a breach of the fiduciary and legal duties of an agent. There should be absolutely no distinction between a first offer that is in negotiation and a second offer subsequently received by the Listing Agent. All offers are to be considered with the same weight and submitted to the seller immediately.

A licensee may, if requested by the principal, provide his or her opinion to the principal as to which offer to accept. A listing agent may express his or her opinion, objectively, regarding which is the most favorable offer. The agent may and should explain to a seller that the price is not the only consideration when making a decision. There are many factors, such as mortgage contingencies, inspection clauses and similar issues, which should be assessed.

One potential pitfall a seller's/landlord's broker should be aware of is if there exists a written offer and acceptance on a particular property and subsequently the seller/landlord would like to accept a new offer over the first one. While written offers signed by a seller and buyer relating to the purchase and sale of real property are not commonplace in the New York Metropolitan area (although very common in other parts of New York State), letters of intent or written offers for leasing transactions are utilized by some brokerage firms. Therefore, if there is a written offer signed by the seller/landlord and the buyer/tenant, before a broker advises the client whether or not to accept the second offer, the broker should advise the client to seek advice of counsel.

While an oral acceptance of an offer is not binding in New York State on real estate purchase transactions (i.e., the Statute of Fraud requires that all contracts for the sale of real property be in writing and signed by both parties), if there exists a written agreement or purchase offer signed by the parties, the Listing Agent could be found liable for tortious interference with a contract if he or she advises the client to accept a subsequent offer. Further, the agent could be "subject to a charge of inducing a breach of contract in violation of Regulation §175.9" (See *Broker's Duty Regarding Multiple Offers*, published by NYSAR). Although the law and fiduciary duties require an agent to continue to provide all offers to his or her seller-client, even where a formal contract of sale has been entered into between a buyer and seller, the agent should, again, advise the client to discuss the matter with his or her attorney (See also Standard of Practice 1-7).

### **Must a Listing Agent Disclose the Existence of Multiple Offers to Buyers?**

There is no duty for a Listing Agent to disclose to a buyer or Buyer's Agent that there exist multiple offers (or competition) on a particular property. However, if asked a direct question, the Listing Agent must answer the question honestly, as required by his or her legal and ethical duties. If no direct question is asked, unless the seller/principal directs otherwise, there is no affirmative duty to disclose such information to a buyer or Buyer's Agent (See Standard of Practice 1-15). A Listing Agent is also customarily required to keep confidential certain information, such as the amount of an offer. The only time such information should be released is when the agent discusses same with the principal and obtains the principal's consent. Once however an offer is accepted, Standard of Practice 3-6 applies:

**"Realtors® shall disclose the existence of accepted offers, including offers with unresolved contingencies to any broker seeking cooperation."**

### **Buyer's Agents and the Risk of Multiple Offers**

The Buyer's Agent must also be aware of the risk of multiple offers and what it

may mean to his or her client(s). A Buyer's Agent should inform his or her buyer-client(s) that a seller may withdraw his or her accepted offer at any time prior to contracts being signed (unless there exists a valid, binding written offer and/or contractual relationship). A buyer must be made aware, preferably in writing, that he or she could lose the money expended to complete inspections, fees incurred in connection with loan applications, legal fees, title and other costs, without recourse to the seller or anyone else, if a valid and binding contract is not ultimately executed. At the same time, the Buyer's Agent must not, in any way, fail to act in accordance with his or her fiduciary duties or fail to inform the buyer that he or she should be making all of the requisite inspections of the property. Although the buyer should be encouraged to act quickly and be made aware of these risks, the agent should never engage in any act that could be seen as putting the principal at risk or fail to act in the best interest of his or her client.

The market for real estate will turn around. While it may not take place overnight, all agents need to be prepared to deal with the anticipated rebound. Agents must be aware of their duties and obligations imposed by law and the Code of Ethics. Each agent must always act as a fiduciary and keep the interests of his or her client above his or her own. If sellers and buyers are made aware of all of the risks involved in connection with multiple offers, they will be better able to move forward and make knowledgeable and informed decisions.

\* \* \* \*

Legal Column authors Edward I. Sumber, Esq. and John Dolgetta, Esq. are partners in the law firm of Edward I. Sumber, P.C. The firm has been counsel to the Westchester Putnam Association of Realtors, Inc. since 1974 and the firm was responsible for incorporating the Empire Access Multiple Listing Service, Inc. in 1976. For information about Edward I. Sumber, P.C. go to <http://www.sumberlawpc.com/>.