Broker Commission Disputes: You Win Some, You Lose Some.

By John Dolgetta, Esq.

Recent decisions from the New York State Appellate Division serve as reminders to brokers, associate brokers and licensed salespersons of the importance of entering into written agreements and the strict fulfillment of fiduciary duties, such as dual agency disclosure, in order to preserve rights to commissions. The failure to do so will likely place commissions at risk and lead to unnecessary litigation and expense. It is not uncommon for the costs incurred in connection with such litigation to exceed the actual amount of the commission, causing a real estate licensee to elect to forego his or her rightfully earned commission.

***P. Zaccaro, Co., Inc. v. DHA Capital, LLC*:**
A Breach of Fiduciary Duty and Forfeiting Commissions

In *P. Zaccaro, Co., Inc. v. DHA Capital, LLC* [157 A.D 3d 602 [App. Div. 1st Dept.] (January 25, 2018) at http://bit.ly/2FjB6ZB], the Plaintiff, P. Zaccaro, Co., Inc. ("Zaccaro") which entity was the real estate broker for the seller, Ding K. Wai a/k/a John Wai and Sentry Operating Corp. (collectively, the "Seller"), sued the Seller, and other parties, including the Buyer, to attempt to obtain a commission in connection with the sale of real property to DHA Capital, LLC (the "Buyer").

Mr. Zaccaro (the principal broker) met with Mr. Wai, the principal and authorized representative of the Seller, to discuss the representation arrangement relating to the sale of the property owned by the Seller. According to Zaccaro, the parties entered into an oral brokerage agreement for the purpose of procuring "a ready, willing and able" purchaser to purchase the Property. It was Zaccaro's position that the sale of the property between the Buyer and Seller took place as a direct result of Plaintiff's efforts and argued "…that their oral or implied contract requires that Plaintiffs receive a one percent commission." The Seller refused to pay Zaccaro alleging that Zaccaro failed to disclose it was acting as a dual agent for the Seller and Purchaser and further, Zaccaro failed to obtain the Seller's express consent to do so. The Seller argued that Zaccaro should forfeit its right to collect any commission.

Zaccaro denied this and argued that it "…disclosed to DHA the fact that Zaccaro had been retained by the Seller to market and sell the Premises, [and] the affidavits submitted…leave no question that DHA was, at all times, aware of the dual agency." However, notwithstanding the statements made in Zaccaro's pleadings, a formal dual agency disclosure, confirming whether or not a dual agency situation existed, was never provided to either the Buyer or the Seller, a clear violation of the agent's fiduciary duty.

Zaccaro further argued that even if the court found that there was an undisclosed dual agency, this did not matter because it was merely a "finder" and not a real estate broker in the transaction. Zaccaro stated that it merely "introduced" the Buyer to the Seller and was not "…called upon to do anything more, and thus acted as a traditional finder, and not a fiduciary." The Court was "unpersuaded" by this latter argument, explaining that Zaccaro, by its own admission, was a real estate broker in the transaction and was integrally involved in the

negotiation process between the parties. The Plaintiff, in its amended complaint, stated that "…[it] and DHA entered into an oral agreement wherein [Zaccaro was] authorized by DHA to act as the licensed real estate broker[]." The Court pointed out that "[t]his statement constitute[d] a formal judicial admission" that it was acting as a broker for the Buyer as well.

The Appellate Court ultimately dismissed the action holding that the Plaintiff by its actions acted as "…a broker for the buyer of the property, and therefore engaged in an impermissible dual agency without full disclosure." In its holding, the Court in *Zaccaro* cited the First Department Appellate Division case, *Douglas Elliman LLC v. Tretter* decided in 2012, which was affirmed by the New York Court of Appeals (the highest court in New York) [*see Douglas Elliman LLC v. Tretter*, 84 AD3d 446, *aff'd* 20 NY3d 875 [2012] at http://bit.ly/2D821li], another interesting case which is discussed, in part, below.

The *Tretter* Case: Breach of Fiduciary Duty

In *Tretter*, the Appellate Division held that "…a real estate broker is deemed to have earned his or her commission when he or she produces a buyer who is ready, willing and able to purchase the property, and who is in fact capable of doing so [citation omitted]. During the process of facilitating a real estate transaction, the broker owes a duty of undivided loyalty to its principal [citation omitted]. If this duty is breached, the broker forfeits his or her right to a commission, regardless of whether damages were incurred [citation omitted]." In contrast to the *Zaccaro* case, the Appellate Division in *Tretter* held that the broker did not engage in dual agency and that the arrangement had been adequately disclosed in writing to the parties. The Court in *Tretter* upheld the award of the commission to the broker.

In the dissent, Justice Manzanet-Daniels further elaborated on the disclosure and fiduciary duties of an agent, explaining that,

> "…[i]t is elementary that a real estate broker is a fiduciary with a duty of loyalty to act in the best interests of the principal. Where a broker's interests or loyalties are divided by reason of a personal stake in the transaction or the representation of multiple parties, the broker *must* [emphasis added] disclose to the principal the material facts illuminating the broker's divided loyalties. Plaintiff, as a real estate broker for defendant sellers, had an affirmative duty not to act for the buyers unless defendant sellers had full knowledge of the facts and consented to the dual agency [citations omitted]."

While Justice Manzanet-Daniels believed that the broker in *Tretter* did in fact engage in behavior amounting to an undisclosed dual agency, the Court of Appeals ultimately affirmed and upheld the decision of the majority.

Gator Hillside Village, LLC v. Schuckman Realty, Inc.: Enforcement of Oral Brokerage Agreement

In *Gator Hillside Village, LLC v. Schuckman Realty, Inc.* [2018 NY Slip Op 01178 [App. Div. 2nd Dept.] (February 21 2018) at http://bit.ly/2p07AgJ], Gator Hillside Village, LLC ("Gator

Hillside"), the owner of a shopping center with commercial space available for lease, was sued by Schuckman Realty, Inc. ("Schuckman") for payment of the commission earned by it in connection with the negotiation of its commercial space.

A licensed salesperson, Ari Malul ("Malul"), affiliated with Schuckman Realty, Inc. ("Schuckman"), a licensed real estate brokerage firm, prepared and sent to Gator Hillside a "letter of intent" on behalf of a prospective tenant client who was interested in leasing Gator Hillside's space. The initial correspondence also contained a provision which required that Gator Hillside pay Schuckman a specific rate of commission. While Gator Hillside never formally executed or acknowledged the letter, or the specific commission provision contained therein, the parties, nevertheless, commenced lease negotiations.

Gator Hillside, through its president, made it clear that it would not pay any commission. In its decision, the Court points out that "[i]n an email to Malul dated October 30, 2011, Goldsmith made a take-it-or-leave-it counteroffer in which the plaintiff would pay the defendant a commission of five percent of the rent for the first five years of the lease agreement if it wanted to move forward on the deal." The agent did not expressly reject or accept the offer. However, Gator Hillside and the tenant eventually entered into a lease. After the lease was entered into, Schuckman demanded that Gator Hillside pay the commission that had been laid out in the initial "letter of intent." Gator Hillside refused to pay the commission and this action ensued. The Supreme Court eventually entered a judgment declaring that the brokerage commission in the amount of $24,650 was due to Schuckman.

In its holding, the Appellate Division provided that "…the existence of a binding contract is not dependent on the subjective intent of [the parties]" and that "[i]n determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the *objective manifestations* [emphasis added] of the intent of the parties as gathered by their expressed words and deeds. [citations omitted]." In essence, the Court explained "…simply, that the manifestation of a party's intention rather than the actual or real intention is ordinarily controlling [citations omitted].

The Court held that Schuckman "…established, prima facie, its entitlement to a judgment declaring that the brokerage commission due was five percent of the rent for the first five years of the lease agreement by submitting evidence that the defendant did not reject the counteroffer, but instead proceeded to have its client enter into the lease agreement." The Court went on to explain that "[w]hile mere silence, when not misleading, cannot be construed as acceptance, a counteroffer may be accepted by conduct." By entering into the lease, Gator Hillside's conduct established an "objective manifestation" of an agreement with the commission rate in Schuckman's original demand.

Important Takeaways

As these cases point out, it is important to ensure that one takes his or her fiduciary responsibilities seriously and that one memorializes all agreements and required disclosures in writing. A breach of fiduciary duties by a real estate licensee, especially one which involves the non-disclosure of a dual agency, will result in the forfeiture of the entire commission.

The same goes for commission agreements and representation agreements. Any such agreements or arrangements should be in writing as well. While the broker in the *Gator Hillside* case was ultimately victorious, it could have been easily decided the other way. Another important factor to note is that, in many cases, the court can order that the legal fees and court costs be paid for or reimbursed by the unsuccessful party. Many formal agreements, which are in writing, explicitly provide for whether the court costs and reasonable legal fees are shared equally or whether the losing party is required to cover same. In any event, it is always recommended to have these issues negotiated and decided in advance so that there are no issues when and if that time comes.

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