

## **Recent NAR Legal Conference: A Focus on “Pocket Listings” and “Coming Soon” Listings**

By John Dolgetta, Esq.

At the National Association of Realtors® (“NAR”) Legal Conference recently held in Boston one of the topics discussed included the increased use of “Pocket Listings” and “Coming Soon” listings on behalf of clients when listing properties for sale. These types of listings are utilized by Realtors® and real estate licensees in certain instances and many times Realtors® and licensees are not fully aware of the risks involved when deciding to employ these techniques. While these types of listings have been around for many years, recently they have become more common as a result of the low inventory and high demand in the real estate market.

### **The “Coming Soon” Listing – Valuable Marketing Tool?**

A “Coming Soon” listing refers to a property that is not yet ready for showing or sale. According to NAR’s Associate Counsel, Chloe Hecht, Esq., a ““Coming Soon” [listing] can be a legitimate advertising technique, allowing the owners more time to complete repairs, pack, or otherwise prepare the property for showing or sale. A legitimate Coming Soon listing should truly be unavailable for purchase or showing.” [See “*The Latest on ‘Coming Soon’ Listings*”, Realtor® AE Magazine (July 28, 2017) at <https://bit.ly/2D8xcAx>]. Ms. Hecht points out that “[s]ometimes, however, ‘coming soon’ advertising is used to circumvent the MLS, market the property to a select group of people, or pressure a buyer to use the listing broker for the transaction, which not only breaches real estate professionals’ ethical duties to clients but may violate real estate license and consumer protection laws.” They can also be violative of the fair housing laws if properties are not made available to everyone. Real estate licensees must use extreme care when employing these techniques and must be sure to adhere to their legal, fiduciary and ethical obligations.

According to NAR’s General Counsel, Katie Johnson, Esq., “...a broker’s decision to market a seller’s property as ‘coming soon’ must always be made based on the client’s informed determination of what best serves the client’s interests.” [See ““*Coming Soon*’ – *Is it in the Seller’s Best Interest?*”, by Katie Johnson, Esq., Realtor® AE Magazine (June 16, 2014) at <https://bit.ly/2DawliM>]. Ms. Johnson recommends that the “[t]he first important step in advising a seller-client on whether to advertise a property as ‘coming soon’ is to identify the client’s best interests, as defined by the client”, **not** the broker or agent. The client must be informed of the “pros” and “cons” relating to same and of the “limited” marketing reach. Ultimately, if an agent fails to act in the client’s best interest, it would clearly be a violation of state real estate license laws and regulations, MLS policies, and the Realtor® Code of Ethics.

At the Conference, NAR Associate Counsel, Charlie Y. Lee, Esq., pointed out some of the proper uses and best practices recommended by NAR relating to a “Coming Soon” listing:

- Assists the Seller with generating market interest in the property.
- Provides the Seller with additional time to prepare the property to be listed on the MLS.
- A broker must present a true and accurate picture of the status of the property.
- All buyers must be treated equally and fairly.

- Are only for properties under a signed listing agreement.
- There must be a compelling reason to justify utilizing this technique, including ensuring that it will be in the best interest of the client.
- Obtain the client's informed consent in a thoroughly documented written agreement.
- Restrict showings and bids equally to all potential buyers.
- Any "coming soon" advertising must comply with all state laws, regulations and MLS rules and regulations.

It is very common nowadays to see "coming soon" listings all over social media forums like Facebook and Twitter, and brokers and agents must be sure to adhere to all of New York's Department of State advertising regulations as well as the rules and regulations of the multiple listing service, if they are a member of same, and the Realtor® Code of Ethics, as applicable.

The following are the improper uses of "coming soon" listings and/or reasons to avoid using a "coming soon" listing, as highlighted by Mr. Lee:

- That the property is ultimately never listed on the MLS.
- The property is only shown to a select few or group of people.
- It is utilized without the consent or knowledge of the client.
- There is no signed listing agreement.
- Accept bids or offers before the advertised time expires.
- There is no logical or reasonable reason to utilize the "coming soon" listing marketing technique.
- Compel sellers to accept offers from a buyer who is represented by the seller's own agent.

### **Pitfalls of the "Pocket Listing"**

According to NAR, a "...pocket listing, off-MLS, or 'office exclusive' listing as it is sometimes called, generally refers to a listing in which an agent has a listing agreement and the seller does not authorize the placement of the listing on the MLS." [*See* "Law & Policy: Professionalism and Pocket Listings", by Leslie Muchow, Realtor® AE Magazine (March 5, 2014) at <https://bit.ly/2F5u9vA>]. The owner of the property must expressly "opt-out" and execute a form confirming that the owner acknowledges and agrees that the property not be listed on the multiple listing service ("MLS"). Most MLSs require that any property which is the subject of a listing agreement must be placed on the MLS within forty-eight (48) hours after receiving a signed listing agreement from the owner. The agent will be subject to fines and penalties if he or she fails to abide by the MLS's rules and regulations.

While the use of "pocket listings" is not illegal, Ms. Muchow explains that the "[l]egal risk concerning pocket listings arises when agents or brokers keep listings off the MLS for reasons that are not in the best interest of the client. For example, unlike MLS listings, pocket listings are more likely to result in the agent representing the seller and the buyer, and the outcome would be a higher commission for the agent." While this is not illegal or unethical per se, Ms. Muchow indicates that "...if the prospect of a double commission is the reason an agent suggests a pocket listing to the client, then this could violate the Code of Ethics, MLS rules, and laws in most states."

Therefore, the brokers and agents need to be very careful when agreeing to a “pocket listing” arrangement because in many, although not all instances, the seller is not aware of the potential limitations and the risk that the agent’s fiduciary duties to the client may be compromised.

Again, it is important to note that the “pocket listing” could be a viable option and useful tool, especially where a seller requests that it be utilized due to privacy concerns or other legitimate reasons, which may include the seller’s desire for a speedy transaction, control over the number of people who access the property, or a seller’s desire to test the price of the home in the market. Nevertheless, the agent must clearly discuss and explain all of the pitfalls and issues surrounding the use of a “pocket listing” and must ensure that no fiduciary or other duties are violated or compromised. Ms. Muchow explains that:

“When an agent recommends a pocket listing to a client...[t]he agent should go one step further and be sure that the seller understands the benefits being waived by not including the property on the MLS. In general, the MLS offers sellers the greatest exposure of their property, allowing it to be actively marketed to every real estate agent belonging to that MLS. In addition, by listing on the MLS, the property may be downloaded to and displayed on third-party advertising sites used by the general public. Withholding a property from listing on the MLS significantly diminishes these marketing opportunities, which may result in reaching fewer potential buyers and a longer time from listing to selling the property, and, perhaps at the core of most sellers’ minds, it may not yield the highest price for the property.”

There has been a recent growth in the number of agents and brokers utilizing pocket listings and “whisper listings” for exclusive, high-end properties [*see* “*The Secret’s Out: New Portal to Display Whisper Listings*”, by E.B. Solomont, *The Real Deal* (July 28, 2018) at <https://bit.ly/2Ov2hAw>; and “*Secret Listings Soar*”, by E.B. Solomont, *The Real Deal* (May 1, 2018) <https://bit.ly/2ASiFaN>]. These “off-market deals” create a buzz and “exclusivity” around their businesses and many wealthy clients are attracted to these agents because of this. Again, while these types of techniques are not per se illegal or unethical, if the listings are purposefully kept off the MLS “...in order to boost the brokerage’s reputation, not to benefit the seller-clients, the result can be a violation.”

### **Fiduciary and Ethical Duties of the Real Estate Professional Revisited**

Under Section 443 of the Real Property Law, real estate licensees owe their clients fiduciary duties, which include the duties of reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and a duty to account. In essence, being a fiduciary requires that a broker place the interests of the broker's client above her or his own. Therefore, when a real estate licensee uses the techniques above, a seller may allege that the agent breached one or more of the fiduciary duties, particularly if an agent fails to fully disclose all of the negatives relating to the use of a “pocket listing” or the “coming soon” listing, such as not being able to obtain the highest and best price for the client or that the marketing and exposure of the property will be restricted or limited.

Moreover, when a broker chooses to become a Realtor®, the broker becomes contractually obligated to abide by NAR’s Realtor® Code of Ethics. Article 1 of the Code of Ethics is

particularly significant and provides:

“When representing a buyer, seller, landlord, tenant, or other client as an agent, Realtors® pledge themselves to protect and promote the interests of their client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve Realtors® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, Realtors® remain obligated to treat all parties honestly.”

While Article 1 clearly emphasizes the importance of the agent's fiduciary duty to the client, the agent is further obligated to treat all parties honestly. Article 3 of the Realtor® Code of Ethics additionally requires that “Realtors® shall cooperate with other brokers except when cooperation is not in the client's best interest.” Standard of Practice 3-8 states that: “Realtors® shall not misrepresent the availability of access to show or inspect a listed property.” Therefore, making the recommendation to a client to use or agree to a “pocket listing” or “coming soon” listing, which is done with the intention of limiting access to the property only to those agents within the same brokerage firm or indicating that the property is not available yet to be shown, but then agents in the firm are, in fact, permitted to view or show the property, would not constitute fair and honest dealings with all parties involved.

Section 13(a) of the Restatement of the Law of Agency explains that: “[f]iduciaries are held to the highest amount of good faith, are required to exclude all selfish interests, are prohibited from putting themselves in positions where personal interest and representative interest will conflict, and must, in any direct dealing with the principal, make full disclosure of all relevant facts and give the latter an opportunity to obtain independent advice.” Real estate licensees owe their clients fiduciary duties and statutory duties under state licensing laws and regulations. Additionally, if a Realtor®, MLS rules and regulations and the Realtor® Code of Ethics must be adhered to and followed. “Pocket Listings” and Coming Soon” listings should be used only in very limited circumstances and when they are, agents need to make sure that the interests of their clients are placed first and should ensure that their clients are fully informed and expressly consent to same.

\* \* \* \*

Legal Column author John Dolgetta, Esq. is the principal of the law firm of Dolgetta Law, PLLC. For information about Dolgetta Law, PLLC and John Dolgetta, Esq., please visit <http://www.dolgettalaw.com>.

The foregoing article is for informational purposes only and does not confer an attorney-client relationship.