

I Told You That I Wanted A View of the City!

By John Dolgetta, Esq.

In a recent decision, *Widlitz v. Douglas Elliman, LLC*, (see <https://bit.ly/2AZ2BTH>), the plaintiff commenced an action against her real estate broker and attorney based on a variety of claims, such as breach of fiduciary duty, negligent misrepresentation, and fraudulent misrepresentation, because the newly constructed condominium unit she was in contract to purchase did not have views of New York City but rather views of the walls of neighboring buildings. Both the real estate broker and attorney moved to dismiss the lawsuit. The Supreme Court (New York County) upheld the motion to dismiss made by the attorney, however, the Court held that there was a sufficient basis for the lawsuit to move ahead against the plaintiff's real estate broker.

The Facts

The plaintiff was the purchaser under a contract for the sale of a new construction condominium unit in New York City. The Court points out that "...it was very important for her to have views." When construction of the building was ultimately completed, the purchaser's unit ended up facing a pre-existing building that had been there since 1929. The plaintiff indicated that when she went to visit the property for the first time, before entering into contract, she was not able to determine where the location of the unit would be.

However, according to the Court's records, she "insisted" that she had a conversation with an agent from the brokerage firm the following day and "noted that she was relying on representations about the subject apartment's city views and that [the] agent confirmed the apartment had city views." The plaintiff claimed that she was told to visit the firm's website where there were photos taken by a drone of actual views from the apartment. Soon thereafter the plaintiff submitted an offer which was accepted. The plaintiff subsequently entered into contract for the apartment by way of an assignment, on September 11, 2014, of an existing contract that another purchaser had entered into with the seller. The plaintiff engaged an attorney to whom she was referred by her agent and claims that she also informed the attorney of her concerns about having city views.

The contract which was ultimately assigned over to the plaintiff had been in effect since June, 2013, and originally was scheduled to close in July, 2015. However, there were several delays and an actual closing date was not set until March 23, 2016. It seems odd, but the records reflect that it was on this date that the plaintiff first visited the apartment and when she arrived to the unit she stated that "...only brick walls could be seen when looking out of every room in the apartment." The plaintiff claimed she was told many times throughout the nearly two years of being in contract that her unit would have full city views. Although the plaintiff refused to close on March 23rd, she did eventually close, but fired her attorney a few days after the failed March 23rd closing.

The plaintiff ultimately sued the attorney for legal malpractice and breach of fiduciary duty and sued her real estate broker for breach of fiduciary duty, fraudulent misrepresentation, and

negligent misrepresentation. Both the attorney and the broker moved to dismiss the plaintiff's lawsuit. The Court granted the attorney's motion for dismissal but did not grant the broker's motion to dismiss. The plaintiff also moved for summary judgment against the broker on the negligent misrepresentation claim and was successful.

Fraudulent Misrepresentation vs. Negligent Misrepresentation

The plaintiff sued the broker for both fraudulent misrepresentation and negligent misrepresentation. The Court explains that in order for the plaintiff to succeed in an action for fraudulent misrepresentation, the plaintiff must establish that (1) there was a *material* misrepresentation of a fact; (2) the defendant knew or had knowledge that the fact or information was false; (3) the plaintiff *justifiably* relied on the false fact or information; and (4) the plaintiff suffered damages as a result.

The broker argued that the plaintiff relied on representations made to her by the attorney and that it was on the advice of counsel that she entered into the agreement. The broker also claimed that there was no intent or knowledge that the fact (i.e., that there would be city views) was false because "...the agent did not know that the view would be obstructed and was just as shocked as the plaintiff was upon discovering there was no city view."

The Court, however, held that the broker's motion to dismiss could not be granted because there were sufficient issues of fact presented which would need to be reviewed and ultimately decided by a jury. The Court pointed out that some of the evidence presented established that after the plaintiff commenced the lawsuit a change was made to the listing by an agent where the words "City Full" were deleted after "View:". There was also an email from the agent "conceding" that the "listing 'misrepresented' and 'mis-advertised' the apartment as having full city view."

Negligent Misrepresentation

As for the plaintiff's claim against the defendant for negligent misrepresentation, the plaintiff moved for summary judgment against the defendant. The Court explained that for a plaintiff to establish a claim for negligent misrepresentation, the plaintiff is required to show "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." A key difference between fraudulent misrepresentation and negligent misrepresentation is that the defendant does not have to have specific knowledge or intent that the fact or information is false. The mere fact that the information is incorrect is sufficient.

The plaintiff claimed that there was a "special" relationship because she had engaged the agent to represent her on this real estate transaction and to provide the plaintiff with true and accurate information. In addition, the plaintiff claimed that she reasonably relied on the misrepresentation and incorrect information regarding full city views and, that based on this, she proceeded with the purchase of the unit. The Court points out that there was no question as to the misrepresentations and incorrect information provided to the plaintiff by the broker and the agent. Specific views from the apartment were contained in advertisements, the brokerage firm's website, and drone photographs, as well as in emails from the agent to the plaintiff.

One email from the agent to the plaintiff cited by the Court states the following: “Your unit has full city and skyline views and there is always a premium on a view”, and another states, “You are really going to love your apartment especially since it has a view!” It is clear here that whether or not the agent intentionally made certain representations regarding the view, in the end, they turned out to be incorrect and the plaintiff relied on this information. Based on this the Court ruled in the plaintiff’s favor and granted summary judgment. It is very important for all agents, before any statement is made regarding any fact or information relating to a property, to ensure that it is accurate, correct and truthful. Article 12 of NAR’s Code of Ethics states, in part, that “REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing and other representations.”

Breach of Fiduciary Duty

The defendant’s motion to dismiss the plaintiff’s claim for breach of fiduciary duty was also dismissed. Again, the Court determined that there existed sufficient triable issues of fact for a jury to decide whether or not the defendant breached the fiduciary duty owed to its client. The Court explained that in order to establish a breach of fiduciary duty the plaintiff must establish “...that (1) the defendant owed [the plaintiff] a fiduciary duty, (2) defendant committed misconduct, and (3) [the plaintiff] suffered damages caused by the misconduct.” Here the first element is clear, the defendant was engaged by plaintiff to be her real estate agent and under the law, the defendant must act in the best interest of the plaintiff and owes the plaintiff critical fiduciary duties.

Section 443 of the Real Property Law of the State of New York defines fiduciary duties as requiring reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and a duty to account. A fiduciary is a person or entity who or which acts on behalf of another and is a role having one of the highest standards known in law. Fiduciaries include guardians, trustees, executors, officers, directors, attorneys, and persons acting in an agency capacity, such as real estate agents. Like all fiduciaries, real estate agents have the duties of undivided loyalty (except in the instance of a dual agency relationship), confidentiality, full disclosure, obedience and the duty to account. A real estate agent acting in a fiduciary capacity is required to act in good faith and exercise a prudent “duty of care, skill and diligence” when acting on behalf of the individual being served.

In *Widlitz*, the plaintiff alleged that once the defendant provided her with “false” and “inaccurate” information regarding the views from the apartment, the defendant breached its fiduciary duty. The Court points out that the defendant claimed it was “shielded” from any liability because once the issue regarding the view was discovered, the plaintiff needed to consult with her attorney since these were legal, contractual issues. The Court made it clear that “[o]ne does not get off the hook for misconduct just because someone else gets a lawyer.” Again, the Court explained that since there were sufficient “triable issues of fact” for a jury to consider relating to the broker’s and agent’s misconduct, such as the misleading photos and ads, and the emails, the defendant’s motion to dismiss must be denied.

Agents Must Be Very Careful When Describing a Property and Placing Ads

Section 175.25(a) defines “[a]dvertising” or an “advertisement” as a “...promotion and solicitation related to licensed real estate activity, including but not limited to, advertising via mail, telephone, websites, e-mail, electronic bulletin boards, business cards, signs, billboards, and flyers.” For purposes of the DOS Regulations, although not specifically mentioned, all social media sites are included within the above definition and are treated as websites.

Any details provided to the client, whether in an ad or by email, can subject a real estate agent and broker to liability. While the *Widiltz* case has yet to be resolved, it is clear that specific statements as to location of an apartment, views, or any characteristics of the property or its surroundings must be confirmed in advance or simply not made. Whether the agent knew that the specific views were not going to be offered or simply made an error, the agent will be liable for those errors. It is always recommended that agents and brokers err on the side of caution before including any statement as it relates to any property being marketed or sold.

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