

Latest from Court of Appeals - Scope of Duty Owed by a Realtor to a Seller

By Leo K. Barnes Jr.

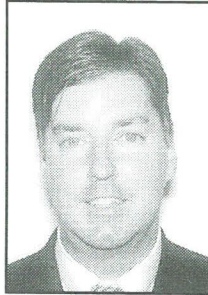
In our June 2009 column entitled *Caveat Broker: Avoiding Unenforceable Agreements to Agree*, we reviewed the prerequisites to a viable and enforceable brokerage commission agreement.

This month we explore the scope of exclusivity owed by a broker to a seller in light of the recent decision by the Court of Appeals in *Douglas Elliman LLC v. Tretter*, 2012 WL 5833609 (2012).

In *Douglas Elliman LLC v. Tretter*, plaintiff Douglas Elliman Real Estate (Douglas Elliman) brought suit against

defendants Franklin and Sheila Tretter (the Sellers) for failure to pay a broker commission on the sale of their cooperative apartment. According to the decision, the Sellers retained Prudential Douglas Elliman Real Estate to sell their apartment located in Manhattan, wherein Barbara Lockwood served as the broker for the listing. The brokerage agreement stated that the Sellers

would be required to pay a 6 percent commission on the sale of the apartment. After the brokerage agreement was signed,



Leo K. Barnes

Lockwood prepared the listing and began to show the apartment at open houses and by appointment. In November 2008, a potential purchaser made an offer on the apartment, which was accepted by the Sellers, subject to the cooperative board's approval.

During one of the open houses at the seller's apartment, Lockwood met Taurie Zeitzer.

After the initial bidder's offer was accepted, and while the bidder was providing the required information to secure the cooperative board's approval, Lockwood communicated with Zeitzer and her husband via email and showed the Zeitzers five other properties, including four properties listed through other agencies. In addition, Lockwood discussed 12 other apartments with the Zeitzers.

Ultimately, the Sellers' deal with the initial bidder fell through in late November 2008. A few weeks later, Lockwood again showed the apartment to the Zeitzers. Subsequently, the Zeitzers made an offer of \$1.4 million, and in December 2008 the Sellers accepted the offer and entered into a contract with the Zeitzers (the Buyers) for the purchase of the apartment.

Prior to the Sellers and the Buyers

reaching an agreement, Lockwood sent the Sellers a deal sheet which listed a \$70,000 brokerage commission (5 percent of the \$1.4 million). Douglas Elliman later confirmed in writing that the brokerage fee on the deal sheet was correct and that it would reduce its brokerage commission from 6 percent to 5 percent if the Sellers sold the apartment to the Buyers, which ultimately occurred. Further, the contract between the Sellers and the Buyers listed "Prudential Douglas Elliman (Barbara Lockwood)" as the broker, and stated that it was the Sellers' sole responsibility to pay the broker's commission.

The \$70,000 commission was due and payable at closing, however, Lockwood was unable to attend the closing and the \$70,000 was placed in escrow. After the \$70,000 was not turned over, Douglas Elliman filed suit against the Sellers to recover its broker commission on the sale. In their Answer, the Sellers alleged that Douglas Elliman was not entitled to a commission because Lockwood had breached her fiduciary duty to the Sellers by acting as a dual agent of the buyers.

The Sellers moved to dismiss the Complaint, and Douglas Elliman cross-moved for summary judgment on its claim to obtain the commission. The trial court denied both motions finding that there

(Continued on page 22)

