



From the Law Office of Ronald H. Gitter, Esq.

Addressing the Realities of Residential Real Estate

September 13, 2010

Dual Agency Disclosure Law Has Been Revised

The Law is Changing



Effective January 1, 2011, a broker must obtain the written consent of the buyer and seller in order for the broker to act as a “dual agent” on behalf of both parties in a co-op or condo transaction. Previously, only “informed consent” had to be obtained in New York City for these transactions, and written consent was not required. In addition to requiring written consent, the revised disclosure law allows the broker to obtain “advance” consent to act as dual agent (which I will touch on shortly) . The disclosure requirement is somewhat

confusing, but at the end of the day, requiring the broker to obtain written consent to dual agency will ultimately benefit the consumer. All that being said, what exactly is “dual agency” and is it a good idea or a bad idea?

The Broker’s Duty

Like many agency relationships, the agent (that is, the broker) owes the principal (that is, the co-op or condo buyer or seller) a duty of loyalty, confidentiality and trust. The agent has a fiduciary obligation to act in the best interests of the principal, and only for that principal. In this case, the listing broker for an apartment does everything he or she can, to obtain the best price for the apartment under existing market conditions. The buyer’s broker on the other hand, schleps the buyer around from apartment to apartment until the buyer finally finds something that works. Once that happens, the buyer’s broker goes back and forth with the listing broker until there is “a meeting of the minds” on price and all other relevant terms of the transaction. Each broker works exclusively for the best interest of his or her client. So far, so good.

It’s Complicated

We live in a world of mega-companies and residential brokerage is no exception. In many cases, the listing broker for a particular co-op or condo, works for the same brokerage company as the broker representing the party making an offer on the apartment. When that happens, the brokers may be exercising their required fiduciary responsibilities as the law of agency intends, but dual agency is deemed to exist as there is only one brokerage company

involved in the transaction. This inherent conflict of interest is resolved when the seller and buyer both consent to what the revised law calls “dual agency with a designated agent.” As mentioned above, the revised law now allows for consent to dual agency with a designated agent to be given in advance, so that the broker does not have to obtain written consent each time this type of conflict arises (that is, different brokers, but the same brokerage company). As so many deals fall into this category in New York City, particularly in Manhattan, allowing this “advance consent” makes sense and does not change the landscape of how transactions actually work. However, having the same agent act for both buyer and seller, simply called “dual agency”, is something completely different.

Who’s Your Broker?

I can’t tell you how many times over the years I’ve had to explain to a buyer that the seller’s broker was acting only in the interests of the seller and not the buyer. For some reason, it’s hard for buyers, particularly first time buyers, to accept the fact the seller’s broker has no duty to the buyer whatsoever. Being nice does not equal loyalty. For that reason, the buyer is almost always better off having his or her own broker who will be acting solely in the best interests of the buyer. Somehow, the concept of one agent acting as the broker for both parties was introduced into the residential real estate environment and it is now legal in a majority of states. When one agent acts as broker for both parties, at the time the dual agency is consented to by the parties, the broker will explain to each party that the duty of loyalty and fiduciary obligation which the broker would ordinarily owe to the principal will be compromised in order to facilitate the transaction. As a result, the broker will not be able to represent each party to the same extent that would be possible if the broker were only acting for one of the parties. Whether your average buyer or seller truly understands the significance of this distinction is questionable.

Dual Agency is a Bad Idea

I’m sure many brokers would disagree, particularly on economic grounds as the commission is not split with another broker in a “direct deal”, but I think that dual agency (where one person acts for both parties) is a horrible idea and should be avoided at all costs. Particularly in the difficult real estate market we are experiencing today, each party needs the best advice possible, not a compromised version of the best advice. Not facilitation, but representation. Folks can have lots of money to buy an apartment, but can be totally unsophisticated about the process and pitfalls of a particular transaction. When a broker can’t disclose a material fact because it would violate the broker’s duty to one of the parties, or if confidentiality could be impacted, that’s not a good result. Each party needs direct representation from someone who will only act in his or her best interests rather than someone who will coax each side to the finish line. There are situations where there is already a meeting of the minds between the buyer and seller on all of the material issues

and a broker acting as dual agent will facilitate the completion of the transaction. In my experience, however, those situations are few and far between.

Residential Reality: When it Comes to Dual Agency, Proceed with Caution

Dual agency is a confusing and complicated topic to get your hands around, at best. So let's sum up: Allowing brokers to act as dual agents where the same brokerage company is on both sides of the transaction (called "dual agency with a designated agent"), is a necessary evil that works well most of the time. Granting consent in advance to that type of dual agency makes sense. When it comes to the same person acting as broker for both the buyer and the seller (just called "dual agency"), proceed with extreme caution and avoid that conflict if at all possible. Expect to see brokers breaking out the new dual agency consent form at the commencement of the brokerage relationship. Both buyers and sellers should review the request for consent to dual agency carefully before anything gets signed.

For More...

A few links on the subject that are worth the effort:

[Josh Barbanel](#) Wall Street Journal, September 2, 2010

[Malcolm Carter](#) Service You Can Trust, September 1, 2010

[Sandy Mattingly](#) Mahattan Loft Guy, September 1, 2010

[Real Estate Board of New York](#) Press Release, August 31, 2010

© 2010 Ronald H. Gitter, Esq. All Rights Reserved

110 East 59th Street, 23rd Fl., New York, NY 10022 Tel: 212.826.2405

PLEASE READ: [Lawyer Advertising Compliance and Terms of Use](#)