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Liability for misrepresenting zoning designations in R.E.

August 08, 2013 - Front Section

Massachusetts real estate brokers can now be sued and held liable for incorrectly representing the zoning designations of properties they list - even where they rely on information supplied by sellers - as a result of a recent decision by the Mass. Supreme Judicial Court (SJC).

In *DeWolfe v. Hingham Centre, Ltd.*, the SJC ruled that real estate brokers have a legal duty to exercise reasonable care when making representations concerning a property's zoning designation. The court further held that simply relying on information provided by a seller will not insulate a broker from liability if the circumstances and other information available to the broker make such reliance unreasonable.

As discussed below, this decision significantly expands the potential exposure of brokers to litigation for alleged misrepresentations concerning the properties they list.

Not In the Zone

The buyer in *DeWolfe* alleged that the licensed real estate broker misrepresented the zoning classification of property he purchased in Norwell, Mass. in 2004. The buyer claimed to have relied on the broker's written representations that the property was zoned as "Business B," which would have allowed the buyer to operate a business at the property.

The written representations consisted of the multi-listing agreement and newspaper advertisements placed by the broker. Both sources described the property as having a "Business B" zoning classification. Only after the buyer purchased the property did he learn that the property was actually zoned as "Residential B." This zoning classification prevented the buyer from converting the two-family residence and opening his hair salon business at the property.

The buyer sued the sellers of the property, as well as the sellers' licensed broker and the brokerage firm that employed her. Complicating matters for the broker, the sellers denied telling the broker that the property had such a classification, claiming instead they told her it was zoned "Residential B," which allows for a limited home-based business connected to the residence.

Before trial, a Superior Court judge granted the request of the broker and her firm to dismiss the case. The buyer appealed the decision, and the SJC ultimately vacated the summary judgment in favor of the broker and sent the case back down for a trial.

The SJC's Reasoning

The Mass. Association of Realtors and the Greater Boston Real Estate Board participated in the appeal by filing "friend of the court" briefs. Supporting the broker and her firm, the associations argued that allowing the buyer's claims to proceed to trial would impose a duty on brokers to verify the zoning classification of the properties they market, a matter which is generally outside the scope of brokers' knowledge and expertise.

Imposing this duty, they argued, would transform a broker from a facilitator of the transaction to a guarantor of the information provided by the seller. Such a change in rules, together with the

increased liability exposure, would discourage sellers' brokers from gathering information from their clients and limit the amount of information ultimately passed along to buyers.

The SJC recognized that a broker ordinarily may rely on information provided by a seller in making representations about a property, but added that a "broker is not insulated from all liability merely by virtue of such reliance."

Rejecting the broker's and the associations' arguments, the court concluded that a broker has a duty to exercise reasonable care in making representations concerning a property's zoning designation and may be held liable for negligent or intentional misrepresentations concerning such zoning classifications.

According to the SJC, courts must look to whether the broker "failed to exercise reasonable care or competence in obtaining or communicating the information." The SJC explained that where it is reasonable in the circumstances for a broker to rely on information provided by a seller, a broker will not be liable for conveying that information to prospective buyers without conducting further investigation. Where, however, it is unreasonable in the circumstances for a broker to rely on information provided by a seller, the broker has a duty to investigate further before conveying that information to prospective buyers.

The SJC noted that a jury in the DeWolfe case could find that the broker failed to exercise reasonable care in making representations as to the zoning status of the property. For example, a jury could find that the sellers told the broker that the property was zoned "Residential Business B," a zoning designation that did not, in fact, exist in Norwell, and that the broker advertised the property as zoned "Business B" instead. A jury could also conclude that the broker was aware of no prior business use of the property, and that the broker only observed houses - not businesses - adjoining the property on either side.

Based on this evidence, the SJC determined that the broker was not entitled to summary judgment because a jury could find that the broker "was on notice that the information provided by [the seller] might be unreliable and that [the broker] acted unreasonably in representing the property as zoned 'Business B' without first conducting further investigation."

Construction of P & S Language

The broker, her firm and the associations also argued that the buyer was barred from recovery under the terms of the Purchase and Sale Agreement, which contained this clause:

The buyer acknowledges that the buyer has not been influenced to enter into this transaction nor has he relied upon any warranties or representations not set forth or incorporated in this agreement or previously made in writing, except for the following additional warranties and representations, if any, made by either the seller or the broker(s): NONE. [Emphasis added].

The buyer argued that the "warranties and representations" clause barred only verbal representations, an interpretation that the broker and associations argued was erroneous. They asserted that such an interpretation eviscerated the purpose of the clause and "turns on its head the interpretation relied upon by parties...and their attorneys for more than 30 years."

The SJC, however, sided with the buyer's construction of the provision, holding that the clause's use of the word "not" in the middle of the clause was intended to apply to both conditions that follow it. In other words, the clause permits a buyer to rely on prior written warranties and representations not set forth or incorporated in the agreement. The clause, therefore, did not relieve the broker and her employer of liability for the written misrepresentations that appeared in the newspapers and MLS document.

Avoiding Litigation and Liability

Although the SJC in *DeWolfe* noted that a broker still may generally rely on information supplied by a seller without requiring further investigation, its decision nevertheless undermines that general proposition and, instead, increases brokers' exposure to lawsuits arising from representations made by sellers, at least with respect to zoning classifications and permitted uses of the properties they list.

Increased exposure to claims of misrepresentation should motivate brokers to take affirmative measures to protect themselves. Questionable information received from sellers should always be discussed and, in many instances, investigated further before marketing a property.

Most importantly, buyers should always be advised in writing to perform their own investigation into the applicable zoning laws and permitted uses of listed properties, and to consult with their own attorneys, real estate agents and home inspectors concerning such matters. While liability exposure cannot be eliminated, a proactive approach by brokers can reduce it.

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