Dual Agency

A Hazardous Real Estate Practice

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"DUAL AGENCY" is a practice used routinely in many residential real estate transactions, and the liability risks often are not recognized by the parties or the real estate licensees (both agents and brokers). Many licensees are ill-equipped to know how to identify a conflict between the interests of the buyer and the seller after the Dual Agency Agreement has been signed and, when such a conflict happens, how to proceed.

The potential hazard of dual agency relationships has been recognized in the industry for years but those warnings have not necessarily been heeded. According to a survey of legal issues conducted by the National Association of Realtors® (NAR) in 2011, 57% of respondents stated that the issue of dual agency is the basis for a "moderate" or "high" number of disputes, and more than 83% placed the issue among their top three current legal issues. The survey disclosed a belief that agents and brokers do not understand dual agency. When the NAR survey was conducted again in 2013, breach of fiduciary duty lawsuits accounted for the largest single number of residential real estate-related court cases, including conflicts over the duties owed in a dual agency relationship.

An excellent example of this legal minefield is the recent case of *Martha v. Black v. Stouffer Realty, Inc. & Relic*, Summit Cty. Common Pleas Case 2010-11-7671. Conflicts arose between the interests of the seller of a home in Richfield and the buyer after they had signed a Dual Agency Agreement. These conflicts served to posture the Agent on the side of Seller and adverse to Buyer.

Eventually the transaction fell through. Seller, disgruntled, sued Buyer for breach of contract. Buyer in turn sued Agent and Broker for fraud, breach of fiduciary duty and breach of the Dual Agency Agreement. The jury returned verdicts against Agent and Broker on all three counts and the court entered judgment on the three verdicts. This judgment was affirmed on appeal. *Black v. Stouffer Realty, Inc. & Relic,* 9th Dist. C.A. 26550 (Dec. 26, 2013).

The Ohio Department of Commerce Division of Real Estate publishes a standardized form that defines "dual agency" and provides a list of actions that the licensee shall and shall not take, outlined by R.C. 4735.57(B). A dual agent may not, among other things, advocate or negotiate on behalf of either party or engage in conduct that is biased on behalf of either party.

By signing the Real Estate Purchase Agreement, Seller and Buyer had expressed their common objective to conclude the transaction. Agent thus perceived her fiduciary duty to the parties as doing whatever was necessary to consummate the transaction. But a dual agent's obligation is more complex than this. Agent's misperception resulted in considerable conflict, trouble and expense for all concerned — particularly for Agent and her Broker.

The transaction was peppered with mistakes by Agent from the beginning. Buyer testified that only after she had submitted her initial offer on the Purchase Agreement form did Agent present Buyer with the Dual Agency Agreement form, stating authoritatively "Oh, I have this form you have to sign. This is so I represent both the buyer and seller fairly." Buyer was under the impression that signing the document was a requirement — not a choice.

By this point in time Agent should have presented Buyer with the "Consumer Guide to Agency Relationships." OAC 1301:5-6-05; R.C. 4735.56(D). At trial Agent admitted that failing to give the Consumer Guide to Buyer until weeks later was wrongful.

Buyer's initial offer was $500,000, with the deal being contingent on her ability to sell her present home in Green. Seller formulated a written counteroffer of $515,000, and delivered this counteroffer to Agent. However, Agent never presented the $515,000 counteroffer to Buyer. Agent instead presented a different counteroffer to Buyer four days later, after Agent and Seller secretly conferred with each other. The revised counteroffer provided for a purchase price of $510,000, with Agent waiving $5,000 of her commission. It also provided that the contingency clause would be removed. When Buyer accepted the revised counteroffer she did not know that the original counteroffer had ever existed. Agent concealed the initial counteroffer from Buyer and suggested the revised counteroffer so as to accommodate Seller's afterthoughts about the contingency clause.

An agent in a dual agency relationship may not engage in any act of advising on or advocating the price of the property — no matter how well intentioned. Here, Agent appreciated how important it was to Seller to remove the contingency clause but ignored how important the clause was to Buyer. Agent was duty-bound to convey to Buyer, as Buyer's agent, Seller's original counteroffer. Had Agent done so, Buyer could have accepted the purchase price of $515,000 and retained the ability to terminate the transaction if she was unable — in a soft housing market — to sell her present home. Agent presumably understood that the contingency clause was desirable to Buyer and undesirable to Seller. Agent believed that her willingness to waive some of her commission to facilitate the transaction was commendable; when in fact any effort by a dual agent to influence an agreement on the price terms is prohibited.

Another problem was the physical appearance of the Purchase Agreement. Agents often direct the parties to hand-write their offers and counteroffers in the margins and spaces of the original purchase agreement form. The final version of the Purchase Agreement in this case was virtually indecipherable due to the numerous revisions that had been scribbled throughout the document. The quagmire of notations created ambiguity as to whether Buyer was to make a down payment of $148,000 or only $103,000.

Once the parties agreed to the terms of the deal in principle Agent could have prepared and had the parties sign a clean, readable copy of the Purchase Agreement. This is what most lawyers would do if finalizing a contract containing countless revisions. Had Agent done so the ambiguity would have come to light and the parties could have resolved it early on.

The ambiguity as to the down payment, which Agent could have prevented, was a major reason why Seller sued Buyer for breach of contract.

Agent also crossed the line by trying to facilitate financing. Because the purchase of the property was no longer contingent on the sale of Buyer's home, Buyer sought to obtain a mortgage loan. The bank's appraisal of the property came back at $25,000 less than the $510,000 price in the Purchase Agreement. Agent informed the loan officer that she disputed the initial appraisal. Agent requested that the initial appraisal be appealed and supplied the loan officer with several additional comps for consideration. But Agent failed to obtain Buyer's permission to pursue this appeal.

As a result of Agent's appeal, a revised appraisal established a value of the property that was even lower than the first appraisal — $58,000 less than the purchase price. The loan officer informed Agent that the revised appraisal was controlling. Agent protested and suggested that yet a third appraisal be obtained — again without Buyer's authorization.

At this point it was in Buyer's best interest to abandon the anticipated deal. Buyer had no motivation to pay $510,000 for property that appraised for $58,000 less. A loyal advocate would have helped Buyer find a permissible way to terminate the contract rather than continue to pursue the transaction aggressively. The positions of the parties were irreconcilable; Seller wanted to keep the deal and Buyer wanted to kill the deal. Agent could no longer serve the interests of both sides.

The bank eventually denied Buyer's loan application based on the low appraisals. Agent, still oblivious to the concept of neutrality, promptly put Seller's property back on the market and served as dual agent for Seller and the eventual purchaser of the property. When all was said and done, Seller ended up with the Agent and Buyer ending up with a Summons. There were many times that Agent should have informed Seller and Buyer of a conflict and that she was unable to proceed in a manner that was unbiased as to both parties. This case is an important teaching tool for brokers and agents as to their obligations to both sides after the Dual Agency Agreement has been signed. It demonstrates the sobering fact that the principles of dual agency sometimes require the licensees to notify the seller and buyer of their right to terminate or revoke the agency relationship. See, e.g., R.C. 4735.57(B)(7), R.C. 4735.71(A) and R.C. 4735.72(E)(1).

Dual agency is not an effortless maneuver to score a double commission; it fundamentally changes the agent's relationship with both seller and buyer. For prospective sellers and buyers, this case illustrates why they should not casually consent to a Dual Agency Agreement that an agent has asked them to sign. The case demonstrates that brokers have a responsibility to ensure that their agents understand the Dual Agency Agreement well enough to explain it to sellers and buyers and to implement it conscientiously.

Lawyers ordinarily refuse to enter into dual representation relationships with potentially adverse parties; and once in such a relationship they proceed with considerable caution. In matters involving dual agency, the real estate sales industry would do well to emulate the laudable principle of restraint that is exercised by the legal community. Real estate licensees, for the benefit of their clients as well as themselves, should not view the Dual Agency Agreement as a routine practice but, rather, a contract laden with serious risks that may outweigh its potential value.

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