



The Monarch News Carrier*

"For the Serious Real Estate Professional"

Volume V

January/February 2011

* Nothing contained hereinabove is intended to be legal and/or tax advice and is offered solely for instruction. Any legal and/or tax questions should always be addressed to licensed legal and/or tax professionals. Further, nothing herein is designed to replace or modify, in any way, the policies, procedures and instructions of any licensee's managing broker and/or brokerage firm.

GREAT NEWS FOR REALTORS® FROM A VIRGINIA CIRCUIT COURT

The Circuit Court of the City of Norfolk recently reaffirmed a Broker's right to be paid a commission under what has traditionally been considered the "grace period" of listing agreements. Judge Everett A. Martin, Jr. determined that the word "sold" in the instant listing agreement meant "contracted to sell" and did not include the actual settlement of the transaction. As such, any contract *ratified* during the grace period (also known as the "tail period") of the listing agreement entitles the broker to his commission provided the buyer so contracting to purchase was introduced to the property during the term of the listing agreement.. *Ware Creek Real Estate Corp. v. J&R Enterprises, et al* (New Kent County Circuit Court, Civil No. CL10-90, December 9, 2010).

The facts of *Ware Creek* are relatively common. Broker and Owner had entered into a 6 month "Exclusive Authorization to Sell" listing agreement with a term beginning October 16, 2007 and expiring at midnight on May 1, 2008. The Agreement provided in pertinent part that: "...if within 90 days after expiration of the initial period of time or any extension thereof, the Property is sold or exchanged by the Broker, by Owner, or by any other person, to a purchaser or purchasers to whom the Property was shown, offered, or introduced by the Broker...Owner agrees to pay Broker the Fee."

The Agreement expired on May 1st 2008 without any extension; however, Owner entered into a contract to sell the Property on June 2, 2008 with a settlement date to be determined. Owner did not involve Broker in the Contract. The sale was settled on August 19, 2009. Owner contended that Broker had not earned his commission because the sale was settled well after the term of the Agreement plus the 90 day grace period.

By his opinion letter dated December 9, 2010, Judge Everett overruled the Defendant-Owner's *demurrer*, concluding that a broker's fee is earned at the time of the contract ratification even if such occurs after the expiration of the listing agreement but within the post-expiration grace period provided therein (90 days in the instant case). He added that the Standard Provisions incorporated into the Agreement bolstered his construction of the word "sale" stating: "Paragraph G provides 'In the event of a sale of the Property, Owner agrees to convey the Property to any purchaser...by general warranty deed...' *Sale thus precedes conveyance.*" (*Emphasis Added*) He added that the Owner would also be liable for the commission if the contract failed to settle due to Owner's default.

Although the 4th Circuit's opinion may not be binding as to the entire Commonwealth, it provides considerable persuasive authority as to other circuit court jurisdictions and goes a long ways toward boosting this long-held position regarding the point at which a commission is earned: essentially, when a ready, willing and able buyer is produced—and in this case, enters into a contract with client/seller.

If you have any questions about the foregoing case or commission recovery issues, feel free to contact Ann Johnston at 703.852.1764.

MARYLAND REAL ESTATE COMMISSION ATTEMPTS TO EASE BROKER'S BURDENS IN HANDLING EARNEST MONEY DEPOSITS

In 2010, the Maryland Real Estate Commission (MREC), gave two significant advisory opinions to Maryland REALTORS regarding the way in which they could properly handle earnest money deposits ("emd") under the licensing laws:

1) To better protect the consumer by reducing the potential difficulties posed by emd terms allowing for delayed emd payment, the Commission advised that brokers may not accept the emd to hold in trust for contracts providing that it would be paid (in whole or installments) after the 7 day period in which the MD licensing laws require the broker to have it deposited in broker's trust account. In those contracts providing for delayed emd payments, licensees would be required to direct that the emd be paid to an attorney, settlement company or other similar entity to be held in trust. As such, brokers are relieved of what many times can be confusing and time-consuming issues relative to delayed deposits and thereby also reduce their exposure for licensing law violations.

2) At its June 6, 2010 business meeting, MREC passed a motion providing that broker licensees would be allowed to return earnest money deposits in instances where buyers had a clear right to terminate a contract under the homeowner association or condominium document review contingencies.

"The Real Estate Commission takes the position that the HOA and Condominium Acts allow a broker to refund the buyer's earnest money deposit when the buyer has cancelled the contract exercising the right to cancel after receipt of the HOA or Condo documents and disclosures, without first obtaining a signed release from the seller...Following this new policy statement by the Real Estate Commission, a broker may return the buyer's deposit once written notice to cancel the contract is given."

This step by the Commission should help brokers more promptly respond to buyers' request for a return of their earnest money in cases where the buyer has lawfully terminated the contract and affects BOP Art. 17-505(a). Caveat: Brokers are still advised to be certain the parties have terminated and ideally, obtain a writing from both indicating that they understand the contract is terminated. Although it should be clear that a buyer has terminated the contract due to the HOA/Condo document contingency, there's always room for a legal argument (e.g. that the notice of termination was defective) that could lead to litigation over the emd. The Broker who releases emd in such cases, does so at his peril.

Of Interest from the 2010 Maryland General Assembly and MAR:

Effective October 1, 2010, the Maryland General Assembly passed the New Owner's 60 Day Property Tax Appeal Notice -- House Bill 6 requires all residential contracts of sale to contain a notice informing the buyer of his/her right to challenge the tax assessment of the property within 60 days of purchase. The contract must contain a statement in substantially the same form as the following: "If any real property is transferred after January 1 and before the beginning of the next taxable year to a new owner, the new owner may submit a written appeal as to a value or classification on or before 60 days after the date of the transfer.

BROKER RISK MANAGEMENT REMINDERS/CLIENTS UNDER MORE THAN ONE CONTRACT:

Even in (or perhaps because of) these tough economic times, sellers are still mistakenly entering into more than one contract for the sale of their property. It seems to be because the listing agent fails to ensure that the first contract was properly terminated (usually because of a vague belief that Buyer #1 had "changed her mind" and walked away) Unfortunately, in these scenarios, no steps were taken to clarify Buyer #1's position before the Seller signed the 2nd contract.

Whatever the reasons, **all agents** should be sure their clients (buyers or sellers) have properly terminated a contract before entering into another one!! If a signed release agreement or (other writing signed by the parties indicating termination) cannot be obtained, the NAR COE of ethics and our standards of practice require REALTORS® to advise the seller (or buyer) to seek the advice of a real estate attorney before signing another contract. If it happens that your seller is under two contracts, try persuading one of the buyers to release the seller—(and then sell that Buyer one of your other listings)---and get the Seller to a good real estate attorney!

Check out Monarch's new CE Program offerings!!

“Staying Out of REALTOR® Jail:
Avoiding the Most Common (and Costly)
REALTOR® Errors”

“Knowledge is Power:
REALTORS®, Know Your Stuff!!”

We'll bring our program to your office for 2HR or 4HR VA CE programs and/or 1, 2, 3, 4 HR Approved DC CE—or—check for our schedule of programs already scheduled.

For further details, contact Ann Johnston at Monarch Title via ann.monarchtitle.net.

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