7-1996

Don't Take Listings Too Lightly

Roger Bernhardt
Golden Gate University School of Law, rbernhardt@ggu.edu

July 1996

Don't Take Listings Too Lightly

Roger Bernhardt[5]

Real estate brokers do remarkably well when they are suing for commissions, rather than being sued for malpractice. *Century 21 Butler Realty, Inc. v Vasquez* (1995) 41 CA4th 888, 49 CR2d 1 (reported at 19 CEB RPLR 66 (Mar. 1996)), illustrates this fact and should also remind attorneys to warn their seller clients how little room they have to maneuver once their broker has gotten them to sign a listing.

In *Vasquez*, the sellers—exasperated with the inactivity of Century 21—canceled their listing, retained a new broker, and sold their property a few weeks later. Because that sale occurred within the original time limit of Century 21's listing, however, the court of appeal held that Century 21 had earned a commission.

The trial court had granted the sellers' summary judgment on the ground that Century 21 had failed to give the sellers a list of its prospective buyers, as required by the "safety clause" of the listing (which provided for a commission if the property was sold, within seven months after the listing period had expired, to someone the broker had previously contacted). The court of appeal held that conclusion erroneous. Century 21 earned its commission based on the "exclusive right to sell" clause of the listing, calling for payment to the listing broker if there is a sale within the listing period, regardless of who was the procuring agent.

Firing your broker, it turns out, does not terminate the broker's right to a commission if you then sell the property too soon. Many sellers get rid of their brokers because they think they can get better results without them, but that strategy can be disastrous.

The obvious advice to sellers would be to see an attorney before signing a listing, but they are not likely to do so in the current California real estate climate. We are lucky when sellers see us before rather than after they have already signed contracts to sell their houses. Advising sellers about honoring a listing agreement, however, may be more important than advising them about how to deal with an offer to purchase just received.

"Firing your broker, it turns out, does not terminate the broker's right to a commission if you then sell the property too soon. Many sellers get rid of their brokers because they think they can get better results without them, but that strategy can be disastrous."

I say this because the liability for breaching a listing agreement is basically strict: the full commission is owed. Under the terms of the typical listing agreement, a rejected broker can force performance of the seller's promise to pay rather than seek damages for nonperformance. Such language is not subject to attack as an invalid penalty or liquidated damages clause, despite its inclusion in a printed form contract that was drafted—and explained—to the sellers by their broker/agent in a fiduciary capacity. (The language is also certainly contrary to the intuitive assumption of most sellers that a commission is owed only if a sale has closed.) Economically, it is much more dangerous for a seller to breach a listing agreement than to breach a sales contract (in which case CC §3306 may limit exposure to out-of-pocket expenses if the property value and the selling price are the same). Under the listing agreement, if the seller has repudiated, the

---

ROGER BERNHARDT is the Editor of the Reporter. He is a Professor of Law at Golden Gate University. In this column he considers the practical implications of recent developments in the real property area.

broker may recover a 6 percent commission without showing any harm to itself or effort by itself to sell the property.

In addition to the exclusive listing and safety clauses, standard listing agreements often also include a "withdrawal from sale" clause, imposing similar commission liability for simply taking the property off the market. Even if the *Vasquez* sellers had not resold, they might have owed a commission under that clause. See *Blank v Borden* (1974) 11 C3d 963, 115 CR 31. The three clauses together (exclusive, safety, and withdrawal) constitute a triple whammy for the incautious. Because we attorneys cannot easily undo sellers' agency contracts for them, we ought to make clear the dangers of trying to wriggle out.

If circumstances permit, sellers can sit tight and hope that no offers matching the asking price are received, but that works only for the seller who can afford not to sell. In rare cases, the listing may provide an escape if it includes some measurable duty (*e.g.*, a minimum number of advertisements or open houses) that the broker did not perform, but most form listings require only that the broker act "diligently," and lack of diligence is a very problematic defense. (The *Vasquez* sellers fired their broker because they thought it "had not performed adequately and foreclosure was imminent" (41 CA4th at 490), but the court of appeal paid no attention to that assertion. Perhaps that was because it was not relevant to the summary judgment issue, or perhaps lack of diligence is not a defense when the commission is claimed under the exclusive listing provision after a sale of the property within the listing period. *Blank v Borden, supra,* however, can be read as asserting that diligence does matter when the sellers withdraw their property from the market, so a defense based on lack of diligence might depend on which provision the broker invokes in its claim. Under that logic, I would guess that such a defense would also fail against a commission claim based on the safety clause.) And even if lack of diligence is a defense, do we really dare advise sellers to replace their brokers at the risk of liability for the entire commission if a jury makes an after-the-fact determination that the former broker did perform adequately? Diligence is a vague and uncertain standard.

"Economically, it is much more dangeronus for a seller to breach a listing agreement than to breach a sales contract."

Before an attorney permits a disgruntled seller to replace her broker, the effect of the replacement brokerage relationship should also be considered. Because the Vasquezes sold their property a month later through a second broker, I imagine that they owed him a commission, too. I doubt that they said anything in the second listing agreement that enabled them to claim indemnity or to force any kind of commission split between the two brokers. Their impatience with their first broker was a costly bit of impetuosity, given the advantages of form listing agreements for their drafters.