Real Estate Brokers and Disclosure Requirements

By Andrew Lieb

A real estate seller generally has no disclosure requirement concerning the condition of the real property to be sold. Yet, does the seller's real estate broker have such a disclosure requirement?

The New York State Property Condition Disclosure Act, at Article 14 of the Real Property Law, includes disclosure requirements and addresses real estate brokers. Therein, section 461(1) defines "[a]gent" to mean a "real estate broker" and section 466 imposes a duty on the agent to inform both the seller and buyer of their "obligations under [Article 14]." However, the Disclosure Statement has a scheme for sellers to avoid disclosure and almost every attorney in the state advises a seller not to dream of making disclosure by way of filling-out the Disclosure Statement. In fact, the Disclosure Statement expressly states on its face, at section 462 and at Form DOS-1614, that "[i]n the event a seller fails to perform the duty … to deliver a Disclosure Statement prior to the signing by the buyer of a binding contract of sale, the buyer shall receive upon the transfer of title a credit of $500 against the agreed upon purchase price of the residential real property." So, counsel should advise their seller clients to look at the $500 as an insurance policy to avoid liability and common practice dictates to avoid using the Disclosure Statement in all scenarios. Regardless, section 466, which expressly deals with real estate brokers, states that following a real estate broker's satisfaction of their duty in informing the transacting parties about their obligations under the act, that "the agent shall have no further duties under this article and shall not be liable to any party for a violation of this article." Consequently, the Property Condition Disclosure Act does not impose a disclosure requirement on a real estate broker.

Andrew Lieb

Assuming satisfaction of the information requirement of the Property Condition Disclosure Act, does a real estate broker have any further disclosure requirements? While the common law doctrine of caveat emptor protects sellers who do not fill-out the Property Condition Disclosure Statement from claims of non-disclosure, does the doctrine extend to real estate brokers? Both the First and Second Departments have extended the common law doctrine to real estate brokers by holding that absent active concealment a real estate broker cannot be sued for what could have been discovered by a buyer through their independent due diligence. *See Daly v. Kochanowicz*, 67 AD3d 78 (2d Dept., 2009) and *Stambovsky v. Ackley*, 169 AD2d 254 (1st Dept., 1991). Yet, just last year a small claims court raised a statutory preemption of the common law caveat emptor doctrine for real estate brokers and read a broad disclosure requirement into the statue in holding against the real estate broker.

In *McDermott v. Related Assets, LLC*, the Civil Court of the City of New York, Richmond County, heard a claim about a house that was wrongfully listed as having "city sewers" when it did not. In hearing the purchaser's suit, the court noted arguments by the broker's counsel about caveat emptor, but then stated that, "real estate brokers insist that they are professionals, and as professionals they are to be held to a higher standard than an unsophisticated, untrained buyer and seller." In setting forth that higher standard the court quoted Real Property Law section 443's requirement that "a seller's agent should … disclose all facts known to the agent materially affecting the value or desirability of property except as otherwise provided by law." Impliedly at issue in *McDermott* was the definition of the phrase "all facts known" contained with the statute. The civil court ruled against the real estate broker in finding a duty to fact-check all assertions concerning the property's condition against public records and thereby construed the phrase "all facts known" to include constructive knowledge of facts found in the online public record. The *McDermott* court explained that the broker failed "to use due diligence in checking the information being provided by the seller from the easily accessible on-line public record." Previously, Real Property Law section 443's express statutory disclosure requirement had only been interpreted through administrative hearings by the Department of State and no court, beyond *McDermott*, has interpreted the section 443 statutory text, as deter-

(Continued on page 25)

Focus on FOIL (Continued from page 17)

Oct. 17, 2013), a law firm represented itself *pro se*. On review by the New York County Supreme Court, petitioner's request for attorney's fees was granted because the New York City Police Department's responses were not timely, as required by Public Officers Law section 89(4)(c). This decision was upheld on appeal.

When the Supreme Court determines that one of FOIL's requirements for awarding attorney fees has not been met, the appellate court will review whether the lower court erred as a matter of law in reaching that conclusion.[9] Even when statutory prerequisites are met for attorney's fees in an action under FOIL, the decision to grant or deny counsel fees still lies within the discretion[10] of the trial court. Additionally, an agency may not shield itself from liability after the initiation of an Article 78 proceeding by releasing the documents sought.

On appeal, the reviewing court will determine whether the Supreme Court's decision was an abuse discretion as well as the initial denial by the Respondent(s).[11] Usually the courts will not grant an award of fees if respondent(s) had a reasonable basis for the denial or had a significant interest of which it sought to protect; however, the court should grant an award of fees if respondents fail to respond to a FOIL request, did not have a reasonable basis for the denial, or failed to respond in a reasonable time.

The Committee on Open Government Report (Committee) recommends that "awards of attorney's fees should be mandatory in certain instances; far too often we learn of resistance and delays that can defeat the intent of FOIL."[12] Citing *Kohler-Hausmann v. New York City Police Department*, 42 Misc. 3d 1214 [A](2014), the Committee states that this case "illustrates the current unwillingness of courts to use fee awards as a tool to compel or encourage compliance with FOIL." Indeed, the case is on appeal and the deterrent of non-compliance is no longer there should the appellate court not find an abuse of discretion by the Supreme Court. "If FOIL is amended to require that courts award attorney's fees payable by recalcitrant agencies in certain cases, there would exist a clear deterrent to unreasonable denials of access. Compliance would improve, and costly and time-consuming litigation would diminish."

The Committee recommends an additional amendment to the law, providing that a court "shall award costs and reasonable attorney's fees when an agency had no reasonable basis for denying access to records, and may do so when an agency fails to respond within the proper time or otherwise fails to comply with this article." This amendment would solidify and safeguard this well recognized civil right as well as open a market to some otherwise hesitant attorneys who would no longer worry about testing the discretion of a Supreme Court judge should a case present itself.

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[1] Public Officers Law § 89 (3)(a).
[2] *Legal Aid Soc. v. New York State Dept. of Corrections and Community Supervision*, 105 A.D.3d 1120, 962 N.Y.S.2d 773 (3d Dep't. 2013).
[3] *Matter of Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ*., 4 N.Y.3d 225, 230, 792 N.Y.S.2d 370, 825 N.E.2d 585 (2005) (internal quotation marks and citation omitted)).
[4] Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73.
[5] *See* L. 2006, ch. 492, § 1; Public Officers Law § 89(4) (c).
[6] Senate Introducer's Mem. in Support, Bill Jacket, L. 2006, ch. 492, at 5
[7] 2005 Legis. Bill Hist. NY S.B. 7011.
[8] *Kheel v. Ravitch*, 93 A.D.2d 422 (1st Dep't. 1983), *affd*. 62 N.Y.2d 1(1984).
[9] *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 842 N.E.2d 466 (2005) (hereinafter "Beechwood").
[10] *Todd v. Craig*, 266 A.D.2d 626, 697 N.Y.S.2d 722 (3d Dep't. 1999); *see Urac Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 223 A.D.2d 906, 636 N.Y.S.2d 480 (3d Dep't. 1996); *see also Powhida v. City of Albany,* 147 A.D.2d 236, 542 N.Y.S.2d 865 (3d Dep't 1989).
[11] *Matter of Miller v. New York State Dept. of Transp.,* 58 A.D.3d 981, 985, 871 N.Y.S.2d 489 [2009], *lv. denied* 12 N.Y.3d 712, 2009 WL 1544032 [2009]; *Matter of Humane Socy. of U.S. v. Fanslau,* 54 A.D.3d 537, 539, 863 N.Y.S.2d 519 [2008]).; *New York Civil Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338, 926 N.Y.S.2d 732, 733 (3d Dep't. 2011) (determining whether there was a reasonable basis for the denial of records).
[12] New York DOS, Committee on Open Government, *Annual Report to the Governor and State Legislature* (Dec. 2014); *available at* http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf.

Denied a Discharge for Failure to Keep Records (Continued from page 19)

tices for record keeping in the debtor's type of business; the degree of accuracy disclosed by the debtor's existing records; the extent of any egregious conduct on the debtor's part; and the debtor's demeanor in court.

Once the plaintiff satisfies its burden, then the burden shifts to the debtor to justify the absence of the records. In determining whether a debtor is entitled to a discharge the issue of justification depends largely on what a normal, reasonable person would do under similar circumstances.

Here, Judge Grossman determined that the plaintiffs satisfied their burden and the debtor failed to demonstrate that his failure to keep records was justified. The debtor's belief that he did not need to keep records did not constitute justification.

This case should be contrasted with another case decided almost a decade ago by Judge Elizabeth S. Stong in the Brooklyn Bankruptcy Court. *Pereira v. Young* (*In re Ginger Young*), 04-14794-ess, Adv. Pro. No. 04-1476-ess (Bankr. E.D.N.Y. 2006).

In *Young*, which I discussed in my October 2006 column in *The Suffolk Lawyer*, the Chapter 7 trustee, John S. Pereira, brought a similar adversary proceeding against the debtor alleging that the debtor, a paraprofessional, sold her home six months before filing, netting $78,000, and because she couldn't account for where the money went, she should be denied a discharge.

The debtor here claimed that she was the victim of domestic abuse as her boyfriend engaged in extreme coercion and control, and threatened the debtor's life. The debtor had to move hurriedly, and had to discard most of her possessions including her documents. Judge Stong noted that the bankruptcy court has broad discretion in determining what is a reasonable excuse and found that discarding documents under these circumstances did not amount to intentional neglect or indifference to proper record keeping and thus, the debtor justified her absence of records.

Judges Stong and Grossman both began their legal arguments by stating two general starting points behind all bankruptcy filings: bankruptcy relief is a privilege, not a right, and should only inure to the benefit of the honest but unfortunate debtor; and the denial of a discharge is an extreme penalty and must be construed liberally in favor of the debtor. Both judges also focused on the two-step burden-shifting approach and the eight factors. Judge Grossman's *Antoniou* decision did not make any reference to the *Young* decision.

Any bankruptcy attorney who has a client that cannot produce books, records or receipts should take a good look at both of these cases. You should also be mindful that a claim that a debtor has failed to maintain books and records often overlaps with a claim under Bankruptcy Code section 727(a)(5), which permits the denial of a discharge if the debtor has failed to satisfactorily explain any loss of assets.

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Disclosure Requirements (Continued from page 10)

mined by a Westlaw search incident to the drafting of this article.

The Department of State is expressly authorized to interpret section 443 by way of Real Property Law section 442-e. While the Department has previously found the phrase "all facts known" to include constructive knowledge, it has restricted such constructive knowledge to only within the context of violations of local zoning and occupancy regulations. *See Department of State v. Lorraine Jacob*, 121 DOS 93; *Division of Licensing Services v. Marie M. Parenti*, 94 DOS 93; *Department of State v. Lorraine Jacob*, 121 DOS 93. Now, *McDermott* has extended the constructive knowledge chargeable to real estate brokers from the narrow topic of local zoning and occupancy regulations to everything "easily accessible on-line public record." Yet, the *McDermott* court failed to define what makes an online record "easily accessible" and there now exists ambiguity in the disclosure requirements for real estate brokers. It is important that the legislature by statute, or the Department of State by regulation, or even an appellate court by binding precedent, clearly defines the phrase "all facts known" because the *McDermott* decision opens the door for ever extending exposure to real estate brokers. In the age of the Internet, where county clerks are now able to take electronic signatures, the public record will continue to extend and become more easily accessible. What is clear is that a real estate broker should check the online public record about sewers prior to taking a listing into the future.

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