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Broker improperly files lis pendens for recovery of commission

By Alfred Fazio, Esq.

Judge Philip Straniere of the Civil Court of the City of New York, County of Richmond, offered this decision, which is of great importance to the real estate brokerage community. After commencing an action for the payment of real estate brokerage commissions allegedly due and owing as a result of having procured a prospective purchaser on behalf of a homeowner, the real estate broker filed a Notice of Pendency or lis pendens against the property in order to secure payment. The defendant-homeowner sought an Order to Show Cause to cancel the lis pendens of record. This action was initiated in the [New York State] Supreme Court where Justice Anthony Giacobbe issued an order canceling the Notice of Pendency on the basis that the complaint was a breach of contract and not one that sought a judgment, which would "affect the title to, or possession, use or enjoyment of, real property" as required by the CPLR 6501. The action was subsequently removed to the Civil Court on the issue of the brokerage commission and any damages sustained by the homeowner as a result of the improper filing of a lis pendens.

Judge Straniere lamented that real estate licensees "are required to have a certain amount of training, pass a written examination and attend continuing education programs to retain their licenses." As a result, both the homeowner and the attorney should have been aware that there was no statutory authority giving real estate brokers the right to file a lis pendens in regard to the sale of the residential real estate. The statute allows the broker to "file an affidavit of entitlement to commission for completed brokerage services in the office of the recording officer of any county in which any of the real property is situated." Case law has consistently held that a lis pendens is not proper in an action for the recovery of a real estate brokerage commission.

The New York State Legislature permits real estate brokers to file the lien in certain situations, specifically "when the broker is claiming a commission is due from negotiating a lease for a term in excess of three years on property to be used for other than residential purposes." Judge Straniere suggested that as a licensed and trained professional, the real estate broker should have been aware of this basic tenet of the real estate brokerage industry. "As such, it is clear that not only is defendants' counterclaim not dismissed, the defendant-homeowners are entitled to a judgment on that issue with a trial to take place solely to determine the amount of damages the defendants suffered as a result of the plaintiffs' wrongfully encumbering, even temporarily, defendants' title. The plaintiffs' action of filing a Notice of Pendency constituted a tort. The actions of the broker were wrongful and designed to force the defendants to pay a broker's commission to which the plaintiffs' entitlement was in dispute. The sole purpose of the filing of the lis pendens was to compel

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Property owners not liable for rental company's conduct

A New York federal court has considered whether a property owner was liable for alleged violations of civil rights laws by the company it hired to manage its property.

Caplaw Enterprises ("owner") hired LC Properties of Rochester ("property manager") to perform all management activities for the owner's apartment building. Brandon Cleveland and Isiah Jackson ("tenants") brought a lawsuit against the owner alleging violations of the federal Fair Housing Act ("act") and federal civil rights laws known as sections 1981 and 1982. The tenants alleged that the property manager had refused to rent them an apartment, allegedly referring to the tenants as "black hoodlums." The tenants claimed that the owner was vicariously liable for the actions of the property manager. (The tenants had filed an earlier lawsuit naming the property manager and others for violations arising out of the same incident). The owner filed a motion seeking judgment in its favor.

The United States District Court of the Western District of New York ruled in favor of the owner. The act makes it illegal to deny, refuse to negotiate, or otherwise make unavailable the sale or rental of property on the basis of a person's race, religion, sex, familial status, or national origin. Section 1981 prohibits discrimination in the making and enforcing of private contracts, and section 1982 prohibits private racial discrimination in the sale and rental of real and personal property.

The issue before the court was whether the owner could be vicariously liable for the conduct of the property manager. In

See Conduct, page 5

Trademark dispute between brokerages proceeds

A Minnesota federal court has considered whether a brokerage firm could bring a trademark infringement action against another brokerage firm who used the first brokerage firm's name as an Internet search term to drive traffic to its website.

Edina Realty, Inc. ("Edina") is an independent real estate brokerage company. Edina has registered the "Edina Realty" ("trademark") mark with the U.S. Patent and Trademark Office. Edina utilizes the trademark in its advertising and marketing and has an Internet website with an address that uses the trademark.

The MLSonline.com ("MLSonline") is a real estate brokerage firm that competes in the same market as Edina. At various times, MLSonline has purchased the following search terms from Google: Edina Realty, Edina Reality, EdinaReality.com, EdinaRealty.com, www.EdinaReality.com, and www.EdinaRealty.com. MLSonline also placed hidden text on its webpages using Edina's name and the trademark, and also used Edina's name in the sponsored link sections of Yahoo and Google. As a result, the MLSonline's website links would appear higher on search results in Google and Yahoo than Edina's name would. This caused between 18 to 30 percent of consumers who searched for information about Edina to instead click on links to the MLSonline's website.

Edina complained that the MLSonline was benefiting from Edina's marketing efforts by using Edina's name to capture Internet search results. Edina sent MLSonline a letter demanding that the MLSonline "cease and desist its infringing use of its registered trademark." The MLSonline refused to change its practices, and so Edina filed a lawsuit.

The United States District Court for the District of Minnesota partially granted judgment on certain counts, but otherwise allowed the lawsuit to proceed to trial. The court first considered the trademark infringement allegations, centering on MLSonline's use of the trademark as a search term. MLSonline raised a number of arguments against Edina's allegations. First, MLSonline argued that it did not use the trademark in "commerce," a required showing for a trademark infringement lawsuit. The court rejected this argument, finding that MLSonline did purchase "sponsored links" using the trademark and so was using the trademark in commerce.

Next, the court considered whether there was a reasonable likelihood of confusion from MLSonline's use of the trademark. In order to assess the likelihood of confusion, the court must consider the following factors: 1) the strength of the owner's mark; 2) the similarity between the owner's mark and the alleged infringer's mark; 3) the degree to which the products compete with each other; 4) the alleged infringer's intent to pass off its goods as those of the trademark owner; 5) incidents of actual confusion; and 6) whether the degrees of purchaser care can eliminate any likelihood of confusion that would otherwise exist.

Edina argued that the traditional criteria set forth above should be modified because it was invoking the doctrine of initial interest confusion, which occurs when a competitor tries to lure customers away from one producer by initially passing its goods and services off as another's, even though the confusion is removed by the time a transaction occurs. MLSonline invoked the defense of nominative fair use and so it argued that the traditional analysis should be modified because of this defense.

The court considered the six factors listed above. The parties agreed on the first three factors, and so the court focused on whether MLSonline had used Edina's name because it had the "intent to pass off its goods as those of the trademark owner." MLSonline argued that it had Edina's listings on its website and that it had referred confused consumers back to Edina's website who confused the entities. Edina argued that MLSonline's conduct revealed its attempt to confuse consumers as it continued using variations of the trademark even after Google had made MLSonline modify its sponsored link text to reduce confusion. The court stated that this was a factual dispute that would need to be resolved at trial.

Next, the court considered whether there were incidents of actual confusion. Edina introduced evidence of actual confusion by consumers who claimed to mistake MLSonline for Edina. MLSonline argued that the evidence did not demonstrate actual confusion, but instead was the result of inattention by the consumers or was because MLSonline did have some of Edina's listings on its website. The court found that this was another fact issue, which needed to be considered at trial. The court also found that the final element, purchaser care, also involved a fact dispute. Therefore, the court ruled that a trial would need to resolve whether there was a likelihood of confusion resulting from MLSonline's use of the trademark and so denied Edina's motion for judgment.

Finally, the court considered the MLSonline's "nominative fair use" defense. A party raising this defense must show three things: first, the use of the other party's mark is necessary to describe both parties products and services; second, the party only uses so much of the mark as necessary to describe its goods and services; and finally, the party's conduct or language reflect the true and accurate relationship between the parties. The court ruled that MLSonline's use of the trademark did not constitute a nominative fair use of the trademark and its use of the trademark in its sponsored links did not paint a true picture of the relationship between the two companies as MLSonline featured Edina's name more prominently than its own on some of the results pages. Thus, the court denied MLSonline's motion for judgment in its favor. The court then sent the case to trial to resolve the remaining fact issues.

Edina Realty, Inc., v. TheMLSonline.com, No. Civ. 04-4371JRTFLN, 2006 WL 737064 (D. Minn. Mar. 20, 2006). [This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service. If an official reporter citation should become available for this case, the citation will be updated to reflect this information].

Leasing commission denied for failed transaction

A federal appellate court has considered whether a Georgia broker could recover a leasing commission when the client filed for bankruptcy protection, causing the transaction to collapse.

In 2001, WorldCom, Inc. ("tenant") leased space in two office buildings owned by 485 Properties LLC ("owner") and managed by Cousins Properties, Inc. ("property manager"). The property manager sought to renegotiate one of the leases because it was expiring. The tenant directed the property manager to its leasing firm, WorkPlace USA ("WorkPlace"). John Amend ("broker") is the president of WorkPlace and a licensed Georgia real estate broker.

In 2002, the property manager and WorkPlace executed a fee agreement where the property manager would pay a commission to WorkPlace for any leases between the tenant and the owner. WorkPlace and the property manager then negotiated a 10-year lease for one of the properties ("property"), and the tenant signed the lease in May 2002. Prior to its signing the lease, the owner became aware of the tenant's precarious financial condition due to an accounting scandal and refused to sign the lease.

In July 2002, the tenant filed for bankruptcy. As part of its business reorganization, a new leasing agent was appointed to represent the tenant in its real estate dealings. The new leasing agent then negotiated two five-year leases for the property, but for less space than the lease originally negotiated by WorkPlace. The property manager attempted to pay WorkPlace a reduced commission rate in order to finalize the lease negotiations. WorkPlace refused to accept the lower rate from the property manager, and so the negotiated lease was signed without paying WorkPlace a commission.

In 2003, the broker brought a lawsuit against the owner alleging breach of contract and seeking a quantum meruit recovery. The trial court ruled in favor of the owner, determining that the fee arrangement between WorkPlace and the property manager was not enforceable because WorkPlace was not a licensed real estate broker and also because the agreement barred the payment of a commission if another leasing agent was used. The broker appealed.

The trial court had denied the quantum meruit recovery because the broker was not the "procuring cause" of the lease signed by the owner, since the lease signed by the owner was negotiated by the second leasing agent.

The United States Court of Appeals for the Eleventh Circuit affirmed the trial court. The court first considered whether the Georgia license laws precluded the broker's recovery of a commission. Georgia law requires a Georgia real estate license when providing services related to the sale or rental of property, and Georgia law also bars an unlicensed person from bringing a commission action. The broker argued that an earlier case had considered whether a broker whose license had temporarily lapsed, but became active during the transaction could bring a commission lawsuit. The court found that this case was not analogous because WorkPlace never held a Georgia real estate license and so Georgia law barred the broker from seeking payment of a commission pursuant to the agreement with the property manager.

Next, the court considered whether the broker could recover under a quantum meruit theory. A quantum recovery allows recovery for the value of the services provided if the services were performed in expectation of receiving payment and the recipient of the services should have known that the other party expected to be paid. The trial court had denied the quantum meruit recovery because the broker was not the "procuring cause" of the lease signed by the owner, since the lease signed by the owner was negotiated by the second leasing agent.

The court considered whether "procuring cause" was a necessary element of a Georgia quantum meruit recovery. Since the Supreme Court of Georgia was in the process of considering that very issue, the court certified a question to the state's highest court to determine whether procuring cause was a necessary element of a quantum meruit recovery. The state's highest court stated that in order for a Georgia broker to succeed in a quantum meruit action, the broker must, in addition to the requirements set forth above, also demonstrate that he/she was the procuring cause of the completed transaction. Since the lease negotiated by WorkPlace was never signed by the owner, the court affirmed the trial court's rejection of the quantum meruit action. Thus, the court affirmed the trial court's ruling in favor of the owner.

Amend v. 485 Properties, LLC, 401 F.3d 1255 (11th Cir. 2005), *cert. question ans. and d. ct. aff'd*, 2006 WL 709132 (Mar. 22, 2006).

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State property seizure reversed by US Supreme Court

The Supreme Court of the United States has considered whether the state of Arkansas ("state") properly seized a residential property for the owner's failure to pay taxes, even though the state knew that the owner had not received notice about the state's intent to seize the property.

Gary Jones ("owner") purchased a home in 1967. He lived in the home until he separated from his wife in 1993, at which time he moved out of the house. He continued to pay the mortgage on the property until 1997, after which the property was fully paid off. The mortgage lender had escrowed and paid the owner's property taxes during the life of the owner's mortgage. The owner did not pay property taxes following the termination of the mortgage in 1997, and the state eventually classified the property as delinquent in tax payments.

In 2000, the Arkansas Commissioner of State Lands ("commissioner") sent notice via certified mail to the owner at his home's address about his tax delinquency. The notice stated that his property would be sold at a public sale in two years if the taxes were not paid. The letter also gave the owner information about how to redeem his property by paying his past due taxes. No one signed for the letter when delivery was attempted and no one claimed the letter at the post office, so the letter was returned to the commissioner.

Two years later, the commissioner published notice of its intent to sell the owner's property for unpaid taxes in a local paper. A few weeks later, the state held a public sale. While the owner's property was not purchased at the public sale, eventually Linda Flowers ("buyer") purchased the property for $21,042.15. The fair market value of the home was approximately $80,000. Prior to purchase, the commissioner sent another certified letter to the owner at the home's address informing him that the property was about to be sold to the buyer if he did not pay his taxes. This letter was also returned as undelivered.

Following the buyer's purchase of the property and the expiration of the owner's period of redemption, the buyer sought to have the residents evicted from the property. The owner then learned his property had been sold to the buyer. The owner filed a lawsuit seeking to prevent the buyer from taking over his property. In the lawsuit, he argued that he had not received proper notice from the commissioner about its intent to sell the property for unpaid taxes and the owner's right to redeem the property prior to the sale. The Arkansas courts ruled that

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the owner had received constitutionally sufficient notice of the state's intent to sell the owner's property, and so the courts ruled in favor of the state. The owner appealed to the Supreme Court of the United States.

The Supreme Court reversed the state courts, ruling that since the state knew that the owner had not received notice of the state's intent to sell his property, the state had failed to meet the requirements of the Due Process Clause of the Constitution of the United States. Due process does not require that the government provide an owner actual notice of its intent to seize property prior to seizure; instead, the government must provide notice, which is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afforded them an opportunity to present their objections." So, the question for the court was whether the state's process met the above standard.

The court ruled that the state had failed to employ a method "reasonably calculated" to notify the owner of the sale, since it knew that the owner had not received the letters sent by the commissioner about the intended property sale. Looking at how other courts had addressed this issue, the court found that most other courts required the government to take some sort of additional step when the government knows that its initial attempts to provide notice to the property owner have failed. The court found that while the state's process for providing notice would likely succeed with most taxpayers, in this instance the state had actual knowledge that the owner had very likely not received notice about the state's intention to sell his property and it took no further action. Therefore, the court ruled that the state had failed to meet the notice requirements of the due process clause and so the Arkansas courts were reversed.

The state had argued that there were three reasons why it was not required to take additional steps to provide notice to the property owner. First, the state had sent notice to an address that the property owner had a legal obligation to maintain. Second, the owner had been put on notice through property tax bills of the requirements to pay taxes and so the owner had inquiry notice of the tax delinquency. Finally, the owner had a duty to make sure that those in possession of his property would notify him if the property was in danger of seizure. The court rejected all three arguments, finding that all three methods failed to provide the adequate notice required by the due process clause because none of these methods actually notified the owner about the state's intent to sell the property.

Although the court found that the state had failed to satisfy the due process requirements, the court declined to set forth the specifics of how the state could have provided sufficient notice to the owner. The court identified a few follow-up methods that could have satisfied the notice requirement, which included re-sending the returned letters by regular mail to property's address or posting a notice on the front door of the property. However, the court did reject creating a standard, which would force the state to find the actual address where the taxpayer lived by looking in the phone book or other such records.

Justice Clarence Thomas dissented from the court's opinion, joined in his opinion by Justices Antonin Scalia and Anthony Kennedy. Justice Thomas believed that the methods employed by the state had long been sufficient to satisfy the requirements of due process and so the lower court's rulings in favor of the state should have been affirmed.

Jones v. Flowers, No. 04-1477, 2006 WL 1082955 (U.S. Apr. 26, 2006). [This is a citation to a Westlaw document. Westlaw is a subscription, online legal research service. If an official reporter citation should become available for this case, the citation will be updated to reflect this information].

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an agency relationship, a principal has "vicarious liability" for the actions of its agent performed within the scope of the agency relationship, and so the court needed to determine whether the property manager was the agent of the owner. A key element in determining whether an agency relationship exists is examining the amount of control that the principal exercises over the agent. In *Meyer v. Holley*, the Supreme Court stated that the common laws of agency apply to act cases and that "the manifestation of consent by one person to another that the other shall act on his behalf…and consent by the other so to act."

In this case, the court found that the owner had turned over the entire management of the apartment building to the property manager and so the owner had no control over the property manager's rental activities on the property. The tenants had not alleged that the owner had maintained the requisite control over the property to establish an agency relationship, as the agreement between the owner and the property manager gave the property manager complete control over the property. Nor did the tenants allege that the owner had knowledge of the property manager's alleged discriminatory conduct. Therefore, the court ruled that the owner could not be vicariously liable for the conduct of the property manager based on the tenant's allegations and so the court entered judgment in favor of the owner.

Cleveland v. Caplaw Enterprises, 379 F. Supp. 2d 330 (W.D.N.Y. 2005).

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the defendants to pay the plaintiffs or risk losing the purchaser."

Judge Straniere proceeded to discuss the documentary evidence submitted by the real estate broker in support of its claim for a brokerage commission. His ultimate decision in denying the broker's claim and the manner by which he reached the decision is quite troubling. The real estate broker argued that the listing agreement, which was signed on the Staten Island Multiple Listing Service Exclusive Right to Sell Contract, established a relationship between the parties. The language of the clause and the agreement contemplated that the broker would be compensated during the "term of the agreement" and for a period of 60 days after the termination of the agreement if the property was sold to a "buyer introduced to the property during the term of the agreement." The court held that the broker's case failed because the buyer of the property was not introduced during the term of the agreement; instead the evidence established that the buyer of the property was a neighbor of the homeowner, who entered into a handwritten binder one month before the listing agreement was signed. Judge Straniere then reasoned that the buyers were neither "introduced to the property" during the term of the agreement nor through the efforts of the plaintiffs. The plaintiffs did not produce a ready, willing and able buyer nor were their actions the procuring cause of the sale. In fact, plaintiffs' actions sought to prevent the sale. Plaintiffs sought to capitalize on the efforts of the defendant-homeowners. Had the neighbors come along and signed the binder after the day of the listing agreement or even waited until after the listing agreement expired, plaintiffs might have had a viable claim under the terms of the agreement. This did not occur and as a result the court held that the claim must fail.

The doctrine of "unclean hands" was also introduced into this case by the homeowners. They believed that the unclean hands of the brokers arose from the fact that the salesperson working for the corporate plaintiff was told of the pre-existing binder with the defendants' neighbor and misrepresented the listing agreement and its legal effects to the defendants in order to induce them to sign the contract. The equitable defense was not dismissed from the case since the circumstances surrounding the signing of the document was a question of fact. Judge Straniere went to great lengths in giving examples of the plaintiffs' unclean hands. First, the correct name of Talk of the Millennium Realty, Inc. was not disclosed in the listing contract. Second, paragraph 10 of the document required that "merits of any dispute arising under or in connection with this agreement shall be determined before an arbitrator in the County of New York, State of New York…" The court noted that the plaintiff-broker totally ignored this requirement of the agreement and commenced an action in Civil Court. Judge Straniere asked the question: "Why include an arbitration clause in an agreement which the plaintiffs prepared and then ignored?" Judge Straniere wondered why the arbitration clause referred the matter to New York County, but not Richmond County. If I were available to discuss this with the judge, I would have told him that the American Arbitration Association has its office in Manhattan and in no other borough in the City of New York, and it is for that reason that the venue is designated as New York County. Notwithstanding this reasoning, Judge Straniere asked, "Is this a mistake or a deliberate attempt to make it more difficult for sellers to participate in the arbitration process?"

> It should be noted that the failure of a licensee to comply with the Agency Disclosure Law can result in the imposition of fines as imposed by the New York State Department of State. The statute does not indicate that the failure to comply with the disclosure law results in the forfeiture of brokerage commissions; however, the fact that Judge Straniere took this position in voiding the payment of a brokerage commission should be heeded by all licensees.

The most disturbing aspect of the entire decision concerns Judge Straniere's discussion of the Agency Disclosure Law, which is found in Real Property Law Section 443. Pursuant to the statute, a listing agent is required to provide to a seller a disclosure form regarding the real estate agency relationship "prior to" entering into a listing agreement with the seller and shall obtain a signed acknowledgement from the seller. The court noted that the statute does not provide any penalty for the failure of the broker to complete the disclosure form in the manner required by the legislation. "The failure to comply with this statute would subject the licensee to disciplinary action by the Department of State as set forth in the Real Property Law Section 441(c).

Judge Straniere believed that "a more logical penalty would be to create a presumption that the failure to comply with the disclosure law would serve as a basis to deny a broker a commission when there is a non-compliance with the statute. An argument can be made that a broker seeking a commission should have affirmatively plead compliance with this requirement or explain why the statute is not applicable in order to collect a commission claimed due. It makes no sense to permit the broker to collect a commission when the broker cannot prove compliance with the disclosure statute designed to protect the public. Plaintiffs have neither pleaded nor proven compliance with the statute. In fact, it

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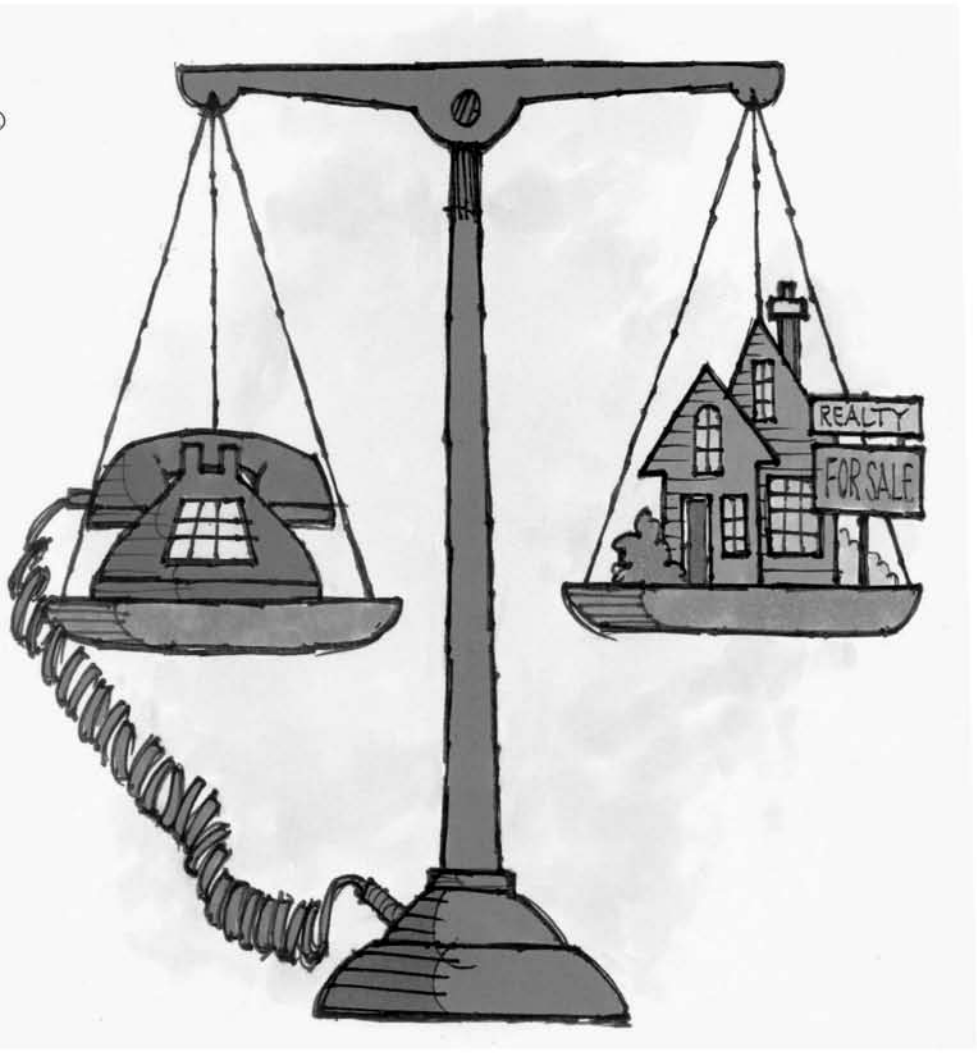

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appears that they have totally ignored it. Even if the court was to permit this to be corrected at trial and allowed the plaintiff to conform the pleadings to the proof, the failure to plead compliance is prima facie evidence of "unclean hands" in the transaction, which defeats any motion to dismiss as an affirmative defense." The case was referred to the trial court on the issue of damages sustained by the homeowners arising from the improper recording of the lis pendens, and the homeowners' motion to dismiss the plaintiffs' complaint and brokerage commission was also granted.

It should be noted that the failure of a licensee to comply with the Agency Disclosure Law can result in the imposition of fines as imposed by the New York State Department of State. The statute does not indicate that the failure to comply with the disclosure law results in the forfeiture of brokerage commissions; however, the fact that Judge Straniere took this position in voiding the payment of a brokerage commission should be heeded by all licensees. It is possible that other courts will take a similar position and as a result compliance with the Agency Disclosure Law should be strictly enforced.

Talk of the Millennium Realty, Inc. v. Sierra, Civil Court, Richmond County (NYLJ 1/18/2006)

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