

2021 MONTHLY
LEGAL UPDATE
FREE

OCTOBER 2021

By Anthony Gatto, Esq.



New York State Association of REALTORS®, Inc.

Legal Hotline
Monday-Friday
9:00a.m.-4:00p.m.
518-436-9727

Future Dates

- NYSAR's free monthly Legal Update CE
- May take once every license renewal period for 1 credit under legal update category
- Recorded and livestreamed for non-credit

Future Dates

November 18

December 14

2022 dates in the process of being scheduled

Register

- You must be logged in to NYSAR .com to register
- Under “Education” choose “NYSAR Course Schedule”
- Classes are on the calendar
- Choose “Education” and “NYSAR Legal Update CE Course” for more information

IS NY STILL UNDER A STATE OF EMERGENCY?

Are We Still Under a State of Emergency?

- Yes, There are currently 2 SoE's in effect
- Gun violence
 - effective until further notice
- Health care staffing shortages
 - effective until 10/26/21

Cold Calls

- NO COLD CALLS
- The law is not industry specific and is triggered statutorily by the SoE
- Only when the SoE is lifted will cold calling be permitted

General Business Law §399-z(5-a)

“It shall be unlawful for any telemarketer doing business in this state to knowingly make an unsolicited telemarketing sales call to any person in a county, city, town or village under a declared state of emergency or disaster emergency as described in sections twenty-four or twenty-eight of the executive law.”

General Business Law §399-z(1)

- h. “Telemarketer” means any person who, for financial profit or commercial purposes in connection with telemarketing, makes telemarketing sales calls to a customer when the customer is in this state or any person who directly controls or supervises the conduct of a telemarketer. For the purposes of this section, “commercial purposes” shall mean the **sale or offer for sale of goods or services**;
- j. “Telemarketing sales call” means a **telephone call made by a telemarketer** or by any outbound telephone calling technology that delivers a prerecorded message **to a customer or to a customer's voicemail or answering machine service for the purpose of inducing payment or the exchange of any other consideration for any goods or services**;

AMENDMENTS TO THE TENANT PROTECTION ACT

Tenant Protection Act

- Prohibits landlords from collecting:
 - Security deposit greater than 1 month rent
 - Advances on rent other than 1st month

Tenant Protection Act-Amendment

- Exempts “Seasonal Use Dwelling Unit” (SUDU) from security deposit and rent advances
- To qualify for SUDU must on “seasonal use dwelling unit registry”
- If all requirements are not meant, no exemption and TPA applies

Tenant Protection Act-Amendment

- To qualify as a SUDU the rental must meet all the following requirements:
- The lease expressly provides that:
 - (i) the dwelling unit is registered as a seasonal use dwelling unit, indicating the local or county government agency with which it is registered; and
 - (ii) the occupancy of the tenant is only for seasonal use not to exceed one hundred twenty days or a shorter period provided for in the lease; and
 - (iii) such tenant has a primary residence to return to, the address of which is expressly provided in the lease; and

Tenant Protection Act-Amendment

- To qualify as a SUDU the rental must meet all the following requirements:
 - Such dwelling unit is not rented as a seasonal use dwelling unit for more than one hundred twenty days during each calendar year; and
 - The local government with jurisdiction for building administration over such unit, the county in which such unit is located, or the state shall have adopted a seasonal use dwelling unit registry; and
 - Such unit shall be registered by filing a copy of the seasonal use lease and such additional information as the local government, county, or state agency that administers such registry may require.

Tenant Protection Act-Amendment

- To qualify as a SUDU the rental must meet all the following requirements:
 - Such dwelling unit is not rented as a seasonal use dwelling unit for more than one hundred twenty days during each calendar year; and
 - The local government with jurisdiction for building administration over such unit, the county in which such unit is located, or the state shall have adopted a seasonal use dwelling unit registry; and
 - Such unit shall be registered by filing a copy of the seasonal use lease and such additional information as the local government, county, or state agency that administers such registry may require.

Tenant Protection Act-Amendment

- If there is no local, county or state registry, the property would remain subject to the deposit/advance provisions of TPA and would not be able to claim the exemption.

Tenant Protection Act-Amendment

- If a licensee is listing property for seasonal use and collecting more than one month's rent as a security deposit and/or more than one month's rent licensee would be required to verify that the property is registered as a "seasonal use dwelling unit" pursuant to the statute.
- If the property is not registered, the licensee may be liable for collecting more than one month's rent as a security deposit or more than one month's rent as an advance.

Tenant Protection Act-Amendment

- License required to verify compliance as a SUDU
- These obligations are no different than a licensee's responsibility to verify the legality of a rental property generally or where permits are required to rent.

Tenant Protection Act-Amendment

- At this time NYS does not have a registry
- County and local government is the most logical place for this to be done
- Many municipalities have rental permits already
 - SUDU would be a logical “add on”

MULTIPLE OFFERS

Multiple Offers

- No law, rule or regulation controls multiple offers
- **Brokers actions controlled by clients wishes**
 - Discuss MO with seller at time of listing
 - Seller can determine ahead of time or when it arises
 - Seller has options as to how they want to proceed
 - Seller must be informed when MO arises
- Seller **does not** have to treat all buyers equally (non-discriminatory)
- Broker **does not** dictate how to treat MO's

Types of Multiple Offers

- Highest and best (all or some)
 - Seller is permitted to share details of other offers
 - Seller does not have to accept highest and best
 - Seller can do this multiple times
 - Seller **does not** have to treat all buyers equally (non-discriminatory)

Types of Multiple Offers

- Counter offer (all or some)
 - Be careful, make it contingent on seller acceptance
 - Seller can send out multiple counters if following above
 - It is not recommended that seller send out multiple counters and tell buyers “first in time wins”
 - Seller **does not** have to treat all buyers equally (non-discriminatory)

Types of Multiple Offers

- Accept any offer submitted and not enter MO
 - Seller is not required to take the best offer
 - Seller can go back to one or more offers with any lawful demand
 - Seller **does not** have to treat all buyers equally (non-discriminatory)

Questions to Ask Yourself

- Ask yourself two questions:
 1. What does the seller want to do if there are multiple offers?
 2. What type of multiple offer scenario does the seller want to initiate, if any?

Escalation Clauses and Multiple Offers

- What if multiple offers contain escalation clauses?
 - Each offer would trigger the escalation clause of another offer
 - Continue through the process of elimination
 - Seller is not required to take highest offer
 - Only the seller may determine “no escalation clauses”

Multiple Offers

- Make sure you discuss all possible pros and cons with each multiple offer counter
- The seller does not have to offer the counter to all potential purchasers, may pick and choose so long as not being done for a discriminatory purpose
- Licensee should document multiple offer discussions and final decision made by seller

COURT/DOS DECISIONS

DOS v GTRM

- Brokerage GTRM (and other entities)
- CB is Corporate Broker
- PG is President of GTRM
- SP is Salesperson
- MP is Member of the Public

DOS v GTRM

- MP filed complaint against CB and SP
- MP went to SP to find apartment
- SP was not licensed at the time

DOS v GTRM

- MP gave SP \$1,650 security deposit
- MP did not get unit
- GTRM refused to return security deposit

DOS v GTRM

- Investigation uncovered many violations
 - PG not a licensed broker
 - Commingling
 - Negative escrow balance
 - Unlicensed activity
 - And many others!!!

DOS v GTRM

- Many GTRM “salespeople” were unlicensed
- PG admitted there were no escrow accounts
- Tried to change admission
- Escrow account with a negative balance
- MP deposit into business account

DOS v GTRM

- CB admitted that PG paid for use of license
- \$180/week
- CB had no involvement with brokerage
- Not an officer
- No control over bank accounts

DOS v GTRM

- Unearned commission
- Paying commission to unlicensed individuals
- Commingling
- Fraud
- Untrustworthy and Incompetent

DOS v GTRM

- availing his or her license to another person so as to enable that person to act as a real estate broker
- Failure to supervise
- Brokers license revoked for multiple entities

FAIR HOUSING PERSONAL LETTERS FROM BUYERS

The Letter

- Listing Agent receives purchase offer
- Purchase offer contains personal letter from buyer(s)
- What should Listing Agent do?

Where did the Letter Originate?

- Licensees should NEVER EVER suggest use of a letter that identifies protected class
- Subjecting seller and listing brokers to potential fair housing violation

We Would Love to Live...

- Usually, letters are an emotional plea
- Often directly or indirectly mentions protected classes
 - “I can see our family celebrating...here”
 - “My wife and I would love to raise our family”
 - “Our family pictures will line the staircase just like your family”
 - “Our daughter loves to swim”
 - “Our mother can walk to” specific house of worship
 - “We want to send our children to the Elementary School”

Prevention

- If letter is a contributing factor to acceptance/denial it is discriminatory
- Buyer's Agent/Seller's Agent
 - Discuss potential fair housing violation
 - Do not read or accept letter drafted by buyer
- Listing agent
 - Discuss liability at listing interview and do not deliver letter to seller
 - Strongly advise against accepting letter from buyers

The Buyer Wants the Letter...

- Listing agent and/or buyer's agent should not be involved in the delivery of letter
- Listing agent/buyer's agent should not have any knowledge as to the contents of the letter
- If buyer wants letter make them deliver it

The Buyer Wants the Letter...

- Recommend that seller have their attorney review the letter
- Have a paper trail showing your good faith effort at advising against practice
- Seller can instruct licensee not to accept any offers with personal letters

Liability

- Non-prevailing purchaser is aggrieved party
- Find out why they lost out...**remember the grocery store**
- “The seller wanted the new family to have it”
- DING...DING...DING
- If a licensee is involved, they will be a named party if an action is filed
- Licensee will have to show they had no knowledge of letter or show good faith effort

Liability-Agency Issues

- Dual/Designated Agency
 - Licensee puts seller at risk
 - Seller is client of licensee's broker
 - Not act to the detriment of either party
- Seller or Broker's Agency
 - Licensee must act in best interest of seller
 - Submitting letter on behalf of buyer may breach fid duty

The Painful Part

- If you know that the buyer has delivered a letter to the seller containing references to a protected class against your advice and you know the seller has made their determination as a result of the aforementioned letter, you should immediately withdraw from the transaction
- Document everything!!!
- Commissions at closing are not worth prosecution for fair housing
- DON'T BE THE TEST CASE...IT'S COMING

The Painful Part

- Oregon passed a law banning personal letters
- Many are states are looking into similar legislation
- Legislative Steering Committee directed NYSAR staff to investigate
- Staff will report back to appropriate WG and Committee

FAIR HOUSING: WHAT CAN YOU DO NOW?

Office Policies

- Create strong anti-discrimination office policy
- Address what is expected
- How to treat seller/purchaser
- What resources are available
 - NAR/NYSAR
 - HUD
 - NYS DHR/DOS

Office Policies

- Sellers
 - Pre-approval of potential purchasers must be universal (up to seller whether to require pre-approval)
 - Discuss Fair Housing issues at interview
 - Acceptance of personal letters, discuss with Seller
 - Scrutinize listing information provided

Office Policies

- Purchasers
 - Pre-approval of potential purchasers before showing any properties must be universal*
 - Writing and delivery of personal letters
 - Standard search procedures for properties

Office Policies

- Purchasers
 - Do not discuss:
 - Demographics
 - Crime
 - Quality of schools
 - Neighborhoods
 - Places of worship

Training/Education

- Brokers may provide voluntary training
 - On-site or off-site
 - Broker is being proactive
 - Utilize existing resources, don't reinvent the wheel
 - NYSAR is a great resource with new information added on a regular basis

What Can NYSAR Do For You?

- NYSAR.com Fair Housing page
 - Overview
 - Articles
 - Videos
 - Link to government resources
- NYS DHR Fair Housing page
- NAR Fair Housing page
- HUD Fair Housing page

What Can NYSAR Do For You?

- NYS DHR Fair Housing page*
- NAR Fair Housing page
- HUD Fair Housing page

MANDATORY CE REQUIREMENT EFFECTIVE 7/1/2021

Continuing Education

- Currently, non-exempt licensees must complete 22 ½ hours of CE every 2 years
- Included in the 22 ½ hours are 3 hours of Fair Housing and 1 hour of Agency (unless 1st renewal, then 2 hours of Agency)
- Brokers licensed for 15 consecutive years prior to 7/1/2008 are currently exempt from CE

Continuing Education

- During the Fall 2018 NYSAR business meetings, multiple committees approved proposed legislation to increase the “core” requirements of CE
- The same committees also supported the elimination of the grandfathering clause
- It was NYSAR’s opinion that every licensee needs to take CE and no other licensed profession has a grandfathering exemption

Continuing Education

- NYSAR drafted proposed amendments to the Real Property Law
- Proposed amendments were introduced before the legislature
- Passed Assembly on 5/30/19, passed Senate on 6/20/19
- Delivered to Governor on 10/11/2019

Continuing Education

- Governor Cuomo signed into law on 10/23 to:
 - Include 2.5 hours of ethical business practices
 - Include 1 hour of legal updates
 - This is part of the total 22.5 hours required
 - Fair Housing and Agency are still required
 - Eliminate the “grandfathering exemption” for all licensees

Continuing Education Removed Text

~~The provisions of this paragraph shall not apply to any licensed real estate broker who is engaged full time in the real estate business and who has been licensed under this article prior to July first, two thousand eight for at least fifteen consecutive years immediately preceding such renewal.~~

Continuing Education RPL 441(3)(a)

3 hours of instruction pertaining to fair housing and/or discrimination in the sale or rental of real property or an interest in real property, at least 2 ½ hours of instruction pertaining to ethical business practices, at least 1 hour of instruction pertaining to recent legal matters governing the practice of real estate brokers and salespersons in New York which may include statutes, laws, regulations, rules, codes, department of state opinions and decisions, and court decisions and at least 1 hour of instruction pertaining to the law of agency except in the case of the initial 2-year licensing term for real estate salespersons, 2 hours of agency related instruction must be completed

Continuing Education

- Changes would not go into effect until 7/1/2021
- Every single licensee currently grandfathered would be required to complete 22.5 hours of CE
- No exemptions means no exceptions (except for attorneys)
- NYSAR and local Realtor boards/associations will most likely offer the 2 ½ hours of ethical business practices that will also satisfy the NAR requirement

DHR PRIVATE SETTLEMENTS

DHR

- Effective October 12, 2021
- Any complaint filed with DHR or filed with another agency and forwarded to DHR (DOS)
- DHR will not discontinue action if private settlement

DHR

- Prior to 10/12/21
 - DHR would permit parties to enter private settlements without DHR involvement
 - DHR was not entitled to terms of private settlement
 - DHR would then honor parties request to terminate prosecution

DOS v GTRM

- 77% of cases where probable cause is found result in a settlement.
- Half of all post-probable cause settlements are private settlements without any public record of the terms of the settlement.

DOS v GTRM

- DHR and NYS have a significant governmental interest in prosecuting individuals or entities violating