

DOES A VIOLATION OF THE LICENSING LAW VOID A LISTING AGREEMENT?

Barry S. Goodman*

Although the New Jersey Real Estate Licensing Act¹ (the “Act”) requires you, as a listing agent, to leave a copy of the fully executed listing agreement with the seller when it is executed and to specify the termination date in the listing agreement, you inadvertently forgot to do so. As a result, you could be subject to sanctions by the Real Estate Commission for violating the Act.

However, does such a violation of the Act also automatically void the listing agreement? Under a 1979 case, the answer to this question has been “yes.” However, based on a recent Appellate Division decision, the listing agreement no longer automatically would be void but, depending upon the circumstances, might be voidable.

Section 17 of The Act

Under Section 17² of the Act, real estate licensees are prohibited from engaging in certain conduct. One of these prohibitions specifically deals with listing agreements. Section 17(f) specifically provides that a real estate licensee will be guilty of violating the Act for the following conduct regarding a listing agreement:

- f. Failure to provide his client with a fully executed copy of any sale or exclusive sales or rental listing contract at the time of execution thereof, or failure to specify therein a definite terminal date which terminal date shall not be subject to any qualifying terms or conditions.

In 1979, a trial court held that, if Section 17(f) is violated, the listing broker would not be permitted to enforce the listing agreement because the agreement was void as a matter of public policy³. No cases in New Jersey had been decided on this issue since then until a September 2007 Appellate Division decision.

The Appellate Division Considers If Violations Of The Act Void Listing Agreements

In a case known as *Exit A Plus Realty v. Zuniga*⁴, the Appellate Division reviewed the issue of whether or not a violation of the Act should automatically void a listing agreement and bar a broker’s right to recovery a commission under the agreement.

By way of background, Exit A Plus Realty (“Exit Realty”) was the buyer’s agent and Coldwell Banker Jablonski Real Estate (“Coldwell Banker”) was the listing agent with regard to the sale of property in Bayonne, New Jersey by Edison and Teresita Zuniga to Sharon Rockett (“Rockett”). The Zunigas executed a multiple listing agreement granting to Coldwell Banker the exclusive right to sell the Zunigas’ home during the period from April 14, 2005 to June 14, 2005. The offering price for the home was \$474,900. The listing agreement provided that Coldwell Banker was offering to cooperating brokers a commission of two percent (2%) minus two hundred dollar (\$200).

There is a dispute whether or not the listing agreement was left with the Zunigas when they signed it. They testified that it was not but the Coldwell Banker agent said that he left a copy of it with them. The trial court accepted the Zunigas’ testimony that the listing agreement was not left with them when they signed it.

In addition, the trial court found that the listing agreement was not completed when it was signed because the space providing for the extended protection period was left blank and later was filled in by the Coldwell Banker agent and mailed to the Zunigas. Mr. Zuniga testified that, when he received the listing agreement in the mail, the blank space for the extended protection period was filled in with “90 days.” He therefore immediately called the Coldwell Banker agent. Mr. Zuniga testified that the agent told him that he should not worry about it and did not explain what the 90 days meant. Mr. Zuniga further testified that, since he had agreed to list the property with Coldwell Banker for “60 days,” he put a line through the handwritten “90 days” and wrote “60” above it.

In mid-May 2005, Exit Realty then produced Rockett as a buyer for the property. The contract included a price of \$465,000, subject to the property being appraised at that price or above. However, the appraisal came back at \$450,000 and the Zunigas refused to lower the price. Instead, one day after the expiration of the exclusive listing agreement with Coldwell Banker, the Zunigas advised the buyer that they were declaring the contract void unless she agreed to purchase it for \$465,000, which she refused to do.

Several days later, the Zunigas agreed to lower the price to \$450,000 and the buyer agreed to purchase the property. Title closed on July 19, 2005 and, upon learning of the sale, the brokers demanded to be paid their commission, which the Zunigas refused to pay.

As a result, Coldwell Banker and Exit Realty filed suit. After a trial, the trial court dismissed the lawsuit, holding that Section 17(f) had been violated and, as a result, the listing agreement automatically was void and unenforceable. Coldwell Banker appealed.

The Appellate Division Adopts NJAR®’s Position Concerning A Violation of Section 17(f)

The New Jersey Association of REALTORS® (“NJAR®”) filed an application to appear as an amicus curiae before the Appellate Division concerning this important issue. The Appellate Division not only granted NJAR®’s application but then adopted NJAR®’s position with regard to the issue and reversed the longstanding policy in New Jersey that listing agreements automatically are void when there is a violation of the Act.

NJAR® argued that the listing agreement in question is enforceable even assuming, after its execution, there may not have been strict compliance with Section 17(f). NJAR® contended that Section 17 does not provide that listing agreements will be void if this section is violated. Instead, it provides that the agent may be subject to sanctions by the Real Estate Commission. The Appellate Division agreed with NJAR®’s position.

The Appellate Division specifically rejected the 1979 trial court decision and stated as follows: “[W]e are of the view that a violation of any of the enumerated provisions of N.J.S.A. 45:15-17 would render the agreement voidable, but not automatically void. Indeed, as pointed out in the amicus curiae brief submitted by NJAR®, if the Legislature had wanted to invalidate agreements entered in contravention of N.J.S.A. 45:15-17, it could have done so explicitly, as it has done in numerous other instances.”

The Court also noted that the Zunigas did not suffer any prejudice as a result of the failure to have a copy of the listing agreement with them on the date it was signed since it was mailed to them the next day. Similarly, they were not prejudiced by the insertion of the 90-day provision in the agreement since Mr. Zuniga saw that the “90 days” had been inserted and therefore could have objected to the insertion and refused to go forward with the listing agreement. Instead, he changed “90 days” to “60 days,” which was accepted by Coldwell Banker. The Appellate Division also found that Mr. Zuniga’s testimony that he understood the 60-day period to be the term of the agreement, not an extended protection period, to be at odds with the actual wording of the listing agreement.

Finally, the Court noted that Zunigas’ cancellation of the contract of sale with the buyer one day after the expiration of the exclusive listing agreement and their subsequent acceptance of the offer of purchase at the appraised value of the property gave rise to significant questions of good faith and fair dealing by the buyer and sellers. The Court held that “technical violations that resulted in no prejudice” to the buyer and sellers should not be the basis for denying a broker’s claim to a commission.

Conclusion

As a result of this significant Appellate Division decision, listing agreements no longer automatically are void if a real estate licensee violates Section 17 of the Act. However, listing agreements are voidable depending upon all of the facts and circumstances involved in the transaction. In addition, real estate licensees still may be subject to sanctions by the Real Estate Commission for violating Section 17. Real estate licensees therefore still should carefully adhere to the requirements of Section 17 in order to ensure that their commissions are protected.

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* Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith & Davis LLP, is General Counsel for NJAR®. He is a trial attorney who focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders and partnership disputes.

1) N.J.S.A. 45:15-1, et seq.

2) N.J.S.A. 45:15-17.

3) See *Winding Brook Realty v. Platzer*, 166 N.J. Super. 575 (Law Div. 1979), *aff'd* on other grounds, 173 N.J. Super. 472 (App. Div.), cert. denied, 85 N.J. 119 (1980).

4) _____ N.J. Super. _____ (App. Div., decided and approved for publication on September 5, 2007).