

Best of the hotline

By James L. Goldsmith, Esquire

Here's one for you big city brokers.

Facts. I am planning to move my office to an office building that permits no exterior signs. Also, signs are not permitted in the first floor lobby where one might expect to see a marquis showing the names and locations of the tenants. Apparently there are so many tenants that a sign board is not feasible. Strategically located in the lobby are electronic tablets on which visitors can identify the tenants and their floor and office number.

Q. How can I satisfy the sign requirement for licensure of my office?

A. Regulations of the State Real Estate Commission require that the business name of the broker be prominently displayed, in "permanent" fashion "outside" of the office. I am not sure what permanent means given my belief that nothing on this planet is permanently affixed to anything! I think, however, that a sign will be deemed "permanent" if it is of such materials and affixed in such a way that it is likely to remain in place as long as the broker inhabits the office. Where is "outside of the office"? Generally one would anticipate that a sign would be visible from the street. In a large office building where signs may not be posted on the exterior, one would think that the lobby would be considered "outside the office." Where the number of tenants precludes signs within the lobby, then a sign posted on the exterior wall outside of the office, on the floor of the office would be acceptable. The Real Estate Commission is cognizant that large office buildings present unique problems. As long as a consumer can see a sign and determine the location of a broker's office before entering through the door to that office, it will suffice.

Here's one for you country folk.

Facts. The home I am about to list looks like a modular home. When discussing the matter with the sellers, they "assured" that the home was not a trailer (manufactured). Their understanding is based on the marketing information they received when they received they purchased the property. Among their papers was a copy of a page from the MLS that they reviewed when they were looking to purchase the home clearly stating that the property is "modular."

Q. Am I safe advertising the property as modular? Do I have to verify that it is modular and not manufactured? How can I tell?

A. I wouldn't address these questions if the distinction between modular and manufactured homes was not an issue for Realtors®. I've defended more than few Realtors® and appraisers who have misidentified a manufactured home for modular. Even when misidentified by listing agents, I believe the greater risk is borne by the buyer agent. Let's explore.

Generally, it is easy to distinguish a home that is either modular or manufactured from a home that is stick-built on-site. We all know the look. The problem is determining whether the

modular looking thing is really modular. While it is not imperative that a listing agent make the call, it is essential that the listing agent understands the distinction. There are plenty of online resources. I Googled “distinguishing modular from manufactured” and was bombarded with great articles. I opened the first, published by the International Association of Certified Home Inspectors (InterNACHI), and learned all I needed to know. Modular homes are built in factories and trucked to sites in multiple parts where they are assembled. Manufactured homes are also built in factories, but on a chassis so that they can be trucked to the site on their own wheels. Generally, the standards of construction differ and they are treated differently by the appraisal and lending processes. There is also a stigma attached to manufactured homes, once called “trailers.”

When owners discover that the modular home they purchased is really a trailer, they are understandably upset. Appraisers can quantify the difference in market value that may represent the damages to which the errant party, if any, is liable.

Let’s look at the duties and liabilities of the listing and buyer agents. The listing agent is to gather information that is entered in the MLS and that may be marketed through advertisements and other means. It is important to gather accurate information. Looking at previous listing materials from years past may be helpful; accessing the tax assessment records is also helpful; a careful walk-through is essential. Unfortunately, past MLS documents and tax assessment records may be inaccurate. They frequently are.

An inspection by the listing agent, while not required by Pennsylvania license law (the Rules and Regulations of the State Real Estate Commission provide that a licensee is not under a duty to conduct an independent inspection of the property), it is nevertheless helpful. In a home that might be misidentified as modular or manufactured these are telltales. A sticker or plate with a VIN or certification number generally means that the home is manufactured. Look for this sticker in a closet, inside of a kitchen cabinet (under the sink), near or on the electrical panel, or on the outside frame. If a manufactured home is perched on a foundation so that it has a basement, looking under a dropped ceiling may reveal a chassis.

For the protection of the listing agent and seller (protection from failure to disclose or misrepresentation suits) it is advisable to disclose that while the seller believes the property to be modular, the buyer should make that determination. A statement to this effect will most certainly exonerate the seller and the listing agent. It might also make marketing more difficult. This disclosure need not appear in the MLS, but certainly must be in the hands of the buyer agent and buyer before an agreement of sale is executed.

Listing agents are also protected by a number of legal doctrines. The most significant is a rule of evidence known as the parol evidence rule. It provides that if the buyer executes an integrated contract she may thereafter not look to previously viewed advertising materials or statements to support a claim of misrepresentation. An integrated contract is one that specifically provides that all terms between the parties are stated in the agreement. The parol evidence rule provides that evidence of previously made representations or agreements not in the agreement of sale may not be admitted into evidence in a misrepresentation suit. So, an MLS description that states that the property is modular is not admissible evidence if the agreement of sale is integrated (PAR’s is) and if it does not state anything about the property being modular or manufactured.

The theory is that if you state in an agreement of sale that you are not relying on any materials/representations outside of the agreement of sale, then you cannot come into court claiming to have relied on such materials/representations. "I relied on the MLS description of the property as modular," is lost! Since the agreement of sale does not provide that the property is modular, how can the buyer sue claiming there to be a breach of contract or misrepresentation?

As I alluded to earlier, the buyer agent is more likely to face a problem. True, the buyer agent didn't misrepresent that the property was modular and it seems like the buyer agent did nothing wrong. The problem for the buyer agent is the failure to recognize that the agreement of sale did not warrant the property as modular rather than manufactured. The buyer agent should be aware that if the buyer is relying on information or representations outside of the agreement of sale, the reliance may be unfounded and not support a lawsuit when the buyer is later disappointed. A buyer agent should determine what representations have been made that the buyer is relying upon when making the decision to purchase. If one of those facts happens to be the seller's representation that the property is modular, then the agreement of sale should include a provision that the sale is of a modular home. Failure to recognize this risk most likely makes the buyer agent culpable.

So what happens when a buyer agent modifies an agreement of sale to state that the seller warrants that the property is modular? It is possible that the seller refuses to sign (listing agent, don't let you seller sign such a warranty if he is not absolutely positive of the nature of the property).

So now we have a situation where the seller refuses to warrant because the seller isn't absolutely certain and neither the buyer nor buyer agent can determine the nature of the construction. What to do? This is where the buyer may choose to sign the agreement, but take advantage of the inspection contingencies. Make certain that the home inspector understands the difference between modular and manufactured. If the inspector cannot provide you with a clear indication of which type it is, then buyer can back out or proceed without recourse against any other party.

To prevent misidentification and the suits that follow, buyer should be educated as to the distinction so that he or she can make the effort to come up with an answer. There is nothing wrong with buyers taking risks, provided the buyer understands that risk. In this case, a buyer who is unable to obtain a seller warranty or a definitive identification of the property, must understand that if he or she purchases it, and it turns out to be manufactured, there will be no remedy.