

“We have other offers”

By James L. Goldsmith, Esquire

This, or something like it, is a frequently heard refrain. You hear it when you tell a listing agent that your buyer's offer is forthcoming.

Is it true? Does it have to be true? When it is not true, do you have recourse? These are questions we hear on the Hotline and they are questions addressed in malpractice claims pursued against listing and buyer agents. As you might imagine, correctly so, the answer is very fact dependent.

“I am bringing you an offer” does not always result in an offer being tendered. Buyers can be fickle and circumstances can change overnight. When that representation proves false, has the buyer agent made a misrepresentation? Yes, the agent uttered a false or misleading account. The better question is whether the agent's misrepresentation is “actionable.” “Actionable” is a term, used mostly by lawyers, to define conduct that serves as the basis for recompense or some other remedy. Not all misrepresentations serve as a basis for imposing a remedy or meting out punishment. Representations about a future event more frequently fall into this category of ‘non-actionable’ misrepresentation. The justification for this disparate treatment is evident. Saying something false about a past event more strongly suggests that the statement was delivered with the intent to deceive. However, claiming that something will occur in the future may not have been intended to deceive someone, especially if the person making the statement truly believed it to be true.

The facts need to be reviewed before one can conclude that a false utterance is actionable. “I have an offer” may have been uttered in sincerity and with the reasonable belief that the offer would be penned and delivered. It may have also been uttered with a recklessness that was motivated by wishful thinking or otherwise. Listing agents who hear these representations know the situation. If I had a dollar for every time I heard “If I had a dollar every time someone promised an offer was coming . . .” You get the point.

That takes us to a corollary: “I have another offer coming, so make yours _____.” You can fill in the blank because you have heard it before. Unlike the quote “I am bringing an offer,” the phrase “I have another offer coming” is not concrete. Go back to the analysis I discussed above. Did the listing agent intend to deceive; or did she hold a reasonable belief that an offer was forthcoming? In real life these discussions are much more nuanced. Maybe the buyer previously submitted an offer that was rejected, and now his agent says a better offer is on its way. Why wouldn't the listing agent believe that a better offer was on its way? Again, real life presents many situations that cause us to believe one way or another.

Because these kinds of representations about multiple offers have found their way to courtrooms, reasonable care should be exercised. A buyer agent who hears “I have other

offers” might seek to press the listing agent to reveal whether those offers are in-hand and whether they remain viable (has the expiration date for accepting the offer passed?). The buyer agent could also deliver an email to the listing agent stating something to the effect that the listing agent has represented that the seller has multiple offers from which to choose. “If this is incorrect, kindly advise immediately.”

Why should a buyer agent determine what is meant by “multiple offers?” Buyers may act out of fear that there is competition for the property, and make an offer higher than they would otherwise. If buyers later learn that there was not another offer, or even if they suspect that the seller was playing games, they are more likely to file a suit.

Likewise, listing agents should exercise caution when representing that there are multiple offers. Are the offers in-hand or are they promised? Would it be better to state that there are multiple offers in-hand or that he has been promised that another/others is/are forthcoming?

The claims arising from “I have another offer” are surprisingly varied. One such claim pitted a buyer against her agent. In the suit she claimed that the agent convinced her to pay well over market price because there were other competing offers. The buyer claimed that her agent neither questioned the listing agent to verify whether the other offers were in-hand or “promised;” the buyer also claimed that the buyer agent had a duty to counsel her that “I have another offer” doesn’t always mean what it says.

The more common claims are asserted by buyers against listing agents who say that they paid more than they would have because they relied on the listing agent’s representation that “I have another offer.” Often, the listing agent in these cases joins the buyer agent alleging that the buyer agent misquoted and/or that it was the buyer agent who encouraged the buyer to make an offer in excess of market value. The claims and intricacies are varied, but the point should be evident. Examine closely the situation at hand and be careful in your representations, whether they pertain to multiple offers, or other facts relating to your transaction.

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