

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

HELEN FAHEY

Debtor

Case No. 95-11463 K

The Chapter 11 Debtor-in-Possession, Helen Fahey (“Debtor” or “Seller”), has objected to an administrative claim filed by R.W. Bronstein Corp., a real estate broker (the “Broker” or “Listing Broker”) in connection with the Debtor’s sale of a parcel of her realty. The parties have submitted the matter for a decision to be based solely upon the relevant documents and upon a stipulation that the decision should rest on a presumption that there was no bad faith intent or bad faith behavior on the part of the Debtor or her affiliates or counsel. The Broker is a corporation that has well and faithfully served in bankruptcy cases in this district for many decades, and although this Decision finds that the Broker did not fully perform its agreed duties, there is no suggestion of anything other than good faith on the Broker’s part either.

ISSUE 1.

Specifically at issue in the first instance is whether the Broker was entitled to five (5%) percent of the sale price of the real estate or only two and one-half (2.5%) percent of the sale price of the real estate, under the Listing Agreement and surrounding circumstances. The

Listing Agreement was an “exclusive sale” agreement and the form used was a standard form approved by the Multiple Listing Service (“MLS”). Although that form contemplates the possibility that a buyer might obtain the services of a buyer’s broker who would seek compensation from the seller, the agreement does not contemplate the circumstance of a buyer who obtains a buyer’s broker who will seek compensation only from the buyer.

Here, the facts present the latter circumstance, and the issue is whether the Listing Broker is entitled to keep the full five (5%) percent of commissions that had been set aside under the agreement or whether it is entitled only to a commission of two and one-half (2.5%) percent, as if the Buyer’s Broker had sought compensation from the Seller.

The operative provisions of the agreement are:

- Paragraph 2, which states “In consideration of the Broker’s Agreement to list the property promptly through the Multiple Listing Service (“MLS”) of the Western New York Real Estate Information Services, Inc., the seller hereby grants to the broker, a Member of said Multiple Listing Service as of 12/19/97, until and including 6/19/98, the exclusive right to sell, exchange, rent, and/or lease Property for the sum of \$450,000 and/or at such other price or terms to which Seller may consent. The Seller agrees to pay the Broker a commission of five (5%) percent of sale or leased price”

- Paragraph 4, which states, “The Seller authorizes the Broker to submit this listing to the MLS of Western New York Real Estate Information Services, Inc. thereby making a unilateral offer of subagency to the participants in the MLS The Seller authorizes that the compensation paid to the Selling subagent in a transaction shall be two and one-half (2.5%) percent of the selling price . . . to be paid out of the commissions stated above.”

- Paragraph 5, which states “The Seller authorizes the

Broker to cooperate with brokers who represent Buyers with the understanding that such Buyers' brokers will be representing only the interests of the prospective Buyer. The Seller authorizes that the compensation to a Buyer's broker participating in the transaction shall be two and one-half (2.5%) percent of the selling price . . . to be paid out of the commission stated above."

- And paragraph 6, where it is stated "All offers to lease or purchase will be presented by the Broker and, with Seller's consent, the cooperating Broker, if any."

Conspicuously absent from the agreement is language such as the following, which was contained in an earlier agreement that had expired: "The Seller authorizes the listing broker . . . to cooperate with other brokers on terms satisfactory to the listing broker, including but not limited to limitations and the payment of compensation from the commission of the listing broker. In the event the purchaser is represented by a Buyer's agent you may pay a two (2%) percent commission out of your commission to be paid to said Buyer's agent providing the agent is not receiving compensation in any form from the purchaser." [Emphasis added.]

In the case at bar, it is undisputed that the Listing Broker was aware that the Buyer's Broker had "registered" as a Buyer's Broker who was to be paid by the Buyer. It is also undisputed that the Buyer's Broker, for whatever reason, did not conform with the obligation to forward any purchase offer to the Listing Broker for presentation to the Seller. And it is further undisputed that although the Seller was represented by counsel, and counsel was negotiating with the Buyer's Broker, the Listing Broker was aware of these facts and did not insist that such negotiations cease in light of his right to receive all purchase offers. (It did write letters of complaint requesting information, but no more than that.)

It is the Debtor's argument that the Listing Broker could have had no expectation of receiving more than two and one-half (2.5%) percent in any case in which a selling broker is involved, and that the Listing Broker was aware that the Selling Broker had "registered" as such. The Listing Broker, on the other hand, argues that the contract clearly provides for it to receive a five (5%) percent commission except in the instance in which there is a Buyer's Broker who seeks compensation from the seller, rather than from the buyer. This was a negotiated term of the Listing Agreement, the Listing Broker argues, and had the Listing Broker been consulted with regard to the purchase offer, there would have been further negotiations about the appropriate compensation of the Listing Broker under these circumstances in which the Buyer's Broker was looking to the Buyer for compensation.

It is self-evident that if a Buyer's Broker and her client elect to forego collection from the Seller's Broker, that may reflect itself in the price paid. Though it will not necessarily result in a dollar-for-dollar reduction of the purchase price to offset the fee paid by the Buyer to the Buyer's Broker, it may so result. This is one among many reasons why it is critical for the Listing Broker to give advice and counsel to the Seller when the Buyer's Broker is not a "subagent" owing a duty to the Seller.

Consequently, it must be decided whether the burden of policing paragraph 6 of the Listing Agreement must fall on the Listing Broker or on the Debtor's Chapter 11 estate.¹ I find that the burden must fall on the Listing Broker. It is this writer's experience that MLS form

¹The Listing Broker seeks allowance of an administrative claim, and carries the burden of bringing itself squarely within the administrative priority.

agreements like the one at bar are the subject of much comment and debate among real estate professionals (lawyers and non-lawyers alike) before adoption. It is not for the Bankruptcy Court to fill the void in the standard agreement or in the enforcement mechanisms provided by the Multiple Listing Service for grievances among its members of the MLS. The duty was clearly on the Listing Broker to take all steps necessary to have the property properly listed with the MLS, and it was presumably within the Listing Broker's power (through insistence on the contract terms, and perhaps through MLS grievance procedures) to insure that the Buyer's Broker (of whom the Listing Broker was aware) complied with paragraph 6 of the form agreement. Had these two MLS-member-brokers performed the contract, the present question would not be before the Court.

Indeed, the listing instrument was drafted by listing brokers, selling brokers, and all other members of the MLS. The brokers here clearly knew, or should have known the contents of the agreement and knew that it was silent as to the circumstance present here (unlike the earlier, expired agreement). It is appropriate to construe the instrument in favor of the Chapter 11 estate; neither the estate nor the Debtor played any role in the drafting of the agreement. So construing, the Court finds that the authorization provided to the Listing Broker by clause 5, entitled "Buyer's Brokerage," did not permit the Listing Broker to cooperate with brokers who represent buyers under circumstances in which the Listing Broker would keep the entire five (5%) percent and the buyer would compensate its own broker, potentially at the expense of the offering price to the Seller. The Listing Broker acted at its own risk,

consequently, in co-operating with a Buyer's Broker who was not to be paid out of the five (5%) percent commission set aside by the seller. The Listing Broker compounded the potential for injury to the Seller by failing to insist that the Buyer's Broker obey the Listing Agreement and (I presume) the rules of the Multiple Listing Service, requiring the offer to be submitted through the Listing Broker. It further compounded the risk of damage to the Seller by failing to perform the duty to assist in the negotiations and, in particular, to fully advise and disclose to the Debtor the Listing Broker's intention to lay claim to the entire five (5%) percent, regardless of the extent to which the Buyers might reduce their purchase offer in light of their obligation to pay their own broker.

The Listing Broker thus breached the Listing Agreement and is entitled to compensation here only on a quantum meruit basis. The Court finds the appropriate award to be the two and one-half (2.5%) percent that had been bargained-for in the one and only type of "buyers brokerage" that was addressed in the Multiple Listing Agreement.

The other arguments raised by the Listing Broker are to no avail. In its papers, it makes much of the fact that it "was not made a part of the negotiations on the sale price of the main residence;" that the "so-called negotiations were held without the knowledge or consent of [the listing broker] since the attorneys for the bankrupt kept [the listing broker] in the dark as to the signing of the Contract for the sale;"² that it "was not given the opportunity to be present

²This Listing Broker knew about negotiations regarding the sale, but has chosen to characterize the present dispute as one involving the "bargaining away," by others, of a part of its commission.

during the negotiations or at the presentation of the contract for sale;” and similar other assertions. The Court finds this to have been a self-inflicted wound. It is acknowledged by all that the Listing Broker knew about the Buyer’s Broker and knew that the negotiations were occurring. At any time it could have instructed the Buyer’s Broker to cease and desist its violation of the duty to submit all offers through the Listing Broker.

It also relies upon the language of the earlier-expired agreement -- the “Reserve Auction Listing Agreement,” quoted above -- for the proposition that the “buyer’s broker may be compensated by receiving compensation from the buyer or through the listing broker, but not both.” Clearly, however, that agreement had expired and was replaced by the MLS agreement which was silent on this point. (Furthermore, to return two and one-half (2.5%) percent to the Seller is not “to pay Buyer’s Broker twice.” Rather, it protects the Seller from *paying* twice; once by paying an “extra” two and one-half (2.5%) percent to her own agent, and also possibly³ losing, in the purchase price, the two and one-half (2.5%) percent (or other sum) that the Buyers paid their own agent.

The Court agrees that the Buyer’s Broker “had no right or authority to waive, modify or bargain away any rights to compensation due” the Listing Broker. But the existence of this dispute is the fault of the Listing Broker. Indeed, paragraph 3 of the MLS agreement specifically states, in relevant part, that the Listing Broker will “assist in negotiating, in the

³The Listing Broker’s counsel correctly pointed out that the Court’s notion that the offered price would necessarily be decreased by what the offerers must pay their own agent, was “speculation.” Though true, any doubt here must be resolved in the estate’s favor; see footnote 1, above.

seller's best interest, any and all offers to purchase . . . [and] provide professional advice and assistance in accordance with the Broker's legal obligations of reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and duty to account." Further, the paragraph of the Listing Agreement entitled "Buyer's Brokerage," in clear contradistinction to the then-expired "Reserve Auction Listing," never contemplated the possibility that a Buyer's Broker might be compensated by the buyer, or the effect that such an arrangement would have on the agreement to pay five (5%) percent to a Listing Broker. In this regard, it seems clear to the Court that there was no "meeting of the minds" between the Listing Broker and the Seller as to that potentiality, and, as ruled above (1) there consequently was no authority for the Listing Broker to co-operate with a Buyer's Broker who was not going to share in the five (5%) percent, and (2) this was compounded by the failure of the Listing Broker to enforce the agreement against the Buyer's Broker, and by the failure to properly provide advice and counsel to Seller, as would have occurred if the agreement was so enforced.

ISSUE 2.

The Listing Broker's claims for commissions for the additional property addressed in "addenda" also must be rejected in light of its failure to compel the Buyer's Broker to obey paragraph 6 of the agreement (and the rules of the MLS, I presume), and the Listing Broker's failure to otherwise involve itself in the negotiations. That paragraph is clearly intended to avoid this sort of dispute, and it was not enforced by the Applicant. (Again, it is the Listing Broker's

duty, not its client's duty or its client's own lawyers' duty, to enforce a paragraph drafted by brokers to prevent precisely this dispute.

CONCLUSION

The objection is sustained in all regards, and the Listing Broker's claim is disallowed to the extent that it exceeds the total sum of \$8,750.00. If the Listing Broker is in possession of any assets of the Debtor above and beyond such claim, it is directed to turn those moneys over to the Debtor's attorney.⁴

SO ORDERED.

Dated: Buffalo, New York
January 22, 1999

/s/ Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.

⁴As noted at the outset, the parties stipulated to submit this matter to the Court for decision on a premise (a premise that has not been tried to the Court) that no one acted in bad faith with regard to any aspect of these transactions. Consequently, this ruling is entirely without prejudice to any rights that the Listing Broker may have against the Buyer's Broker under the agreement in question or the rules and regulations of the MLS, or other authority. This Decision is final, however, as to this Chapter 11 estate.