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Hey matrimonial attorneys – real estate agents have privilege

By Andrew Lieb

You are a matrimonial attorney and you want to cross-move for contempt against the husband for not paying child support and maintenance in a post-divorce proceeding. The husband has already started an action for a downward modification of support based upon a claim that he has no money and therefore has suffered an extreme hardship pursuant to DRL §236 (part B, subd. 9, par. b) and the precedent of *Pintus v. Pintus*.

However, and regardless if his claims are true, there is a marital residence with lots of equity, which is jointly owned by the parties, albeit, as tenants in common pursuant to the Judgment of Divorce, which would adequately pay all of the outstanding monies due and owing, plus a lot more for a long time into the future. Yet, the marital residence has not been sold, pursuant to the terms of the Stipulation of Settlement (hereinafter “Stip”), which was incorporated, but not merged, into the Judgment of Divorce. Yes, the parties did hire a real estate agent, who listed the property, pursuant to the terms of the Stip, but no sale has been closed to date, but there have been quite a few offers.

Your client, the wife, says that the husband, who is living in the house, has obstructed the sale and is therefore violating the intent of the Stip. She says that he will not agree to reasonable offers that

have been made on the home, which are acknowledged to not fall within the 5 percent of the listing price as required to be accepted by the Stip, but are nonetheless reasonable. Plus, the wife claims that the husband intentionally dirties the place before showings to prospective purchasers and even has gone so far as telling prospects ghost stories about the history of the home.

So, you first ask the real estate agent to write a letter to backup the wife’s claims, which you intend to show to the judge at your first court conference on this matter. She refuses, saying that her broker-of-record will not let her get into the middle of this mess and you are frustrated. In response, you decide that you are an officer of the court and you will just subpoena her to testify and then she will have no choice, but to backup your client, the wife.

So, you serve the subpoena on her as an agent of the real estate brokerage company at their offices downtown. Unbeknownst to you, the subpoena should have been served on the broker-of-record as you served her in her corporate capacity and furthermore the office downtown was not the principal place of business for the brokerage company, but this is neither here nor there and these are all matters that may be excused by the court.



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Then, you receive a Motion to Quash by the brokerage company’s attorneys, which details all of the above potentially curable mistakes, but also cites privilege and you are perplexed. You think back to your evidence class in law school and are sure that real estate agents are not one of the enumerated categories for privilege in the State of New York, pursuant to CPLR

§4505, and fortunately, you are correct, which you verified in a quick Westlaw search. Yet, you thereafter read the motion and this is what you learned.

In New York, real estate agents are licensed professionals with oversight from the Department of State, pursuant to Real Estate License Law, which includes, but is not limited to, Article 12-A of the Real Property Law (hereinafter “RPL”) and 19 NYCRR 175. In fact, RPL §442-e states, in pertinent part, as follows: “Any person who violates any provision of this article shall be guilty of a misdemeanor”. Furthermore, RPL §443, which is also a part of Article 12-A, lays out how a real estate agent owes fiduciary duties to their clients, including a duty of confidentiality. Thus, the motion states that should the court require the real estate agent to testify, each and every question would pertain to confidential information. The motion goes on to explain that such disclosure would

therefore breach the real estate agent’s RPL §443 fiduciary duty owed to their client, and thus, pursuant to RPL §442-e, this breach of fiduciary duty would constitute a misdemeanor. Therefore, the motion argues that the real estate agent has properly claimed the privilege against self-incrimination pursuant to the Fifth Amendment of the United States Constitution; Article 1, Section 6 of the New York State Constitution; and CPLR §4501, and should receive a Protective Order pursuant to CPLR §3103.

So, matrimonial attorneys, stop subpoenaing real estate agents to testify about their clients’ confidences. Real estate agents cannot pick sides in a matrimonial fight, so why waste your client’s money by trying to drag them into the middle when they can just quash your subpoena. Instead, you should encourage them to sell the house so your client can get paid. To be clear, real estate agents are not hired to be an arbitrator of faults; they are supposed to sell houses. Let them do their jobs.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as Co-Chair to the Real Property Committee of the Suffolk Bar Association and served as this year’s Special Section Editor for Real Property in The Suffolk Lawyer