THE SUFFOLK LAWYER

THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION

DEDICATED TO LEGAL EXCELLENCE SINCE 1908

website: www.scba.org

Vol. 28, No. 10
June 2013

REAL ESTATE

Landmines in real estate brokerage

By Andrew Lieb

Many of your practices deal with corporate work or commercial litigation and you say to yourself, sure I can represent a real estate brokerage, but can you? Yes, legally you can represent whoever you like. Yet, applying your skills from other areas of practice to this licensed category is very dangerous and can lead to your client losing their license and to you being sued for malpractice. In fact, this type of representation is really a niche practice and should be reserved for those who will take the time to truly understand that real estate is a licensed profession in this State.

I was inspired to write this article because my firm recently finalized a buy-out between members of a Limited Liability Company, in which one broker is buying out her salesperson co-member and it is apparent that the attorney, who drafted the membership agreement and advised concerning the franchise agreement, just pulled out a form and played plug and play. Wow, if only the corporate lawyer who had put this entity together was familiar with license law, they never would have done it in the first place.

You see, real estate agents have to comply with Article 12-A of the Real Property Law and 19 NYCRR 175, which include the regulations issued by the Department of State, New York, for this highly regulated profession. However, that is far from the end of the story as there is also precedent from Administrative Hearing Decisions and Administrative Appeals Decisions as well as Consent Orders that provide guidance for the practice. Then, there are the all-important Opinion Letters offered by the Office of the General Counsel of the Department of State, New York, to further guide the interpretation of the applicable Statutes, Regulations, and Administrative and Case Law.

Andrew Lieb

So where should have the corporate lawyer started when they put together the subject membership agreement before drafting? Well, with a very simply question: can a real estate salesperson even be a member of a Limited Liability Company in the first place?

To analyze this inquiry one would initially look to the applicable Statute, the Real Property Law, at §441-b(2). Therein, the statute states, in pertinent part, "[n]o license as a real estate salesperson shall be issued to any officer of a corporation nor to any manager or member of a limited liability company nor to a member of a co-partnership licensed as a real estate broker." If you got this far, you may say absolutely not, but maybe that is not entirely correct. So, you may want to go further and perform a thorough search of the topic and next you would turn to 19 NYCRR 175.22 and find the subject regulation applicable to ownership restrictions, which is entitled "Ownership of voting stock by salespersons prohibited." This regulation states that "[n]o licensed real estate salesperson may own, either singly or jointly, directly or indirectly, any voting shares of stock in any licensed real estate brokerage corporation with which he is associated." So, while the statute appears to be a blanket restriction, the regulation contains a carve-out by way of differentiating between voting and non-voting stock. Moreover, the regulation addresses a corporate structure, but does not apply the carve-out to the Limited Liability Company structure. Therefore, you would next turn to a search of case law and administrative precedent on the topic to see if you can find any guidance. Yet, you would not likely find anything directly on point. So, you would finally look to preexisting Opinion Letters and you would find the much talked about Opinion Letter, dated April 26, 2013, which determined that "brokerages may not provide corporate titles to agents for marketing or other purposes." Therein, you would find an analysis of RPL §441-b(2) and 19 NYCRR 175.22 and a conclusion that "[t]aken together, these provisions prohibit a real estate salesperson from holding voting stock or being appointed as an officer in a corporate brokerage, a manager or membership of a limited liability company or a member of a partnership." So, there is no guidance providing that a salesperson can be a member of a Limited Liability Company regardless if somehow their voting rights are curtailed.

Therefore, would it be shocking to learn that the buy-out that we just finished addressed a Limited Liability Company that had granted the salesperson a voting membership?

So, where are we now? We are thankful to the Department of State for offering Opinion Letters that help guide this practice and we, as members of the Bar, should ask many questions to the General Counsel so that our clients can fully comply and raise the standard of practice in the industry. So, thank you for the Opinion Letters Department of State. They are quite helpful for practitioners to gain an insight on how the Department of State will decide future Administrative Hearings for license complaints. In that spirit, my firm has asked the Department of State if the salesperson can now purchase a membership interest in another brokerage with non-voting rights, but we have also asked if the salesperson can vote on non-brokerage related decisions, like borrowing money. Stay tuned for an article with the answer to these questions when *The Suffolk Lawyer* publishes again after the summer hiatus - happy summer.

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.