Can a buyer recover the due diligence fee based on a listing agent's misrepresentation?

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QUESTION: I represent a buyer who hired a building inspector shortly after getting a home under contract. The inspector's report commented on the roof. He noted that while a small portion of the roof is new, a significant portion is estimated to be 15 years old and is in poor condition. My client was shocked because the public remarks in the MLS listing stated "All new everything – including roof and HVAC." My client decided to terminate the contract. He has asked me if he can recover his due diligence fee from the seller. He says that had he known the true age of the roof, he would have taken that fact into consideration when making his offer. Does the listing agent's statement in the MLS listing give my client a basis to demand the return of his due diligence fee from the seller?

ANSWER: Brokers are not lawyers. If asked for an opinion on a client's legal rights, a broker should remind their client of that fact. Nevertheless, it is helpful for brokers to understand the factors that a judge would consider in a situation like the one you have described. After all, if a seller refuses a buyer's demand for a refund of the due diligence fee, the buyer's only recourse would be to sue and it would be up to a judge to decide.

A buyer's due diligence fee is generally non-refundable. But there are exceptions. As an example, paragraph 8(n) of Standard Form 2-T states that if Seller materially breaches the contract, and Buyer elects to terminate the contract as a result of the breach, Buyer is entitled to a refund of the due diligence fee among other remedies.

Here, your client's claim would not be based on the seller's breach of contract. Instead, it would be based on the conduct of the seller's agent. Under North Carolina law, that is enough. There are at least two reported decisions by North Carolina courts, including one by the North Carolina Supreme Court, holding that a seller of real estate is bound by his agent's material representations of fact to the same extent as if he had made them himself. These cases hold that the seller can be held liable for the misrepresentations of his listing agent.

North Carolina recognizes two types of misrepresentation clams, one for fraudulent (i.e. intentional) misrepresentation, and one for negligent misrepresentation. To establish a negligent misrepresentation claim, a claimant must show that he (a) justifiably relied (b) to his detriment (c) on information prepared without reasonable care (d) by one who owed the relying party a duty of care. In your case, we believe that the buyer has a plausible claim for negligent misrepresentation against the seller. As to the first element, your client can argue that his reliance on the listing agent's representation was justified because it is not reasonable to expect a buyer to inspect a roof before entering into a contract. To establish detriment, your client would merely have to allege the loss of his due diligence fee. To show that the listing agent owed a duty of care to him, your client could cite the license law which imposes a duty on licensees to disclose material facts not just to their clients but to all persons with whom the broker deals. Proving the "reasonable care" element would be the most difficult hurdle. It would be up to a judge to determine whether the listing agent acted with reasonable care when he advertised in the MLS that the roof was new without first confirming the accuracy of that representation.

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