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COURT OF APPEALS

STATE OF NEW YORK

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DOUGLAS ELLIMAN LLC,

Respondent,

-against-

No. 184

TRETTER,

Appellant.

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27 Madison Avenue  
New York, New York 10010  
October 9, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 184, Douglas  
2 Elliman v. Tretter.

3 Counselor, would you like any rebuttal  
4 time?

5 MR. HELLER: Yes, I'd like to reserve two  
6 minutes of time.

7 CHIEF JUDGE LIPPMAN: Two minutes. Okay,  
8 counselor, go ahead.

9 MR. HELLER: May it please the court, my  
10 name is Randy Heller with the firm of Gallet Dreyer &  
11 Berkey, counsel for the appellants, Mr. and Mrs.  
12 Tretter. It's my honor to appear before you for the  
13 time and thank you for traveling all this way just  
14 for me.

15 CHIEF JUDGE LIPPMAN: Thank you for being  
16 here.

17 MR. HELLER: As you are aware, this is a  
18 case involving a real estate broker's egregious acts  
19 of disloyalty to her principals - - -

20 JUDGE PIGOTT: Well, it struck me - - - it  
21 struck me, in reading the record and stuff that are  
22 we making a mistake in saying that a real estate  
23 agent who does what is described in this is, is doing  
24 something wrong. Because it's pretty much the way  
25 real estate works. And the way I envisioned this

1 after a while was, you're talking about an LLC, a  
2 company. And if they had two - - - if they had Ms.  
3 Lockwood on one side and let's say another agent over  
4 representing a purchaser, they've got to tell you  
5 that, because they're getting three percent over  
6 here, presumably, and six percent here, and that's  
7 not fair.

8 But if there is no deal, if there is no  
9 remuneration for the second one, how are you harmed  
10 in any way?

11 MR. HELLER: Well, a number of issues  
12 there. First of all, if there is, in fact, a breach  
13 of a fiduciary duty, we know you don't need harm in  
14 order to disentitle them from - - -

15 JUDGE READ: Well, we know that.

16 MR. HELLER: But I'll answer your - - -

17 JUDGE READ: But I had the same question.  
18 What is the harm here?

19 MR. HELLER: The harm is that it is, in  
20 fact - - - when Mr. Tretter - - - Mr. and Mrs.  
21 Tretter hired their seller's agent on an exclusive,  
22 which means that they cannot go out and sell it to  
23 their friends, that any effort on the part of the  
24 broker, they'd have to write a check to Lockwood for  
25 70,000 dollars. So they have to get something for

1 their exclusive. What they're getting for that  
2 exclusive agency - - -

3 CHIEF JUDGE LIPPMAN: Counselor, did - - -

4 JUDGE CIPARICK: Well, they got - - -

5 MR. HELLER: - - - is a fiduciary duty - -  
6 -

7 CHIEF JUDGE LIPPMAN: - - - didn't the  
8 agent sell the apartment? Isn't that the bottom line  
9 of this case - - -

10 MR. HELLER: Not that - - -

11 CHIEF JUDGE LIPPMAN: - - - is that the  
12 apartment was sold at near the price that they were  
13 seeking?

14 MR. HELLER: I thought I just heard an  
15 understanding, a concession. Judge Cardozo has said,  
16 it matters not whether the apartment was sold. If  
17 your broker - - -

18 JUDGE CIPARICK: Well, she brought the  
19 buyer back to them.

20 MR. HELLER: - - - exclusively deals with -  
21 - -

22 JUDGE CIPARICK: Didn't she bring - - -

23 MR. HELLER: - - - deals with - - - I'm  
24 sorry.

25 JUDGE CIPARICK: She brought the buyer back

1 to them, did she not? I mean, she showed them other  
2 apartments. She wasn't getting compensated.

3 MR. HELLER: Well, I'm - - - do you really  
4 think if she sells 10C on the floor below, she's not  
5 getting compensated?

6 JUDGE READ: Well, is there any - - -

7 MR. HELLER: They don't even contend that  
8 they were - - -

9 JUDGE READ: - - - is there any suggestion  
10 - - -

11 JUDGE GRAFFEO: How did this - - -

12 JUDGE READ: - - - here that the apartment  
13 went for less because of the broker?

14 MR. HELLER: We won't - - -

15 JUDGE READ: In other words there was - - -

16 MR. HELLER: - - - we will never know. 10C  
17 was selling for less. It was a better apartment.  
18 We'll never know what Taurie Zeitzer would have paid  
19 had Ms. Lockwood not showed her that, said 10C the  
20 seller is motivated here.

21 JUDGE GRAFFEO: How does this violate the  
22 rule we articulated in the Sonnenschein case?

23 MR. HELLER: Yes, and that's - - - thank  
24 you. Because the Sonnenschein case, we believe, set  
25 forth the rule in 2001 and that the facts here fit

1           squarely within your decision in Sonnenschein.

2                   JUDGE GRAFFEO:    So what's your problem;  
3           that she showed apartments that weren't listed with  
4           her brokerage?

5                   MR. HELLER:    Precisely.  You determined in  
6           Sonnenschein, I think - - - let me put my - - -

7                   JUDGE GRAFFEO:    And why is that a better  
8           rule?

9                   MR. HELLER:    Because in the marketplace, in  
10          the - - - you looked at cases in 2001 from other  
11          states.  You said that you looked at the nature and  
12          fundamental requirements of the real estate  
13          marketplace in New York.  You felt you had to draw a  
14          line, you had to make a distinction, and you did it.  
15          You said we have to let brokers show other  
16          apartments, other principals of their - - -

17                   JUDGE GRAFFEO:    Right.  But why shouldn't -  
18          - -

19                   MR. HELLER:    - - - own firm - - -

20                   JUDGE GRAFFEO:    - - - why shouldn't we  
21          expand it to also permit the showing of other  
22          apartments?

23                   MR. HELLER:    Because I think you worked  
24          hard to draw that line.  If you eliminate that line,  
25          it then becomes - - - I think you eviscerate entirely

1 - - -

2 CHIEF JUDGE LIPPMAN: What's the - - -

3 MR. HELLER: - - - the duties of - - -  
4 fiduciary duties.

5 CHIEF JUDGE LIPPMAN: - - - counselor,  
6 what's the practical difference between showing  
7 apartments that you have and showing some other  
8 broker's apartment? What does it matter, in this  
9 context?

10 MR. HELLER: Without a line, then it's the  
11 Wild West.

12 CHIEF JUDGE LIPPMAN: But is it a line that  
13 means anything?

14 MR. HELLER: It is, because I think you  
15 have to take into account the realities of the  
16 marketplace - - -

17 JUDGE PIGOTT: But isn't it cons - - -

18 MR. HELLER: - - - and say you can only  
19 repre - - - you can't say you can only represent Mr.  
20 Tretter. You can't - - - you don't have to put Mr.  
21 Tretter on your business card that you represent one  
22 person. But on the other hand, you can't let your  
23 exclusive - - - the exclusive agency would be  
24 meaningless - - -

25 JUDGE PIGOTT: But isn't it - - -

1                   MR. HELLER: - - - if you could go out and  
2 represent anybody.

3                   JUDGE PIGOTT: Let's assume for a minute  
4 that the Zeitzers did exactly what they did here, and  
5 they said to Ms. Lockwood, we want to see 10C. Does  
6 she then say, I'm sorry, but I'm not going to show  
7 you 10C; they say thank you very much. They go get  
8 another agent, who, of course, will never show your  
9 apartment, because in your definition of what they  
10 have to do, they can't cross this line, and you end  
11 up losing the Zeitzers and you're still sitting there  
12 with two apartments instead of one.

13                   MR. HELLER: I think you actually addressed  
14 this in Sonnenschein. You said that a broker can't  
15 be expected not to show other units requested by the  
16 prospective purchaser of other of their principals.

17                   JUDGE CIPARICK: I think we would agree  
18 with you if - - -

19                   CHIEF JUDGE LIPPMAN: What - - - go ahead.

20                   JUDGE CIPARICK: I think we would agree  
21 with you if she had signed an agreement with these  
22 other customers, et cetera, or if she had been  
23 compensated and was sort of double-dealing. But  
24 basically all she did was send some e-mail listings.  
25 She showed them a couple of apartments. She did not

1 receive compensation from them. She did not sign an  
2 agreement with them. So I don't see the problem.

3 MR. HELLER: Well, we know that fiduciary  
4 duties can be established even by a - - -

5 JUDGE SMITH: And she would have earned a  
6 commission if she - - -

7 MR. HELLER: Of course she would have  
8 earned - - -

9 JUDGE SMITH: - - - if she'd sold one of  
10 the others. And you're saying that even assuming  
11 there's no harm, the law exacts a forfeiture. Is  
12 that the point?

13 MR. HELLER: I think that there's a  
14 tremendous amount of harm to the Tretters - - -

15 JUDGE SMITH: Well, suppose - - - suppose -  
16 - - well - - -

17 MR. HELLER: - - - all's well that ends  
18 well, which doesn't absolve the fiduciary - - -

19 JUDGE SMITH: - - - well, how can you say  
20 there's a tremendous amount of harm and also say  
21 all's well that ends well?

22 MR. HELLER: No, no. I mean, all's well  
23 that ends well for the Tretters, because they got the  
24 sale.

25 JUDGE SMITH: But suppose there's no harm.

1           Suppose there's no harm whatever.   Suppose your  
2           client got - - - even paying the commission, got  
3           everything - - - your clients got everything they  
4           expected, how does the case come out?

5                       MR. HELLER:   I think Judge Cardozo said in  
6           1926 in *Wendt* how the case comes out.   Because a  
7           breach of the fiduciary duty, that goal of having  
8           undivided loyalty to your client is so important that  
9           it doesn't matter if there's no harm - - -

10                      CHIEF JUDGE LIPPMAN:   Counselor - - -

11                      MR. HELLER:   - - - and all's well that ends  
12           well.

13                      CHIEF JUDGE LIPPMAN:   - - - counselor, what  
14           will this do to the real estate market in New York?  
15           Isn't what happened here absolutely what happens in  
16           ninety percent of the cases?   You come in.   There's  
17           an open house.   You see a person who's handling the  
18           open house.   And then the person says, almost  
19           invariably, do you have an agent?   Can I show - - -  
20           if you're not interested in this one or - - - can I  
21           show you something else.

22                      Does this differ from what happens in the  
23           average real estate transaction every day of the week  
24           in New York County?   And if it does, if it is very  
25           typical, what do we do to the market as it exists

1           today?

2                       MR. HELLER:   Just listening to you describe  
3           that situation, isn't that shameful?  If you wanted  
4           to sell your apartment, and you give an exclusive to  
5           a broker, how do you feel about that broker trolling  
6           for new clients - - -

7                       CHIEF JUDGE LIPPMAN:  Do you disa - - -

8                       MR. HELLER:   - - - at your open house?

9                       CHIEF JUDGE LIPPMAN:  - - - do you disagree  
10          that that is the normal situation that happens?  I  
11          know from personal experience that that is the normal  
12          situation.

13                      MR. HELLER:  Well, if I'm allowed to  
14          address that, yes.

15                      CHIEF JUDGE LIPPMAN:  Sure.

16                      MR. HELLER:  At cocktail parties and I tell  
17          this story to brokers, they look at me like what's  
18          the problem?  I have to - - -

19                      JUDGE JONES:  But doesn't this - - -

20                      MR. HELLER:  - - - concede that.  And I am  
21          appalled.  But there are lawyers saying what's the  
22          problem - - -

23                      JUDGE JONES:  Doesn't this destroy - - -

24                      MR. HELLER:  - - - when you represent both  
25          halves of deals.

1 CHIEF JUDGE LIPPMAN: Judge Jones.

2 JUDGE JONES: Counselor, doesn't this  
3 destroy the value of an exclusive agency? As far as  
4 the seller's concerned, what's the point?

5 MR. HELLER: Of course it does.  
6 Absolutely. With - - - what did they get for their  
7 exclusive agency if the broker controls the new  
8 clients, goes show them competing clients, tell them  
9 those other sellers are motivated.

10 JUDGE SMITH: Doesn't - - -

11 JUDGE GRAFFEO: What could this - - -

12 MR. HELLER: She had a confidential  
13 relationship with that broker that says, you know, so  
14 that you can't - - - how can you have a duty to a  
15 full disclosure to the Tretters when you've  
16 established a confidential relationship with the  
17 Zeitners - - -

18 JUDGE GRAFFEO: Counsel, what could this  
19 agent have done? Are you saying that the agent  
20 should have asked your clients if they could show  
21 these other apartments?

22 MR. HELLER: Of course. We have - - - we  
23 have disclosures - - - full open disclosures and all  
24 the stark reality - - -

25 JUDGE GRAFFEO: And if your clients

1 declined and said no, we don't want you to show them  
2 other apartments?

3 MR. HELLER: Then they would not be able to  
4 show other apartments that were not Douglas Elliman  
5 apartments. Douglas Elliman has many agents. You've  
6 drawn the line that because - - -

7 CHIEF JUDGE LIPPMAN: Counsel - - -

8 MR. HELLER: - - - of that reality - - -

9 CHIEF JUDGE LIPPMAN: - - - so your  
10 position is that - - - just to kind of sum up - - -  
11 that you don't deny that this may be common practice,  
12 but your answer is, it's wrong. And if you have an  
13 exclusive, you can't show people apartments for other  
14 - - - from other houses?

15 MR. HELLER: Yes. And I think - - -

16 CHIEF JUDGE LIPPMAN: Okay.

17 JUDGE SMITH: Does the record establish - -  
18 -

19 CHIEF JUDGE LIPPMAN: Judge Smith.

20 JUDGE SMITH: - - - does the record  
21 establish anything about what the common practice is?  
22 Is there any evidence of customer usage in the  
23 record?

24 MR. HELLER: I do not believe that there  
25 is, no. Certainly not produced by Douglas Elliman.

1 CHIEF JUDGE LIPPMAN: Okay, counselor,  
2 you'll have rebuttal time.

3 MR. HELLER: Thank you very much.

4 CHIEF JUDGE LIPPMAN: Counselor?

5 MR. COLE: May it please the - - -

6 JUDGE CIPARICK: So your argument is that  
7 Lockwood had no duty to refrain from offering other  
8 people?

9 MR. COLE: You know, I've thought about  
10 that.

11 JUDGE CIPARICK: Yes.

12 MR. COLE: And I think that there is  
13 something you have to consider. And in thinking  
14 about it - - -

15 JUDGE CIPARICK: So what's the duty?

16 MR. COLE: Well, this is what I think the  
17 duty is. The buyer - - - the broker can show other  
18 units, but the broker cannot try to sell or prefer  
19 those other units over the principal - - -

20 CHIEF JUDGE LIPPMAN: Counselor, how do we  
21 draw that line, then? How do you - - - how - - -

22 MR. COLE: In this case it's easy. I'll  
23 tell you why.

24 CHIEF JUDGE LIPPMAN: Yes, tell us.

25 MR. COLE: If you look at all the e-mails,

1 and that's on record pages 58 to 116, what you will  
2 see is a pretty good job in this sense. The broker  
3 is informative and honest. But nowhere does she say  
4 don't buy 10C; I think 26B is better.

5 CHIEF JUDGE LIPPMAN: Do you accept the  
6 fact that, or argue that this is common practice?  
7 And as Judge Smith indicated, is there anything in  
8 the record to indicate that it is within the real  
9 estate market here?

10 MR. COLE: Common practice to do what?

11 CHIEF JUDGE LIPPMAN: To do exactly what  
12 the agent did - - - the Elliman agent.

13 MR. COLE: I think most of the agents that  
14 - - - I've represented Elliman now for ten, twelve  
15 years. And most of the agents I see have a good  
16 understanding when - - -

17 JUDGE SMITH: Okay. Can we - - - can we  
18 take judicial notice of what most of the agents you  
19 see do? I mean, do we have any basis for drawing any  
20 inference?

21 MR. COLE: I'm sorry?

22 JUDGE SMITH: How do we know what the  
23 custom is; how - - - I mean, without relying on what  
24 most of the agents you see in your practice do?

25 MR. COLE: That's a hard question. I'm not

1           sure that from this record I can answer that. And I  
2           - - -

3                         JUDGE READ: Well, doesn't that mean that -  
4           - - doesn't that suggest that maybe summary  
5           judgment's not appropriate, then?

6                         MR. COLE: Well, it is, and I'll tell you  
7           why. If you apply the rule of whether this  
8           particular broker did the right job, meaning did this  
9           broker act in any way inconsistent with her  
10          principal's interest, the answer is no.

11                        JUDGE PIGOTT: Well what about - - -

12                        JUDGE SMITH: At least she didn't put it in  
13          writing.

14                        MR. COLE: What's that?

15                        JUDGE SMITH: At least she was wise enough  
16          to do it orally and not by e-mail.

17                        MR. COLE: Well, she did it right all the  
18          way. Let me give you the bottom - - -

19                        JUDGE SMITH: How do you - - - how do we  
20          know what she - - -

21                        MR. COLE: I'll show you how.

22                        JUDGE SMITH: - - - whispered in somebody's  
23          ear?

24                        MR. COLE: Let me show you how. Recall  
25          that there was an offer from Villa Nueva that was on

1 the - - - that was out for a contract November 4,  
2 2008. That's record page, I think, 14. That fell  
3 apart on November 22nd, 2008, and the seller tells  
4 you this on record page 26.

5 Within one month - - - one month, this  
6 broker had this buyer under contract. And I might  
7 add, think of when this was. November-December 2008.

8 JUDGE SMITH: Well, are you - - - but  
9 you're not - - - but you concede, don't you, that if  
10 there was a breach of fiduciary duty, the result  
11 doesn't cure it, the fact that there was - - -

12 MR. COLE: No, there was no breach of  
13 fiduciary duty.

14 JUDGE SMITH: I understand that you say  
15 there's no breach. Assume hypothetically that we  
16 disagree with you; we think there was a breach. That  
17 ends the case, doesn't it? You can't recover your  
18 fee if there's a breach?

19 MR. COLE: Well, if the Court of Appeals  
20 determines that there's a breach of fiduciary duty,  
21 there's nothing more to say.

22 JUDGE SMITH: I mean, even though there's  
23 no harm done?

24 MR. COLE: If there is a breach of  
25 fiduciary duty, counsel is correct when he says

1 damages are not the issue.

2 CHIEF JUDGE LIPPMAN: Counsel, is there a  
3 different category of cases that - - - in this  
4 particular situation, when there's a deal pending  
5 before the board, is that a niche of cases that are  
6 different in terms of the responsibilities of the  
7 agent, where a deal is pending? Would it matter if  
8 there was no deal pending and the agent did exactly  
9 the same thing - - -

10 MR. COLE: Well, let - - -

11 CHIEF JUDGE LIPPMAN: - - - showing these  
12 other apartments. Does it matter?

13 MR. COLE: Well let me say this. If you  
14 look at Sonnenschein, it doesn't. But if you think  
15 about it, if you think about it in detail, I think  
16 you come to the conclusion I came to, which is, I  
17 think the broker may ha - - - has some obligation to  
18 their seller not to prefer those properties over - -  
19 -

20 JUDGE GRAFFEO: But, you know, we have to -  
21 - - we have to think about a rule that affects more  
22 than this - - -

23 MR. COLE: That's the rule I'm thinking - -  
24 -

25 JUDGE GRAFFEO: - - - particular case and

1 more than - - - beyond this record. And - - -

2 MR. COLE: That's what I'm thinking.

3 JUDGE GRAFFEO: - - - how is the average  
4 seller going to know that their exclusive agent is  
5 not taking prospective purchasers to some other  
6 apartments and saying, you know, here's the  
7 advantages of this apartment?

8 MR. COLE: Well, the duty then falls on the  
9 broker. If the broker is then selling the buyer over  
10 their principal, that broker becomes a dual agent  
11 under the law, in this state - - -

12 JUDGE SMITH: But if - - -

13 JUDGE GRAFFEO: How are they going to know  
14 that? I'm worried about how we - - - how you apply  
15 the rule that you're suggesting.

16 MR. COLE: I suppose the rule - - - and I  
17 would go back to what the State already has in place.

18 JUDGE GRAFFEO: I mean, a smart agent just  
19 won't put anything in an e-mail.

20 MR. COLE: Well, a dishonest agent, I  
21 couldn't account for. But the brokers are obligated  
22 now, if they become a buyer's agent, meaning, if  
23 they're preferring that property over their seller's,  
24 they are duty-bound to disclose it by law - - -

25 CHIEF JUDGE LIPPMAN: Counselor, do we have

1 to extend Sonnenschein to - - -

2 MR. COLE: No. And I'll tell you why.

3 CHIEF JUDGE LIPPMAN: - - - fight you or  
4 does Sonnenschein control the way it is?

5 MR. COLE: Sonnenschein does - - -

6 CHIEF JUDGE LIPPMAN: Why?

7 MR. COLE: - - - and I'll tell you why.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. COLE: Because Sonnenschein said  
10 specifically that the purpose of the decision was to  
11 facilitate the interest of sellers, to show the  
12 maximum amount of potential buyers. Sonnenschein  
13 also says it is the duty of the broker to assist the  
14 buyer. Moreover - - -

15 JUDGE JONES: But if we were to agree with  
16 you, what's the point in a seller signing an  
17 exclusive? What are they getting from this?

18 MR. COLE: The seller gets the benefit of  
19 the broker trying to make the deal for that seller,  
20 the best deal that seller can get. And this broker  
21 did that.

22 JUDGE SMITH: Unless the broker can make  
23 more money on the other side of the deal.

24 MR. COLE: I'm sorry?

25 JUDGE SMITH: Unless the broker figures out

1 she can make more money on the other side of the  
2 deal.

3 MR. COLE: I can't account for a dishonest  
4 broker.

5 JUDGE SMITH: Well, I mean, is it - - - I  
6 mean, I'm sure the standard of ethics among real  
7 estate brokers in New York City is very high. But  
8 don't we have to consider the possibility there might  
9 be some who would be tempted to bend things a little  
10 bit?

11 MR. COLE: Again, I would call - - - I  
12 would call your attention to the laws currently in  
13 place that require a broker to disclose. Now, if a  
14 broker did not disclose and the evidence was adduced,  
15 he forfeit - - - he or - - -

16 CHIEF JUDGE LIPPMAN: Counselor, we have to  
17 have a rule that's clear that we're able to apply.  
18 And you know, I think this is - - -

19 MR. COLE: May I suggest one?

20 CHIEF JUDGE LIPPMAN: Yes, please. That's  
21 exactly what I'm going to ask you.

22 MR. COLE: I suggest that the rule is, as  
23 follows - - -

24 CHIEF JUDGE LIPPMAN: And is it consistent  
25 with Sonnenschein - - -

1 MR. COLE: And yes it is - - -

2 CHIEF JUDGE LIPPMAN: - - - whatever you're  
3 going to propose?

4 MR. COLE: - - - consistent with - - -

5 CHIEF JUDGE LIPPMAN: Go ahead.

6 MR. COLE: - - - Sonnenschein. That  
7 consistent with Sonnenschein, a broker can show a  
8 buyer other properties. The broker can be  
9 informative, can be honest, can be straightforward,  
10 but cannot prefer the property over the princip - - -  
11 over the property of their principal.

12 If you look at the e-mails in this case,  
13 you will find consistently, every one is either  
14 neutral or informative.

15 CHIEF JUDGE LIPPMAN: So if the broker says  
16 - - - if the broker, during the course of this kind  
17 of dialog back and forth - - - whatever the broker  
18 shows, the broker comes back and says, but you know  
19 what, I think 29F is the best apartment for you, the  
20 broker's okay?

21 MR. COLE: No. That's too simplistic.

22 CHIEF JUDGE LIPPMAN: What is - - - so  
23 what's the rule?

24 MR. COLE: The rule is - - -

25 CHIEF JUDGE LIPPMAN: What's less

1           simplistic?

2                   MR. COLE: The rule is that the broker can  
3           be informative and honest about the unit, but cannot  
4           sell the unit over their principal. I'll give you an  
5           example.

6                   JUDGE PIGOTT: Wasn't there - - - wasn't  
7           there - - -

8                   JUDGE CIPARICK: So - - - I'm sorry.

9                   JUDGE PIGOTT: - - - before you go there.  
10          Wasn't there some deposition testimony that Mrs.  
11          Zeitzer told Ms. Lockwood that she didn't want her  
12          showing that other apartment, and Ms. Lockwood kind  
13          of blew that off?

14                  MR. COLE: Yes, Ms. Lockwood said in a  
15          deposition that it will be advantageous for you if I  
16          do show. That's a broker's - - -

17                  JUDGE SMITH: And her client wasn't  
18          convinced.

19                  JUDGE CIPARICK: Was there a window - - -

20                  JUDGE SMITH: Her client was not convinced  
21          it would be - - -

22                  MR. COLE: No, but she was right. But she  
23          was right. And she sold - - -

24                  JUDGE CIPARICK: Was there - - -

25                  MR. COLE: - - - within a month.

1                   JUDGE CIPARICK: - - - counsel, was there a  
2 window period between November 4th and November 22nd  
3 when negotiations were going on with the board, et  
4 cetera, for another buyer; during that period of  
5 time, what could this broker do?

6                   MR. COLE: From November 4 when there was  
7 an offer accepted - - -

8                   JUDGE CIPARICK: Right.

9                   MR. COLE: - - - from the - - - from Villa  
10 Nueva, this broker was busy showing this buyer other  
11 units. And even during that time, you will find no  
12 evidence where she was preferring, even then - - -  
13 and maybe you could argue she could have back then,  
14 but she didn't. All of those units, you look at  
15 every one of them, she says, for example, about one,  
16 they're negotia - - - this one's got good  
17 negotiability, but they've got to come down 100,000  
18 dollars. Another one she said well, it looks - - -

19                   JUDGE SMITH: But let me give you, if I  
20 could, a couple of hypothetical situations. The - -  
21 - so the broker has an exclusive. She meets  
22 customers in the apartment she's selling. The  
23 customer says oh, gee, this is fine, except there's a  
24 little structural damage over here. The broker says,  
25 I'll tell you what, I'll show you the one downstairs

1 that doesn't have the damage. Is that a breach of  
2 fiduciary duty?

3 MR. COLE: I would say, in that case, the  
4 broker would have to say I could show you a few other  
5 apartments you might compare to this. But I don't  
6 think she could say I'll show you a better one with  
7 no structural damage. I think she - - -

8 JUDGE SMITH: How can we - - - how can the  
9 law police something like that at, a distinction like  
10 - - -

11 MR. COLE: What's that?

12 JUDGE SMITH: How can - - - is a  
13 distinction like that really enforceable? The words  
14 - - - we're policing the words that come out of the  
15 broker's mouth?

16 MR. COLE: I think the key is not  
17 enforceability; it's understanding your obligations.

18 JUDGE GRAFFEO: Why isn't it a simpler rule  
19 to just say you have to - - - you have to advise the  
20 seller that you're going to show other units that  
21 aren't listed with your brokerage and get their - - -

22 MR. COLE: The broker does have to advise -  
23 - -

24 JUDGE GRAFFEO: - - - and advise them, and  
25 you know, disclose to them what you're going to do,

1 and let them decide if they want you to do that or  
2 not?

3 MR. COLE: I think that's a - - - that is  
4 the best rule. But the bench was asking me - - -

5 CHIEF JUDGE LIPPMAN: That's the better  
6 practice - - -

7 MR. COLE: - - - a deeper question about  
8 further beyond that, is there anything that the  
9 broker has to do once she shows these other  
10 apartments, that's even a deeper - - -

11 CHIEF JUDGE LIPPMAN: Counsel, are you  
12 saying - - -

13 MR. COLE: - - - question - - -

14 CHIEF JUDGE LIPPMAN: - - - that the bet -  
15 - -

16 MR. COLE: - - - they were after - - - I  
17 was being asked.

18 CHIEF JUDGE LIPPMAN: - - - are you saying  
19 that's a better practice, but it's not the rule?

20 MR. COLE: I'm sorry?

21 CHIEF JUDGE LIPPMAN: Are you saying that's  
22 a better practice, but it's not the rule?

23 MR. COLE: It's not the current rule, but  
24 it - - -

25 CHIEF JUDGE LIPPMAN: Is that - - -

1 MR. COLE: - - - conceptually should be - -  
2 -

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. COLE: - - - conceptually is.

5 CHIEF JUDGE LIPPMAN: Again, what's the  
6 rule?

7 MR. COLE: The rule is that a buyer can  
8 show other properties - - - I'm sorry - - - the  
9 broker can show the buyer other properties but cannot  
10 prefer or sell those other properties - - -

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. COLE: - - - over their principal's  
13 property.

14 CHIEF JUDGE LIPPMAN: Okay, counselor.

15 MR. COLE: And I believe the evidence in  
16 this case is consistent with that rule - - -

17 CHIEF JUDGE LIPPMAN: Thank you.

18 MR. COLE: - - - and that's why summary  
19 judgment should be affirmed.

20 CHIEF JUDGE LIPPMAN: Thank you, counselor.  
21 Rebuttal, counsel?

22 MR. HELLER: Thank you Your Honors. The  
23 rule is, of course, one of disclosure. That's  
24 simple, plain, there's even a form for it - - -

25 JUDGE PIGOTT: But disclosure of what, is

1 the question.

2 MR. HELLER: - - - assuming the form does  
3 apply - - -

4 JUDGE PIGOTT: I want to go back to what I  
5 asked you in the beginning. Isn't the easy rule to  
6 say that you have to disclose it? If this company  
7 said we have an agreement with this buyer; she's  
8 going to pay us three percent of whatever the  
9 purchase price; we have to disclose that to you  
10 because now we're a dual agent.

11 But absent that, absent consideration,  
12 aren't we getting into a murky area of where - - -  
13 you know, who says what to whom and what the  
14 impression was of a buyer, or the broker, or the  
15 seller?

16 MR. HELLER: Not for disclosure and  
17 consent, because consent has to be in writing. It  
18 has to be definitive. There's no - - - there would  
19 be - - - nothing about that would be murky. If  
20 there's anything murky, it's a rule that says you can  
21 show an apartment, and in the privacy of looking at  
22 that apartment, things you can say and things you  
23 can't say - - -

24 CHIEF JUDGE LIPPMAN: Counselor, do you  
25 have to disclose any apartment that you show, beyond

1 the one - - - to an a - - - to someone who comes in -  
2 - - and let's take this particular scenario - - -  
3 comes in on an open house and you're the exclusive  
4 agent; can you show any apartment to that person  
5 without going to the person who has the exclusive  
6 with you and saying, look, I'm going to show them  
7 some other apartments?

8 MR. HELLER: I think you should have to  
9 disclose even that. It's possible that in  
10 Sonnenschein you would determine that you said that  
11 the world now, since 2001 is on notice that you could  
12 show other apartments being sold by Douglas Elliman,  
13 and that's the way - - -

14 CHIEF JUDGE LIPPMAN: So your - - -

15 MR. HELLER: - - - of the world.

16 CHIEF JUDGE LIPPMAN: - - - bottom line is  
17 that Sonnenschein has set the line, and the line is  
18 within your own house, agency, you can show  
19 apartments, but you can't show from other companies?

20 MR. HELLER: Precisely so.

21 JUDGE PIGOTT: Well, what do you do then,  
22 when you're a sole practitioner?

23 MR. HELLER: I think there's an  
24 understanding that it's a breach of fiduciary duty,  
25 even to show within your house. But look, we have a

1 world here that we have to live in. We have these -  
2 - - all these brokers that we meet at the cocktail  
3 parties that look askance when you tell them that  
4 something might be wrong - - -

5 JUDGE PIGOTT: What do you do if you're a  
6 sole practitioner?

7 MR. HELLER: - - - and so we have to  
8 accommodate a certain amount of reality in the  
9 situation.

10 CHIEF JUDGE LIPPMAN: Judge Pigott's asking  
11 a question.

12 MR. HELLER: I'm sorry.

13 JUDGE PIGOTT: What do you do if you're a  
14 sole practitioner?

15 MR. HELLER: You cannot show anybody else  
16 without getting consent.

17 JUDGE PIGOTT: Can't show any houses?

18 MR. HELLER: You would have to make  
19 accommodations. No exception would apply for the  
20 work-a-day world of the practice of our marketplace  
21 in New York.

22 JUDGE PIGOTT: Okay, thank you.

23 CHIEF JUDGE LIPPMAN: Okay, thank you both.  
24 Appreciate it.

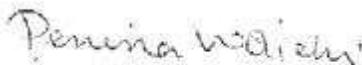
25 MR. HELLER: Thank you.

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(Court is adjourned)

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Douglas Elliman LLC v. Tretter, No. 184 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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