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Real Estate Litigation Advisory

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When Does A Real Estate Agent Owe A Fiduciary Duty To Both Buyer And Seller?

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You are the listing agent for a beautiful home in Malibu. You work under broker, ABC Homes. You receive an offer to purchase from the buyer's agent, who also works with ABC Homes. Your client accepts.

- Q: To whom do you owe a fiduciary duty in the transaction?
- (a) Seller
 - (b) Buyer
 - (c) Both the Seller and the Buyer

In *Horiike v. Coldwell Banker Residential Brokerage Co.*, 2014 Cal. App. LEXIS 318 (Apr. 9, 2014), the Court of Appeal confirmed that the answer is (c) Both the Seller and the Buyer. The Court held that when a salesperson representing one party to the transaction is employed by the same broker as the salesperson representing the other party, both salespersons owe a fiduciary duty to all parties in the transaction equivalent to the broker.

Plaintiff Hiroshi Horiike, the buyer of a residential property in Malibu, brought several claims, including a breach of fiduciary duty claim, against Coldwell Banker Residential Brokerage Company and the salesperson who listed the property, Chris Cortazzo. Horiike, who was represented by another Coldwell Banker salesperson in the transaction, claimed that the listing agent Cortazzo breached his fiduciary duty by significantly overstating the property's square footage in advertising materials.

The trial court found that the listing agent Cortazzo did not owe a fiduciary duty to Horiike. The Court of Appeal reversed, holding that the listing agent Cortazzo owed a fiduciary duty to Horiike because he was an associate licensee of Coldwell Banker Residential Brokerage Company, which acted as a dual agent of the buyer and seller in the transaction. The Court noted that the push by the real estate industry to establish salespersons as "independent contractors" for tax purposes has contributed to a misunderstanding that there is no dual representation if one salesperson represents one party to the transaction and another salesperson employed by the same broker represents another party to the transaction. The Appellate Court emphasized that all salespersons employed by a single broker acting in a dual agent capacity owe the same fiduciary duty to all parties in the transaction and thus, even though Cortazzo was the listing agent, he owed a fiduciary obligation to the buyer, Horiike.

The Court also confirmed the longstanding rule that the failure of a fiduciary to disclose material information to the principal is constructive fraud, and noted that a careless misstatement may constitute constructive fraud even where there is no fraudulent intent. In the *Horiike* case, a trier of fact could conclude that although the listing salesperson, Cortazzo, did not intentionally conceal information regarding the square footage of the home, Cortazzo breached his fiduciary duty to the buyer by failing to communicate all material information he knew about the square footage.

There are two important takeaways from this opinion:

- First, if the buyer and seller in a real estate transaction are represented by different sales persons who work under the same broker, those sales persons owe a fiduciary obligation to both the buyer and the seller in the transaction.
- Second, if the listing agent is aware of material information and fails to provide this information to the purchaser of the property who is represented by another salesperson working under the same broker, this could constitute a breach of fiduciary duty even though the salesperson did not have any fraudulent intent.