

## **ADMONITION NO. 00-24**

### **CLASSIFICATION:**

Candor Towards Tribunal, Ex parte Proceedings [Mass. R. Prof. C. 3.3(d)]

### **SUMMARY:**

On February 8, 1998, the respondent's client as buyer executed a purchase and sale agreement regarding residential property. A deposit of \$16,250.00 was paid to the real estate broker.

The purchase and sale agreement contained a standard mortgage contingency clause with a notice date of February 18, 1998. On February 13, 1998, the buyer gave written notice to the seller that she had applied for a mortgage but was denied because she was forced to resign from her new position. The buyer demanded return of the deposit under the mortgage contingency clause. The seller, however, disputed whether the buyer had made diligent and good faith application for a mortgage. The seller informed the respondent that she claimed entitlement to the deposit as liquidated damages. The purchase and sale

agreement contained standard language that the broker would hold the deposit in escrow pending mutual instruction in the event of dispute. At all applicable times, the broker in fact held the deposit in escrow and at no time released it to any party.

On February 25, 1998, the respondent wrote to the broker and informed the broker of its legal obligation to hold the deposit in escrow pending resolution, but did not ask the broker to confirm the holding of the funds. The letter asked the broker to contact the respondent if the broker had any questions. The broker did not contact the respondent.

On May 15, 1998, the respondent filed a civil complaint for damages, an affidavit of the buyer and a motion for ex parte real estate attachment and included with the pleadings a copy of the purchase and sale agreement. The respondent orally argued the motion in the district court on May 15, 1998. The basis for the request for emergency relief was that the property was subject to a new sale transaction with a closing date of May 19, 1998.

The respondent represented in her papers that, "In the event that the property is sold or transferred, it is unlikely that the Plaintiff will be able to satisfy any judgment that she might recover against the Defendant." She also stated, "...the only asset to satisfy the Defendant's breach of the agreement is the real estate at..." The respondent asked for an attachment in the amount of \$20,000.00.

At oral argument, the respondent similarly did not inform the court that the last that she knew, the deposit was held by the broker, although the fact that the broker at least initially held the deposit was contained in the purchase and sale agreement attached to the pleadings. The court did not specifically ask about the current status of the deposit. The court allowed the motion in the amount of \$17,000.00 and a writ of attachment was recorded.

On May 19, 1998, the attachment was dissolved upon motion of the seller when the trial judge learned that the deposit was being held in escrow by a reputable broker and would be available to satisfy any potential judgment.

The respondent's failure to inform the tribunal of the current status of the deposit was in violation of Mass. R. Prof. C. 3.3(d) which requires a lawyer in an ex parte proceeding to inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The respondent is an experienced member of the bar who had no prior discipline. The respondent received an admonition.