Broker Liability

By

William C. Wagner

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Presenter - William C. (Bill) Wagner
Partner, Taft Stettinius & Hollister LLP
Ph. 317-713-3500
Email wwagner@taftlaw.com
Author: Bill Wagner Environmental Lawyer Blog
Contributing Author: Taft Environmental Law Insight Blog

1. As Is

- In 1978, a farmer discovered an underground gas tank was leaking, pumped it out, and stopped using it, but told no one.
- In 1985, he sold the farm to Buyer 1, who resold part of the farm to Buyer 2. Buyer 1's broker said the real estate would be suitable for business, residential, recreation, and family purposes. The purchase contract included an integration clause and stated the property was sold on an "as is" basis.
- After Buyer 2 took possession, he discovered the wells were contaminated from a leaking UST. In 1989, Buyer 2 sued the seller's (Buyer 1's) real estate broker for claims including negligence and negligent misrepresentation under a state law imposing a duty to disclose material facts.

As Is - Options

- Question: Can a broker be liable for negligence and/or misrepresentation when he makes a positive representation about an aspect of the property if the contract includes an integration clause and the property is sold “as is”?
- No - because the contract’s integration clause negates the prior statements and the effect of an “as is” clause is to alert the buyer that he or she must determine the condition of the property being purchased.
- Yes - because when the seller’s agent’s made an affirmative representation about the use of the property, he negated the effect of the “as is” clause.

As Is - Answer

- Answer = Yes, the broker is liable.
- The trial court found for the broker, but the court of appeals reversed. The Wisconsin statute imposed a duty on the broker to conduct a reasonably competent and diligent investigation to determine the existence of material facts adverse to the transaction.
- While an "as is" clause can negate reliance in a breach of warranty claim, it does not have the same effect against a negligence or misrepresentation claim.
- Further, "tort disclaimers in contracts will not be honored unless the disclaimer is specific as to the tort it wishes to disclaim." Here, the clause did not specify or refer to negligence or misrepresentation.

As Is - Answer

- "Once the seller's agent makes an affirmative representation about some aspect of the property, the buyer is entitled to rely upon that statement and expect full and fair disclosure of all material facts related to that aspect of the property."
- The circuit court erred in granting summary judgment on the buyer's claims of negligence, intentional misrepresentation, strict responsibility misrepresentation, and negligent misrepresentation necessitating a trial.
- *Grube v. Daun*, 496 NW.2d 106 (Wis. Ct. App. 1992)

1. As Is - Score

- If you answered correctly (Yes, the broker is liable), you win 25 points.
- If you answered incorrectly, you lose 25 points.

2. Brownfield Blues

- Seller converted an abandoned factory to condominiums. The factory had been contaminated with TCE and the “fix” included installing a vapor barrier, but the site was never properly decontaminated.
- Buyers were led to believe the contamination was cleaned up based in part on a newspaper article and the brokers’ sales brochure indicating the site was decontaminated.
- Buyers did not hire an environmental consultant to conduct due diligence before buying the condominium unit.
- Before closing on the sale, the state’s environmental agency advised the brokers that the sales brochure contained inaccurate and misleading information.

Brownfield Blues - Options

- The buyers sued the brokers on theories of silent fraud and negligent misrepresentation. Question: Are the brokers liable?
- No - because they were the seller's agents and the buyers did not have a reasonable basis to rely on sales brochures that are considered mere "puffery".
- Yes - because the brokers knew the buyers were interested in the contamination and failed to pass on the newly acquired information from the State's environmental agency.

Brownfield Blues - Answer

- Answer = Yes, the brokers are liable.
- Although Michigan law has never imposed a duty of disclosure on a seller’s agent as opposed to a seller, here the seller’s agent had a duty to disclose the newly acquired information the agent recognized as making his prior affirmative statement untrue or misleading, especially where the agent knows the buyers have had a particular concern or had directly inquired on the subject to the seller.
- *Alfieri v. Bertorelli*, __ N.W.2d__, 2012 WL 87666 (Mich. App. Jan. 10, 2012).

Brownfield Blues – Buyers to Blame

- However – the jury found the buyers 35% at fault for their own damages because they failed to exercise reasonable care and hire a consultant to perform environmental due diligence and executed a purchase contract stating that the defendants had no knowledge of the property's environmental condition.

2. Brownfield Blues - Score

- If you answered correctly (Yes, the brokers liable), you win 25 points.
- If you answered incorrectly, you win zero points.

3. *Is Silence Golden?*

- A builder/developer of new homes constructed a new subdivision near an unlined hazardous-waste landfill. The landfill vented methane gas and residents complained of odors and physical symptoms consistent with the exposure.
- The builder/developer and brokers marketing the new homes decided never to mention or discuss the nearby landfill, even when asked and even after early purchasers complained about the odors.
- The silent treatment continued even after the brokers' supervisor was warned by the State environmental agency against building a large development near the landfill.

Is Silence Golden? - Options

- The homeowners filed a class action and sued the brokers for misrepresentations. Question: Were the homeowners' claims dismissed?
- Yes - because the builders/developers and the brokers had no duty to disclose the condition of someone else's property (for which they could be sued for liable if they were wrong) and the brokers never made an affirmative misrepresentation about the nearby landfill.
- No - because the builder/developer and its brokers had particular knowledge of the landfill that they knew would be of interest to the homeowners and remained silent.

Is Silence Golden - Answer

- Answer = No, the homeowners' claims were not dismissed.
- The trial court granted the motion to dismiss, but the court of appeals and New Jersey supreme court reversed the trial court's order.
- "We hold that a builder-developer of residential real estate or a broker representing it is not only liable to a purchaser for affirmative and intentional misrepresentation, but is also liable for nondisclosure of off-site physical conditions known to it and unknown and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonably buyer."

Is Silence Golden - Answer

- We "limit our holding to professional sellers of residential buildings (persons engaged in the business of building or developing residential housing) and the brokers representing them. Neither the reseller of residential real estate nor the seller of commercial property has that same advantage in the bargaining process…. professional sellers of residential housing and their brokers enjoy markedly superior access to information. Hence … such professionals [have] a similar duty to disclose off-site conditions that materially affect the value or desirability of the property."
- *Strawn v. Canuso*, 657 A.2d 420 (N.J. 1995)

Is Silence Golden?

- Similar result in *Haberstick v. Gordon A. Gundaker Real Estate Co.*, 921 S.W.2d 104 (Mo. Ct. App. 1996). There, brokers chose not to disclose the adjacent property as a confirmed abandoned or uncontrolled hazardous waste site, stating instead that the property had been farm property, could not be developed, etc.

3. Is Silence Golden - Score

- If you answered correctly (No, the homeowners' claims were not dismissed), you win 50 points.
- If you answered incorrectly, you lose 50 points.

4. Damages

- Broker reviewed the sellers' unremarkable sales disclosure form with the buyers, but did not disclose that the local drug task force recently discovered a marijuana grow operation and methamphetamine lab on the property. The buyers' son later heard that they were living in a "drug house".
- The buyers called the police to find out what happened. The police told the buyers about the meth lab. The health department told the buyers the property was contaminated and not fit for occupancy, and they could not remove their personal property because of the risk of cross-contamination.
- The buyers sued for rescission and misrepresentation.

Question: The Broker is Responsible for Which Damages?

- A. The purchase price, plus accrued unpaid interest on the mortgage, penalties, and foreclosure costs the lender assessed against the buyers ($150,000)
- B. The expected economic loss resulting from higher mortgage costs because of damaged credit scores
- C. Lost income from inability to work without tools
- D. Personal effects and keepsakes (pictures, etc.)
- E. Anxiety and emotional distress damages
- F. Attorney fees and litigation expenses (per contract)
- G. None of the above
- H. All of the above

Damages – Answer

- Answer = H, all of the above.
- The court held the broker jointly and severally liable with the sellers for all damages. *Bloor v. Fritz*, 180 P.3d 805 (Wash. Ct. App. 2008)

4. Damages - Score

- If you answered correctly (H, all of the above), you win 25 points.
- If you answered incorrectly, you win zero points.

5. Expert Matters

- Buyers purchased commercial property for $9M to develop residential units on the property.
- The purchase agreement stated that the property was sold "as is". It also stated that the seller and its brokers agents did not make any representation about the property, including its "environmental condition," and the buyers agreed to release the seller and its brokers from any and all claims in connection with the property, including environmental aspects.
- Seller's representations, however, said that except as disclosed in environmental reports (Phase I and Phase II reports), neither seller nor its predecessors used, stored, or release hazardous materials in violation of applicable laws.

Expert Matters

- Other documents included:
- An “Exclusive Authorization to Sell Agreement” and a “Dual Agency Agreement”, which both carved out Expert Matters, including those related to the use, storage, or presence of hazardous substances as beyond the expertise and responsibility of the brokers.
- An “Expert Matters Agreement” that stated that the brokers have not and will not independently investigate Expert Matters regarding the use, storage, or presence of hazardous substances; brokers’ disclosures will not include information beyond that provided by seller or known by brokers; and brokers recommend buyer obtain advice from a qualified legal professional.

Expert Matters - Options

- Buyers discovered VOC groundwater contamination during refinancing and sued both brokers and their agency for professional negligence and breach of fiduciary duty. Brokers moved to dismiss the buyers' claims. Question: On what basis did the court grant the brokers' motion to dismiss?
- A. It dismissed the claims because the buyers failed to identify any statutory or contractual duty on the part of the seller's brokers to investigate and advise regarding environmental conditions for this commercial property.
- B. It dismissed the claims against the buyers' brokers because the buyers released any and all claims against the brokers under the agreements.
- C. Both of the above.

Expert Matters - Answer

- Answer = C, both of the above.
- The buyer failed to establish that the brokers had a duty to investigation the environmental condition of the property or to recommend additional investigation and "all the agreements above suggest the opposite."
- *Movassate v. Dudley Ridge Properties, LLC*, 2011 WL 672773 (N.D. Cal. Feb. 16, 2011).

5. *Expert Matters - Score*

- If you answered correctly (C, both of the above), you win 25 points.
- If you answered incorrectly, you lose 25 points.

Score

- And the winner is?

Taft/