JUDICIAL UPDATE

A CLOSER LOOK AT **RECENT CASES** AFFECTING THE PRACTICE **OF REAL ESTATE BROKERAGE** IN GEORGIA

2014

PARTIAL DISCLOSURE OF DEFECTS LEAVE SELLER IN HOT WATER

In a recent case involving a leaking basement, *Stephen A. Wheat Trust v. Robert Sparks IV,* the Georgia Court of Appeals was unsympathetic to sellers who only partially disclosed defects known to them. The facts of the case as are follows:

As part of listing their home for sale, Mr. and Mrs. Sparks filled out a Seller's Property Disclosure Statement. On the disclosure, the sellers acknowledged that there had been water leakage, water accumulation, or dampness in the basement. The attached addendum stated: "During very heavy rains the front corner of the basement occasionally became damp. Installed French drains down the sides of the house to draw water downhill and away from house." In April, Mr. and Mrs. Wheat, the buyers toured the house and saw no evidence of leaks in the basement. After closing in September, the buyers experienced extensive water damage in the basement, which they repaired at considerable cost. The buyers sued the sellers for fraud based on alleged misrepresentations and the active concealment of water leaks into the basement during heavy rains.

The sellers were apparently aware of "three major leaks" and one "minor leak" in the basement during the months after they signed the disclosure statement. The real estate agent advised the sellers to update their disclosure, but they failed to heed her advice. The sellers did tell their agent that the leaks would be repaired soon, but they never took any corrective action other than to set up multiple fans in the basement to dry it out prior to the house being shown. In an email from the seller to the agent in April, the seller acknowledged the presence of the continued leaks and actually thanked their agent for providing extra fans prior to the open house. The trial court granted summary judgment to the sellers, which the buyers promptly appealed.

In order to survive a motion of summary judgment, a plaintiff must show that there is at least one material fact in dispute with regard to each element of the fraud claim. A successful fraud claim requires proof of all five of the elements below: (i) a false representation made by the defendant, (ii) knowledge by the defendant that the representation was false when made, (iii) intent to induce plaintiff to act or refrain from acting, (iv) justifiable reliance on the misrepresentation by the plaintiff, and (v) damage to the plaintiff. To successfully defend against a fraud claim, a seller must only show that one of the elements is not met. With regard to the first element of fraud, it can either be a willful misrepresentation, such as an outright lie, or a fraudulent concealment. A fraudulent concealment occurs when a seller, who knows of a defect, either takes active steps to conceal it and prevents the buyer from discovering it or the seller passively conceals a latent or hidden defect by simply keeping quiet about it. A buyer is thought not to have justifiably relied upon a misrepresentation of the seller regarding a defect (or the passive or active concealment of a defect) if the buyer could have discovered the defect on his or her own through the exercise of due diligence and fails to do so.

In this case, the evidence of the use of fans by the sellers and the email in which the sellers acknowledged additional leaks was sufficient to show that the sellers had continued knowledge of the defects and that their disclosure was not truthful. This is all that is needed to create a question of fact on the first three elements of a fraud claim.

On appeal, the sellers argued that they had satisfied


2014

their duty of disclosure by acknowledging the past problem and disclosing "an attempted repair to the water leaks they experienced". The argument of the sellers appeared to be that they had disclosed enough about the problem that a reasonable buyer should have investigated the problem further. In the view of the sellers, the buyers failed to exercise due diligence to discover the full extent of the problem thus barring their claim. The Court of Appeals was not persuaded by this argument and stated that a jury could find that the sellers' explanation on the disclosure statement was stated in such a way as to induce a buyer to believe that the problem was in the past and had been successfully resolved, and not merely an attempted repair.

As discussed above, if a defect could have been discovered by the buyers through the exercise of due diligence but is not discovered because the buyers did not do sufficient due diligence, the buyers will not generally be able to prove that the seller committed fraud. In fact, in certain cases where the buyer could have learned of the problem by, for example, doing a title search or obtaining a survey, the courts have dismissed potential fraud claims as a matter of law without the case ever reaching a jury. This type of case is referred to as a "plain and indisputable" case. In this case, the court explained that buyers losing fraud cases as a matter of law was rare and usually reserved to situations where the seller is misrepresenting characteristics of the property such as the property's zoning or acreage because there a buyer is on an equal footing with the seller regarding access to information to determine the truth and the buyer chose not to investigate. The court went on to explain that cases involving misrepresentations or concealment of property defects are much less likely to be dismissed by a court as a matter of law because there is generally an uneven balance of information favoring a seller over a buyer. In one case, a seller made certain misrepresentations regarding a septic system, which the county had refused to certify as functional and the seller knew that the refusal of certification was available to the public. That court found that even though there was information available in the county records that would have told the buyer that the septic system was defective, it was still not plain and indisputable that the plaintiff failed to exercise due diligence. Those "plain and indisputable" exceptions aside, questions of fraud, such as whether the buyer could have protected himself by exercising due diligence, are generally questions for the jury. Because the Court of Appeals found here that the buyers had established a genuine issue of material fact with respect to each element of their fraud claim, the trial court's grant of summary judgment to the sellers was reversed.

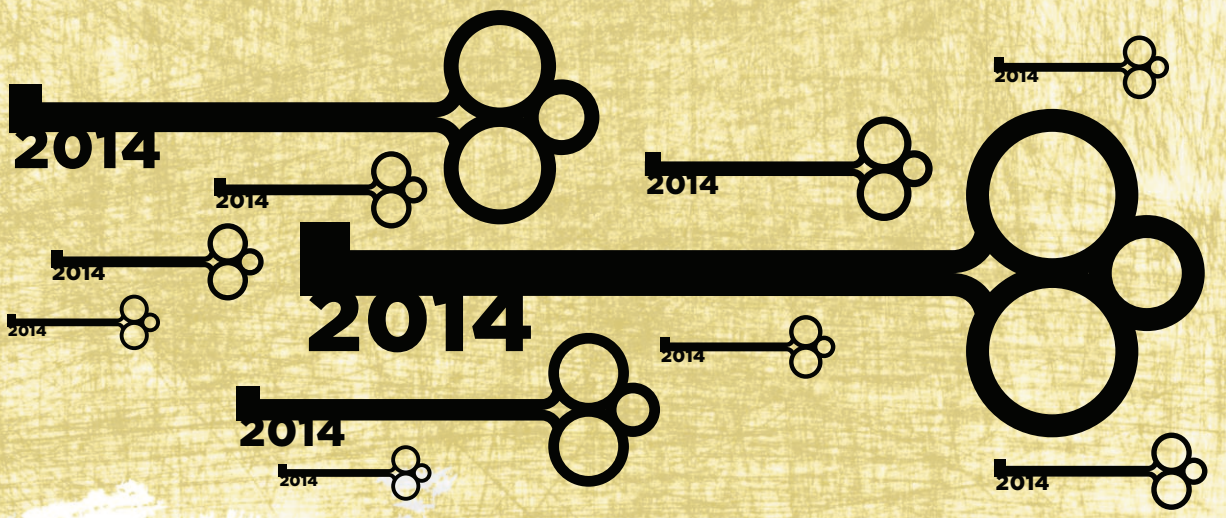
A seller's property disclosure statement will protect sellers when there is full and accurate disclosure of defects. The lesson of this case is that partial and inaccurate disclosures will usually get the seller in as much, if not more, trouble than if no disclosure had been made at all. While the case did not address the liability of the real estate agent involved in the transaction, she also owed an independent duty to disclose material adverse facts pertaining to the physical condition of the property actually known to the agent and which could not have been discovered upon a reasonable inspection of the property by the buyer. This disclosure duty exists on the part of the agent regardless of whether an accurate and complete disclosure is made by the seller.

A NON-BUILDER SELLER NOT SUBJECT TO NEGLIGENT REPAIRS CLAIM

In another recent leaking basement case, the Court of Appeals reaffirmed that as a matter of law, buyers cannot maintain suits for negligent repairs against sellers, who were not the property builders. In *Reininger v. O'Neill,* the buyers were displeased when they discovered water leaking into their basement despite previous repairs made by the seller, but both of their claims against the seller for negligent repairs and fraud ultimately failed.

In an effort to stop water from entering his basement during times of heavy rain, the seller dug a six to seven foot hole in the area where a retaining wall intersected with the house's brick façade. The seller discovered an area of separation, which he undertook to repair using a caulk gun by filling the gap first with a sealant and then a bead of hydraulic cement. The repairs were completed prior to entering into a contract with the buyers for the sale of them home. There was no evidence to suggest that any further leaking occurred prior to the sale of the house.

A SELLER'S PROPERTY DISCLOSURE STATEMENT WILL PROTECT SELLERS WHEN THERE IS FULL AND ACCURATE DISCLOSURE OF DEFECTS.



On the Seller's Property Disclosure Statement, the seller acknowledged that the basement had experienced multiple leaks in the past by checking "Yes" to the two following questions: "(a) Has there been any water leakage, water accumulation, or dampness within the basement, crawl space [,] or other part of the main dwelling at or below grade?"; and "(b) Have any repairs been made to control any water or dampness problems in the basement, crawl space or other parts of the dwelling at or below grade?" After reviewing the Disclosure Statement, the buyers questioned the seller on the details of the leaks. The seller verbally disclosed that he had discovered and repaired the following leaks: there had a pipe leak; a leak in a basement closet; and a leak around a crack in the basement wall. To repair the pipe leak, the seller removed a piece of existing peg board and after repairing the pipe replaced the peg board. The buyer proceeded to have a home inspection, which indicated that the basement door and garage door would need to be replaced because of water damage to their exteriors. The buyers still closed on the property and nearly two years later they filed suit against the sellers because water would accumulate near the basement door during times of heavy rain.

Among other things, the buyer alleged that the sellers should be liable for negligently repairing the area of separation between the retaining wall and the house's brick façade. The trial court determined their claim failed as a matter of law because a claim for negligent repair can only be brought against a builder/seller. The Court of Appeals agreed that even though the sellers had lived in the property for 16 years and performed numerous repairs during that time, the sellers still did not build the house and they could not therefore be liable for negligent repairs. With respect to their claim asserting fraud, the trial court found that there was no evidence to suggest that even the first element had been met as there was no misrepresentation or concealment and thus it was proper to dismiss the claim on summary judgment. The court found that the entire agreement clause in the purchase and sale agreement stating that the document was their entire agreement was effective and the buyers were barred from relying on any evidence of verbal statements regarding the leaks and repairs made prior to signing the contract. There was no evidence, as in the *Wheat* case, to suggest that the seller knew of any continued leaks, which could have created a question of fact sufficient to survive summary judgment. The buyers also argued that by removing the pegboard to fix the pipe and then replacing it again was an act of concealment, but the Court of Appeals was not impressed and merely said those actions were just part of making the repair.

How could the buyers have protected themselves in this situation? One solution might have been for the buyers to have asked the seller for a warranty of the work the seller did on the house.

HOUSE BUILT ON NEIGHBORS LAND BECOMES NEIGHBOR'S HOUSE

REALTORS® should cringe every time they hear buyers say "No, We don't plan on getting a survey." There is an old proverb that describes an entire kingdom being lost because someone failed to pay attention to a detail as small as a horseshoe nail. Recently, one Georgia homeowner discovered the painful truth of that adage when for the lack of a survey his entire house was lost in the case of *McGlashan v. Snowden*.

McGlashan and Snowden own adjacent home-site lots in a large heavily wooded development that spans over 11,000 acres. Both undeveloped home-sites were over 20 acres. McGlashan contracted to have a house built on his lot, which was ultimately completed in July 2010. Somehow nearly a year later, it came to McGlashan's attention that his house was not actually located within his bound-

THERE ARE TWO DISTINCT APPROACHES IN GEORGIA FOR SEPARATING REAL PROPERTY: STATUTORY PARTITION AND EQUITABLE PARTITION.

ary lines. Now this was not a borderline situation where a corner of the house's eves extended slightly over the line; rather, the entire house was encroaching a full 1.11 acres inside Snowden's lot. Snowden, who was living in Florida at the time, had no knowledge of the construction of the house until McGlashan informed him of the mistake. Snowden immediately filed a complaint for ejectment seeking to recover possession of his lot including the new dwelling and all the improvements located on it, and to be awarded fee simple title to the home, plus additional damages for the trespassing. McGlashan filed a counter claim including an equitable claim for unjust enrichment, which essentially said it would be unfair to allow Snowden to profit by keeping the house. McGlashan asked the court to grant him permission to relocate the home onto his lot. As a fall back plan, McGlashan also filed suit against his home builder seeking money damages to recover the full value of the house should he lose the ejectment suit. The trial court granted summary judgment to Snowden and awarded him title to the house. McGlashan appealed, but the Court of Appeals affirmed the decision. The court noted that equitable remedies are only available where there is no available adequate and complete remedy at law. The availability of money damages is an example of an adequate and complete remedy at law. Put more plainly, the court will not craft a specialized remedy such as granting permission to move a house, when the person who is damaged can be fully compensated by money. Since McGlashan had already decided to seek money damages from the home builder, the Court found that the loss of his house could be adequately compensated and he was therefore not eligible for an equitable remedy.

If McGlashan had only obtained a survey prior to starting construction, he could have avoided the all the costs associated with losing a house, losing two year lawsuit, maintaining a second lawsuit against his builder, and avoided the emotional stress and anxiety that is bound to accompany any protracted legal battle. The best advice a REALTOR® may ever give a client is a strong recommendation to obtain a survey prior to purchasing or at the very latest prior to starting a construction project.

EQUITABLE PARTITION NOT AVAILABLE WHEN STATUTORY PARTITION IS ADEQUATE

A REALTOR® may be the first person called upon to give advice to a landowner who is in a dispute over dividing a jointly held piece of property, so it is useful to know that there are two distinct approaches in Georgia for separating real property: statutory partition and equitable partition. In a statutory partition, the common owner must comply with a series of detailed statutory procedures in order to reaching one of the three possible remedies: physical division of the land, co-owner buyout, or a public sale. Given that the multistep process of the statutory procedure can be avoided in an equitable partition, the primary advantage of an equitable partition is its relative simplicity plus it allows for multiple issues between two parties to be handled in one proceeding; however, equitable partitioning is not always available. Recently, the Georgia Court of Appeals amended a trial judge's ruling to reflect that the decision should have been based on statutory partition instead of equitable partition.

In the case of *Pack v. Mahan*, Co-owner A of a 3.5 acre parcel of land wanted to cash out his interest in the land and he believed that selling the whole property at one time would yield the highest profit. Co-owner B wanted to physically split the property into two parcels. There were no other extenuating circumstances or additional issues in dispute between the parties. Co-owner A filed a suit for equitable partition. The trial judge ruled that the property was to be sold at public auction and the proceeds divided between the two co-owners. While agreeing with the trial judge's decision, the Court of Appeals determined that the decision should have been based on the statutory partitioning scheme, because an equitable partition is available only in the absence of an "adequate remedy of law" or in other words, when the statutory partition's narrow scope is not capable of taking into account all the other background factors or disputes in a given situation. Though making this change in the trial judge's decision may sound like exercise in semantics because it did not ultimately affect the outcome between the involved parties, it does provide valuable guidance as to when it is appropriate to file for an equitable partition. The lesson to take away is that when consulted on a land division issue, a REALTOR® should recommend that the landowner consult with a real estate attorney in order to determine if the statutory partitioning scheme is capable of resolving the particular dispute.

SETH G. WEISSMAN IS GAR'S GENERAL COUNSEL, AN ATTORNEY AT WEISSMAN, NOWACK, CURRY & WILCO, P.C., AND A PROFESSOR OF THE PRACTICE OF CITY PLANNING IN THE COLLEGE OF ARCHITECTURE AT GEORGIA TECH.