



Courtside *Newsletter*

Listing Agent's Duty to Disclose Further Clarified in California Courts



BY: KELLY A. NEAVEL, ATTORNEY AT LAW
CASEY MCINTOSH, PARALEGAL

Lately, the California Court of Appeal has been deciding numerous decisions that affect real estate practitioners, and June was no exception. At the end of last month, the Court decided in favor of the listing agent in a case that involved accusations of nondisclosure. Peake v. Underwood, et al. addressed the issue of whether the listing agent fulfilled his fiduciary duty to the buyer by disclosing all material facts regarding the property. The Court's ruling further clarified a listing agent's duty to the buyer and the buyer's duty of investigation.

In 2007 Marviel and Deanna Underwood ("Underwoods") purchased a home in San Diego County and were represented by real estate agent Paul Ferrell ("Ferrell"). About one year later, the Underwoods sold the home to Joanne Peake ("Peake") due to financial difficulties.

In 2010, Peake sued the Underwoods and Farrell after her son's foot went through a bathroom floor. In her complaint, Peake alleged that a water-intrusion incident had caused standing water to wick into the foundation, causing the attached structures to deteriorate. Peake only became aware of the extent of the water-intrusion damage when her son's foot went through the floor. Peake further alleged that the

Underwoods knew of the unrepaired water damage and deteriorated floor structure at the time of the sale, yet failed to disclose these facts. Peake also contended that Farrell "fail[ed] to conduct a competent and diligent inspection" and "fail[ed] to disclose information about the true condition of the [residence] including water damage" that he knew or should have known about.



Through the course of the action, Peake ultimately dismissed her case against the Underwoods after learning they were insolvent, and struck all claims against Ferrell except her claim that Ferrell breached his statutory duties under California Civil Code §§ 2079 and 1102, et seq.

The Civil Code (CC) sections listed in Peake's complaint against Ferrell have to do with the duties of real estate agents to inspect and disclose material information. CC § 2079(a) states that a real estate agent or broker has a duty "to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the

property..." CC § 1102, et seq. states that those disclosures must "be made in good faith."

In March 2011, Ferrell served Peake and her counsel with a motion for sanctions, contending Peake's claim against Ferrell was frivolous and had no factual or legal basis. Ferrell argued that disclosure of the subfloor or water intrusion problem was not visible on a reasonable inspection. He also argued that he went beyond his statutory duties "by providing Peake with all relevant reports that would have disclosed problems with the subfloors" and that the statute does not require a seller's agent to independently verify the seller's representations.

Ferrell submitted several documents in support of his motion, including:

- The Transfer Disclosure Statement, wherein the Underwoods indicated that they were not aware of any "[f]looding, drainage or grading problems" on the property. However, the form contained the disclaimer that the representations contained therein were those of the sellers and not of the agent. It directed Peake to see Ferrell's Visual Inspection Checklist and the reports and disclosures from the previous owner, which were also provided to Peake.

Continued...

Calendar

Changes to the RPA for Brokers & Managers

Date: August 14, 2014
 Time: 11:00 a.m. – 2:00 p.m.
 Location: Tri-Counties Association of REALTORS®

Contact Tri-Counties sign up!
www.tricorealtors.com

RPA

Date: September 12, 2014
 Time: 9:00 a.m. – 1:00 p.m.
 Location: Pacific West Association of REALTORS®

Contact PWR to sign up!
www.pwr.net

Changes to the RPA

Date: September 12, 2014
 Time: 2:00 p.m. – 4:00 p.m.
 Location: Pacific West Association of REALTORS®

Contact PWR to sign up!
www.pwr.net

Changes to the RPA

Date: September 18, 2014
 Time: 1:00 p.m. – 3:00 p.m.
 Location: Tri-Counties Association of REALTORS®

Contact Tri-Counties to sign up!
www.tricorealtors.com

C.A.R. Business Meetings

Date: October 8-10, 2014
 Time: 2:00 p.m. – 4:00 p.m.
 Location: Anaheim Convention Center

Contact C.A.R. to learn more and register!
www.car.org

Changes to the RPA

Date: October 14, 2014
 Time: 10:00 a.m. – 12:00 p.m.
 1:00 p.m. – 3:00 p.m.
 Location: Pacific West Association of REALTORS®

Contact PWR to sign up!
www.pwr.net

- The Visual Inspection Checklist, wherein under “Landscaping” Ferrell directed Peake to “see disclosures on drainage upgrades by previous owner.” Under “Foundation/Slab,” Ferrell indicated that he observed a “soft spot in the subfloor in one bedroom.” Lastly, under “Other” Ferrell wrote, “See past inspection reports, drainage upgrade report and work by Civil Engineer...and bond construction. Drainage improvements were performed in two separate projects.”
- Peake’s acknowledgment that she had received numerous documents that were provided to the Underwoods by the previous owners. These documents included a January 4, 2007 physical inspection report that disclosed substantial problems and decay in the subflooring of the home.
- Peake’s testimony that she had been aware of prior drainage problems in the home and repairs to the drainage system had been conducted. She also acknowledged that she did not look further into the matter because she had two other inspection reports from her own experts that said “everything was fine.”

Ferrell discussed Peake’s lack of investigation during the litigation process and her counsel’s disregard for Ferrell’s attorney’s emails advising him to reevaluate Peake’s claim.

Peake continued to argue that Ferrell knew about the drainage and water-intrusion issues and the subfloor repairs. However, the trial court agreed with Ferrell, finding that “at the close of escrow, [Peake] had all the information necessary and that the brokers satisfied all their duty by supplying all reports” and “there is nothing that plaintiff or her counsel can point to establishing that Mr. Ferrell failed in his...inspection duties.” Peake’s complaint was found to be in bad faith and sanctions were issued against

her and her counsel. Peake appealed this decision.

The Court of Appeal agreed with the trial court. The Court found that Ferrell did not breach his statutory duties. CC § 2079(a) clearly states that a seller’s agent’s duties are limited to disclosing defects that are apparent from a visual inspection. CC § 2079.3 clarifies that this duty does not “include or involve an inspection of areas that are reasonably and normally inaccessible to [such] an inspection.” It was undisputed that the defective conditions of the subfloors were not visible and would not have been apparent during a reasonable property inspection.



Ultimately, the Court of Appeal reaffirmed what was found earlier this year in *Saffie v. Schmeling* and *Swartz v. Coldwell Banker Residential Brokerage* that a listing agent’s fiduciary duty includes disclosing known facts materially affecting the desirability of the property, as per CC §§ 2079 and 1102, et seq. However, the duties do not extend so far as to conducting research that the buyer’s broker or agent should be doing or conducting more than a visual inspection. In the instant action, the listing agent (Ferrell) met his fiduciary duty to the buyer by disclosing all of the facts known to him, as well as producing reports from the previous purchase of the property. Peake’s allegations against Farrell were far-reaching and ultimately proved to be in bad faith.

As we can see, nondisclosure has become a hot-button issue in real estate. Real estate practitioners would be wise to follow the unwritten rule: if in doubt, disclose.