Judge Catherine Shaffer
Trial: August 12, 2013

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

HARTLEY McGRATH,

Plaintiff,

v.

VESTUS LLC; WINDERMERE REAL ESTATE/EAST, INC., and CHRISTOPHER HALL and JANE DOE HALL and the Marital Community of CHRISTOPHER AND JANE DOE HALL,

Defendants.

NO. 12-2-08537-4 SEA

DEFENDANTS' MOTIONS *IN LIMINE*

The above-captioned defendants, through their counsel of record, asks that the following evidence or matters not be submitted to the jury.

1. Agent duties under RCW 18.85, broker licensing statute.

Plaintiff complains that the actions of defendants "violate the laws intended to protect parties in real estate transactions, including Chapters 18.85 and 18.86 RCW." Complaint ¶ 22. RCW 18.85 (to be distinguished from RCW 18.86, the agency statute) authorizes the licensing of real estate brokers and brokerage firms. It establishes a professional code and public disciplinary remedy for violations, but it does not authorize a private right of action. *Woodhouse v. Re/Max Northwest Realtors*, 75 Wn.App. 312, 878 P.2d 464 (1994). Therefore, it would be misleading and improper for the jury to hear of any alleged violations of RCW 18.85, the broker licensing statute. Plaintiff will have plenty of opportunity to present to the jury defendants' alleged

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

violations of RCW 18.86, the agency statute, such as the duty to exercise reasonable skill and care and the duty to disclose material facts not reasonably ascertainable to plaintiff -- that is fair game. But it would be pointless and needlessly prejudicial to allow the jury to consider any alleged violations of the licensing law, RCW 18.85.

2. Forfeiture of real estate brokerage commission.

Plaintiff asked in her Complaint that the real estate brokerage commission paid to the defendants after her purchase of a property at foreclosure auction be refunded.

As a general rule, a real estate agent's fault renders the agent liable only for the actual damages caused to the complaining party. *Monty v. Peterson*, 85 Wn.2d 956, 959, 540 P.2d 1377. If, and only if, the real estate agent fails to disclose pertinent facts that bear on the agent's duty of loyalty to the plaintiff, then the court may order the agent to forfeit the commission paid without proof that the breach caused plaintiff a loss. *Monty*, 85 Wn.2d at 959-61, *citing Mersky v. MacPherson's, Inc.*, 69 Wn.2d 776, 420 P.2d 205 (1966) (commission forfeited where agent representing seller failed to disclose to seller his close family relationship with the buyer).

Here, parties' contract (Exh 6) in paragraph 1 explicitly states that the parties "shall have no agency relationship" unless otherwise agreed in writing, and there is no such other writing. Therefore, defendants' duties as real estate agents did not include any duty of loyalty to plaintiff. (*See* RCW 18.86.050, duties of buyer's agent, not applicable here, and RCW 18.86.030, duties of real estate licensees to all customers, which does not include any duty of loyalty.) Accordingly, Ms. McGrath cannot be entitled to a forfeiture of the commission she paid. If she proves that defendants breached a duty or breached the contract, she is of course entitled to recover the amount of damages she proves were legally caused by such breach, but that is a different matter.

In addition, even if there had been a breach of loyalty in this case, forfeiture of a real estate commission would still be discretionary with the *court* -- commission forfeiture is a matter of law for the judge to decide, not the jury. *Cogan v. Kidder, Mathews & Segner*, 97 Wn.2d 658, 667, 648 P.2d 675 (1982).

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

The claim for forfeiture or disgorgement of real estate commission should not go to the jury.

3. Claim for "negligent misrepresentation by omission".

Ms. McGrath is claiming "negligent misrepresentation by omission". For this, she has submitted as a proposed jury instruction the following portions of WPI 165.03:

> A party to a business transaction has a duty to disclose to the other party, before the transaction is completed, the following information under [any of] these circumstances:
>
> (a) matters known to him or her that the other is entitled to know because of a relationship of trust and confidence between them;
>
> (b) matters known to the party that he or she knows to be necessary to prevent his or her partial or ambiguous statement of the facts from being misleading[.]

However, our Supreme Court has held that "An omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation. [Citations omitted.] Moreover, the plaintiff must not have been negligent in relying on the representation." *Ross v. Kirner*, 162 Wn.2d 493, 499-500, 172 P.3d 701 (2007). *See also Austin v. Ettl*, 171 Wn.App. 82, 87-91, 286 P.3d 85 (2012), where the court discussed at great length that a failure to disclose cannot be the basis of a negligent misrepresentation action. Accordingly, notwithstanding the recently published WPI 165.03, any theory of "negligent misrepresentation by omission" is not recognized in this State and should not be submitted to the jury.

Even under a past court formulation that appeared to entertain "negligent misrepresentation by omission", it was under strictly limited circumstances. If plaintiff was going to claim it on the basis of the relationship of the parties, it had to be a "special relationship", a "quasi-fiduciary relationship". *Van Dinter v. Orr*, 157 Wn.2d 329, 334, 138 P.3d 608 (2006). Recall that the parties' Agreement (Exhibit 6) disclaimed any agency relationship

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

between the parties and limited the scope of information to be provided by defendants to plaintiff. Also it must be borne in mind that Ms. McGrath was acting as a businessperson, intending to buy real estate for speculative resale profit, and that she had more ready access to engineering expertise -- her father -- than the defendants.

In addition, *Van Dinter* held that where the plaintiff "could easily have discovered" the matter now complained of, plaintiff has no "negligent misrepresentation by omission" claim. *Id.* Ms. McGrath did in fact "easily discover" the problems now complained of when she looked at the property for the first time the day after her purchase. *See also Bailey, discussed supra in this subsection.*

Since *Ross v. Kirner,* however, there is no "negligent misrepresentation by omission" and the jury should not be given an instruction on it.

4. Claim for $60,000 for Mark Cooley's labor.

In response to defendants' third written discovery requests, plaintiff included a claim for $60,000 for Mark Cooley's labor. Mark Cooley is Ms. McGrath's boyfriend. He is not a party to this action. No documentation or itemization of Mr. Cooley's work, or Ms. McGrath's payment for it, has been supplied, despite discovery requests asking for this type of material. Certainly there is no proof that all of this was for items directly related to settling or foundation issues. In addition, public records show Mr. Cooley has not been a licensed general contractor for several years and did not have this status in 2011. If as appears Mr. Cooley is not a licensed contractor, by law he could not bring an action to compel McGrath to pay him. RCW 18.27.080. If McGrath paid or now pays him anyway, she is doing so as a volunteer and should not be able to charge Vestus for his work.

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

Defendants have received some indication that plaintiff has dropped this claim. If not voluntarily dropped, the court should not allow this claim to go to the jury.

5. Lost profits / lost opportunities.

Plaintiff claims damages for the "lost profits" she could have obtained for the house she bought and the lost profits in the form of "lost opportunities" in not being able to invest in new house-flipping projects because her money and credit were tied up in repairing the subject property.

Lost profits are never recoverable for negligent misrepresentation. Damages recoverable by a successful plaintiff for such tort include:

> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation

Janda v. Brier Realty, 97 Wn.App. 45, 50, 984 P.2d 412 (1999), quoting Restatement (Second) of Torts § 552B (emphasis added). Note a plaintiff may *not* recover difference between the value of what was represented and the value received, i.e. no lost profits or "benefit of the bargain" can be recovered.

Although lost profits are sometimes allowed in other causes of action, the scope is strictly limited. It is well settled in Washington that lost profits may only be recovered if plaintiff either (a) has an established track record in the particular business to provide a benchmark for legitimately measuring lost profits, or (b) appropriate expert testimony: *Farm Crop Energy, Inc. v. Old National Bank of Washington*, 109 Wn.2d 923, 927, 760 P.2d 231 (1988), quoting *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677, 396 P.2d 879, 32 A.L.R. 125 (1964). In our case, Ms. McGrath has been making a point of this being her first venture in house-flipping,

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

and her witness list does not include any expert on valuation or profits. Her claim for "lost profits" should not even go to the jury. Even more speculative than "lost profits" is the "lost opportunities" Ms. McGrath claims -- that because her money and credit were tied up in fixing up the subject property, she lost out on the opportunity to buy and profit from other properties. This presents so many unknown and unforeseeable events, it is simply impossible to assess a damage amount with any reasonable certainty.

The jury should not be allowed to consider lost profits or lost opportunities (which essentially are lost profits on future potential opportunities).

6. Emotional distress.

This element of damages was not pleaded, and was only claimed in response to plaintiff's responses to defendants' Third Discovery Requests, months after plaintiff's deposition was taken. It would be unfair to allow this claim now.

Nor is this element of claimed damages well founded on the merits. The latest major pronouncement on emotional distress from our Supreme Court was the 6 to 3 decision *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 293 P.3d 1168 (2013). In *Bylsma*, the Court held that emotional distress damages could be recoverable where a fast food restaurant customer discovered an employee's spittle on his hamburger. In doing so, the Court reaffirmed the historical limitations on emotional distress claims:

> In negligence cases, however, we allow claims for emotional distress in the absence of physical injury only where emotional distress is (1) within the scope of foreseeable harm of the negligent conduct, (2) a reasonable reaction given the circumstances, and (3) manifest by objective symptomatology. *Hunsley v. Giard,* 87 Wash.2d 424, 433, 436, 553 P.2d 1096 (1976).

176 Wn.2d at 560. The court then cited some examples where our courts have allowed recovery for emotional distress:

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

> We have permitted recovery in the absence of physical injury, for example, where undertakers improperly buried an infant child, *Wright v. Beardsley,* 46 Wash. 16, 89 P. 172 (1907), where a defendant inadvertently printed plaintiff's telephone number on its sales slips causing the plaintiff to be harassed by telephone calls, *Brillhardt v. Ben Tipp, Inc.,* 48 Wash.2d 722, 297 P.2d 232 (1956), and where a funeral home failed to provide ashes in a burial urn and the decedent's mother handsifted through the ashes, mistaking them for packing material, *Corrigal v. Ball & Dodd Funeral Home, Inc.,* 89 Wash.2d 959, 962, 577 P.2d 580 (1978)

Id. The Court then pointed out that each such case involved "emotionally laden personal interests" and in each, "emotional distress was an expected result of the objectionable conduct". *Id.* The Court then stated that "Common sense tells us that food consumption is a personal matter and contaminated food is closely associated with disgust and other kinds of emotional turmoil." *Id.* Therefore, the six member Court majority concluded that emotional distress was "within the scope of foreseeable harm" and "a reasonable reaction". The Court did not specifically discuss "objective symptomatology" (the third element) as related to this case, but did note that the plaintiff's claimed symptoms included vomiting and nausea. 176 Wn.2d at 558.

In our case, Ms. McGrath's dealings with Vestus were not a "personal matter" and her claim does not involve "emotionally laden personal interests". Ms. McGrath was acting as a business person seeking defendants' services to help her find a suitable property to resell for monetary profit. In the context of an economic relationship, emotional distress damages generally are not recoverable. *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991). There was no "special" or "fiduciary" relationship here -- the contract between McGrath and Vestus explicitly disclaimed any agency relationship. The gravamen of Ms. McGrath's entire case is that Vestus failed to give her information, and that failure cost her dollars and cents -- not that the defendants committed disgusting or revolting acts that attacked her personal interests outside the financial realm. Nor has Ms. McGrath so far put forward any evidence of "objective symptomatology", despite extensive written discovery requests.

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

A proposed Order is attached.

DATED this 5th day of August, 2013

DEMCO LAW FIRM, P.S.

By_____
Lars E. Neste, WSBA #28781
Philip T. Mattern, WSBA #16986
Attorneys for Defendants

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

Judge Catherine Shaffer
Trial Date August 12, 2013

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

HARTLEY McGRATH,

Plaintiff,

v.

VESTUS LLC; WINDERMERE REAL ESTATE/EAST, INC., and CHRISTOPHER HALL and JANE DOE HALL and the Marital Community of CHRISTOPHER AND JANE DOE HALL,

Defendants.

NO. 12-2-08537-4 SEA
Proposed
ORDER ON DEFENDANTS' MOTIONS *IN LIMINE*

This matter having duly come on for hearing before the undersigned Judge on Defendants' Motions in Limine, and the court having considered the Motion and appropriate materials, now then it is hereby

ORDERED that the following may not be presented to the jury:

1. Any evidence or argument claiming that any defendant(s) violated any provision of the Washington broker licensing statute, Chapter 18.85 of the Revised Code of Washington.

2. Any evidence or argument claiming that any defendant(s) should recover the commission paid by plaintiff as a result of plaintiff's real estate purchase the subject of this action.

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

3. Any evidence or argument based on "negligent misrepresentation by omission".

4. Any evidence or argument claiming that plaintiff should recover any funds for any labor or other work performed by Mark Cooley.

5. Any evidence or argument claiming that plaintiff should recover damages for any alleged lost profits or lost opportunities.

6. Any evidence or argument claiming that plaintiff should recover damages for any alleged emotional distress.

DONE IN OPEN COURT this ___ day of _____, 2013.

_____
Judge Catherine Shaffer

Presented by:

Demco Law Firm, P.S.

By_____
Lars E. Neste, WSBA #28781
Philip T. Mattern, WSBA #16986
Attorneys for Defendants

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001