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Two BRRETA Cases Clarify Duties Owed to Customers

Two recent appellate cases discuss the legal duties owed by a real estate broker to a customer.

The case of James Spies and Darlene Spies v. Deloach Brokerage, involved a real estate dispute between a buyer and the buyer's broker where the buyer accused the broker of fraud and violating the Brokerage Relationships in Real Estate Transactions Act ("BRRETA"). In 2012, Darlene Spies began looking for a retirement home in St. Simon's Island, Georgia. After seeing multiple homes with Mr. Delaney, who was working with Mrs. Spies in a broker-customer relationship, Mrs. Spies, her friend, and Mr. Delaney visited 105 Dudley Lane, St. Simons Island, GA 31522 ("the Property"). The Property, built in 2000, is a 2,518 square foot home that sits on .46 acres. The Property is bounded by a salt marsh to the west and Dunbar Creek to the east. An unfinished spa or pool, in addition to a brick patio, can be found in the backyard, while oak and cedar trees encircle the Property's outer bounds. From the house, the water is accessible by walking through shrubbery and trees. The property along the water's edge is large enough to support a dock, a feature that Mrs. Spies wanted to find for her husband, who is an avid boater. If Mrs. Spies purchased the home, Mr. Delaney told her that they would be neighbors, as he and his family live on Dunbar Lane.

Mrs. Spies "fell in love with" the Property when she first visited—she was "blown away with the view." During the thirty-to-sixty minute tour, the trio wandered outside, but they did not stay out for too long because of rain. Instead of venturing to the property line, the trio stood on the balcony overlooking the water. From the land's appearance, Mrs. Spies believed that the boundaries of the Property were clearly marked. Mrs. Spies observed the vegetation, the palmettos, and the trees along the edge of the property, noting one dead, leaning tree in particular.

Mrs. Spies admitted that she did not "investigate" the property she "didn't inspect it," but rather she "just glanced" at it during her tour with Mr. Delaney. Mrs. Spies was very excited about the house; she told Mr. Delaney that she would "consider making an offer" but she needed to speak to her husband first.

Prior to leaving, Mrs. Spies sought reassurance from Mr. Delaney, stressing to him she would be unable to return to St. Simons Island for any inspections prior to closing on the home. Mrs. Spies specifically mentioned that she needed Mr. Delaney's help with the survey, the home inspection, the walk-through, and the sales agreement. Mr. Delaney assured her that he would "be more than happy to take care of all of that for her," telling her "don't worry[;] I got your back."

Although the parties discussed Mrs. Spies' expectations of Mr. Delaney, they never verified their discussion in writing.

During the conversation in the driveway, Mr. Delaney conveyed to Mrs. Spies that a survey is not required in the State of Georgia. Mrs. Spies was "surprised" to learn that fact, but she assumed that her bank would require it to secure financing and to "protect their interest." Mrs. Spies' bank offered to obtain a survey for $375, and she assumed that her bank would take care of procuring it for her. Even though she never purchased a home without first procuring a survey, she did not think one was necessary because the boundary lines appeared clearly marked. Mrs. Spies never followed up with the bank to determine if the survey had been completed. Mrs. Spies did not discover that the bank never obtained the survey until six months after closing on the Property.

Prior to closing, Mr. Delaney recommended, and subsequently hired, a home inspector on behalf of the Spies. After the home inspector generated his report, Mrs. Spies, with Mr. Delaney's help, accessed the report and read it in its entirety. Following her review of the report, Mrs. Spies requested that the seller correct several issues prior to closing. Even with her corrections, she still relied on Mr. Delaney's statement that "it was a very clean home". She took his word for the condition of the property due to "the trust that [they] developed in the days that [they] spent together."

The sale of the Property proceeded as planned, even though the Spies never returned from Florida to see it. When Mr. Delaney sent the Spies the completed Purchase Agreement, he did not review the terms with Mrs. Spies or her husband. Additionally, he failed to provide the Spies with a copy of a Georgia Association of REALTORS® ("GAR") brochure entitled "Protect Yourself When Buying a Home." Pertinently, paragraph six of this brochure states, "Get a survey of the property. Buyers are encouraged to get surveys of the properties they are considering buying so that they know where the exact boundary lines of the properties are located. Buyers should request that the survey identify... whether the property is in a flood plain." Mrs. Spies did not realize that she did not receive this brochure because she was "extremely busy" and she did not read the Purchase Agreement. Mrs. Spies admits that she "probably never read" any of her prior contracts involving her other real estate transactions because "a REALTOR®'s job is to protect the buyer." Even though she did not read the contract, Mrs. Spies "signed it where [she] was told to" because she "trusted [Delaney]." Although Mrs. Spies never told Mr. Delaney that she was not going to read the contract, she lamented the fact that Mr. Delaney did not go over the contract with her, as her prior real estate agents had done.

The sellers of the property included a property disclosure statement, which Mrs. Spies "mostly read," that stated: (1) the property was located in a special floodplain; (2) there may be dead trees located on the property; (3) there were "water leaks, accumulation or dampness within the basement crawl space,"; (4) there were repairs to "control water leaks,"; and (5) there was no soil movement. Mrs. Spies believes that the seller lied about some of the statements in the seller's Property Disclosure, particularly regarding the issue of the soil movement, but acknowledges that the seller would have had more knowledge of the movement of the property line than Mr. Delaney. As part of the closing, Mrs. Spies received an elevation certificate, but she did not recall if she saw it before closing.

Mrs. Spies did not learn of the erosion problem on the Property until she hired a contractor to build a spa, approximately six months after completion of the sale. The contractor informed her that she had a "serious problem" on her hands because he could not install her requested spa, for fear that it would be lost to erosion. Following that conversation, Mrs. Spies enlisted several surveyors to assess her property.

Two areas of erosion were found on the Property. Mrs. Spies hired a surveyor to conduct a survey of the Property after she installed a timber bulkhead in the area along Dunbar Creek. The surveyor admitted that he did not have information regarding whether the land was built up

and filled in, and he could not give a precise estimate as to when the erosion occurred or how it had changed over time.

Right around the time of her discussion with her contractor, Mrs. Spies and a friend were driving in her car when her mobile phone rang. The Bluetooth device in Mrs. Spies' car and phone allowed for everyone in the car to hear the conversation. Mr. Delaney called Mrs. Spies to invite her and her husband to the festivities revolving around a PGA golf tournament. Mrs. Spies informed Mr. Delaney that she was on the island to install a bulkhead on the Property. There was a "brief pause" before Mr. Delaney responded by asking, "Don't you remember me telling you about that erosion problem?" Mrs. Spies immediately berated Mr. Delaney exclaiming, "Did I ever come across when we met as a stupid fricking idiot ... [?] If you had told me about the land erosion then I would have definitely made sure we looked into it." Mr. Delaney responded by recommending the name and telephone number of a bulkhead builder, with whom Mrs. Spies immediately met to discuss installing a bulkhead on the Property.

Mrs. Spies knew about the principle of erosion, because there were bulkheads on her other waterfront properties, but it never occurred to her that erosion could occur on a tidal creek. Mrs. Spies testified that she expected Mr. Delaney to have a general knowledge about erosion due to his knowledge of St. Simons Island and the fact that he lived by Dunbar Creek for a number of years.

Mrs. Spies and her husband filed suit against Deloach Brokerage with which the Spies were affiliated in the Superior Court of Glynn County, Georgia, seeking punitive damages not less than $250,000 and asserting claims, among other things, of fraud and statutory violations of BRRETA. Deloach removed the action to federal court and eventually moved for summary judgment in the case. Summary judgment is normally granted when there are no genuine disputes as to any material facts and one party is entitled to a judgment as a matter of law. The Court found in favor of Deloach Brokerage on summary judgment and dismissed all of the claims.

ANALYSIS OF THE COURT

In evaluating the fraud claim, the Court explained that the tort of fraud consists of the following five elements: "(1) a false representation or omission of a material fact; (2) scienter (or an evil intent); (3) intention to induce the party claiming fraud to act or refrain from acting; (4) justifiable reliance; (5) damages." Lehman v. Keller, 677 S.E.2d 415, 417-18 (Ga. Ct. App. 2009). In the context of real estate transactions, there are three different types of fraud:

> A willful misrepresentation, i.e., the seller tells a lie; upon active concealment where the seller does not discuss the defect but takes steps to prevent its discovery by the purchaser; and thirdly a passive concealment where the seller does nothing to prevent the discovery but simply keeps quiet about a defect which[,] though not readily discernible, is known to the seller.

The Court observed that the parties in this case differed as to whether the actions, or inactions, in question constitute a case of passive concealment or active concealment. The Court spent much time discussing whether the nature of the relationship between the Spies and Mr. Delaney was a fiduciary relationship since in the view of the court, this issue was central to the resolution of the case.

In determining whether Mr. Delaney acted in a fiduciary relationship the Court looked to O.C.G.A. § 10-6A, otherwise known as the Brokerage Relationships in Real Estate Transactions Act ("BRRETA"). O.C.G.A § 10-6A where it states that:

> A broker who performs brokerage services for a client or customer shall owe the client or customer only the duties and obligations set forth in this chapter, unless the parties expressly agree otherwise in a writing signed by the

> parties. A broker shall not be deemed to have a fiduciary relationship with any party or fiduciary obligation to any party but shall only be responsible for exercising reasonable care in the discharge of its specified duties as provided in this chapter and, in the case of a client, as specified in the brokerage agreement.

Based on BRRETA, the Court thus found that Mr. Delaney did not enjoy a fiduciary relationship with the customer (Mrs. Spies) unless the parties agree otherwise in a signed writing. The Court also found that the parties never created a separate contract, in writing, expressly delineating the Spies' expectations of Mr. Delaney. In fact, the only evidence the Court has of the existence of such an agreement is Mrs. Spies' assertion that Mr. Delaney told her "don't worry [;] I got your back," with regard to coordinating the home inspection, the survey, the sale agreement, and the walk-through. The Court found this to be insufficient to create a fiduciary relationship. The Court did note that § 10-6A-14(b)(3)(A) provides that a broker acting as a transaction broker must:

> timely disclose the following to all buyers and tenants with whom the broker is working: (A) all adverse material facts pertaining to the physical condition located thereon including but not limited to material defects in the property, environmental contamination, and facts required by statute or regulation to be disclosed which are actually known by the broker which could not be discovered by a reasonably diligent inspection of the property by the buyer.

The Court also noted that in fulfilling this duty the broker (and his or her licensees) must only "exercise reasonable care".

The Court found that Mr. Delaney followed Mrs. Spies' instructions and discharged his duties when he (1) located and hired a home inspector; (2) directed Mrs. Spies' attention to the home inspector's report, which she reviewed and made changes as she deemed necessary; (3) informed her that a survey is not required in Georgia; and (4) completed the sales contract. The Court noted the BRRETA clearly states that a broker's duty is to "locate" a home inspector as part of his "ministerial acts." O.C.G.A. § 10-6A-14 (a) (5). "Locating" a home inspector does not involve evaluating the home inspector's work, unless the parties signed an agreement stating otherwise. In the view of the Court, the Spies could not point to any evidence in the record suggesting that Mr. Delaney did not successfully discharge his duties pursuant to the BRRETA.

The Court then evaluated whether Mr. Delaney's actions constituted either active fraud or passive fraud. To prove fraud under a theory of active concealment, the Spies do not need to prove that Mr. Delaney did not discuss the defect - here, the erosion - but instead took steps to prevent its discovery. The Court found that Mr. Delaney never attempted to hide the condition of the Property. Mr. Delaney told Mrs. Spies that a survey was not required in Georgia: he stated the law for her, and as the Court saw it, "he did not attempt to hide the ball on this point in any way." Mrs. Spies learned that her bank would prepare a survey for $375, but she never followed up with the bank to determine if it had been completed and never insisted that Mr. Delaney locate a surveyor. The fact that the Property sat on land without a bulkhead was an open and obvious condition that Mr. Delaney in no way obscured. If Mrs. Spies, who is an experienced home buyer, wanted a survey of the Property, she had every right during the inspection period to have a survey prepared. In other words, the Court found that: 1) the erosion condition was obvious, had a careful inspection of the land been done; 2) telling the buyer that a survey was not needed did not conceal that fact.

With Mrs. Spies having done next to nothing to protect herself, the Court found that Mrs. Spies' expectation that Mr. Delaney should be held liable for erosion on her land that he did not own, merely because he lived down the street and had knowledge of the waterways around

Dunbar Creek, when she knew that there were dead, leaning trees on the Property, strained credulity.

In next evaluating the passive concealment fraud claim, the Court found that this occurs "…where the seller does nothing to prevent the discovery [of the issue] but simply keeps quiet about a defect which though not readily discernible, is known to the seller." To constitute passive-concealment fraud, the Court explained that the Mrs. Spies must first prove, "as a factor of justifiable reliance, that they could not have discovered the alleged defect in the exercise of due diligence."

"While [j]ustifiable reliance, more often than not, is a jury issue, the Court found that summary judgment may be appropriate if the means of ascertaining the relevant facts are equally available to all parties."

The Court reiterated that the law does not afford relief to one who suffers by not using the ordinary means of information, whether the neglect is due to indifference or credulity. When the means of knowledge are at hand and equally available to both parties, and the subject of the purchase is alike open to their inspection, if the purchaser does not avail himself of these means, he will not be heard to say that he was deceived by the vendor's representations or lack thereof."

As is set forth above, Mrs. Spies knew that there were issues with the Property. Although Mrs. Spies relied on Mr. Delaney to be her "eyes," the law imparts on everyone a duty to read. The Court found that Mrs. Spies offered a myriad of excuses regarding why she did not read her contract - that she was "extremely busy", and that she expected Mr. Delaney to go through it with her, but there is simply no excuse for her failure to read the contract when she had ample opportunity to do so. Mr. Delaney did not prevent her from reading the contract in any way - in fact, when he directed her attention to the home inspector's report, she read it and she immediately made changes that she deemed necessary. If the language of the contract confused Mrs. Spies, she could have called Mr. Delaney, seeking clarification. It is clear that Mrs. Spies had the wherewithal to read and elucidate issues when she wanted to, but she cannot renege and claim ignorance now that it suits her purposes. The Court then stated that the law on this point is clear; the Court will not reward Mrs. Spies when she could have avoided this quagmire by taking ten minutes out of her "busy" day to read.

The Court never clearly explains exactly what the Spies would have discovered had they read their contract. Presumably, a careful reading of the contract would have revealed that they had the right to do a survey and the existence of a brochure that offered advice to the Spies on how they could have protected themselves. Having found no evidence of fraud on Mr. Delaney's part and insufficient evidence that the Spies attempted to protect themselves, the Court dismissed the charges against the brokerage firm.

In reading the Court's opinion, the Court is clearly saying that absent a fiduciary relationship, the buyer in a customer-broker relationship could not blindly rely on the broker to protect the buyer against potential problems. BRRETA eliminated the fiduciary duty once owed by real estate brokers and provides that such a duty can only be created by and express agreement in writing. The fact that the Court did not find Mr. Delaney's verbal promise to "watch the buyer's back" as sufficient to create a fiduciary duty is both the correct interpretation of the statute and a welcome ruling to REALTORS©. The court also found that the buyer had a duty, which the buyer did not fulfill in this case, to protect herself by surveying carefully inspecting the property. Certainly, had Mrs. Spies carefully inspected the property and observed dead trees near the creek, this might have cause her to investigate the cause of the problem further and learn of the erosion problem.

The second case that highlights REALTORS®' duty to customers is RZI Properties, LLC v. Southern REO Associates, LLC. In this case, RZI wanted to purchase property owned by SunTrust Mortgage, Inc. and sued the broker working with RZI in a customer relationship after

the offer was rejected. RZI entered into a verbal agreement with Pat, a licensee of Southern REO (whom we will simply refer to as "Pat"), in which she would receive a commission of approximately $1,500 "…for performing simple tasks related to the closing." The buyer representative's instructions to her were "…to perform or provide all necessary paperwork as requested by the seller … to promptly notify the buyer if anything was needed from the buyer and to timely notify the buyer of any and all communications from the seller".

In early January 2012, RZI submitted an offer to purchase the property. The timeline of events that occurred thereafter are as follows:

January 4: The seller's listing broker sent Pat an email ("the preferred form for offers") with "BANK ADDENDUMS FOR MEMORIAL DRIVE LOT #2" in the subject line, and noted that "ALL OFFERS ARE SUBJECT TO FINAL CORPORATE APPROVAL." The email listed a purchase price of $5,000, requested that RZI provide a complete package of information within 24 hours that included a purchase and sale agreement with certain terms, a copy of the earnest money check made out to the seller's closing attorney, and an "[u]pdated proof of funds within the last 30 days." The email also instructed that the earnest money check be mailed to a particular address within 48 hours. Pat forwarded this email to the buyer's representative within an hour of receiving it (and the representative acknowledged that he did in fact receive it), adding a message to him that, "[w]e have accepted contract for $5,000. Please read below and let me know. Thanks!"

January 6: The buyer provided Pat with the packet of information requested by the seller's broker, but the proof of funds he included was not dated within the past 30 days. Pat nevertheless submitted the packet of information to the seller's broker the same day.

January 12: The seller's broker sent Pat an email message at 4:08 p.m.: "Contract was rejected because the proof of funds is over 30 days old. Please send updated proof of funds and the seller is now requesting an extension to the close date to 02/24/2012. I need this back by 10:00 am!!" Pat forwarded this email to the buyer the same day with the instruction to "Please read below." The buyer, in his deposition, stated that he did not receive this email from Pat until midday on January 13, and that he contacted Pat to inquire "…as to what was going on because I thought we had a contract. Consequently, I believed there was no need for an updated proof of funds." He told Pat that he would provide an updated proof of funds on Tuesday, January 17, 2012 (Monday, January 16, was a holiday). Pat responded to the email from the seller's broker: "Buyer is out of town right now. Is there any way that you can give time to get back in town to get you the update [proof of funds]?"

January 17: At 8:52 a.m., the seller's broker emailed Pat: "Please advise on the updated [proof of funds] and extension. If it is not in today the seller [is] going to move on and your offer will be rejected." Pat responded at 9:02 a.m.: "Buyer accepts the extension on the closing date and getting the update[d] [proof of funds], but he will not be back in town until tomorrow." At 9:36 a.m., the seller's broker responded: "Seller is moving on. Please advise, we need by end of business today." At 10:17 a.m., Pat replied: "We did all we can, but the buyer will not be in town until tomorrow. He is banking with small bank and cannot find one where he is right now. He can get you the [proof of funds] tomorrow. If the seller wants to move on, there is nothing we can do. If that is what the seller wants to do, should I call the attorney's office to let them know the contract is being rejected?" The buyer stated in his deposition that he faxed Pat an updated proof of funds at approximately 11:00 a.m., but that he did not receive any communication from her and was not told about the close of business day " 'drop dead' e-mail from the seller's agent." At 3:02 p.m., the seller's broker emailed Pat: "Your offer has been rejected. Property is going back on the market. Sorry we couldn't make this work." At 4:49 p.m., Pat emailed the seller's broker: "Is the property back on the market today? My buyer wants to

present another offer with an update[d] proof of funds tomorrow." The seller's broker responded minutes later: "You can resubmit an offer, but not until I have the updated proof of funds."

January 18: The buyer provided Pat with an updated proof of funds and Pat submitted another offer to purchase the property.

January 19: At 8:56 a.m., the seller's broker informed Pat that the seller had already accepted another offer. At 12:06 p.m., Pat forwarded to the buyer the January 17 email from the seller's broker informing her of the end of day deadline, with a message to the buyer, "Here you go!"

The buyer stated in his deposition that had he been informed of the "January 17 'drop dead' close of business deadline," he "would have easily been able to comply with this deadline and provide an updated proof of funds to Pat." He stated further that he had an updated proof of funds in his possession on January 17 and "could have easily re-sent it," but he believed that he had an "accepted contract" and that "we were good to go."

The essence of the claim against the brokerage was that it failed to perform its ministerial acts of timely communicating with the buyer with reasonable care. In evaluating this claim, the Court focused on BRRETA. The Court first noted that absent a written, signed agreement to the contrary, the duties and obligations imposed upon a real estate broker who performs brokerage services are limited to those set forth in the statute. OCGA § 10–6A–4 (a). More specifically, it provides that "[a] broker shall not be deemed to have a fiduciary relationship with any party or fiduciary obligations to any party but shall only be responsible for exercising reasonable care in the discharge of its specified duties as provided in this chapter and, in the case of a client, as specified in the brokerage engagement."

Because there was no written agreement between RZI and the brokerage (Pat), the Court found RZI was Pat's "customer" as defined in OCGA § 10–6A–3 (8) limited to performing ministerial tasks. The term "ministerial acts" is defined as "those acts described in Code Section 10–6A–14 and such other acts which do not require the exercise of the broker's or the broker's affiliated licensee's professional judgment or skill." OCGA § 10–6A–3 (12). Examples of ministerial acts that are "include[d] without limitation" are set forth in OCGA § 10–6A–14 (a). And subsection (b) provides a list of the mandatory duties of a transactional broker. While not specifically enumerated among the examples of ministerial acts listed in subsection above the Court found that Pat's failure to timely communicate vital information concerning the status of the offer to purchase the property, is an act that did not require the exercise of Pat's professional judgment or skill. Under this statutory framework, the Court then found that genuine issues of facts exists regarding whether Pat exercised reasonable care in the discharge of a ministerial duty.

Therefore, the appellate court reversed the decision of the trial court which had granted summary judgment to the broker. The effect of the Court's decision is that the trial court will decide whether Pat acted in a timely and appropriate fashion in communicating with her seller.

This case emphasizes the importance of timely communicating with both clients and customers and the risk of claims if this does not occur. Frankly, one of the lessons of the case is that when important deadlines are involved, the broker should communicate with his or her client or customer in every way possible with the buyer. To avoid later claims by a client or customer that the real estate agent was unresponsive, send an e-mail or text that states: 1) I have been trying to call you by phone and have been unable to reach you; and 2) I have important and time-sensitive news that requires you to call me back immediately.

This case also emphasizes the importance of knowing how to get in touch with customers and clients. Before working with a customer or client, brokers would be well advised to obtain every telephone number and e-mail address at which the customer or client can be reached (and maybe even an emergency contact number just in case) so that the REALTOR® has

multiple ways to get in touch with the client or customer.

The GAR Listing Agreements already include language where the client agrees to be available to receive communications. The GAR Forms Committee will likely consider whether this language should also be included in the customer agreements.

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