

“When is an Arizona realtor subject to a commissionectomy?”

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Arizona Real Estate Agents’ Duty to Disclose

April 2013

It has been famously said that “with great power comes great responsibility.” This is especially true for Arizona real estate licensees who, under Article 26 of the Arizona Constitution, are bestowed with a tremendous amount of power. Specifically, Article 26 provides licensees with the power to draft any and all instruments incident to the sale, exchange, trade, or leasing of property.¹ As a result of this power, real estate licensees bear the responsibility of explaining the implications associated with any and all documents incident to the sale of real property.² Put another way, a real estate agent must have the real estate contract preparation skills and real estate knowledge of an attorney or else face the possibility of committing real estate malpractice.³ Further, when a licensee commits real estate malpractice, the licensee is subject to not only a “commissionectomy,”⁴ but may be liable for punitive damages as well.⁵

Understanding the Duty to Disclose

Real estate agents have a fiduciary duty to their clients.⁶ Among the duties owed is the “Duty of Disclosure.” Unfortunately for real estate agents, the disclosure standards applicable to the type and the extent of a disclosure oftentimes differ. As a result, a real estate agent’s failure to properly apply the proper type of disclosure or provide disclosure to the extent required by law can result in liability.

While many disclosure requirements are set by statute (*ie*: Notice of Soil remediation, ARS §§ 33-424.01 and 49-701.02), the more difficult disclosure compliance issues arise out of the

¹ See Article 26 §1 of the Arizona Constitution

² *Morley v. J. Pagel Realty & Ins.*, 27 Ariz. App. 62, 66, 550 P.2d 1104 (1976).

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⁴ *Jennings v. Lee*, 105 Ariz. 167, 461, P.2d 161 (1961).

⁵ *Marquette Venture Partners II, L.P., v. Leonesio*, 227 Ariz. 179, 181, 254 P.3d 418, 420 (App. 2011)

⁶ A.A.C. R4-28-1101

commonly used but often misunderstood “Materiality Standard.” Although the Restatement (Second) of Contracts §161 and Torts §551 has attempted to clarify this standard, some would say that Arizona cases have blurred this attempted clarification. Specially, in *Amerco v. Shoen* it was reasoned that a fact is material if it is one to which a reasonable person would attach importance in determining the person’s choice of action in a transaction.⁷ Simple right?!? As any experienced real estate agent will tell you, the importance a buyer or seller places on a home’s characteristics can vary from day to day. Accordingly, do the facts that are material to those buyers and sellers vary from day to day as well? Even more troublesome, an agent’s duty to disclose exists even when the fact is not determined to be material so long as the buyer makes an inquiry of the seller.⁸ As a real estate agent, can you always tell the difference between a comment and an inquiry between a buyer and seller?

Disclosure Requirements for Sellers and Buyers

Further compounding this issue is that the duty to disclose for sellers is different than what it is for buyers. Worse yet, the duty for buyers and sellers differs from licensees. For example, a seller of residential property has a duty to disclose material facts to the buyer, which are not known by the buyer, if the material fact would affect the value of the property. Doesn’t that seem counter intuitive? Conversely, a buyer has a duty to disclose facts critical to their ability to perform to the seller. How many sellers or sellers’ agents out there have had a deal fall through because the buyer could not perform? When this happened, did the buyer make aware their potential inability to perform beforehand? Did the buyer breach their duty of disclosure?

Disclosure Requirements for Licensees

Like buyers and sellers, Arizona real estate licensees must also comply with disclosure requirements. Specifically, R4-28-1101(B) sets forth:

“A licensee participating in a real estate transaction shall disclose in writing to all other parties any information the licensee possesses that materially or adversely affects the consideration to be paid by any party to the transaction, including:

- 1) Any information that the seller or lessor is, or may be, unable to perform;
- 2) An information that the buyer or lessee is, or may be, unable to perform;
- 3) Any material defect existing in the property being transferred; and

⁷ *Amerco v. Shoen*, 184 Ariz. 150, 158 n. 10, 907 P.2d 536, 544 n. 10 (App. 1995)

⁸ *Universal Inv. Co. v. Sahara Motor Inn, Inc.*, 127 Ariz. 213, 215, 619 P.2d 485, 487 (1980)

- 4) The existence of a lien or encumbrance on the property being transferred.”

As a careful reading of this requirement reveals, a licensee’s duty to disclose includes any material defect existing in the property being transferred. This is true even if the defect is one that is not readily observable. A licensee’s violation of R4-28-1101 constitutes negligence and gives rise to an action for negligence per se against the licensee.

What’s to make of all this?

It is safe to say that Arizona’s laws hold buyers, sellers, and licensees to strict standards. It is also safe to say that an Arizona licensee will be held to the same standard as an attorney, who has attended 3 years of law school, despite the licensee having only completed 90 hours of pre-licensing education. As a result, every REALTOR® should establish and maintain a personal relationship with an attorney to discuss these types of issues. Attorneys are not deal killers and when consulted early can help reduce a buyer, or seller, or licensee’s liability exposure in addition to helping close the deal.

About the Author

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