

CASE UPDATE

Commission Agreements – Real Estate Brokers

The following elements are essential in order that a written commission agreement be enforceable in Texas:

1. A commission agreement must be in writing.

The writing must be prepared and executed by the time the sale or lease is consummated. It is not necessary that the writing exist when the broker first renders his services or that the writing pre-date the agreement between the owner and the prospective buyer or tenant.

2. The writing must identify the broker to whom the commission is to be paid.
3. The writing must promise to pay a definite commission or refer to a written commission schedule.

Therefore, a promise to pay the “usual or customary commission” on a transaction is not enforceable.

4. The writing must be signed by the person promising to pay the commission. It is not enough to have a commission agreement which states that “the broker will look solely to the lessor (or landlord) for any commission.” The party responsible for paying the commission must actually sign the commission agreement.
5. The writing must adequately describe the real estate.

Although a metes and bounds description is not required in the written commission agreement, the agreement must furnish enough data to identify the property with reasonable certainty. A contract providing for the sale or lease of an unidentified portion of a larger, identifiable tract does not reasonably identify the land. Additionally, a street address, standing alone, does not reasonably identify the land.

Disclosures -- Real Estate Brokers

Under Texas law, a real estate broker has the duty to disclose to prospective purchasers known, material facts that would affect the purchaser’s decision to buy the property. The same duty applies in lease transactions.

In *Pfeiffer v. Ebby Halliday Real Estate*, the court held that a broker cannot be held liable under the Deceptive Trade Practices Act for failure to disclose facts for that which he does not know. The case involved a property with a history of foundation problems,

which were common knowledge among area brokers. However, the evidence showed that the listing broker did not have knowledge of the foundation problems. The court held that the broker could not be held liable for failing to disclose foundation defects of which the broker did not have knowledge, even if he should have known about the defects. The case also indicated that a broker is not required to “look behind” an inspection report or make further investigation of matters raised in such reports.

Pfeiffer v. Ebby Halliday Real Estate, 747 S.W.2d 887 (Tex.App.—Dallas 1988, no writ).

Similar to *Pfeiffer*, the court in *Kubinsky v. Van Zandt* held that a broker has no duty to inspect listed property for defects other than asking the seller whether defects exist. It is the function of a real estate inspector, not a broker, to inspect the physical condition of a property.

Kubinsky v. Van Zandt, 811 S.W.711 (Tex.App.—Ft. Worth 1991, writ denied).

The “As Is” Clause

A buyer of a four-story office building in Austin sued the seller for misrepresentation in concealment of the presence of asbestos-fire proofing in the building. Prior to bidding on the building at auction, the buyer had the building inspected by his maintenance supervisor, his property manager, and an independent professional engineering firm. The buyer’s offer contained a provision that the buyer was purchasing the property “as is”, with any and all latent and patent defects and that the seller disclaimed all warranties. The buyer additionally recognized that he was not relying upon any representation, statement or other assertion with respect to the property condition, but was relying upon his own inspection of the property.

Buyer brought a lawsuit against the seller three years after the purchase because a lender required inspection of the property discovered asbestos fire-proofing in the building. The Texas Supreme Court indicated that there was no evidence to indicate that the seller had actual knowledge that the building contained asbestos prior to the sale. Without any evidence of knowledge of this defect by the seller, the Court held that the buyer’s “as is” agreement prevented him from asserting that the seller’s conduct caused his damages.

The Court went on to reason that “[b]y agreeing to purchase something ‘as is,’ a buyer agrees to make his own appraisal of the bargain and accept the risk that he may be wrong.” The Court did, however, recognize that the buyer is not bound by an agreement to purchase something “as is” that he is compelled to make due to a fraudulent representation or concealment of information. Rather, when reviewing an “as is” agreement, the nature of the transaction and the totality of the circumstances surrounding the agreement are to be taken into consideration. When the “as is” clause is a significant component of the basis of the bargain and not an incidental or boilerplate provision, and it is entered into by parties with somewhat equal bargaining power, a buyer’s affirmation that he is not relying upon representations by the seller should be given effect. Therefore,

the Court ruled that the “as is” agreement negated the required element of causation between any acts by the seller and damages by the buyer.

Prudential Ins. Co. of America v. Jefferson Associates, Ltd., 896 S.W.2d 156 (Tex. 1995).

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