

Real Estate Agents Beware: Missouri Court Recognizes Seller's Agent Liability under Consumer Protection Statute

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Soetaert v. Novani Flips, LLC, WD 82933, 2021 WL 3354295--- S.W.3d ---- (Aug. 3, 2021)

The Missouri Court of Appeals, Western District recently affirmed a jury verdict finding a real estate agent liable for violation under the Missouri Merchandising Practices Act ("MMPA") when she, acting as a seller's agent, acted in reckless disregard as to whether statements in the sellers' disclosure were true or false.

In *Soetaert v. Novani Flips, LLC*, after the plaintiff purchased a residential home and experienced water intrusion in a finished basement necessitating extensive repairs, she sued the sellers, sellers' agent, and the sellers' contractor, for violation of the MMPA, R.S.Mo. § 407.020, *et seq.* The sellers, who lived in Canada and invested in real property for rentals and flips, had a prior business relationship with the sellers' agent and the contractor (the latter two were previously married and frequently referred each other business). The agent was aware the subject property needed "full rehab" before sale. The sellers, through the contractor, undertook significant repair work to the basement and foundation before the home was sold to the plaintiff, including epoxy injections, installation of I-beams, and creating a yard swale to divert water from the foundation.

The Court of Appeals, reading two statutes governing real estate brokers together with the MMPA, recognized the plaintiff had a viable claim against the sellers' agent. Specifically, the court relied on § 339.730 (stating "[a] licensee acting as a seller's...agent owes no duty or obligation to a customer, except that a licensee shall disclose to any customer all adverse material facts actually known or that should have been known by the licensee") and § 339.190 (barring suits against a licensee "for any information contained in a seller's disclosure for residential,...real estate furnished to a buyer, unless the real estate licensee ... knew prior to closing that the statement was false or the licensee acted in reckless disregard as to whether the statement was true or false."). Thus, the Court of Appeals concluded the sellers' agent could not be liable for a violation of the MMPA *unless* the sellers' agent knew the statements in the disclosure were false or acted in reckless disregard as to whether the statements were true or false. "Reckless disregard," in turn, exists when there is a degree of awareness of probable falseness of the statement or there are serious doubts as to its truth.

Despite the right to sell contract between the sellers and their agent obligating the sellers to complete the requisite disclosure and condition of property addendum, the sellers' agent filled out the disclosure form. The sellers' agent, therefore, took on the duty of filling out the disclosure form, and in doing so, chose to make slash marks through twelve sections of the disclosure instead of checking the "yes" or "no" boxes. Notably, the sellers' agent slashed through four questions directly addressing foundation problems, cracks in walls or foundation, corrective action (including bracing), and water leaking in the basement. The agent noted in the disclosure the sellers were out of the country and have never visited the property, and "their knowledge is limited to the information provided by the contractor and the home inspection," and attaching a one-page scope of work.

At trial, the plaintiff argued the sellers' agent took on the duty of filling out the disclosure form but did so with such ambivalence it constituted reckless indifference. The jury agreed, returning a verdict for compensatory and punitive damages against the sellers' agent. The Court of Appeals found sufficient evidence the sellers' agent filled out the disclosure form with a reckless disregard as to whether the statements were true or false. In support, the Court relied on the agent's testimony about her knowledge of issues with the foundation and her decision not to answer questions in the disclosure, but instead relying on the scope of work. The Court noted the attached scope of work was "cryptic," "extremely limited and did not provide the same depth of knowledge that answering the questions in the disclosure would have provided," and made no mention of water intrusion. And though the disclosure form requested invoices, repair estimates and other documentation for significant repairs, improvements, and alterations, the sellers' agent did not provide any such documents, which "effectively represented to buyers that no such documents existed," despite her knowledge from prior dealings with the contractor and the sellers that relevant documents would exist. Because the jury was properly instructed to find the sellers' agent misrepresented or concealed a material fact about the condition of the home which she knew or should have known, the Court of Appeals held such finding supported the reckless disregard requirement for the punitive damage award.

In sum, the Missouri Court of Appeals recognized and affirmed liability for a sellers' agent under the MMPA based on her reckless disregard of the truth when she undertook the duty to complete the seller's disclosure.

Please note this case has not yet been published. On August 31, 2021, the Missouri Court of Appeals, Western District denied a motion for rehearing/transfer to the Supreme Court of Missouri filed by the seller's agent. The Court of Appeals opinion may be subject to modification.