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OUR MISSION

Empowering Our Members for Success and Enhancing the Quality of Life in Our Communities

2022 Judicial Update

SETH G. WEISSMAN is general counsel to the Georgia REALTORS®, and a partner in the law firm of Weissman, P.C.

A Closer Look AT Cases Involving A Lapsed License, Withholding Defects, AND A Question OF Client vs. Customer

It has been a while since we have written a judicial update. The good news is that this is because there have been so few cases involving REALTORS® that have reached our appellate courts. Still, the few cases that our appellate courts have heard are worth knowing about. Let's review these latest decisions.

LAPSED LICENSES AND COMMISSIONS

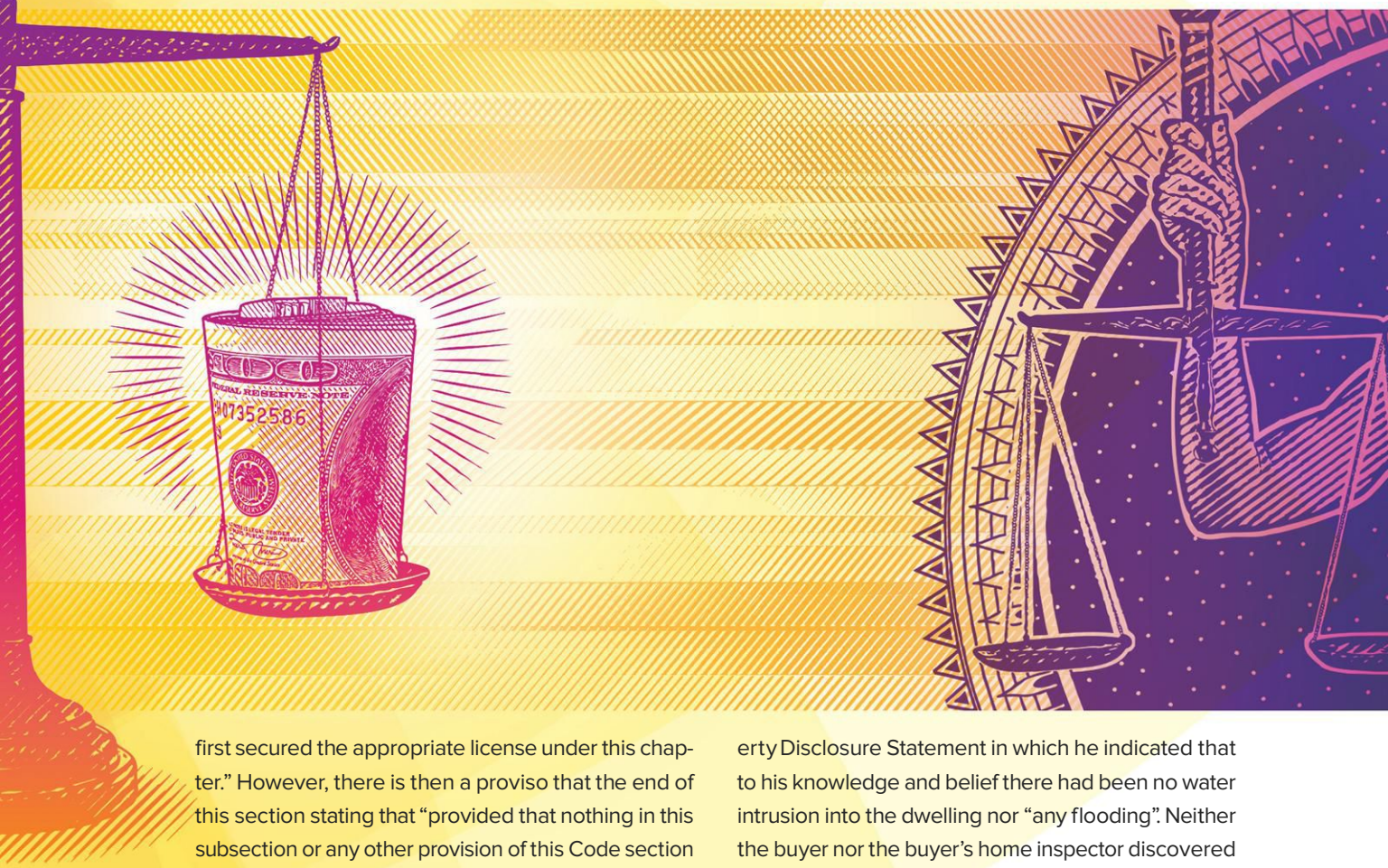
In the case of Ridgewalk Holdings, LLC v. Atlanta Apartment Investment Corp., (2021 WL 824710), the Court of Appeals dealt with the question of whether a real estate broker was entitled to a commission when a broker who had an exclusive listing on a piece of commercial property, was licensed at the time of the listing but not at the time of the closing. The owner of the listed property arguably kept the broker out of the negotiations to sell the property intentionally and did not pay the broker a real estate commission. The listing broker had a real estate brokerage license at the time the brokerage engagement agreement was entered into and at the time the broker was kept out of the negotiations. However, at the time the buyer and seller entered into a binding purchase agreement, without the broker's involvement, the broker's license had lapsed. The broker argued that his commission was due because he was licensed at the time he was kept out of the transaction and the brokerage agreement was thus breached. The Court of Appeals disagreed.

As the Court explained, a broker's commission is earned when, during the term of the agreement, the broker finds a purchaser ready, willing and able to buy and who actually offers to buy on the terms stipulated by the owner. Thus, the cause of action does not arise until there is a binding contract to purchase the listed property. The court also found that if the broker was not properly licensed at that time, no real estate commission could be earned. As the court further explained, one of the rules governing real estate brokers is that a broker may not bring an action to collect a commission without alleging and proving that he and anyone acting on his behalf was duly licensed in Georgia at the time the alleged cause of action arose. Since the court found that the cause of action did not arise until the property went under contract, the property went under contract and the broker was not licensed at the time, the court found against the broker.

While not discussed in this case, state law already makes it clear that a broker may not sue in our Georgia courts to collect a commission without alleging and proving "that any person acting in the broker's behalf was duly licensed at the time the alleged cause

of action arose." (O.C.G.A. § 43-40-24(b)). Therefore, the result in the case would have been the same even if the broker had been properly licensed, but the agent of the broker working on the transaction had not been licensed.

What remains a bit unclear, however, is whether one broker can choose to pay another broker a real estate commission in a situation where the second broker's agent is unlicensed. License law only provides that a licensee can be sanctioned for "[p]aying a commission or compensation to any person for performing the services of a real estate licensee who has not first secured the appropriate license under this chapter." However, there is then a proviso that the end of this section stating that "provided that nothing in this subsection or any other provision of this Code section shall be construed so as to prohibit the payment of earned commissions." The proviso would appear to allow the voluntary payment of a commission from one broker to another, even if the license of a broker or broker's licensee had lapsed, although there is not a case directly on point. The lesson of the case is to always be vigilant in maintaining your real estate license since the consequences can be the loss of commission income.



RECISSION AS A REMEDY WHEN SELLERS MISREPRESENT THEIR PROPERTIES

The case of Napier v. Kearney, (2021 WL 775220) decided by the Georgia Court of Appeals, did not necessarily establish new law in Georgia, but did a good job of explaining a buyer's rights and obligations when the seller allegedly conceals defects. In this case, the buyers sued the seller alleging that he 1) failed to disclose moisture intrusion and flooding; and 2) tried to hide the condition by moving a refrigerator and rugs over the area where there was evidence of such moisture and flooding. The seller filled out a Seller's Property Disclosure Statement in which he indicated that to his knowledge and belief there had been no water intrusion into the dwelling nor "any flooding". Neither the buyer nor the buyer's home inspector discovered any water intrusion or flooding. Five months after moving in the buyers discovered that the floor and subfloor in the dining room were wet and that there was significant pooling of water in the rear of the backyard.

One remedy available to buyers who have been defrauded is to seek to rescind the contract where the buyers try to force the seller to buy back the property. In this case, the buyers did just that. However, prior to seeking rescission, they waited some ten

months while they negotiated with their insurance company to see if they had coverage for the flooding. Unfortunately for the buyers, the law is well-established in Georgia that if the buyer does not act promptly to rescind by notifying the seller of their decision (and their filing suit to seek the same) the right to rescind is waived. Rescinding the contract normally requires that the buyer send a formal notice to the seller rescinding the contract and "tendering" the property back to the seller. This does not involve actually deeding the property back to the seller, but instead, verbally giving the property back to the seller.

The trial court found that as a matter of law, waiting ten months was too long to wait and that the right to rescind had been waived. This decision was affirmed by the Court of Appeals. However, the Court of Appeals sent the case back to the lower court for a trial on whether the seller actively concealed the flooding. The buyer's evidence was that the seller placed rugs inside the house in a way to conceal the water intrusion during the sales process. Additionally, the pointed to evidence that the refrigerator was shown in one location in the listing photographs but had been moved to a different location before the home inspection, thus concealing evidence of water intrusion. The seller argued that these were routine design changes and that the buyer could have moved the rugs and refrigerator during the inspection process. Buyers cannot win a claim for fraud in Georgia without showing that they used reasonable diligence to discover the fraud. The seller's argument was essentially that the buyer failed to exercise the required diligence to discover the property's true condition.

The Court of Appeals found that the question of whether a purchaser exercised reasonable diligence to inspect the property was a jury question. Interestingly, in reaching its decision, the Court stated that the buyer's failure to move the heavy furnishings was not as a matter of law a failure to exercise due diligence (although a jury might find differently). However, the case underscores the importance of buyers doing thorough and careful inspections of the properties they are buying. While the Court sent the case back to the lower court for a trial on the issue of whether the buyers acted reasonably to try to discover the true condition of the property, the outcome of that trial remains undecided.

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A **WRITTEN AGREEMENT** IS **NECESSARY** TO **ESTABLISH** A **CLIENT RELATIONSHIP**

In the case Starks v. Carver, 360 Ga. App. 366, 861 S.E.2d 193 (2021), a seller sued a commercial real estate brokerage firm for negligence arguing that the broker failed to warn the seller that the method of determining the sales price could yield a much lower sales price to the seller. The sales price was based on the exact acreage of the property but was "exclusive of areas contained within any public road right of way, setback lines, buffers or easements, flood plains or wetlands." Because of the inclusion of this provision, the purchase price turned out to be much lower than what the seller was expecting.

The brokerage firm argued that it was a customer of the seller rather than a client and as such owed no special duties to the seller. The brokerage firm brought a motion for summary judgment to get the case dismissed outright and the trial court denied the motion. The brokerage firm appealed just that ruling to the Court of Appeals.

The broker did represent the seller at one time pursuant to an exclusive listing agreement. However, in a letter sent in December 2015, the seller wrote a letter terminating the listing agreement in order "to step back and re-examine future plans for the property." As fate would have it, the former listing agent received an offer for the property roughly one month later and presented it to the seller. The offer provided for the payment of an eight percent commission to the listing broker. The seller argued that because the listing broker answered the seller's questions about the contract, it was evidence that the listing agreement had been renewed and that the seller's status was thus that of a client. In addition, the seller argued that the payment of a commission established a client relationship.

However, the Georgia Court of Appeals found that this was inconsistent with the plain language of the Brokerage Relationships in Real Estate Transactions Act ("BRRETA"). The payment of a commission does not determine whether a brokerage relationship has been created under the plain language of BRRETA. The Court also noted that BRRETA is clear that one's status as a client is dependent upon there being a written agreement to that effect between the broker and the client. The Court found that the listing agreement terminated without either party entering into an extension or another written agreement. Thus, Carver's status was a matter of law, no longer that of a client. As stated by the Court, to consider the broker to be a client, "based solely on the parties' actions would run counter to the explicit language of the statute."

This case helps answer the question many brokers have asked about whether a broker can be found to be a de facto client of a party through the broker's actions, even when there is no written agreement establishing a client relationship.

This case helps answer the question many brokers have asked about whether a broker can be found to be a de facto client of a party through the broker's actions, even when there is no written agreement establishing a client relationship. The answer to that question, based on this decision by the Georgia Court of Appeals, appears to be no.

Court decisions are always being reached that affect the practice of real estate brokerage in Georgia. Georgia REALTORS® regularly monitors these cases to keep REALTORS® up to date on the law.