

IN THE SUPREME COURT OF GUAM

PETER WILKINSON AND ELLEN WILKINSON,
Plaintiffs-Appellants,

v.

LUCIE JONES AND ANGELITA A. MELTON,
Defendants-Appellees.

OPINION

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Supreme Court Case No.: CVA97-019
Superior Court Case No.: CV1821-94

Appeal from the Superior Court of Guam
Submitted on the Briefs on July 1, 2002
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice, FRANCES TYDINGCO-GATEWOOD, Associate Justice, PETER C. SIGUENZA, Justice *Pro Tempore*.

PER CURIAM:

[1] After closing on the purchase of a new home, Appellants Peter and Ellen Wilkinson (“Wilkinsons”) discovered that the seller, Angelita Melton (“Melton”), was the mother of real estate broker Appellee Luchie Jones (“Jones”), and that Melton had purchased the home from the original owner for \$100,000 less than the price the Wilkinsons paid. The Wilkinsons then filed suit against Jones and Melton, alleging fraud, breach of fiduciary duty, and conspiracy. The trial court granted summary judgment in favor of Jones and Melton. We reverse and remand this case back to the trial court.

I.

[2] The following facts are as alleged in the pleadings and other papers filed in the lower court. The Barrigada Townhouse Partnership (“Developers”) gave Jones exclusive authorization to sell sixteen units of the Colina de Barrigada condominium development in December 1991. This exclusive authorization was thereafter extended. By December 1993, several of the units had been sold. The Developers indicated that they were willing to sell the remaining eleven units at \$450,000 each if they could sell them all to a single purchaser.

[3] Robert and Liesl McKnight (“McKnights”), Jones’s son-in-law and daughter, agreed to initially purchase all eleven units. The McKnights were to then immediately re-convey seven of the units to people who had agreed in advance to purchase them. The Developers and the McKnights entered into a contract for the sale of the eleven units at the price of \$460,000 per unit. The sales of the seven units from the McKnights to the people who had agreed in advance to purchase them closed on March 11, 1994. At the closing, the McKnights transferred one of the units, House No. 13, to Melton, Jones’s mother.

[4] In early 1994, the Wilkinsons contacted Jones about buying one of the units. The Wilkinsons had approached Jones previously about purchasing a unit but had not made an offer. When the Wilkinsons contacted Jones in March of 1994, they inquired whether the price of the units had been reduced to around \$450,000, as they had heard from various sources. Jones denied that any of the units were being sold for less than \$550,000. The Wilkinsons signed a contract to buy Melton’s unit, House No. 13, for \$560,000

on March 11, 1994, the same day that the McKnights transferred the unit to Melton. The sale from Melton to the Wilkinsons closed on June 2. Subsequent to the June 2 closing, the Wilkinsons discovered that Melton was Jones's mother.

[5] The Wilkinsons filed a complaint on December 9, 1994 against Jones and Melton, alleging fraud and conspiracy, and against Jones for breach of fiduciary duty. After requesting supplemental memoranda from the parties regarding the scope of duty that a real estate broker owes to a buyer of property, the trial court granted a motion for summary judgment in favor of Jones and Melton in a written Decision and Order, filed on April 15, 1997. The trial court held that no genuine issues of material fact existed and that the Wilkinsons failed to provide evidence to establish the essential elements of fraud or breach of fiduciary duty. The Wilkinsons appealed the trial court's decision.¹

II.

[6] This court has jurisdiction over a final judgment of the Superior Court pursuant to Title 7 GCA § 3107 (2002) (amended by P.L. 27-31 (Oct. 31, 2003)). The parties appeal from a grant of summary judgment. This court reviews the grant of summary judgment *de novo*. *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10, ¶ 7.

III.

[7] The Wilkinsons appeal from the trial court's grant of summary judgment in favor of Jones. Under Rule 56 of the Guam Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Guam R. Civ. P. 56. A genuine issue exists if there is sufficient evidence establishing a factual dispute that requires resolution by a fact-finder. *Iizuka*, 1997 Guam 10 at ¶ 7. A fact is material when it "is relevant to an element of a claim or defense and [its]

¹ The Wilkinsons filed a notice of appeal on May 13, 1997. That appeal was dismissed because, although the Decision and Order was filed on April 15, 1997, the judgment was not entered until January 28, 1998. The Wilkinsons filed an amended notice of appeal on February 24, 1998. Oral arguments were heard on May 8, 1998. No opinion was issued. Following a status hearing on July 1, 2002, the parties agreed to allow a second panel to decide the case without hearing arguments.

existence might affect the outcome of the suit.” *Id.* (quoting *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors, Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)). “[T]he court must view the evidence and draw inferences in the light most favorable to the non movant.” *Id.* at ¶ 8. If the record shows no genuine dispute of material fact, then summary judgment is properly granted. *See Kim v. Hong*, 1997 Guam 11, ¶ 8.

[8] Here, the trial court held that as a matter of law, Jones did not commit fraud or breach any duty to the Wilkinsons. The trial court further found no evidence of conspiracy. The Wilkinsons argue that Jones committed fraud and breached either a fiduciary duty or a duty of honesty and fair dealing that she owed to them as a real estate agent.

A. Broker’s Duty to Principal

[9] The general rule is that “a real estate broker or salesperson is an agent for his principal, with incumbent fiduciary duties to that person alone.” *Proctor v. Holden*, 540 A.2d 133, 142 (Md. Ct. Spec. App. 1988). Those duties include disclosing to the principal any personal interest the agent has in the property. *See Vining v. Smith*, 343 So. 2d 871, 872 (Fla. Dist. Ct. App. 1977) (“The law does not permit a broker to advance his own personal interest by discharging the duties of his position in such a manner as to make a secret profit for himself.”). Thus, a broker cannot sell to or purchase from his principal without a full disclosure of all the facts and circumstances relevant to the transaction. *See id.* Certain familial or marital relationships between the agent and a prospective buyer are considered material facts subject to disclosure. An agent’s relationship to a prospective buyer is a material fact if the agent “occupies with him such blood [or] marital . . . relationship which would suggest a reasonable possibility that the agent could be indirectly acquiring an interest in the property himself” *Loughlin v. Idora Realty Co.*, 66 Cal. Rptr. 747, 754 (Ct. App. 1968); *see also Sierra Pacific Indus. v. Carter*, 163 Cal. Rptr. 764, 766 (Ct. App. 1980) (following *Loughlin, supra*, and determining that the agent has a duty to disclose to the seller that the buyers of the property were the agent’s daughter and son-in-law); *Ross v. Perelli*, 538 P.2d 834, 836 (Wash. Ct. App. 1975) (explaining that the duty of full disclosure of any personal interest includes an obligation of an agent “to clearly, expressly, and timely reveal to his principal any familial relationship between the broker or participating subagent and the prospective buyer”).

[10] In the present case, the Wilkinsons argue that the trial court erred in granting summary judgment in favor of Jones on their breach of fiduciary duty claim. The Wilkinsons do not base their claim on the

existence of an agency relationship between themselves and Jones. Rather, the Wilkinsons argue that Jones owed them a duty based on Jones's position as a real estate broker. The question on appeal is whether Jones, as a real estate broker, owed a duty to the Wilkinsons, as buyers. The existence of a duty is a question of law. *Nissan Motor Corp. v. Sea Star Group Inc.*, 2002 Guam 5, ¶ 10 (“[T]he existence of a legal duty in a given factual situation is a question of law. . . .”) (quoting *Andrews v. Wells*, 251 Cal. Rptr. 344, 347 (Ct. App. 1988)).

B. Broker's Duty to Third Party Buyer.

[11] Although the duty that a real estate broker owes to his principal to disclose a personal interest in the property is clear, whether that duty extends to someone who is not the agent's principal is not settled.

[12] Some courts have held that where an agency relationship exists only between the broker and the seller, the broker owes no duty to the buyer. *See Proctor*, 540 A.2d at 142 (“We reiterate the general rule that a real estate broker or salesperson is an agent for his principal, with incumbent fiduciary duties to that person alone. The broker cannot act for both the seller and buyer in the same transaction because of the potential conflict of interest.”). Other courts have recognized that although the broker is the agent of the seller, the broker in fact owes a duty of “honesty and fairness” to the buyer. *See Nguyen v. Scott*, 253 Cal. Rptr. 800, 806 (Ct. App. 1988). We adopt the latter rule.

[13] It certainly is true that “the interest of seller and buyer are adverse.” *Nguyen*, 253 Cal. Rptr. at 808–09. Furthermore, the various duties the seller's broker owes to the seller, such as the “duties of loyalty, diligence, and disclosure,” inure from the agency relationship between those parties. *Id.* However, the absence of an agency relationship between the buyer and the broker does not indicate that a real estate broker owes no duty at all to the buyer. *See id.* at 806; *Stortroen v. Beneficial Fin. Co.*, 736 P.2d 391, 400-01 (Colo. 1987) (stating that “[t]he absence of an agency relationship between the purchaser and the selling broker does not leave the purchaser unprotected in his dealings with the selling broker or salesperson[,]” and noting that “Colorado courts have consistently held a license or salesperson accountable where the licensee failed to deal fairly and honestly with the purchaser”). “Real estate brokers occupy a position of trust with respect to the purchasers with whom they are negotiating.” *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 432 N.E.2d 849, 852 (Ill. 1982). The broker often spends many hours with the buyer and has access to confidential information through the process of negotiating a sale.

See *Walter v. Moore*, 700 P.2d 1219, 1225 (Wyo. 1985). Thus, the buyer is justified in expecting the broker to deal with him honestly and fairly. *Id.*; see also *Nguyen*, 253 Cal. Rptr. at 808–09 (Cal. Ct. App. 1988) (“Many buyers in fact *justifiably* believe the seller’s broker is also protecting their interest in securing and acting upon accurate information and rely upon him.”) (brackets and ellipsis omitted) (quoting *Easton v. Strassburger*, 199 Cal. Rptr. 383 (Ct. App. 1984)).

[14] Furthermore, the law requires brokers to be licensed before they can perform the duties of a real estate broker. Title 21 GCA §104101 (2000 Update). The purpose for requiring licensed brokers to meet high standards of honesty and trustworthiness is to safeguard the public. *Stevens v. Jayhawk Realty Co.*, 677 P.2d 1019, 1025 (Kan. Ct. App. 1984). In *Holland Realty Investment Co. v. State Department of Commerce*, the Nevada Supreme Court upheld the revocation of a real estate license, holding that the broker acted unethically because even without a fiduciary duty to the buyer, “once [the agent] discussed the question whether a lower price was attainable he had to ‘speak the whole truth and not by partial suppression or concealment make the utterance untruthful and misleading.’” *Holland Realty Inv. Co. v. State Dep’t of Commerce*, 436 P.2d 422, 426 (Nev. 1968) (quoting *Am. Trust Co. v. Cal. W. States, Life Ins. Co.*, 98 P.2d 497, 508 (Cal. 1940); *Ratray v. Scudder*, 169 P.2d 371, 377 (Cal. 1946)). Accordingly, anyone dealing with a licensed broker “may naturally assume that he possesses the requisites of an honest, ethical man; and where a real estate broker is acting as agent for the seller, he nevertheless owes a duty to the buyer.” *United Homes Inc. v. Moss*, 154 So.2d 351, 354 (Fla. Dist. Ct. App. 1963); see also *Funk v. Tiff*, 515 F.2d 23, 25 (9th Cir. 1975), *Hughey v Rainwater Partners*, 661 S.W.2d 690, 691 (Tenn. Ct. App. 1983).

[15] Thus, we hold that the seller’s broker owes the buyer a duty of honesty and fair dealing. A broker can breach the duty of honesty and fair dealing “by failing to convey a prospective purchaser’s offer to the seller and by secretly competing with the purchaser.” *Nguyen*, 253 Cal. Rptr. at 806. Because of the position of trust that a real estate broker occupies with respect to the buyer, when brokers are interested in acquiring the same property as prospective buyers, they owe the buyers a duty “to exercise good faith and disclose any personal interest they have in property they list for sale.” *Sawyer Realty Group*, 432 N.E.2d at 852. A broker’s failure to disclose that he is also bidding on the property is unfair to all purchasers because “the broker is likely to have an advantage over other bidders because of his knowledge

of their offers and the owner's desires ... [and] his contacts with other purchasers may easily lead them to rely on his assistance and forego their own efforts to negotiate for the property." *Nguyen*, 253 Cal. Rptr. at 806.

[16] Whether Jones breached their duty to the Wilkinsons is a question for the trier-of-fact. This case is not one that is appropriate for summary judgment because questions of fact exist regarding whether Jones was competing with the Wilkinsons for the property and whether she realized secret profits from the transaction, regardless that she was not an agent for the Wilkinsons.

C. Fraud

[17] The Wilkinsons argue that the trial court erred by making factual findings in reaching its conclusion that the elements of fraud had not been met. According to the Wilkinsons, the trial court made improper findings that Jones did not make any false statements, and that the Wilkinsons did not justifiably rely on Jones's statements. The Wilkinsons argue that, contrary to the trial court's conclusion, they were harmed by Jones's misrepresentation despite their continuing occupation of House No. 13 because they paid \$100,000 more for the property than they would have if it were not for Jones's alleged misrepresentation.

[18] The trial court granted summary judgment based on its determination that the Wilkinsons failed to establish the required elements of fraud. "The elements of fraud include: 1) a misrepresentation; 2) knowledge of falsity (or scienter); 3) intent to defraud to induce reliance; 4) justifiable reliance; 5) resulting damages. The absence of any of these required elements will preclude recovery." *Trans Pacific Export Co. v. Oka Towers Corp.*, 2000 Guam 3, ¶ 23 (citations omitted).

[19] Whether Jones committed fraud is a question of fact. See *Perez v. Gutierrez*, 2001 Guam 9, ¶ 23. In granting summary judgment, a court is required to view the facts in the light most favorable to the nonmoving party. *Villalon v. Hawaiian Rock Prods., Inc.*, 2001 Guam 5, ¶ 8. From a review of the trial court's April 15, 1997 Decision and Order, it is apparent that the trial court considered the factual allegations offered by both parties. The trial court recognized the following facts: the Wilkinsons heard rumors that the homes were being sold for reduced prices; Jones informed the Wilkinsons that the price for each unit had not gone down from \$550,000; the units were in fact sold in bulk for around \$450,000 each; and Melton became the owner of House No. 13 immediately preceding the sale to the Wilkinsons. These facts were relevant to the elements of the Wilkinsons' fraud claim. Rather than viewing the facts in

a light favorable to the Wilkinsons, the trial court determined several factual issues in favor of Jones. The trial court held that Jones did not make a false statement, that the Wilkinsons did not justifiably rely on Jones's statements, and that the Wilkinsons were not harmed because they received what they had bargained for. Because the facts recognized by the trial court in its Decision and Order evidenced a dispute as to these issues, a determination of the claim for fraud "requir[ed] resolution by a fact-finder." *Guam Hous. & Urban Renewal Auth. v. Pacific Superior Enter. Corp.*, 2001 Guam 8, ¶ 11 (quoting *Iizuka*, 1997 Guam 10 at ¶ 7). Accordingly, the trial court's grant of Jones's motion for summary judgment was in error. *See Gutierrez v. Charfauros*, 2002 Guam 7, ¶¶ 12, 19, 36 (reversing a grant of summary judgment because "the record at the time of summary judgment was insufficient to allow the trial court to make its finding"); *Guam Hous. & Urban Renewal Auth. v. Dongbu Ins. Co.*, 2001 Guam 24, ¶¶ 24, 26 (finding the trial court's grant of summary judgment inappropriate because there existed a genuine issue of material fact for resolution by the jury).

IV.

[20] We hold that a real estate broker owes a duty of honesty and fair dealing to a third party buyer. Whether Jones breached that duty cannot be determined from the undisputed facts of this case. Whether Jones committed fraud also must be resolved by the trier-of-fact. Accordingly, we **REVERSE** the grant of summary judgment and **REMAND** this case back to the trial court.