

# Disclose More. Never Less.



## *COUNSEL'S CORNER*

In 2009 Shawn and Stephanie Holloway hired Jeremy Williams, a sales agent with Keller Williams Realty Northeast, to help them sell their existing home and find a new one. M/M Holloway were shown a home owned by Jennifer Blalock – another sales agent with Keller Williams Realty NE.

Following intermediary protocol, Keller Williams Realty NE engaged Tina Martin, also a sales agent with Keller Williams, to assist Jennifer Blalock. Meanwhile Jeremy Williams continued to represent M/M Holloway.

A Contract was signed for the purchase and sale of Blalock's property. Keller Williams NE was designated as the broker for both seller and buyers. The Holloways were allowed a 10-day inspection period, and so they hired Clint Simon (referred to them by Jeremy Williams) for a termite inspection.

Simon found no visible evidence of active termite infestation or previous infestation, although Simon did disclose his finding of evidence of previous treatment for subterranean termites.

M/M Holloway closed the purchase and soon after closing the Holloways started renovating the property. The contractors discovered extensive termite damage – substantial enough to cause the Holloways to move out.

The Holloways filed a lawsuit against Blalock, Simon and Keller Williams NE. Blalock filed bankruptcy; Simon paid \$200,000 to be released. That left Holloways vs. Keller Williams NE.

The trial jury found liability against Keller Williams NE based primarily on a theory of failure-to-disclose under the Texas Deceptive Trade Practices Act. The trial court then converted the jury's findings into a Judgment.

Keller Williams NE appealed, claiming that the evidence was insufficient to support the jury findings. The point made by Keller Williams NE was that the only means

for the jury to find it liable would have been due to the actions (possible failure to disclose) of Jennifer Blalock. And – that Jennifer Blalock was not an agent for Keller Williams NE, because Jennifer Blalock was acting only for herself.

Now of course Jennifer Blalock had signed an Independent Contractor's Agreement with Keller Williams NE, to perform services as a real estate agent. However, in the Holloway deal Blalock was not acting in an agency capacity but rather as an owner and seller of the property. As such, the ICA was inapplicable and the actions (inactions) of Blalock did not bind Keller Williams NE as no principal-agency relationship was intended by this one, unique transaction.

So the argument went.

The Court of Appeals evaluated evidence that Blalock's agent did "very little" and instead Blalock represented herself, offered the Property for sale herself, negotiated the sale herself, and sold the Property for her own account.

Thus, no agency relationship existed between Blalock and Keller Williams NE.

Then the Court turned its attention to the question of Keller Williams' knowledge of the existence of unrepaired termite damage. Again, the evidence did not support the conclusion that Keller Williams knew of the issue, and failed to disclose.

The trial court's Judgment was reversed in favor of the Keller Williams franchisee.

See *Flutobo, Inc., dba Keller Williams Realty Northeast v. Holloway*; Nos. 14-12-00104-CV and 14-12-00170-CV, December 16, 2013.

Lessons learned:

1. If the non-disclosure is significant enough, there will be a claim. If the claim is not resolved, there will be a lawsuit. If there is a lawsuit, the only winners will be the lawyers as attorneys' fees might eclipse the amount of any judgment. Particularly if there are appeals.
2. This case is residential in context. But the same rules regarding disclosure and intermediary relationships apply to commercial transactions. There is no difference in Texas law, as TREC makes no distinction between the types of transactions relative to the disclosures that must be made although the DTPA applies only to "consumers."
3. Err on the side of disclosing too much, after of course you have obtained your principal's written authorization. You might need to consider withdrawing if your principal refuses to furnish that consent. Better a blown commission than a lawsuit!

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