

Wisconsin Court: “That Shouldn’t Be a Problem” = Misrepresentation



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In *Marchese v. Miller*, et al., purchasers entered into a contract to purchase a vacant lot upon which the seller/builder was to construct a home. The lot had a storm water retention pond that had to be removed prior to construction, thus the contract called for the seller/builder to obtain municipal and homeowner association approval to relocate the pond. The buyers became concerned about the relocation effort and contacted the listing agent, who advised them to draft an amendment stating, “Buyers to obtain construction loan by August 31, 2009. Construction to commence upon securing loan. First draw to include purchase of vacant lot by buyers.” Instead, the buyers signed and submitted an amendment stating, “First draw on lot will not be made until retention pond is relocated and homeowners association settlement is satisfied.” In an email, they asked the listing agent if the amendment was satisfactory, to which

he responded, “That shouldn’t be a problem”. The seller’s representative signed the amendment.

The buyers closed the transaction knowing that the pond had not been relocated. They assumed that the amendment terms were included in the closing documents, thus money would not be paid to the seller/builder until the pond was moved. At the closing, they signed documents which they saw for the first time and which the listing agent did not explain to them. The buyers later discovered that the documents authorized the disbursement of \$100,000 to the builder, which occurred at the closing. The pond was never moved and the buyers had to purchase a different property.

The buyers sued the seller/builder, the broker and the broker’s company. During the ensuing civil jury trial, the broker admitted that he knew that the home could not be built unless the pond was moved, and knew well before the closing that the homeowner’s association was against moving the pond and the city would not approve it unless the homeowners association did. The broker also did not dispute his failure to send the contract amendment to the title company, which resulted in an inaccurate closing statement and disbursement of funds to the builder contrary to the terms of the amendment. In addition, the seller/builder’s representative testified that he told the broker that he would not move the pond until he got paid, which would not happen until the closing.

The jury delivered a verdict in favor of the buyers. As to the broker and the company, the jury found intentional misrepresentation, unfair trade practices and negligence. The trial court, however, overturned the verdict because there was insufficient evidence to support it. The court reasoned that the broker’s statement, “That should not be a problem”, was not supported by evidence that the broker knew the builder never intended to move the pond, or intended to draw construction funds prior to moving the pond, despite executing the contract amendment. The trial court also dismissed the negligence verdict

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because no expert testimony was presented to explain what the broker's duties to the buyers were. The buyers appealed, arguing among other things that the statement, "That shouldn't be a problem", established the broker's intentional misrepresentation that funds would not be disbursed to the seller/builder until *after* the pond was moved, as the contract amendment specified.

The Court of Appeals of Wisconsin reversed the trial court decision. Among other things, the court observed that the broker's failure to disclose that the contract amendment terms were not included in the closing statement, and that funds were going to be paid to the seller/builder at closing, supported the jury verdict of intentional misrepresentation. The Court observed that the broker knew that the buyers believed that their expectations would be honored, which was the whole point of the contract amendment that the broker said "... shouldn't be a problem".

The court also reinstated the jury verdict regarding negligence, finding that expert testimony was unnecessary because the question of whether the broker failed to provide adequate brokerage services to the buyers "is neither unusually complex nor esoteric". The court noted that two title company witnesses explained the importance of having all of the contract terms in order to prepare accurate closing documents. And, the broker himself testified that the responsibilities of a listing broker include ensuring that the transaction closes upon the agreed-upon terms and that the parties understand the closing documents. [The broker argued on appeal that the contract amendment was invalid. The court rejected the argument.]

[*Marchese v. Miller, et al.*, 2015 Wisc. App. LEXIS 327. Note: This case was not recommended for publication in the official reports.]