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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ELIZABETH A. SEDLOCK and
JASON BANISH,

Plaintiffs,

v.

Civil Action No. 06-C-370-2

THOMAS MOYLE, JOANN MOYLE,
MARSHA ANN FELTON,
JEAN HOLLANDSWORTH,
DOUBLE H. REALTY, INC.
a West Virginia corporation,
DAVID A. ROMANO and
CATHY JOBY ROMANO,

Defendants.

**ORDER GRANTING DEFENDANTS',
MARSHA ANN FELTON, JEAN HOLLANDSWORTH AND
DOUBLE H. REALTY, INC. MOTION TO DISMISS**

On the 15th day of September, 2006, came Defendants Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., by counsel Daniel C. Cooper, Esq., and filed "Defendants' Marsha Felton, Jean Hollandsworth, Double H. Realty, Inc. Motion to Dismiss." Upon consideration of Defendants Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc.'s motion, the memorandum in support thereof, Plaintiffs' brief in opposition, Defendants' response to the Plaintiffs' opposition, and the entire record, the Court **ORDERS** that the motion is **GRANTED**.

STATEMENT OF FACTS

The Court states the following facts:

1. In 2004, Marsha Ann Felton was a West Virginia licensed real estate salesperson and Jean Hollandsworth was a licensed West Virginia broker. At that time, Ms.

Hollandsworth was also an officer in the corporation, Double H Realty, Inc. ("Double H Realty"). Double H Realty retained Ms. Felton as a real estate salesperson.

2. On February 18, 2004, Ms. Felton obtained an exclusive listing agreement from owner, Elizabeth A. Sedlock for 601 Indiana Avenue, Nutter Fort, WV, 26301. Ms. Felton showed the Indiana Avenue house to Joann E. Moyle and Thomas L. Moyle. On March 29, 2004, Ms. Felton drafted a "Contract for Sale and Purchase" for the sale of Ms. Sedlock's Indiana Avenue house to the Moyles. Included in this contract was a clause making the performance of the contract "contingent upon the seller locating acceptable housing."

3. On June 26, 2004, Ms. Sedlock and Mr. Banish entered into a contract to purchase another home. The contract entered into by Plaintiffs for the purchase of the 339 Worley Avenue house owned by David A. Romano and Cathy Joey Romano expressly conditioned the sale upon "buyers closing on the sale of their home at 601 Indiana Ave., Nutter Fort, WV 26301 prior to the closing date on 339 Worley Ave., Clarksburg, WV 26301." The offer made by Mr. and Mrs. Moyle to purchase Sedlock's home on Indiana Avenue had expired.

4. The Moyles executed a new offer to purchase Sedlock's Indiana Avenue home on July 5, 2004. The "Contract for Sale and Purchase" of Sedlock's home on Indiana Avenue to Mr. and Mrs. Moyle, was drafted for Sedlock's approval. The prior contract's contingency regarding acceptable housing had been fulfilled. Plaintiffs had located acceptable housing and entered into a contract for its purchase. Plaintiffs' ability to obtain financing to purchase the Worley Avenue house was contingent upon Ms. Sedlock first selling her house located on Indiana Avenue. The contingency clause regarding locating acceptable housing was not included in the draft of the contract dated July 5, 2004.

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5. Ms. Sedlock read the contract, inquired about the contingency's absence, accepted the contract as drafted, and executed the contract on July 5, 2004. Ms. Sedlock initialed and signed the contract acknowledging that she read and understood the provisions and agreed to sell her house at the price, terms, and conditions set forth, and that she was not relying upon any oral statements or representations made by the Purchaser, a real estate broker, or agent that were not in the contract.

6. On or about August 19, 2004, Mr. and Mrs. Romano notified Beth Taylor, their real estate salesperson, that they would not sell their house to Sedlock and Banish as was provided for in the June 26, 2004 contract. Ms. Sedlock chose at that time not to attempt to enforce the contract that she had entered into for the purchase of the Romanos' house. Ms. Sedlock wanted to maintain her house on Indiana Avenue. The Moyles enforced the contract requiring Ms. Sedlock to sell her house.

STANDARD OF REVIEW FOR MOTION TO DISMISS

1. The trial court should grant a motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to West Virginia Rule of Civil Procedure 12(b)(6) where the Plaintiffs can proffer no set of facts in support of their claim that would entitle them to relief. See Coberly v. Coberly, 213 W. Va. 236, 238, 580 S.E.2d 515, 517; See Chapman v. Kane Transf. Co., 160 W. Va. 530, 538, 460 S.E.2d 54, 212 (1977).

2. For purposes of a motion to dismiss, the complaint is construed in the "light most favorable to the plaintiff[s]," and the allegations are taken as true. See John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157 (1978).

3. Where the complaint fails to state a claim under any legal theory, it should be

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dismissed pursuant to Rule 12(b)(6). See id.

CONCLUSIONS OF LAW

1. The Court finds that no duty is placed upon a real estate salesperson to anticipate a breach of contract and to protect a customer from such breach. The Court finds that the plaintiffs' alleged duty in this regard lacks the essential element of foreseeability.
2. The Court finds that parties to a real estate contract have a duty to read their contract and know what is in the documents they sign and that if they fail to do so, they may not blame another. Southern v. Sine, 95 W. Va. 634, 643, 123 S.E. 436, 439 (1924). A party to a contract who signs a contract without first reading it does so at his or her own peril. Reddy v. Community Health Foundation of Man, 171 W. Va. 368, 373, 298 S.E.2d 906, 910 (1982). "Failure to read a contract does not excuse a person from being bound by its terms." Reddy v. Community Health Foundation of Man, 171 W. Va. 368, 373, 298 S.E.2d 906, 910 (1982).
3. The Court finds that the seller of real property is not relieved of his or her duty to read sales agreements by virtue of reliance on a relationship with the drafting real estate agency. Rhodes v. Perimeter Properties, Inc., 369 S.E.2d 332, 333 (GA.App.1988). Those who can read must read, and that failure to read a document on the basis solely of reliance upon the advise of the real estate salesperson does not relieve an individual of his or her "ordinary duty" to read the sales agreement. See id. at 333.
4. The Court finds that Section 30-40-26(f) of the West Virginia Code requires that a licensee make certain that all necessary terms and conditions of a real estate transaction are contained in any contract prepared by the licensee. W. Va. Code §30-40-26 (2006). Section 30-40-26(f) of the West Virginia Code must be read with the remainder of Article 30 of the West Virginia

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Code, including Section 30-40-5(a)-(b), which states that activities normally performed by a lawyer are not included in the capacity of a real estate salesperson. See W. Va. Code §30-40-5(a)-(b) (2006).

5. The Court finds that Section 30-40-26(f) of the West Virginia Code does not require a real estate salesperson to place any requested term or condition in a real estate contract, regardless of how impossible or impractical that term or condition may be.

6. The Court finds that West Virginia law does not impose a duty on a real estate salesperson to include in a contract a clause that has already been fulfilled, is no longer necessary, and that will provide no further protection of the requesting parties' interests. See W. Va. Code §30-40-5(a)-(b) (2006); W. Va. Code §30-40-26(f) (2006); Southern, 95 W. Va. at 643, 123 S.E. at 439; Reddy, 171 W. Va. at 373, 298 S.E.2d at 910; Rhodes, 369 S.E.2d at 333.

7. The Court finds that Plaintiffs' complaint regarding these defendants fails to state a cause of action upon which relief can be granted. Defendants Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty, Inc., as a matter of law, did not breach any duty owed to Plaintiffs. The Court finds that these Defendants had no duty to anticipate a breach of contract by the Romanos or to protect Plaintiffs from such breach. The Court finds that the Romanos breach was not foreseeable to these Defendants.

For the foregoing reasons, this Court **GRANTS** Defendants Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty's motion to dismiss and **DISMISSES WITH PREJUDICE** Plaintiffs' claims against Defendants Marsha Ann Felton, Jean Hollandsworth, and Double H. Realty because the Complaint fails to state a claim upon which relief may be granted and fails to assert an actionable breach of duty.

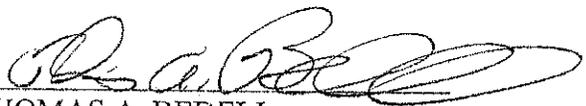
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Pursuant to West Virginia Rule of Civil Procedure 54, this is a final decree from which an appeal lies.

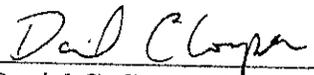
The Clerk is directed to send a certified copy of this Order to all counsel of record herein.

October 24, 2006

ENTER:


THOMAS A. BEDELL
CIRCUIT JUDGE

Prepared by:


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