

Court of Appeals of Tennessee,  
AT KNOXVILLE  
Toryiana Louisa SOTO, et al.  
v.  
PRESIDENTIAL PROPERTIES, LLC, et al.  
2021 WL 1626275

***Holding:***

Selling property that you do not own in exchange for valuable consideration requires a Real Estate Brokers License in Tennessee. This case may have a large impact on the concept of “wholesaling” in Tennessee and can be read to state selling equitable interest in real property requires a real estate license.

***Facts:***

This case involves several claims by Toryina and Luis Soto and John and Tina Colbaugh (collectively “the Plaintiffs”) against Presidential Properties, LLC (“PPLLC”) and Kenneth Gross (collectively “the Defendants”). The claims stem from real estate transactions that went awry.

In 2006, the Colbaughs purchased a residential home located at 219 Michaels Ridge Road, Gray, Tennessee (“the Michaels Ridge property”). The Colbaughs lived at the Michaels Ridge property for several years but decided to sell it in 2011. Initially, they were unsuccessful. In December 2014, Mr. Gross contacted Mr. Colbaugh to inquire about the Michaels Ridge property. Mr. Gross began negotiating with Mr. Colbaugh on behalf of PPLLC to help sell the Michaels Ridge property. PPLLC is a single-member limited liability company based in Johnson City, Tennessee. Mr. Gross is the sole member, principal officer, and agent of PPLLC. Mr. Gross offered to help sell the property even though he did not have a Tennessee Real Estate Brokers License.

On December 10, 2014, the Colbaughs and Mr. Gross, on behalf of PPLLC, executed a written sales agreement concerning the Michaels Ridge property. At the time the parties executed this agreement, the Michaels Ridge property was subject to an existing mortgage of \$225,000, payable by the Colbaughs. The Colbaughs and the Defendants agreed to a total purchase price of \$240,000. They also agreed that closing would occur “when [Mr. Gross] [found] a buyer.” If a buyer was not found by April 1, 2015, Mr. Gross would be held responsible for the existing mortgage until a buyer was found. After the parties executed this agreement, Mr. Gross began marketing the sale of the Michaels Ridge property on PPLLC’s website. Promotional materials by PPLLC included disclaimers that indicated PPLLC and its workers were not real estate agents or real estate brokers.

Prior to the Colbaughs’ dealings with the Defendants, the Sotos owned residential property in Kingsport, Tennessee, located at 541 Bays View Road (“the Bays View property”). In September 2012, Mr. Soto’s employment transferred him to California. As a result, the Sotos decided to sell the Bays View property and executed an owner-financed sales agreement with James and Laura Williams. The Williamses agreed to pay the Sotos \$688.00 per month for the Bays View property until the outstanding note on the property was satisfied. After executing the sales agreement with the Williamses, the Sotos moved to California.

In March 2015, Mr. Soto learned that he would be transferring back to Tennessee. Mr. Soto was scheduled to move back to Tennessee in April 2015. In anticipation of the move, Mrs. Soto began looking for a house to purchase in Tennessee. Mrs. Soto soon discovered that the Michaels Ridge property was listed on PPLLC’s website. The listing stated that the Michaels Ridge property could be sold with “owner financing” through PPLLC. Thereafter, Mrs. Soto contacted Mr. Gross about the information on PPLLC’s website and began the application process for purchasing the Michaels Ridge property. Mr. Gross assured Mrs. Soto that he owned the Michaels Ridge property and had purchased it in January 2015, although this was untrue.

On March 6, 2015, Mrs. Soto and Mr. Gross had a telephone conversation to discuss the terms for purchasing the Michaels Ridge property. The parties agreed that the Sotos would purchase the Michaels Ridge property from the Defendants for a total purchase price of \$315,00.00. At closing, the Sotos would make an initial \$20,000 cash payment and assign their interest in the Bays View property to the Defendants. The parties assigned a \$55,000 value on the Sotos' remaining interest in the Bays View property. The parties agreed that the Sotos would pay the remaining portion of the purchase price by making monthly payments to the Defendants.

On March 11, 2015, Mr. Gross emailed a "Letter of Intent" to the Sotos that set forth the terms for purchasing the Michaels Ridge property. The letter stated that closing would occur "on or before April 1, 2015." The Sotos signed the letter of intent and returned it to Mr. Gross. Again, Mrs. Soto believed that the \$20,000 payment and the assignment of the Bays View property would transfer upon closing. However, the parties never closed on the Michaels Ridge property.

Shortly after the Sotos executed the letter of intent, Mr. Gross contacted Mr. Colbaugh to inform him that he found a buyer for the Michaels Ridge property. Mr. Gross stated that the Colbaughs would need to meet at Mr. Gross's attorney's office to close on their sale of the property to the Defendants. When the parties met at the attorney's office, Mr. Gross presented Mr. Colbaugh with two documents to sign. One document was an unsecured promissory note for \$240,000; the other was a warranty deed that transferred ownership of the Michaels Ridge property from the Colbaughs to the Defendants. Despite their initial agreement, the documents indicated that the Colbaughs would remain liable for the outstanding mortgage on the Michaels Ridge property. Upon realizing that he and his wife would remain liable for the mortgage, Mr. Colbaugh refused to sign the documents presented by Mr. Gross.

After failing to close on their initial agreement, Mr. Gross contacted Mr. Colbaugh to discuss a potential lease purchase agreement for the Michaels Ridge property. As a result of this conversation, the parties executed a lease agreement with an option to purchase the Michaels Ridge property. Under this agreement, Mr. Gross agreed to "rent" the Michaels Ridge property for a term of twelve months, beginning April 1, 2015, for \$1,428.96 per month.<sup>1</sup> As the "tenant," Mr. Gross was granted the right to sublet the property. Mr. Gross was also given an option to purchase the property for \$240,000.00.

Meanwhile, on April 2, 2015, Mr. Gross sent Mrs. Soto a text message to assure her that they were on track to close on the Michaels Ridge property despite failing to close by the April 1 deadline. On April 6, the parties had still not closed, and Mrs. Soto inquired about whether Mr. Soto could move into the Michaels Ridge property before closing. Mr. Gross responded via text message, stating that Mr. Soto could move into the Michaels Ridge property before closing because "y'all are buying it," referring to the Sotos.

Shortly after Mr. Gross assured the Sotos that they were purchasing the Michaels Ridge property, Mr. Gross emailed the Sotos several documents. The documents included a "Warranty Deed" that conveyed the Bays View property to PPLLC and a "Real Estate Purchase Option Agreement." According to Mrs. Soto, Mr. Gross assured her that these documents were necessary to close on the Michaels Ridge property. She asserts that Mr. Gross stated the warranty deed would be held by his attorney in trust until closing on the property. The "Real Estate Purchase Option Agreement" stated that the Sotos were granted an "option" to purchase the "Property" described in the agreement. However, the "Property" described in the agreement was the Bays View property. Despite the discrepancies in these new documents, Mrs. Soto claims that Mr. Gross assured her that closing would occur and that she should sign the documents without changing any terms. Believing that Mr. Gross owned the Michaels Ridge property, the Sotos signed and returned the documents to Mr. Gross. Thereafter, in mid-April 2015, the Sotos moved into the Michaels Ridge property and began making monthly payments to Mr. Gross towards the purchase of the property.

Upon returning to Tennessee, Mr. Soto planned to have a housewarming party at the Michaels Ridge property. Mr. Soto contacted the Colbaughs—whom the Sotos were previously acquainted with through their church—and invited them to the party. When Mr. Soto shared the address of his “new house,” Mr. Colbaugh immediately informed him that he owned the Michaels Ridge property and that Mr. Gross was simply leasing it from him. According to the Sotos, this was the first time that they became aware of the true ownership of the Michaels Ridge property. After learning of the property’s true ownership, the Sotos sought the advice of legal counsel.

Although the Sotos continued to make the monthly payments to Mr. Gross—making payments for April, May, June, and July 2015—the dealings between Mr. Gross and the Sotos quickly soured. After the Sotos learned that they could not purchase the Michaels Ridge property directly from Mr. Gross, Mr. Gross demanded the \$20,000 cash payment. According to Mrs. Soto, Mr. Gross informed her that if they did not make the payment as soon as possible, he would evict them from the Michaels Ridge property and would record the warranty deed that conveyed the Bays View property to PPLLC. The Sotos refused to tender the \$20,000. As a result, Mr. Gross recorded the deed to the Bays View property and began collecting payments from the Williamses. In total, Mr. Gross collected 37 payments from the Williamses.

The Sotos vacated the Michaels Ridge property in July 2015. After the Sotos were no longer residing at the Michaels Ridge property, Mr. Gross continued to make payments to Mr. Colbaugh under their lease agreement. Mr. Gross made payments through May 2016 but failed to pay rent for June 2016. When Mr. Gross failed to make a payment for June 2016, Mr. Colbaugh sent the Defendants a “Notice of Lease Violation” and “Notice of Termination [of] Lease.” Thereafter, Mr. Gross ceased making payments and vacated the Michaels Ridge property. Mr. Colbaugh re-leased the property in July 2016, losing only one month’s rent. Beginning June 1, 2017, the Sotos entered into a new lease with the Colbaughs for the Michaels Ridge property.

***Trial Court Finding:***

On January 15, 2020, the trial court entered a memorandum opinion that stated its findings of facts and conclusions of law. In this opinion, the trial court found that the testimonies of the Plaintiffs were “completely credible and convincing.” The court concluded that Mr. Gross improperly held himself out as the owner of the Michaels Ridge property in dealing with the Sotos when, in fact, he never owned the property. The court specifically found that Mr. Gross informed the Sotos that he bought the Michaels Ridge property in January 2015. Based on its findings and the uncontroverted evidence, the trial court concluded that the Defendants fraudulently held themselves out as the owners of the Michaels Ridge property when they were trying to sell the property to the Sotos. The court also concluded that the Defendants breached the sales contract with the Sotos by agreeing to sell and finance property that it did not own; that Mr. Gross breached the lease agreement with the Colbaughs by failing to pay rent under the lease; that Mr. Gross knowingly deceived and intentionally misled the Sotos, in violation of the TCPA; and that Mr. Gross violated the Brokers Act, which barred him from asserting any claims against the Plaintiffs.

***Appeal:***

The Defendant Appealed and one of the issues on appeal was: Whether the trial court erred in finding that Kenneth Gross and Presidential Properties, LLC violated the Tennessee Real Estate Broker License Act.

***The Tennessee Real Estate Broker License Act Ruling on Appeal:***

The Defendants argue that the trial court erred in finding that they violated the Brokers Act. We disagree and affirm the trial court’s conclusion that the Defendants violated the Brokers Act. As a result, we also agree that the Defendants are barred from asserting any claim for compensation against the Plaintiffs.

“The Tennessee Real Estate Broker License Act of 1973 is designed to protect the public from irresponsible or unscrupulous persons dealing in real estate.” *Bus. Brokerage Centre v. Dixon*, 874

S.W.2d 1, 3 (Tenn. 1994) (citing *Prowell v. Parks*, 767 S.W.2d 633, 634 (Tenn. 1989)). The Act states that individuals must obtain a real estate broker's license before acting as a real estate broker. Tenn. Code Ann. § 62-13-301; *Bus. Brokerage Centre*, 874 S.W.2d at 3. “[F]ailure to obtain a broker's license before engaging in acts defined as ‘brokering’ is punishable as a Class B misdemeanor.” *Bus. Brokerage Centre*, 874 S.W.2d at 3 (citing Tenn. Code Ann. § 62-13-110(a)(1)); see also Tenn. Code Ann. § 62-13-103(b) (stating that “a single such act by a person required to be licensed under this chapter and not so licensed constitutes a violation of this chapter”). However, the licensing requirement under the Act does not apply to the *owner* of the subject real estate. See Tenn. Code Ann. § 62-13-104(a)(1)(A). Any unlicensed party that “violat[es] the provisions of the Act is prohibited from bringing an action to recover ‘compensation for any act done or service rendered.’” *Burks v. Elevation Outdoor Advert., LLC*, 220 S.W.3d 478, 484 (Tenn. Ct. App. 2006) (quoting Tenn. Code Ann. § 62-13-105).

Under the Brokers Act, “broker” is defined as a person “who, for a fee, commission, finders fee or any other valuable consideration or with the intent or expectation of receiving a fee ... or any other valuable consideration from another, solicits, negotiates or attempts to solicit or negotiate the listing, sale, purchase, exchange, lease or option to buy [or] sell” real estate. Tenn. Code Ann. § 62-13-102(4)(A). Stated differently, a “broker” is a person “who receive[s] or expect[s] to receive some form of consideration from another for their efforts in soliciting or negotiating the listing, sale, or purchase of real estate.” *Bowden Bldg. Corp. v. Tenn. Real Estate Comm’n*, 15 S.W.3d 434, 440, 440 n.6 (Tenn. Ct. App. 1999) noting that “persons” includes individuals, corporations, partnerships, and associations). A person can act as a broker by directly or indirectly dealing in real estate. See Tenn. Code Ann. § 62-13-103(a); *Bus. Brokerage Centre*, 874 S.W.2d at 3.

It is clear that the Defendants violated the Brokers Act by Mr. Gross acting as a “broker” when he attempted to sell the Michaels Ridge property to the Sotos. It is undisputed that Mr. Gross has never owned the Michaels Ridge property. Therefore, he is not exempt from the broker license requirement under the Act. See Tenn. Code Ann. § 62-13-104(a)(1)(A). It is also undisputed that Mr. Gross did not have a real estate broker's license at the time he attempted to facilitate the sale of the Michaels Ridge property. We cannot agree with the Defendants’ claim that they are absolved from liability due to Mr. Gross's use of disclaimers that indicated he was not a real estate broker. Further, it also matters not whether the Sotos agreed to purchase the Michaels Ridge property outright or simply agreed to purchase an option to purchase the property. The Act defines a “broker” as an individual who deals or attempts to deal by “negotiat[ing] the listing, sale, *purchase*, exchange, *lease or option*” to buy or sell real estate. *Id.* § 62-13-102(4)(A) (emphasis added). To hold that the Defendants did not violate that Act because Mr. Gross only attempted to sell an option in the Michaels Ridge property would be a blatant misreading of the Brokers Act.

At trial, Mr. Gross attempted to justify his lack of a broker's license by claiming that he was not working for a fee or commission when he dealt with the Sotos. Again, this assertion is an affront to the plain language of the Brokers Act. The Brokers Act defines a “broker” as a person who deals in real estate with the expectation of receiving “a fee, commission, finders fee or *any other valuable consideration*.” *Id.* (emphasis added). Although Mr. Gross was not seeking a fee or commission, he expected to receive several forms of *valuable consideration* from the Sotos, including: (1) a cash payment of \$20,000; (2) the warranty deed that assigned the Bays View property to PPLLC; and (3) monthly payments by the Sotos for the Michaels Ridge property.

Based on the foregoing, we affirm the trial court's conclusion that the Defendants violated the Brokers Act by Mr. Gross acting as a “broker” without obtaining a real estate broker's license. Accordingly, the Defendants are barred from asserting a claim for damages or other compensation from the Plaintiffs. See *id.* § 62-13-105 (stating that a party that violates the Act is barred from asserting a claim for compensation for the dealings that stem from the prohibited act).