New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
VOL. 220 NO. 9 MONDAY, JUNE 1, 2015 NJLJ.COM

Disclose, Disclose, Disclose

New Jersey courts reaffirm the need to disclose defects, even in "as is" deals

By Nicholas Racioppi Jr. and Joshua M. Greenfield

©ISTOCKPHOTO.COM

Sellers relying on the doctrine of "caveat emptor" could easily find themselves in for a rude awakening. Beginning in the mid-twentieth century and continuing through the present day, New Jersey courts have steadily moved away from caveat emptor and toward mandatory disclosure of latent items (i.e., items which are not readily observable by purchasers conducting inspections), with buyers permitted to raise post-closing claims based on the nondisclosure. In two recent decisions, New Jersey courts have held that sellers have a duty to disclose "latent" defects to a buyer regardless of any "as is" language in the sale agreement. *Dalmazio v. Rosa*, 2015 N.J. Super. Unpub. LEXIS 326 (App. Div. Feb. 20, 2015).

In *Dalmazio*, the Appellate Division overturned the Law Division's grant of summary judgment on a home purchaser's common-law fraud claims. The defendant, a contractor, purchased a home with the intent of demolishing it and building a new home for his personal use. Upon realizing that a demolition and rebuilding was not feasible, he decided to renovate the house instead (which renovations included extensive foundation work). While the renovations were underway, the plaintiff inquired about purchasing the property, expressing a desire to purchase the property in its current condition, with the interior being completely unfinished except for the wall studs.

Eventually, a deal was struck to sell the property in its unfinished, "as is" condition. A contract was negotiated, with the "as is" nature of the property being noted in at least three separate locations. There were some questions over whether the plaintiff had any inspection rights under the agreement, but it is undisputed that no preclosing inspections occurred (at trial, the plaintiff's architect testified that the defects were not concealed and would have been evident to a "good" inspector or engineer). After closing, the plaintiff hired the same architect who was originally retained by the defendant to design an addition to the house. While inspecting the property, the architect noted several problems with the rehabilitation and stated that the construction was not in conformance with her original plans, but nevertheless proceeded to draw up plans for the addition.

After receiving plans for the addition, the plaintiff sought a bid from a contractor, who informed the plaintiff that the foundation work done by the defendant was unusable. The plaintiff then contacted the municipality to inquire if the necessary inspections of the foundation work were performed. The municipality said that there was no record of the required inspections being performed. The plaintiff's architect, in a letter to the town official supporting the plaintiff's request to demolish the building, expressed concerns with the structure and noted that "[i]t is impossible to repair or remediate the violations because of the manner in which the construction was done and the location of the violations."

Further review by other profes-

Racioppi is a partner with Riker Danzig Scherer Hyland & Perretti in Morristown. He is chairman of the firm's real estate group. Greenfield is an associate in the firm's real estate group.

sionals revealed additional deficiencies in the foundation, and that the house was neither horizontal nor level. The structural engineer hired by the plaintiff noted that "correction for [the house] being out-of-square is almost impossible," and also recommended demolishing the house. The plaintiff commenced suit against the defendant for, among other items, common-law fraud. The trial court granted the defendant's summary judgment motion on all counts, concluding that the "as is" language of the contract contravened any seller's obligation to disclose defects.

The appellate division overturned the trial court's grant of summary judgment as to the plaintiff's common-law fraud claim, noting that "[i]n the context of a real estate sale, a sufficient misrepresentation occurs if the seller fails to disclose 'on-site defective conditions if those conditions were known to them and unknown and not readily observable by the buyer.'" The court went on to state that:

> [A] contract that purports to sell the real property "as is" or in its "present condition" is nevertheless subject to rescission or monetary damages where the seller fails to disclose or conceals material defects in the property which are actually known or constructively known to the seller, but not readily apparent to the buyer.

The appellate division also held the defendant to a higher standard than a lay builder, holding that a reasonable jury could find that based on his over 30 years' experience in the construction industry with "knowledge of construction code and building requirements," the defendant knew or should have known about the structural issues, and deliberately sought to avoid a municipal inspection in order to conceal the defects from a buyer. *Rivas v. Estate of Melillo* (ESX-L-1531-13).

Soon after the *Dalmazio* decision, the trial court in *Rivas* considered a motion to dismiss filed by a defendant accused of failing to disclose the structural damage caused by a fire at the property approximately 27 years earlier. The defendant, who had lived in his now-deceased mother's multifamily house since the mid 1940s, was forced to move out of the property while repairs were being made following a fire in 1981. Following the fire, the defendant's brother supervised what would ultimately prove to be inadequate repairs to the home. In 2008, the defendant, as administrator of his mother's estate, entered into a contract to sell the property to the plaintiffs for $310,000.

Approximately two months after closing on the property, the plaintiffs, while renovating the first floor of the building, discovered charred wood and other damage hidden behind sheetrock (the damage was evident throughout more than just the first floor of the building). The plaintiffs, apparently then learning of the 1981 fire, alleged that structural damage caused was not properly repaired, but simply covered over. The plaintiffs produced expert reports stating that the best course of action was to demolish the building (the repair work would cost over $300,000), and that the market value as of the closing date was $78,600, factoring in the defects.

The plaintiff filed a complaint alleging, among other things, fraudulent misrepresentation, negligent misrepresentation and fraudulent concealment. The defendant filed a motion to dismiss the plaintiff's complaint, relying on language in the contract noting that the property was being sold "as is," that the seller "does not make any claims or promises about the condition or value of any of the property," and that the "[b]uyer has inspected the property and relies on this inspection."

The court, in denying the defendant's motion to dismiss, noted that "[a] seller's concealment or nondisclosure of a condition of real property satisfies the requirement of a misrepresentation when (1) the seller deliberately fails to disclose (2) a latent defect not observable or discoverable by the purchasers," and that an "as is" clause did not preclude a failure to disclose claim. Importantly, the court noted that latency is to be evaluated from the perspective of a purchaser and not a professional inspector. The court found that the plaintiffs had produced sufficient evidence to show (at least for purposes of surviving summary judgment), that the defendant could have known of the damage and lack of proper repairs, that the damage was latent and that the plaintiffs reasonably relied on the seller's lack of disclosure.

These recent cases suggest that: (1) simply giving a buyer the opportunity to find a known defect is not sufficient if the defect is not easily discoverable or recognizable; (2) buyers will not be held to the standards of a professional inspector in determining whether a defect is latent or not; and (3) sellers with a heightened level of knowledge concerning possible defects will be held to that heightened level. Even if a seller does not believe a defect to be "latent," disclosure should still be considered to avoid a later argument as to how discoverable the defect was. While many sale contracts note that the sale of property is "as is" and have the buyer acknowledge that the seller is not making any representations or warranties, this language may not provide the safe harbor that many sellers assume. The safest policy for sellers (residential, for now) continues to be full disclosure, in writing, of all known defects.

While the above rulings concern individuals purchasing a single-family and three-family home, respectively, it remains to be seen how far, if at all, the holdings will be extended into the realm of commercial real estate transactions. ■