

Real Estate Law Update

May, 2013

With the real estate market getting healthier by the month, many of you will be either buying or selling a home (or both) in the near future, so I thought the topic of “disclosures” might be timely.

We just concluded a trial in Vista Superior Court involving improper disclosures in the sale of residential property. Our clients were an elderly couple with absolutely no experience buying or selling real estate. They had rented apartments their whole lives until early 2010, when they received a modest inheritance that allowed them to buy a small house. They found a real estate agent who represented them throughout the transaction. He found a house within their price range, completed all the paperwork, and guided them through the process from offer to close of escrow. After our clients moved into the house they quickly began to discover problems with it. There were several serious plumbing problems, the roof leaked, some windows would not open, others would not lock, and there was extensive termite damage.

The questions in the case were: 1) whether the sellers should have disclosed the problems; 2) whether the real estate agents for the buyers and sellers had made proper inspections and disclosures, and; 3) whether the home inspection contractor performed a competent inspection. There were many interesting side-issues, but to keep it simple, we'll only address these three main ones here.

Sellers' Disclosures – We all know that sellers of residential real estate are required to make disclosures to buyers. But how far does that requirement go? The law says sellers must disclose, in writing, all known facts that

materially affect the value or desirability of the property. This legal obligation cannot be waived by stating the sale is “as is,” even if the buyer is willing to purchase the property on that basis. A seller must still disclose a material fact even if the problem has been repaired. Whether something is “material” is a question of fact, and may differ in each case. The question a judge or jury would be asked to answer is: would a reasonable person in the buyer's position have acted differently if he had known the undisclosed fact(s)? “Acting differently” could include demanding repairs, requiring proof of past repairs, requesting a lower sale price, or terminating the transaction.

Agents' Disclosures – Both the sellers' and buyers' agents also have disclosure obligations. They are required to disclose in writing all material facts of which they are aware, whether or not the seller has disclosed such facts. In addition, agents are required to make a reasonably competent and diligent visual inspection of the property's accessible areas and disclose to the buyers any and all material facts the inspection reveals. Agents are not required to perform invasive inspections, or climb on roofs or into attics; nor are agents expected to have the same level of knowledge as a contractor. However, arguably an agent should turn on water faucets, open and close windows, and look inside cabinets, as well as the obvious: checking the ceilings, floors, and walls for water stains, noting cracks in concrete and damage to toilets, bathtubs, sinks, and woodwork.

Inspectors' Disclosures – Believe it or not, home inspection contractors have essentially the same duties of inspection and disclosure as do agents, although they are charged with a higher degree of knowledge. They have impressive inspection reports, but after you read all the things they expressly exclude from their investigation, their work usually boils down to a

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reasonably competent visual inspection. In addition, their contracts invariably require their clients to waive any right to sue them for a negligent inspection.

Buyers' Inspections – Buyers, too, are obligated to make inspections. They cannot rely exclusively on the sellers' and real estate agents' disclosures, nor on their home inspection contractor's report. Buyers are required to exercise reasonable care to protect *themselves* when purchasing residential real estate. Buyers are charged with making a diligent investigation into facts that are readily available. Whether a buyer unreasonably failed to protect herself or unjustifiably failed to discover material facts, is – once again – a question of fact. This legal obligation on the part of buyers might seem to conflict with the duties of sellers and agents to disclose all known facts. For example, if the seller failed to disclose an obvious water stain on the ceiling of the dining room, and the buyer failed to discover it, is it the sellers' fault, the agents' fault, or the buyers' fault? The answer: perhaps all three, equally.

Recommendations – As real estate lawyers we frequently hear from buyers who are upset that defects in their recently-purchased home or condominium were not disclosed by the sellers or discovered by their inspector. We analyze the merits of these cases by considering the materiality of the defect, whether it was something that was known or should have been known by the sellers, whether the agents should have discovered it when fulfilling their inspection obligations, and whether the buyers should have discovered it themselves. Of course, we consider whether the home inspection contractor should have discovered it, but as stated above, their obligations and liabilities are pretty meager.

If you are a seller we recommend that you omit nothing. It is better to disclose even the most minor item, rather than have the buyers

discover it after they move in. Homes are so expensive nowadays, and buying a home is such an emotional purchase, that buyers can easily reach the conclusion they have been cheated – especially if they are feeling buyers' remorse, as often happens.

To real estate agents and buyers we recommend that you go out of your way to poke around and actually attempt to find problems. Discovering even a small, undisclosed problem will assist greatly if you ever have to convince a judge or jury that you made a "reasonably competent and diligent visual inspection" of the property. On the other hand, if you fail to find and disclose something obvious, such assertions will be far less credible.

As for home inspection contractors, we believe a buyer's money would be better spent engaging a forensic construction or architectural expert. It will cost closer to \$2,000 than the \$400 or \$500 charged by home inspection contractors, but a forensic expert will be more thorough, and the results will be much more valuable.

If you or someone you know are buying or selling a home, give us a call to discuss how to ensure your interests are protected. If you or someone you know has recently purchased a home and have found undisclosed defects, we will be happy to provide a consultation to determine whether you have any legal recourse.

As for that trial in Vista we just concluded, we are still waiting for the judgment. We'll let you know how it turns out in next month's Real Estate Law Update. In the meantime, we wish you a great Spring!

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