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WINTER ISSUE • 2019

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LEGAL EASE



Inspect, Inspect, Inspect!

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DISCOVER **Hidden Defects** WHEN YOU **Inspect, Inspect, Inspect**

I still remember the buyer who called me after learning that the house he bought did not have the septic system that he thought it did. When I told him that being connected to public sewer had its advantages, he agreed but said that I didn't understand his predicament. You see, the property was not connected to public sewer either. In fact, the house had no legal sewer system

whatsoever with a sewage line simply ending at a pile of rocks downhill from his house. While this certainly created a pile of ... trouble ... for the buyer, it emphasizes the importance of a thorough inspection of the property by a professional. In this case, the buyer had conducted his own inspection of the property without the benefit of a professional home inspector. Sometimes, houses are missing even major systems like a sewer system. The goal of an inspection should be to discover all defects in a house to avoid such unwelcome surprises.

Georgia is a Caveat Emptor State

Georgia is a state that still expects buyers to follow the principle of caveat emptor, or buyer beware. Buyers cannot win a fraud claim against the seller of residential property for failing to disclose a defect in the property if the defect could have been discovered by the buyer through a careful inspection. The court opinions on this point are numerous. In one case, the seller did not disclose some charred timbers in the corner of the attic. The court found for the seller ruling that had the buyer carefully inspected the attic, the charred timbers would have been seen.

In another case, the buyer bought a property on which he wanted to build a house that was represented as being 1.5 acres in size. In actuality, the property was only .8 acres. This misrepresentation really put the buyer in a bind because there was no sewer line in the area and there was a one acre minimum lot requirement in order to install a septic system. In other words, the buyer bought a property that essentially could not be used for its intended purpose. Did the court find that the seller committed fraud? The answer is no. The court found that had the buyer done a survey, the buyer would have discovered the actual size of the property. Not having done a survey, the court found that the buyer could not complain about anything a survey would have revealed. If ever there was a great argument for getting a survey, this case is it. Our appellate courts have also found that buyers cannot win fraud claims if the subject matter of the alleged fraud could have been prevented through a title search.

Another case on this issue involved a house by a creek with a very dank basement with a musty odor. The property was not, however, in a flood plain. The buyer asked whether the property had flooding problems and the listing agent allegedly denied that

there had been previous flooding. After closing, the property flooded and the buyer sued for fraud. The court denied the claim noting that the buyer neglected to adequately investigate the risk of flooding. The court concluded that the buyer could have checked with the county or the homeowner's insurance agent and failed to do either. The court also explained that the buyer should have been on notice of a potential problem based on the dank, musty basement and the property's proximity to a creek.

In another case, there was an unusually large drainage cover on the side of the house. The seller said nothing about the cover. In the fall, leaves covered the drain and the basement flooded. The buyer sued the seller for fraud. The court ruled for the seller, find-

cracks, sloping floors, a chimney pulling away from the house, an electrical outlet that does not work, low water pressure, a toilet that does not flush properly, an appliance that does not work or a lack of hot water in a shower, these are not defects that would likely result in a win in a fraud case against the seller. This is because they are all things that a careful inspection of the property would have revealed and are not, thus, hidden conditions. If an inspection reveals issues that would have caused a reasonable buyer to inspect further, and the buyer chooses not to inspect further, a court is likely going to dismiss a fraud claim of the buyer against the seller. For example, a buyer who learns of large settlement cracks will not likely be able to complain



ing that any person of reasonable intelligence should know that if you do not keep a drain cover free of leaves, the drain cover will be blocked and might overflow and flood during a rain storm.

What Caveat Emptor Requires in an Inspection

What are the lessons of these cases? There are several. First, buyers of residential properties need to do careful inspections of the properties they are buying. This means that crawl spaces should be crawled through and attics need to be accessed. Most importantly, attention needs to be paid to the details. If it later turns out that there are settlement

about settlement problems after closing if the buyer does not do further follow up inspections after learning of the cracks. A professional home inspection should always be strongly recommended since most buyers do not inspect a property with the level of detail expected by the courts.

Where the law is not so clear is whether our courts expect buyers to move furniture, plants and rugs to see what lies beneath. However, if a buyer is expected to crawl around an attic or crawl space, it is hard to imagine a court saying that the buyer should not have at least looked beneath an easily moved rug to see if there was a water stain on the floor. On the other hand, the court may rule differently if the

buyer has to start moving heavy furniture to discover the water stain. Similarly, if a basement smells musty, a court will likely rule that a buyer should have at least touched the carpet to see if it was wet.

Second, buyers should always get a survey and title search of the property since buyers are on constructive notice of anything that would have been revealed from either of these things.

Third, buyers should ask to see utility bills. Large water bills are often a sign of a leak in a water line. Large gas and electric bills can reflect on how well the home is insulated and the efficiency of various systems.

Fourth, buyers should walk around the yard looking for wet areas and areas where the ground might

formation is equally available to buyers and sellers. Listing brokers have no duty to disclose things to buyers that the buyer could have learned of through a careful inspection of the one mile area surrounding the property. Listing brokers owe no duty to make any disclosures of neighborhood conditions beyond the one mile area.

To be clear, buyers are not expected to discover truly hidden conditions. Nailing new boards over active termite damage to prevent its discovery is fraud. Buyers are not expected to discover the inner workings of septic systems. Accordingly, a court found a seller liable for fraud when the seller failed to disclose that an inadequately sized septic system overflowed

Buyers should ask to see utility bills. Large water bills are often a sign of a leak in a water line.

during periods of rainy weather. Sellers of residential property are expected to disclose defects in the property that cannot be observed through a careful visual inspection and will generally be found liable for fraud when they fail to do so.

While the law on this point is not yet definitive, it also appears that the appropriate legal standard is not what an inspector would have discovered from a careful inspection of the property, but what a buyer would have discovered. Therefore, if a defective siding can be immediately spotted by a professional inspector because of its telltale fake wood knots, but a homebuyer would not know the significance of the unique wood knots, the buyer would likely win a fraud claim against a seller unless a visual inspection of the siding would have revealed that it was defective.

Selling Property “As-Is” Does Not Eliminate a Disclosure Obligation

The duty of sellers to disclose latent and hidden defects of which the seller is aware exists even if the property is sold in “as-is” condition. Some sellers mistakenly believe that selling a property “as-



be soft which can indicate a malfunctioning septic system or water leak.

Fifth, buyers need to inspect the neighborhood as well as the property. Buyers are expected to learn whether there are planned road widenings or condemnations. If a buyer buys a property on a road that is widened shortly after the purchase, the buyer will not likely be able to win a fraud claim against the seller. Knowledge of the schools serving a property or the governmental jurisdiction in which the property is located is information of which the buyer is expected to be aware. A nearby cemetery, railroad tracks, a smelly pig farm or chicken rendering plant are generally seen as things about which in-

is” gets them off of the hook in terms of making full disclosure. This is simply not the case.

The Duty to Inspect Is Even Greater with Commercial Property

Georgia courts expect buyers of commercial property to fully satisfy themselves whether the property meets their needs. Sellers of commercial property owe no duty to disclose latent or hidden defects of which the seller is aware. Instead, with commercial property, sellers can sit on their hands and not disclose defective conditions in their properties. In one case, a seller of farmland knew that it contained fungus laden grass that attacked the hooves of horses and caused them to eventually die. The seller said nothing to the buyer and the buyers never asked why the grass was so green. The buyers raised horses and learned the true facts about the diseased grass after the buyer’s horses began to die. The buyers lost their fraud claim against the seller. The appellate court ruled that sellers of commercial property (unlike sellers of residential property), owed no duty to disclosed

Sellers of commercial property have no duty to volunteer information about a property.

hidden defects and that buyers of commercial property were expected to be sophisticated and capable of protecting themselves.

This is why buyers of commercial properties typically ask for due diligence periods that are so much longer than in residential transactions. It also explains why buyers of commercial property typically ask the seller for more extensive due diligence materials and for the seller to make affirmative representations and warranties regarding the condition of the property and how it was used in the past.

Sellers of commercial property have no duty to volunteer information about a property. However, if sellers affirmatively lie about the condition of the property, they can be held liable both for fraud and for breach of contract if the seller breached a representation or warranty in the contract.

This explains why buyers of commercial property typically request in the purchase and sale contract copies of all reports, studies, and evaluations done on the property. Buyers of commercial property typically obtain an ALTA survey of the property showing all easements and encroachments, review the zoning on the property, obtain a Phase I environmental report, a geo-technical study of the soil if the property is going to be developed and confirm that there is access to property and sewer and utility availability. In addition, buyers often hire engineers to do an inspection of the property and carefully examine maintenance and repair records.

REALTORS® representing buyers of residential properties might want to recommend that their buyers use a higher level of scrutiny in the due diligence process more typical of commercial transactions. In this spirit, the following special stipulations might give buyers a greater level of protection.

{ Special Stipulation #1 }

Seller warrants that Seller has not been advised to make a repair or replacement of or to any portion of the Property, or to any component or system therein that Seller has not made in full and in accordance with the advice given.

{ Special Stipulation #2 }

Seller shall provide Buyer with a copy of any written report, evaluation or study of the Property or any improvement or condition therein received by Seller within ____ years prior to the Binding Agreement Date.

{ Special Stipulation #3 }

Seller is aware of no latent or hidden defects in the Property that Seller has not disclosed to Buyer and acknowledges that Seller must disclose latent and hidden defects even when the Property is sold in “as-is” condition.

For years, REALTORS® have regularly given sellers the great advice to disclose, disclose, disclose and when in doubt, always disclose. The corollary to this, which is not mentioned as much, is to tell buyers to inspect, inspect, inspect. Only through a careful inspection can buyers fully protect themselves against unwelcome surprises.