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Featured Articles

Things That Go "Bump" in the Night and (Morning, and Afternoon): What Real Estate Agents Must Disclose to The Buyer About The Property

by Daniel S. Strick

Currently pending before the Pennsylvania Superior Court is the matter of *Samia v. Walker, et al.*, No. 258 EDA 2009, where the court will determine whether lack of sound-proofing – leading the buyer to constantly hear his neighbors walking around and having sexual intercourse – must be disclosed by the sellers and the real estate agent. All residential property sales must be in writing and virtually all of the agreements of sale contain integration clauses stating the buyer did not rely on any representations made by the sellers or their real estate agents. Generally, absent fraud in the inducement of the formation of the contract, an integration clause would preclude the buyer from claiming he relied on an oral misrepresentation. However, in Pennsylvania, there is an exception to this general rule which only applies in real estate agreements.

I. Real Estate Inspection Case Exception to the Parol Evidence Rule

Generally, when parties to an agreement adopt a writing as the final and complete expression of their agreement, alleged prior or contemporaneous oral representations or agreements concerning subjects which are specifically covered by the written contract are merged in or superseded by the contract. When the parties, without fraud or mistake, deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement. The general rule is where the alleged oral representations concern a subject which is specifically addressed in the written contract, and the written contract covers or purports to cover the entire agreement of the parties, mere allegations of falsity or fraud will not make parol evidence admissible. An exception to this general formulation of the impact of the parol evidence rule has been created for "real estate inspection cases." *LeDonne v. Kessler*, 389 A.2d 1123 (Pa. Super. 1978).


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The test stated by *LeDonne* requires a balancing of the extent of the parties' knowledge of objectionable conditions derived. This is from a reasonable inspection against the extent of the coverage of the contract's integration clause in order to determine whether the party could justifiably rely upon oral representations, without insisting upon further contractual protection or the deletion of an overly broad integration clause. If reasonable inspection of the property would have provided information needed to ascertain the existence of the "objectionable condition", evidence of the alleged oral representations by the sellers and real estate agents is deemed inadmissible. *Blumenstock v. Gibson*, 811 A.2d 1029 (Pa. Super. 2002).

In *Blumenstock*, the buyers alleged breach of contract, fraud, violations of the Unfair Trade Practices and Consumer Protection Law, misrepresentation and negligent misrepresentation against the sellers and the real estate agents involved in the transaction. Prior to the closing, buyers allegedly indicated concern over the fact the property had two (2) sump pumps. *See id*. at 1032. The real estate agent advised the sump pumps were installed as a precaution when the basement was improved. *See id.* Buyers asserted they would not have purchased the property had they been informed the sump pumps functioned from time-to-time. *See id*. After buyers moved into the new home, they realized the sump pumps ran intermittently and sometimes constantly if heavy rains occurred. *See id*. On March 25, 1998 the circuit breaker controlling the sump pump shut off, resulting in a flooded basement causing damage to personal property. *See id*. at 1032-33. The *Blumenstock* court granted defendants' motion for summary judgment on the grounds plaintiffs could not assert they justifiably relied on the representation made regarding the sump pumps. They were in plain sight and plaintiffs' inspection, on their own behalf or by someone on their behalf, provided sufficient information for plaintiffs to come to their own conclusion the sump pumps removed water from the basement of the house. *See id*. at 1040. The *Blumenstock* court found since plaintiffs could not establish they justifiably relied on the representations made by the sellers relating to the sump pump, they could not succeed on a claim for misrepresentation, fraud or violation of UTPCPL. *Blumenstock*, 811 A.2d at 1038.

II. Noise and Lack of Sound-Proofing Discoverable By Reasonable Inspection?

Currently pending before the Superior Court of Pennsylvania is a real estate inspection case involving sound transmission. On January 14, 2005 plaintiff Emmanuel Samia purchased a condominium located at 429 N. 13th Street, Unit 3E, Philadelphia, Pennsylvania 19123 from defendants Lin Walker and Antonio Garcia. On December 21, 2004 plaintiff and defendants Walker and Garcia entered into an Agreement of Sale wherein Samia (appellant) agreed to purchase the property for $265,000.00. The condominium is located in an historic factory building which was converted into condominiums by defendant Miles & Generalis, Inc. The floors and

ceilings of each unit and all hallways in the building are made of wood. The sellers and the real estate agent were aware of the sound transmission characteristics of the condominium. Plaintiff's complaint alleged his condominium was not sound-proof due to lack of insulation in the walls. Plaintiff consistently heard his neighbors having sexual intercourse, and was kept awake at night because he could hear his neighbors and visitors walking through the hallways. Plaintiff claimed the lack of adequate sound proofing was a material defect which should have been disclosed to him by the sellers or the dual real estate agent – who worked for a company related to the developer. Plaintiff sued the sellers, real estate agent and the real estate company's employer for negligent misrepresentation, violations of the UTPCLP and negligence for the failure to disclose the lack of sound proofing.

Defendants filed a motion for summary judgment asserting the parol evidence rule precluded plaintiff's claims for negligent misrepresentation, violations of the UTPCLP and negligence as the alleged objectionable condition (sound transmission) was open and obvious and would have been discovered with reasonable inspection of the property. In his deposition, plaintiff testified he "started hearing [the noise conditions] just as soon as he moved in." Collectively, he heard these noises "morning, noon, and night, every day of the week." In granting defendants' motion for summary judgment, the trial court stated, "If the noise was bad as plaintiff claims, it follows he would have discovered the lack of adequate sound-proofing with a reasonable inspection." Accordingly, the court found even though plaintiff could not reasonably inspect behind the walls for insulation, a reasonable inspection would have revealed the alleged lack of adequate sound-proofing if the noise condition was as bad as claimed. Just being on the property for a reasonable time would have had to alert plaintiff to the alleged defect, particularly if the neighbors were as "active" as he claimed. As a result the trial court found the exception to the parol evidence rule relating to real estate inspection cases did not apply.

On appeal, plaintiff currently contends the real estate inspection case exception to the parol evidence rule applies and the statements concealing the lack of sound-proofing are admissible. *LeDonne* bars parol evidence of the concealment of an open and obvious defect discoverable with reasonable inspection. Unlike the sump pump in *Blumenstock* which can be seen, noisy sex and inadequate sound-proofing cannot. Defendants contend reasonable inspection of the property, as the trial court noted, would have revealed the claimed objectionable condition bringing the case outside of the *LeDonne* exception to the parol evidence rule. Therefore, plaintiff could not justifiably rely on the alleged misrepresentations of the sellers or real estate agent relating to sound transmission.

III. Other Jurisdictions

Not all jurisdictions have imposed on the seller a duty to disclose defects. For example, New York still adheres to the doctrine of caveat emptor and imposes on a seller no duty to disclose latent defects to a buyer. *Stambovsky v. Ackley*, 169 A.D.2d 254, 675 (App. Div. 1991). Massachusetts is in accord. "Homeowners who sell their houses are not liable for bare nondisclosure in circumstances where no inquiry by a prospective buyer imposes a duty to speak." *Solomon v. Birger*, 477 N.E.2d 137, 142 (Mass. App. Ct. 1985). There must be some affirmative act of concealment by the seller. Similarly, Indiana, *Indiana Bank & Trust Co. v. Perry*, 467 N.E.2d 428 (Ind. Ct. App. 1984), Alabama, *Cato v. Lowder Realty Co.*, 630 So. 2d 378, 382 (Ala. 1993), and Minnesota, *Klein v. First Edina Nat'l Ban*k, 196 N.W.2d 619, 622 (Minn. 1972), impose no duty to disclose.

Although most agreements of sale have integration clauses – stating the buyer understands any representations made by the seller, broker or real estate agents are not part of the agreement and the agreement contains the whole agreement between the parties and there are no other terms, obligations or representations oral or otherwise concerning the sale – buyers and real estate agents cannot rest on the integration clause to protect them from claims of misrepresentation or fraud.

A seller cannot keep silent and leave the buyer to discover defects. Most jurisdictions impose on the seller a duty of disclosure in certain situations. Generally, the seller and its real estate agents must disclose a known material defect, not observable to the prospective buyer. This is because a seller's duty to disclose defects arises only with respect to latent or hidden defects, not patent defects. If the defect is patent or obvious, the seller has no duty to disclose it in the first place, and a failure to disclose will not give rise to the seller's liability. Courts impose limits on what defects the seller must disclose. Most courts use a standard of materiality. Encompassed in this standard is the acknowledgment the seller need not disclose every minor defect in the property, even though this may be of interest to the buyer. The seller must actually know of a defect materially affecting the value of the property before a duty is imposed to disclose it. The seller has no duty to affirmatively inspect the premises in search of problems yet unknown. The seller must also know that such facts are not known to or within the reach of the buyer through reasonable inspection. The burden is on the plaintiff-buyer to prove that the seller had such knowledge at the time of the sale.

IV. Conclusion

What information needs to be disclosed to a potential real estate buyer varies based on the jurisdiction. Additionally, whether the integration clause will provide complete protection for the seller will also depend on the jurisdiction. In Pennsylvania, a seller and a real estate agent must disclose all known material defects which would not be discovered during a reasonable inspection of the property regardless of whether there is an integration

clause in the agreement of sale. Whether the seller and his agent need to disclose noisy, sexually active neighbors remains to be seen.

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