MISFORTUNE AND RECOVERY

Real stories of the "as is" purchase contract

By James A. Zitesman

For the year of 2004, the Columbus Board of Realtors reported over 26,000 residential transactions took place in Central Ohio. This number does not include sales which are not reported to the CBR, such as for sale by owner. Out of that many sales, there are numerous buyers who have discovered the home they bought has some problems. The recourse for the buyer of real estate against a seller is very limited. The Supreme Court of Ohio upheld the doctrine of caveat emptor in *Layman v. Binns* (1988), 35 Ohio St.3d 176. The headnotes of the case state:

The doctrine of caveat emptor precludes recovery in an action by the purchaser for a structural defect in real estate where (1) the condition complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser had the unimpeded opportunity to examine the premises, and (3) there is no fraud on the part of the vendor.

Proving fraud requires meeting the six part test as stated in the recent 10th District case of *Gentile v. Ristas*, 160 Ohio App.3d 765,783 2005-Ohio-2197:

The elements of fraud are (1) a representation or, when there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance on the representation or concealment, and (6) an injury proximately caused by that reliance. Fraud may be committed not only by affirmative misrepresentation or concealment, but also by nondisclosure when there is a duty under the circumstances to disclose. The elements of fraudulent inducement are essentially the same as those for fraudulent misrepresentation, fraudulent concealment, and fraudulent nondisclosure. (Internal citations omitted)

The knowledge element is very difficult to prove. To have an inspector or expert state that the seller "should have known" about the condition is not probative. The Court in Gentile at 784 stated:

A finding of fraud requires proof that [the seller] had actual knowledge of the alleged defect and purposely misrepresented or concealed it. The expert's opinion that defendant "knew" of the alleged defect is without foundation. Whether defendant "should have known" is an issue that would be relevant only in a negligence determination. It is not probative of [the seller's] actual knowledge and is irrelevant to a determination of fraud.

Of course, in most transactions the sellers are required to provide a Residential Property Disclosure Form at or prior to the time of contracting. The doctrine of caveat emptor does not relieve the seller from the requirement to be truthful. However, the form itself states in all capital letters in the Purpose of Disclosure Form paragraph, "THIS STATEMENT IS NOT A WARRANTY OF ANY KIND BY THE OWNER OR BY ANY AGENT OR SUBAGENT REPRESENTING THE OWNER OF THE PROPERTY. THIS STATEMENT IS NOT A SUBSTITUTE FOR ANY INSPECTIONS. POTENTIAL PURCHASERS ARE ENCOURAGED TO OBTAIN THEIR OWN PROFESSIONAL INSPECTION."

The Residential Disclosure Form is a disclosure of information that the sellers know as of the date they signed the form. If I see a form that is several months old, I may request a new one be completed as a condition of the contract. This way, the sellers will be obligated to disclose any new issues that may have been discovered through other buyers' inspections and request for remedies.

The words "as is" are sometimes added to a contract. The case of *Donnelly v. Taylor*, 122 Ohio Misc.2d 24, 2002-Ohio-7461 addresses the inclusion of "as is." It is about a house infested with bats. A couple of weeks after taking possession, the Donnellys heard noises in the walls, and a local pest control company suggested it was mice. Traps were set but no mice were caught. Sometime thereafter, a dead bat was found in the basement shower and a bat expert was called to eradicate the bats. The Donnellys were told that the bats were probably in the home for two or three years. They also found foil in the air vents presumably to keep the bats out of the vents. The court stated that the contract did contain an ''as is'' clause, and therefore absent fraudulent misrepresentation or fraudulent concealment, the purchasers bore the risk of any latent defects in the property, whether they were discoverable or not discoverable by a reasonable inspection. An ''as is'' provision in a real estate contract means the purchasers have to establish that the sellers actively engaged in either a misrepresentation or a concealment of a latent defect. The Donnellys lost because they could not prove the Taylors knew about the bats.

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The recent case of *Schmitt v. Snow*, 2005-Ohio-4698 (8th Dist.) is where the buyers were able to prove the sellers' knowledge. The Schmitts bought the home from the Snows. The Schmitts called Royal Flush to the home a couple of weeks after taking possession to fix the sewer back up problem. The man from Royal Flush said he had been out there before and told the Snows that the sewer line needed to be dug up and replaced. Instead of fixing the sewer line, the Snows sold the home "as is" and did not disclose their knowledge on the disclosure form. Their only problem? They got caught. The court stated, "Although great emphasis has been placed on the 'As Is' provision of the purchase agreement, an 'As Is' provision bars claims for passive non-disclosure, but not for the misrepresentation or concealment of a material fact involving the transaction."

As stated in *Donnelly v. Taylor*, "…fraud 'trumps' an 'as is' clause…." However, proving fraud is very difficult, unless you are lucky enough to get a Royal Flush.

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