TULLY RINCKEY PLLC
YOUR LAWYERS FOR LIFE - 1888LAW4LIFE.COM

The Legal Pitfalls of Caveat Emptor: Are There Cracks in the Foundation?

Not so long ago, caveat emptor passed the 200th anniversary of its first appearance in a reported New York case. Through its history, the doctrine has reared its head in every conceivable type of buy-sell transaction, but perhaps its greatest mischief has been done in the area of residential real estate.

Simply stated, “The doctrine of caveat emptor imposes no duty upon a vendor to disclose any information concerning the property in an arm’s length real estate transaction.” For as long as it has existed, though, caveat emptor has been accompanied by its faithful corollary, the doctrine of active concealment. It provides that if some conduct on the part of the seller (meaning more than the seller’s mere silence) rises to the level of active concealment, the seller may have a duty to disclose information concerning the property. Failure to disclose under such circumstances, resulting in the deception of the buyer, may yield a cause of action.

Lest a buyer stand too firmly on the floor of active concealment, the law placed a trap door beneath it. A seller would be excused even from active concealment if the facts represented were not peculiarly within the seller’s knowledge and the buyer had the means available to learn the true situation by the exercise of ordinary intelligence. This corollary, which might be remembered as “peculiar knowledge,” has wreaked some harsh results in the Third Department, especially where it has been held that the buyer has no recourse against the seller even though the property turns out not to have an adequate supply of potable water.

Some imaginative buyers’ attorneys, faced with the specter of annihilation at the hands of caveat emptor, joined the home inspection company as a defendant, claiming that it had been negligent in failing to turn up the defects prior to the closing. However, the Third Department has held that such claims are easily sidestepped by limitations of liability in the home inspection company’s boilerplate agreement, thereby establishing the aphorism that a home inspection is worth no more than you pay for it.

Into this fray stepped the New York Legislature, which enacted Real Property Law Article 14, effective March 1, 2002. It is far from clear that this legislation was intended to slay the dragon caveat emptor. According to Section 1 of the Legislative findings, “residential real estate consumers, both buyers and sellers would benefit from a mechanism intended to increase their ability to obtain information concerning a home purchase and sale.” However, the mechanism created, the Property Condition Disclosure Statement (PCDS), was all but swallowed whole by the legislature’s further statement that, “This act is not intended to and does not diminish the responsibility of buyers to carefully examine the property which they intend to purchase.

It does not appear that any of the Appellate Divisions has squarely addressed the issue of exactly how Article 14 impacts caveat emptor. The clear trend of lower court decisions has

been that the statute has little or no effect in this regard.

Recently, however, one appellate level court weighed in with an interesting decision. In Calvente v. Levy, the Appellate Term, Second Department, affirmed a small claims judgment of $1,500 in “actual damages” in favor of the buyer on the ground that the seller answered “no” on the PCDS to the question of whether there were “any flooding, drainage or grading problems that resulted in any standing water on any portion of the property.” In fact, the seller was aware of “a prior water leakage in the basement during a severe storm.”

There are several notable aspects of this decision. First, it is not clear whether the PCDS was actually false, because there is no indication that the “water leakage” resulted in standing water. Second, if this “severe storm” had been an anomaly, as the seller claimed, could the fact that water leaked into the basement really be considered evidence of a flooding, drainage or grading problem?

Third, and most interesting from the perspective of this article, the court eschewed any discussion of “peculiar knowledge.” What if the buyer had constructive knowledge of the problem because, in the exercise of reasonable diligence, she could have learned of the water leakage prior to the closing, for example by the presence of water stains in the basement? Does the seller’s falsification of the PCDS trump the buyer’s knowledge? Calvente leaves too many questions unanswered to provide comfort to a buyer.

Until the interplay between Article 14 and caveat emptor is clarified, either by the higher appellate courts or, perhaps, the legislature, a buyer cannot afford to rely solely on the PCDS. Due diligence is still required, including a thorough, professional inspection of all reasonably accessible areas of the property.

This may require greater than accustomed expenditures for the buyer, but it is the tribute demanded by caveat emptor which, although wobbling, has not yet been toppled from its throne.