

## Can a Seller Lie About Condition of Property?

By Mathew Tully Question:

My wife and I are preparing to buy our first house, and the seller we're dealing with has been squirrely when I ask about the condition of the property. Can he get away with flat-out lying about his property's condition? Response:

Home buyers put themselves at great financial risk if they base their decision to go through with a purchase solely on the seller's or an agent's statements about a property's condition made either verbally or in writing. New York's Real Property Law requires most sellers to complete and sign a property condition disclosure statement (PCDS). If the seller does not furnish this document, the buyer should receive a \$500 credit against the agreed-upon purchase price. Even this legal document warns buyers that it "is not a warranty of any kind by the seller or by any agent representing the seller ... [and i]t is not a substitute for any inspections or tests." While reviewing a PCDS, buyers need to know that sellers under certain circumstances can get away with flat-out lying or lying through omission. Even if the seller commits fraud by lying about flooding in the home's basement, for example, the buyer must still negate the doctrine of caveat emptor ("buyer beware"). So, if a seller says there are no flooding problems and you buy the home based upon that assertion only to later find it to be false, to collect damages you would have to prove that the seller knew about this defect in the first instance. That can be easier said than done. You'd also have to prove that the seller willfully lied or tried to cover up that defect. Then you'd have to prove that you had no way of knowing there were any past flooding problems. A tough uphill battle, indeed. The case *Daly v. Kochanowicz et al.* involved a buyer who purchased lakefront property in Westchester County (67 A.D.3d 78 [N.Y. App. Div. 2009]). After her new home was "catastrophically flooded" after two severe storms, she sued the seller. The buyer claimed the seller deceived her into believing there were no prior water intrusion problems. The buyer's inspector had noted evidence of water intrusion in the basement, but the seller denied knowing of any such problem. The seller did not provide a PCDS to the seller — despite requests from the buyer for her to do so. Instead, the seller provided the buyer with a \$500 credit as required by the law if no PCDS was given. Even though the buyer later learned that the seller had received — and did not disclose information pertaining to — a federal flood insurance loss payment two years before the closing, the court dismissed the lawsuit. First, the court noted that the seller or her agent were not obligated to disclose water intrusion history information, with exception to the requirement to complete the PCDS. It further noted that the buyer was put on fair notice about the possibility of water intrusion problems, as evidenced by the home inspector's report, a survey showing a river in the property's northern boundary, and an advisory that the state maintains an easement through the property to access the river. Showing that a buyer relied on a seller's misrepresentation is not enough, the court said. A buyer must also prove that "this reliance was reasonable or justifiable." With all these red flags, the court said the buyer's reliance on the misrepresentation was not reasonable and she did not perform her due diligence concerning any flooding issues with the property. The best defense against unpleasant surprises post-closing is the recruitment of an experienced home inspector and leaving no stone unturned during the inspection and contract process. Additionally, where the

sellers are reluctant to provide a completed PCDS to a client at the time of contract signing, you need to have a serious conversation with your attorney about what type of red flag this is sending and what precautions should be taken at that time. When a PCDS is given, but is incomplete, it is better to make the contract contingent upon the review of a completed PCDS. If the PCDS or an inspector's report note any material defects or other issues, have your real estate law attorney address these issues during the attorney approval process before waiving your rights under the contract.