Thursday, August 8, 2013

In the sale of real estate, the expression "caveat emptor" is often used. This Latin phrase simply means "let the buyer beware." Just what the buyer should be aware of is of great importance, as getting what you did not bargain for in a real estate deal can be a devastating and costly problem.

As caveat emptor implies, it is the buyer's responsibility to take great care when purchasing a property. The purchase of a home is a significant financial commitment and, thus, it is on buyers to make the necessary inquiries and inspections before signing on the dotted line. "As a general rule where no direct representation is made by the vendor concerning definite facts and the purchase has sufficient opportunity to observe the condition of the premises, the maxim of caveat emptor is applicable." Fannon v. Carden, Ky., 340 S.W.2d 101, 103 (1951). What happens, though, when a buyer exercises great care to ensure a home meets his standards and purchases it, convinced he is aware of its shortcomings, only later to discover a defect?

When an undisclosed defect is found after a purchase, the first step in the legal analysis is to determine whether the defect is patent or latent. A patent defect is an open and obvious flaw that exists in or around the home. These kinds of defects are discoverable upon a reasonable inspection. For example, crumbling brick steps leading to the doorway should be obvious to any prospective buyer, as should a hole in the living room wall or a broken window. When these defects are found, a prospective buyer must make his concerns known. A prospective seller and buyer can then bargain to repair the defects or, alternatively, reach a sale price that reflects the identified imperfections.

A latent defect, in contrast, is a defect that a buyer cannot reasonably uncover by inspection. Latent defects are not within the knowledge, nor the sight, of a prospective buyer. These kinds of defects may, among other things, render a property dangerous to occupants (e.g., a cracked foundation wall) or make the house unfit for habitation (e.g., mold). While no cause of action exists merely for the uncovering of latent defect after a buyer takes possession, such a discovery is often accompanied by a buyer making a misrepresentation claim. As stated by the Kentucky Court of Appeals:

In the sale of real estate the intentional suppression of facts known to the seller and unknown to the purchaser is ground for an action for deceit if the purchaser was damaged by reason of the fraudulent concealment. Where there is a latent defect known to the seller and he remains silent with the knowledge that the buyer is acting on the assumption that no defect exists, the buyer has a cause of action against the seller for an intentional omission to disclose such latent defect.

Bryant v. Troutman, Ky., 287 S.W.2d 918, 920 (1956). In order to establish an allegation of this sort, a buyer is required to prove the following elements: "a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury." United Parcel Service Co. v. Rickert, Ky., 996 S.W.3d 464, 468 (1999).

In Kentucky, property owners have a legal duty to make extensive disclosures to prospective buyers through a Seller Disclosure Form, KRS 324.360; 20 KAR 11:350. This statutory duty enables buyers to beware of all possible problems that are within the seller's purview. The disclosure is not a warranty by the seller or seller's agent.
Furthermore, the disclosure specifically states that the "seller does not possess any expertise in construction, architectural, engineering, or any other specific areas related to the construction or condition of the improvements on the property." In other words, the seller is considered to have no greater knowledge than the potential buyer who conducts a careful inspection. Additionally, generally-inaccessible areas like the foundation or roof do not have to be inspected at all by the seller.

Real estate licensees, such as brokers and agents, have a duty to inform potential buyers and sellers of any known defects which substantially affect the value of the property and they cannot make any substantial misrepresentations. KRS 324.160(4)(b). By virtue of their profession, a real estate broker or agent is held to owe a duty "to all those with whom they deal, even in the absence of an express principal agency relationship." Givan v. Aldemeyer/ Stegman/Kaiser, Inc. (ASK Realty), 788 S.W.2d 503, 505 (Ky. App. 1990).

As previously explained, sellers are only liable if they fraudulently conceal a latent defect, so it must be determined what a seller knew and when he knew it. If the current seller was unaware of a defect (for instance, because he only owned the property for a short amount of time), is there a previous seller who knew about the problem and did not disclose it? Was an agent told about the defect and not forthcoming, rendering him liable, too? Answering these questions can be time-consuming and generally require the aid of attorneys. Buyers are often forced to make a choice between repairing a costly defect on their own or pursuing litigation, which can be costly in its own right.

When considering the purchase of a home, prospective buyers should always hire a professional to conduct a thorough home inspection. The Seller Disclosure Form should be reviewed at length and any questions should be addressed long before the closing. Buyers should expect candid and complete answers from both the seller and seller's agent when asking questions about the property.

Prospective sellers should beware that in Kentucky, "when a party asserts that something is true when he does not know whether it is true or untrue, he is practicing a fraud on the party with whom he deals." Bunch v. Bertram, 219 Ky. 848, 294 S.W. 805, 808 (1927). It is therefore imperative that prospective sellers use caution when making statements about the condition of the property they are selling. The ever-so-common sales pitch cannot cross the line into asserting potentially false information as truth.

Home buying is an emotional process, filled with ups and downs on both ends of the transaction. When a latent defect is found, the home buyer will likely face disappointment, frustration, and high costs. If the seller or seller's agent knew of the defect, they will face legal liability.

Both parties can protect themselves by doing their homework and always engaging in fair dealing.

© 2019 by McBrayer, McGinnis, Leslie & Kirkland, PLLC. All rights reserved.