

**Toxic Mold:
The Importance of Awareness
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Toxic Mold has become a growing problem in today's real estate industry. Many home buyers are not aware of the potential health risks and concerns associated with toxic mold. Real estate professionals, including Realtors®, attorneys and home inspectors, must be aware of the immense legal liability surrounding its existence. The growing awareness of health risks and liability issues has resulted in an increasing number of claims made by new home buyers and tenants for illnesses caused by mold. A bill has been introduced in New York State to create a statutory framework to deal with mold, mold remediation and disclosure.

Clement: A Recent Toxic Mold Lawsuit Filed

A recent lawsuit was filed in Rockland County Supreme Court, Clement v. Delaney Realty Corp., et al., Index Number SU-2006-001201, by Ira and Sarah Clement against the sellers, their real estate agent, the agent's brokerage firm, a home inspection company, a home inspector and the attorney for the purchasers. In their complaint the purchasers allege several causes of action against the various defendants. The purchasers filed suit against the home inspector for gross negligence and fraud; against the sellers for active concealment and fraud; against the real estate salesperson and the agent's firm, for breach of fiduciary duty, breach of the broker's statutory duty under Real Property Law Section 466, negligent misrepresentation and aiding and abetting the sellers in fraud. The purchasers also claim that their own attorney committed legal malpractice. They seek \$10,000,000 in compensatory damages and \$10,000,000 in punitive damages against all of the defendants. Although the lawsuit is in its preliminary stages, the allegations are intimidating.

The Facts of Clement

The facts in the Clement case are strikingly similar to those in real estate transactions which take place daily. An offer was made by the purchasers and accepted by the sellers. The home was thirty-nine (39) years old. The offer was subject to an "engineer/termite/radon inspection." The purchasers hired a home inspection company and home inspector recommended by the real estate agent. The complaint indicates that the inspection report "...provided no material warnings and did not recommend further testing prior to closing of title." The purchasers, who were represented by an attorney, then entered into a contract of sale with the sellers. The sellers did not provide the purchasers with a Property Condition Disclosure Statement ("PCDS"). The contract provided instead that the purchasers were to receive a \$500 credit at the closing.

The closing took place on November 24, 2003. The purchasers did not conduct a walkthrough and alleged that they were not advised by their attorney or the real estate

agent to do so. The contract, however, did include the customary walk-through provision. A few days after the closing, the purchaser noticed the windows were “steamed up to the extent that they could not see through them.” Within a few weeks after moving into the home, the purchasers noticed water dripping in a guest bedroom and on the front door of the living room. By the end of December the purchasers “...observed darkness on the walls of their son’s bedroom.” Eventually, by March, 2004 the darkness had become so extensive that the purchasers hired a company to remediate the mold and moisture problem. The purchasers’ homeowners’ insurance company would not provide coverage claiming that it was a pre-existing condition and was excluded from their homeowner’s policy.

By May of 2004 the purchasers began feeling ill and had the mold tested by a “microbial expert”. It was determined that the mold was indeed toxic. The purchasers were advised to vacate the premises and in June, 2004, moved out of their home. The complaint indicates that the purchasers have not moved back.

Purchasers’ Allegations Against the Inspector and Sellers

The complaint alleges that the inspection report prepared by the home inspector failed to warn the purchasers about the extensive water problems that existed with regard to the roof, the attic, the HVAC system and the exterior of the premises. The complaint also alleges that the inspector should have noted the recent painting of the bedrooms and exterior of the home. The rest of the home had not been painted.

The sellers are alleged to have “actively concealed the mold problems by painting the affected areas so that the purchasers would not be able to ascertain the extent of the water leakage and seepage problems and the mold problems.” The purchasers claim that the mold that appeared after the closing appeared in all of the places where the sellers had painted.

Claims Against the Real Estate Agent and Broker

The complaint alleges that the real estate agent and brokerage firm, were negligent in their representation of the purchasers. They state that the real estate agent failed to inform them that they were entitled to a Property Condition Disclosure Statement and also failed to advise the purchasers to conduct a walk-through of the home prior to closing especially where the home was thirty-nine (39) years old and the purchasers were taking title to the premises “As Is.” The purchasers claim they relied on the real estate agent’s representation that the home inspector “...was a highly qualified, reputable home inspector with whom she had done substantial business.”

The complaint further alleges that both the real estate brokerage firm and real estate agent breached their fiduciary duty to the purchasers; that the real estate agent “...agreed to act as a licensed real estate broker for the plaintiffs in connection with their purchase of a residence; and thereby assumed a fiduciary duty to them.”

A Realtors’ Obligations Under Section 466 of the RPL

Section 466 of the Real Property Law of State of New York provides that:

An Agent representing a seller of residential real property as a listing broker shall have the duty to timely inform each seller represented by that agent of the seller's obligations under this article. An Agent representing a buyer of a residential real property, or, if the buyer is not represented by an agent, the agent representing the seller of a residential real property and dealing with a prospective buyer, shall have the duty to timely (in any event, before the buyer signs a binding contract of sale) inform the buyer of buyer's rights and obligations under this article. If an agent performs the duties and obligations imposed upon him or her pursuant to this section, the agent shall have no further duties under this article and shall not be liable to any party for a violation of this article.

Under New York law a real estate agent is required to inform a seller and buyer about the Property Condition Disclosure Statement and of their specific rights under Section 462 of the Real Property Law. The purchasers allege that the real estate agent failed to disclose such rights to the purchasers.

A Licensee's Duty of Reasonable Care

Brokers have a duty of reasonable care to all parties in a transaction. The purchasers allege that the real estate broker and agent failed in their duty to use "reasonable care" in that they failed to point out several inaccuracies in the inspection report; that the agent was guilty of negligent misrepresentation when the agent recommended the home inspector to the purchasers; and further, that the broker and agent "aided and abetted" the sellers in their commission of fraud by recommending such a "dishonest and incompetent" inspection company and by failing to point out to the purchasers "the obvious defects in the house which the [home inspector] had ignored."

Legal Malpractice Claim Against Attorney

The purchasers also named their own attorney in the lawsuit alleging that he failed to advise them of the consequences of their waiver of the Property Condition Disclosure Statement, and that the attorney did not advise them to conduct the walk-through prior to the closing especially since the house was old and they were taking the property in "As Is" condition.

The Dangers of Non-Disclosure, Fraud and Misrepresentation

Although there has been no decision affirming any of the allegations made by the Clements, the case highlights the importance of disclosure and awareness. The potential liability that may exist for all real estate professionals can be severe. The allegations must be proven at trial but that may be years and many sleepless nights into the future.

Although sellers do not have a legal obligation to make certain disclosures to prospective purchasers about their property, brokers and agents are certainly required to make full disclosure of all material facts about a subject property of which they are aware (RPL Section 443). Prospective home buyers rely on the advice and recommendations of real estate professionals.

Real estate agents must also refrain from withholding pertinent information relating to a subject property. Brokers and agents must advise their seller clients that agents are not allowed by law to withhold critical and material information that would influence a buyer's decision to proceed with a transaction. A seller may, at times, direct an agent to withhold such information. An agent must advise the seller that licensees are not allowed to do so and that they are obligated to disclose known facts affecting the value or desirability of the property.

The Legislature's Attempt to Protect Purchasers from Toxic Mold

Bills have been introduced in 2005 and 2006 (Bill Numbers A01108 and A09542) which relate directly to issues dealing with mold and mold remediation. The proposals relate "...to the remediation and prevention of indoor mold and requires the disclosure of mold history upon the sale of certain real property." These measures seem to have stalled in the legislature. In a section entitled "Justification" the Bill points out that:

"indoor mold has been referred to as 'killer mold'. This is because the health risks associated with certain types of mold are tremendous. Inhalation of a wide variety of fungi can lead to or exacerbate existing conditions of allergies. Mold has also been found to cause toxic effects or infections. Currently, there are no government standards or practices for detection, prevention and/or remediation of indoor mold."

The Act, if passed, would amend the Public Housing Law, the Public Health Law and the Real Property Law. It would add a separate question to the PCDS relating to mold and mold disclosure. The Act would also require both the Commissioner of Housing and Community Renewal and the Commissioner of Health to promulgate rules and regulations necessary for mold disclosure and mold remediation.

The Role of the Real Estate Professional and "Killer" Mold

It is imperative that all real estate professionals understand the health and liability risks associated with toxic mold. Realtors®, attorneys, home inspectors, home builders, HVAC installation companies, siding companies and roofing companies, can be named in a mold related lawsuit. Realtors® must inform their seller clients of the potential liability risks associated with non-disclosure and active concealment relating to "killer" mold and other toxic substances. Although New York is a "buyer beware" State, this doctrine does not protect a seller who engages in fraud and active concealment nor will it protect the real estate licensee who knowingly conceals such information.

It is important for attorneys and Realtors®, when making any type of recommendations to purchasers, to recommend highly qualified home inspection companies and to qualify their recommendations as necessary. Realtors® and attorneys should always recommend more than one inspection company, or alternatively, refrain entirely from making any recommendation at all. The recently enacted Home Inspection Law in New York now requires home inspectors to be licensed through the Department of State.

New home buyers should be advised of all of the various types of inspections that can be conducted or at least considered. In addition to customary inspections such as radon, termite and engineering, a buyer should also be advised to obtain inspections and testing relating to, but not limited to, water potability and pressure tests, septic system tests, inspection and removal of underground oil storage tanks and testing, and inspections specifically relating to toxic mold. Buyers should also be advised of the importance of the final walk-through. Waiver should not be recommended. A final walk-through should be done immediately prior to closing. The courts, if the opportunity is presented, may soon determine who (the broker or the attorney or no one) has the duty to educate the purchasers. The results of this case may well have significant impact on the industry.