

Daly v. Kochanowicz
Caveat Emptor is Alive and Well in New York
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On August 18, 2009, the Appellate Division Second Department rendered an opinion in the matter of *Daly v. Kochanowicz* (884 N.Y.S.2d 144; N.Y.A.D. 2 Dept. [2009], 884 N.Y.S.2d 144 [2009]). This decision is a perfect teaching tool for real estate licensees and attorneys, as to how "*Caveat Emptor*" is applied in New York.

The decision involved a home in Mamaroneck, New York, which was the subject of a closing on July 6, 2006. The owners of the property, Tara Kochanowicz and Robert Janowitz, listed their property with Kathleen Spadaro and Spadaro Real Estate, Ltd. The purchaser, Stephanie Daly was introduced to the property by Christopher Abate of CS Realty & Relocations Services, Inc. Approximately nine (9) months after the closing, two separate, severe storms (on March 2, 2007 and April 15, 2007) occurred and the subject property became "catastrophically flooded." The purchaser, Stephanie Daly, was forced to relocate. The damage to the property, as well as to the contents of the property, was severe. Thereafter, Ms. Daly commenced an action in Westchester County Supreme Court alleging that the brokers (both listing agent and selling agent) conspired to defraud the purchaser about the likelihood of flooding at the property and further alleged that the seller made a material misrepresentation to her and to her home inspector by denying that there were water problems in the property. The purchaser alleged that the brokers and sellers fraudulently induced Ms. Daly into purchasing the premises.

The Decision of the Court

In the initial Westchester County Supreme Court action Judge Aldo A. Nastasi entered a decision on March 3, 2008 which granted Summary Judgment to all of the defendants, dismissing the Complaint. The purchaser, Stephanie Daly, then undertook an appeal to the Appellate Division, Second Department attempting to reverse Judge Nastasi's decision. The Appellate Court found in favor of each of the broker-defendants and the sellers, affirming Judge Nastasi's decision and dismissing Ms. Daly's case. In reaching its decision, the four (4) judges of the Appellate Division provided a thorough analysis of the state of the law in New York and made clear that the doctrine of *Caveat Emptor* is not only alive and well, but once again affirmed the burden upon a purchaser to fully investigate and satisfy himself or herself about the condition of the property "by the exercise of ordinary intelligence."

The thorough analyses set forth by the Appellate Division Judges are worth summarizing.

The Court's Analysis

In order to understand the decision of the Court, it is useful to note that:

1. The plaintiff, Stephanie Daly, hired a home inspection company which provided a report to her, indicating that the inspector called the owners of the property (who were not present during the actual inspection) and that one of the owners had made a misleading statement to the inspector. The inspector's report stated, "When asked over the phone if there was ever any water in the lower level areas, the homeowner stated that there has not been any water." The defendant-sellers denied that either one of them had made any such statement. Nevertheless, the inspector noted evidence of water seepage and advised Ms. Daly.
2. Most importantly, the inspector's report advised the purchaser, Stephanie Daly, to "(a)sk neighbors what happened during Hurricane Floyd and who got water in their homes and who did not. Do this prior to either the closing of the contract or prior to the signing of the contract." The report also recommended that Ms. Daly consult with local officials to ask about wetland maps and 100-year Flood Plain Maps and how such maps "affect this property," prior to signing the contract.
3. The contract included a provision that the premises were being transferred subject to a certain survey made in 1991, which clearly depicted the Mamaroneck River inside the northern boundary line of the property and also reflected an easement in favor of the State of New York permitting the State to access the river through the back yard of the property.
4. Ms. Daly's attorney attempted to prepare a Rider to the Contract of Sale that included a representation that the basement would be "free from seepage at closing." The sellers refused to make such a representation and crossed it out of the Rider.
5. The sellers refused to complete a Property Condition Disclosure Statement and the contract included a provision in which the purchaser stated, "Purchaser hereby accepts the \$500 credit in lieu of the Statement and accepts the premises as is."
6. The contract contained all of the standard clauses commonly in use in contracts for real property in Westchester County that assert that "the purchaser is fully aware of the physical condition and state of repair of the Premises..."; that "all prior understandings, agreements, representations and warranties, oral or written between seller and purchaser are merged in this Contract..."; and that "It is specifically understood and agreed by the parties hereto that the acceptance and delivery of the deed or conveyance at the time of closing...shall be deemed to constitute full compliance by sellers with the terms, covenants and conditions of this Contract..."

Did Anyone Have a Duty To Disclose the History of Water Intrusion?

The Court concluded that, “New York adheres to the doctrine of *caveat emptor* and imposes no liability on a seller for failing to disclose information regarding the premises, when the parties deal at arm’s length, unless there is some conduct on the part of seller which constitutes active concealment.” The Court noted that an exception would occur if the seller completes a Property Condition Disclosure Statement and makes a false statement in such document. In this instance, the Court noted that the sellers elected to not complete the Property Condition Disclosure Statement and opted instead, to give a \$500 credit to the purchaser.

Did The Buyer Have Fair Warning?

The Court noted that the buyer, Stephanie Daly, had been warned in several ways “of a potentially serious water intrusion problem.” Most importantly, the Court noted that she failed to perform “even minimum due diligence in investigating the subject property’s water intrusion history.”

Was There Fraud, Collusion or Active Concealment?

The Court indicated that for purposes of its analysis, it would assume that one of the sellers made a false statement to the property inspector as referred to in the property inspector’s report. Notwithstanding that assumption, given the information that the purchaser had prior to the closing, the Court found that the plaintiff had failed to even state a cause of action “taking all facts alleged as true and according them every possible inference favorable to the plaintiff...” The Court analyzed the elements of fraud which are:

- [a] An affirmative representation of a material existing fact;
- [b] The falsity of that fact;
- [c] Scierter (knowledge that the fact is false);
- [d] Deception; and
- [e] Injury.

In order for a fraud action to proceed, a plaintiff must show that the plaintiff relied on the alleged misrepresentation and that this “reliance was reasonable or justifiable.” Here the Court indicates that the plaintiff could not prove that her reliance upon any representation allegedly made by the sellers, was reasonable or justifiable. Based upon the knowledge that had been imparted to her by her inspector, by the facts set forth in the survey and by the sellers’ unwillingness to make any representation about seepage in the basement, the Court concluded that the ability to ascertain the truth was well within the capacity of a person of ordinary intelligence and that the purchaser failed to act responsibly in seeking out the necessary information to ensure that she was getting a property free from water intrusion.

Did the Purchaser Rely Upon A False Representation?

The Court concluded that any reliance by the plaintiff on a representation by the seller “was not reasonable or justifiable.” The Court noted that the plaintiff’s inspector had discovered evidence of water intrusion, made it known to the purchaser prior to the closing and that the purchaser could not, therefore, sustain an argument that she detrimentally relied upon a fraudulent representation in entering into the contract.

Was There Active Concealment?

Although the doctrine of *caveat emptor* is still in force in the State of New York, it may be inapplicable if a plaintiff can show that there was “active concealment” on the part of a seller regarding facts that were not readily ascertainable by a purchaser. The Court noted that in this instance, the purchaser, Stephanie Daly, had to show that the sellers attempted to thwart her efforts to fulfill her responsibilities to make a full investigation and inspection. There was no evidence of same and no allegation of same.

Did the Purchaser Fulfill Her Due Diligence Responsibilities?

In the opinion of this author, the most important aspect of this decision is the analysis made by the Court regarding a purchaser’s due diligence requirements. The Court applied the laws of the State of New York and prior case law to the facts in this instance. It noted that the plaintiff (Stephanie Daly) made no “attempt whatsoever, prior to closing, to independently research whether the area experienced significant flooding.” The Court noted that knowledge of flooding conditions in the property were not matters “of which the sellers had peculiar knowledge.” The Court made it clear that there was sufficient public information available which shifted the burden to the purchaser to discover such conditions “through the exercise of due diligence.”

Did the Contract Terms Protect the Parties?

The Court concluded that the specific provisions of the contract (which are commonplace in contracts in this jurisdiction) bar the plaintiff’s claims. The Court essentially indicated that if there are oral representations made in the course of a purchaser’s dealings with the seller and the purchaser does not insist that the seller include such representations in writing in the contract, even if the purchaser relies upon such representations, the contract provisions will preclude any action regarding a falsehood which is not repeated in the contract.

Was There A Breach of Fiduciary Duty On the Part of the Purchaser’s Agent, Christopher Abate and CS Realty & Relocations Services, Inc.?

The purchaser (Stephanie Daly) asserted that her broker, Christopher Abate and CS Realty & Relocations Services, Inc., had fiduciary duties to her which they breached in that “they knew or should have known about the flooding conditions in and around the subject property.” The Court concluded that such claims were irreconcilable with Ms. Daly’s claim that “the propensity for flooding in the area was in the peculiar knowledge of the sellers...”. Moreover, the Court noted that a purchaser must show under these circumstances that his or her damages were directly caused by the misconduct of the fiduciary. Ms. Daly asserted that the broker had a duty to “conduct due diligence on the flood history of the subject property and the surrounding area” and further failed to or refused to provide information responsive to the requests made by Ms. Daly. The Court once again assumed the truth of the plaintiff’s allegations and giving Ms. Daly “the benefit of every favorable inference” noted that Ms. Daly failed to show that any damages incurred by her were directly related to any misconduct by the defendant brokers. The Court noted that Ms. Daly acknowledged that she was aware of the evidence of water intrusion in the basement and therefore, any damages which she incurred could not be directly related to defendants’ misconduct.

Did the Listing Agent Breach Any Fiduciary Duty?

The Court then analyzed the obligations of Kathleen Spadaro and Spadaro Real Estate, Ltd. regarding the allegations by Ms. Daly of a breach of fiduciary duty. The Court noted that the complaint of Ms. Daly failed to even allege that the defendants owed a fiduciary duty to the purchaser, Ms. Daly. “It is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal.” The Court concluded that Ms. Spadaro and Spadaro Real Estate, Ltd. were under no duty to disclose “any information concerning the premises, unless there is a confidential or fiduciary relationship between the parties or some conduct on the part of the seller which constitutes active concealment.” Once again the Court affirmed that the buyer has an affirmative duty to be diligent. The Court stated, “a buyer has the duty to satisfy himself as to the quality of his bargain.”

Conclusion

This column has repeatedly cautioned Realtors against even inferring to a buyer that a buyer should waive inspections or not undertake active due diligence with respect to a prospective purchase. This case sets forth a thorough analysis of the law as it exists in New York. It makes clear that as long as *caveat emptor* remains applicable to real property transactions in this State, purchasers must do all that they can to be diligent, to act as a prudent person of ordinary intelligence and ascertain whatever facts are necessary in order to ensure that the purchaser is obtaining the bargain that the purchaser believes justifies his or her purchase.

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