***Comora v. Franklin*:**
The Doctrine of "Buyer Beware" Is Still Alive - But One Must Still Beware

By John Dolgetta, Esq.

On April 10, 2019, the Appellate Division for the Second Judicial Department issued a decision in *Comora v. Franklin* (*see* https://bit.ly/2H90yk4) holding that the defendants in the case, the seller and seller's agent, had no duty to disclose to the buyer, based on the doctrine of "Caveat Emptor" (i.e., "Buyer Beware"), the existence of humidity and mold in an indoor pool area of the home they purchased. This may seem like a simple and straightforward decision reiterating that the doctrine of "Buyer Beware" is still the law in New York; however, it is important to note that the rationale the Appellate Court applied in *Comora* in overturning the decision of the lower court was primarily based on the existence of specific disclaimers contained in the contract of sale.

The Facts of *Comora v. Franklin*

The purchasers, Adam and Hillary Comora, purchased a luxury home from the seller, Martin Franklin, in November, 2013, for $6.2 Million. The seller's real estate agent was his sister, who worked for the brokerage firm that listed and marketed the property. Prior to entering into contract, the purchasers had the home inspected by a licensed home inspection company and the report found that there was no visible evidence of mold. After "extensive negotiations" between the parties, the seller accepted the purchasers' offer and the parties entered into a formal contract of sale on October 11, 2013.

The standard "Residential Contract of Sale" form (version 11-2000) prepared by the Real Property Section of the New York State Bar Association and other organizations (the "Form Contract") was used by the seller's attorney in this transaction. This From Contract is commonly used by real estate attorneys on residential transactions in the southern parts of New York State, but is not commonly used in the more northern parts of the State. Paragraph 12 of the Form Contract includes the following language:

> *"12. Condition of Property. Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements or representations, written or oral, as to the physical condition, state of repair, use, cost of operation or any other matter related to the Premises or the other property included in the sale, given or made by Seller or its representatives, and shall accept the same "as is" in their present condition and state of repair, subject to reasonable use, wear, tear and natural deterioration between the date hereof and the date of Closing (except as otherwise set forth in paragraph 16(e)), without any reduction in the purchase price or claim of any kind for any change in such condition by reason thereof subsequent to the date of this contract."*

There was also an additional rider ("Rider") annexed to and executed by the parties, which provided, in pertinent part, that:

> *"Seller is not liable or bound in any manner by any verbal or written statements, representations, real estate broker's set-ups, or information pertaining to the Premises furnished by any real estate broker, agent, employee, servant, or other person, unless the same are specifically set forth herein. Purchaser is purchasing the premises in "AS IS" condition as of the date hereof."*

The Rider also provided that the purchaser agreed to receive, and seller agreed to provide, a credit of $500 in lieu of the seller delivering the Property Condition Disclosure Statement to the purchasers. This is customary in most residential real estate transactions. The same paragraph further stated that the "Purchaser has been given the opportunity to have any and all inspections done to the Premises that the Purchaser wishes to have done." It also specifically provided that the provision would survive the closing.

After the parties entered into contract, the purchasers' attorney ordered the customary title search on the premises which included a standard municipal search. The only item that came up relating to this in the municipal search was the approval for the original construction and completion of the indoor pool area. However, according to the original Summons and Complaint filed by the purchasers on July 31, 2015, it was discovered, after the closing, that the seller had undertaken a major mold remediation project in March of 2013 at a cost in excess of $1 million. The municipal search did not reveal that there were any permits pulled in connection with this remediation work. The home was eventually listed for sale in May, 2013.

In September, 2013, the purchasers (who were represented by their own agent according to the court records) met with the seller's real estate agent to view the property for the first time, and once the offer was accepted by the seller, in early October, the purchasers had the home, including the pool area, inspected by a licensed inspection company. The inspection report noted that there was "no visual evidence of musty odor associated with fungi during the inspection, and there were no elevated moisture levels to indicate fungi proliferation." However, shortly after the closing, the purchasers stated that the humidity alarm went off when they attempted to prepare the pool for its first use. When the alarm was triggered the purchasers contacted the seller who, as they recount, "curtly" referred them to the company that handled the remediation project in March. The mold remediation company went out to the property several times to attempt to remedy the humidity issue and it was during this time that the purchasers first learned that this company had handled the major mold remediation project in March.

In January, 2014, mold began to appear in the pool area. The purchasers had the pool wing inspected again by the original inspection company they had used and then obtained a second opinion. Both inspection companies reached the same conclusion, "that there were significant moisture issues in the pool area and that the infrastructure and mechanical systems in place to control these issues were flawed." Ultimately, the purchasers' attorney reached out to the seller's attorney, who responded on April 14, 2014 and informed them of the mold remediation project for the first time. The seller's attorney provided the purchaser's attorney with a copy of the

remediation report showing that the mold issue had been resolved and the invoices relating thereto. The purchasers also obtained copies of additional reports from the remediation company which detailed subsequent visits to the property after the March 2013 project. In the Spring of 2014, the purchasers hired a mold removal company and at the same time elected to redo the entire pool area at a cost of $1.1 million. Soon thereafter, the purchaser commenced the lawsuit against the seller and seller's agent.

The purchasers alleged that the seller and seller's agent engaged in fraud because they had a "peculiar knowledge of the humidity and mold problems" and failed to inform the buyers of these issues. They alleged that the seller and seller's agent "actively concealed these issues" until several months after the closing. The purchasers further alleged that the defendants engaged in fraud by posting a misleading listing which did not include any mention of the 2013 remediation work.

As trial court judge, Judge Smith, points out in her May 3, 2016 decision, the purchasers also claimed that the seller did not obtain the necessary permits from the town to complete the March 2013 remediation project which would have put the purchasers on notice about the issue. They allege that the seller did so intentionally so that it would not appear in the building department records. The purchaser also sought punitive damages alleging that the fraud was "gross" and involved "wanton dishonesty". The defendants filed a motion to dismiss the action and Judge Smith dismissed only two of the ten causes of action filed by the purchasers. She held that there were sufficient questions of fact as to allow the lawsuit to proceed against the defendants. She did, however, dismiss the 10th cause of action for punitive damages and 3rd cause of action simply because it was not "pleaded with any particularity." The defendants appealed the decision to the Appellate Division.

The Appellate Division Upholds the Doctrine of Buyer Beware

As the Appellate Court points out, citing various previous Appellate Division decisions (*see* *Hecker v. Pashke* (2015) (https://bit.ly/2VQ8uyQ); *Daly v. Kochanowicz* (2009) (https://bit.ly/2YiFxt0) and *Jablonski v. Rapalje* (2005) (https://bit.ly/2DViXyI)), "[i]n the context of real estate transactions, 'New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment.'"

The Court explains that "[i]n an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. [citations omitted]." The decision further explains that "[i]f however, some conduct (i.e., more than mere silence) on the part of the seller rises to the level of active concealment, a seller may have a duty to disclose information concerning the property." Therefore, if the seller or agent engages in "active concealment," which according to this decision has to be more than the actions of the defendants in this case, then there may be potential liability for failing to disclose same.

In order to proceed with a fraud claim based on active concealment, "the plaintiff must show, in effect, that the seller or the seller's agent ***thwarted*** [emphasis added] the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor." The critical question is - what is the purchaser's responsibilities under the Buyer Beware" doctrine? According to the cases, Purchaser's most important responsibility in New York is to thoroughly and completely inspect the property before entering into contract, or after the contract is executed, if there are inspection contingencies included in the contract. In this case, the Purchaser was provided the opportunity to the inspect the premises and did so - by engaging a third-party licensed inspection company. While the decision does not elaborate much on the active concealment aspect, its holding seems to establish that as long as the seller did not "thwart" the purchasers' efforts in conducting their inspections, the purchasers do not have any legal rights as against the sellers in this instance.

Disclaimers Are Critical and Can Protect Against Fraud Claims

Another, and more important, aspect of the decision in *Comora*, is the focus on disclaimers in contracts. The Court holds that "[t]he presence of disclaimers in a written agreement may ***preclude*** [emphasis added] a claim of common-law fraud by rendering any resulting reliance unjustified [citations omitted]." The Court goes on to state that "a specific disclaimer of reliance on representations as to the condition of real property will generally bar related fraud-based claims." As indicated above, there were very specific disclaimers and "AS IS" language contained in the Form Contract and added rider. Ultimately, the Appellate Division held that "[i] n light of the facts alleged, together with the language of the contract,…the plaintiffs cannot establish reliance upon the alleged concealment of material facts related to the condition of the premises." While these disclaimers provide increased protection, one cannot assume that these disclaimers will always be included in contracts or drafted in a way that will protect the seller and seller's agent. Contracts are normally negotiated and if these provisions are changed or "watered down" the protections afforded by them may not be available.

Obligations of Realtors Under NAR's Code of Ethics

While not part of the decision in *Comora*, it is important for those real estate agents and brokers who are "Realtors" to note their obligations under the National Association of Realtors' ("NAR's") Code of Ethics. Article 2 of the Code of Ethics requires that,

> *"REALTORS® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. REALTORS® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency or non-agency relationships as defined by state law."*

NAR's Code of Ethics makes it clear that Realtors are not required to discover "latent" defects, however, if they know of certain defects, they may be required to disclose such facts. Nevertheless, they are not obligated to "…advise on matters outside of the scope of their real estate license or to

disclose facts that are confidential under the scope of agency or non-agency relationships as defined by state law."

One critical takeaway from all of these "Caveat Emptor" decisions is that Realtors should never infer or recommend a buyer to waive inspections or not undertake active and comprehensive due diligence with respect to the purchase of real property. The ***Comora*** case reestablishes that as long as the doctrine of Caveat Emptor remains applicable, purchasers must be diligent and conduct thorough inspections of any property they wish to purchase. On the other hand, sellers, seller's agents and attorney must ensure that appropriate disclaimers are included in the contracts, that a purchaser is never "thwarted" from conducting any inspections and that they never actively conceal a defect that would make its discovery impossible.

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