



Disclaimers Don't Always Protect You

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Can a seller of property be held liable for fraud for concealing a defect in the property when he has provided a residential property disclaimer statement and the buyer has had the property inspected by two different property inspectors? According to the case of Devine v. Buki, decided by the Virginia Supreme Court on January 8, 2015, the answer is yes.

Donald Devine and his wife Nancy owned a wood frame home in Northumberland County called Rock Hall. Rock Hall is more than 200 years old and its main structure is supported by a large wooden beam, called the foundation sill, resting on a masonry wall. Shortly after acquiring Rock Hall in 2005, Donald began the process of renovating and restoring the home. Donald performed some of the work by himself, but hired at least two contractors to do the rest. Neither of the contractors did any work on the foundation sill or the wooden siding or corner posts of the house.

Apparently, needing cash to purchase another piece of property, Donald Devine decided to sell Rock Hall in December of 2006. He listed the house for sale with a real estate agent named Rebecca Lemmon. Together, Lemmon and Donald created promotional literature for potential buyers. The literature stated that (1) Rock Hall had been "completely restored"; (2) Rock Hall's foundation had been restored; and (3) Rock Hall was "completely renovated and restored between 2004 and 2005 from the wood plank doors and molding to the portico, and from the brick foundations to the roof and chimney." Finally, the literature stated that the information was provided by the seller and deemed accurate, but it was not guaranteed.

Some of the promotional material found its way in to the hands Charles Buki and Kimberly Marsho. In January of 2007, Buki and Marsho entered into a contract to purchase Rock Hall for \$590,000. The real estate contract included a disclaimer statement which said that the owners made no representations and warranties as to the condition of the property and that the purchasers would take the property as is and with all defects, if any, except as otherwise provided in the purchase contract.

Buki and Marsho hired a home inspector named William Knight, who inspected the property with Buki and Marsho present. Knight pointed out that some window frames were warped on the house, which allowed air to enter, and that the windows would probably need to be replaced within five years. He also noted a water stain and mold forming on the living room ceiling, and some moisture damage in the basement, as well as some evidence of wood boring insect damage to the rear sill. Nevertheless, Knight told Buki and Marsho that he found nothing that would cause him to tell a potential purchaser not to buy Rock Hall.

Buki and Marsho thereafter engaged Jeffrey T. Cox, Sr. to perform another inspection of the property, focusing on insect damage. Like Knight, Cox noted the moisture and insect damage in the basement. Cox stated however, that the termite damage was limited to one basement window and a baseboard. He also stated that based on what he could see at the time, no evidence of termite damage anywhere else in the house or an active termite infestation existed. He further stated that the moisture damage was not out of the ordinary for that area.

Based on the two inspections, Buki and Marsho requested several repairs to Rock Hall, including that the sellers find the source of the moisture stain on the living room ceiling and repair or replace it and treat the mold and paint or repair it. The listing agent Lemmon informed Buki's and Marsho's agent that the stain on the living room ceiling was caused by a window being left open during Hurricane Ernesto in September of 2006, and the stain was repaired and painted.

The parties closed on the sale of Rock Hall on March 9, 2007. Shortly after closing, Buki and Marsho noticed water leaking from the east and south facing walls and windows when there was wind-driven rain, and water leaking from the living room ceiling. They hired a contractor named Brown to install new windows, and he discovered mold and sheetrock damage around all of the windows on the east wall. According to Brown, the damage was not from a single event, but had been ongoing for some time. Finally, Brown noticed that the exterior siding had significant cracks and recommended that it be replaced.

Based on that recommendation, Buki and Marsho hired another contractor named Bruce Stanley, who inspected the siding along with Brown. The two contractors noticed that the lower courses of siding and portions of the corner posts had been replaced with new material. They removed the lower courses of siding and discovered that the foundation sill and corner boards were substantially damaged by rot and termite damage. The rot and termite damage on the foundation sill significantly compromised the structural integrity of the house.

Buki and Marsho sued Donald and Nancy Devine in Northumberland County Circuit Court alleging that they had fraudulently induced Buki and Marsho to enter into the real estate contract and close on Rock Hall, by misrepresenting and concealing the true condition of the home. After submitting the matter to a commissioner, the circuit court took up the case and focused on the false statements set forth in the promotional material, the concealment of the damage to the foundation sill, and the misrepresentation as to the source of the living room ceiling stain, and found that Donald, but not Nancy, had fraudulently induced Buki and Marsho to buy Rock Hall. The trial court thus ordered rescission of the purchase contract. That required Donald and Nancy to refund the purchase price of \$590,000 to Buki and Marsho,

with interest from the date of closing until fully paid. It also required Buki and Marsho to reconvey Rock Hall to Donald and Nancy upon the refund of the purchase price. Finally, the court entered judgment against Donald, but not Nancy, in the amount of \$135,129.41 for consequential damages and interest, plus attorney's fees and related expenses in the amount of \$98,575.66. Donald appealed to the Virginia Supreme Court.

Before the Supreme Court Donald claimed, among other defenses, that he had no duty to reveal the damage to the foundation sill because the disclaimer statement he provided with the real estate contract specifically informed the purchasers that they were buying the property "as is, that is, with all defects which may exist." The Supreme Court disagreed. Although the decision does not describe any direct evidence indicating that Donald himself concealed the damage to the foundation sill with new siding and corner post material, the trial court found that he had, and he did not dispute it. Instead, Donald focused on the fact that Buki and Marsho did not allege that his concealment induced them to enter into the contract, only to close under the contract. Donald argued that the concealment came after Buki and Marsho already had entered into the contract and, as such, the disclosure statement absolved him of any duty to inform them of the condition of the foundation sill.

In refuting Donald's argument, the Supreme Court noted the difference between fraudulent inducement to contract, and fraudulent inducement to perform. Fraudulent inducement to perform arises when one party induces the other to perform by concealing some fact which excuses performance by the latter. Unlike fraudulent inducement to contract, where the concealment necessarily precedes the formation of the contract, the concealment at issue in a fraudulent inducement to perform claim may occur either before or after the contract has been entered into. In this case, the court held that Donald concealed the defective condition of the foundation sill, and that his concealment constituted a fraud that induced Buki and Marsho to perform the contract by proceeding to closing.

Whether the fraud induced the purchaser to enter the contract in the first place, or to follow through with performance of the contract, the result is the same. The entire contract is rendered voidable at the demand of the defrauded party. In this case, Buki and Marsho demanded rescission of the contract, which voided the contract. Because the contract was void, Donald could not point to the disclaimer statement included in the contract to rely on the "as is" language. The disclaimer was wiped out by the rescission along with the rest of the contract. The Supreme Court thus upheld the circuit court in granting rescission based on Donald's fraudulent concealment of the damage to the foundation sill.

In addition to the fraud issue, the court addressed several other issues in this complex case, including the appropriateness of awarding consequential damages and attorney's fees, and whether Nancy should be liable along with Donald for the fraudulent concealment. Those issues are beyond the scope of this column. In the meantime, REALTORS and their seller clients need to understand that a disclaimer statement does not provide an impenetrable shield against claims for fraudulent concealment of defects in a property.

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