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Larson Real Estate File

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BANFORD CITY ORDINANCES

Chapter 11, Zoning

§ 11.50 Historic Districts

The following sections of the City of Banford, Franklin, are hereby designated as historic districts: Groveside, Terrapin Heights, and Sherwood. Because the Banford City Council has determined that safeguarding the historic character of these neighborhoods is integral to the quality of life and cultural heritage of Banford, no substantial changes to the exteriors of properties located within one of these designated historic districts may be made without prior approval of the Neighborhood Preservation Committee, in addition to the applicable permits from the Building and Zoning Board. This ordinance does not pertain to landscaping or the installation of satellite dishes, provided that the latter do not exceed 30" in diameter and are not placed on the side of the structure facing the street.

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FRANKLIN REAL PROPERTY LAW

§ 350 Residential Real Property - Required Disclosures

(a) Applicability. This section applies to sales of Franklin residential real estate having no less than one and no more than four dwelling units, whether or not the sale is completed with the assistance of a licensed real estate broker. This section does not apply to: eminent domain proceedings, transfers by fiduciaries as part of administering estates, sales pursuant to court orders, and bankruptcy proceedings.

(b) With respect to sales of real property under this section, the seller of the residential real property shall furnish to the buyer a disclosure statement disclosing known material facts relating to the property and its environs.

(c) The disclosure statement must be delivered to a buyer prior to entering into a real estate contract of sale.

(d) Failure by the seller to provide such a disclosure statement to a buyer does not void the purchase contract or create any defect of title. However, a seller who fails to perform any duty prescribed by any provision of this section may be liable for actual damages suffered as a result of conditions existing in the property or its environs, as of the date of the execution of the real estate purchase contract, in addition to reasonable attorney's fees and court costs.

(e) Nothing contained within this section shall prevent a buyer from pursuing any remedies at law or equity otherwise available against a seller in the event of a seller's intentional misrepresentation and/or fraudulent concealment of the condition of the subject property or its environs.

(f) This section shall take effect on March 31, 2005, and shall apply to real estate transactions entered into on or after such date.

Hernandez v. Comfrey

Franklin Supreme Court (2002)

Plaintiff Hernandez cried foul when the home he purchased from defendants proved to have a leaking basement and wood rot in its structural supports. The issue before us is whether Hernandez's claim for intentional misrepresentation raised genuine issues of triable fact. The trial court awarded summary judgment to the sellers, the Comfreys. The court of appeal affirmed that decision. For the reasons set forth below, we affirm in turn.

Hernandez argues that the Comfreys intentionally misrepresented the true condition of the property and that he would not have purchased the property but for their misrepresentations.

Hernandez viewed the house twice and states that the Comfreys told him at the time that the house was in excellent shape. Hernandez contends that he asked about the basement and the Comfreys responded that it was "fine." Five months after closing, following a torrential rain, the basement flooded, causing substantial damage. A professional inspection thereafter found that the drainage system around the house was defective and also that there was extensive wood rot in load-bearing supports. This litigation followed.

It is the buyer's responsibility to exercise due diligence by inspecting real property prior to purchase. Franklin adheres to the *caveat emptor* (buyer beware) doctrine in sales of residential real estate. Sellers have no affirmative obligation to volunteer information about defective conditions in the property being offered for sale. When, however, a seller intentionally misrepresents or fraudulently conceals material facts regarding a property's condition or its environs, a buyer is entitled to recover actual damages, and, in cases where the concealment or misrepresentation has severe financial or safety implications, punitive damages from the seller.

To prevail in an action alleging intentional misrepresentation, a plaintiff must establish the following: (1) misrepresentation of a material fact; (2) justifiable reliance; and (3) injury.[1] Materiality is an objective standard, looking to whether the purported fact would affect the decision making of the reasonable home buyer. Minor or de minimis defects do not qualify as material facts, even if such items may be of interest to the buyer.

It is not disputed here that the wood rot and the defective drainage system are material facts that were not disclosed to Hernandez. Moreover, Hernandez contends, the statements describing the property in the sales listing and the Comfreys' assurances that the house was in

[1]Similarly, to prevail in an action for fraudulent concealment a plaintiff must establish: (1) concealment of a material fact with the intent to mislead; (2) justifiable reliance; and (3) injury. *See Fowles v. Hutchison* (Franklin Ct. App. 1989) (fraudulent concealment found where seller placed heavy furniture over hole in floor).

"excellent shape" constitute intentional misrepresentations. Therefore, Hernandez concludes, the Comfreys are liable for damages resulting from the failed drainage system and wood rot, as well as for the inconsistencies between the sales listing and the actual condition of the property.

First, we note that the Comfreys' statements that the house was in "excellent shape" are merely opinion, and will not support an intentional misrepresentation claim. A certain amount of "puffery" or sales talk is to be expected in any sales transaction. The sellers' nonspecific statements regarding the desirability of the property do not rise to the level of actionable misrepresentations.

The *caveat emptor* doctrine does not protect sellers who lie in response to a direct question about a particular feature or condition of the property. In order to demonstrate intentional misrepresentation, however, the plaintiff must show knowledge on the part of the seller. Here, there was no evidence that the Comfreys knew of material defects in the drainage system or wood supports. Because the Comfreys did not know of these structural problems with their house, they could not have intentionally misrepresented them.

Because Hernandez was concerned that the Comfreys would receive competing offers in a hot real estate market, he contends that an independent inspection was not feasible given the pressure to close on the house. He submits that he had no choice but to rely upon the Comfreys' assurances regarding the house's condition.

This rationale falls far short of a showing of justifiable reliance. It remains the buyer's responsibility, personally or through an agent, to act with due diligence and inspect the premises to his or her satisfaction. The record is devoid of any evidence that Hernandez was denied the opportunity to have the property professionally inspected before he bought it.

Although no claim of fraudulent concealment is raised by Hernandez, we note that there is nothing to suggest that the Comfreys fraudulently concealed the defects alleged in the property. Nor is this a situation where a seller's attempts to repair a problem might be interpreted as fraudulent concealment. Such cases raise factual disputes regarding the seller's intent that are not present in the record before us.

Accordingly, the order for summary judgment in favor of the Comfreys is affirmed.

Wallen v. Daniels

Franklin Court of Appeal (2006)

We address the extent of disclosure that a real estate seller must provide to a buyer. Oscar and Peg Wallen purchased a "fixer-upper" home in Verdes Canyon. Shortly after moving in, they applied for a building permit to add a second story. It was at this point that the Wallens learned that the addition had to comply with the county's strict building code for structures that, like their new home, were located in an earthquake-prone area. Consequently, the Wallens' addition would cost fifty percent more than a similar addition to a house not subject to "earthquake-proof" building codes. The Wallens sued Frank Daniels, the former owner, for failure to comply with § 350 of the Franklin Real Property Law and for fraudulent concealment in the sale of the property, alleging that Daniels had failed to inform them that, because of the house's location, improvements to the structure were not economically feasible.

The trial court granted summary judgment to the Wallens on both claims, holding that Daniels, the seller, failed to disclose a material fact affecting the property. Daniels appeals.

Until recently, Franklin followed a strict *caveat emptor* doctrine in real estate transactions. Under that doctrine, it fell to the buyer to detect any material facts regarding a property before purchasing it. The seller was prohibited only from engaging in fraudulent concealment and intentional misrepresentations. There was no affirmative duty to disclose information about the property. *Hernandez v. Comfrey* (Franklin Sup. Ct. 2002).

In 2005, however, the Franklin Legislature enacted § 350 of the Real Property Law, "Residential Real Property - Required Disclosures." Under § 350, it is now the seller's responsibility to disclose material facts known to the seller about the property itself and its environs to potential buyers. The duty to buyers created by § 350, however, does not go so far as to require that sellers inspect their properties for latent material conditions or defects to disclose.

Failure to comply with § 350 may give rise to a statutory claim for failure to disclose. For example, in *Harris v. Roth* (Franklin Ct. App. 2005), a buyer was awarded damages when the seller failed to note in the § 350 disclosure statement that the property was a half mile from a toxic waste dump that had been abandoned ten years before but was contaminating the groundwater.

Nondisclosure may result in an award for actual damages, that is, the cost to repair the property so that it conforms to its condition as represented by the seller at the time of sale with respect to those defects of which the seller had actual knowledge. When repair is not possible, damages may be measured by the difference in value between the property as represented in the disclosure statement and an independent

appraisal that reflects the undisclosed material fact. *See Harris.*

In addition to liability for failure to disclose under § 350, where a seller has fraudulently concealed or intentionally misrepresented a defect, the seller remains subject to liability based on the common law.

Applying the new law, the trial court held that the increased cost of construction on properties zoned "fault area" was a material fact that § 350 obligated the seller to disclose. It awarded damages to the Wallens equal to the added cost of building in compliance with earthquake-zone construction standards. We conclude that the trial court misconstrued § 350.

The Wallens concede that before bidding on the house, Daniels provided them with a "Real Property Disclosure Statement," noting that the property was zoned as "Residential (fault area)." Nevertheless, they argue that Daniels was required to disclose that any major improvements to the house, given its location in a fault area, would be prohibitively expensive.

We conclude that § 350 does not render a seller liable for nondisclosure of facts that a buyer could have discovered with reasonable effort. A buyer has a responsibility to exercise due diligence in inspecting property before purchasing it. *See Hernandez.* Although the claim in *Hernandez* was for intentional misrepresentation, we conclude that the duty the court imposed on buyers to inspect real property prior to purchase applies equally to claims alleging failure to disclose under § 350.

We are not persuaded that the high price of remodeling according to code is a material fact. A material fact is one relating to the quality of the property which might decrease its value. While a property's classification within a particular zoning class is material, the responsibility for discovering the ramifications of the classification lies with the buyer because the relevant information is freely available and a matter of public record.

The Wallens knew when they bought the house that it was zoned "Residential (fault area)." They were therefore on notice that building codes could impact home improvement plans in the fault area. The actual impact that such ordinances would have on their plans and their pocketbook is information readily available. We will not burden the seller to research local building codes and advise a buyer as to their effect on the realty when the buyer has already been accurately informed as to the zoning.

Because it was the Wallens' responsibility to discover the legal and financial ramifications of the property's zoning, we conclude that the Wallens cannot sustain a claim for fraudulent concealment. *See Hernandez.*

Reversed.