BUYER BEWARE!
Undisclosed defects in resale homes are a prevalent problem in today’s real estate market

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It goes without saying that the purchase of a home will be the most significant financial commitment most people will ever make. The emotions of a purchaser, especially the unseasoned variety, will run the gamut from excitement, to anticipation to stress and nervousness. Two common goals thread through every residential home purchase regardless of price-point or geographic location: 1) To pay a fair price; and 2) To get what you pay for.

But just when the above-mentioned objectives seem to have been met, the furniture is moved in, and the stress over the financial leap of faith has subsided, often, defects in the home are discovered that were not noticed prior to the purchase and certainly not mentioned by the vendor who was eager to sell. There might be a crack in the foundation that leads to basement flooding, a poor shingling job that has lead to a leak in the roof, and hidden mold due to unwanted moisture.

Depending on the severity of the discovered defect, the cost of remediation can often be overwhelming for the purchaser, and not something that was budgeted for at the outset. Naturally, if the defect was something known by the vendor and not disclosed prior to the purchase and sale, the purchaser may commence legal action to recoup the costs of remediation and the related, foreseeable damages suffered as a result of the failure to disclose.

Included below are some of the terms and tactics used in dealing with claims for undisclosed defects in resale homes.

PATENT vs. LATENT

Undisclosed defects can be broken down into two categories: Patent and Latent.

A patent defect, by definition, is an obvious flaw that would be discovered upon a reasonable inspection of the home. For instance, a giant hole in the family room wall that is plainly visible is a patent defect. It is assumed that a prospective buyer can observe such an apparent defect and raise related concerns as they see fit.
As such, the costs related to remediation of patent defects are often not recoverable depending on how strictly the Court applies the legal doctrine of *Caveat Emptor.*

A true latent defect is one that was not known to either the vendor or the purchaser at the time of sale, and, as a result, was not disclosed. If no evidence can be gathered to support a theory that the vendor had knowledge of a defect and deliberately failed to disclose it, then the vendor is not liable for the resulting costs of repairs.

However, liability for the vendor becomes an issue when it can be proven that a defect was known to the vendor but could not have been discovered by the purchaser, even upon a reasonable inspection of the property. In essence, the defect can be said to have been patent (or obvious) to the vendor but latent (or hidden) to the purchaser.

Further aggravating circumstances might see the vendor actively attempt to conceal a defect from the purchaser (i.e. hanging a large picture to cover that giant hole in the family room wall).

Most often, such a fact pattern will lead to the issuance of a claim against the vendor for negligent misrepresentation with the goal of being reimbursed for damages as a result of the non-disclosure.

**NEGLIGENCE MISREPRESENTATION**

A claim for negligent misrepresentation will be successful if the following test is met:

1) That there was a duty of care between the parties based on a “special relationship” between the vendor and purchaser;
2) The representation must be untrue, inaccurate or misleading;
3) The vendor must have acted negligently in making the representation;
4) The purchaser must have relied in a reasonable manner on the negligent misrepresentation;
5) The reliance must have been detrimental to the purchaser in the sense that damages resulted.

**LIABILITY OF HOME INSPECTORS**

It is commonplace and advisable that the purchaser in a resale home transaction hire a certified home inspector to inspect the premises. It is valuable, if for nothing other than peace of mind, to have a professional examine the property for defects that a lay person may not notice.

Inevitably, when defects which were not identified by a hired inspector come to light shortly after move-in day, the concept of negligence is revisited. The question becomes, "Was the home inspector negligent in his/her inspection of the property in failing to identify the defect?"

In the normal course of business, a home inspector will have the purchaser sign a waiver releasing the inspector from future claims in relation to his/her examination of the
property. Needless to say, such a release is meaningless in the event of gross negligence that is out of touch with industry standards.

In deciding on the appropriateness of joining the home inspector to the action as a co-defendant, lawyers and purchasers must understand that, while home inspectors are hired for their expertise and critical eyes, they are also quite limited in how thoroughly their inspections may probe. In gauging the validity of claim for negligence against the home inspector, it is helpful to refer to the Ontario Association of Home Inspectors Standards of Practice.

LIABILITY OF REAL ESTATE AGENTS

With the Ontario Court of Appeal’s recent decision in Krawchuck v. Scherbak et al. 2011 ONCA 352 liability may also extend to the vendor’s real estate agent. In its decision, the ONCA found that the agent’s lack of diligence in reconciling misleading statements made in the Property Seller Information Statement (PSIS) amounted to negligence.

The agent in this particular case was aware that the home had plumbing issues and settling problems dating back some seventeen years. The vendor failed to disclose said issues in the PSIS and the agent, having knowledge, failed to make the purchaser aware of the defects prior to the sale.

The ONCA found that 50% of the fault belonged to the vendor and the remaining 50% belonged to the agent for failing to warn the vendors of the implications of false statements might have, as well as failing to bring the unspoken issues to the attention of the purchaser.

PROPERTY SELLER INFORMATION STATEMENTS

Finally, the aforementioned Property Seller Information Statement is not a compulsory part of purchase and sale agreements in Ontario. As such, due to fear of the implications that any inconsistencies may have, deliberate or otherwise, many agents are steering clear of this form.

While the PSIS is not mandatory, the use of the form as evidence in an action for negligent misrepresentation can be extremely helpful for the plaintiff’s lawyer as it will crystallize the vendor’s deceit or attempt to conceal defects that were known at the time of sale and not disclosed.

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