

Buyer Beware – Residential Versus Commercial Property

By: James W. Mallonee

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It is well known that a buyer of Commercial Property is on notice to investigate the property being purchased for any and all defects. That does not mean that if the Seller prevents the buyer from learning the facts of the property or creates an artifice or trick in such purchase that liability for damages could not be applied. Does this same standard apply to residential property?

For residential property, Florida's courts have applied the requirement that if a material fact is not disclosed, the buyer would be in a position to seek damages or rescission of the sale. Most material facts involve leaking roofs, flooding, septic overflow, termite infestation and plumbing defects.

In the commercial property world, the above material facts are the responsibility of the buyer to discover unless the seller deliberately hides or prevents discovery of such defects. What about deception involving the value of commercial property? In a recent case, a buyer purchased commercial property but failed to fully determine what it would take to rehabilitate it. The buyer claimed that he was not fully apprised of the entire premises and that the value of the property as projected to him amounted to fraud. The appellate court determined that the buyer had full access to the property and was under a duty to investigate the premises for purposes of rehabilitation. The fact that he failed to fully consider the full value to repair and rehabilitate the property was not the seller's responsibility to assist in calculating such repairs. The court ultimately ruled there was no deception.

In the residential area, the seller must disclose material defects that could affect the value of the property being purchased. This is also true for those properties that are sold "AS IS." If you are aware of a material defect, failure to disclose or at least point it out is asking for trouble. In a case involving termites, the seller had the property tented and supposedly cleared of the termite colony. The buyer purchased, but was not informed of the previous termite infestation. The termites returned and the buyer found out from the pest control company that the property had been subject to termites. The buyer sued and was awarded damages for the loss in value of the property including consequential damages for the cost to tent the house and having to seek alternative living conditions during the tenting.

In another case, the seller failed to disclose that the land upon which the residence sat occasionally flooded. This only happened during the rainy season. The flooding did not engulf the house, but did overrun a large majority of the land. The source of the flooding came from a small creek that crossed between the seller and neighbor's property and which appeared on the buyer's survey. Unfortunately, the creek could not handle the large flow of water during the rainy season and the land the buyer purchased contained high concentrations of clay which prevented percolation of the excess water. The buyer sued and won because no disclosure was provided regarding the potential for flooding and it prevented the buyer from using the land which was viewed as affecting the value of the property.

In a more recent case, a buyer purchased property and had it inspected. In particular the septic system was inspected and nothing was found to be defective. The buyer took possession of the property and upon doing their first two loads of wash and bathing, the septic system overflowed in the yard and backed up into the house. It was discovered that the seller knew of the septic problem, having had the septic tank pumped out twice in the same year the property was being sold. The seller had to have the septic system replaced including the drain field. The buyer sued for damages and failure to disclose the defective septic system. The seller argued that the buyer had the septic system inspected and it passed; moreover, the sale was an “AS IS” sale and disclosure was not required.

The court ruled in favor of the buyer, citing that the septic system is a major part of the real estate being sold. Thus, its defectiveness created a material reduction in the value of the property. The buyer was awarded damages (the value of a replacement septic system) and consequential damages for having to vacate the property while the septic system was being replaced.

As you can see, there is disparity between disclosure of commercial and residential defects to a buyer. If you are a seller, the key for commercial property is not to employ some artifice or trick to prevent the buyer from making an independent discovery of the property being sold; 2) where the buyer does not have an equal opportunity to become apprised of facts involving such commercial property; and, 3) where the seller discloses facts but not the whole truth. In a residential sale, disclosure of a material defect must be disclosed, especially if it would affect the value of the property.

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