



Alerts

Sellers' Real Estate Agent Did Not Breach Duty to Disclose Existence of Mold to Buyers

January 13, 2016

Professional Lines Alert

Watterud v. Gilbraith, No. DA 15-0234 (Mont. Oct. 6, 2015)

Home sellers hired defendant real estate agent to sell their home and entered into an agreement with plaintiffs purchasers. The agreement included property disclosure statements advising of a flood in the basement in 2005 that had been repaired in 2008 and that the home had not been tested or treated for mold. No other representations were made about the presence or absence of mold and under the contract it was the buyers' responsibility to obtain mold inspection by a qualified inspector. Plaintiffs decided not to obtain their own mold inspection.

After the closing, plaintiffs became ill and discovered mold growing in the basement. Plaintiffs sued the sellers, the sellers' real estate agent and their home inspector for negligence. Plaintiffs maintained that the sellers' agent was obligated to discover: adverse material facts about the property (including the existence of mold in the basement) and the details of any remediation efforts, and to then disclose them to plaintiffs. Plaintiffs attempted to establish a common duty to discover adverse material facts based on the Realtor Code of Ethics and through another realtor's testimony. The sellers' agent moved for summary judgment, arguing that plaintiffs' negligence claim was premised upon inspection and discovery duties that did not exist as a matter of law. The trial court granted summary judgment for the sellers' agent and the Supreme Court of Montana affirmed.

Question Before the Court

Did the real estate agent have a duty to discover adverse material facts about the listed property and disclose them to the sellers?

No. The Court held that Montana Code § 37-51-313(1) abolished all common law duties, limited the duty of a sellers' agent to disclose only known adverse material facts and affirmed that the sellers' agent is not required to conduct an inspection or to verify statements made by the seller. Plaintiffs argued that Subsection 13 of the same Code section — which states that "a licensee shall endeavor to ascertain all pertinent facts concerning each property in any transaction in which the licensee acts so that the licensee may fulfill the obligations to avoid error, exaggeration, misrepresentation or concealment of pertinent facts" — established an affirmative duty on the part of the sellers'

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agent to discover adverse material facts, such as the existence of mold, and that the sellers had attempted to remediate the flood damage themselves. The Supreme Court rejected that argument and interpreted subsection 13 as not imposing such a duty to discover and disclose on a seller's agent as a matter of law. The Court found that the sellers' agent had complied with this Code section by swearing under oath that she was not aware of any material facts concerning mold in the home and by submission of mold disclosure form stating that the sellers' agent could not represent or warrant the absence of mold. The sellers' agent had no duty to go beyond those representations and inspect the property to independently discover adverse material facts about the property or verify the sellers' statements.

What the Court's Decision Means for Practitioners

This Court declined to interpret the conflicting language in Subsection 13 as imposing a duty on a seller's agent to independently discover adverse material facts and communicate them to the buyers. The purpose of these Code provisions was to abolish common law duties and limit the liability of a sellers' agent for just this type of claim by unhappy buyers who had declined to exercise their contractual right to commission their own pre-closing mold inspection.

For more information, please contact your regular [Hinshaw attorney](#).

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