Summer 2021

LAW CURRENTS An informational newsletter from
Richard A. Klass, Esq.

# Caveat Emptor:

## *"All Houses Wherein Men Have Lived and Died Are Haunted Houses."*

***— Henry Wadsworth Longfellow (1807-1882)***

The buyer of a Brooklyn building sued the seller for fraud and breach of contract after the closing of title. The buyer made several claims against the seller, including that the roof was leaking, it wasn't new, and the construction and renovations performed on the building were shoddy and done only to quickly "flip" the property. The buyer also claimed that the tenant's signed estoppel certificate was false. The buyer's attorney claimed that no ordinary amount of due diligence would have revealed that the roof was leaking; only destructive testing done prior to closing would have shown water intrusion or mold. The seller's position was that any alleged defects in connection with the sale of the building could have been raised before the closing of title. Once the closing took place, any alleged defects were waived; the representations in the contract of sale merged with the transfer of title.

### *Disclaimers in the Contract of Sale*

In the contract of sale between the seller and buyer, there were numerous clauses that contained specific disclaimers.[1] Among these disclaimers was the following one (which is fairly typical in real estate contracts):

> The Purchaser acknowledges that they have physically inspected the Premises prior to signing this Contract and are aware of the physical condition of the Premises and agree to take the Premises in "AS IS CONDITION" in its present physical condition. Purchaser acknowledges that the Seller has made no representation or warranties and concerning the physical condition of the Premises other than those that are specifically set forth herein.

### *Doctrine of Caveat Emptor – Buyer Beware!*

The seller retained **Richard A. Klass, Esq.,** *Your Court Street Lawyer,* to defend the lawsuit brought by the buyer. A motion to dismiss the case was filed based on several legal arguments, first and foremost being the defense of *caveat emptor* (meaning that the buyer was responsible for checking the quality of his purchase).

New York adheres to the *caveat emptor* doctrine and imposes no duty on the seller to disclose any information concerning

the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment. *Platzman v. Morris*, 283 AD2d 561 [2 Dept. 2001]. As held by the Second Department in *London v. Courduff*, 141 AD2d 803 [2d Dept. 1988], "The buyer has the duty to satisfy himself as to the quality of his bargain pursuant to the doctrine of caveat emptor, which in New York State still applies to real estate transactions."

As held in *Simone v Homecheck Real Estate Services, Inc*., 42 AD3d 518, 521 [2d Dept 2007], "Where the contract specifically disclaims the existence of warranties or representations, a cause of action alleging breach of contract based on such a warranty or representation cannot be maintained (*see Bedowitz v Farrell Dev. Co.,* 289 AD2d 432 [2001]). Here, the contract of sale specifically provided that the premises had been inspected by the buyer and was being sold 'as is' without warranty as to condition, express or implied. Furthermore, a specific merger clause is contained in the rider to the contract and precludes the buyer from claiming that he relied on any of the sellers' alleged misrepresentations (*see London v Courduff, supra*). In addition, because title to the property had closed and the deed was delivered, the doctrine of merger extinguished any claim the buyer may have had regarding the contract of sale (*see Ka Foon Lo v Curis*, 29 AD3d 525 [2006]). Hence, the cause of action to recover for breach of contract cannot be maintained and should have been dismissed pursuant to CPLR 3211 (a) (7)."

Where the contract of sale, as in this case, contains a provision that the plaintiff is fully aware of the condition of the premises based upon his own inspection and is not relying upon any representations of the seller, any subsequent action for fraud is barred. *Daly v. Kochanowicz*, 67 AD3d 78 [2 Dept. 2009]; *Platzman v. Morris*, 283 AD2d 561, 563 [2 Dept. 2001] ("Since the contract contained a provision that the plaintiffs were fully aware of the condition of the premises based upon their own inspection and investigation, and not based upon any information or representations, written or oral, made by the sellers, the plaintiffs cannot claim fraud.").

## *No 'latent defect' exception to the merger doctrine*

The buyer argued in opposition to the motion that the merger doctrine did not apply to latent defects (which may only be discovered after occupancy of the premises). He incorrectly cited *Fehling v Wicks*, 179 Misc 2d 1041 [App Term 1999] as being a decision from the Second Department. It is actually a decision of the Appellate Term, Second Department. More importantly, the *Fehling v Wicks* decision has been rejected by the Appellate Divisions.

In *Arnold v Wilkins*, 61 AD3d 1236, 1237 [3d Dept 2009], the court held: "Plaintiffs alternatively contend that the merger doctrine does not apply here because the faulty sewage system was a 'latent defect.' In support, they rely on *Fehling v. Wicks*, 179 Misc.2d 1041, 687 N.Y.S.2d 868 [1999] for the proposition that 'where the purchaser discovers latent defects which are discoverable only after the purchaser occupies the premises,' the merger doctrine is inapplicable (id. at 1042, 687 N.Y.S.2d 868). Importantly, however, the purported 'latent defect' exception to the merger doctrine has not been adopted by the Appellate Divisions or the Court of Appeals in these circumstances."

In *TIAA Glob. Investments, LLC v One Astoria Sq. LLC*, 127 AD3d 75, 85 [1st Dept 2015], the court held (emphasis added):

> The merger doctrine in a real estate transaction provides that once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract (*Ka Foon Lo v. Curis,* 29 A.D.3d 525, 526, 815 N.Y.S.2d 131 [2d Dept.2006] ). The only exception to this rule is where the parties clearly intended that the particular provision of the contract supporting the claim would survive the delivery of the deed (*id.*). Further, an "as is" clause in a contract to sell real property will ordinarily bar a claim for breach of contract (*see Board of Mgrs. of the Chelsea 19 Condominium v. Chelsea 19 Assoc.,* 73 A.D.3d 581, 581, 905 N.Y.S.2d 8 [1st Dept.2010] ). Plaintiff argues that the merger doctrine does not apply here because of the latent nature of the defects at issue. It further contends that its allegations of deceptive behavior on Seller's part to mask the true condition of the building render the "as is" clause inoperable.
>
> **Although plaintiff cites trial court opinions identifying a latency exception to the merger doctrine, the concept has not been adopted by any of the Appellate Divisions or by the Court of Appeals (see *Arnold v. Wilkins*, 61 A.D.3d 1236, 1237, 876 N.Y.S.2d 780 [3d Dept.2009]), and we are not adopting it here.**

It was urged that the seller was bound to the decisions of the Appellate Divisions, as the Second Department has not opined on the issue yet. See, *Summit Const. Services Group, Inc. v Act Abatement, LLC*, 34 Misc 3d 823, 831 [Sup Ct 2011] ("The general rule is that trial courts must follow applicable decisions of the Appellate Division in their Department. If there is no decision from the Appellate Division in the Department in which the trial court is located, the trial court must follow the decision of another Department. This is because the Appellate Division is a single statewide court divided into departments for administrative convenience.")

## *Seller did not engage in active concealment*

The buyer's attorney also argued that there was active concealment of defects by the seller. The complaint failed to make any allegation that the buyer was somehow thwarted by the seller from conducting any inspections or due diligence which could have discovered the purported defects. It was

necessary for the buyer to allege material facts as essential allegations that the seller thwarted any efforts on his part to perform his due diligence. *See, Jablonski v Rapalje*, 14 AD3d 484, 485 [2d Dept 2005] ("To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his responsibilities fixed by the doctrine of caveat emptor.")

In *Laxer v Edelman*, 75 AD3d 584, 586 [2d Dept 2010], the Second Department held:

> New York adheres to the doctrine of caveat emptor and imposes no liability on a seller [or the seller's agent] for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller['s agent] which constitutes active concealment" of a defective condition (*Simone v Homecheck Real Estate Servs., Inc*., 42 AD3d 518, 520 [2007]; *see Daly v Kochanowicz*, 67 AD3d 78, 87 [2009]; cf. Real Property Law §§ 462, 465). Moreover, even proof of active concealment will not suffice when the plaintiff should have known of the defect (*see Richardson v United Funding, Inc*., 16 AD3d 570, 571 [2005]). A plaintiff seeking to recover damages for active concealment must show that the defendant "thwarted" the plaintiff's efforts to fulfill his or her responsibilities imposed by the doctrine of caveat emptor (*Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 245 [2009] [internal quotation marks omitted]; *see Rozen v 7 Calf Cr., LLC*, 52 AD3d 590, 593 [2008]).

Based on the arguments presented, the judge granted the motion to dismiss. The judge held that the "defendants have established that the merger doctrine bars any claims arising out of the contract, requiring dismissal of the plaintiff's cause of action for breach of contract. In a real estate transaction, the merger doctrine provides that, once title to the property closed and the deed was delivered, any claims that the plaintiff might have had arising from the contract of sale were extinguished."

*— Richard A. Klass, Esq.*

*Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court St., 28th Fl., Brooklyn, NY. He may be reached at (718) COURT•ST or RichKlass@courtstreetlaw.com with questions. Prior results do not guarantee a similar outcome.*



Richard A. Klass, Esq.
Your Court Street Lawyer℠

**Richard A. Klass, Esq.**
Principal
richklass@courtstreetlaw.com

**Hillary F. Schultz, Esq.**
Associate
hschultz@courtstreetlaw.com

**Eucline Spencer**
Paralegal
euclinespencer@courtstreetlaw.com

**Steven D. Cohn, Esq.**, Of Counsel

**Stefano A. Filippazzo, Esq.**, Of Counsel

**Address**
16 Court Street, 28th Floor
Brooklyn NY 11241

**Phone**
(718) COURT•ST
(718) 643-6063

**Fax**
(718) 643-9788

**Website**
www.courtstreetlaw.com

## *End Notes*

[1] Section 11(c) stated: Except as otherwise expressly set forth in this contract, none of Seller's covenants, representations, warranties or other obligations contained in this contract shall survive Closing.

Section 12 stated: **Condition of Property**. Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all property included in this sale, based on Purchaser's own inspection and investigation and not upon any information, data, statements or representations, written or oral, as to the physical condition, state of repair, use, cost or operation or any other matter related to the Premises or the other property included in the sale, given or made by Seller or its representatives, and shall accept the same "as is" except as set forth herein in their present condition and state of repair; subject to reasonable use, wear, tear and natural deterioration between the date hereof and the date of Closing (except as otherwise set forth in paragraph 16(f), without any reduction in the purchase price or claim of any kind for any change in such condition by reason thereof subsequent to the date of this contract. Purchaser and its authorized representatives shall have the right, at reasonable times and upon reasonable notice (by telephone or otherwise) to Seller, to inspect the Premises before Closing.

Section 28 stated: **Miscellaneous**. (a) All prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this contract.

Rider at Section 12 stated: **Tenancies**. The purchaser herein agrees to take title to the Premises, SUBJECT TO the following tenancies: NONE. PURCHASER SHALL RECEIVE A CREDIT OF $5,000 FROM SELLER FOR THE LOWER RENT AMOUNTS & SECURITY DEPOSITS.

Rider at Section 15 stated: **No representations by Seller**. Seller makes no warranties or representations concerning the physical condition, work repairs, renovations, or improvements, if any, income, expenses for operation, taxes or fitness of the Premises except as specifically set forth herein. The Purchaser acknowledges that they have physically inspected the Premises prior to signing this Contract and are aware of the physical condition of the Premises and agree to take the Premises in "AS IS CONDITION" in its present physical condition. Purchaser acknowledges that the Seller has made no representation or warranties and concerning the physical condition of the Premises other than those that are specifically set forth herein. The Seller shall not be bound by or liable for any representations, oral or written, pertaining to the Premises, furnished or made by any real estate broker or salesperson, agent or employee, servant or other, unless same is specifically set forth herein. Notwithstanding, none of the representations, warranties, covenants or other obligations of SELLERS hereunder shall survive the CLOSING, except as expressly provided herein. Acceptance of the deed by PURCHASERS shall be deemed full and complete performance and discharge of every agreement and obligation of SELLERS hereunder, except those, if any, which expressly are stated herein to survive the CLOSING.

Rider at Section 22 stated: **Delivery and Acceptance of the Deed**. The delivery and acceptance of the deed at closing by the Purchaser shall constitute full compliance by the Seller of all of the terms and conditions of this Contract, and none of the terms and conditions of this Contract shall survive the delivery of the deed unless specifically stated otherwise.

Rider at Section 32 stated: **Entire Understanding**. This agreement constitutes the entire Contract between the parties. It may not be modified orally or in any other manner except by an agreement in writing signed by the parties hereto.

Rider at Section 38 stated: **Property Condition Disclosure Credit**. Seller will not provide to the Purchaser the Property Condition Disclosure Statement under Article 14 of the New York Real Property Law. The Purchaser agrees to the $500.00 monetary credit as set forth in section 465(a) of the Property Condition Disclosure Act. By the acceptance of a $500.00 credit, the purchaser waives any failure or misrepresentation whether of not knowing or willful on the part of the Seller. The purchase price reflected herein is net of the $500.00 given by Seller to Purchaser as a credit in lieu of Purchasers receiving a property condition disclosure statement from Sellers.