

## SELLING PROPERTY "AS IS" HAS A LIMITATION

By Judith I. Johannsen

Suppose a buyer named Elmer Fudd entered into a Purchase and Sale Agreement with a seller who discloses that the property, being sold "As Is", is rabbit free. Fudd, who hates wascally wabbits and wants none on his property, relies on the seller's rabbit-free disclosure and buys the property. However, after he buys the property, Fudd is outwaged to discover that the property is home to colonies of wascally wabbits.

Fudd sues the seller based on negligent misrepresentation arguing that the seller knew that there were bountiful bunnies in his yard, but chose to conceal that fact in hope that Fudd would rely on his misrepresentation and buy the property. Fudd asks the court for damages in the amount of the money he spent fixing the wabbit pwoblem.

The seller argues that Fudd has no one to blame but himself claiming that Fudd was negligent in inspecting the property because he did not dig up the lawn searching for wabbit holes and, as everyone knows, under "caveat emptor", buyer beware. Besides, their contract included the "As Is" language, meaning Fudd takes the property as he finds it.

Sound far-fetched? A similar set of facts and arguments formed the basis of a lawsuit brought by a buyer against a seller in Stamford Superior Court.

A buyer moved into his home and discovered that, contrary to the seller's representations in the state-mandated Residential Property Condition Disclosure Report (RPCDR), there was plywood flooring, not hardwood flooring, under the wall-to-wall carpeting in the living and dining rooms and there was a significant water drainage problem in the basement.

The buyer wondered if the seller knew about the defects (and how could he not?) and simply "forgot" to disclose them on the RPCDR and if that "As Is" language in the Purchase and Sale Agreement meant that the seller couldn't be held responsible for the now very obvious misrepresentations.

The buyer claimed that the seller's representations about the flooring and drainage were negligent misrepresentations because the seller had the means of knowing, ought to have known, or had a duty of knowing the truth, but he concealed the information.

The seller maintained that if the buyer did not discover the plywood flooring and/or the basement's poor drainage that was the buyer's own fault as he was negligent in not inspecting the premises more thoroughly (seller suggested the buyer should have looked under the wall-to-wall carpeting). Furthermore, seller argued that the lawsuit should be thrown out because the concept "caveat emptor" made not discovering the defects the buyer's fault the buyer took the property in its "As Is" condition.

The court stated that in an action based on negligent misrepresentation, the buyer only has to prove that the seller made a representation that contained false information and that the buyer reasonably relied on that representation.

The evidence at trial revealed that the seller knew that the living room and dining room carpeting covered plywood flooring, not hardwood, and that there were drainage issues in the basement, but that he purposefully chose to conceal the defects from the buyer, letting the buyer rely on the misrepresentations of hardwood flooring throughout and no drainage problems.

The court believed the buyer when he testified that he relied on the seller's disclosure form's representations as fact, leaving him without knowledge about the defects and held that an "As Is" disclaimer in a real estate Purchase and Sale Agreement would negate a negligent misrepresentation claim against a seller *only if the buyer had knowledge of the alleged defect*. As the buyer was totally unaware that the living and dining room floors were plywood, not hardwood, and the basement suffered drainage problems, the court decided in favor of the buyer and ordered the seller to reimburse the buyer for his cost of having hardwood floors installed and the property's entire drainage system replaced.

The moral of both the Fudd story and the actual case is that sellers should not rely on the "As Is" clause in their Purchase and Sale Agreements for protection as they conceal defects and make less than truthful disclosures of which their buyers are unaware.

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