Calemine v Samuelson

2/17

Real Estate; Seller's duty to disclose; Prior litigation

Samuelson and his wife became the initial owners of a three story condominium in Woodland Hills. The development was known as Jared Court. The condo had a lower level with a garage and a bonus room. He and his wife lived there until they sold it to the plaintiff in 2002.

Between 1983 and 1999, the lower level of the project was subject to periodic water intrusion and flooding. The Jared Court Homeowners Association sued the developer in 1986, and Samuelson sued as an individual unit owner, for design and construction defects. In 1992, the HOA hired Westar Flooring to repair and waterproof the affected areas. Samuelson s unit never suffered any water intrusions thereafter, but the HOA eventually sued Westar for negligent repairs, in 1996. Samuelson knew this because he was president of the HOA in 1993 and 1994, and treasurer from 1994 to 2001.

A September 1997 consultation estimated the cost of repair at over a million dollars. In 1998, the Westar suit settled for $410,000, and the HOA sought bids for the repair work. Eventually a bid of $119,800 was accepted. Samuelson was the point man in connection with the repair work. The repair contractor cautioned the bid encompassed, ...only a portion of the problem. It detailed further work to be undertaken in a second phase of cleanup, patching, painting and covering up of the subterranean garage and storage room walls. The first phase was just a band-aid.

In the fall of 2001, Samuelson and the plaintiff began negotiations and in November of 2001, Samuelson signed a real estate transfer disclosure statement stating he was aware of flooding, drainage or grading problems. Water damage in the garage was described by the listing agent, and the buyer was urged to get a physical inspection from a licensed contractor. Plaintiff had the home inspected by a contractor and a termite company, both of whom detailed extensive water damage.

Plaintiff contacted Samuelson and he told plaintiff since the repairs had been effectuated he hadn t had a problem. Problem solved. Plaintiff bought the condo in July 2002 and in January 2005, the garage flooded. At that time, plaintiff first learned of the prior lawsuits, both against the developer and the repair company. Samuelson had not disclosed the litigation in the transfer disclosure because he believed he was obligated only to disclose pending actions. The flooding recurred in March 2005 and January and April 2006.

In 2005, plaintiff sued Samuelson, the HOA and others. Plaintiff alleged breach of contract, negligence and misrepresentation/concealment, and that defendant Samuelson breached his duty to make full and complete disclosures of past actions. In April 2006, the defendant moved for summary judgment and/or summary adjudication. The trial court granted the motion in July 2006. Plaintiff appealed.

A real estate seller has both a common law and statutory duty of disclosure. Where the seller knows of facts materially affecting the value or desirability of the property... and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. Undisclosed facts are material if they would have a significant and measurable effect on market value. (Shapiro v Sutherland (1998) 64 Cal.App.4th 1534)

When a seller fails to disclose a material fact, he may be subject to liability for mere non-disclosure since his conduct in the transaction amounts to a representation of the nonexistence of the facts which he has failed to disclose. (Lingsch v Savage (1963) 213 Cal.App.2d 729) Generally, whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact. (Shapiro, at p. 1544)

Additionally, in Civil Code section 1102.6, the Legislature requires that a seller answer whether he or she is aware of any significant defects/malfunctions in the slabs and sidewalks, and whether he or she is aware of flooding, drainage or grading problems and any lawsuits by or against the Seller threatening to or affecting the real

property, including lawsuits alleging a defect or deficiency in the real property or common areas.

Here the defendant represented the property was free of defects and did not disclose that he was a member of the Board at the time of the second lawsuit, nor what had been done with the funds from the settlement. The trial court properly observed the defendant adequately disclosed the water intrusion history. Defendant urged the plaintiff to obtain an inspection. The undisputed evidence showed no misrepresentation nor a failure to disclose facts relating to water intrusion.

Civil Code section 1102.6 required disclosure of the lawsuits. Defendant stated he thought that meant current lawsuits. The Second DCA noted there was no support in the statute for his interpretation, but stated defendant owed a common law duty to disclose information materially affecting the value or the desirability of the property. (Kovich v Paseo Del Mar Homeowner Assn. (1996) 41 Cal.App.4th 863. The Justices found the evidence established a triable issue of fact as to whether the existence of the developer lawsuit and the Westar lawsuit was the type of information which should have been disclosed.

Here, the defendant knew the Westar repairs in the common areas were ineffective, resulting in the lawsuit. He knew the work was only a partial repair. Yet the defendant did not disclose the existence or the outcome of the lawsuits either in the transfer disclosure statement or in verbal conversations with plaintiff. Since the existence of the two lawsuits was the very type of material information that a potential buyer could find seriously affected both the desirability and value of the property, a question of fact is present as to whether they should have been disclosed.

Where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. (See, Pavich v Santucci (2000) 85 Cal.App.4th 392) While disclosure of the details of a lawsuit alleging defects in the property need not be disclosed, a seller s duty of disclosure encompasses disclosure of the existence of such a lawsuit. It is then up to the buyer to examine the

entire file to learn all the details of the suit and its settlement. (See, Assilzadeh v Califomia Federal Bank (2000) 82 Cal.App.4th 399)

Here, the Justices held, disclosure of the litigation would have enabled plaintiff to examine the details of those actions and evaluate the purchase in light of the information, including that water intrusion had existed since the condo was built, and that repairs were twice ineffective. Without defendant s disclosure of this information, these matters were not within plaintiff s diligent attention. Plaintiff stated in his opposition to the summary judgment that if he had known these facts he would not have purchased the condominium.

The evidence on summary judgment did not support the trial court s finding of sufficient disclosure. A triable issue of fact regarding the obligation to disclose is present. The judgment is reversed and remanded to the trial court.