BECKER MEISEL
ATTORNEYS AT LAW

SPRING 2014 | BECKER MEISEL NEWS

Appellate Division "Flips" Allegations That Consumer Fraud Act Applies to Ambiguous MLS Description of Foreclosed Real Estate by Michael E. Holzapfel, Esq.

In an unpublished ruling that may provide foreclosing mortgagees and realtors with a degree of comfort as they make efforts to place bank-owned inventory back on the market as real estate prices slowly come back to life, the Appellate Division recently concluded that a broad "as-is" disclaimer in a MLS listing trumped what could have been construed as an ambiguous representation regarding a property's utility services.

In *Williams v. Chase Home Finance LLC*, plaintiffs Richard and Christie Williams purchased a foreclosed property in Keyport owned by Chase Bank for $75,000. Chase enlisted realtors NJ REO Asset Management and Ralph Barone to assist in the sale of the property by placing the property on the MLS database. MLS listed the property's utilities as "public sewer, public water, septic." The listing also contained a broad disclaimer stating that the property was being sold "as-is"; that the buyer was responsible for all inspections and certificates; that the property was acquired through foreclosure and had not been individually evaluated or inspected by the bank; and that the information in the listing was "reliable but not guaranteed."

After taking title, plaintiffs discovered that the property was not in fact linked to the public sewer, and its septic system was defunct. As a result, plaintiffs paid $30,000 to connect the property to public sewer and forfeited an $8,000 tax credit.

Despite this disclaimer, plaintiffs never ordered a title report or conducted any inspections prior to closing. Plaintiffs, nevertheless, claimed that they relied on the MLS listing's utilities description as meaning that the property had "started out on a septic system, but had later been connected to the public sewer." After taking title, plaintiffs discovered that the property was not, in fact, linked to the public sewer, and its septic system was defunct. As a result, plaintiffs paid $30,000 to connect the property to public sewer and forfeited an $8,000 tax credit. Claiming that defendants mislead them as to the nature of the property's utilities, plaintiffs brought suit alleging violations of the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 *et seq.*, common law fraud, and breach of contract. In connection with their CFA allegations, plaintiffs' sought treble damages and attorney's fees.

continued...

The trial court rejected plaintiffs' arguments and dismissed their complaint. Plaintiff thereafter appealed the dismissal of their CFA claims, arguing that the utilities description on the MLS listing constituted a "misrepresentation" made "in connection with the sale or advertisement of real estate." Plaintiff did not allege that defendants intentionally misrepresented the nature of the property, but, because intent is not an essential element a "misrepresentation" under the CFA (unlike an "omission," which requires proof that the defendant knowingly concealed something material to the transaction), plaintiff argued that the MLS listing had the capacity to mislead them into believing that the property was linked to public sewer.

Like the trial court, the Appellate Division rejected this argument. The description "public sewer, public water, septic," the court held, simply incorporated all possible utility options. While acknowledging that this description was "ambiguous," the court found that it was not inherently misleading when viewed in the broader context of the listing's many disclaimers, which expressly pointed out that the bank acquired the property through foreclosure; that it had not conducted any independent investigations of the property; that the onus was on the buyer to obtain any title reports or inspections; and that the listing's information was "reliable but not guaranteed." Notably, the plaintiffs opted to forego the ordinarily routine exercise of obtaining a title report or a property inspection prior to closing. Had the plaintiffs done their due diligence, they would have discovered, quite easily, that the property was not linked to public sewer. As such, the court found that the MLS listing did not have the "capacity to mislead" and dismissed the plaintiffs' CFA claims.

The Williams decision is consistent with CFA case law, which generally holds that a seller cannot hide behind general disclaimers and warnings as a defense to advertisements which deliberately misrepresent the quality or nature of the property, or are duplicitously or purposefully vague or misleading. In Williams, however, the MLS listing simply recited all utility possibilities for the property (public water, public sewer, and septic), and it expressly stated that the bank had made no prior inspections of the property and placed the onus on the buyer to obtain their own inspections and searches.

Williams' logic does not represent a return to past days of "caveat emptor" (a doctrine New Jersey has largely abandoned), but rather a logical reflection of the present-day economy. Lenders have filed hundreds of thousands of foreclosures in New Jersey since the economic downturn of 2008. According to a February 2014 Bloomberg study, New Jersey recently surpassed Florida as the state with the largest percentage of residential mortgages that are either delinquent or in foreclosure. The inventory of bank-owned property in this State is the highest it has ever been, and as lenders work to put these foreclosed properties back on the market – usually at deeply discounted prices – they cannot be expected to conduct independent inspections of each property on their books.

continued…

Foreclosing lenders (and their realtors) cannot affirmatively misrepresent material aspects of the property or be intentionally vague or deceptive in their advertisements, but at the same time they are not precluded from selling properties "as-is" and "without representations." This is only logical in the foreclosure context, where bank-owned sales are considered unconventional sales involving a large percentage of speculative buyers. The carrot for these buyers is that they frequently acquire properties at deeply discounted prices. The stick, of course, it that they acquire them without any representations from the foreclosing mortgagee, and with the understanding that they may well come out net losers (as did the Williams plaintiffs) in what is effectively a high-stakes gamble. But, if the world of distressed real estate is a casino, the CFA only exists to ensure that the house does not cheat, not to ensure that the players win.

* * * *

About Becker Meisel

Becker Meisel is a premier mid-market firm serving the New York, New Jersey and Philadelphia corridor. In addition to providing the complete spectrum of legal services from litigation, transactional, labor and employment, and bankruptcy law counseling, to intellectual property, real estate and construction law-related advice, the firm also provides legal services through its innovative business services practice group. Our size and regional footprint allows us to provide sophisticated services in a manner not only focused on results, but also on our client's return on their investment. For more information, call 973- 422-1100, or visit www.beckermeisel.com.