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## **Realtor Beware**

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On May 6, 2011, the Ontario Court of Appeal held a real estate agent 50% percent liable for damages awarded against the seller. This liability derived partly from the agent's participation in filling out the Seller's Property Information Sheet [SPIS] with her clients. The agent was found liable for negligent misrepresentation notwithstanding the disclaimer of the agent's liability at the top of the SPIS form.

The agent with 30 years experience was first hired by a couple to help them sell their home. The sellers informed the agent that they had had foundation problems in the past but that it had been fixed and that no issue had occurred in the last 17 years. The agent asked the sellers to fill out an SPIS and assisted them with the task. To the question "Any structural issues with the house", the sellers said: "yes, north east corner settling, no problems in last 17 years". To the question "Any plumbing issues" the sellers answered: "no".

At the open house, an unrepresented person showed serious interest in the property and asked the agent about the condition of the house. The agent gave her a copy of the SPIS, repeated what the sellers had told her and also said: "I am not an expert in building inspections". The unrepresented person then retained the agent to represent her with the purchase. The agent duly informed the clients (buyer and sellers) of her obligations and limitations towards both parties due to the dual representation.

Before the open house, the agent had prepared an Agreement of Purchase and Sale with financing and building inspection conditions. However, because of the high traffic and interest in the property, when it came time for the buyer to put in an offer, the agent told her that she expected many offers and that an offer with conditions was unlikely to be accepted. Consequently, the buyer put in an unconditional offer \$10,000.00 over the asking price. The offer was accepted, the deal closed and the buyer moved in a few months later.

Shortly after moving in, the buyer found some sand in one corner of the crawl space. She hired an engineer to come in and assess the problem. The engineer found a major problem with the foundation and while looking in the basement, he also found traces of raw sewage in a trap in the basement. A representative of the City came to evaluate the situation and issued a work order to repair the foundation. The buyer proceeded with the repairs at a cost of approximately \$190,000.00. The buyer then sued the sellers, the

real estate agent and the real estate agent's firm for her loss.

At trial, the judge found the sellers liable for having made negligent misrepresentations on the SPIS. With respect to the agent, the trial judge concluded that there was no obligation on her to inquire further into or to independently investigate the sellers' statements about the foundation and the past plumbing issues. Consequently, no liability was attributed to the agent.

On appeal, the court upheld the judgment against the sellers but also found the real estate agent 50% liable based on the fact that she had plenty of reasons to inquire further into the nature of the repairs to the foundation and their representation that there were ongoing problems. The court found there were enough red flags that the agent should have questioned the information provided by the sellers regarding the foundation and the plumbing issues. The appeal judge said:

*"[the agent] had plenty of reasons to question the veracity of the [sellers]' assurances that the settlement problems had long since been resolved. She was a real estate agent with 33 years experience specializing in residential houses. She knew that the house had a history of settlement problems and accordingly was underpriced. As well, her visual inspection of the property disclosed settlement problems, the manifestation of which was sufficiently significant that it prompted her to further question the [sellers]. Against this background and [the agent]'s admission that she was "no home inspector", it seems to me that she had good reason to look behind the [sellers]' representations."*

The appeal court also found that it was negligent on the agent's part not to have a building inspection condition included in the Agreement of Purchase and Sale to protect the buyer, knowing that the house had had foundation problems and plumbing issues. In reaching this conclusion, the appeal judge relied, in part, on the Canadian Real Estate Association's Code of Ethics and emphasized the fact that an agent:

*"shall not discourage the Parties to a Transaction from seeking outside professional advice. A Licensee shall encourage the Parties to a Transaction to seek appropriate outside professional advice when appropriate"*

and that an agent:

*"shall encourage the parties to a transaction to seek appropriate outside professional advice when appropriate and that a Licensee should discover and verify the pertinent facts relating to the Property and Transaction relevant to the Licensee's client that a reasonably prudent Licensee would discover in order to fulfill the obligation to avoid error, misrepresentation or concealment of pertinent facts."*

This decision seems to raise the standard of care for real estate agents with respect to sharing information with a potential buyer, even if the agent is just relating/transmitting information provided by a seller. The decision

suggests that; if a real estate agent assists their clients in filling out an SPIS form, they should go further than simply rely on what their clients tell them about a property if they have or should have any reasons to doubt the veracity and accuracy of the information. Additionally, if a realtor has any reason to think that a building inspection should be conducted and the buyer client refuses to put the condition in the offer, the realtor should take all necessary precautions and have the buyer acknowledge the recommendation of the agent and the independent decision of the buyer not to include a building inspection condition, acknowledge the risk, and the reason for not including the condition. In some cases, it might be best to walk away from the deal.

The agent and the sellers have until July 5, 2011 to seek leave to appeal to the Supreme Court of Canada. As of June 20, 2011 they had not yet done so. Stay tuned.