

The closing was only the beginning

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© *Inside Business*/August 1, 2011

In a real estate transaction, the seller hopes that the closing marks the end of the legal relationship between seller and buyer. In a recent Virginia Supreme Court case, *Abi-Najm, et al. v. Concord Condominium LLC*, the closing only marked the beginning of the seller's legal problems.

What the seller assumed was only a simple breach of contract case became a matter in which the seller was potentially liable to multiple plaintiffs for punitive damages and attorney's fees.

In this case, 27 plaintiffs collectively alleged that the defendant was liable for breach of contract, violation of the Virginia Consumer Protection Act and fraud in the inducement.

The plaintiffs stated that the purchase contracts for the condominium units contained a schedule of standard finishes that included a particular type of hardwood flooring. The schedule stated that the seller reserved the right to substitute "substantially equivalent materials and finishes" for the items listed on the schedule. The plaintiffs claimed that the defendant substituted inferior flooring material for the specified hardwood floors and that such material was not substantially equivalent.

Based on these facts, the plaintiffs asserted that the substitution constituted a material breach of the purchase contract. In addition, the plaintiffs claimed that the purchase and sale of a condominium unit was a consumer transaction as defined in the VCPA and that the defendant was liable for actual damages, treble - three times actual - damages under the VCPA, and punitive damages, together with prejudgment interest and attorney's fees. Under the VCPA, it is unlawful for a supplier in connection with a consumer transaction to misrepresent that goods or services are of a particular standard, quality, grade, style or model. Finally, the plaintiffs also alleged that the defendant fraudulently induced each buyer to purchase a condominium with inferior floors and that the defendant was liable for actual damages and punitive damages, together with prejudgment interest and attorney's fees.

The defendant responded that the breach of contract claims were barred by the "merger" doctrine and that the claim under the VCPA and the claim for fraud in the inducement were barred by the "economic loss" rule. The trial court agreed.

On appeal, the Virginia Supreme Court reversed the decision of the trial court. First, the court held that contract provisions unrelated to the transfer of legal title are not merged into the deed and survive the execution and delivery of the deed. Because the allegations about improper substitution of flooring materials were unrelated to the legal title, the claims for breach of contract survived the closing of the sale of the units.

Second, the court found that the sale of a condominium unit is a consumer transaction under the VCPA and that the economic loss rule does not bar a claim for breach of duty under the VCPA that is totally independent of the breach of contract claim.

Third, the court held that the claim of fraudulent inducement arose out of facts that occurred before the sales contract ever came into existence and that the economic loss rule did not prevent the plaintiffs from seeking tort damages from the defendant for this separate fraudulent conduct.

It is important to note that the court only upheld the right of the plaintiffs to assert their legal theories and pursue their claims in court; the plaintiffs still bear the burden of proving liability under each legal theory asserted and proving damages if liability is established.

The Abi-Najm case is significant because it permits plaintiffs to pursue causes of action with more expansive remedies than are available in a simple breach of contract case. By alleging breach of separate legal duties unrelated to the obligations under the contract of purchase and sale, the plaintiffs expanded the potential liability of the defendant to include treble or punitive damages as well as recovery for attorney's fees.

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