What defects must be disclosed when selling my home?

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Caveat Emptor

Nieberding v. Barrante, 8th Dist. Cuyahoga No. 110103, 2021-Ohio-2593

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that the sellers had no obligation to disclose the holes in the seawall and that the doctrine of caveat emptor barred the buyers' claims.

The Bullet Point: Pursuant to R.C. 5302.30(C) and (D), sellers of residential real estate must complete a residential property disclosure form disclosing "material matters relating to the physical condition of the property" and "any material defects in the property" that are "within the actual knowledge" of the seller. If the seller fails to disclose a material fact with the intent to mislead the buyer, the seller may be liable for the buyer's resulting injury. That being said, the buyer has a duty to conduct an inspection of the premises. Specifically, where the buyer "has had the opportunity to inspect the property, he is charged with knowledge of the conditions that a reasonable inspection would have disclosed." Stated differently, the buyer cannot treat the property disclosure form as a substitute for conducting his own property inspections. Per the relevant section on the disclosure form, material defects include any non-observable physical condition that could be dangerous to anyone occupying the property or that could inhibit a person's use of the property. Moreover, the court noted that the doctrine of caveat emptor barred the buyers' claims. In Ohio, the doctrine of caveat emptor bars recovery for a structural defect in the property if the following elements are satisfied: "(1) the condition complained of is open to observation or discoverable upon reasonable inspection; (2) the purchaser had the unimpeded opportunity to examine the premises; and (3) there is no fraud on the part of the vendor."

Trust Assets Subject to Setoff

Zipkin v. FirstMerit Bank, N.A., 8th Dist. Cuyahoga No. 109501, 2021-Ohio-2583

In this appeal, the Eighth Appellate District affirmed in part, reversed in part, and remanded the trial court's decision, finding that the bank did not act improperly when it setoff an account in the name of a revocable trust.

The Bullet Point: In this case, the trustee of a trust brought an action against the bank, alleging it acted improperly when it set off a defaulted commercial loan with the assets held in the trust's bank account. The bank contended it had the right to setoff pursuant to the terms of a guaranty, which the trustee signed in his individual capacity. Specifically, the guaranty contained a "Right of Setoff" provision that stated the bank

reserved the right of setoff in all of the guarantor's accounts with the bank except for any accounts "for which setoff would be prohibited by law." The bank argued that pursuant to R.C. 5805.06, the trust's bank account was not the type of account where setoff was prohibited by law. Under R.C. 5805.06, assets of revocable trusts are subject to claims of creditors. Further, with respect to irrevocable trusts, creditors or assignees of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. R.C. 5805.06. In making the determination that the bank properly exercised its right of setoff, the court first analyzed the trust documents and concluded the trust was a revocable trust. Subsequently, the court considered whether or not the guarantor was the settlor of the trust. Pursuant to R.C. 5801.01(S), a "settlor" is "a person, including a testator, who creates, or contributes property to, a trust." Not only did the court determine the guarantor was the settlor of the trust, but he was also the sole trustee in charge of the trust assets and was the trust's sole beneficiary. The court noted the official comment to R.C. 5805.06(A)(2), which states the statute was intended to prevent a settlor who, like here, is also a trust beneficiary from using the trust as a "shield" against his or her creditors. As the trust was a revocable trust and the guarantor was the settlor, R.C. 5805.06 permitted the bank to reach the assets of the trust to setoff the defaulted commercial loan.

Defamation

Concrete Creations & Landscape Design LLC v. Wilkinson, 7th Dist. Carroll No. 20 CA 0946, 2021-Ohio-2508

In this appeal, the Seventh Appellate District affirmed in part, reversed in part, and remanded the trial court's decision, agreeing that under the totality of the circumstances, the defendant was not liable for defamation as his Facebook posts and private text messages were constitutionally protected opinions.

The Bullet Point: In this dispute between former business partners, the plaintiff alleged the defendant committed libel per se when he wrote Facebook posts and private text messages insulting the plaintiff. Under Ohio law, a publication is libel per se if, on its face, it "reflects upon the character of such person by bringing him into ridicule, hatred, or contempt, or affects him injuriously in his trade of profession" by the use of unequivocal words. The defendant countered by pointing out that even if his statements constituted libel per se, they were constitutionally protected under Ohio's so-called opinion privilege. Both the trial court and appellate court agreed, finding that the defendant's statements were protected opinions. As this court explained, one of the elements a plaintiff must prove in a defamation claim is that the allegedly defamatory statement is false. A statement deemed to be an opinion as a matter of law cannot be proven false. In making the determination of whether the defendant's statements were allegations of fact or protected opinions, the court used a totality of the circumstances test. Under said test, there are at least four factors courts review: "(1) the specific language used; (2) whether the statement was verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared." In analyzing the specific language used, courts consider how the defendant's words are commonly understood and "whether a reasonable reader would view the words used to be language that normally conveys information of a factual nature or hype and opinion; whether the language has a readily ascertainable meaning or is ambiguous." Under the second factor, courts consider whether the statement is objectively verifiable. If the statement "lacks a plausible method of verification, a reasonable

reader will not believe that the statement has specific factual content" but will understand the statement is "value-laden and represents a point of view that is obviously subjective." In analyzing the general context of the words, courts employ "an analysis of the larger objective and subjective context of the statement" to ascertain whether the words should be "characterized as statements of objective facts or subjective hyperbole." Under this third factor, courts look for the use of language such as "in my opinion" and whether the general tenor of the statement is sarcastic, more typical of persuasive speech than factual reporting. Lastly, courts examine the broader context of the words by considering where the statement was published, the social context, and the writer's reputation for hyperbole and opinion. For instance, courts consider whether a statement was published in the forum section as opposed to the news section of a publication.

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