Bob Aaron bob@aaron.ca

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Cellar flood among wave of lawsuits from disclosure form

Seller Property Information Statement has prompted over 200 court cases since 1997

In the wake of widespread flooding in Toronto last week, I've had a number of phone calls and emails from people trying to sell their properties. They ask about their legal obligation to advise the buyers of a flood which occurred after the signing of a purchase and sale agreement, but prior to closing.

That was the exact issue which came before Ontario's Divisional Court this past May.

Don and Louise Beauchamp decided to sell their property on Gardenvale Cr., in London, back in 2007. After inspecting the property, Adam and Olga Soboczynski submitted an offer which was prepared by an agent who was a friend of the Beauchamps — the sellers of the home. The offer was accepted with a price of $290,000.

Before the offer conditions were waived, the sellers delivered to the buyers a Seller Property Information Statement (SPIS) which was provided to them by the agent. The form is published by the Ontario Real Estate Association (OREA).

Regular readers of this column know that I am a staunch critic of this form, which has been responsible for about 225 reported Canadian court cases since 1997. The dispute between the Beauchamps and the Soboczynskis has now been added to the list, which is growing at the rate of about one case a month.

In the SPIS, the Beauchamps stated the property was not subject to flooding and they were not aware of any moisture or water problems. At the bottom, the form states that the sellers will disclose any "important changes" to the buyers before closing.

After receiving a favourable home inspection report, the buyers waived the conditions making the offer firm and binding.

Nine days before closing in January, 2008, water entered the basement. The Beauchamps dried out the wet rug and replaced the underpad.

The transaction closed as scheduled without disclosure of the flood to the buyers. Three weeks later, the basement flooded again and the buyers cleaned up at their own expense. Later in 2008, the new owners learned of the January flood. They felt that the sellers had misrepresented the water issues and started a lawsuit.

At trial, deputy judge Anthony Little found that the Beauchamps did not disclose the January flood because they honestly believed it was a one-off occurrence. He ruled that the SPIS did not form part of the purchase agreement, and dismissed the case.

In April, 2013, the Soboczynskis appealed to a three-judge Divisional Court panel. Writing for the court in May, Justice Thea Herman referred to a half dozen previous decisions on the SPIS, and ruled that the trial judge was in error on the issue of pre-closing disclosure of the flood.

Based on the wording of the SPIS, the court held that the sellers should have advised the buyers of the pre-closing flood. The flood was an "important change" to the information provided in the SPIS.

The Beauchamps were ordered to pay $25,000 to the buyers for negligent misrepresentation.

Several lessons emerge from this case:

- Sellers are liable for misrepresentation, even if the misrepresentation is innocent.
- If there was no SPIS form in this case, the sellers would probably have not have been ruled responsible.
- Whether sellers have to disclose a pre-closing flood which caused no damage, in the absence of an SPIS, remains an open question.

Clearly the SPIS form causes more litigation than it prevents.

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TRIAL DECISION http://www.canlii.org/en/on/onsc/doc/2011/2011onsc6791/2011onsc6791.html

DIVISIONAL COURT APPEAL DECISION:

http://www.aaron.ca/columns/SOBOCZYNSKI v BEAUCHAMP DIV CT.pdf

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Bob Aaron is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818.
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