



Austin Kerr

Equity & Help Inc

Issue Presented

The issue presented is whether the land contract seller is liable when a delinquent land contract purchaser has threatened action over failure to disclose asbestos in the property.

Preliminary Disclaimer

The issue presented appears to be a matter specific to New York State Law. General counsel is not licensed to practice in New York. Client is aware of this limitation. Therefore, this opinion letter will focus on general rules and summaries of existing code and case law in the specific jurisdiction but will not constitute legal advice.

General rules regarding disclosure law

Firstly, as client is already aware, federal law does not specifically require disclosure of asbestos risks for real estate sales. This is primarily because federal law is largely absent about these sorts of disclosures and instead focuses more on the transactional and lending side of real estate purchases.

Importantly, most state disclosure requirements are predicated on “actual” knowledge, as opposed to “constructive” knowledge, or even strict liability.

Actual knowledge is what one would reasonably assume it is – true knowledge of a fact. This means the party charged with the requirement actually knew what was going on. This can be expanded slightly into the category of “should have known”. This expansion is based on the concept that it is nearly impossible to prove someone actually knew something unless they admit the knowledge. As such, a totality of the circumstances test demonstrating that a reasonable person would have had the knowledge, given the facts, often suffices. An example of this would be a pet owner who is within the residence, has a dog who likes to exit the residence whenever the door is open, and is aware that the front door was left open when he brought in the groceries earlier in the day. This pet owner, if he hadn’t seen the pet within the residence, would be charged with knowing that the pet had gotten out. It is a reasonable conclusion, as any reasonable person presented with those facts would know the pet got out.

Constructive knowledge is when there are specific circumstances that impute knowledge on a person, even if they didn't have actual knowledge or even realize the specific circumstances. An example of this in real estate law is with recording of deeds and mortgages. Putative owners are charged with constructive knowledge of any document recorded with the county against their property. The concept is that a diligent property owner would pay attention to actions taken against their interest. As such, if a lien is recorded against a property owner, they cannot claim ignorance of the lien as a defense – because they should have been paying attention to the public record.

Strict liability is the most extreme. It requires no knowledge at all, and the responsible party is charged with the knowledge. Speeding and parking tickets are good examples of strict liability. Knowledge of the speed limit or that one cannot park in a specific place should be required for these offenses to take place. To avoid the lack of knowledge as a defense, legislatures have imposed strict liability, meaning knowledge is not required to be liable.

New York Disclosure Requirements

New York's legislature enacted "The Property Condition Disclosure Act" in 2002 in attempt to provide clarity and protection to buyers and sellers alike. The act creates liability for specific defects that are not disclosed when the seller has actual knowledge. One such defect is the presence of asbestos.

An early version of the bill utilized the standard of constructive knowledge, but that standard was specifically rejected. The commentary around the law (NY CLS Real P 461) is clear that the legislature intended only for failures to disclose when actual knowledge is present. Case law has upheld this requirement repeatedly by granting summary judgment in favor of sellers whom the buyer could not demonstrate actual knowledge. See Klafehn v. Morrison, 75 A.D.3d 808, 906 (N.Y. App. Div. 3d Dep't 2010). See also Sample v. Yokel, 94 A.D.3d 1413, 943 (N.Y. App. Div. 4th Dep't 2012).

Conclusion

The issue presented by the client did not disclose any level of knowledge. However, lack of actual knowledge was implied by the phrasing of client's request. Given this assumption, it is unlikely that client will be exposed to any liability from the asbestos issue.

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