

Yesterday's repair – Today's due diligence.

By James L. Goldsmith, Esquire

Seller disclosure requirements have created an environment where buyers know much more of the history of a home than was previously the case. Knowing what to do with this knowledge can be critical. Take the case of the buyers who were informed that the sellers, several years previous to selling, had a "mold issue" that was "professionally remediated." Despite this revelation, buyers were keen on the property and therefore susceptible to rationalizing away its problematic history. They were nevertheless cautious enough to exercise some measure of due diligence and asked their agent to get the "paperwork" relating to the problem and its remediation. At about the same time, the parties entered an agreement of sale providing for a home inspection.

Instead of scheduling an inspection (to include a mold analysis), buyers waited for the paperwork. They were convinced that they would see the remediation details and reach the conclusion stated by listing agent: "The property has been professionally cleaned by mold experts and is in great condition." So they waited for the papers. And they waited. But they did not engage their own inspector. By that time they were committed to the notion that this was to be their new home and bought into the representation that it was mold free and professionally cleaned.

The documents they sought relating to the remediation never came. Yet, they settled and lived happily for about one year when they discovered . . . evidence of mold growth! And when they looked closer they found lots of mold in lots of places.

It was at this point that the buyers called their agent who in turn called the legal HotLine. Who is at fault? Who is to blame? Who will pay for a second round of mold remediation?

It is not apparent that the sellers have any legal responsibility to the buyers. They acknowledged mold infestation and reported having it professionally cleaned. Presumably this is so, in which case the sellers are home free. I agree that the sellers (or their agent) were not very compliant in that sellers never produced any of the paperwork that pertained to the discovery and remediation of the mold. But the buyers were well aware of sellers' failure and did nothing. And why didn't the buyers (or their agent) make production of this important paperwork a provision/contingency of the agreement of sale? (This provision would be to the effect that buyers would have so many days after production of the documents to terminate the agreement.)

One should also question whether obtaining the old paperwork would have been sufficient. Assume that it was very detailed about where the mold was discovered and how it was remediated. Should that be sufficient to allay all fears of a reasonable buyer? I suggest not. Those papers will only describe what was found and done by a particular company at some time in the past. The buyers, not having hired that company, would likely have no recourse against it if its findings and remediation efforts were flawed. Further, even if the remediation company did

a bang-up job, is it not possible that some remnant of the mold led to new infestation or that a new leak is to blame?

Absent clear evidence that the sellers intentionally misrepresented the truth, the target will eventually become the buyer agent. The first mistake was likely the agent's failure to caution the buyers about buying a home that had a previous mold problem. One doesn't need a degree in industrial hygiene to posit that if a property had mold once before, it is possible to have it again. By its history alone, the agent should have known to advise the buyers that if they were going to proceed, they should have their own experts analyze its condition. The buyers should be encouraged to ask the inspection company what, if any, recourse buyers would have if the property later develops mold. At least the buyers should have an understanding as to the accuracy and reliability of a due diligence mold investigation. Having the paperwork pertaining to the previous infestation and its remediation would be certainly helpful to any company subsequently assessing the condition of the property.

**Copyright © James L. Goldsmith, Esquire, CALDWELL & KEARNS, P.C., 2015
All Rights Reserved**

Jim Goldsmith is an attorney with Caldwell & Kearns and serves as general counsel to PAR. A substantial portion of his practice is dedicated to providing advice and counsel to real estate licensees. He and his firm represent and defend real estate salespersons and brokers in civil lawsuits and licensing claims across the Commonwealth. Jim also defends REALTORS® in disciplinary hearings conducted by the Real Estate Commission. He routinely counsels employers on employee relations issues and is one of the voices of the PAR Legal Hotline. He may be reached at www.realcompliance.com.

08039-008/42598