

March 19, 2019



## **REAL ESTATE BROKERS BEWARE!** The Importance of a Signed Seller's Disclosure

In New Jersey, failing to provide a buyer with a signed Seller's Property Condition Disclosure ("Seller's Disclosure") can be very costly for a real estate licensee. This is because if a buyer is not

"A REAL ESTATE LICENSEE CAN BE  
LIABLE FOR CONSUMER FRAUD AS A  
RESULT OF REPEATING MATERIAL  
MISREPRESENTATIONS OF A SELLER"

provided an executed Seller's Disclosure, and it is found that a real estate licensee repeated a seller's misrepresentation(s) even if the licensee has no knowledge that the representations are false or deceptive, a licensee may be liable for treble damages and payment of the purchaser's attorney's fees under the New Jersey Consumer Fraud Act (the "NJ CFA"). Although there is no statute in New Jersey expressly requiring the Seller's Disclosure, providing one can

shield a licensee from liability under the NJ CFA.

New Jersey courts interpret the NJ CFA broadly. The NJ CFA is violated when, among other ways, there is a "misrepresentation ... in connection with the sale or advertisement of ... real estate, ... whether or not any person has in fact been misled, deceived or damaged thereby.... N.J.S.A. 56:8-2. "One who makes an affirmative misrepresentation is liable [under the CFA] even in the absence of knowledge of the falsity of the misrepresentation, negligence, or the intent to deceive[.]" *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 605 (1997), but "[t]he misrepresentation has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase." *Perri v. Prestigious Homes, Inc.*, No. A-0403-10T1, 2012 WL 95564, at \*4 (N.J. Super. Ct. App. Div. Jan. 13, 2012) (quoting *Gennari v. Weichert Co. Realtors*, 288 N.J. Super. 504, 535 (App.Div.1996)).



### **ABOUT JOHN N. POULOS**

John N. Poulos is a real estate lawyer licensed in New Jersey and New York. He is honored to represent lending institutions, buyers, and sellers in residential and commercial real estate transactions in both New Jersey and New York. He has been selected as a Super Lawyer for 2019 and a "rising star" in 2009 and 2010.

No aspect of this advertisement has been approved by the Supreme Court of New Jersey

In other words, under the NJ CFA, a real estate licensee can be liable for consumer fraud as a result of repeating material misrepresentations of a seller to a potential purchaser, even if the licensee had no knowledge that the representations are false or deceptive.

In a 1996 case, *Gennari v. Weichert Co.*, a developer misrepresented to the real estate licensee the quality of materials that would be used in new homes being built and the developer's experience and the craftsmanship that would be going into the building of the homes, among other things. Weichert agents had then represented to purchasers of numerous newly built homes that the developer was an experienced builder who had built hundreds of quality homes throughout New Jersey. The facts were to the contrary. Generally speaking, he had always worked under the supervision of others. "His workmanship, moreover, was disastrous" according to the trial court. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 592 (1997).

After Appeals, the Supreme Court of New Jersey held, *inter alia*, that: (1) the real estate brokerage firm was liable under the NJ CFA for its agents' affirmative misrepresentations as to experience and workmanship of the builder whose homes it marketed, advertised and sold, even absent showing that firm's agents knew that their misrepresentations were false or that purchasers relied thereon; and (2) the firm was liable only for its proportionate share of treble damages assessed under the NJ CFA.

So how does a real estate licensee avoid liability after *Gennari*? After *Gennari*, the New Jersey Realtors lobbied for protection against this severe liability imposed on a real estate licensee because of the NJ CFA. What came out of this lobbying effort was an amendment to the NJ CFA or what I call the *Gennari exception*. N.J.S.A. 56:8-19.1 provides in relevant part:

Notwithstanding any provision of NJ CFA to the contrary, there shall be no right of recovery of punitive damages, attorney fees, or both, under

section 7 of P.L.1971, c. 247 (C.56:8-19), against a real estate broker, broker-salesperson or salesperson licensed under R.S.45:15-1 et seq. for the communication of any false, misleading or deceptive information provided to the real estate broker, broker-salesperson or salesperson, by or on behalf of the seller of real estate located in New Jersey, if the real estate broker, broker-salesperson or salesperson demonstrates that he:

Had no actual knowledge of the false, misleading or deceptive character of the information; and

Made a reasonable and diligent inquiry to ascertain whether the information is of a false, misleading or deceptive character. For purposes of this section, communications by a real estate broker, broker-salesperson or salesperson which shall be deemed to satisfy the requirements of a "reasonable and diligent inquiry" include, but shall not be limited to, communications which disclose information:

(1) provided in a report or upon a representation by a person, licensed or certified by the State of New Jersey, including, but not limited to, an appraiser, home inspector, plumber or electrical contractor, of a particular physical condition pertaining to the real estate derived from inspection of the real estate by that person;

(2) provided in a report or upon a representation by any governmental official or employee, if the particular information of a physical condition is likely to be within the knowledge of that governmental official or employee; or

(3) that the real estate broker, broker-salesperson or salesperson obtained from the seller in a property condition disclosure statement, which form shall comply with regulations promulgated by the director in consultation with the New Jersey Real Estate Commission, provided that the real estate

broker, broker-salesperson or salesperson informed the buyer that the seller is the source of the information and that, prior to making that communication to the buyer, the real estate broker, broker-salesperson or salesperson visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller. (emphasis added) N.J. Stat. Ann. § 56:8-19.1 (West)

In fact, the NJ Real Estate Commission already incorporated part of the *Gennari exception* into a licensee's duties and responsibility by imposing on real estate licensees a duty to make a reasonable effort to determine all material information about the physical conditions of a property whether or not a seller's disclosure is provided. Moreover, the form Seller's Disclosure already includes language stating that the real estate licensee acknowledges by executing the Seller's Disclosure that he or she "visually inspected the property with reasonable

USING A SELLER'S DISCLOSURE PROVIDES THE LICENSEE WITH SIGNIFICANT PROTECTIONS. YOU SHOULD NOT ONLY HAVE SELLERS FILL THEM OUT BUT SIGN THEM

diligence to ascertain the accuracy of the information disclosed by the seller, prior to providing a copy of the property disclosure statement to the buyer."

Accordingly, under the *Gennari exception*, to avoid any liability based on potential misrepresentations by a seller to a prospective buyer, if the issue of any condition of the home comes up with a prospective buyer, only relay information from an inspection report by a licensed inspector or from the Seller via an executed Seller's Disclosure after visually inspecting the home to confirm the accuracy of the information provided in the Seller's Disclosure.

## **REAL ESTATE BROKERS BEWARE!**

### The Importance of a Signed Seller's Disclosure

*"To avoid any liability based on potential misrepresentations by a seller to a prospective buyer, if the issue of any condition of the home comes up with a prospective buyer, only relay information from an inspection report by a licensed inspector or from the Seller via an executed Seller's Disclosure after visually inspecting the home to confirm the accuracy of the information provided in the Seller's Disclosure."*

**Poulos LoPiccolo PC** is a real estate and litigation law firm located in New Jersey and New York that has extensive experience in representing clients in real estate, complex litigation, class actions, and estate planning. We are committed to providing each one of our clients with quality, cost effective legal services. With our depth of experience and aggressive advocacy skills, we can take on the most complex problems facing any business or individual. Our attorneys have decades of high level litigation and real estate transactional experience with over 30 years of combined commercial litigation experience with a prestigious Manhattan law firm ranked #1 in the United States in the American Lawyer's A-List.