

Unfriendly Business

Undisclosed Moisture Leaves Listing Agent All Wet



Jacob Reynolds*, a listing agent, was contracted by his friend Andrea Thomas in the sale of her residential property. In preparation for the sale, Reynolds recommended several activities to prepare the house for showings: one, to remove a dehumidifier, and, two, to install room deodorizers to diminish the home's musty smell.

Risk Factor #1

The listing agent encouraged Ms. Thomas to remove the dehumidifier and install air fresheners.

These actions went beyond preparing a house for show condition and constituted concealment. To assist the client in getting the best price for a property, a real estate agent can make recommendations on how to highlight the home's strengths and downplay its weaknesses. Masking a defect such as a musty smell crosses the line into unethical and even fraudulent behavior. It's good risk management practice to require the seller to disclose everything and let the buyer decide what is important.

Risk Factor #2

The seller and the realtor failed to disclose key information about the property.

Because of their fiduciary duty, real estate agents can not disclose confidential information without their clients' consent. However, when real estate agents becomes aware of conditions that should be disclosed, they have an ethical obligation to see it through. Failure to do so is unethical and may be viewed as participation in a fraud. In some states, agents are legally obligated to disclose known property defects to potential buyers. If a client is reluctant, the agent can remind the client that non-disclosure can lead to costly litigation. If the client is not convinced, the real estate agent should consider walking away from the listing. On this transaction, the cost of mounting a defense plus settlement far outweighed the commission.

Mr. Reynolds also assisted Ms. Thomas in completing the Seller's Disclosure Notice. One issue that surfaced was the wood floor which had a cupping problem. The floorboards were warped in several places, which is often a result of water trapped in the wood. In their discussions, Ms. Thomas argued that the flooring was not ideal, but that its **problem did not need to be disclosed**. Because the condition of the floor was open and obvious, Mr. Reynolds **deferred to the wishes of his friend**. As the information was discussed among the two, the **Seller's Disclosure Notice was completed by Mr. Reynolds** and then signed by Ms. Thomas.

An offer to buy the home was made and accepted. During their first visit to the property, the buyers noticed the problem with the wood flooring and indicated their concern to Mr. Reynolds. In response to their apprehensions about the flooring, Mr. Reynolds suggested an inspection. Mr. Reynolds **contacted a plumber and floor installer** and arranged for them to inspect the floor and moisture problems, and Ms. Thomas agreed to give them access to the home. Meanwhile, negotiations concluded and a closing date was set. Several days before the closing, the results from the inspections were passed along to the buyers by Mr. Reynolds.

After closing and moving into the house, the buyers quickly noticed the moisture and the musty smell in the house. They investigated the history of the flooring and moisture problems and discovered that there had been a prior insurance claim filed for water damage to the house. A leak in the house had caused flooding and led to the floor's replacement by Ms. Thomas, who did not tell Mr. Reynolds about it and thus **it was not disclosed**. The buyers sued both parties for failing to disclose the condition of the property.

Once suit was filed, the friendship between Ms. Thomas and Mr. Reynolds quickly dissolved. Ms Thomas placed the blame on Mr. Reynolds and threatened to file bankruptcy, leaving Mr. Reynolds as the sole defendant in the case. Given the adverse facts in this case, the claim was settled for approximately \$100,000.

* Names have been changed.

Risk Factor #3

Mr. Reynolds let his friendship with Ms. Thomas influence his professional conduct.

An agent should be careful to avoid letting friendship cloud professional judgment. Unfortunately, the risk of lawsuits is not always lowered when the client is a friend. When sellers are sued by an angry buyer, they have no choice but to engage attorneys to defend them. Their attorney will then recommend bringing suit against the real estate agent—you.

Risk Factor #4

The listing agent completed the Seller's Disclosure Notice.

Notices should be completed by the property seller and signed off on by the seller, and if required by the state, the agent. By completing the notice for the seller, the buyers could argue that it was the listing agent's representations about the property.

Risk Factor #5

The listing agent—and not the buyers—hired the professionals to investigate the issues with the home.

Listing agents represent the seller in connection with the sale of property and should not step into other roles. If the buyers wish to have professionals provide advice on the value or condition of the home, they should engage professionals themselves. If the buyers need assistance, the agent can provide a list of several professionals. The list should include a disclaimer clarifying that the agent is merely passing on information, and is neither endorsing any of the contractors nor will they supervise their activities.