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Columns

Dear Moshe

Posted 1/19/2005
By *MOSHE LAZARUS*

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Dear Moshe:

Help! We recently bought a house for what we thought was a great price. As it turned out, though, the deal was too good to be true. About a month after we moved in, we noticed that the toilets began to overflow on a regular basis, and that sewage started bubbling up in our downstairs bathtub and sinks. We called a plumber to try and fix the problem, and he told us that our underground pipes had been severely damaged by tree roots (which had burst through the pipes in several places), and that it would cost upwards of \$20,000 to repair the damage.

Of course, we had no idea that the pipes were damaged when we agreed to buy the house. In fact, when I asked the seller about the status of the plumbing equipment (when we were looking at the house) he assured me that all of the equipment was regularly maintained and in excellent condition.

To make matters worse, our plumber told us that he noticed that some temporary repairs were recently done to these pipes, and it is likely that the seller was actually aware of these problems and performed the temporary repairs so that we wouldn't notice that the equipment was defective.

We were outraged to learn that the seller lied to us, and called him to demand that he pay for these repairs. He refused, and said that his lawyer advised him that the contract we signed provides that he could not be held liable after the closing for promises he made to us when showing us the house. Is he right? Is there anything we can do?

Answer:

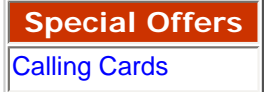
I must say that your letter was truly disturbing. Although I am of course well aware that there are many people who are willing to sacrifice their souls at the altar of the almighty dollar, it is nevertheless quite upsetting to hear of a Jew taking advantage of another Jew in this manner.

On the bright side, however, I believe that the law is on your side, and that the seller is in fact responsible to repair the damaged plumbing equipment (or, alternatively, to compensate you for the costs you've incurred in doing so). In explaining my answer, I will first set forth some of the arguments which would likely be advanced by the seller and his attorney, and I will then explain why I believe that these claims would in fact not help them in your situation.

The first argument that would likely be raised by the seller is the fact that sales of real property are generally governed by the principal of "caveat emptor," or "let the buyer beware." As applied, this



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principal provides that a person selling a home has absolutely no obligation whatsoever to disclose any information regarding the home to the purchaser. Likewise, if the purchaser discovers a defect in the property after the closing, caveat emptor dictates that the seller shall not in any way be held liable or responsible for such defect.

Rather, caveat emptor places the burden of discovering and protecting against defects in the property entirely and exclusively upon the purchaser. As such, under ordinary circumstances, a person who discovers defects in property he has purchased (as you did) has absolutely no recourse against the seller regarding such defects.

Furthermore, the standard contract of sale with respect to residential property, which you have more than likely signed and agreed to, contains two provisions which would likewise seem to protect the seller in your case.

One such clause, known as the "as is" clause, provides that the purchaser agrees to take the home as it is, with all of its defects and shortcomings, and that the seller will not have any obligations towards the purchaser regarding such deficiencies. If your contract does in fact contain this provision, it might be argued that you have agreed to accept the property regardless of any defects that may exist, including the defective pipes you have actually discovered.

The second such clause, known as the "merger" clause provides that any promises made to you by the seller regarding the property prior to the closing will no longer have any effect, and only those agreements explicitly set forth in the contract of sale will be binding. Again, if your contract does in fact contain this provision, your seller will claim that you have agreed that you are not entitled to rely on any promises he has made to you prior to the closing. Of course, if that is the case, you would not be entitled to rely on his assurance that the plumbing was in good working order.

It is likely that the seller's attorney was thinking of caveat emptor, as well as the "as is" and "merger" clauses of the contract in advising the seller that he could not be held liable to repair the damaged plumbing equipment. However, despite all of this, I believe that the seller's attorney is incorrect, and that the seller is in fact obligated to pay for the repair of the damaged pipes.

You see, under New York law, caveat emptor does not apply (and thus, would not serve to protect the seller from liability) in situations where the seller has made fraudulent misrepresentations upon which the purchaser has reasonably relied, or where the seller has actively concealed the defects in the property from the purchaser (both of which seem to have happened in your case). Similarly, no court will allow the "as is" and "merger" clauses of a contract of sale to protect the seller in situations where he has actively defrauded the purchaser.

Thus, as your seller has blatantly defrauded you regarding the status of the pipes and went so far as to have work performed to conceal the defects, I have no doubt that he will in fact be obligated to repair the faulty plumbing equipment, despite any of the aforementioned arguments in his favor.

I hope that the information I have provided will help you remedy the situation quickly and easily, and I wish you and your family much mazel and bracha in your new home.

Disclaimer: The advice contained in this column is general in nature, and may vary greatly depending on the particulars of a given situation. For this reason, one should not act in reliance on the information contained in this column without first consulting with an attorney. •

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