

Is the Doctrine of *Caveat Emptor* Dying in Florida?

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For the time being, the authors explain, sellers of commercial real property in Florida are still afforded the protection of caveat emptor. However, that may be changing.

C*aveat emptor* — let the buyer beware — is a longstanding doctrine of American law which relieves sellers of property of the duty to disclose the property's defects to buyers. However, over the past few decades, Florida courts have restricted the application of *caveat emptor* and in some instances even questioned its continued viability as a rule of law altogether. The recent ruling of the Third District Court of Appeal in *Hayim Real Estate Holdings, LLC v. Action Watercraft International, Inc.*,¹ reminded us of these limitations, as the court found the seller liable based upon an exception to *caveat emptor*.

Historically, this doctrine applied to the purchase and sale of any type of property, but today it is almost exclusively associated with the sale of real property. In Florida, it is currently only applicable to commercial property,² residential property having been excluded altogether from the doctrine by the Supreme Court of Florida in *Johnson v. Davis*.³ In that case, the court reasoned that, as to residential transactions, *caveat emptor* does:

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not conform with current notions of justice, equity and fair dealing. One should not be able to stand behind the impervious shield of *caveat emptor* and take advantage of another's ignorance.... Modern concepts of justice and fair dealing have given our courts opportunity and latitude to change legal precepts in order to conform to society's needs. Thus, the tendency of more recent cases has been to restrict rather than extend the doctrine of *caveat emptor*. The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.⁴

Commercial transactions, on the other hand, still fall within the scope of *caveat emptor*.⁵ In these instances, the doctrine serves to shift the risk of discovering any existing defects in the property to the buyer; the seller is not required to disclose any known latent defects. As a result, the buyer is relegated to the use of its own due diligence in discovering any latent defects, failing to do so at its own risk.

These two sharply contrasting rules, one for commercial property and one for residential property, beg the question — how do you know if a property is residential or commercial? In many instances it is clear — the 15 story office tower is commercial and the single family home is residential. But what about a duplex where the owner intends to occupy one half and rent out the other, or a condominium that will be primarily rented to others, but also occasionally used by the owner? This precise problem arose in *Agrobin, Inc. v. Botanica Development Associates, Inc.*,⁶ when a corporation was formed for the purpose of purchasing a condominium which was used as a vacation home for the owners, but also rented out in a “commercial venture.” Because of the commercial nature of the purchaser's intended use, the court found that *caveat emptor* applied and therefore the seller did not have a duty to disclose a known leakage problem.⁷ While *Agrobin* is illustrative of commercial/residential divide, with the purchaser's intended use weighing heavily on the determination, in the realm of *caveat emptor*, however, Florida has not yet declared a bright line.

CAVEAT EMPTOR & ITS EXCEPTIONS

As we are reminded by *Hayim*, while the seller of commercial real property may stand silent and be protected by *caveat emptor*, the seller may not actively interfere with the buyer's attempts to discover defects. Although it is the buyer's obligation to discover defects, the seller may not obstruct the buyer by concealing or misrepresenting defective conditions. Additionally, *caveat emptor* is a default rule. The parties may contract for different disclosure duties and, if so, the common law will not stand in the way of the contract. Under these rules, a seller of commercial property in Florida, while having no general common law duty to disclose non-obvious defects to the buyer, may nonetheless incur liability if the seller (i) actively conceals defects in the property; (ii) misrepresents the condition of the property; or (iii) breaches a contractual obligation to make certain disclosures about the property. Because of these exceptions, sellers, while afforded significant protection by the doctrine of *caveat emptor*, nevertheless must take precautions to ensure that they do not incur liability through their actions or contractual agreements.

The doctrine of *caveat emptor*, as defined by Florida's courts, provides that "buyers are expected 'to fend for themselves, protected only by their own skepticism as to the value and condition of the subject of the transaction.'"⁸ The seller has no duty to voluntarily disclose any information regarding the property, whether material or not, and "cannot be held liable for any harm sustained by the buyer or others as a result of a defect existing at the time of the sale."⁹ For example, in *Mostoufi v. Presto Food Stores, Inc.*,¹⁰ the doctrine of *caveat emptor* shielded the seller of a gas station/convenience store from liability when the purchaser discovered an undisclosed petroleum tank located under the property. In this instance, the buyer believed that he was purchasing a facility with only three underground storage tanks; in fact, there was an abandoned fourth tank which was leaking petroleum into the soil. The buyer alleged that he was unaware of the existence of the tank, but made no allegation that this was the result of fraud or misrepresentation on the part of the seller.¹¹ Despite the substantial contamination of the property, the court held that the doctrine of *caveat emptor* barred the buyer from recovering damages from the

seller for the diminished market value of his property.¹²

However, as mentioned in *Hayim*, there are exceptions to the rule. “In a commercial real property transaction, Florida law distinguishes between the mere nondisclosure of a known defect, a non-actionable offense, and the active concealment of one, an actionable offense.”¹³ This first, and perhaps most obvious, exception logically springs from the nature of *caveat emptor*. The doctrine relieves the seller of the duty of disclosure, shifting to the buyer a burden of discovery. In this circumstance, it would be intrinsically unfair for the seller to then interfere with the buyer’s attempts at discovery through the concealment of a defect.

Active concealment was the central issue in *Hayim*, as the buyer sought damages against the seller after it discovered problems with the property’s septic tank and drainage field, which led to a failure of the plumbing system and environmental contamination. Prior to the execution of the contract, the area above the problematic drainage field was covered by asphalt, however, shortly thereafter the seller tore out the asphalt and resurfaced the area with concrete pavers. The buyer alleged that this was done in an attempt to conceal these problems, especially since “the pavers represented a capital expenditure on property which had already contracted to sell for a fixed price.”¹⁴ The buyer therefore argued, and the court agreed, that because of its active concealment of the problem by covering over the area in question with concrete pavers, the seller’s failure to disclose was not shielded by *caveat emptor*.

The second exception, misrepresentation of the condition of the property, was exemplified by the Supreme Court of Florida in the case of *Bessit v. Basnett*.¹⁵ In a case of gross misrepresentation, the sellers of a fishing lodge represented the property to be 5.5 acres (it was only 1.44 acres), the previous year’s income of the lodge to be \$88,000 (actually substantially lower) and the roof to be brand new (it was not new and it leaked). In a clear statement of the law, the court ruled that a “person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of *caveat emptor*.”¹⁶

In another case of a claimed misrepresentation, the buyer in *Wasser v. Sasoni*¹⁷ brought suit after the apartment building he had purchased needed structural repairs. He alleged that the seller’s statements that “the building was ‘a very good building’ requiring ‘normal type of maintenance’

and ‘an excellent deal’¹⁸ were misrepresentations that should preclude the application of *caveat emptor*. After reaffirming that *caveat emptor* is the general rule applicable to the sale of commercial real property, and that an exception exists for misrepresentations of the property’s condition, the court nevertheless sided with the seller. It concluded that the purported misrepresentations were clearly “puffing or statements of opinion [which] do not relieve a buyer of the duty to investigate the truth of those statements and do not constitute fraudulent misrepresentations.”¹⁹ In essence, the *Wasser* decision further clarifies that a misrepresentation must be factual in order to circumvent the protection of *caveat emptor*. Statements of opinion and sales techniques, even if some might disagree with what is being asserted, do not rise to such a level.

The third and final exception to the doctrine of *caveat emptor* arises when the parties contract for a heightened disclosure obligation. In *RNK Family Limited Partnership v. Alexander-Mitchell Associates*,²⁰ the seller failed to disclose that the property was required to connect to the county wastewater system, at a cost in excess of \$93,000. While ordinarily *caveat emptor* would preclude liability against the seller for failing to disclose such a fact, as the burden of its discovery would have instead been on the buyer, the contract called for a heightened duty on the part of the seller. Specifically, the contract contained the following provision: “Seller warrants that there are no facts known to Seller materially affecting the value of the Real Property which are not readily observable by Buyer or which have not been disclosed to Buyer.”²¹ The court concluded that this contractual provision trumped the doctrine of *caveat emptor* as “a reasonable purchaser relying on the aforesaid provision would anticipate that, at least as to property value, the doctrine of *caveat emptor* would have been circumvented.”²² As a result, the appellate court reversed the trial court and allowed the buyer’s claim for damages to go forward.

The contractual duty exception was also highlighted in the *Hayim* case discussed above. In addition to the active concealment argument, Hayim also argued that the seller breached his contractual duty which, according to the court, required the seller “to provide specific systems in working order as well as communicate their knowledge of specific problems.”²³ Because of this duty, the court overturned the trial court’s grant of summary

judgment based upon *caveat emptor*, as the seller “owed [the buyer] a duty under the express agreement it negotiated,”²⁴ which took precedence over the default rule of *caveat emptor*.

QUESTIONING THE CONTINUED VALIDITY OF CAVEAT EMPTOR

Although *caveat emptor*, subject to its exceptions discussed above, remains the law in Florida as it pertains to commercial real property transactions, several courts have questioned the continuing validity of its ideological underpinnings.²⁵ The most significant challenge to the doctrine came in the First District Court of Appeal’s decision in *Haskell Company v. Lane Company, Ltd.*,²⁶ where the court stated:

We believe that the time has come to add *caveat emptor* to the trash heap of discarded legal doctrines and rules.... In its place, we would require in all real property transactions (sales or leases) full disclosure to the buyer or lessee of all facts material to either the value or the condition of the property.

The court laid out its argument as follows:

It seems to us that there is little justification for continuing to draw a distinction between transactions involving residential real property and transactions involving commercial real property. Many of the policy considerations used to justify a duty to disclose in residential cases apply with equal force to commercial cases.... People who buy [or lease] real property for business purposes vary widely in their experience, knowledge, sophistication, bargaining power, wealth, and access to outside advisers and experts. Moreover, the buyer (or lessee) of commercial property has the same reasonable expectations as does the buyer (or lessee) of a residence—that he or she will receive what was bargained for, and be able to use it for its intended purposes. Likewise, requiring disclosure in commercial transactions will encourage good workmanship in commercial structures, just as it will with regard to residential structures.²⁷

However, the *Haskell* court stopped short of overturning *caveat emptor* as it decided that such a significant change in the law “should be made by the supreme court, rather than this court.”²⁸ Accordingly, it certified the question to the Florida Supreme Court, which subsequently declined to review the issue.

With Florida’s high court leaving it unaddressed, other appellate courts have continued to raise the issue and often referred back to *Haskell*’s criticism of *caveat emptor*. Shortly after *Haskell*, the Second District Court of Appeal stated in *Mostoufi* that “[w]hile the wisdom of applying the doctrine to commercial real property continues to be questioned, that application has not yet been abrogated.”²⁹ Next, the Fifth District Court of Appeal echoed this sentiment in *Kaplan v. Peterson*,³⁰ another instance of leaking underground petroleum tanks, lamenting that “although questioned and criticized, the doctrine still prevails in Florida with regard to sales of commercial real property.”³¹ The doctrine was further criticized by the Forth District in *Green Acres, Inc. v. First Union National Bank of Florida*.³² There, subsequent to the sale, the land was discovered to be the “site of an ancient Indian campsite which eventually was determined to be the first site in South Florida of the Seminole Tribe... which placed severe limitations on the property and made it undevelopable.”³³ In reference back to *Haskell*, the *Green Acres* court, while not ruling on the issue, acknowledged that there is support for the argument that “the duty should be extended to commercial real estate transactions, [as] investors run the gamut from small businesses to large corporations and... individuals who buy real estate vary widely in their experience, knowledge, sophistication, bargaining power, wealth and access to outside advisers and experts.”³⁴

CONCLUSION

As *Hayim* has reminded us, the doctrine of *caveat emptor*, while providing substantial protection for the sellers of commercial real property in the state of Florida, is subject to exceptions which can strip that protection away from those who are not careful. While precautions can be taken to ensure that the contract does not provide for a heightened duty of disclosure, sellers must be especially careful that their actions do not trigger an

exception by misrepresenting the condition of the property to the buyer. Although active concealment requires the seller to have affirmatively attempted to pull the wool over the eyes of the buyer, misrepresentations can arise even in casual conversation. As seen in *Wasser v. Sasoni*, even comments that salespersons make on a daily basis can potentially form the basis for a claim that the shield of *caveat emptor* should be eviscerated. Although the court found the statements in *Wasser* to be clear “puffing,” it would not take a stretch of the imagination to believe that off-hand statements such as those with slightly more factual basis could form the foundation for an argument that liability is not precluded by *caveat emptor*.

Beyond the currently existing exceptions to *caveat emptor* discussed above, several courts have hinted that the time to remove the doctrine from the law altogether has arrived; indeed it has been more than 20 years since the Florida Supreme Court removed its application from residential real estate transactions, citing modern concepts of justice and fair dealing.³⁵ It does not sit well with some courts that the law permits a seller with full knowledge of the condition of the premises, and in the best position to know of that condition, to merely sit by while defects go unnoticed by a purchaser. Although the Florida Supreme Court turned down the opportunity to address the continued applicability of *caveat emptor* to commercial real property transactions when the question was certified to it in *Haskell*, the continued acknowledgement of *Haskell*’s arguments in opposition to the application of the doctrine by every other District Court of Appeal in the *Mostoufi*, *Kaplan*, *Green Acres* and *Hayim* decisions seems to indicate that it will have to act sooner or later. In the meantime, sellers of commercial real property are still afforded the protection of *caveat emptor*.

NOTES

¹ *Hayim Real Estate Holdings, LLC v. Action Watercraft International, Inc.*, 15 So.3d 724 (Fla. 3d DCA 2009).

² *Haskell Company v. Lane Company, Ltd.*, 612 So.2d 669, 674 (Fla. 1st DCA 1993).

³ *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985).

⁴ *Id.* at 628.

⁵ *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*, 578 So.2d 363,

364-65 (Fla. 3d DCA 1991)(“Nowhere does Johnson address or change the long line of case law establishing caveat emptor as the rule in the sale of commercial property.”).

⁶ *Agrobin, Inc. v. Botanica Development Associates, Inc.*, 861 So.2d 445 (Fla. 3d DCA 2003).

⁷ *Id.* at 446.

⁸ *Haskell*, 612 So.2d at 671.

⁹ *Id.*

¹⁰ *Mostoufi v. Presto Food Stores, Inc.*, 618 So.2d 1372 (Fla. 2d DCA 1993) (disapproved on other grounds).

¹¹ *Id.* at 1373.

¹² *Id.*

¹³ *Hayim*, 15 So.3d at 727.

¹⁴ *Id.*

¹⁵ *Bessit v. Basnett*, 389 So.2d 995 (Fla. 1980).

¹⁶ *Id.* at 997; *See also, Thibault v. Transact Realty & Investment*, 709 So.2d 593 (Fla. 5th DCA 1998)(“*caveat emptor* would not bar a claim of fraud based on affirmative misrepresentation”).

¹⁷ *Wasser v. Sasoni*, 652 So.2d 411 (Fla. 3d DCA 1995).

¹⁸ *Id.* at 412.

¹⁹ *Id.*

²⁰ *RNK Family Limited Partnership v. Alexander-Mitchell Associates*, 788 So.2d 1035, 1036 (Fla. 2d DCA 2001).

²¹ *Id.*

²² *Id.*

²³ *Hayim*, 15 So.3d at 726.

²⁴ *Id.*

²⁵ *Kaplan v. Peterson*, 674 So.2d 201, 203 (Fla. 5th DCA 1996)(“However, although questioned and criticized, the doctrine still prevails in Florida with regard to sales of commercial real property.”).

²⁶ *Haskell Company v. Lane Company, Ltd.*, 612 So.2d 669 (Fla. 1st DCA 1993).

²⁷ *Id.* at 675-76.

²⁸ *Id.* at 675.

²⁹ *Mostoufi*, 618 So.2d at 1377.

³⁰ *Kaplan*, 674 So.2d 201 (Fla. 5th DCA 1996).

³¹ *Id.* at 203.

³² *Green Acres, Inc. v. First Union National Bank of Florida*, 637 So.2d 363 (Fla. 4th DCA 1994).

³³ *Id.* at 364.

³⁴ *Id.* at 365.

³⁵ *See Johnson v. Davis*, 480 So.2d 625 (Fla. 1985).