Can Real Estate Seller Disclosure Obligations (Johnson v. Davis) Be Waived in a Purchase and Sale Agreement?

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CAN REAL ESTATE SELLER DISCLOSURE OBLIGATIONS (JOHNSON V. DAVIS) BE WAIVED IN A PURCHASE AND SALE AGREEMENT?

Written by Charles B. Jimerson, Esq. – 3/22/19

We are often asked by buyers and sellers alike as to what obligations of disclosure a seller has on a residential real estate transaction. Thanks to well established Florida precedent, in *Johnson v. Davis*, the Florida Supreme Court created an obligation on sellers of residential real estate to disclose latent defects in their property to buyers. Now that the sale of existing homes is on the rise, sellers of real property are often looking for guidance as to what must be disclosed and how to get best protect themselves in a residential real estate transaction. This blog post will address Florida law on sellers disclosures and whether sellers may use contractual clauses that seek to minimize or obviate their *Johnson v. Davis* disclosure obligations.

Johnson v. Davies and the Duty to Disclose

Following the Florida Supreme Court's decisions in *Johnson v. Davis, 480 So.2d 625 (Fla. 1986)*, a seller of residential real

property must disclose any latent defects if he or she has knowledge of conditions materially affecting the value of the property that are not readily observable or known to the buyer. Prior to this case, the doctrine of caveat emptor, or "buyer beware," applied ubiquitously across the state. In *Johnson v. Davis*, the plaintiff-buyers alleged breach of the sales contract, fraud, and misrepresentation against the sellers upon the buyers' discovery of roof leaks. *Id.* When the buyers sued for return of their deposit and rescission, the trial court ruled that the sellers had misrepresented key facts, but refused to order rescission of the real estate contract.

The Florida Supreme Court, in choosing to depart from the ancient doctrine of caveat emptor, noted that times had changed, and especially in the context of residential real estate transactions, one should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance." *Id*. at 628. Thus, the Florida Supreme Court in *Johnson v. Davis* held "that where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used." *Id*. at 629. With the stroke of a pen, a new body of law was created.

As case law on the issue evolved, Florida courts were able to weigh in with guidance that helped buyers and sellers of residential real property. In the 1997 case of *Gilchrist Timber Co.*

v. ITT Rayonier, Inc., 696 So. 2d 334 (Fla. 1997), the Florida Supreme Court reviewed the following question certified by the United States Court of Appeals for the Eleventh Circuit:

Whether a party to a transaction who transmits false information which that party did not know was false, may be held liable for negligent misrepresentation when the recipient of the information relied on the information's truthfulness, despite the fact that an investigation by the recipient would have revealed the falsity of the information.

The Florida Supreme Court further expounded on *Johnson v. Davis*, ruling that the buyer would "not have to investigate every piece of information furnished;" rather, the buyer would need only to investigate "information that a reasonable person in the position of the [buyer] would be expected to investigate." *Id.* at 339. With this ruling, Florida law was clarified that the buyers have cannot sit by idly when receiving unintentional misrepresentations- rather there was at least some affirmative obligation to discover there error in material fact, even if that misrepresentation was negligent.

In the early 2000's the Florida Supreme Court weighed in again confirming that buyers may rely on a fraudulent representation without a duty to make an inspection, unless the falsity is "obvious." *MI Schottenstein Homes, Inc. v. Azam,* 813 So. 2d 91, 95 (Fla. 2002). This decision attempted to clarify that while a buyer has no duty to make an inspection where the allegation is

nondisclosure, the buyer does have an obligation to observe what is "readily observable." *Id.*

Therefore, to prevail on a *Johnson v. Davis* claim, the buyer must only prove the following elements: 1) the seller had actual knowledge of the property defect; 2) the defect must materially affect the value of the property; 3) the defect must not be readily observable and was unknown to the buyer; and 4) the buyer must establish that the seller failed to disclose the defect to the buyer. *Jensen v. Bailey*, 76 So. 3d 980 (Fla. 2d DCA 2012). [1]

Sellers exclusions from Johnson v. Davis claims

As set forth above, a number of Florida District Courts of Appeal have discussed the extent of the *Johnson v. Davis* duty to disclose in the residential real estate context[2]. But can a seller get out of these obligations through crafty contracting? Many have tried, and many have also failed. For example, it is generally agreed that *Johnson v. Davis* duties are not waived by "as is" clauses that are common in standard form residential transaction contracts. *Syvrud v. Today Real Estate, Inc., 858 So.2d 1125 (Fla. 2d DCA 2003)*. Most case law addresses interpretation of standard form "as-is" clauses, while dancing around the issue of whether more specific exculpatory language would relieve a seller from potential *Johnson v. Davis* liability. For example, at present time, no district courts of appeal decision have weighed in on whether a buyer may waive *Johnson v. Davis* rights in the purchase documents through exculpatory

language that specifically provides that "Buyer waives the Sellers' duty to disclose hidden defects materially affecting the value of the property" or words of similar impart. It is puzzling why the residential real estate industry has not tried to wordsmith around the *Johnson v. Davis* elements and test the courts on their ability to reconcile common law claims with longstanding contractual interpretation law. A potential end-around is discussed below.

Sanislo Test for an Exculpatory Clause – Are Johnson v. Davis waivers enforceable as a matter of contract interpretation?

While "as-is" clauses have failed sellers trying to relieve themselves of Johnson v. Davis obligations, there may be solid arguments to be made that carefully drafted exculpatory clauses will limit seller liability. If any court precedent were to provide justification for enforcing a waiver of *Johnson v. Davis* duties, it would be *Sanislo v. Give Kids the World, Inc., 157 So.3d 256 (Fla. 2015)*. Specifically, *Sanislo* has been treated as laying out a test for determining whether an exculpatory clause is unambiguous and enforceable. According to the Fourth DCA, the test is whether the language of the exculpatory clause "unambiguously demonstrates a clear and understandable intention to be relieved from liability so that an ordinary and knowledgeable person will know what he or she is contracting away." *Id*. at 271.

In extrapolating this to sellers disclosure laws, a preliminary question is whether a contractual waiver of a seller's *Johnson v. Davis* duties counts as an exculpatory clause under *Sanislo?* The plain meaning of the phrase "exculpatory clause" suggests that it might. Moreover, *Sanislo* has been applied outside of the personal injury context, such as in *Obsessions In Time, Inc. v. Jewelry Exchange Venture, 247 So.3d 50 (Fla. 3d DCA 2018)*, which involved a leased jewelry booth.

Application of the *Sanislo* test involves careful scrutiny of a contract's particular exculpatory language. Neither the Florida Supreme Court, nor any District Court of Appeals has considered language releasing a seller of his or her duty to disclose latent defects of residential real property under the *Sanislo* test. Therefore, on its face, *Sanislo* cannot be used to inform as to whether parties to a contract may waive claims for affirmative misrepresentation or nondisclosure. Further, the "ordinary and knowledgeable person" standard of *Sanislo*suggests an enforceable clause must certainly do more than make reference to *Johnson v. Davis* duties. While *Sanislo* may be interpreted to say that *Johnson v. Davis* waivers come down to contract interpretation, it is difficult to imagine exculpatory language that would satisfy the *Sanislo* test. Furthermore, it is difficult to imagine unambiguous language that would not violate public policy. For example, an unambiguous waiver would need to disclaim liability for unobservable or hidden defects that the seller is aware of, has constructive knowledge of, or ought to

know of. It is unrealistic that the act of signing away these contractual rights would not violate public policy when an unsophisticated party is involved, such as a first-time home buyer.

Notwithstanding the above doubts about *Sanislo*'s application to residential real property, it is conceivable that a court would be more willing to enforce a waiver of *Johnson v. Davis* duties when sophisticated parties are involved. For example, a developer that is buying up a number of blighted properties in a given area may be willing to release various sellers of *Johnson v. Davis* duties, since the developer has no intention of residing in the dilapidated buildings, but rather intends to demolish them in order to construct a new development.

That the doctrine of caveat emptor still applies to commercial real estate transactions supports the inference that a waiver of *Johnson v. Davis* duties is more likely to be enforced when sophisticated parties are transacting, if at all. The public policy concerns motivating the original departure from this ancient doctrine in *Johnson v. Davis* indicate that the Court was concerned with residential homeowners not being able to bear the burden of their information asymmetry. In so far as that is not the case, *Sanislo* may in fact allow for *Johnson* duties to be waived under limited circumstances.

Conclusion

In summary, it is unlikely that a seller's duty to disclose latent defects may be waived in a residential real estate transaction.

However, recent Florida Supreme Court precedent suggests a waiver of the duty to disclose latent defects may be enforceable for residential transactions if the language of the contract satisfies the *Sanislo* test. This may be an important issue to watch if the right case comes along to test the law.

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[1] Though beyond the boundary of this blog post, it should be noted that Johnson v. Davis *duties have been extended to real estate brokers. Syvrud v. Today Real Estate, Inc., 858 So.2d 1125 (Fla. 2d DCA 2003).*

[2] Despite stating that the duty "is equally applicable to all forms of real property," it is generally assumed that the doctrine of caveat emptor still applies to commercial real property transactions. Haskell Co. v. Lane Co., Ltd., 612 So.2d 669 (Fla. 1st DCA 1993); Wasser v. Sasoni, 652 So.2d 411 (Fla. 3d DCA 1995).