WALK-THROUGHS AND THE DOCTRINE OF MERGER

This just in: your legal corner guru is aghast. Someone said I stuck my foot in my mouth at the last Night Court regarding handwritten provisions (not) trumping boilerplate ones. To quote LYTLE ON CONTRACTS, OPUS 1, CHAPTER 1: "Thou are clearly wrong and mistaken," and from CHAPTER 2: "Talk to the hand." However, since I had already written a different article for this month and I'm on a deadline from She Whose Deadlines Must Be Met, I will save that instructive riposte for next month in an article to be entitled "Rules to Live By in an Uncertain Contract." But I digress, as I love to do.

To the question at hand: Consider the following hypothetical: assume a REIN contract, buyer conducts a walk-through prior to closing and does not discover any problem with the heat and air then or at any time prior to closing, but after closing and recordation the buyer discovers the heating system was in fact not working and had not been working at the time of the walk-through (assume as a factual matter you can prove this). Can the buyer successfully sue the seller for the cost of repair?

The REIN contract provides, at paragraph 8, that "representations and warranties made by the Seller herein and all other provisions of this Agreement shall be deemed merged into the deed delivered at settlement and shall not survive settlement, unless otherwise provided herein." This clause states the legal doctrine of merger. The legal doctrine of merger simply means as a general proposition that contractual warranties do not survive closing; rather, they are "merged" into the final representations and warranties stated in the documents concluding the transaction, which in our particular case is the deed.

So, it is clear that the intention of the REIN contract is to have the contractual property *condition* warranties merged into the property *title* warranties stated in the deed, which of course do not cover heating systems. In fact, paragraph 8 is generally read by our local group to mean that if something is not in good working order at closing and not

discovered in the walk-through prior to closing, then the purchaser would have no post-closing remedy against the seller. Much like the gentle reader who thought I misspoke at Night Court, that reading on its face, however, would be incorrect.

Virginia courts have consistently ruled that the doctrine of merger, at least with respect to a deed and a real estate transaction, does not incorporate or subsume non-title related warranties.

The case of *Smith v. Nonken, et al.*, 54 Va. Cir. 259 (2000), is instructive. The parties used a standard VAR contract, which of course provided that the heating system was to be in good working order at settlement or possession. It also had our standard doctrine of merger language that was stated to apply to everything in the contract. The purchasers had a home inspection performed, later removed the home inspection contingency without any request to have the heating system repaired or noting that it was defective, and on the day of closing (after their walk-through) the buyer executed a document stating she accepted the property in its present condition and that the sellers had performed their obligations under the contract provision regarding the condition of systems and appliances.

First, the trial court considered whether the doctrine of merger (the VAR contract uses language nearly identical to the REIN contract in this regard) barred the purchaser's claim for damages for the faulty heating system. The trial court examined existing Virginia Supreme Court doctrine of merger cases and concluded that the doctrine of merger, even one expressly stated to bar collateral matters in the contract, would not bar a claim on collateral (non-title, e.g. heating) issues.

The court then examined the paper trail. The seller essentially argued: "Hey, they signed a home inspection contingency removal, they conducted a walk-through, and then they *signed a walk-though agreement saying everything was ok …* doesn't that count for something?"

The court said it did. Since the buyer signed, pre-settlement, a form that stated that the buyer had "inspected the property [and accepted] the property in its present condition and that the buyer *[agreed] that the sellers had fulfilled their obligations per paragraph E* [of the contract]," which was the section obligating the sellers to have the heating system in good working order at settlement, the court found the buyer had waived her right to have the heating system working at closing (or probably more correctly, accepted it as a matter of law). Frankly, the decision is a little confusing about this because we do not have the exhibits, but I am assuming this final document was similar to our REIN Walk-Through Report. In other words, had a Walk-Through Report not been signed the case may well have gone the other way because according to the court the buyer's claim survived closing and was not barred by the doctrine of merger.

The moral of the story is this: Listing agent: make sure the buyers sign and deliver the walk-through report prior to settlement. Selling agent: make sure the buyers conduct a thorough walk-through, but if you get through the deal without the form being signed your buyers may have a post-closing remedy in the event of a problem. And yes, as She Who Demands Mediation would remind us, that remedy starts with mediation per paragraph 17.

You may tell it to the hand at bdlytle@lytlelaw.com.