

BUYING & Selling

New home not how you expected it?



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REAL ESTATE
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The first in a series of articles about what happens if your new home isn't as you expected.

Misrepresentation

We recently had an occasion where a client purchased a property and in the listing the basement floors were reportedly engineered hardwood. The real estate agent and the seller also told the client that the floors were engineered hardwood. When the client moved into the prop-

erty, they found that the floors were actually peel-and-stick laminate tiles made to look like hardwood floors.

An Agreement of Purchase and Sale is a contract between the buyers and sellers. Therefore, both parties had to agree on the terms and conditions of the contract. For example, the buyers cannot be thinking they are buying engineered hardwood floors while the sellers know that the floors are a different material. The parties are not contracting for the

same thing, therefore there is no agreement.

If the buyers discover once they move in that they did not get what they contracted for, the buyer can take recourse against the sellers for breach of contract and misrepresentation.

At law the harmed party must mitigate their damages. In this case, our client had to obtain quotes to replace the floors with the material that was represented in the MLS Listing, being engineered hardwood. A lawyer will then send a demand letter to the sellers demanding the sellers cover the cost of repair.

If the sellers refuse to pay for the replacement of the item, in this case, the floors, the clients would be able to sue the sell-

ers for misrepresentation and/or breach of contract.

Vacant Possession

Vacant possession means to have unimpeded access to the property that you have just purchased. The two most common impediments to vacant possession are people and things.

Imagine that you arrive at your new home to find several people still at the property. Not every person will cause an impediment to vacant possession. The person cannot have been an invited guest, such as a painter or plumber. Often times, purchasers will have a worker on site to paint the property before they move in, or the vendor has some

last minute painting to complete to fulfill the conditions of the Agreement of Purchase and Sale. The invited workers do not prevent the purchaser from moving in.

However, if there is a trespasser who is preventing vacant possession, the purchaser has a greater chance of proving that the vendors did not provide vacant possession. The purchaser must show that there has been a substantial impediment which "interferes with the enjoyment of a substantial part of the property." (Cumberland Holdings Ltd. v. Ireland (1946)). The vendor has the duty to eject any unauthorized person in order for the purchasers to have the vacant possession.

If items are left at the property when you go to move into your new home, there must be a substantial interference to possession in a substantial portion of the property. Therefore, if the vendors have left a few garbage bags in the garbage, this will not qualify as having not provided vacant possession. However, if the vendor was a hoarder and left 40 years of accumulated things in the property, this would amount to a substantial part of the property.

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