



Can a seller check “No Representation” if they have actual knowledge of a problem?

Release Date: 11/10/2022

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QUESTION: I am representing a buyer who is under contract on a property. The home inspection report indicates among other things that a window air conditioning unit isn't cooling. The seller checked “No Representation” in response to question #9 on the Residential Property and Owners' Association Disclosure Statement, which asks if there “[i]s any problem, malfunction or defect with the dwelling's heating and/or air conditioning.” My buyer is confident that the seller must have known that the unit wasn't working properly, and she pointed out to me that in paragraph 2 of the “Instructions to Property Owners” on page 1 of the Disclosure Statement, it states that “[i]n responding to the questions, you [the seller] are only obligated to disclose information about which you have actual knowledge.” Could the seller be responsible for the cost of repairing the AC unit if it can be proven he had actual knowledge that it wasn't working and didn't disclose that information?

ANSWER: We don't believe the seller could be held liable for the cost of repairing the AC unit based on his “No Representation” answer to question #9. As a general rule, a seller is not required to disclose information about their property to a prospective buyer. They can't misrepresent the property in any way, but they generally don't have any affirmative duty to disclose material facts about their property. An exception to the general rule requires sellers to disclose latent material defects that the buyer will not be able to discover in the exercise of reasonable diligence. See a Q&A on that topic by clicking [here](#). A broken window air conditioning unit clearly is not a latent material defect, as evidenced by the fact that the inspector discovered that it isn't cooling.

The wording your client pointed out in the instructions for completing the Disclosure Statement is confusing, but what it actually is trying to say is that the seller's "yes" or "no" answers are based on the seller's actual knowledge, not that the seller is required to disclose the seller's actual knowledge about any particular characteristic or condition of the property. To interpret the instruction otherwise would render the "No Representation" option meaningless. The Residential Property Disclosure Act clearly gives the seller the choice of either disclosing their actual knowledge about a characteristic or condition of the property or choosing to make no representation about any such characteristic or condition. [Here's a link](#) to the relevant section of the Act. See subsections (a)(1) and (a)(2).

On the other hand, if the property is listed, and if the listing agent knew or should have known that the air conditioner wasn't cooling, he or she would have been required to disclose that fact. A broken AC unit is a material fact and brokers are required by the Real Estate License Law to disclose material facts that they are aware of or reasonably should be aware of.

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