NEW YORK STATE
COUNTY OF ONTARIO
CITY OF CANANDAIGUA **CANANDAIGUA CITY COURT**

DEBRA PARSONS
WILLIAM FOOSE and SUSAN FOOSE

Claimants,

vs. **DECISION**

LINDSAY HENEHAN n/k/a
LINDSAY PENNISE

Defendant.

Presiding: Hon. Stephen D. Aronson

Appearances: Claimants by: Pro Se

Defendant by: John J. Gilbert, Esq.

In this small claims case, the claimants ("buyers") seek $1,981.81 from the defendant ("seller"). The buyers purchased a used house on West Lake Road from the seller. The written real estate contract provided that the buyers would accept the property in "as is" condition. The contract also contained a disclosure addendum as required by law. In the addendum, the seller checked a box indicating that there were no underground storage tanks. The credible evidence established that the seller was not aware of any underground storage tanks. After she purchased the property, the buyer noticed something in the front yard near the driveway – it turned out that there was an underground heating oil storage tank buried in the front lawn. The buyers seek $1,981.81 -- the cost to remove the tank.

In every small claims case, the court is bound to perform substantial justice in accordance with principles of substantive law.

Applicable Substantive Law

The statute governing property condition disclosure statements is found at Real Property Law Article 14, §460 et seq. It is called the Property Condition Disclosure Act (hereafter PCDA). Section 461 contains definitions of relevant terms, including the following: " 'knowledge' means only actual knowledge of a defect or condition on the part of the seller of residential real property." Section 462 sets forth the actual language of the property condition disclosure statement (hereafter PCDS) and states that nothing in this article is intended to prevent parties from entering into contracts for sale of property in "as is" condition. The introductory paragraphs of the PCDS state that it is not a warranty and should not be regarded by the buyer as a substitute for inspections or tests. The instructions to the seller include the statement "If you do not know the answer check 'unkn' (unknown)."

The next relevant portion is §465, paragraph 1, which gives buyers the remedy of a $500 credit at the time of closing if sellers have failed to complete a PCDS, and paragraph 2, which states that any seller who provides a PCDS shall be liable "...only for a willful failure to perform the requirements of this article. For such a willful failure, the seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory remedy."

The last section, entitled "Liability," says that nothing in this article "...shall be construed

as limiting any existing legal cause of action or remedy at law, in statute or in equity" (PCDA §467).

Legal Issues

1. Is there a cause of action for misrepresentation based on the PCDA?

The law is not yet settled in New York as to whether a cause of action exists pursuant to the PCDA. The authors of the "Practice Commentaries" following PCDA §462 in McKinney's tell us that this legislation has "confounded commentators" and that the first judicial interpretation in *Malach v. Chuang,* 194 Misc2d 651 [Civ Ct, Richmond County 2002] accuses the PCDA of confusing what was a well settled area of law and concludes that portions of it are "unenforceable." The *Malach* decision held that there was no cause of action under the PCDA. Mr. Gilbert, attorney for Defendant Pennise (f/k/a Henehan), has cited *Middleton v. Calhoun*, 13 Misc3d 949 [New York County Ct 2006], which follows the reasoning of *Malach.*

The plaintiff in *Middleton* encountered serious septic system problems shortly after closing on the sale of the house formerly owned by defendants. The defendants had checked "no" in response to the PCDS question whether there are any known material defects in the septic system.

The contract had been made contingent upon Ms. Middleton getting an inspection of the septic system before the closing, but there was nothing in the record indicating that she ever got one. In court, the defendants denied any knowledge of septic system problems even though written evidence from an inspector and a neighbor both indicated that symptoms of the problems

had existed for years. The court determined that there was no statutory remedy for Ms. Middleton under the PCDA. It also found that she failed to establish a cause of action in common law fraud because she did not prove that the defendants had either actual or constructive knowledge of the septic system defects.

The *Middleton* decision outlines arguments both for and against the existence of a cause of action under the PCDA. Cases cited against it include Monroe County Supreme Court case *Renkas v. Sweers,* 10 Misc3d 1076(A) [2005]. Arguments against a PCDA cause of action are

1) the legislative history does not show an intent on the part of the framers to create a new cause of action;

2) section 465(1) of the statute provides for a specific remedy (the $500 credit for buyers), thus precluding other remedies under the statute;

3) the phrase "willful failure to comply with the requirements of this article" in §465(2) is too vague to be enforceable; and

4) the language of the PCDS itself says the seller *may* be subject to claims by the buyer for a knowingly false or incomplete statement. If the Legislature had wanted to create a cause of action, the wording would have been "...the seller *shall* be subject to claims..." (emphasis added).

Cases in which courts have interpreted the PCDA to create its own cause of action include *Gabberty v. Pisarz,* 10 Misc3d 1010 [Sup Ct, Nassau County 2005], *Fleischer v. Morreale,* 11 Misc3d 1004 [Suffolk Dist Ct 2006], and *Calvente v. Levy*, 12 Misc3d 38 [Sup Ct, Orange County 2006].

The court in *Fleischer* felt there was abundant evidence that the defects in the roof and the flooding problems complained of by buyers existed prior to the sale and that the sellers knew

or should have known about them. The sellers had answered "no," meaning that there were no defects, to the relevant questions on the PCDS. The court considered the language of §465(2) to be a perfectly clear remedy for buyers. The statute provides that a seller who commits willful misrepresentation on the PCDS shall be liable for a buyer's actual damages resulting therefrom. The court also reasoned that the language of §467, which preserves the common law theory of fraud in the inducement, was an indication that the legislature intended to create a different remedy under §465(2), one that favored the buyer "...due to the consumer protection nature of the act." *Fleischer, id.*, at 1011.

In *Calvente v. Levy, id.,* buyers recovered actual damages from sellers related to flooding damage. The court believed the sellers had actual knowledge of a flooding problem prior to completing the PCDA and therefore willfully failed to perform their duties under the PCDA when they answered "no" to the relevant question.

I find the reasoning in *Fleischer* more convincing than that in *Malach* and therefore believe that the PCDA does create a statutory cause of action. Judge Hackeling in *Fleischer* points out that one sign that the legislature was creating a new cause of action under the PCDA is the fact that §465 is entitled "Remedy." He goes on to explain why the PCDA should be considered an "affirmative statute," pursuant to McKinney's Consolidated Laws of New York, Book 1, Statutes §34. He also concludes that the use of "may" rather than "shall" in the PCDS (referred to in argument #4 against a statutory cause of action, above) should not be given the weight given to it by the court in *Malach.* (See pages 3-5 of the attached printout of the *Fleischer* decision for excellent response/rebuttal to the *Malach* reasoning.)

2. Assuming that there is a cause of action for misrepresentation under the PCDA, should

claimants Foose and Parsons prevail on such a theory?

The PCDA in §465(1) gives a $500 remedy for sellers who fail to complete the PCDS. Nothing is said about sellers' frame of mind or intent; the section covers simple failure on the part of sellers to come forth with a PCDS. This is not our fact situation.

Section 465(2) gives actual damages to buyers when the sellers have completed the PCDS but have nevertheless committed a "willful failure to perform the requirements of this article." The court in *Gabberty, id.*, came up with a working definition of what this willful failure means, summarized as follows: a deliberate misstatement regarding the defective condition that would tend to assure a reasonably prudent buyer that no such condition existed and which a professional inspector might not discover.

In this case, the court finds that Ms. Pennise did not make a *deliberate* misstatement by answering "no" to question 14. She stated in court that she had no knowledge of the existence of the underground tank, so the answer she should have chosen is "unknown." Nevertheless, the court concludes that Ms. Pennise was totally credible when testifying that she had no knowledge of the existence of the underground tank and she was not attempting to conceal anything, i.e., she was not deliberately misstating a known condition.

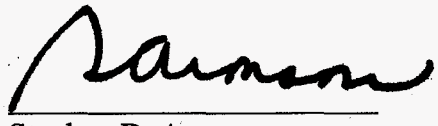
3. Have claimants Foose and Parsons established either common law fraud or breach of contract?

Nothwithstanding the disclosure addendum, claimants could still prevail if the defendant acted fraudulently or in breach of their contract. The most recent case treating similar issues to this case is *Rivietz v. Wolohojian,* 38 AD3d 301 [1st Dept 2007], which was just decided in March. It involves the sale of a condominium, in which there is no requirement that the seller fill

out a PCDS. The court found that there was no breach of contract where the contract clearly stated that the premises were being sold "as is" and contained both a merger clause and a no-modification clause. The claim of fraudulent misrepresentation failed because plaintiffs did not allege that the defendants had made any "material, false representations or acts of concealment to induce plaintiffs to enter into the contract." *Id.*

The contract between Fooses and Henehan (a/k/a Pennise) contains the standard "as is" clause (paragraph 13) and the standard language making the contract the entire agreement and preventing survival of seller's representations after closing (paragraph 19). Therefore, there is no breach of contract claim. Also, since there is no evidence of a false representation or act of concealment, there is no fraudulent misrepresentation claim.

Judgment for the defendant dismissing the claim.



Stephen D. Aronson
Canandaigua City Court Judge

Dated: July 09, 2007
Canandaigua, New York

"An appeal from this judgment must be taken no later than the earliest of the following dates: (I) thirty days after receipt in court of a copy of the judgment by the appealing party, (ii) thirty days after personal delivery of a copy of the judgment by another party to the action to the appealing party (or by the appealing party to another party), or (iii) thirty-five days after the mailing of a copy of the judgment to the appealing party by the clerk of the court or by another party to the action."