



Effective: March 1, 2002

McKinney's Consolidated Laws of New York Annotated [Currentness](#)

Real Property Law ([Refs & Annos](#))

Chapter 50. Of the Consolidated Laws

▣ [Article 14](#). Property Condition Disclosure in the Sale of Residential Real Property ([Refs & Annos](#))

➔ **§ 462. Property condition disclosure statement**

1. Except as is provided in [section four hundred sixty-three](#) of this article, every seller of residential real property pursuant to a real estate purchase contract shall complete and sign a property condition disclosure statement as prescribed by subdivision two of this section and cause it, or a copy thereof, to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale. A copy of the property condition disclosure statement containing the signatures of both seller and buyer shall be attached to the real estate purchase contract. Nothing contained in this article or this disclosure statement is intended to prevent the parties to a contract of sale from entering into agreements of any kind or nature with respect to the physical condition of the property to be sold, including, but not limited to, agreements for the sale of real property "as is".

2. The following shall be the disclosure form:

PROPERTY CONDITION DISCLOSURE STATEMENT

NAME OF SELLER OR SELLERS:

PROPERTY ADDRESS:

THE PROPERTY CONDITION DISCLOSURE ACT REQUIRES THE SELLER OF RESIDENTIAL REAL PROPERTY TO CAUSE THIS DISCLOSURE STATEMENT OR A COPY THEREOF TO BE DELIVERED TO A BUYER OR BUYER'S AGENT PRIOR TO THE SIGNING BY THE BUYER OF A BINDING CONTRACT OF SALE.

PURPOSE OF STATEMENT: THIS IS A STATEMENT OF CERTAIN CONDITIONS AND INFORMATION CONCERNING THE PROPERTY KNOWN TO THE SELLER. THIS DISCLOSURE STATEMENT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR BY ANY AGENT REPRESENTING THE SELLER IN THIS TRANSACTION. IT IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR TESTS AND THE BUYER IS ENCOURAGED TO OBTAIN HIS OR HER OWN INDEPENDENT PROFESSIONAL INSPECTIONS AND ENVIRONMENTAL TESTS AND ALSO IS ENCOURAGED TO CHECK PUBLIC RECORDS PERTAINING TO THE PROPERTY.

A KNOWINGLY FALSE OR INCOMPLETE STATEMENT BY THE SELLER ON THIS FORM MAY SUBJECT THE SELLER TO CLAIMS BY THE BUYER PRIOR TO OR AFTER THE TRANSFER OF TITLE. IN THE EVENT A SELLER FAILS TO PERFORM THE DUTY PRESCRIBED IN THIS ARTICLE TO DELIVER A DISCLOSURE STATEMENT PRIOR TO THE SIGNING BY THE BUYER OF A BINDING CONTRACT OF SALE, THE BUYER SHALL RECEIVE UPON THE TRANSFER OF TITLE A CREDIT OF FIVE HUNDRED DOLLARS AGAINST THE AGREED UPON PURCHASE PRICE OF THE RESIDENTIAL REAL PROPERTY.

“RESIDENTIAL REAL PROPERTY” MEANS REAL PROPERTY IMPROVED BY A ONE TO FOUR FAMILY DWELLING USED OR OCCUPIED, OR INTENDED TO BE USED OR OCCUPIED, WHOLLY OR PARTLY, AS THE HOME OR RESIDENCE OF ONE OR MORE PERSONS, BUT SHALL NOT REFER TO (A) UNIMPROVED REAL PROPERTY UPON WHICH SUCH DWELLINGS ARE TO BE CONSTRUCTED OR (B) CONDOMINIUM UNITS OR COOPERATIVE APARTMENTS OR (C) PROPERTY ON A HOMEOWNERS' ASSOCIATION THAT IS NOT OWNED IN FEE SIMPLE BY THE SELLER.

INSTRUCTIONS TO THE SELLER:

- (a) ANSWER ALL QUESTIONS BASED UPON YOUR ACTUAL KNOWLEDGE.
- (b) ATTACH ADDITIONAL PAGES WITH YOUR SIGNATURE IF ADDITIONAL SPACE IS REQUIRED.
- (c) COMPLETE THIS FORM YOURSELF.
- (d) IF SOME ITEMS DO NOT APPLY TO YOUR PROPERTY, CHECK “NA” (NON-APPLICABLE). IF YOU DO NOT KNOW THE ANSWER CHECK “UNKN” (UNKNOWN).

SELLER'S STATEMENT: THE SELLER MAKES THE FOLLOWING REPRESENTATIONS TO THE BUYER BASED UPON THE SELLER'S ACTUAL KNOWLEDGE AT THE TIME OF SIGNING THIS DOCUMENT. THE SELLER AUTHORIZES HIS OR HER AGENT, IF ANY, TO PROVIDE A COPY OF THIS STATEMENT TO A PROSPECTIVE BUYER OF THE RESIDENTIAL REAL PROPERTY. THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER AND ARE NOT THE REPRESENTATIONS OF THE SELLER'S AGENT.

GENERAL INFORMATION

1. HOW LONG HAVE YOU OWNED THE PROPERTY?
2. HOW LONG HAVE YOU OCCUPIED THE PROPERTY?
3. WHAT IS THE AGE OF THE STRUCTURE OR STRUCTURES? NOTE TO BUYER--IF THE STRUCTURE WAS BUILT BEFORE 1978 YOU ARE ENCOURAGED TO INVESTIGATE FOR THE PRESENCE OF LEAD

BASED PAINT.

4. DOES ANYBODY OTHER THAN YOURSELF HAVE A LEASE, EASEMENT OR ANY OTHER RIGHT TO USE OR OCCUPY ANY PART OF YOUR PROPERTY OTHER THAN THOSE STATED IN DOCUMENTS AVAILABLE IN THE PUBLIC RECORD, SUCH AS RIGHTS TO USE A ROAD OR PATH OR CUT TREES OR CROPS. YES NO UNKN NA

5. DOES ANYBODY ELSE CLAIM TO OWN ANY PART OF YOUR PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

6. HAS ANYONE DENIED YOU ACCESS TO THE PROPERTY OR MADE A FORMAL LEGAL CLAIM CHALLENGING YOUR TITLE TO THE PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

7. ARE THERE ANY FEATURES OF THE PROPERTY SHARED IN COMMON WITH ADJOINING LAND OWNERS OR A HOMEOWNERS ASSOCIATION, SUCH AS WALLS, FENCES OR DRIVEWAYS? YES NO UNKN NA (IF YES DESCRIBE BELOW)

8. ARE THERE ANY ELECTRIC OR GAS UTILITY SURCHARGES FOR LINE EXTENSIONS, SPECIAL ASSESSMENTS OR HOMEOWNER OR OTHER ASSOCIATION FEES THAT APPLY TO THE PROPERTY? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

9. ARE THERE CERTIFICATES OF OCCUPANCY RELATED TO THE PROPERTY? YES NO UNKN NA (IF NO, EXPLAIN BELOW)

ENVIRONMENTAL

NOTE TO SELLER - IN THIS SECTION, YOU WILL BE ASKED QUESTIONS REGARDING PETROLEUM PRODUCTS AND HAZARDOUS OR TOXIC SUBSTANCES THAT YOU KNOW TO HAVE BEEN SPILLED, LEAKED OR OTHERWISE BEEN RELEASED ON THE PROPERTY OR FROM THE PROPERTY ONTO ANY OTHER PROPERTY. PETROLEUM PRODUCTS MAY INCLUDE, BUT ARE NOT LIMITED TO, GASOLINE, DIESEL FUEL, HOME HEATING FUEL, AND LUBRICANTS. HAZARDOUS OR TOXIC SUBSTANCES ARE PRODUCTS THAT COULD POSE SHORT- OR LONG-TERM DANGER TO PERSONAL HEALTH OR THE ENVIRONMENT IF THEY ARE NOT PROPERLY DISPOSED OF, APPLIED OR STORED. THESE INCLUDE, BUT ARE NOT LIMITED TO, FERTILIZERS, PESTICIDES AND INSECTICIDES, PAINT INCLUDING PAINT THINNER, VARNISH REMOVER AND WOOD PRESERVATIVES, TREATED WOOD, CONSTRUCTION MATERIALS SUCH AS ASPHALT AND ROOFING MATERIALS, ANTIFREEZE AND OTHER AUTOMOTIVE PRODUCTS, BATTERIES, CLEANING SOLVENTS INCLUDING SEPTIC TANK CLEANERS, HOUSEHOLD CLEANERS AND POOL CHEMICALS AND PRODUCTS CONTAINING MERCURY AND LEAD.

NOTE TO BUYER - IF CONTAMINATION OF THIS PROPERTY FROM PETROLEUM PRODUCTS AND/OR HAZARDOUS OR TOXIC SUBSTANCES IS A CONCERN TO YOU, YOU ARE URGED TO CONSIDER SOIL AND GROUNDWATER TESTING OF THIS PROPERTY.

10. IS ANY OR ALL OF THE PROPERTY LOCATED IN A DESIGNATED FLOODPLAIN? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

11. IS ANY OR ALL OF THE PROPERTY LOCATED IN A DESIGNATED WETLAND? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

12. IS THE PROPERTY LOCATED IN AN AGRICULTURAL DISTRICT? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

13. WAS THE PROPERTY EVER THE SITE OF A LANDFILL? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

14. ARE THERE OR HAVE THERE EVER BEEN FUEL STORAGE TANKS ABOVE OR BELOW THE GROUND ON THE PROPERTY? YES NO UNKN NA IF YES, ARE THEY CURRENTLY IN USE? YES NO UNKN NA LOCATION(S) ARE THEY LEAKING OR HAVE THEY EVER LEAKED? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

15. IS THERE ASBESTOS IN THE STRUCTURE? YES NO UNKN NA (IF YES, STATE LOCATION OR LOCATIONS BELOW)

16. IS LEAD PLUMBING PRESENT? YES NO UNKN NA (IF YES, STATE LOCATION OR LOCATIONS BELOW)

17. HAS A RADON TEST BEEN DONE? YES NO UNKN NA (IF YES, ATTACH A COPY OF THE REPORT)

18. HAS MOTOR FUEL, MOTOR OIL, HOME HEATING FUEL, LUBRICATING OIL OR ANY OTHER PETROLEUM PRODUCT, METHANE GAS, OR ANY HAZARDOUS OR TOXIC SUBSTANCE SPILLED, LEAKED OR OTHERWISE BEEN RELEASED ON THE PROPERTY OR FROM THE PROPERTY ONTO ANY OTHER PROPERTY? YES NO UNKN NA (IF YES, DESCRIBE BELOW)

19. HAS THE PROPERTY BEEN TESTED FOR THE PRESENCE OF MOTOR FUEL, MOTOR OIL, HOME HEATING FUEL, LUBRICATING OIL, OR ANY OTHER PETROLEUM PRODUCT, METHANE GAS, OR ANY HAZARDOUS OR TOXIC SUBSTANCE? YES NO UNKN NA (IF YES, ATTACH REPORT(S))

STRUCTURAL

20. IS THERE ANY ROT OR WATER DAMAGE TO THE STRUCTURE OR STRUCTURES? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

21. IS THERE ANY FIRE OR SMOKE DAMAGE TO THE STRUCTURE OR STRUCTURES? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

22. IS THERE ANY TERMITE, INSECT, RODENT OR PEST INFESTATION OR DAMAGE? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

23. HAS THE PROPERTY BEEN TESTED FOR TERMITE, INSECT, RODENT OR PEST INFESTATION OR DAMAGE? YES NO UNKN NA (IF YES, PLEASE ATTACH REPORT(S))

24. WHAT IS THE TYPE OF ROOF/ROOF COVERING (SLATE, ASPHALT, OTHER.)? ANY KNOWN MATERIAL DEFECTS? HOW OLD IS THE ROOF? IS THERE A TRANSFERABLE WARRANTY ON THE ROOF IN EFFECT NOW? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

25. ARE THERE ANY KNOWN MATERIAL DEFECTS IN ANY OF THE FOLLOWING STRUCTURAL SYSTEMS: FOOTINGS, BEAMS, GIRDERS, LINTELS, COLUMNS OR PARTITIONS. YES NO UNKN NA (IF YES, EXPLAIN BELOW)

MECHANICAL SYSTEMS & SERVICES

26. WHAT IS THE WATER SOURCE (CIRCLE ALL THAT APPLY - WELL, PRIVATE, MUNICIPAL, OTHER)? IF MUNICIPAL, IS IT METERED? YES NO UNKN NA

27. HAS THE WATER QUALITY AND/OR FLOW RATE BEEN TESTED? YES NO UNKN NA (IF YES, DESCRIBE BELOW)

28. WHAT IS THE TYPE OF SEWAGE SYSTEM (CIRCLE ALL THAT APPLY - PUBLIC SEWER, PRIVATE SEWER, SEPTIC OR CESSPOOL)? IF SEPTIC OR CESSPOOL, AGE? _____ DATE LAST PUMPED? _____ FREQUENCY OF PUMPING? _____ ANY KNOWN MATERIAL DEFECTS? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

29. WHO IS YOUR ELECTRIC SERVICE PROVIDER? _____ WHAT IS THE AMPERAGE? _____ DOES IT HAVE CIRCUIT BREAKERS OR FUSES? _____ PRIVATE OR PUBLIC POLES? _____ ANY KNOWN MATERIAL DEFECTS? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

30. ARE THERE ANY FLOODING, DRAINAGE OR GRADING PROBLEMS THAT RESULTED IN STANDING WATER ON ANY PORTION OF THE PROPERTY? YES NO UNKN NA (IF YES, STATE LOCATIONS AND EXPLAIN BELOW)

31. DOES THE BASEMENT HAVE SEEPAGE THAT RESULTS IN STANDING WATER? YES NO UNKN NA (IF YES, EXPLAIN BELOW)

ARE THERE ANY KNOWN MATERIAL DEFECTS IN ANY OF THE FOLLOWING (IF YES, EXPLAIN BELOW. USE ADDITIONAL SHEETS IF NECESSARY.):

32.	PLUMBING SYSTEM?	YES NO UNKN NA
33.	SECURITY SYSTEM?	YES NO UNKN NA
34.	CARBON MONOXIDE DETECTOR?	YES NO UNKN NA
35.	SMOKE DETECTOR?	YES NO UNKN NA
36.	FIRE SPRINKLER SYSTEM?	YES NO UNKN NA
37.	SUMP PUMP?	YES NO UNKN NA
38.	FOUNDATION/SLAB?	YES NO UNKN NA

- 39. INTERIOR WALLS/CEILINGS? YES NO UNKN NA
- 40. EXTERIOR WALLS OR SIDING? YES NO UNKN NA
- 41. FLOORS? YES NO UNKN NA
- 42. CHIMNEY/FIREPLACE OR STOVE? YES NO UNKN NA
- 43. PATIO/DECK? YES NO UNKN NA
- 44. DRIVEWAY? YES NO UNKN NA
- 45. AIR CONDITIONER? YES NO UNKN NA
- 46. HEATING SYSTEM? YES NO UNKN NA
- 47. HOT WATER HEATER? YES NO UNKN NA
- 48. THE PROPERTY IS LOCATED IN THE FOLLOWING SCHOOL DISTRICT UNKN

NOTE: BUYER IS ENCOURAGED TO CHECK PUBLIC RECORDS CONCERNING THE PROPERTY (E.G. TAX RECORDS AND WETLAND AND FLOOD PLAIN MAPS)

THE SELLER SHOULD USE THIS AREA TO FURTHER EXPLAIN ANY ITEM ABOVE. IF NECESSARY, ATTACH ADDITIONAL PAGES AND INDICATE HERE THE NUMBER OF ADDITIONAL PAGES ATTACHED.

SELLER'S CERTIFICATION: SELLER CERTIFIES THAT THE INFORMATION IN THIS PROPERTY CONDITION DISCLOSURE STATEMENT IS TRUE AND COMPLETE TO THE SELLER'S ACTUAL KNOWLEDGE AS OF THE DATE SIGNED BY THE SELLER. IF A SELLER OF RESIDENTIAL REAL PROPERTY ACQUIRES KNOWLEDGE WHICH RENDERS MATERIALLY INACCURATE A PROPERTY CONDITION DISCLOSURE STATEMENT PROVIDED PREVIOUSLY, THE SELLER SHALL DELIVER A REVISED PROPERTY CONDITION DISCLOSURE STATEMENT TO THE BUYER AS SOON AS PRACTICABLE. IN NO EVENT, HOWEVER, SHALL A SELLER BE REQUIRED TO PROVIDE A REVISED PROPERTY CONDITION DISCLOSURE STATEMENT AFTER THE TRANSFER OF TITLE FROM THE SELLER TO THE BUYER OR OCCUPANCY BY THE BUYER, WHICHEVER IS EARLIER.

SELLER _____ DATE _____

SELLER _____ DATE _____

BUYER'S ACKNOWLEDGMENT: BUYER ACKNOWLEDGES RECEIPT OF A COPY OF THIS STATEMENT AND BUYER UNDERSTANDS THAT THIS INFORMATION IS A STATEMENT OF CERTAIN CONDITIONS AND INFORMATION CONCERNING THE PROPERTY KNOWN TO THE SELLER. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR SELLER'S AGENT AND IS NOT A SUBSTITUTE FOR ANY HOME, PEST, RADON OR OTHER INSPECTIONS OR TESTING OF THE PROPERTY OR INSPECTION OF THE PUBLIC RECORDS.

BUYER _____ DATE _____

BUYER _____ DATE _____

3. Nothing in this article shall require a seller to undertake or provide for any investigation or inspection of his or her residential real property or to check any public records.

CREDIT(S)

(Added L.2001, c. 456, § 2, eff. March 1, 2002.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

L.2001, c. 456 legislation

L.2001, c. 456, § 3, provides:

“This act shall take effect on the first day of March in the year next succeeding the year in which it shall have become a law and shall apply to any real estate purchase contract entered into on or after such date.”

Former Sections

A former § 462, relating to who may be joined as defendants, was added by L.1920, c. 930, § 1, and repealed by [Real Property Actions and Proceedings Law § 2111](#), eff. Sept. 1, 1963. See [Real Property Actions and Proceedings Law § 1012](#).

A prior § 462 was renumbered [Real Property Law § 602](#) by L.1920, c. 930, § 2.

SUPPLEMENTARY PRACTICE COMMENTARIES

2009 Electronic Update

by Rudolph de Winter and Larry M. Loeb

2006

A spate of lower court decisions, with varying interpretations of the Property Condition Disclosure Act (“PCDA”) has now followed its initial judicial critique.

The initial foray came in [Goldman v. Fay, 2005, 8 Misc.3d 959, 797 N.Y.S.2d 731](#), decided by the same court,

and Judge, as *Malach v. Chuang*, cited in the main volume. In *Goldman*, the purchaser sought to recover damages for the repair of a leak the seller had allegedly failed to disclose. The real property involved consisted of a condominium unit and, as such, was expressly excluded from the PCDA (RPL § 461[5]). The court questioned the rationality of the exclusion of condominiums and cooperatives and opined that their exclusion rendered the statute, as written, violative of the equal protection clause and suggested that the Legislature amend the statute to encompass all residential real estate transactions. On the merits, the court dismissed the claim for, among other grounds, a lack of independent evidence that the leak had been caused by the defendant prior to the closing.

In *Gabberty v. Pizarz*, 2005, 10 Misc.3d 1010, 810 N.Y.S.2d 799 (Supreme Court, Nassau Co.) the purchaser discovered after taking title a chronic basement flooding and/or water seepage condition which she alleged the seller had hidden from her. The defendant-seller had delivered a Property Condition Disclosure Statement ("PCDS"), albeit signed by his wife, which had left unanswered questions 30 and 31 dealing with flooding or drainage problems and seepage resulting in standing water in any portion of the property. Initially, the court noted that as a matter of statutory construction RPL § 465, entitled "Remedy," "clearly provides for claims should a seller not comply with the statute," thereby declining to follow *Malach*. It next held that by having furnished an incomplete PCDS, the seller had failed to perform its obligations under RPL § 465(1) and that, although not demanded, the plaintiff was entitled to the \$500 credit. The court next considered the claim that the seller had intentionally misrepresented and failed to disclose the true condition of the flooding problem. Having determined that RPL § 465(2) did provide a remedy for "a willful failure to perform the requirements of this article," a phrase left undefined in the statute, the court set forth a definition which it believed met the legislative goals, namely, a deliberate misstatement regarding a defective condition that would tend to assure a prudent buyer that no such condition existed, and one that a professional inspector might not discover. Applying this standard, the court noted that the plaintiff had signed the contract knowing that information was missing from the PCDS, and could not therefore claim that she relied on it or sustain a cause of action under RPL § 465(2). Lastly, the court dismissed plaintiff's fraud claim for lack of proof of active concealment.

In *Bishop v. Graziano*, 2005, 10 Misc.3d 342, 804 N.Y.S.2d 236 (District Court, Suffolk Co.), the plaintiff-buyer sued alleging claims for breach of contract and fraud to recover for damage to floors and walls discovered post-closing. The sellers asserted RPL § 465(1) and/or common law as affirmative defenses. Initially, the court dismissed the breach of contract claim on the strength of the "as is" and merger clauses in the contract, reasoning that these provisions vitiated any representations following the delivery of the deed. In its analysis of the PCDA defense, the court first noted that the remedy provisions contained in RPL § 465(2) were inapplicable to sellers, as in the instant case, who had elected to "opt-out" of furnishing a PCDS and allowed the buyer a \$500 credit, but that, in accord with the dicta of *Malach*, such sellers could nevertheless remain liable under common law or existing statutory theories. On the fraud claim the court found a complete absence of any representations and held that despite RPL § 467 (which preserves existing causes of action at law, in statute or in equity) "the creation of a nondisclosure election inherently vitiates a fraud claim which exists at the time of the election as it is premised upon relied upon misrepresentations which are no longer possible."

Next followed *Renkas v. Sweers*, 2005, 10 Misc.3d 1076(A), 814 N.Y.S.2d 892 (Supreme Court, Monroe Co.), in which the plaintiff-buyer asserted, among others, causes of action for breach of contract, fraudulent misrepresentations and negligence, all predicated on alleged oral misrepresentations and answers in the PCDS delivered prior to the execution by the buyers of an "as is" contract for the purchase of a residential property, regarding standing water in the basement. In granting defendant-seller's motion for summary judgment, the court,

although viewing the facts alleged most favorably for the buyers, found that there was no “justifiable reliance” by the buyers on the seller's alleged misrepresentations. There was no concealment of the condition, thus under the prevailing *caveat emptor* doctrine there was no duty on the part of the seller to disclose information concerning the condition of the property. The buyers had hired an engineer to perform an inspection, but his report was inconclusive. Citing RPL § 462[1] and [2], the court noted that the seller's answers in the PCDS, neither thwarted the buyers' ability to assess the condition of the property nor altered their agreement to purchase the property “as is.” For the dismissal of the breach of contract claim the court relied on the “as is” and merger clauses of the contract and, more significantly, held that no breach of contract claim could be based on representations made in the PCDS, citing *Malach* as authority; and in its dismissal of the negligence claim, it noted the absence of a duty to disclose at common law and legislative findings which, said the court, did not evidence an intent to create by means of RPL Article 14 a new independent cause of action.

Then, in *Fleischer v. Morreale*, 11 Misc.3d 1004, 810 N.Y.S.2d 624 (District Court, Suffolk Co.), upon a finding that roof leaks and basement flooding were presale conditions known to the seller and that the seller's contrary misrepresentation in his PCDS were knowingly false, the court, relying on its statutory construction and the holding in *Gabberty*, rather than on *Malach* and *Renkas*, held that injured parties have standing to seek judicial redress for violations of RPL Article 14. By adopting the *Gabberty* definition of willful failure to perform the requirements of the Article, the court, awarded the plaintiff the damages sustained in making the necessary repairs.

Finally, an appellate decision set a new course by interpreting the statute's remedy provision, contrary to *Malach* and *Renkas*, as not only surviving the contract of sale, but as not being superseded by the contract's “as is” and specific disclaimer provisions. In its affirmance of a small claims Justice Court judgment, the Appellate Term (9th & 10th Jud. Dists) in *Calvente v. Levy*, 2006, 12 Misc.3d 38, 816 N.Y.S.2d 828, held that “substantial justice” had been done within the rules and principles of substantive law (see UJCA 1807), when the lower court awarded the purchaser \$1,500 in damages after the seller had checked off “no” to entry 30 of the PCDS (regarding flooding, drainage and standing water), although there was uncontroverted evidence that there had been prior water leakage in the basement during a severe storm, of which the seller had actual knowledge, but which the seller claimed to have been “an anomaly.” Relying on RPL § 465(2), the Appellate Term held that the “willful failure” to have disclosed the flooding problem rendered the seller liable, inasmuch as the contract specific disclaimer and “as is” provisions would not “vitiating the Disclosure Statement which the statute requires ‘shall be attached to the real estate purchase contract’ (Real Property Law § 462(1), nor waive the buyer's cause of action specifically provided for under Real Property Law § 462(2) (*contra Malach v Chuang...*)”(citation omitted).

Sellers should be aware that if such reasoning is upheld and/or followed, their answers in the PCDS will survive the contract and closing.

PRACTICE COMMENTARIES

2006 Main Volume

by Rudolph de Winter and Larry M. Loeb

Since its effective date in March 2002, the Property Condition Disclosure Act ([RPL Article 14, § 460 et seq.](#)) not only has confounded commentators (see e.g., N.Y. State Bar Association, *Real Property Law Journal*, Summer 2002, Vol. 30, No. 3, p. 100), but in its initial judicial interpretation in [Malach v Chuang, 2002, 194 Misc.2d 651, 754 N.Y.S.2d 835](#), the NYC Civil Court found portions of the statute to be unenforceable and others “only to confuse what had been a well settled area of real property law.”

In the instant action the defendant-sellers *did* complete and deliver the Disclosure form before the contract was executed. Following the closing it was discovered that the base of the swimming pool had rot. The plaintiff-purchasers then asserted that the response “Unknown” given by the sellers to Question 20--“Is there any rot or water damage to the structure or structures?” was designed to deceive the purchasers.

In an extended analysis of the statute, the court examined, among others, the following issues:

1. Does Article 14 provide a cause of action? In concluding it did not, the court initially reviewed [RPL § 465\(1\)](#) and noted that allowing the buyer to receive a \$500 credit at closing was the sole remedy provided by the statute upon a seller's *failure* to deliver a Disclosure form prior to the execution of a “binding contract,” while [RPL § 467](#) preserved any common law or statutory causes of action. Next, it examined [RPL § 465\(2\)](#) to determine whether a buyer was afforded a statutory remedy for an alleged misrepresentation in the seller's completion of the Disclosure form. Focusing on the third paragraph of the Disclosure form--“A knowingly false or incomplete statement by the seller on this form *may* subject the seller to claims by the buyer prior to or after transfer of title” (emphasis added), the court observed that “permissive language” such as “may subject” as opposed to the use of the word “shall” was too vague and nebulous to create a remedy “and therefore [RPL § 465\(2\)](#) is unenforceable.”.

2. Does the Disclosure survive the contract or closing? Observing that [RPL § 462](#) expressly authorizes the parties to enter into agreements of any kind with respect to the physical condition of the property, including a sale “as is,” and that the multi-bar Residential Contract of Sale employed in the instant transaction contained multiple disclaimers as well as a merger provision, the court concluded that although the Disclosure Form had to be attached to the contract, the information contained therein need not be included in the contract and that nothing contained in the statute was intended to survive beyond the contract or the closing.

Citing other problems with the statute, the court noted that because “actual knowledge” was the standard to be followed by the seller in responding to the Disclosure questions, “a response of ‘Unknown’ is an oxymoron.”

In concluding its analysis and dismissing the plaintiffs' action based on a breach of the Disclosure statement, the court urged the legislature to revisit the legislation and clarify its provisions and, in the interim, questioned the wisdom of sellers who provide the form which could be used against them in a suit under a common law theory; implying that allowing a \$500 credit was the more prudent course.

LIBRARY REFERENCES

2006 Main Volume

Consumer Protection  8.

Westlaw Topic No. 92H.

C.J.S. Credit Reporting Agencies; Consumer Protection §§ 40 to 51, 64.

RESEARCH REFERENCES

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Encyclopedias

[93 Am. Jur. Proof of Facts 3d 293](#), Real Estate Purchaser's Recovery of Damages for Seller's Nondisclosure of Dangerous Condition of Land.

[NY Jur. 2d, Real Property Sales & Exchanges § 70](#), Generally; Property Disclosure Statement.

[NY Jur. 2d, Real Property Sales & Exchanges § 72](#), Remedy.

Forms

[New York Forms Legal and Business § 1:17](#), Property Condition Disclosures.

[New York Forms Legal and Business § 1:74](#), Property Condition Disclosure Statement.

[New York Forms Legal and Business § 1D:1](#), Basic Elements.

[New York Forms Legal and Business § 4E:25](#), Property Condition Disclosure Statement.

[McKinney's Forms, Real Property Practice § 3:74](#), Sale of Real Estate "As Is" (Form).

NOTES OF DECISIONS

Construction and application [1](#)

Credits against purchase price [2](#)

Fraud [4](#)

Purchaser's responsibilities [3](#)

Waiver [5](#)

1. Construction and application

"As is" provision of contract for sale of residential property did not supersede Property Condition Disclosure Statement in which vendor failed to disclose water leakage problem of which he had actual knowledge, and did not waive purchaser's cause of action against vendor for actual damages for willful failure to disclose the problem. [Calvente v. Levy](#),

2006, 12 Misc.3d 38, 816 N.Y.S.2d 828. [Antitrust And Trade Regulation](#) 🔑 297

Willful failure to perform requirements of statute requiring vendor of real property to complete property condition disclosure statement means a deliberate misstatement or misstatements in a fully completed and timely delivered statement regarding the defective condition complained of that would tend to assure a reasonably prudent buyer that no such condition existed, and which a professional inspector might not discover upon an inspection of the premises that would meet generally accepted standards in the trade. [Gabberty v. Pisarz, 2005, 10 Misc.3d 1010, 810 N.Y.S.2d 799. Antitrust And Trade Regulation](#) 🔑 199

Statute requiring seller of property to complete property condition disclosure statement did not diminish buyer's responsibility to carefully examine property he intended to purchase and did not limit existing responsibilities of seller, buyer, or agent. [Gabberty v. Pisarz, 2005, 10 Misc.3d 1010, 810 N.Y.S.2d 799. Antitrust And Trade Regulation](#) 🔑 199

Information contained in real estate disclosure contained did not survive contract or closing, although signed disclosure was required to be attached to real estate purchase contract; the items set forth on disclosure form would merge into contract of sale and into deed at closing. [Malach v. Chuang, 2002, 194 Misc.2d 651, 754 N.Y.S.2d 835. Antitrust And Trade Regulation](#) 🔑 199

2. Credits against purchase price


Vendor of real property was required to give purchaser \$500 credit against agreed purchase price upon transfer of title for his failure to complete statutorily required property condition disclosure statement before sale, where statement delivered by vendor left certain questions unanswered. [Gabberty v. Pisarz, 2005, 10 Misc.3d 1010, 810 N.Y.S.2d 799. Antitrust And Trade Regulation](#) 🔑 389(2)

Vendor of real property was required to give purchaser \$500 credit against agreed purchase price upon transfer of title for his failure to complete statutorily required property condition disclosure statement before sale, where statement delivered by vendor left certain questions unanswered. [Gabberty v. Pisarz, 2005, 10 Misc.3d 1010, 810 N.Y.S.2d 799. Antitrust And Trade Regulation](#) 🔑 389(2)


3. Purchaser's responsibilities

Vendor of real property could not be held liable for willful failure to comply with statutory requirement of completing property condition disclosure statement, since purchaser, who was represented by counsel, signed contract for sale of property even though vendor's property condition disclosure statement was incomplete and did not answer questions regarding intrusion of water into premises; statutory requirement of property condition disclosure statement did not diminish purchaser's responsibility to carefully examine property it intended to purchase, notwithstanding missing information on disclosure statement purchaser signed contract, and thus purchaser could not claim to have relied on statement in entering into contract. [Gabberty v. Pisarz, 2005, 10 Misc.3d 1010, 810 N.Y.S.2d 799. Antitrust And Trade Regulation](#) 🔑 199

4. Fraud

Purchaser of real property failed to establish that seller intentionally concealed water condition in basement, as required to support action for common-law fraud in the inducement; fact that seller sheetrocked, painted, and carpeted basement a year before he sold house did not prove concealment since finishing a basement before placing home on market could have been done to boost sales price and vendor's property condition disclosure statement did not answer questions about flooding, drainage and seepage, or sump pump. [Gabberty v. Pizarz, 2005, 10 Misc.3d 1010, 810 N.Y.S.2d 799. Fraud](#)  16

5. Waiver

By accepting real estate disclosure form with “unknown” answers, at time of closing, purchaser waived any claims for defects that could arise in areas answered “unknown”; by answering “unknown,” seller triggered duty to inquire on part of purchaser, relieving seller of potential liability for defects arising regarding the part of premises covered by the question. [Malach v. Chuang, 2002, 194 Misc.2d 651, 754 N.Y.S.2d 835. Antitrust And Trade Regulation](#)  297

McKinney's Real Property Law § 462, NY REAL PROP § 462
Current through L.2009, chapters 1 to 14 and 16 to 217.

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