BY KELLY M. GRECO

The Shrinking Warranty of Habitability: *Fattah v. Bim*

Builders owe an implied warranty of habitability to home buyers. But if a buyer waives the warranty and later sells the home, does that waiver protect the builder against claims by the second buyer, even if Buyer #2 didn't know about the waiver? In *Fattah v. Bim*, the Illinois Supreme Court says "yes."

TAKEAWAYS >>

- Traditionally, sellers of real estate in Illinois were not liable for undisclosed defects under the doctrine of *caveat emptor* and the doctrine of merger. But in1979, the Illinois Supreme Court held that "in the sale of a new house by a builder-vendor, there is an implied warranty of habitability which will support an action against the builder-vendor by the vendee for latent defects and which will avoid the unjust results of Caveat emptor and the doctrine of merger."
- In *Fattah v. Bim*, the Illinois Supreme Court held that the implied warranty of habitability may not be extended to a second purchaser of a house when a valid, bargained-for waiver of the warranty has been executed between the builder-vendor and the first purchaser.
- Notwithstanding *Fattah*, builder-vendors may want to place the waiver of the implied warranty of habitability in the recorded deed so that subsequent purchasers will have record notice of the waiver.

FOR MANY YEARS, SELLERS OF REAL ESTATE IN ILLINOIS WERE NOT LIABLE FOR undisclosed defects under at least two legal doctrines. Under the *caveat emptor* doctrine, the buyer has the burden to perform due diligence when purchasing real property.[1] Similarly, the doctrine of merger provides that all agreements between a buyer and seller merge into the deed when it is delivered to the buyer at closing unless a clause in the contract provides otherwise.[2] In other words, the doctrine of merger prevents relief to the aggrieved purchaser after receipt of the deed.

In 1979, however, the Illinois Supreme Court held that "in the sale of a new house by a builder-vendor, there is an implied warranty of habitability which will support an action against the builder-vendor by the vendee for latent defects and which will avoid the unjust results of caveat emptor and the doctrine of merger."[3] The supreme court later extended this protection to subsequent purchasers who typically do not have privity with the builder-vendor.[4]

In *Fattah v. Bim*, the Illinois Appellate Court expanded the protections further,[5] holding that an initial buyer's waiver of the implied warranty of habitability does not bind a subsequent purchaser who had no knowledge of the waiver. But a few months ago, the Illinois Supreme Court reversed, holding that the implied warranty of habitability may not be extended to a second purchaser when a valid, bargained-for waiver of the warranty has been executed between the builder-vendor and the first purchaser.[6]

This article begins with background on the implied warranty of habitability in Illinois. It then discusses the lower court rulings in *Fattah v. Bim* and the Illinois Supreme Court's reversal. Finally, it looks at what *Fattah* means for builder-vendors and practitioners in Illinois.

Overview of the implied warranty of habitability in Illinois

Scope. As the Illinois Supreme Court has explained, the implied warranty of habitability in the sale of new homes by a builder-vendor is a judicial innovation based on public policy.[7] Illinois

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1. See, *e.g.*, *Mitchell v. Skubiak*, 248 Ill. App. 3d 1000, 1005 (1st Dist. 1993).
2. *Coughlin v. Gustafson*, 332 Ill. App. 3d 406, 411 (1st Dist. 2002).
3. *Petersen v. Hubschman Construction Co.*, 76 Ill. 2d 31, 39-40 (1979).
4. *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 185 (1982).
5. See *Fattah v. Bim*, 2015 IL App (1st) 140171.
6. *Fattah v. Bim*, 2016 IL 119365, ¶ 35.
7. *Petersen*, 76 Ill. 2d at 38-9; *Redarowicz*, 92 Ill. 2d at 183.

EVEN AFTER *FATTAH*, BUILDER-VENDORS MAY WANT TO PLACE THE WARRANTY WAIVER IN THE DEED TO GIVE SUBSEQUENT PURCHASERS RECORD NOTICE.

ISBA RESOURCES >>

- ISBA FreeCLE, *Real Estate Law Update – 2015* (Nov. 20, 2015), http://onlinecle.isba.org/store/seminar/seminar.php?seminar=54760.
- James W. Springer, *When Home is Not So Sweet: Suing for Defective Residences*, 102 Ill. B.J. 546 (Nov. 2014), https://www.isba.org/ibj/2014/11/whenhomenotsosweetsuingdefectiveres.
- Roger L. Price & M. Ryan Pinkston, *The Implied Warranty of Habitability in Illinois: A Critical Review*, 98 Ill. B.J. 92 (Feb. 2010), https://www.isba.org/ibj/2010/02/theimpliedwarrantyofhabitabilityini.

courts have implied the warranty "because of the unusual dependent relationship of the vendee to the vendor."[8]

A buyer is usually not knowledgeable in construction practices and must rely on the integrity and skill of the builder-vendee. The implied warranty of habitability is meant to protect innocent new-home purchasers who subsequently discover latent defects.

The implied warranty of habitability arises with the execution of the contract between the vendor and the vendee, and it survives the delivery of the deed.[9] However, while the warranty has roots in the contract, it exists independently and privity is not required.[10]

The implied warranty is that the house, when completed and sold, is reasonably suited for its intended use. It extends only to latent defects that interfere with this legitimate expectation.

Subsequent purchasers. Noting that privity of contract is not required for the implied warranty of habitability to exist, the Illinois Supreme Court extended it to subsequent purchasers in *Redarowicz v. Ohlendorf*.[11] The supreme court observed that the subsequent purchaser also has little opportunity to inspect the construction methods and is typically not knowledgeable in construction practices. The court held that repair costs should be borne by the responsible builder-vendor who created the latent defect.

The court also found that "[t]he compelling public policies underlying the implied warranty of habitability should not be frustrated because of the short intervening ownership of the first purchaser; in these circumstances the implied warranty of habitability survives a change of hands in the ownership."[12] Latent defects in a house may not manifest themselves until after the original purchaser has sold to an unsuspecting buyer. While a subsequent purchaser did not know the builder-vendor, he or she still relies on the builder's expertise.

The supreme court reiterated that the warranty is designed to protect innocent purchasers and that "any reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally as deserving as recovery is incomprehensible."[13] However, the court limited its extension of the implied warranty of habitability to latent defects that manifest themselves within a reasonable time after the purchase.

Making a prima facie case and disclaimer of the implied warranty of habitability. To establish a breach of the warranty of habitability, the original purchasers must prove the home had a latent defect caused by improper design, material, or workmanship, which rendered the property unsuitable for use as a home.[14] In order to show a breach of an implied warranty of habitability, a subsequent purchaser must show that (1) there are latent defects in the house (2) that interfere with its reasonably intended use and (3) manifested themselves within a reasonable time after the house was purchased.[15]

The Illinois Supreme Court has held that a knowing disclaimer of the implied warranty of habitability is not against public policy.[16] Any disclaimer must, however, be strictly construed against the builder-vendor and cannot be buried in "boilerplate" clauses. Rather, it must be a conspicuous provision that fully discloses its consequences and reflects a true agreement between the parties. The builder bears a heavy burden to show that the buyer relinquished the protection of the warranty.

Fattah v. Bim

Facts. As president and owner of Masterklad, Inc. ("Masterklad"), Mirek Bim ("Bim") began construction of a single-family home in the summer of 2005.[17] Six months after the house was completed, Bim hired a subcontractor to add a 1,000 square foot patio. The patio was over six feet high, built on a grade sloping downward from the back of the house and supported by a retaining wall.

In May 2007, Beth Lubeck ("Lubeck") purchased the new house from Masterklad. In July 2007, Lubeck and

8. *Petersen*, 76 Ill. 2d at 41.
9. *Id.*
10. *Redarowicz*, 92 Ill. 2d at 183.
11. *Id.* at 185.
12. *Id.*
13. *Id.* (quoting *Moxly v. Laramie Builders, Inc.*, 600 P.2d 733, 736 (Wyo. 1979)).
14. *Schleyhahn v. Cole*, 178 Ill. App. 3d 111, 116 (4th Dist. 1989).
15. *Fattah v. Bim*, 2015 IL App (1st) 140171, ¶ 41.
16. *Petersen v. Hubschman Construction Co.*, 76 Ill. 2d 31, 43 (1979).
17. *Fattah*, 2015 IL App (1st) 140171, ¶ 3.

Bim executed a "waiver of disclaimer of implied warranty of habitability" agreement, and the agreement was made a part of the real estate contract. Per the terms of the agreement, Masterklad "hereby and forever disclaimed" and Lubeck "knowingly, voluntarily, fully and forever" waived the implied warranty of habitability applicable to the new house.[18] In addition, the agreement contained an "express warranties" provision that provided:

> The Agreement does not provide that Purchaser will receive from Seller (the "Warrantor") and [*sic*] express written warranty the form of which is attached to the Agreement. The Warrantor shall comply with the provisions of the express warranty and Purchaser accepts the express warranty granted therein as a substitute for the Implied Warranty of Habitability hereby waived by Purchaser and disclaimed by Seller.[19]

The parties acknowledged in the agreement that if a dispute arose between Lubeck and Masterklad, neither party could rely on the implied warranty of habitability. The agreement further provided that it would be binding and inure to the benefit of Masterklad, Lubeck, and "their respective successors, assigns, heirs, executors, administrators, and legal and personal representative."[20]

In May 2010, three years after Lubeck purchased the house, she sold it to John Fattah ("Fattah" or "Plaintiff"). The real estate sales contract between Lubeck and Fattah included an "'As-Is' Addendum Rider" which provided as follows:

> Seller and Buyer acknowledge and agree that the Property is being sold to Buyer in its existing, "as is" condition…and Seller shall not be responsible for the repair, replacement or modification of any deficiencies, malfunctions or mechanical defects on the Property or to any improvements thereon…. Seller makes no representation or warranty to Buyer, either express or implied, as to the (1) condition of the Property, (2) zoning…or (3) the suitability of the Property for the Buyer's intended use or purpose or for any other use or purpose.[21]

Pursuant to the rider, Lubeck agreed that selling the property "as is" did not relieve her from the legal obligation to disclose any and all known material latent defects. The sale to Fattah closed in November 2010.

The patio collapsed four months after Fattah took possession of the house. Fattah promptly filed a complaint against Bim and his wife, alleging they were the developers of the property and had breached the implied warranty of habitability by delivering the house with latent defects in the construction and/or design of the patio that led to its collapse. In his complaint, Fattah alleged that the defects in the home were not discoverable by him at the time of purchase and that, as a result of the Bims' breach, he was now required to repair the patio to bring it to a safe and habitable condition.

In turn, the Bims filed a motion for summary judgment arguing that (1) Lubeck's waiver and Masterklad's disclaimer of the implied warranty of habitability was binding on the plaintiff, (2) the plaintiff waived the warranty by purchasing the home "as is," and (3) the warranty did not apply because the alleged defects did not affect habitability and (4) were not latent.

In an affidavit attached to plaintiff's response to the motion for summary judgment, the plaintiff claimed that he was unaware that Lubeck had signed an agreement waiving her right to assert an implied warranty of habitability claim against Masterklad. The plaintiff stated that he purchased the home "as is" and understood that he was waiving some of his rights to seek recourse against Lubeck. He did not intend, however, to waive any right that he might have against any party other than Lubeck.

Trial court ruling. The Circuit Court of Cook County denied the Bims' motion for summary judgment.[22] After hearing testimony at trial, the circuit court held the evidence showed that latent defects in the patio resulted in the patio's collapse.

Nevertheless, the circuit court held that the plaintiff could not recover because Lubeck had expressly waived and Masterklad expressly disclaimed the implied warranty of habitability. As the circuit court put it, the waiver/disclaimer provided that it "shall survive the closing of the sale of Purchaser of the Residence and shall be binding upon and inure to the benefit of Seller, Purchaser and their respective successors and assigns."[23]

LAWYERS FOR BUYERS SHOULD CONSIDER ADDING A REPRESENTATION TO THE PURCHASE AGREEMENT REQUIRING SELLERS TO INDICATE WHETHER THEY HAVE WAIVED THE IMPLIED WARRANTY OF HABITABILITY.

As to the plaintiff's argument that he was not aware of the waiver/disclaimer, the circuit court wrote that "there is no dispute that [Plaintiff] purchased the home from Ms. Lubeck 'as is.'"[24] Moreover, there was no argument about whether the waiver between Lubeck and the Bims was effective.

Importantly, the circuit court found that a subsequent buyer can protect himself "by obtaining a representation in the purchase contract regarding whether the implied warranty of habitability was waived or not by the original purchaser."[25] The circuit court found that "[r]equiring the builder to rely on the original purchaser to disclose to a subsequent purchaser that the implied warranty was waived and disclaimed would unnecessarily frustrate the policy favoring the enforcement of knowing waiver."[26]

First district ruling. On appeal, the plaintiff argued that (1) waiver of an

18. *Id.* ¶ 4.
19. *Id.*
20. *Id.* ¶ 5.
21. *Id.* ¶ 6.
22. *Id.* ¶ 10.
23. *Id.* ¶ 16.
24. *Id.* ¶ 17.
25. *Id.*
26. *Id.*

implied warranty of habitability cannot bind a subsequent purchaser who has no knowledge of the waiver, and (2) the fact that he purchased the home "as is" is irrelevant.

The first district held that Lubeck's waiver of the warranty did not bind the plaintiff because he had no knowledge of the waiver when he bought the house from Lubeck and was not a party to the waiver agreement between Lubeck and Masterklad.[27]

The first district was not persuaded by the fact that the waiver agreement provided it survived closing and would "be binding upon and inure to the benefit of the Seller, Purchaser and their respective successors, assigns, heirs, executors, administrators, and legal and personal representatives."[28] The appellate court noted that the waiver was part of the real estate sales contract between Lubeck and Masterklad. In Illinois, "privity accompanies a valid assignment of a contract because it puts the assignee in the shoes of the assignor."[29] The contract for sale between the plaintiff and Lubeck was independent from the earlier contract between Lubeck and Masterklad.

Finally, the court found that the purchase of the house "as is" did not change its determination that the plaintiff was not bound by Lubeck's waiver. The "as is" rider was a part of the contract between Lubeck and the plaintiff and did not affect any rights plaintiff may have against Masterklad.

Illinois Supreme Court reversal. On appeal, the Illinois Supreme Court addressed whether the implied warranty of habitability extended to a second purchaser when a valid, bargained-for waiver of the warranty was executed between the builder-vendor and the first purchaser.[30] The supreme court focused on the limitations of *Redarowicz*, noting that the appellate court erred by assuming that the warranty extends automatically to all second purchasers of a home.

The supreme court noted that *Redarowicz* emphasized the short time between the completion of construction and the second purchase. The short period was important because it meant that the original owners would have still been covered by the warranty if they had remained in the house. As such, allowing the subsequent purchaser to sue for breach of the warranty would not increase the builder-vendor's risk or burden.

Moreover, the court emphasized that "*Redarowicz* stands for the proposition that it is fair to require a builder-vendor to pay a second purchaser of a house for the cost of repairing latent defects…so long as the second purchaser is seeking only to recover damages that would have been available to the first purchaser."[31]

In stark contrast, Fattah was seeking to recover more than Lubeck could have, given that Lubeck waived the warranty. Allowing a subsequent purchaser to revive the waived warranty would significantly alter the burdens and expectations of defendants and would be inequitable.

The supreme court reasoned that "[i]f the implied warranty is extended to a second purchaser even in the face of a valid waiver, the financial certainty, which the builder-vendor bargained for and assumed it had obtained, is lost."[32] The builder-vendor has no control over when or to whom the house might be sold by the first purchaser, and thus no way to know when or whether liability for latent defects will reappear, the majority opined.

The supreme court thus held that the implied warranty of habitability may not be extended to a second purchaser when a valid, bargained-for waiver was executed between the builder-vendor and the first purchaser.

The practical impact of *Fattah v. Bim*

The Illinois Supreme Court's decision in *Fattah v. Bim* lets builder-vendors continue to obtain waivers of the implied warranty of habitability without fear they will be lost if the home is sold. In this way, builder-vendors will have the financial certainty that accompanies a valid waiver.

Even so, builder-vendors may want to place the waiver in the deed that will be recorded in the applicable county. Doing so would give subsequent purchasers record notice of the waiver and is consistent with section 2-312(c) of the Uniform Land Transactions Act. The Act, which has not been passed in Illinois, provides that "[a] successor has reason to know of a disclaimer or limitation of liability if it appears in a recorded deed or other recorded document granting the real estate to the protected party."[33]

Lawyers for buyers may want to consider adding a representation to the purchase and sale agreement under which the seller will confirm whether it waived its implied warranty of habitability. IBJ

27. *Id.* ¶ 20.
28. *Id.* ¶ 32.
29. *Id.* ¶ 33 (quoting *Kaplan v. Shure Brothers, Inc.*, 153 F.3d 413, 418-19 (7th Cir. 1998)).
30. *Fattah v. Bim*, 2016 IL 119365, ¶ 2.
31. *Id.* ¶ 26.
32. *Id.* ¶ 30.
33. Unif. Land Transactions Act, § 2-312(c).