

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

James Arbogast, et al.

Court of Appeals No. L-09-1131

Appellants

Trial Court No. CI200603399

v.

Mark C. Werley, et al.

DECISION AND JUDGMENT

Appellee

Decided: May 21, 2010

* * * * *

Donald P. Kotnik, for appellants.

Martin P. Dow and Neil S. McElroy, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Plaintiffs-appellants, James and Michelle Arbogast, appeal the April 14, 2009 judgment of the Lucas County Court of Common Pleas which, following a trial to the court, entered judgment in favor of appellee, Mark Werley. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} This dispute stems from the sale of a home located on Lakeway Drive in Curtice, Lucas County, Ohio. In May 2005, appellants, the buyers, and appellee, the seller, entered into a Residential Real Estate Purchase Agreement which provided, in part:

{¶ 3} "6. Condition of Property. Except as previously disclosed in writing to Purchaser. Seller has no knowledge of any underground tanks, faulty major appliances, faulty electrical, plumbing, heating, cooling, sewer, septic, well or water systems, structural or chimney defects, hidden or latent defects (including leakage, water seepage or wall dampness in basement, foundation, bathroom or kitchen areas) in the Property."

{¶ 4} Appellee responded: "None."

{¶ 5} In addition, the Residential Property Disclosure Form, dated by appellee on February 28, 2005, stated that appellee did not know of any "current leaks other material problems with the roof or rain gutters." Appellee indicated that he did not know of "any previous or current water leakage, water accumulation, excess moisture, or other defects to the property, including but not limited to any area below grade, basement or crawl space." Regarding the "structural components" of the home, appellee denied knowledge of "any movement, shifting, deterioration, material cracks/settling (other than visible minor cracks or blemishes) or other material problems with the foundation, basement/crawl space, floors, or interior/exterior walls[.]" Finally, appellee noted that there was a "small fire at fire place floor-12-25-04" but that it was "completely repaired."

{¶ 6} Appellants hired Foremost Inspections to inspect the home prior to purchase. Their inspection revealed no major problems with the property. Appellants moved into the home in June 2005. Shortly thereafter, appellants noticed a water stain in the living room which revealed a roof leak and they discovered significant moisture and mold on the basement walls.

{¶ 7} On May 9, 2006, appellants commenced this action against appellee, Foremost Inspections, Inc., and Foremost Inspections' owners and employees Donald Stuller and Troy Wyckoff. Appellants were granted a default judgment against the inspection parties; Stuller and Wyckoff appealed and the judgment was affirmed by this court. See *Arbogast v. Werley*, 6th Dist. No. L-07-1283, 2008-Ohio-1555.

{¶ 8} The remaining claims against appellee alleged that appellee failed to disclose material defects in the property, that appellee fraudulently concealed defects in the property, that appellee breached the contract for the sale of the property, and that appellee was unjustly enriched. Appellants also requested punitive damages.

{¶ 9} A trial to the court was held on October 7 and October 8, 2009. At trial, the following testimony was presented. Michelle Arbogast testified that she and her husband went through the home twice prior to the May 2005 purchase of the property. They did not speak with appellee prior to purchasing the home. Michelle testified that in purchasing the home, they relied on appellee's answers on the property disclosure form. Michelle stated that the first week after moving in she noticed discoloration on the living room ceiling and loose drywall in the bathroom. Michelle stated that her husband

touched the spot to see if it was just a loose piece of drywall and his finger went through the ceiling.

{¶ 10} A few weeks after moving in, the Arbogasts discovered mold in the basement "four feet up the wall covering the entire exterior facing walls." Michelle testified that they also observed leakage and staining on the walls and mold in the basement kitchen cabinets.

{¶ 11} On August 21, 2005, appellants had the home re-inspected by professional home inspector Marco E. Vovk. Vovk's report revealed several defects including moisture intrusion, foundation and upper wall cracking, and roof and drainage problems.

{¶ 12} Michelle testified that in December 2005, they hired Everdry Waterproofing to waterproof the basement at a cost of \$17,600 with a finance charge of \$11,370.40. Michelle testified that there were additional repairs that needed to be done to the home including removal of the second story balcony in order to fix the roof leak and paint and drywall in the living room and bathroom.

{¶ 13} Michelle stated that due to their concerns about the mold in the basement, they were uncertain that they could live in the house; thus, they reenrolled their two children in their old, private school and incurred significant travel and tuition costs. Michelle stated that they did move out of the home for a few weeks. Michelle testified that they had intended to rent their old home and lost two months of rent due to the delay.

{¶ 14} Michelle acknowledged that the home was in the Lake Erie floodplain. Michelle further acknowledged that their second home inspector, Marco Vovk, indicated

that the initial inspectors should have informed appellants of the roofing and basement problems. Michelle also acknowledged that many of the problems listed by Vovk were visible, they were not hidden or inaccessible.

{¶ 15} James Arbogast agreed that they had many opportunities to inspect the home prior to closing. James stated that they relied on appellee to truthfully complete the disclosure form.

{¶ 16} Real estate appraiser, Kenneth Wood, testified that on July 26, 2006, he appraised the Lakeway property for \$255,000. In May 2005, the property was appraised for \$280,000. Wood testified that the loss in value was due primarily to the condition of the basement.

{¶ 17} Marco Vovk testified by videotaped deposition as to the contents of his home inspection report and his professional opinions regarding the property. Vovk stated that he believed that appellee failed to disclose pre-existing defects. Vovk opined that appellee knew of the cracks in the foundation because he attempted to seal them. Vovk believed that appellee intentionally tried to conceal the defects in the basement by putting up drywall and painting.

{¶ 18} Jerry Jacobiak, from Everdry Waterproofing, testified that the Lakeway job consisted of cutting out the drywall and carpet and sealing the walls from the inside and out. In order to access the outside walls, a trench was dug around the foundation. Everdry also added sump pumps to the basement.

{¶ 19} Jacobiak testified that in one of the exhibit photographs there was a crack that had appeared to be patched with hydraulic cement. Jacobiak stated that the filler would not keep the crack from leaking because it goes all the way through the wall; once the pressure builds, a weak point would give way. Jacobiak stated that appellee's act of painting and dry walling was evidence of an attempt to conceal the cracks.

{¶ 20} Appellee testified on his own behalf. Appellee testified that he had resided in Florida since 2000, and that he had been a Florida resident since 2001. Appellee purchased the Lakeway property in 1990; it had been built in 1912. Upon purchasing the property, appellee "gutted" the home. Appellee did some of the work himself and hired contractors for the more technical jobs. Appellee stated that during this process, inspections of the wiring and plumbing were made by the Lucas County building inspectors. Appellee stated that a lot of the work was done while he was in Florida.

{¶ 21} Appellee stated that in late 2002 or early 2003, after the occupancy permit was issued, he and his wife would come up from Florida and stay in the home during the summer. They would also come up for a week at Christmas. Appellee testified that they stayed in Florida during the winter months due to his wife's poor health.

{¶ 22} Appellee testified that he and his wife decided to convert the basement into a recreation room for their grandchildren. The drywall and carpeting were professionally installed in early 2003. Appellee agreed that the basement contained a nice pool table and full size arcade video games.

{¶ 23} Appellee testified that in May 2004, his wife passed away. On Christmas Eve 2004, appellee had a fire in the house that spread to the floor joists from the main floor fireplace. It affected the basement ceiling. Appellee testified that the fire department ripped the basement ceiling and interior walls out. The basement carpet was ruined from all the water and debris. After the fire, appellee fixed the damaged drywall, paint, and carpet in the basement. After the basement was repaired, appellee decided to sell the home due to the financial concerns of maintaining two homes.

{¶ 24} Appellee testified that eight or nine years prior to selling the house he filled the cracks in the basement. Appellee stated that it was his belief that once he filled the cracks they no longer existed; that is why he did not disclose them. Appellee further stated that the gutters had extensions on them at the time of the sale though appellants' photographs showed them ending at the foundation. Appellee denied having any water problems or leaks.

{¶ 25} During cross-examination, appellee stated that at the time of the real estate contract, he was not aware of any problems that might "materially impact" the property. Appellee denied having any water problems with the house.

{¶ 26} Following trial, the parties submitted proposed findings of fact and conclusions of law. On April 14, 2009, the trial court granted judgment in favor of appellee and dismissed appellants' complaint. The court found that appellants failed to prove that appellee failed to disclose any material facts on the disclosure form or that appellee had an intent to conceal any defects on the property. This appeal followed.

{¶ 27} Appellants now raise the following assignment of error¹ for our review:

{¶ 28} "I. The trial court committed reversible error when it dismissed appellants' complaint against appellee Werley where the decision by the trial court is against the manifest weight of the evidence and not supported by some competent, credible evidence."

{¶ 29} In their sole assignment of error, appellants argue that the trial court's findings of fact and conclusions of law were against the manifest weight of the evidence and not supported by sufficient evidence. The standard of review provides that in general civil cases, where the plaintiff's burden of proof at trial is by a preponderance of the evidence, a court of appeals will not reverse a trial court judgment if the judgment is supported by some competent, credible evidence going to all the essential elements of the case. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, and *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶ 30} Appellants first dispute the trial court's conclusion of law that there was no evidence of appellee's attempts or acts to conceal and, thus, appellants did not prove fraudulent concealment. Appellants rely on the testimony of the home inspector, Marco Vovk, who testified that he believed that appellee intentionally concealed the cracks in the basement by patching them and then dry walling over them. Vovk believed that the cracks had existed for some time. Everdry Waterproofing employee, Jerry Jacobiak,

¹Although appellants' merit brief lists five assignments of error on the "Assignments of Error" page, the body of the brief contains one assignment of error with multiple issues.

testified that he waterproofed appellants' basement. Jacobiak testified that he believed that appellee tried to conceal the cracks in the basement by filling them and then dry walling and painting over the cracked walls.

{¶ 31} Conversely, appellee testified that since 2001, Florida had been his permanent residence and that he had no knowledge of any water seepage in the basement. Further, appellee testified that after the fire and water damage he had the damaged portions of the basement re-drywalled and painted and that he had it recarpeted. Shortly thereafter, he listed the property because, after the death of his wife, he could no longer afford to maintain two residences. Upon review, we find that there was competent, credible evidence to support the trial court's conclusion that the facts did not support the claim of fraudulent concealment.

{¶ 32} Appellants next contend that the court's conclusion that appellee had no knowledge of any cracks, water leakage or mold in the basement at time of the sale was in error. The trial court found:

{¶ 33} "Defendant had problems with cracks in the basement walls eight to ten years prior to the time he listed the house for sale. Defendant patched the cracks in the walls with concrete filler. Defendant did not patch the walls with the intent to conceal any defects. He had no actual knowledge of any problems involving water leakage, mold or cracks in the home at any time after he repaired the cracks, or at the time it was listed for sale."

{¶ 34} Appellants assert that the fact that appellee admitted that there were cracks, belies the court's conclusion that he had no knowledge of any cracks. Appellants further assert that there was no evidence to "affirmatively establish" that the cracks were repaired eight to ten years prior to the sale. We note that, as the trier of fact, the trial court was in the best position to assess the credibility of witnesses and the weight to be given their testimony and we will not substitute our judgment for that of the trial court on that issue. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d at 81. Upon review of the testimony and exhibits presented and the arguments of the parties, we conclude that competent, credible evidence supported the trial court's finding that appellee repaired the cracks eight to ten years prior to the sale and had no prior water problems.

{¶ 35} Appellants next argue that because they presented overwhelming evidence of fraud, the trial court's contrary finding was not supported by competent, credible evidence. As appellants correctly state, the "as is" clause in the real estate purchase contract, the equivalent of caveat emptor doctrine, does not apply where the seller fraudulently misrepresents or conceals known defects. See *Babiuch v. Crooks*, 6th Dist. No. L-07-1099, 2008-Ohio-600, ¶ 15.

{¶ 36} Prior to the enactment of R.C. 5302.30, under common law property defects were classified as either patent (obvious defects easily discoverable upon inspection) or latent (not obvious or easily discoverable). See *Davis v. Kempfer* (Apr. 10, 1996), 3d Dist. No. 14-95-31. The doctrine caveat of emptor required property sellers to disclose latent defects unless the buyer agreed to take the property "as is." *Id.*, citing

Kaye v. Buehrle (1983), 8 Ohio App.3d 381, 383. However, an "as is" clause still did not relieve the seller from liability for fraudulent concealment or fraudulent misrepresentation. *Davis*, supra, citing *Brewer v. Brothers* (1992), 82 Ohio App.3d 148, 151.

{¶ 37} R.C. 5302.30 removed the distinction between patent and latent defects. *Witfoth v. Kiefer*, 6th Dist. No. L-02-1325, 2003-Ohio-6766, ¶ 15, citing *Akl v. Maher* (Dec. 30, 1996), 6th Dist. No. L-96-125. Now, a seller must complete a statutorily required form, disclosing "material matters relating to the physical condition of the property and any material defect relating to the physical condition of the property that is within the actual knowledge of the seller." *Southworth v. Weigand*, 8th Dist. No. 80561, 2002-Ohio-4584, ¶ 20. See, also, *Witfoth*, supra; *Montgomery v. Proper* (Feb. 14, 1997), 6th Dist. No. H-96-019.

{¶ 38} Consequently, even with an "as is" clause, a seller may be liable for nondisclosure of a material, latent defect which is actually known to him. *Southworth*, supra; *Witfoth*; supra. Where the buyer conducts an inspection of the property and learns that problems existed in the past and chooses not to undertake further investigation, however, the "as is" disclaimer may remove the seller's duty to disclose information relating to the defect. *Belluardo v. Blankenship* (June 4, 1998), 8th Dist. No. 72601.

{¶ 39} To overcome the "as is" clause, a buyer must establish that a seller failed to disclose a material defect on the disclosure form and that this failure constituted fraud.

Southworth, supra. As stated by the trial court, in order to prove fraudulent misrepresentation, a plaintiff must demonstrate:

{¶ 40} "(a) a representation, or where there is a duty to disclose, concealment of a fact,

{¶ 41} "(b) which is material to the transaction at hand,

{¶ 42} "(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,

{¶ 43} "(d) with the intent of misleading another into relying on it,

{¶ 44} "(e) justifiable reliance upon the representation or concealment, and

{¶ 45} "(f) a resulting injury proximately caused by the reliance." *Majoy v. Hord*, 6th Dist. No. E-03-037, 2004-Ohio-2049, ¶ 20-26, quoting *Burr v. Stark Cty. Bd. of Comms.* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus.

{¶ 46} As set forth above, although inspector Vovk and Everdry Waterproofing employee Jacobiak testified that they believed that appellee concealed the defects in the basement and roof, appellee testified that he did not have any water problems and that he repaired the cracks in the basement eight to ten years prior to the sale of the house. The trial court chose to base its judgment on appellee's testimony, which it found to be credible.

{¶ 47} In addition, appellee's responses within the Purchase Agreement and the Residential Property Disclosure Form do not indicate that he intentionally concealed the

repairs to cracks and to the home after the fire. Nothing was presented to show that he knew that these conditions might be material defects in the house. We note that the residential property disclosure form does not indicate to a seller how to distinguish between material cracks and minor cracks when determining what might constitute a "material defect." Appellants knew that the disclosure statements were based only on the seller's knowledge and understanding of the disclosure form. R.C. 5302.30 specifically warns that the required disclosure form is not a warranty and does not require sellers to incur the expense of a professional inspection or to investigate any aspect of the home which is not within their actual knowledge. Therefore, nothing in the record demonstrates that appellee knowingly misrepresented or concealed facts which should have been disclosed.

{¶ 48} Based on the foregoing, we cannot say that the trial court erred when it found that appellee did not commit fraud and the "as is" clause precludes appellants' recovery from appellee's non-disclosure. Appellants' assignment of error is not well-taken.

{¶ 49} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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