

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002313-MR

MARK ROSS and
CHRISTINE ROSS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 99-CI-00401

RALPH D. POWELL
and DEBROAH POWELL

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE. Mark and Christine Ross appeal from an October 14, 2002, order of the Fayette Circuit Court granting summary judgment to Ralph and Deborah Powell in an action in which the Rosses alleged misrepresentation and fraudulent concealment of conditions in a residential real estate transaction. We affirm.

In late 1996, Deborah Powell, a medical doctor with the University of Kentucky Medical School in Lexington, accepted

a position as Dean of the University of Kansas Medical School. Her husband, Dr. Ralph Powell, also accepted a position at the medical school. Deborah relocated to Kansas on April 15, 1997. Ralph remained in Lexington with their children until June 30, 1997.

Just weeks before moving to Kansas, Ralph Powell talked with several prospective real estate agents. Based in part upon the age of the house on Overbrook Lane in Lexington, the agents each suggested that the residence be professionally inspected for termites before listing. The Powells agreed.

On May 22, 1997, Dr. Powell arranged for a representative of T. J. Neary Insect Technologies ("Neary") to inspect the house. Neary's inspection revealed evidence of termites, but Dr. Powell was assured that there was no evidence of damage to the home. Neary recommended that the house be treated and gave Dr. Powell the names of two pest control companies that could perform the service. Dr. Powell contacted B & E Pest Control.

A few days later, on May 26, 1997, the Powells listed their house for sale with Louise Bonner of Turf Town Properties. On June 3, 1997, Ralph Powell completed and signed a Seller Disclosure of Property Condition form as required by KRS¹ 324.360. On the form, the Powells disclosed that the roof had

¹ Kentucky Revised Statutes.

leaked, had sustained damage, and had been repaired. They also revealed that the basement had leaked and had been repaired.

Ralph Powell completed and signed a Seller's Real Property History form as requested by the Lexington-Bluegrass Association of Realtors.² The Real Property History form included a checklist relating to various aspects of the property. It asked the prospective sellers, "[a]re you aware of any present or past wood infestation, *i.e.*, termites, bores, carpenter ants, fungi, etc" Mr. Powell marked "yes." He elaborated separately: that "...[e]vidence of termite infestation found in May '97." Next, the disclosure form asked the prospective sellers, "[a]re you aware of any damage due to wood infestation." Mr. Powell marked "no," indicating "no apparent damage found." Finally, the disclosure form asked, "[h]ave the house and/or other improvements ever been treated for wood infestation? If yes, when and by whom." Mr. Powell marked "unknown," noting that the house was "[s]cheduled to be treated in next 1-2 weeks."

Dr. Powell had the house inspected by B & E Pest Control (B & E) on June 3, 1997. B & E confirmed termite activity in debris under the house but reported only minor visible damage. On B & E's recommendation, the home was treated

² The information provided by the prospective seller on this form is not required to be disclosed by state law.

for termites on June 27, 1997. Dr. Powell and the children moved out of the house and on to Kansas during the month of June.

In June 1997, Dr. Mark Ross first toured the Powells' home at 3345 Overbrook Drive. The Rosses were contemplating relocating to Lexington from Iowa City, Iowa, in order that Mark, a neurologist, might accept a position with the University of Kentucky Medical Center. In September 1997, months after the Powells had vacated the residence, Mark returned to Lexington with his wife, Christine, and the couple toured the Powells' house together with their agent, Carita Arnold. Several months later, the Rosses made an offer from Iowa to purchase the Powells' house.

It was at or near this time (December 17, 1997) that the Rosses claim to have first seen the Powells' disclosure forms.³ Upon learning that the house had been subject to a termite infestation, they advised their realtor that they were no longer interested in the property. Arnold persisted, however, and discussed the issue with Louise Bonner, the Powells' agent. Bonner contacted the Powells in Kansas and talked again with Arnold. Following her discussion with Bonner, Arnold contacted the Rosses in Iowa and assured them that the

³ The Rosses' realtor, Cartita Arnold, stated in her deposition that she gave the Rosses copies of each of the completed disclosure forms in September 1997.

termite infestation had been a minor problem that had surfaced back in May or June of 1997 and that it had been treated professionally. Dr. Ross explained that he understood from the conversation with his realtor that the termites were "considered a remote and closed matter, that this was not any problem at the present time." M. Ross deposition at 23-24. The Powells rejected the Rosses' offer to purchase and made a counteroffer; the Rosses accepted their counteroffer. Closing was scheduled for early March.

The parties' sale and purchase contract contained a provision allowing for inspection of the property by the buyer. Pursuant to this provision, the buyer may report to the seller any substantial defect found by the buyer's inspection that the buyer wishes to be remedied by the seller. The seller then has the opportunity to correct or to repair the reported defect.

Pursuant to the inspection provision contained in their contract, the Rosses hired Pruitt Inspection Company ("Pruitt") to conduct a whole-house inspection of the property on December 18, 1997. Pruitt conducted its inspection and reported no visible or obvious evidence of structural or physical damage to the aging house.

In February 1998, Elite Pest Control Company ("Elite") was retained to inspect the property on the Rosses' behalf. Elite reported that there was visible evidence of a wood-

destroying insect infestation (carpenter ants) and visible evidence of a previous professional treatment for wood-destroying organisms. The company recommended additional treatment.

The Powells had never returned to the house after June 1997, nor did the Rosses conduct a final walk-through inspection before their closing in March of 1998. Despite the bad report contained in the termite inspection of February 1998, the transaction closed without incident on March 6, 1998.

On February 3, 1999, the Rosses filed this action against the Powells, Pruitt, and Elite. The claim of fraud against the Powells was based in part on the allegation that they had "failed to disclose their knowledge that the subject home had termite damage and further failed to have the home properly treated for termite infestation as represented." Complaint at 3. The Rosses also alleged that at the time they sold the property, the Powells "had experienced and were aware that the roof on the subject house leaked and that moisture-related problems were occurring and affecting the interior of the subject home." Id.

The Rosses claimed that Elite had breached its agreement with them and that it had acted negligently by failing to inspect, locate, and report the presence of active termites and termite damage. The Rosses alleged that Pruitt, too, had

breached its agreement with them and that it had acted negligently by failing "to perform an appropriate and thorough inspection of the subject home thereby locating and discovering visible and obvious evidence of structured (sic) or physical damage." Complaint at 7. The Rosses sought to recover costs that they had paid for the repair of the alleged defects at the house along with consequential and punitive damages.

On September 8, 2000, by agreed order, Pruitt was dismissed with prejudice. On January 14, 2002, by agreed order, Elite was dismissed with prejudice. On October 14, 2002, based on the voluminous record amassed in this case, including seven bound volumes of pleadings and fourteen depositions, the Fayette Circuit Court granted the Powells' motion for summary judgment. This appeal followed.

The Rosses contend that the circuit court erred by granting summary judgment in favor of the Powells. Summary judgment is appropriate when it would be impossible for the non-movant to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

The Rosses allege that the Powells committed fraud by materially misrepresenting the state of the house's leaky roof and the presence of live termites along with extensive termite damage in order to induce them to purchase the home at Overbrook

Drive. The elements necessary to establish fraud are set out in United Parcel Service Company v. Rickert, Ky., 996 S.W.2d 464 (1999), where the court held as follows:

[T]he party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury. (Citation omitted).

Id. at 468.

In their completed disclosure forms, the Powells informed the Rosses that the roof had leaked in the past and that it had been repaired. They indicated that the roof was not leaking as of the time of their disclosure on June 3, 1997. (The house had been empty for more than ten months by the time that the Rosses moved in and began discovering defects in the house.) The Powells also clearly informed the Rosses that evidence of termite infestation had been found in May 1997 and that professional treatment had been scheduled. The circuit court found that these disclosures alone were sufficient to overcome the Rosses' claims of fraud. Moreover, the court concluded that the Rosses could not show that false or reckless misrepresentations had been made with respect to the alleged termite damage since the Powells had been assured by professionals that no termite damage existed at the time of

inspection. The court held that the fraud claims must fail as a matter of law.

Having reviewed the record in this case, we agree that there is not sufficient evidence to demonstrate clearly and convincingly that the Powells materially misrepresented the condition of the house on Overbrook Drive. There is no evidence to indicate that their disclosures were untruthful or misleading when they were made. Moreover, the Rosses paid for an independent whole-house inspection and a separate specialized, professional termite inspection prior to closing. The Rosses also acknowledged that they had carefully examined the premises and that they had relied completely on their own judgment and the judgment of their inspectors.

The inspections and the statement of the Rosses together establish that the Rosses did not rely upon any representations by the Powells. Additionally, by virtue of Elite's inspection just weeks before the closing, the Rosses were aware that a serious carpenter ant infestation had been observed - a problem that heretofore had not come to light. Before closing the sale, the Rosses were clearly on notice of potential new problems with the house. "[The law will not] come to the relief of those who with their eyes open understandingly and freely make a bad bargain." Mathis v. O'Brien, 137 Ky. 651, 126 S.W. 156, 158 (1910).

Since it would be impossible for the Rosses to prove the elements of fraud at trial, the trial court did not err by granting summary judgment in favor of the Powells. The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF AND ORAL ARGUMENT FOR
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