COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00117-CV

AMY JOHNSON NAQUIN F/K/A AMY C. NAQUIN — APPELLANT

V.

THOMAS A. CELLIO II AND VANESSA EUGENIA CELLIO — APPELLEES

FROM THE 431ST DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 14-04054-431

CONCURRING MEMORANDUM OPINION[1]

When Naquin purchased her home from the Cellios, they failed to disclose to her that the toilet in the pool house[2] was not connected to a septic or sewage

[1]*See* Tex. R. App. P. 47.4.

[2]Naquin refers to the structure as a "pool house." The Cellios take issue with the term "pool house," and instead refer to the structure as "a small enclosure with a toilet" located next to the pool. The inspector referred to the structure as the "pool side half bath." Here, the term "pool house" is used to describe a small structure near the pool that housed the toilet in question.

system but instead flushed untreated sewage downhill and onto the lawn—and onto the neighbor's lawn as well. It was only when Naquin discovered toilet paper and human feces in her back yard behind the pool house that she realized something was amiss.

The Cellios claim that they had the toilet installed so that their boys could "urinate without needing to dry off or track water into the house" but that because they never intended it to be a "fully functional" toilet, the wastewater from the toilet was simply "distributed into the side yard." Because the toilet was operating in the manner *they* intended, the Cellios contend that the toilet was not defective. And, because Naquin purchased the property "as is,"[3] the Cellios contend that when they signed the disclosure statement indicating that there were no known defects in plumbing systems and that no alterations had been made on the property without necessary permits or in violation of building codes, the misrepresentation was not actionable.

The majority reasons that because Naquin's independent inspection report found that the toilet was "excessively loose at the floor mount" and recommended "further evaluation and possible correction," Naquin could not thereafter complain about the Cellios' deception. According to the majority, when the report revealed that the toilet was not sufficiently bolted to the floor, Naquin was on notice that

[3]The contract actually provided that Naquin accepted the property "in its present condition." But, as the majority points out, we have previously held that contract language stating "in its present condition" is an agreement to accept the property "as is." *Volmich v. Neiman*, No. 02-12-00050-CV, 2013 WL 978770, at *6 (Tex. App.—Fort Worth Mar. 14, 2013, no pet.) (mem. op.).

the drainage system on the toilet might not be connected to a proper sewage disposal system. Although I concur with the result reached in the majority opinion, I respectfully disagree with several of its observations and some of its reasoning.

The law does not permit a seller to conceal a known defect prior to the sale. Even when property is sold "as is," sellers cannot escape liability when they make a false representation or conceal a defect. *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995) ("A buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of information by the seller."). The Cellios knew that if someone used the toilet for the purpose of defecation, the toilet paper and feces would be dumped into the back yard. They never revealed this. And in their disclosure statement, the Cellios represented that they were not aware of any defects in plumbing systems and that no alterations had been made to the home without obtaining necessary permits or in violation of building codes. Those representations could not have been truthful.

It was a defect.

It was a defect the Cellios knew about.

It was a defect that the Cellios should have revealed.

First, I disagree with the majority's observation that Naquin's own inspection "disclosed problems in the very areas about which [she] now complains." The inspector reported that the toilet's attachment to the floor was

"excessively loose." While, indeed, the toilet was near "the very areas" of the sewage pipes, a toilet being loose at its base would no more put a buyer on notice that the sewage pipes would dump raw sewage into the back yard than a report that a vent on an electric dryer was "excessively loose" would put the buyer on notice that the electrical wiring in the walls to which the dryer was connected were inadequately insulated to prevent an electrical fire. The only difference between these two situations is that a seller would be unlikely to know that wiring hidden in the walls was inadequately insulated. But the Cellios knew that the sewage pipes hidden underground directed sewage straight into the back yard.

I also disagree that the Cellios "met their traditional summary judgment burden by presenting evidence that they had no knowledge of any alleged defects." Thomas Cellio presented affidavit evidence directly to the contrary, stating,

> The Property had a pool next to which we built a small enclosure with a toilet fed by water from the swimming pool. The purpose of the enclosure was to allow swimmers, and more specifically our sons, to urinate without needing to dry off or track water into the house. It was never intended to be a "fully functional" restroom and the water from the toilet was distributed into the side yard.

That the Cellios never intended the toilet to be "fully functional" does not negate the fact that the Cellios knew that the toilet was defective as installed. It is hardly reasonable to expect any human being living in a modern, economically developed, "first-world" society to anticipate that a flushing toilet would not carry

away, at a minimum, toilet paper, human excrement, and vomit—and to a location other than the back yard of their home and that of their neighbor. Even conceding that, sadly, squalor persists in our society today, such conditions would not be reasonably expected to exist with regard to plumbing in the $421,000 home at issue here:

By no stretch of the imagination did the Cellios meet their traditional summary judgment burden to entitle them to judgment as a matter of law on the issue of knowledge of the existence of a defect. As movants, the Cellios were required to conclusively prove that they had no knowledge of the defect, and because their own testimony was used to supply the proof, it must have been readily controvertible and "clear, positive and direct, otherwise credible and free from contradictions or inconsistencies." *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 512 (Tex. 2014); *see* Tex. R. Civ. P. 166a(c).

How could Naquin have controverted, much less readily so, such a preposterous claim by the Cellios that they had "no knowledge" that a toilet that does not connect to a proper sewage disposal system was not defective? At most, a fact issue existed for a jury to resolve.

For the same reasons, I disagree with the majority's conclusion that there was "no evidence disputing the Cellios' evidence that the pool side commode [was] functioning as intended." To say that this toilet was functioning as intended is like saying that a freezer that does not maintain a freezing temperature was functioning as intended simply because the seller only subjectively intended the freezer to function as a storage space. As a purchaser of a freezer reasonably expects the freezer to actually freeze items placed inside it, the purchaser of a home with a toilet likewise reasonably expects the toilet to dispose of human waste—whether liquid, solid or something in between—into an appropriate sewage disposal system. And if sellers do not intend a toilet to function in its usual and customary manner, common sense dictates that they reveal, not conceal, such a subjective and unconventional intent.

Indeed, the majority is correct in its observation that there was no evidence disputing the Cellios' contention that the toilet was "functioning as intended." But, again, how would Naquin—or any purchaser in this situation—provide such evidence? The Cellios' absurd claim that a toilet functions "as intended" when it would dump into the back yard the feces of any person who presumed to use it

for feces disposal does not meet the standard of conclusive proof on the issue. At most, it raised a fact issue for the jury to resolve.

That said, the Cellios, through their no-evidence motion for summary judgment, put Naquin to her proof that she relied upon their representations concerning the property—as opposed to the representations of her own inspector—and that the representations by the Cellios—as opposed to her inspector—were the producing cause of her injuries. Once the Cellios challenged Naquin's proof in the no-evidence summary judgment context, the burden shifted to Naquin to produce some evidence explaining why it was reasonable for her to rely upon the Cellios' misrepresentations, rather than the inspection report, and why the Cellios' concealment of the defect, rather than the inspector's failure to discover it, caused her damages. In other words, it was incumbent upon Naquin to produce some evidence—perhaps expert testimony—that an independent inspection of the property could not reasonably have been expected to reveal that which the Cellios concealed.

Because Naquin did not do so, the trial court did not err in granting the Cellios' no-evidence summary judgment motion. Thus, I concur with the conclusion of the majority that the trial court's order should be affirmed.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

DELIVERED: May 18, 2017