ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CA07-655

October 31, 2007

APPEAL FROM THE SALINE COUNTY CIRCUIT COURT
[CV2006-137-1]

HONORABLE ROBERT W. GARRETT, JUDGE

AFFIRMED ON DIRECT APPEAL; DISMISSED ON CROSS-APPEAL

SHIRLEY WHITTEN
APPELLANT

V.

GREGORY B. RICH and KAREN RICH
APPELLEES

This case involves a real-estate contract for the sale of a residential house. Appellant, Shirley Whitten, is the seller, and appellees, Gregory and Karen Rich, are the buyers. When appellant tried to terminate the contract, appellees filed a complaint seeking specific performance of the contract. Appellant answered, asserting several defenses, the most pertinent of which was that appellees had breached the contract by failing to list repairs within ten (10) business days prior to the settlement date as required by Paragraph 15 of the contract. Following a hearing, the trial court ruled in favor of appellees, finding that they had not breached the contract, setting a time to close on the

sale, and denying, from the bench, appellees' request for costs and attorney's fees. It is undisputed that damages issues remain to be determined. Appellant appeals based upon a Rule 54(b) certification. Appellees attempt to cross-appeal concerning attorney's fees. We affirm on direct appeal, but we do not address the cross-appeal.

Direct Appeal

For her first point of appeal, appellant contends that the trial court erred in its interpretation of Paragraph 15 of the real-estate contract between the parties. We disagree.

Paragraph 15, titled "Inspection and Repairs," provides in pertinent part:

> Buyer shall give written notice listing specific repairs needed to Inspection Items or stating no repairs are needed to Inspection Items, so written notice is actually received within allotted ten (10) business day period by Seller or Listing Firm, stating inspections have been performed and listing all items which need repair, except repairs required by FHA, VA, USDA-RD, the lender, or the termite control company ("Third Party Requirements"), which shall be supplied to Seller promptly upon receipt by Buyer. If Buyer provides written notice as required, Seller will have **TEN (10) BUSINESS DAYS** after date written notice is received to state which repairs Seller is **NOT** willing to perform, with the exception of Third Party Requirements. Should Seller fail to respond with TEN (10) BUSINESS DAYS, Seller agrees **all listed repairs will be completed**, including Third Party Requirements, up to but not exceeding Repair Limit defined below.
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> **IN THE EVENT BUYER DOES NOT MAKE THE NECESSARY REQUIRED INSPECTION AND DOES NOT PRESENT THE INSPECTION TO SELLER IN THE ALLOTTED TEN (10) BUSINESS DAY TIME PERIOD, BUYER WAIVES ALL RIGHTS TO A RE-INSPECTION AND ASSUMES COMPLETE RESPONSIBILITY FOR ANY AND ALL FUTURE REPAIRS AND THE CONDITION OF THE PROPERTY.** If written notice is given as required, Seller agrees to pay the cost

to repair the Inspection Items and Third-Party Requirements in a sum not to exceed $ 500.00 (the "Repair Limit") in addition to rights, repairs and corrections required in Paragraph 18 (Lead Based Paint Risk Assessment/Inspection). If repair costs to the Inspection Items and Third-Party Requirements exceed the Repair Limit Buyer shall have the option to (1) accept the Property in its condition at closing with credit to Buyer at closing in the amount of the Repair Limit, less the cost of any repairs made and paid for by Seller after receipt of notice, or (2) declare this Real Estate Contract null and void and recover the Earnest Money. If Buyer closes on the Property believing conditions exist at the Property that require repairs and agrees to a credit equal to the Repair Limit as allowed by this Paragraph 15B, Buyer waives all right to assert a claim against Seller, Selling Firm or Listing Firm concerning the condition of the Property.

If Buyer timely inspected the Property and Seller received written notice thereof within the time period set forth above, Buyer shall have the right to re-inspect the Inspection Items immediately prior to closing to ascertain whether the Inspection Items are in normal working order and to insure that all designated repairs have been made. If the Inspection Items are found not to be in normal working order upon re-inspection, Buyer shall have the option to: (1) accept the Property in its condition at closing with credit to Buyer at closing for any portion of the Repair Limit which has not already been spent by Seller for repairs or previously credited to Buyer under this paragraph 15B, or (2) declare this Real Estate Contract null and void and recover the Earnest Money. SELLER SHALL NOT BE OBLIGATED TO EXPEND AN AMOUNT FOR REPAIRS OR PROVIDE A CREDIT TO BUYER TOWARD THE PURCHASE PRICE CONCERNING REPAIRS IN EXCESS OF THE REPAIR LIMIT. AGREEMENT BY SELLER TO EXPEND, OR ACTUAL EXPENDITURE OF, SUMS BEYOND THE REPAIR LIMIT OR OTHER ATTEMPTS TO SATISFY CONCERNS OF BUYER REGARDING THE INSPECTION ITEMS SHALL NOT AFFECT OR DEFEAT THE OPTIONS PROVIDED TO BUYER IN (1) AND (2) ABOVE.

The parties stipulated that the inspection and repair survey was faxed to appellant's real-estate agent on January 18, 2006, at 8:30 p.m. Appellant's real-estate agent, Robin Hogue of Century 21, testified that she went over the list of repairs with appellant on

January 19 or 20, 2006, which was less than ten business days prior to the closing that was scheduled for no later than January 31, 2006. Appellant's reasons for deciding to terminate the contract included "many problems" resulting from the inspection of her home, *e.g.*, a foul burning odor and insulation debris on her clothing, and the repair list being furnished to her late, *i.e.*, less than ten business days prior to closing. On this testimony, the trial court determined that appellant presented no basis for termination of the contract.

In making her argument on appeal, appellant quotes the contract language and sets out the facts establishing that notice of the repairs was received by appellant's agent less than ten business days prior to closing. However, she offers no explanation as to why that fact would give her the right under the contract to terminate, and she cites no cases in support of that position. The only provisions in paragraph 15 that allow for declaring the contract null and void belong to the buyer, not the seller. We find no basis for reversing the trial court under this point.

For her second point of appeal, appellant contends that in ordering her to perform the real-estate contract, the trial court placed her "at risk of pecuniary losses for which she did not agree to pay upon entering into said real estate contract." She argues that the testimony of Lisa Toms, the buyers' real-estate agent, established that the settlement statement appellant would have been asked to sign at closing did not deduct $500 from her proceeds to cover the repair list, and that without such a deduction, appellees would continue to have the right to assert a claim against her. In support of her argument, she

quotes the following language from Paragraph 15B: "If Buyer closes on the Property believing conditions exist at the Property that require repairs and agrees to a credit equal to the Repair Limit as allowed by this Paragraph 15B, Buyer waives all right to assert a claim against Seller, Selling Firm or Listing Firm concerning the condition of the Property." In addition, she cites Paragraph 5, which states that if the buyer is entitled to a credit for repairs at closing, then the amount of the credit should be reflected on the HUD-1 Settlement statement. And, finally, she quotes again from Paragraph 15B, the portion that provides that the buyer has two options following inspection if the repair costs exceed the $500 limit: 1) accept the property or 2) declare the contract null and void. Her argument, apparently, is that if the buyers could declare the contract null and void if the repairs exceeded the $500 limit, then she should be able to declare it null and void if the repair list was submitted in an untimely manner and the $500 was not deducted on the settlement papers – – which she contends would leave her vulnerable to a claim being brought by the appellees at a later time.

We find no merit in her argument. First, appellees waived any future action against appellant by proceeding with the closing. Second, even if appellees could subsequently bring a claim, the amount would still be limited to $500. Without citation to legal authority and with no convincing legal argument, we conclude that appellant presents us with no basis for reversal under this point.

For her final point of appeal, appellant contends that the circuit court erred in its interpretation of Paragraph 5 of the real estate contract. Paragraph 5 provides:

> 5. LOAN AND CLOSING COSTS: Unless otherwise specified, all of Buyer's closing costs, including origination fees, assumption fees, loan costs, prepaid items, loan discount points, closing fee, and all other financing fees and costs charged by Buyer's lender or any additional fees charged by Closing Agent(s), are to be paid by Buyer solely except for costs which cannot be paid by Buyer if Buyer is obtaining a VA or FHA loan (the "Government Loan Fees") which shall be paid by Seller, up to the sum of $450.00 (the "Seller Loan Cost Limit"), which is not included in any loan or closing cost provisions listed below. *Notwithstanding any provision to the contrary, should the Government Loan Fees exceed the Seller Loan Cost Limit, Seller shall have the option to either pay such excess amount or terminate this Real Estate Contract and have the Earnest Money returned to Buyer*. Seller is to pay Seller's closing costs.
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> Seller is to pay up to but not to exceed 3% of the purchase price for Buyer's closing costs and pre-paids.
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> Should Buyer be entitled to a credit at Closing for repairs pursuant to Paragraph 15 of this Real Estate Contract, the amount of such credit shall be reflected on the HUD-1 settlement statement. Buyer and Seller warrant that all funds received by Buyer from Seller (or other sources) will be disclosed to the Closing Agent and reflected on the HUD-1 settlement statement.

(Emphasis added with italics.) Appellant contends that she retained the right to terminate the contract pursuant to the emphasized language, regardless of the fact that Century 21 was going to pay the excess amount. Again, she cites no cases in support of her position.

If we ignore the fact that appellant does not make a convincing argument, that she does not cite legal authority, and that the fees she complains about were assumed by Century 21, which we decline to do, her construction of the contract in this regard is also incorrect. The government loan fees charged to the seller (but paid by the real-estate agent) totaled $450.00. This is the amount allowed under the contract. Consequently, this provision to terminate would not support appellant's argument. Thus, appellant has not provided a basis for reversal under her final point of appeal either.

Cross-Appeal

In their cross-appeal, appellees challenge the trial court's denial of their request for attorney's fees. We do not address the cross-appeal. First, the April 23, 2007 judgment does not mention attorney's fees. Neither do appellees mention a specific order or judgment in their notice of cross-appeal – – just the trial court's denial of attorney's fees. *See generally* Ark. R. App. P. – Civil 3(e) and Ark. R. Civ. P. 58. Second, this matter was appealed on a 54(b) certification with respect to the specific-performance issue. The denial of attorney's fees was not mentioned. Consequently, the matter of attorney's fees is not properly before us.

Affirmed on direct appeal; cross-appeal dismissed.

HART and MILLER, JJ., agree.