

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RONALD SCOTT KILLEN, )  
 )  
 Plaintiff, )  
 )  
 v. ) C.A. No. 04C-06-041 MMJ  
 )  
 EDNA BOWEN, as Executrix and/or as )  
 Personal Representative of the Estate of )  
 Travis Bowen, deceased, JAMES T. )  
 HALLIGAN, Individually and as Agent, )  
 Representative, Employee, and/or Servant )  
 of RE/MAX Associates, Inc., and as )  
 Agent Representative, Employee and/or )  
 Servant of Travis Bowen, and RE/MAX )  
 ASSOCIATES, INC., a Delaware )  
 corporation, )  
 )  
 Defendants. )

Submitted: September 23, 2009

Decided: December 22, 2009

Decision of the Superior Court

Following a Non-Jury Trial

**MEMORANDUM OPINION**

Robert C. McDonald, Esquire, Silverman, McDonald & Friedman, Wilmington, Delaware, Attorneys for Plaintiff

William J. Rhodunda, Esquire, Chandra J. Rudloff, Esquire, Drinker, Biddle & Reath, LLP., Wilmington, Delaware, Attorneys for Edna Bowen, as Executrix and/or as Personal Representative of the Estate of Travis Bowen, deceased

JOHNSTON, J.

Plaintiff Ronald Scott Killen (“Buyer”) purchased a house from Travis Bowen. Travis Bowen (“Seller”) is now deceased. Defendants in this action are Edna Bowen, the Executrix of the Estate of Travis Bowen; James Halligan (“Agent”), the real estate agent who handled the transaction; and Re-Max Associates, Inc., the real estate agency.

Seller signed a Seller’s Disclosure of Real Property Condition Report. The Acknowledgment of Seller provides:

Seller has provided the information contained in this report. This information is to the best of Seller’s knowledge and belief, complete, true and accurate

Seller has no knowledge, information or other reason to believe that any defects or problems with the property have been disclosed to or discussed with any Real Estate Agent or Broker involved in the sale of this property other than those set forth in this report.

Seller does hereby indemnify and hold harmless any Real Estate Agents involved in the sale of this property from any liability incurred as a result of any third-party reliance on the disclosures contained herein or on any subsequent amendment hereto.

Seller’s Broker and/or Cooperating Broker, if any, is/are hereby authorized to furnish this to any prospective Buyer.

This is a legally binding document. If not understood, consult an Attorney.

In pertinent part, Seller stated: that there had been no animals in the house; that all additions and structural changes were done with all necessary permits and

approvals in compliance with building codes; that there were no problems with the roof, flashing, or rain gutters; and that all additional electrical work was done by a licensed electrician. Seller stated that there had been termite damage in the past, but the property had been inspected and/or treated annually.

Prior to closing, Buyer obtained a home inspection and a termite inspection. The termite inspection revealed visible evidence of termite damage to the door frame around the basement door, located above the hot water heater. The inspector concluded that the infestation was inactive and recommended no treatment.

Upon inspecting the home, Seller testified that it was obvious the dwelling was in need of significant improvements and updates. The house was extremely cluttered, which hampered the inspection. However, there was no evidence that Seller could not have moved the clutter to facilitate a more complete inspection. The home inspector did not identify any significant issues.

### **CAUSES OF ACTION**

Buyer asserts claims for damages resulting from breach of contract, intentional or fraudulent misrepresentation, negligent misrepresentation under the Delaware Consumer Fraud Act, and civil conspiracy. The Court finds Buyer is entitled to damages resulting from Seller's breach of contract and negligent

misrepresentations on the Seller's Disclosure of Real Property Condition Report. The argument that Buyer worked in the construction business, and therefore did not justifiably rely upon Seller's Disclosure, is without merit. The contract at issue is clear on its face and does not provide for a sophisticated purchaser exception.

The Court is not persuaded that there is sufficient evidence of intentional or fraudulent misrepresentation, or consumer fraud, to permit Buyer to recover under those theories. Seller is deceased and it cannot be determined that Seller acted with the degree of scienter sufficient for a finding of intentional or fraudulent conduct. There was no evidence of a conspiracy between Seller and Agent.

### **FINDINGS OF FACT**

Having heard the testimony of the witnesses and having reviewed all documentary and photographic evidence, the Court finds evidence of the following damages, by a preponderance of the evidence. Although Buyer alleges entitlement to compensation for other defects in the house, the Court finds that only the following deficiencies are recoverable.

#### ***Termite Damage***

The evidence demonstrates that there was significant termite damage in several areas of the house. The following areas were not included on the disclosure: damage to the living room floor; decay resulting from infestation of the supports for the roof joists in the sunroom addition; termite damage along the frame of the sunroom and the wall adjacent to the home; and termite damage to framing and sheathing.

Contrary to Seller's Disclosure, the home had neither been inspected nor treated annually for termites.

#### ***Pet Stains***

Upon removal of carpet, pet stains were found in an upstairs bedroom. These stains could not be removed by sanding. Seller had represented that there had been no animals in the house.

#### ***Electrical Additions***

Modifications had been made to the electrical systems. The 110 amp service was increased to 220 amps and a 60-amp box was added. These modifications resulted in a demand beyond the capacity of the circuit breakers. It was undisputed that the modifications were not performed by a licensed

electrician; and that the work was not properly inspected. Seller had represented that all additional electrical work was done by a licensed electrician.

***Failure to Obtain Permits and Approvals***

Although Buyer failed to prove building code violations, there was significant evidence that additions to the home were poorly constructed. Having considered the testimony of the Chief Building Inspector for the City of Newark, the Court finds that Seller did not obtain a building permit or legally-required inspection of the sunroom addition and “wood shop.”

Structural defects to the sunroom included inadequate roof supports and door header, and inoperable sliding glass doors and windows. The wood shop had a cracked floor as a result of being built with no foundation, other than bare dirt, and the rafters were rotted and leaking.

Seller had represented that all additions and structural changes were done with all necessary permits and approvals.

**DAMAGES**

Plaintiff Killen has established entitlement to recovery of the following

damages:<sup>1</sup>

1.	Concrete foundation and slabs for sunrooms	\$ 9,749.00
2.	Sunroom Structures, electric, and glass	53,517.00
3.	HVAC removal and replacement	1,340.00
4.	Roofing and Skylights	2,470.00
5.	Wood Floor repairs from termite, water, and urine damage	1,263.00
6.	Demolish wood shop (3 men x 8 hrs.)	1,200.00
7.	Backhoe rental (1 day)	700.00
8.	Dumpster	700.00
9.	Concrete (20CY x \$100.00/CY)	2,000.00
10.	Form materials	200.00
11.	Concrete labor (6 man-days)	2,400.00
12.	Framing materials	3,088.95
13.	Framing labor (6 man-days)	2,400.00
14.	Siding/roofing	1,041.31
15.	Labor for windows, siding, roofing and doors	12,497.28
16.	Electric work	1,500.00
17.	Drywall, insulation and trim	4,000.00
18.	Electrical work (Masten Electric)	2,000.00

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<sup>1</sup>The amounts of itemized damages were not disputed, although liability clearly was disputed.

18. Siding, framing and sheathing repair	1,300.00
TOTAL	\$ 103,366.54



**CONCLUSION**

Judgment is entered for plaintiff Ronald Scott Killen against defendant Edna Bowen, as Executrix of the Estate of Travis Bowen, in the amount of \$103,366.54, plus post-judgment interest. The action against defendants James L. Halligan and Re/Max Associates, Inc. is hereby DISMISSED.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston