IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

MCINTOSH FISH CAMP, LLC AND SUSAN G. MONROE,

Appellants,

v. Case No. 5D20-1199

MARTIN E. COLWELL, MARK D. COLWELL AND CHARLIE L. GATES, JR.,

Appellees.

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Opinion filed April 9, 2021

Appeal from the Circuit Court
for Marion County,
Edward L. Scott, Judge.

Mark J. Albrechta, Tampa, for Appellants.

Lawrence C. Callaway, III, of Klein & Klein, LLC, Ocala, for Martin E. Colwell and Mark D. Colwell, Appellees.

No Appearance for Other Appellee.

PER CURIAM.

McIntosh Fish Camp, LLC and Susan Monroe appeal the final summary judgment entered on their amended counterclaims for fraud in the inducement, rescission, conspiracy to commit fraud in the inducement, and specific performance against Martin and Mark Colwell. Finding that there are genuine issues of material fact that preclude summary judgment on the amended fraud counterclaims, we affirm in part and reverse in part.

Monroe contracted with the Colwells to purchase commercial real estate containing a fish camp, recreational vehicle sites, mobile homes, and a house. The contract contemplated a fifteen-day due diligence period for Monroe to object to the property's suitability:

> Buyer will, at Buyer's expense and within 15 days from Effective Date ("Due Diligence Period"), determine whether the Property is suitable, in Buyer's sole and absolute discretion, for Buyer's intended use and development of the Property as specified in Paragraph 6. . . . Buyer will deliver written notice to Seller prior to the expiration of the Due Diligence Period of Buyer's determination of whether or not this Property is acceptable. Buyer's failure to comply with this notice requirement will constitute acceptance of the Property in its present "as is" condition.

The contract also specified that if Monroe did not object during the due diligence period, she would purchase the property in "as-is" condition and waive claims against the Colwells for any defects:

> Seller will deliver the Property to Buyer at the time agreed in its present "as is" condition, ordinary wear and tear excepted, and will maintain the landscaping and grounds in a comparable condition. Seller makes no warranties other than marketability of title. . . . By accepting the Property "as is," Buyer waives all claims against Seller for any defects in the Property.

The contract likewise included a merger clause, stating that "[t]he terms of this Contract constitute the entire agreement between [Monroe] and [the Colwells]."

Monroe bought the property subject to a purchase money mortgage. For two years, she made payments on the accompanying promissory note. When she stopped, the Colwells filed foreclosure proceedings, and Monroe and McIntosh counterclaimed. The amended counterclaim alleges the Colwells and their real estate broker conspired to induce Monroe into buying the property through fraud. This alleged conspiracy took five forms, all of which are outlined in Monroe's detailed summary judgment affidavit.

First, the Colwells and their broker told Monroe that she did not need her own lawyer or broker, and they did "all they could do" to dissuade her from hiring one. The broker appealed to her religious beliefs and assured her he was representing both sides of the transaction. Second, the Colwells and their broker prevented Monroe from inspecting portions of the property,

and they directed their existing tenants to remain in their mobile homes and not to speak to her. Third, when Monroe asked them whether the property had appropriate permits, they attested to compliance while knowing the property had not been permitted for use as a mobile home park since 1982. Fourth, they failed to disclose "pre-existing violations of zoning and governmental regulations" in defiance of the contract. Specifically, they did not tell Monroe that they were draining the property's septic system into Lake Orange.

Finally, Monroe raised numerous complaints relating to the property's septic system. She swore that during her due diligence, she had asked the Colwells and their broker about noxious fumes coming from the swimming and pool area. They told her it was from washing machines used by migrant workers. She also asked about effluent flowing into Lake Orange. The Colwells and their broker told her it was from the pool and washing machines. They further assured her there were no problems with the septic system, that it could handle the output of a fully occupied property, and that there had never been any problems, issues, or repairs to the system.

Monroe claims that these statements were false, and the Colwells and their broker knew this when they made them. Further, they directed their tenants not to answer Monroe's questions about the fumes. In reality,

Monroe attests that the septic system was out of code, unable to process more than a fraction of the occupied property, and had been repaired multiple times. She claims that the Colwells were draining sewage into Lake Orange, and they had hidden a septic tank to assist in this process.

The trial court concluded that the contract's merger clause, coupled with the doctrine of *caveat emptor*, barred Monroe and McIntosh's amended counterclaims. Our review is de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Under the existing standard, the Colwells must prove the nonexistence of any genuine issue of material fact. *See Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966). We view the summary judgment evidence, including Monroe's affidavit, in the light most favorable to Monroe and McIntosh. *See Krol v. City of Orlando*, 778 So. 2d 490, 492 (Fla. 5th DCA 2001).

We first conclude that the contract's merger clause does not bar Monroe and McIntosh's fraud-based counterclaims. *See Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689, 690 (Fla. 1941). We have previously addressed a situation involving similar claims and a similar contract. *See Deluxe Motel, Inc. v. Patel*, 727 So. 2d 299, 299–301 (Fla. 5th DCA 1999). In that case, we reversed summary final judgment, concluding that the operative

commercial contract did not preclude a counterclaim for fraudulent inducement. *Id.* at 301.[1]

Similarly, our sister courts have all concluded that the existence of a merger clause does not necessarily bar a fraudulent inducement claim. *E.g.*, *Hahamovitch v. Delray Prop. Invs., Inc.*, 165 So. 3d 676, 683 (Fla. 4th DCA 2015); *Noack v. Blue Cross & Blue Shield of Fla., Inc.*, 742 So. 2d 433, 434–35 (Fla. 1st DCA 1999); *Ortiz v. Orchid Springs Dev. Corp.*, 504 So. 2d 510, 510 (Fla. 2d DCA 1987); *Cas-Kay Enters., Inc. v. Snapper Creek Trading Ctr., Inc.*, 453 So. 2d 1147, 1148 (Fla. 3d DCA 1984); *see also Global Quest, LLC v. Horizon Yachts, Inc.*, 849 F.3d 1022, 1027–28 (11th Cir. 2017). Unlike here, when our sister courts have held that a merger clause does preclude a fraudulent inducement claim, the record lacked fraud allegations. *See, e.g.*, *Wasser v. Sasoni*, 652 So. 2d 411, 413 (Fla. 3d DCA

[1] We have previously outlined in detail the tension between *Oceanic Villas* and an earlier Florida Supreme Court case, *Cassara v. Bowman*, 186 So. 514, 514 (Fla. 1939). *See Billington v. Ginn-La Pine Island, Ltd., LLLP*, 192 So. 3d 77, 82–84 (Fla. 5th DCA 2016). We also acknowledge that the *Deluxe Motel* Court based its decision, in part, on a reconciliation of *Oceanic Villas* and *Cassara* grounded on the Florida Supreme Court overruling itself *sub silentio*. *See* 727 So. 2d at 301. Our colleagues did not have the benefit of the Florida Supreme Court's express admonition that it never overrules itself in this manner. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). Although the *Billington* Court raised worthy questions, we need not reconcile *Oceanic Villas* and *Cassara* to decide this matter. And *Deluxe Motel*'s reasoning remains good law because it was not entirely reliant on *Oceanic Villas* receding from *Cassara sub silentio*.

1995) ("Moreover, Wasser agreed to the 'as is' and integration clauses, which are recognized as valid defenses to claims of fraud, particularly where, as in the instant case, there are no allegations or evidence that the contract itself was induced by fraud."); *Weiss v. Cherry*, 477 So. 2d 12, 13 (Fla. 3d DCA 1985) ("We have diligently examined the record and are unable to find any evidence to support the trial court's finding that the appellees were guilty of fraud which induced the appellant to enter into the contract to purchase the restaurant in question.").

The *caveat emptor* doctrine is equally inapplicable, at least at this stage of the case. Meaning "let the buyer beware," *caveat emptor* "places the duty to examine and judge the value and condition of the property solely on the buyer and protects the seller from liability for any defects." *Transcapital Bank v. Shadowbrook at Vero, LLC*, 226 So. 3d 856, 862 (Fla. 4th DCA 2017) (quoting *Turnberry Court Corp. v. Bellini*, 962 So. 2d 1006, 1007 (Fla. 3d DCA 2007)). Three exceptions to this doctrine exist: "1) where some artifice or trick has been employed to prevent the purchaser from making independent inquiry; 2) where the other party does not have equal opportunity to become apprised of the fact; and, 3) where a party undertakes to disclose facts and fails to disclose the whole truth." *Id*.

(quoting *Green Acres, Inc. v. First Union Nat'l Bank of Fla.*, 637 So. 2d 363, 364 (Fla. 4th DCA 1994)). Monroe's affidavit raises all three exceptions.

Accordingly, genuine issues of material fact exist precluding summary judgment on Monroe and McIntosh's fraudulent inducement and conspiracy to commit fraudulent inducement amended counterclaims. We reverse on those amended counterclaims and remand for further proceedings. We affirm, however, the summary judgment on the rescission and specific performance amended counterclaims.[2]

AFFIRMED in part; REVERSED in part; and REMANDED for further proceedings.

SASSO and TRAVER, JJ., and NABERHAUS, MICHELLE, Associate Judge, concur.

[2] Monroe and McIntosh waived their rescission claim by failing to raise it in their initial brief. *See Land v. Fla. Dep't. of Corr.*, 181 So. 3d 1252, 1254 (Fla. 1st DCA 2015). Their specific performance claim fails because the contract includes no language requiring the Colwells to deliver the property in the condition demanded. *See Anthony James Dev., Inc. v. Balboa St. Beach Club, Inc.*, 875 So. 2d 696, 698 (Fla. 4th DCA 2004) ("The purpose of specific performance is to compel a party to do what it agreed to do pursuant to a contract.").