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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NOS. 1998-CA-002337-MR
AND 1999-CA-000153-MR

PENELOPE ALDERMAN — APPELLANT

v.

CONSOLIDATED APPEALS FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 97-CI-90120

TONY C. ADAMS AND
LAURA H. ADAMS — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The purchaser of a preowned house discovered defects before the purchase but closed anyway and sued for breach of contract, violation of the Kentucky Consumer Protection Act, and fraud, with a request for punitive damages and attorney fees. We believe the doctrines of merger and caveat emptor apply to the facts of this case and we reverse the jury award and the court's award of attorney fees.

Penelope Alderman's mother had a house built in a subdivision for Penelope and her three children. Penelope moved in sometime in 1992. A few years later, Penelope moved back to

her parent's farm and listed the house with a real estate agent. Tony and Laura Adams viewed the house with their agent in 1996 and made an offer of $198,000, contingent on financing and a satisfactory inspection. The buyers had 20 days to have the property inspected and to notify the seller of any defects. The Adamses hired Bill Saylor to conduct a house inspection which he did along with a written report. Based on the Saylor report, Penelope agreed to reduce the price by $1000, and the buyers assumed responsibility for the repairs. The parties closed on the house in July of 1996.

Among the defects in the Saylor report were: second floor air conditioner was low on Freon; the heat cycle on the furnace would not turn on; the first floor furnace has rust and signs of condensate leaking; the first floor condensation line was being piped under the floor instead of to the outside; a valley tin on the roof overshoots the gutter; front gutters could not hold a heavy rain; both bath vents were vented to the attic instead of outside; large amount of water under floor (emphasis added); one supply heating and cooling duct pulled loose under the floor; and one long heating and cooling duct was putting a strain on the Freon lines under the floor.

After moving into the house, the Adamses hired Glen Boodry, a registered engineer, to inspect the house. Boodry found the furnace duct work was pulled loose from the trunk; water pooling; floor uneven; crawl space wet; condensate draining from cooling coil; and span between the girders excessive.

Subsequently, the Adamses hired the Black and Crose Construction Company to do another inspection. They found the drywall cracking over most doorways; floors sagged from ½ inch to 1½ inches; ceramic floor tile in kitchen and bath cracked and separated in places; squeaking floors upstairs; upstairs floor dropped ½ inch to 3/4 inch; the downstairs ceiling fan shakes and swings when walking upstairs; trim falling off stairway handrails; leak in a closet; master bath has a ten-foot crack and separation where the walls meet the ceiling; ceiling cracking; outside porch concrete is cracking; and the whole house exterior is mildewing due to lack of ventilation. Black and Crose attributed these problems to insufficient support beams; upstairs walls being eight inches or more off the downstairs bearing walls; and the beams and floor joist too weak. They opined that to correct the problems, the whole inside of the house would need to be gutted and started over, beginning with more support beams under the floor.

At trial, the seller called the building inspector who found no code violations. Tommy Griffith testified that he replaced the long duct pipe with a larger one and replaced the coil. Art Cummins repaired the overflowing gutters and found one support beam under the house. He said it was cheap, but correct. Jerry Fryer, a structural engineer, testified that the house had settled, had cracks, and a water problem. Bill Saylor testified (by video deposition) that the day he inspected the house, it was raining and there was a sea of mud under the floor, and that he advised the Adamses there was a serious problem which should be

looked at by a contractor. He also detailed numerous water problems to the Adamses and advised them not to buy the house.

The jury found for the Adamses on fraud, breach of warranty on the real estate, and punitive damages. The court entered a final order on August 27, 1998. A motion was made for attorney fees under the Kentucky Consumer Protection Act, more than ten days after the final judgment. On December 15, 1998, the court awarded attorney fees to the buyers in another final order. Penelope appealed both orders and the cases were consolidated by our Court.

Penelope's first argument is that she was entitled to a directed verdict on the fraud claim and the breach of warranty claim because the Adamses had the property inspected and knew about the defects, and because the contract warranties were merged in the deed. This is really two separate legal arguments.

The doctrine of merger states that when a purchase contract contains representations, the buyer has a duty to inspect the property and if the parties close, the representations are worked out or merged into the deed. 3 American Law of Property § 11.65 (A.J. Casner ed. 1952); Borden v. Litchford, Ky. App., 619 S.W.2d 715 (1981). If there is a closing, then the doctrine of caveat emptor applies, that is, the buyer beware, as the property is being accepted as is. The warranty deed only covers warranties in title, not in the physical condition of the property. Vanada v. Hopkins, 1 J.J. Marsh. 285, 19 Am. Dec. 92 (Ky. 1829).

Although the rule of caveat emptor generally applies to the sale of land, the doctrine has an exception, fraud - that is, representations of material facts by the seller to the buyer to induce the buyer to purchase, and reliance by the buyer. Bryant v. Troutman, Ky., 287 S.W.2d 918 (1956); Sanford Construction Co. v. S & H Contractors, Inc., Ky., 443 S.W.2d 227 (1969). There is also concealment or non-disclosure of facts by a vendor that may amount to fraud. Weikel v. Sterns, 142 Ky. 513, 134 S.W. 908 (1911); Bryant v. Troutman, Ky., 287 S.W.2d 918 (1956); Hall v. Carter, Ky., 324 S.W.2d 410 (1959). However, when the facts are equally accessible to the seller as to the buyer, and nothing is said or done by the seller to mislead the purchaser, it is not fraud. 3 American Law of Property § 11.20 (A.J. Casner ed. 1952); Bryant v. Troutman, Ky., 287 S.W.2d 918, (1956); Hall v. Carter, Ky., 324 S.W.2d 410 (1959); Sanford Construction Co. v. S & H Contractors, Inc., Ky., 443 S.W.2d 227 (1969). Also, the buyers waive their rights under fraud when they discover the defects while the contract is executory and they proceed to closing. Hopkins v. Performance Tire and Auto Service Center, Inc., Ky. App., 866 S.W.2d 438 (1993). Knowledge is a defense. Borden, 619 S.W.2d 715.

With the facts not in dispute, the court should have given a directed verdict in favor of the seller. The standard of review of a denial of a directed verdict is set forth in Lewis v. Bledsoe Surface Mining Co., Ky., 798 S.W.2d 459, 461 (1990):

> All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be

> given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"

See also USSA Casualty Insurance Company v. Kramer, Ky., 987 S.W.2d 779, 781 (1999).

Penelope made no direct representations as to the condition of the house. The realtors showed the house without Penelope present, and only after the buyers discovered problems, did she communicate with the buyers by agreeing to a $1000 reduction in the selling price. Also, the contract was left blank as to defects, with the buyers reserving the right to inspect, which they did. Bill Saylor conducted a whole house inspection before the closing and found the problems, even advised against buying the house because of the sea of mud in the crawl space, and other problems. The defects were not concealed, even though discovery required some climbing in the attic and crawling around in the crawl space. What defects did exist were discovered before closing, and the parties compromised the purchase price. The buyers may have gotten a bad bargain for repairs, but then the purchase price may have been low to start with. We don't know and need not to speculate because this case calls for the application of both the doctrine of merger and the doctrine of caveat emptor.

The punitive damage award must also be set aside. A breach of contract or breach of warranty does not justify an award of punitive damages in Kentucky. Ford Motor Co. v. Mayes, Ky. App., 575 S.W.2d 480 (1978); KRS 355.1-106(1); KRS 411.186(4); and Faulkner Drilling Co. v. Gross, Ky. App., 943 S.W.2d 634 (1997). Although fraud can support an award of punitive damages in addition to compensatory damages, the setting aside of the fraud verdict voids the punitive damage issue. KRS 411.184; Faulkner Drilling Co., 943 S.W.2d 634.

The award of attorney fees was based on the allegations of violation of the Kentucky Consumer Protection Act, KRS 367.110, et seq. The fallacy of this argument is three-fold. First, although there was an allegation of a violation of the Act, there was no finding that the seller violated the Act. The jury found fraud and breach of warranty. Mere allegations are not enough to invoke authority for imposition of attorney fees. We are presented with no other authority, and under Batson v. Clark, Ky. App., 980 S.W.2d 566 (1998), a party must show authority for an award of attorney fees. Second, we do not believe that the Kentucky Consumer Protection Act applies to the sale of real estate by an individual home owner. Aud v. Illinois Cent. R. Co., 955 F. Supp. 757 (W.D. Ky. 1997); Miles v. Shauntee, Ky., 664 S.W.2d 512 (1983); and KRS 367.220(1) which applies to:

> [a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act

> or practice declared unlawful by KRS 367.170. . . . (Emphasis added).

As of this date, we are unaware of any Kentucky case which has determined that the Kentucky Consumer Protection Act is applicable to single real estate transactions.[1] Third, the judgment entered August 27, 1998 contains finality language. With a final judgment, a party has to request attorney fees within ten days under a CR 59 motion to amend or alter a judgment or the judgment becomes final. Scott v. Campbell County Board of Education, Ky. App., 618 S.W.2d 589 (1981).

For the foregoing reasons, the judgments of the Rowan Circuit Court are reversed and the matter remanded for the entry of an order dismissing the claim.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barbara Anderson
Lexington, Kentucky

BRIEF FOR APPELLEE:

Thomas W. Miller
Donald R. Rose
Carl D. Devine
Lexington, Kentucky

[1]The Act itself has a section covering "Recreation and Retirement Use Land Sales" which covers subdivisions of land not developed and out of state sales.