

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000853-MR

THOMAS V. TOBIAS;
VEERA J. TOBIAS

APPELLANTS

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE PAUL JONES, JUDGE
ACTION NO. 98-CI-00156

JOHN S. TARTER, INDIVIDUALLY;
JOHN S. TARTER, AGENT FOR
UNITED COUNTRY REALTY, formally
known as UNITED NATIONAL REALTY

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: This is an appeal by Thomas B. Tobias and Vera J. Tobias from an order of the Adair Circuit Court dismissing their lawsuit against the appellee John S. Tarter and appellee United Country Realty (formally known as United National Realty). The lawsuit was based upon the allegation that Tarter defrauded, misled, and negligently or intentionally misrepresented certain realty purchased by the appellants. The issue in this appeal is whether the appellants' circuit court complaint against the

appellees is barred by res judicata because of prior litigation before the Kentucky Real Estate Commission.

In September 1993, the appellants purchased a home on Cemetery Spur Road in Adair County. John Tarter was the selling agent in the deal, and was employed by United Country Realty. Subsequent to the purchase, the appellants discovered various structural defects to the residence. In August 1995, the appellants filed a sworn complaint against Tarter with the Real Estate Commission.

On August 9, 1996, the Real Estate Commission filed an amended notice of hearing and charges. The notice stated that the issues to be heard at the hearing were whether Tarter had violated KRS 324.160(1)(b), (c), (r), and (s) which prohibit and punish, respectively, the making of any substantial misrepresentation, representation or failure to disclose known defects which substantially affect the value of the property; the making of any false promises of a character likely to influence, persuade or induce; any other conduct that constitutes improper, fraudulent or dishonest dealing; and gross negligence. The notice further noted that the appellants alleged that Tarter had used his relationship with the home inspector and the termite inspector "to hide defects in the home from complainants."

In September 1996, a hearing was held before a Real Estate Commission hearing officer. At the conclusion of the appellants' proof, Tarter moved to have the charges against him dismissed for lack of evidence. The hearing officer sustained the motion on the basis that there was not sufficient evidence

presented upon which the Real Estate Commission could determine that Tarter violated any of the statutory provisions referenced in the August 9, 1996, notice. On February 10, 1997, the hearing officer issued his findings of fact, conclusions of law, and recommended order wherein he recommended that all charges against Tarter be dismissed with prejudice. The hearing officer also recommended as a conclusion of law that Tarter had not violated KRS 324.160(1)(b), (c), (r), or (s).

On March 27, 1997, the Commission issued an order adopting the recommendation of the hearing officer that all charges relating to KRS 324.160(1)(c) and (s) be dismissed. However, the Commission remanded the case "for a determination of whether [Tarter] has violated KRS 324.160(1)(b) and (r) as it relates to the sole issue of whether [Tarter] disclosed the information provided in the termite report regarding rot in the home purchased by complainant." Otherwise, the Commission substantially adopted the hearing officer's findings of fact and conclusions of law, and implicitly adopted the granting of the directed verdict as to all issues except Tarter's failure to disclose the contents of the termite inspection report.

Subsequent to remand, following a hearing, on January 14, 1998, the hearing officer issued his findings of fact, conclusions of law and recommended order wherein he found that Tarter had intentionally failed to disclose to the appellants during a telephone conversation some two weeks prior to closing that the termite inspection report specifically referred to the presence of rot damage to the wood of the residence. The hearing

officer determined that based upon this, Tarter had not violated KRS 324.160(1)(b), but had violated KRS 324.160(r) by engaging in improper and dishonest dealing. However, the hearing officer stated that he could not conclude from the record that Tarter engaged in fraudulent activity, that he made an affirmative substantial misrepresentation, or that his failure to mention the rot substantially affected the value of the property. The hearing officer recommended that the Commission suspend Tarter's license for thirty days and that he be required to pay the appellant's restitution of \$1,000.00, the cost of repairing the rotted flooring.

On February 17, 1998, the Real Estate Commission issued an order accepting the recommendations of the hearing officer with the exception that the Commission concluded that Tarter had engaged in fraudulent activity by failing to fully disclose the contents of the termite report to the appellants. The Commission ordered that Tarter's license be suspended for sixty days and that he be required to pay restitution of \$1,000.00 to the appellants. Thereafter, the appellants did not file an appeal of the Commission's order pursuant to KRS 13B.140.

On August 11, 1998, the appellants filed a complaint in Adair Circuit Court against the appellees. Liability as to United Country Realty was based solely upon its agency relationship with Tarter. The complaint alleged that the appellees had fraudulently and knowingly failed to disclose substantial and structural defects in the residence prior to the closing; that the appellees intentionally misrepresented the

condition of the residence; that the appellees violated the express warranty of soundness concerning the construction of the residence; that the appellees violated the implied warranties of fitness and merchantability of the residence; or, in the alternative, the appellees were negligent in their duties owed to the appellants under the August 20, 1993, purchase agreement in failing to investigate, discover and disclose certain defects which existed in the residence. The complaint sought rescission of the purchase contract and revocation of the deed or, in the alternative, compensatory damages for the reduced value of the property and expenses incurred for repair of the residence.

On August 28, 1998, the appellees filed their answer and a motion to dismiss on the basis that the circuit court action was barred by res judicata in that the subject matter of the complaint had previously been litigated between the parties before the Real Estate Commission. On March 10, 1999, the trial court entered an order granting the motion to dismiss. This appeal followed.

The appellants contend that their complaint for damages in circuit court is not barred by res judicata for issues which were not fully and finally litigated and adjudicated by the Real Estate Commission. The appellants contend that the majority of their claims were never fully addressed and adjudicated in the administrative proceeding, and that the sole focus of the administrative action was one statutory provision in regard to one bedroom of floor damages.

In granting the motion to dismiss, the trial court considered matters outside the pleadings, specifically, it considered the litigation before the Real Estate Commission. When matters outside the pleadings are considered on a motion to dismiss, the motion must be treated as one for summary judgment. Ferguson v. Oates, Ky., 314 S.W.2d 518, 521 (1958). Therefore, we review the trial court's dismissal pursuant to applicable summary judgment standards.

In order to qualify for summary judgment, the movant must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56.03. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used when, as matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant. Id. at 483, (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

"Kentucky has for many years followed the rule that the decisions of administrative agencies acting in a judicial capacity are entitled to the same res judicata effect as

judgments of a court." Godbey v. University Hospital of Albert B. Chandler Medical Center, Inc., Ky. App. 975 S.W.2d 104, 105 (1998) (quoting Barnes v. McDowell, 647 F.Supp. 1307, 1310 (E.D.Ky.1986), overruled by same court on other grounds by Thompson v. McDowell, 661 F.Supp. 498 (E.D.Ky.1987)). See also Barnes v. McDowell, 848 F.2d 725 (1988), cert. denied, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 789 (1989). The fundamental principle of res judicata is that "[a] final judgment rendered upon the merits . . . by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." BTC Leasing, Inc. v. Martin, Ky. App., 685 S.W.2d 191, 197 (1984) (citing 46 Am.Jur.2d Judgments § 394 (1969)). "The successful invocation of this doctrine is clearly then dependent upon the demonstration of each of the elements contained in the [foregoing] definition, including the existence of a final judgment rendered upon the merits, an identity of the subject matter, and an identity of parties." Id. "[T]he doctrine of res judicata prevents the relitigation of the same issues in a subsequent appeal and includes every matter belonging to the subject of the litigation which could have been, as well as those which were, introduced in support of the contention of the parties on the first appeal." Huntzinger v. McCrae, Ky. App., 818 S.W.2d 613, 615 (1990) (citing Burkett v. Board of Education of Pulaski County, Ky. App., 558 S.W.2d 626, 627-628 (1977)).

At issue in this case is whether the elements of res judicata are met, thereby barring further litigation in circuit court. A final order was rendered in the administrative proceedings, and it is uncontested that the element of identity of parties is met.¹ In dispute is whether there is identity of subject matter. This issue is resolved by comparing the issues decided, or which should have been raised, in the administrative proceedings with the issues sought to be raised in the circuit court proceedings.

In their circuit court complaint, the appellants alleged that (1) the appellees had fraudulently and knowingly failed to disclose substantial and structural defects in the residence prior to the closing; (2) that the appellees intentionally misrepresented the condition of the residence; (3) that the appellees violated the express warranty of soundness concerning the construction of the residence; (4) that the appellees violated the implied warranties of fitness and merchantability of the residence; or, in the alternative, (5) the appellees were negligent in their duties owed to the appellants under the August 20, 1993, purchase agreement in failing to investigate, discover and disclose certain defects which existed in the residence.

¹While United Country Realty was not a party to the administrative proceedings, that does not lead to the conclusion that there is not identity of parties. United Country's liability is premised upon the acts of Tarter and his agency relationship with United Country. If there is res judicata as to Tarter, it follows that there is res judicata as to United Country.

On June 4, 1996, the Commission filed a notice scheduling the matter for hearing. The notice stated that the issues to be heard at the hearing were whether Tarter had violated KRS 324.160(1)(b) Making any substantial misrepresentation, representation or failing to disclose known defects which substantially affect the value of the property; (c) Making any false promises of a character likely to influence, persuade or induce; (r) Any other conduct that constitutes improper, fraudulent or dishonest dealing; and (s) Gross negligence. While we do not have the record of the administrative proceeding, we accept this as being the intended scope of those proceedings.

The February 10, 1997, report of the hearing officer further discloses the issues that were litigated at the September 1996 hearing. The report notes that "Complainants allege that Respondent 'did know or should have known about material defects that would or could affect the value of the property but failed to disclose' them." As to specific damages to the residence, the report notes that

As of the summer of 1994, this residence had structural damage to the floor in the front bedroom as a result of water causing rot in the wooden foundation. The property also had a serious swag in the living room ceiling, various cracks in the exterior masonry due to expansion or settling of the foundation, "smoky" windows in between the insulated panes of glass, and some cupping of the wooden siding. There was water damage as well to the benches on the rear deck where they had separated from their supports.

. . .

[T]he roof was "stick built" (i.e. piece by piece) as opposed to being constructed with an engineered truss. As presently constructed, the roof has inadequate reinforcement and it will sway. . . . [T]he exterior foundation had either settled or had water damage.

. . .

"[T]he roof of the main dwelling had suffered hail damage, . . . was sagging and needed to be replaced, or at least repaired as soon as practical.

Also raised were the appellants' charges that Tarter had informed them that Kentucky did not have a state income tax; that the property was represented as having 163 acres whereas it had only 152 acres; and that Tarter had failed to disclose or had misrepresented the results of a termite inspection report.

In comparing the circuit court complaint with the issues litigated in the administrative proceedings, we are persuaded that the allegations that Tarter "fraudulently and knowingly failed to disclose substantial and structural defects in the residence prior to the closing"; that Tarter "intentionally misrepresented the condition of the residence"; and that the appellees "were negligent in their duties owed to [the appellants] under the August 20, 1993, purchase agreement in failing to investigate, discover and disclose certain defects which existed in the residence" were litigated in the administrative proceedings, or, alternatively, could have been litigated therein. Therefore, res judicata has attached as to these issues, and the appellants are barred from relitigating these issues in a circuit court suit. The scope of the

administrative proceedings was intended to address all manner of misrepresentation, fraud, deception, false and misleading statements, and negligence regarding Tarter's dealings with the appellants in his role as the real estate agent in the sale of the Cemetery Spur Road property. The trial court properly determined that res judicata applied as to these issues.

It does not appear, however, that the administrative proceedings addressed the warranty claims that the appellees "violated the express warranty of soundness concerning the construction of the residence" and that the appellees "violated the implied warranties of fitness and merchantability of the residence." However, we are persuaded that summary judgment was proper as to these claims, because there is no evidence that Tarter or United National Realty extended such warranties to the appellants.

The "Deposit Receipt and Agreement of Sale" dated August 20, 1993, states that "[i]t is agreed that the buyer has thoroughly examined the property to be conveyed and relies solely on his own judgment in making this agreement to purchase, and that there are no agreements, understandings or representations made either by seller, broker or broker's representatives that are not set forth herein." The agreement contains no provision that the appellees were extending an "express warranty of soundness" to the appellants. The contract does state that "[t]his contract is also conditional that the buyer will be made aware of all repairs on the dwelling and what the cost will be. (needed repairs)." The appellees, however, were not parties to

the contract, and this provision of the agreement cannot be construed so as to impose an express warranty upon the appellees. Moreover, under the doctrine of merger, "all prior statements and agreements, both written and oral, are merged into the deed and the parties are bound by that instrument. Therefore, any express warranties made by the [sellers] or their agent were merged into the deed and the [appellees] cannot rely on those representations for recovery." Borden v. Litchford, Ky. App., 619 S.W.2d 715, 717 (1981).

The appellants do not cite us to any authority which imposes upon a real estate broker or agent an implied warranty of fitness and merchantability in favor of the buyer. "[I]n the sale of a new dwelling by the builder there is an implied warranty that in its major structural features the dwelling was constructed in a workmanlike manner and using suitable materials." Crawley v. Terhune, Ky., 437 S.W.2d 743, 745 (1969). However, this rule does not apply here. Aside from the exception carved out in Crawley, "[i]t has long been the rule that in sales of real property, with limited exceptions, the doctrine of caveat emptor is applicable." Wilson v. Southland Optical Co., Inc., Ky. App., 774 S.W.2d 447, 448 (1988). "[B]reach of warranty is not a viable theory in a personal injury claim for a product sold in a defective condition unless there is privity of contract, except in limited circumstances specified in the [Uniform Commercial Code]." Real Estate Marketing, Inc. v. Franz, Ky., 885 S.W.2d 921, 926 (1994). There is no privity of contract between the appellants and the appellees, and this type of

transaction is not within the limited exceptions provided for in the Uniform Commercial Code. See KRS 355.2-318. There are no implied warranties applicable to this situation, and summary judgment as to this issue was proper.

For the foregoing reasons, the order of the Adair Circuit Court dismissing the appellants' claims against the appellees is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joel R. Smith
Jamestown, Kentucky

BRIEF FOR APPELLEE:

R. Kent Westberry
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