

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001518-MR

PETER E. SHEPARD AND
THERESA D. SHEPARD

APPELLANTS

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT B. OVERSTREET, JUDGE
ACTION NO. 02-CI-00141

RONALD WILLHITE AND LINDA
WILLHITE; HAMILTON PROPERTY
SERVICES, INC.; AND DENISE L.
HAMILTON INDIVIDUALLY AND AS
AGENT OF HAMILTON PROPERTY
SERVICES, INC.

APPELLEES

AND

NO. 2004-CA-002593-MR

PETER E. SHEPARD AND
THERESA D. SHEPARD

APPELLANTS

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT B. OVERSTREET, JUDGE
ACTION NO. 02-CI-00141

RONALD WILLHITE AND
LINDA WILLHITE

APPELLEES

OPINION
AFFIRMING

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BEFORE: ABRAMSON AND BARBER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: Peter and Theresa Shepard filed this action after a home they purchased experienced flooding in the basement. They allege that Ronald and Linda Willhite, as the sellers, and Denise Hamilton, the listing realtor, fraudulently induced them to purchase the residence and that they suffered severe mental and emotional distress.² In response, the Willhites and Hamilton filed motions to dismiss. Hamilton argued that the Shepards failed to name an indispensable party; that the claim was barred by the statute of limitations; that at the time of the closing the Shepards were aware that there had been water in the basement; and absent physical contact, the claim for intentional infliction of emotion distress must fail. The Willhites raised the defense that there was no privity of contract between them and the Shepards; the claim for purely economic loss arising solely from a tort is not recoverable; and that there was no actionable fraud.³ The court found that there

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² The Shepards' complaint included a claim for violation of the Kentucky Consumer Protection Act. They concede that the Act is not applicable to the facts so the only issues concern the tort claims.

was no issue of material fact and granted both motions. We agree and affirm.

Ronald and Linda Willhite resided at 218 August Drive, Georgetown, Kentucky for over twenty years. In early 1998, Ronald learned his job required him to relocate to Louisville, Kentucky. As a part of his job transfer package, Ronald's employer, Kentucky Utilities, contracted with Pinnacle Group Associates, Inc. to purchase the Willhites' residence. In contemplation of the sale, in June 1998, the Willhites signed a homeowner's disclosure statement which included a disclosure that water had run into the basement when a drain clogged and a second time when a downspout was clogged.

In late August 1998, the Shepards, accompanied by Hamilton and their real estate agent, Ronnie Perry, viewed the home and noticed several dehumidifiers and a dusty, damp type smell. At that time, the Shepards were given a copy of the disclosure statement for review. In their affidavit, the Shepards state they asked Hamilton about possible water problems in the basement and she referred them to the Willhites. Consistent with the disclosure statement, the Willhites told them of the two water instances. Although they recalled that

³ Because the parties submitted material outside the pleadings for consideration, the circuit court properly considered the motions under CR 56. Our standard of review is whether the circuit court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. Steelvest v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

there had been water in the unfinished part, water had never reached the finished part of the basement.

In September 1998, Pinnacle formalized its agreement to purchase the property and the Willhites signed, and delivered to Pinnacle, a blank deed. Pinnacle then signed a formal listing agreement with Denise Hamilton and Hamilton Property Services. That same month, the Shepards entered into a purchase contract with Pinnacle and contracted with Bernie C. Hartung & Associates to perform a professional inspection of the property.

After the home inspection revealed signs of basement dampness, the Shepards requested that repairs be made to the basement to prevent leakage; that request, however, was not agreed to by the Willhites or by Pinnacle. Knowing that water had previously been in the basement, in November 1998, the Shepards nevertheless closed on the property. There were no problems with basement leakage until 2001 when it was extensively flooded.

While the Shepards were on vacation in July 2001, the Scott County area experienced major flooding causing sufficient damage for the area to be declared a federal disaster area and its residents eligible for FEMA loans. According to their affidavit, when they returned from vacation, the Shepards found puddles of water in the basement and, after closer inspection, discovered further water damage.

Shortly after their return, the Shepards' phones were inoperable, and a telephone repair man was called. According to the Shepards' affidavit, the unidentified repairman told them that the box and connections had shorted out, and the wall insulation was wet. Upon further inspection, the Shepards discovered that the carpet nail strips were rotting and the carpet pad was wet. They further found that some of the boxes stored in the basement were soaked and mildewed. A contractor hired to repair the flood damage allegedly concluded that the damage to the basement was caused by more than a single flooding incident. The Shepards also contend that a neighbor confirmed the contractor's observation, and that he had seen flooding in the basement. Despite their reliance on these alleged witness statements, there are no supporting affidavits from any of them in the record.

The Willhites and Hamilton raise the same issues on appeal that were raised in their motions to dismiss. Because we hold that the Shepards have failed to allege facts sufficient to sustain a claim for fraud against either, we find it unnecessary to discuss the remaining issues raised.

This is not, as the Shepards point out, an action based on a breach of contract or any express or implied

warranty.⁴ In accordance with their pleadings, the action must be analyzed in accordance with the legal principles governing deceit in the context of real estate transactions to which, as a general rule, caveat emptor applies. It is an ancient rule derived from common law and applied unless the vendor does something to prevent the prospective purchaser from making a thorough examination of the premises to ascertain its nature and value.⁵ Through statutory law, however, there has been some relaxation of the strict adherence to the concept of buyer beware and there is now a duty on the seller to disclose all defects known to the seller on a seller disclosure form.⁶ And where the seller fails to disclose and the buyer is thereby induced to purchase the property and is damaged as a result of the concealed facts, the buyer can maintain an action for fraud.

In the sale of real estate the intentional suppression of facts known to the seller and unknown to the purchaser is ground for an action for deceit if the purchase was damaged by reason of the fraudulent concealment. Where there is a latent defect known to the seller and he remains silent with the knowledge that the

⁴ Under the merger doctrine, all prior statements and agreements, both written and oral, are merged into the deed and the parties are bound by the deed and there can be no recovery under a warranty theory. False and fraudulent misrepresentations, however, do not merge. See Borden v. Litchford, 619 S.W.2d 715 (Ky.App. 1981); Yeager v. McLellan, 177 S.W.3d 807 (Ky. 2005).

⁵ Osborne v. Howard, 195 Ky. 533, 242 S.W. 852 (Ky. 1922).

⁶ KRS 324.360. Although Pinnacle executed a contract to purchase the property prior to the conveyance to the Shepards, the Willhites executed the disclosure form.

buyer is acting on the assumption that no defect exists, the buyer has a cause of action against the seller for an intentional omission to disclose such latent defect.⁷

The Shepards' pleadings as well as the affidavits and documents in the record conclusively establish that not only were the Shepards given the opportunity to discover any potential problems with the basement, but they were aware that the basement had previous water problems.

The Shepards were given a copy of the homeowner's disclosure statement at the time of their initial inspection of the home and at the closing. During their first visit, there were noticeable indications of basement dampness causing the Shepards to inquire further into its source. The professional inspector discovered, prior to the closing, that there was evidence of basement dampness. Despite this knowledge, the Shepards proceeded with the purchase and apparently from 1998 until 2001, had no problem with water in the basement. It was not until the natural disaster hit the area that there was any flooding in the basement. Neither Hamilton nor the Willhites represented to the Shepards that the residence would withstand a natural disaster such as occurred in Scott County in 2001. Based on the facts as alleged, the Shepards were aware that the

⁷ Bryant v. Troutman, 287 S.W.2d 918, 920 (Ky. 1956).

basement was not "dry", and thus, there was no latent defect of which the Shepards were unaware.

The judgments of the Scott Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julius Rather
Lexington, Kentucky

BRIEF FOR APPELLEES RONALD AND
LINDA WILLHITE:

Phillip M. Moloney
J. Peter Cassidy, III
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BRIEF FOR APPELLEES DENISE L.
HAMILTON AND HAMILTON PROPERTY
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Vincent J. Eiden
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