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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001750-MR

WILLIAM LITTON AND
MARY LITTON — APPELLANTS

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 07-CI-00332

RANDY MEADOWS AND
CHASTITY MEADOWS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: William and Mary Litton appeal from a judgment of the McCreary Circuit Court entered on July 11, 2008, in favor of Randy and Chastity Meadows, buyers of real estate, who had alleged misrepresentation and fraudulent concealment of conditions in the transaction. We affirm.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The Littons lived in their McCreary County residence for nearly fourteen (14) years. When they decided to move to Pulaski County, they placed the house on the market "for sale by owner." Eventually, with the house still unsold, the Littons packed their possessions and moved to a new home in Somerset.

In July 2006, the Littons contracted with Re/Max Appletree Realty to list and sell the vacant house. The Littons agreed to sell the house for $68,900.00. In conjunction with the listing agreement, the Littons completed a Seller Disclosure of Property Condition form as required by the provisions of Kentucky Revised Statute(s) (KRS) 324.360. On the form, the Littons disclosed that the roof of the house had been repaired; that there had been additions, structural modifications, or other alterations made to the residence; and that the house had been treated for wood infestation. In answer to a question concerning the owners' knowledge of "any past or current problems affecting [the home's] . . . . [f]loors and walls," the spaces designated both "no" and "unknown" were marked.

The Meadowses toured the empty house with Patricia Schroyer, their Re/Max agent. Chastity peeled back a bit of carpet and inspected the hardwood underneath. They walked through to inspect every room of the house and remarked to their agent that the wood floors would be beautiful once they had been cleaned up. Back at the Re/Max office, the Meadowses reviewed the sellers' disclosure form. On March 29, 2007, they made an offer to purchase the Littons' home for $65,000.00

The Meadowses' form offer contained provisions pertaining to their anticipated inspection of the property. Pursuant to paragraph 5, as the buyers, they were entitled to a wood-destroying organism inspection; a whole house inspection; an individual inspection of the cooling/heating, plumbing, and electrical systems; a water quality inspection; a radon test; or any other inspection that they designated. The form contained this warning: "Inspections required by FHA/VA, lending institutions, appraiser or other regulatory agencies are for their benefit and do not necessarily eliminate the need for an inspection by Buyer." Nevertheless, the Meadowses elected to conduct an inspection only "as lender requires."[2]

Paragraph 6 of the agreement provided as follows:

> Buyer may have inspections made at Buyer's expense to determine whether there are undisclosed material defects in the property, improvements or personal property . . . . Buyer shall notify Seller or Seller's Agent in writing within (10) days, following expiration of the inspection period as noted in 5(a), of any such defects, presence of wood destroying organisms. . . . If Buyer fails to give such notice within the time specified, Buyer shall be deemed to have accepted the property, improvements and personal property in the condition as of the Contract Date. If buyer notifies Seller or Seller's Agent of any such defect, buyer and seller will negotiate in good faith within 5 days for repairs. Should buyer and seller fail to reach an agreement of repairs, within the time limits specified, this contract is voidable by either party with both parties signing a mutual release and Buyer receiving a return of the earnest money.
>
> [ ] Buyer waives **all** inspections of the Property and relies solely upon the Buyer's examination of the Property and releases Seller and Brokers from any and all

[2] Although an appraisal of the property was eventually undertaken, apparently it was not provided to the Meadowses.

> liability relating to any defect or deficiency affecting the Property. This release shall survive the closing.

The Meadowses did not check the bracket indicating that they would waive the sellers' liability arising from any defect in the home.

Pursuant to the provisions of KRS 324.360, the Meadowses were given a copy of the sellers' disclosure form within seventy-two (72) hours of the offer. The Littons accepted the Meadowses offer on April 1, 2007. Closing was scheduled for May 1.

When the Meadowses returned for another look at the house, they were accompanied by a friend, Lonnie Poynter, a home inspector. Poynter brought a ladder and a flashlight. He inspected the attic, the main level, and the crawl space. Poynter suggested that the underside of the house could be better insulated for energy conservation and that builder's wrap should be placed underneath as barrier against moisture. Otherwise, he was satisfied with the condition of the house. The Meadowses did not visit the house again, nor did they arrange for another inspection of any kind before the purchase was completed. The transaction closed on June 8, 2007.

The Meadowses moved on June 9, 2007. When Randy began to mop the living room floor, he noticed that the floor was separated substantially from the baseboard at one corner and that the floor was not firm underfoot. Meadows became alarmed and contacted his agent.

On June 25, 2007, the Meadowses had the house inspected by a licensed home inspector. The inspector's report indicated that the presence of moisture and wood-destroying insects under the home had contributed to the deterioration of its original wood structure and support. The floor had begun to sink, and relatively recently, cement blocks and wood posts had been added to support the sub-floor. A building contractor estimated that repairs to the support structure and replacement of the sub-floor and surface floor would cost more than $25,000.00.

On August 2, 2007, the Meadowses filed this action against the Littons. In their complaint, the Meadowses alleged that the Littons had fraudulently misrepresented to them the condition of the property. They alleged that the home has structural defects and that it is plagued by mold, fungus, wood-boring insects, and environmental hazards. They alleged that the Littons had made temporary repairs at the baseboards and in the crawl space in an effort to conceal material defects in the property and to defraud an unsuspecting buyer. The Littons denied these allegations.

Trial was conducted on July 8, 2008. After hearing the evidence, the jury returned a verdict against the Littons in the sum of $12,500.00. This appeal followed.

The Littons contend that the trial court erred by submitting the issue of misrepresentation to the jury. They contend that because the Meadowses had had a sufficient opportunity to inspect the property and to observe the condition of

the premises, the doctrine of *caveat emptor* ("buyer beware") prevents a cause of action based on fraud. The Littons argue that they were entitled to a directed verdict or judgment notwithstanding the verdict (JNOV).

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985).

The Meadowses claim that in order to induce them to purchase the house, the Littons committed fraud by materially misrepresenting the condition of the floor (and underlying structure), the presence of wood-boring insects, and extensive insect damage. The allegation of fraud in any transaction requires that the following elements be established by clear and convincing evidence:

> (1) a material representation,
> (2) which is false,
> (3) known to be false or made recklessly,
> (4) made with inducement to be acted upon,
> (5) acted in reliance thereon, and
> (6) causes injury.

United Parcel Service Co. v. Rickert, 996 S.W.2d 464 (Ky. 1999).

When she was questioned by the Meadowses' attorney at trial, Mary Litton explained that her brother had once worked under the house to stabilize her

bedroom floor. She indicated that the extra weight of a waterbed in that room had caused the floor to give way over time. Mary testified that the work had been undertaken more than ten years before the Meadowses bought the house and that she had not been concerned about the state of the floors or the substructure when they decided to sell the house. She denied that she meant to deceive potential buyers by aligning trim to cover a gap between the floor and wall of her bedroom, but she did admit that she had supplied a "wrong answer" on the disclosure form by specifically representing that she did not know of any past or current problems affecting the floors and walls.

With respect to an infestation of wood-boring insects, Mary Litton told the jury that the house had never been inspected and that no one had ever mentioned the problem to her. She denied that she had intended to mislead a prospective buyer by indicating on the disclosure form that the house had been treated for wood infestation when in truth it had been treated by an exterminator only for fruit ants (which are not wood-boring). She also explained that she assumed that a rotting wood plank found outside the house had been left over from a vinyl-siding project; her husband had given that same explanation to the realtor in response to a question posed by the Meadowses.

Randy Meadows testified that he reviewed the sellers' disclosure form before making the offer to purchase. He stated that he detrimentally relied on the Littons' oral statements and the written representations made in the disclosure form. He stated that he and his family had been injured as a result.

In compliance with our governing standard, we must make no determinations with respect to witness credibility and view the evidence more favorably to the Meadowses. We are persuaded that the Meadowses presented sufficient evidence of fraud to withstand a directed verdict against them. Properly instructed, the jury believed that the Littons knowingly made false, material representations concerning the condition of their house; that the Meadowses relied on these misrepresentations; and that they were injured as a consequence. Thus, the trial court did not err by denying the Littons' motion for directed verdict or motion for JNOV.

The Littons also contend that the jury award is excessive and unsupported by the evidence. We disagree. As noted previously, a building contractor presented evidence that the damages would cost $25,000 to repair. The jury was persuaded by competent evidence that the Meadowses were damaged to the extent of $12,500.00 – only half that amount. We will not disturb the verdict as excessive.

We affirm the judgment of the McCreary Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Matthew J. Choate
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BRIEF FOR APPELLEES:

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