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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000136-MR

ANDY AND MARJORY PIPPIN — APPELLANTS

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 15-CI-00804

OWENSBORO MASTER BUILDER, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SMALLWOOD AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Andy and Marjory Pippin bring this appeal from a Daviess Circuit Court order granting summary judgment to Owensboro Master Builder, Inc. ("OMB") and dismissing the Pippins' claims for breach of the implied warranty of habitability and breach of contract relating to the construction

of their home by OMB. Having reviewed the record and applicable law, we affirm.

On September 11, 2003, the Pippins entered into a contract with OMB for the purchase of real estate and the construction of a house. The contract provided OMB would furnish all labor and materials and build the residence "in accordance with signed plans and specifications." Further, the contract specified that OMB was not responsible for the accuracy of plans supplied by the buyer "[e]xcept for structural integrity of the Residence." The Pippins did not provide their own building plans and instead OMB used its own plans to build the house. The contract further stipulated that on the date when title to the lot and residence was transferred to the Pippins, OMB would execute and deliver a homeowner's "limited warranty." The contract contained the following disclaimer and waiver provision:

> Builder disclaims and Buyer waives, unless otherwise expressly provided in Builder's limited warranty, all warranties, express or implied, including but not limited to the warranties of habitability, merchantability, and fitness of purpose, and including any warranties that could be construed to cover the presence of radon or other environmental pollutants. BUYER AND BUILDER AGREE THAT SUCH LIMITED WARRANTY SHALL CONSTITUTE THE SOLE WARRANTY FROM BUILDER TO BUYER AND THE LIMITED WARRANTY IS GIVEN IN LIEU OF ALL OTHER WARRANTIES.

The contract also contained the following release and discharge provision:

> Possession of the lot and Residence shall be given on the closing date. . . . The acceptance of key or deed or entry into possession of the Residence and lot by Buyer is acceptance by Buyer of the Residence and lot and, except for matters covered by the limited warranty, constitutes a complete release and discharge of all obligations and liabilities of Builder with respect to the construction, completion and delivery of the Residence and lot and every part thereof.

Although the contract stated that a copy of the limited warranty was attached as an appendix, the Pippins claim it was not and they first saw the limited warranty on March 29, 2004, the date of closing. The Pippins signed the limited warranty, which was effective for 12 months from that date.

The warranty is a seven-page document containing eleven sections relating to construction quality standards and the builder's responsibility to correct defects and provide services in relation to each of these. They include excavating and backfilling, site drainage, expansion and contraction joints, masonry, carpentry, waterproofing, insulation, shingles, roofing, siding, doors and windows, finishes such as wallboard and tile, the water system, plumbing, heating and cooling, and electrical.

The first page of the limited warranty contains the following statement in capital letters enclosed in a border:

> THIS LIMITED WARRANY IS THE ONLY EXPRESSED WARRANTY EXTENDED TO OWNER BY BUILDER. ANY ITEM AND CONDITIONS NOT SPECIFICALLY COVERED BY THIS WARRANTY ARE EXCLUDED FROM COVERAGE AND ARE THE RESPONSIBILITY OF OWNER. IT IS EXPRESSLY UNDERSTOOD THAT THIS LIMITED WARRANTY IS IN LIEU OF ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTIBILITY, FITNESS FOR PARTICULAR PURPOSE, AND HABITABILITY. IN NO EVENT SHALL BUILDER BE LIABLE FOR ANY DAMAGES (CONSEQUENTIAL OR OTHERWISE) ARISING FROM ANY DEFECTS IN ANY ITEM COVERED HEREUNDER. THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS, AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.

In 2005, the Pippins noticed some problems with the house relating to the alignment of the doors, windows, and cabinets; "humps" and "squeaks" in the floors; "waves" in the siding; "nail pops" in the drywall; and broken bricks and cracked tiles. They notified OMB, which attempted to address the issues and assured the Pippins they were cosmetic in nature. The Pippins claim that OMB did not walk through the residence until April 2005, after the warranty expired, and did not send repair persons to address the cosmetic issues until May 2005.

In June 2005 the Pippins retained Tony Huff, a professional engineer, to inspect the house. According to the Pippins, his position was to monitor the house and not cut holes in the walls because he did not see the kind of structural

cracks that appeared later in 2013. On June 3, 2005, the Pippins reported a construction defect claim relating to the home's trusses to OMB's liability insurance company but did not pursue the claim. In the ensuing years, OMB's sole owner retired and the company stopped doing business.

Eight years later, in 2013, the Pippins retained a contractor to investigate "bouncy" floors and cracks in the brick and drywall of the house. The contractor opened the walls and discovered extensive structural defects. Hodge Structural Engineers confirmed the contractor's findings and opined that OMB had not followed the structural design plans. The Pippins sent a "notice to repair" to OMB pursuant to the Notice and Opportunity to Repair Act, Kentucky Revised Statutes (KRS) 411.250 *et seq.* on August 11, 2015.

OMB did not respond to the notice. On September 24, 2015, the Pippins filed a complaint in Daviess Circuit Court pursuant to KRS 411.258(3)(a). The complaint alleged that OMB did not follow the approved construction plans and the house lacked structural integrity resulting in cracks, sloped floors, bouncing floors, doors that will not shut, and load bearing walls and posts that are not properly aligned. The complaint raised two claims: (1) that OMB breached the express promises in the contract that the house would be built according to approved plans and that it would have structural integrity, and (2) that OMB

breached the warranty of habitability implied in all new residential construction contracts.

OMB responded that the Pippins' claims were time-barred because the limited warranty created a 12-month limitations period which had expired. The Pippins argued that the general 15-year limitations period for breach of contract claims under KRS 413.090(2) applied in their case.

The trial court held that that summary judgment was appropriate because the actions and pleadings of the Pippins showed that the parties agreed to the limited warranty "which was bargained for, known to the buyers and relied upon by the Pippins to achieve repairs during the warranty period or shortly after its expiration." This appeal by the Pippins followed.

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 483 (Ky. 1991) (internal quotation marks and citation omitted). "The record must be viewed

in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Id*. at 480. On the other hand, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id*. at 482. "An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

The Pippins' arguments on appeal are primarily concerned with the interpretation, applicability and scope of the contract and the limited warranty. "The construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court." *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000) (citing *Hibbitts v. Cumberland Valley National Bank & Trust Co.*, 977 S.W.2d 252, 254 (Ky. App. 1998). "[I]n the absence of ambiguity a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (internal citations omitted). "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Cantrell Supply*,

Inc. v. Liberty Mutual Insurance Co., 94 S.W.3d 381, 385 (Ky. App. 2002) (internal citations omitted).

The Pippins argue that the 12-month limitations period specified by the limited warranty applies only to claims made under the terms of the warranty itself, not to claims made outside the scope of its coverage, such as their breach of contract claim relating to the structural integrity of the house. But the construction and purchase contract, which the Pippins signed, plainly stated that their acceptance of the residence and lot constituted "a complete release and discharge of all obligations and liabilities of Builder with respect to the construction, completion and delivery of the Residence and lot and every part thereof[,]" except for "matters covered by the limited warranty." Thus, the terms of the contract are unmistakably clear: the limited warranty was to be the Pippins' only recourse with respect to claims regarding the construction of the house. The first page of the limited warranty contains a section labeled "TERMS" which states: "The term of the various coverages of this Limited Warranty . . . shall terminate 12 months after the commencement date, unless otherwise stated herein." The limited warranty has expired under its own terms.

The Pippins argue that the reduction of the limitations period to 12 months was not clear and unambiguous, as required by Kentucky law. "Kentucky case law has long upheld the validity of contractual terms that deliberately depart

from statutory limits and instead provide for shorter limitation periods. A reasonable shortening of the statutory period of limitations does not ordinarily offend public policy." *Schultz v. Cooper*, 134 S.W.3d 618, 621 (Ky. App. 2003) (citing *Webb v. Kentucky Farm Bureau Ins. Co.*, 577 S.W.2d 17 (Ky. App. 1978)). Although the Pippins argue that *Schultz* is distinguishable because the agreement in that case did not actually specify a limitations period but rather dictated when any applicable period would commence to run, the case relied upon in *Schultz*, *Webb v. Kentucky Farm Bureau Ins. Co.*, 577 S.W.2d 17 (Ky. App. 1978), did approve a reduced limitations period because there was no statutory proscription against it.

Although the Pippins argue that there is nothing in the limited warranty or the contract which clearly and unambiguously states that the warranty was intended to shorten the limitations period to 12 months for any and all claims that the Pippins could assert against OMB, we disagree. The contract made it plain that the limited warranty would be the sole source of relief for construction-related claims and only claims specified in the warranty itself. The limited warranty stated that it was applicable for 12 months. Although the two documents must be read in conjunction with each other, their meaning is not thereby rendered ambiguous or unclear. The Pippins have cited cases holding that a contractual warranty limited to a period of time does not serve as a statute of limitation for claims unrelated to the warranty. *See, e.g., Journey Acquisition-II, L.P. v. EQT Prod. Co.*, 39 F. Supp.

3d 877, 888 (E.D. Ky. 2014) ("Kentucky courts have held that parties may contract for a shorter limitations period for bringing a lawsuit, such contractual reductions typically apply where the contract specifically addresses lawsuits or legal causes of action[.]"). But in this case, any claims not covered by the warranty were released by the express terms of the contract which released and discharged "all obligations and liabilities" of OMB with respect to the construction of the house.

Next, the Pippins argue that the contractual waiver of the implied warranty of habitability was invalid. In *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. 1969), our state's highest court held that "in 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." 437 S.W.2d at 745. "*Crawley* elevates the builder's failure to so construct the dwelling to the status of a legally compensable wrong as a matter of law even though it is not a matter of contract." *Real Estate Mktg., Inc. v. Franz*, 885 S.W.2d 921, 925 (Ky. 1994), *overruled on other grounds by Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729 (Ky. 2011). The Pippins argue that, as a matter of public policy, it is doubtful the Kentucky Supreme Court would permit the implied warranty of habitability to be undermined by a preprinted contract, particularly in a case in which the limited warranty does not cover major structural defects.

But the Pippins signed a contract which plainly stated they agreed to waive, "unless otherwise expressly provided for in Builder's limited warranty, all warranties, express or implied, including but not limited to the warrant[y] of habitability[.]" They also signed the Limited Warranty "IN LIEU OF ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF . . . HABITABILITY." There is no legal authority in Kentucky which states that the warranty of habitability may not be expressly waived in this manner. Indeed, as OMB has observed, the General Assembly has never chosen to codify the implied warranty of habitability, whereas it has codified the implied warranty of merchantability, KRS 355.2-314 and the implied warranty of fitness for a particular purpose, KRS 355.2-315. Furthermore, even those implied warranties that the General Assembly has seen fit to codify may be waived by agreement of the parties. KRS 355.2-316(2).

The Pippins further argue that this result means they were without any remedy at all for a breach of the express promise in the contract to construct the home according to the signed plans and specifications and with structural integrity, because the limited warranty does not encompass such claims. Although the Pippins raise genuine public policy concerns, there is no legal authority to support their claim that the implied warranty of habitability may not be waived by contractual agreement.

The Pippins further argue that the trial court made improper factual findings or erred as a matter of law in stating that on the closing date the Pippins "acknowledged a one-year home warranty and agreed that the limited warranty covered all cosmetic, construction and code defects and that such defects would be repaired by the builder at no charge to the purchasers." The Pippins contend that the limited warranty did not cover structural or code defects, only cosmetic defects. In a related argument, they argue that the contract and warranty were internally inconsistent in that the contract expressly obligated OMB to build a home with structural integrity according to the approved plans and specifications yet also purported to disclaim this obligation. The Pippins contend they were thus left without any recourse whatsoever for their breach of contract claim that OMB did not build the home in accordance with the specified plans, resulting in structural defects.

"It is settled law that, absent fraud in the inducement, a written agreement duly executed by the party to be bound, who had an opportunity to read it, will be enforced according to its terms." *United Servs. Auto. Ass'n v. ADT Sec. Servs., Inc.*, 241 S.W.3d 335, 339 (Ky. App. 2006). The Pippins do not allege any fraud in the inducement. Nor do they allege the contract and the warranty are unconscionable. "The doctrine [of unconscionability] is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is

directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain . . . ." *Id*. (quoting *Louisville Bear Safety Service, Inc. v. South Central Bell Telephone Company*, 571 S.W.2d 438, 440 (Ky. App. 1978)).

For the foregoing reasons, the summary judgment and order of dismissal is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEE
K. Timothy Kline Owensboro, Kentucky	Stockard R. Hickey III Louisville, Kentucky