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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001720-MR

JOAN STANLEY APPELLANT

APPEAL FROM BULLITT CIRCUIT COURT
v. HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 16-CI-00796

JASON SMITH AND LEAH SMITH APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

JONES, JUDGE: Appellant, Joan Stanley, brings this appeal from an order of the Bullitt Circuit Court granting summary judgment in favor of Jason and Leah Smith (collectively referred to as the "Smiths"). Before the trial court, Stanley alleged that the Smiths failed to disclose and attempted to conceal certain defects in a home she purchased from them. She sought damages based on several theories including negligent misrepresentation, fraud by omission, and unjust enrichment.

The trial court ultimately determined that the Smiths were entitled to summary judgment because it was undisputed that Stanley agreed to purchase the home in "As Is" condition, waived her right to have the home professionally inspected, and was allowed free access to the home prior to the closing during which time she could have discovered many of the issues for herself. The trial court also determined that Stanley failed to put forth any evidence that the Smiths intentionally concealed any known defects from her or affirmatively or negligently misrepresented the condition of the home in either their written disclosures or oral statements. Having reviewed the record, in conjunction with all applicable legal authority, we AFFIRM.

I. BACKGROUND

In 2009, the Smiths purchased a home located at 352 Running Creek Drive, Shepherdsville, Kentucky 40165 (herein referred to as the "Property") from a bank; the bank had purchased the Property at a foreclosure sale. The Smiths moved into the home and began residing in it. Over the years, they made various upgrades to the Property. In 2015, the Smiths decided to sell the Property. They first listed the Property as "for sale by owners" and offered it at $380,000. Stanley, who lived close to the Smiths, saw the for-sale-by-owners sign in the yard and decided to look at the Property. After doing so, she offered the Smiths $350,000. The Smiths declined Stanley's offer.

After unsuccessfully marketing the Property themselves, the Smiths decided to hire Bob Sokolor, a local real estate agent, to list the Property for them. While Sokolor had the listing, the Smiths purchased another home. They moved out of the Property and into their new home in February 2016. Mr. Sokolor and the Smiths could not come terms on reducing the price of the Property, which Mr. Sokolor believed would be necessary to attract a buyer. Mr. Sokolor's listing agreement with the Smiths expired on April 30, 2016, at which time the Smiths re-listed the Property as "for sale by owners."

About the same time Stanley again called the Smiths about the Property. She told them that she had sold her home, and that she had to vacate it on or before May 2, 2016. She indicated that she was still interested in purchasing the Property from them. The Smiths showed the Property to Stanley on May 1, 2016. Stanley walked through each room of the home, including the basement. There is no evidence that the Smiths prevented Stanley from viewing the Property to her satisfaction.

The Smiths provided Stanley a copy of a seller's disclosure form they had completed at Mr. Sokolor's request, when the Property was listed with him. Of note, the disclosure indicated that the Smiths were aware that the basement had leaked in the past. They handwrote on the form that the last known leak occurred in April of 2015, and that they contracted with B-Dry Systems of Louisville ("B-

Dry") to have the basement leak repaired in July of 2015. They stated that B-Dry "fixed [the leak] completely," and the repair included a transferrable warranty. They also disclosed that "a low of amount of radon" was previously detected in the home and that they had a radon mitigation system installed in 2009. They indicated that the heating system was installed in 1997, making it over fifteen years old, but they did not disclose any existing problems with it.

The Smiths also prepared a typewritten list of various upgrades and repairs they performed on the home since owning it. This list included: (1) installing new carpeting, the radon system, new appliances, and custom window blinds in 2009; (2) replacing the roof, garage door, air conditioner, a 50-gallon hot water heater, and the landscaping in 2010; (3) a kitchen remodel in 2011; (4) drywall work and replacing the chimney siding, an interior door and the 70-gallon hot water heater in 2012; (5) a fireplace renovation and deck restoration in 2014; and (6) bathroom renovations, cabinet painting, concrete repair and restoration, front door restoration, and installing new hardware, light fixtures, and the B-Dry Basement System in 2015.

At the end of the showing, Stanley indicated that she was willing to offer the Smiths $330,000 for the Property. The Smiths were willing to accept the offer, and the parties discussed how to proceed so that Stanley could occupy the Property as soon as possible given that she was pressed for time as her home was

set to close the next day. The Smiths had a contract ready, and the parties debated on what wording to use to denote that Stanley was not going to have the Property professionally inspected before the closing. The parties discussed and initially agreed to write "no time for inspection" on the Purchase Contract. However, Leah Smith called her sister, an attorney, and inquired about whether this was the best language to use in the contract. After Leah talked to her sister, the parties agreed to write "N/A Buyer declines" beside the inspection portion of the contract, and for Stanley to check the "As Is" box on the Purchase Contract. Both parties then signed and dated the Purchase Contract.

After an agreement was reached, Stanley asked the Smiths if she could start moving her belongings into the Property even though they had not officially closed on the sale. The Smiths agreed to let Stanley move in her clothing and some other smaller items. Stanley began doing so almost immediately. During the next few days, Stanley had free access to the Property unimpeded by the Smiths. Stanley moved items into the home three of the next four days, spending several hours in the Property each day. On the fourth day, May 5, 2016, the parties closed on the Property. Stanley began living in the Property immediately and soon began noticing various defects and problems with it.

One of the first problems Stanley noticed was that the furnace blew constantly and would not shut off. Stanley made an appointment with Prudential

Heating and Air Conditioning, Inc. to have a technician inspect the furnace and fix the issue. After examining the furnace, the technician advised Stanley that it had been "hot-wired to blow continuously," which had blown the circuit board. The technician fixed the wiring, ordered a new board, and billed Stanley for the work.

Next, Stanley hired Aqua Lock, LLC to examine the radon system, which was located in the basement's crawl space.[1] When Michael McCartin, an Aqua Lock employee, went down into the basement, he detected a strong odor that made him suspicious of mold, so he decided to investigate further. His investigation revealed the presence of mold; he believed the mold had been present for at least six months. He told Stanley that the mold was likely caused by water seeping into the crawl space through cracks in the foundation wall. McCartin also indicated that the radon system needed some repairs to function properly. Ultimately, Stanley paid Aqua Lock to clean the mold, repair the radon system, and seal the cracks in the foundation. There is no indication in the record that Stanley reached out to B-Dry before having Aqua Lock perform the foundation work even though the Smiths' B-Dry's warranty was transferred to Stanley with the sale.

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[1] In May 2016, Stanley hired DirectTV to install cable in her home. During the installation, the DirectTV employee warned Stanley that there was mud in the crawl space, which he believed should not have been there. Subsequently, Stanley hired Aqua Lock, LLC to examine the radon equipment, which was located in the basement crawl space area.

Finally, after living in the home, Stanley discovered that "several of the casings on the windows were damaged and/or broken." Stanley believes that she was prevented from noticing these defects during her walk through of the home because the windows were covered by the "large custom blinds" the Smiths installed in the home. She believes the Smiths intentionally concealed the condition of the windows from her by using the blinds.

On September 16, 2016, Stanley filed a complaint in Bullitt Circuit Court against the Smiths for failure to disclose latent defects, fraud by omission, negligent misrepresentation, and unjust enrichment. Over the next year, the parties engaged in discovery. On September 20, 2017, the Smiths filed a motion for summary judgment. While some discovery had already been completed, the Smiths were scheduled to be deposed in October 2017; as such, the trial court decided to reserve judgment on the motion for summary judgment until the depositions were completed and the parties were given an opportunity to supplement their filings. Thereafter, the trial court held a hearing on the summary judgment motions during which it entertained arguments.

On October 17, 2018, the trial court granted summary judgment in favor of the Smiths. The trial court was not persuaded that the "As Is" language in the contract was dispositive. The trial court noted that Stanley could still pursue her claims against the Smiths if they intentionally concealed any known and latent

defects. It ultimately concluded, however, that Stanley had failed to put forth any affirmative evidence that the Smiths knew about the mold or hot-wired furnace. With respect to the window casings, the trial court determined that nothing indicated that the Smiths hid the condition of the windows from Stanley.

This appeal followed.

II. STANDARD OF REVIEW

"The standard of review on appeal when a trial court grants a motion for summary judgment is '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.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03). "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Id.* (citing *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991)). "Impossible" is to be used "in a practical sense, not in an absolute sense." *Id.* (quoting *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992)). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate

court need not defer to the trial court's decision and will review the issue *de novo*." *Id.*

III. Analysis

Stanley purchased the Property, in an "As Is" condition. While this fact may limit Stanley's potential claims, it does not completely foreclose her ability to seek damages from the Smiths. An "As Is" agreement for the purchase of property is not determinative of claims regarding the physical condition of the property in every circumstance; if the "As Is" agreement is fraudulently induced by misrepresentation or concealment, it will not be binding. *Bryant v. Troutman*, 287 S.W.2d 918, 920 (Ky. 1956).

"Where there is a latent defect known to the seller and he remains silent with the knowledge that the 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." *Id.* (emphasis added). "One cannot contract against his fraud." *Id.* at 921. A latent defect is one that cannot easily be discovered or noticed. *Id.* A defect that is in plain view of a purchaser cannot be latent. *See Roland v. Griffith*, 291 Ky. 248, 163 S.W.2d 496, 499 (1942) ("This of itself would not have been a communication . . . of any latent or hidden defects, because, as we have said, the appliances were in the plain view of anyone who

entered the bathroom."). With these standards in mind, we turn to Stanley's claims against the Smiths.

As a primary matter, we cannot agree with Stanley that there is any evidence of substance that the Smiths exerted undue pressure on her to close the sale quickly, to waive her right to have the home professionally inspected, or to initial the "As Is" clause. The undisputed evidence is that Stanley contacted the Smiths and told them that she was looking for a quick transaction because she was in dire need of a place to live as her existing home was scheduled to close the following day. This explains why the Smiths had a contract ready when Stanley looked at the Property. None of the parties was represented by an attorney. It appears that the parties had already agreed that Stanley was going to waive the inspection, so the sale could close faster. Leah only called her sister with respect to how to word the agreement the parties had already reached. This was an arms-length transaction between two unrepresented parties. Stanley could have insisted on an inspection period had she wanted it. There is simply no evidence in the record that the Smiths used fraud or undue influence to convince Stanley to waive the inspection.

Having determined that Stanley freely agreed to purchase the Property "As Is," our next determination is whether the Smiths were obligated to make any disclosures to her. We agree with the trial court that the "As Is" clause does

absolve the Smiths of all disclosure obligations. Notwithstanding the provision, the Smiths had an obligation to inform Stanley of any known *and* latent defects. Therefore, we must next determine whether the trial court correctly determined that the defects alleged by Stanley were either unknown or not latent.

We begin with the window casings. With respect to the window casings, the trial court concluded as follows:

> [The Smiths] maintain that there were merely cosmetic cracks on the window casings that were open and obvious, and therefore they cannot constitute a latent defect of the property. . . . [Stanley] points to [the Smiths'] deposition testimony that custom blinds were installed on the windows in the home. [Stanley] maintains that [t]his testimony would allow [] the jury to infer that custom blinds would [have] covered the window casings.
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> Here, [Stanley] merely alleges that the window casings contain cosmetic cracking. [Stanley] failed to submit any evidence or testimony that the custom blinds installed by [the Smiths] covered any of the cosmetic cracking on the window casings. The testimony reflects [Stanley] was in the home on numerous occasions prior to closing, and therefore had the opportunity to inspect the window casings. Therefore, this Court finds that [the Smiths] did not have a duty to disclose the cosmetic cracking of the window casings to [Stanley] since they were readily discoverable upon a reasonable inspection by [Stanley]. Therefore, [the Smiths] are entitled to summary judgment on [Stanley's] claims pertaining to the cosmetic cracks located on the window casings of the home.

While not explicitly stated as such, the trial court's findings suggest it did not view the cracking in the window casings as being truly defective, or at least not materially so. We agree. It would be untenable to suggest that the seller of an older home is obligated to disclose every scuff, scratch, or paint chip that she knows to exist. What some might label as cosmetic defects in an older home, others might consider character. A house of this age can be expected to have minor cracks, chips and scuffs throughout. Unlike a brand-new home purchased from a builder, the buyer of an existing, older home must expect it to contain some cosmetic imperfections. The duty of disclosure arises only when those imperfections affect functionality in some negative fashion. A cosmetic imperfection that affects functionality is a material defect. And, a material defect that is not readily apparent is a latent one that gives way to a duty of disclosure.

Having reviewed the record, we agree with the trial court that Stanley did not allege that the cracks in the window facings amount to any more than cosmetic imperfections that are to be expected and are typical of a home of this age. She did not produce any evidence to show that they affect the functionality of the windows such that the windows leak or will not open or close. Therefore, the cracks do not rise to the level of a true material defect that would require disclosure as such.

Even if Stanley had proven that the cracks rendered the windows defective, we do not believe that she prevented any evidence that they were latent. Stanley maintains that the Smiths prevented her from discovering the cracking because the windows were covered with custom blinds the Smith had installed in the home. The record indicates that the Smiths had the blinds installed in 2009, well before they put the home on the market. While the blinds are described as custom, there is nothing in the record to suggest that they were immovable. In other words, Stanley could have easily pushed the blinds back and viewed the window casings when she was in the home prior to the closing just she did after the closing. The cracks could have been easily discovered by her by simply looking behind the blinds; there is absolutely no evidence that the Smiths prevented her from doing so at any point in time before the closing.

We now turn to the mold issue. Stanley presented evidence that the mold found in the home presented a potential health issue, and it is common knowledge that breathing mold spores can cause health problems. Irrespective of the age of a home, the presence of mold is the type of condition one would characterize as defective. This means the Smiths had an obligation to disclose the mold to Stanley if they knew about it and it was not readily discoverable by Stanley herself.

As a primary matter, we are skeptical that Stanley could not have discovered the mold on her own. While it was located in the crawl space, her own witness, Aqua Lock employee Michael McCartin, averred that the smell of mold was overwhelming upon entering the home. Given that Stanley walked through the home prior to making her second offer to purchase it and spent several hours moving items into the home prior to the closing, it seems that Stanley would have been put on notice of the odor and the need for further investigation. Moreover, Stanley was allowed access to the basement and crawl space area when she viewed the home. There is no evidence in the record that the Smiths made the basement crawlspace unavailable to Stanley or attempted to conceal the mold in the crawlspace.

Even if we assume, however, that the mold in the basement was latent such that Stanley could not have easily discovered it on her own, she has not produced anything beyond mere conjecture and speculation to show that the Smiths had knowledge of its existence. It is undisputed that the Smiths disclosed to Stanley that the basement area of the Property had leaked in the past. They further disclosed to her that they had the leaks repaired by B-Dry. B-Dry completed its work in April of 2015. There was no evidence of mold in the Property at that time. The Smiths began moving out of the Property in September 2015 and were completely moved out by February 2016. Jason Smith testified that

while they lived in the Property, he periodically checked the basement and crawl space area for leaks. He never saw anything he believed was mold during his inspections, and after the B-Dry system was installed, he never noticed any problems with moisture or water seeping into the basement. When the mold was discovered in June 2016, the Smiths had not occupied the home for over four months.

The problem in this case, as correctly determined by the trial court, is that Stanley offers only speculation and conjecture that the Smiths "had to know that there was mold in the crawl space" and presents no real evidence direct or circumstantial to prove that assertion. As explained by the trial court,

> [Stanley] points to Mr. Smith's deposition testimony, in which Mr. Smith testified that while living at the home he viewed the crawl space of the home "several dozen" times. Mr. Smith further testified that he never saw anything during his inspections of the crawl space. [Stanley] argues that this is circumstantial evidence that would allow the jury to infer Mr. Smith was concerned about water leakage, and therefore had to have prior knowledge of such.
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> The record shows [the Smiths] had a prior inspection report performed on the property. From the prior inspection, there was no evidence of any mold being present in the home. In addition, although Mr. McCartin found mold in June of 2016, [the Smiths] had not resided in the home since February of 2016. Mr. McCartin's opinion that [the Smiths] should have known about he mold six (6) months prior based upon its smell is merely speculation. Moreover, [Stanley] even testified that at the time she started living in the home she could smell

> something, but she couldn't identify that smell as mold. In addition, [Stanley] actually entered the home on multiple times prior to the closing. Sh[e] would have had the same ability to detect any smell of mold if it was present. Therefore, Mr. McCartin's opinion fails to create a genuine issue of material fact as to whether [the Smiths] knew or should have known of mold in the home.
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> Although Mr. Smith's deposition testimony reflects that Mr. Smith was in the crawl space on numerous [occasions] there is no testimony or evidence that Mr. Smith saw any mold or should have seen any mold. Mr. Smith clearly testified that he did not see anything during his numerous inspections of the crawl space. Therefore, [Stanley's] assertion that Mr. Smith's actions of checking under the crawlspace infers that he knew or should have known about the mold is purely speculation in nature since his testimony reflects he did not find anything in the crawl space. The Court finds [Stanley] has failed [to] establish that a genuine issue of material fact still exists as to whether [the Smiths] knew or should have known about any mold in the crawl space. Therefore, [the Smiths did not owe [Stanley] any duty to disclose the mold since there is no evidence that [the Smiths] ever had any knowledge of it.

` We agree with Stanley that "[f]raud may be established by evidence which is wholly circumstantial." *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). However, it is also true that mere conjecture or speculation is insufficient to support a claim of fraud. *PBI Bank, Inc. v. Signature Point Condominiums LLC*, 535 S.W.3d 700, 715 (Ky. App. 2016). Distinguishing between circumstantial evidence and mere conjecture and speculation is sometimes difficult. Circumstantial evidence is evidence of a definite nature that points to

something being more likely than not, while speculation invites only the consideration of the thing being possible. The distinction has been explained as follows:

> While this Court has not committed itself to a definitive rule, we are of the opinion that to entitle a plaintiff to go to the jury on circumstantial evidence the essential proven facts upon which liability can be based must do more than suggest a possibility that the defendant was at fault. While we do not at this time go so far as to declare that circumstantial evidence must exclude all other inferences of non-liability, we believe the evidence must furnish some basis for the jury to decide that the probability of fault preponderates over the probability of innocence.

Bryan v. Gilpin, 282 S.W.2d 133, 134-35 (Ky. 1955).

The only evidence Stanley had produced is that because mold was discovered in June 2016 and may have been there for as long as six months, Jason Smith must have known about it when he last inspected the crawl space prior to moving out of the Property in February 2016. This is simply conjecture. The fact that Jason Smith regularly inspected the crawl space could mean he was looking for mold; however, it is just as likely that having paid for costly repairs he was checking to make certain those repairs were still in order. And, it is just as likely to assume that had he discovered mold caused by water seepage during one of those inspections, he would have insisted B-Dry to honor its warranty.

Had there been evidence that the Smiths attempted to paint the crawl space, placed heavy boxes in front of it, excessively used deodorizers in the Property to mask the smell, encouraged Stanley not to enter the basement or crawl space, asked someone to look for mold, were treated for mold related illnesses while living in the Property, previously had a mold problem abated, requested B-Dry to revisit the Property or something of the like, there would be a genuine issue of fact regarding whether the Smiths knew or should have known about the mold and tried to conceal or hide it from Stanley. In this case, however, Stanley rests her entire case on a vague supposition that the Smiths "must have known." The trial court correctly concluded that such vague conjecture, speculation and supposition is not sufficient to overcome a properly supported motion for summary judgment.

We will now discuss Stanley's final factual assertion that the Smiths knew or should have known about the furnace being "hot-wired" to run continuously and failed to disclosure this information to her. With respect to this contention, the trial court determined as follows:

> [A]s it relates to the hotwiring of the furnace, [the Smiths] argue that they had no knowledge the furnace was hotwired. [The Smiths] maintain that they had the furnace serviced by professionals who did not inform them that the furnace was hotwired. [Stanley] argues that the furnace was continuously running after she moved into the home and would not shut off. [Stanley] maintains that this would lead a jury to infer that [the

> Smiths] should have known of the hotwiring of the furnace.
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> There was no evidence submitted to the Court that would create a genuine issue of fact as to any defectiveness of the furnace. [Stanley] has failed to submit any photographs of the alleged hotwiring of the furnace. There was no testimony or evidence submitted that would establish that the furnace was defective. There was no testimony alleging that [the Smiths] ever had any substantive knowledge about the furnace itself or about whether the furnace was ever hotwired. For those reasons, this Court finds that [the Smiths] had no duty to disclose pertaining to the furnace because there is no genuine issue of material fact as to whether the furnace was defective or that Defendants knew or should have known about the hotwiring of the furnace.

The inspection report commissioned by the Smiths when they purchased the Property in 2009 stated as follows: "heating unit blower fan continues at all times, even 30 minutes after was turned off. . . . Review by licensed HVAC contractor." The 2009 report did not indicate a reason for the continuous blowing; it recommended inspection and servicing by a licensed technician. As recommended, the Smiths had the furnace serviced and inspected. They introduced evidence of two separate instances that they had the furnace serviced during the seven years they resided in the Property. They produced the records from the service visits. The records do not note any electrical or wiring problems with the furnace or recommend any additional repairs. The earliest document produced by the Smiths shows a service visit in 2012. The document

states that the technician performed some work after which "everything is good at this time." Another visit occurred in 2014, at which time a hose was replaced, and the furnace was noted to be in good working order after the repair.

Stanley relies heavily on the 2009 inspection to show that the Smiths knew the furnace was "hot-wired." As noted above, however, the 2009 inspection does not indicate a wiring problem. It noted that the furnace was blowing continuously and recommended the Smiths have it serviced. The Smiths produced evidence showing that they followed the recommendation and had the furnace serviced several times during their occupancy of the Property. The last records produced by the Smiths show the furnace was in good working order following a minor repair. None of the technicians who worked on the furnace for the Smiths ever indicated a problem with the unit's wiring. Accordingly, we agree with the trial court that Stanley failed to produce evidence showing that the Smiths knew the furnace was hotwired and failed to disclose this fact to Stanley.

IV. CONCLUSION

For the foregoing reasons, we affirm the trial court's order granting summary judgment to the Smiths.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Jessica D. Smith Louisville, Kentucky	Megan P. Keane Prospect, Kentucky