

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 0927

SHERIE LANDRY WIFE OF/AND RAYMOND C. BURKART, JR.

VERSUS

ELAINE L. WILLIAMSON WIFE OF/AND JAMES R. WILLIAMSON;
WILLIAM L. DUNFORD; RHONDA HEMELT WIFE OF/AND
CHRISTOPHER J. AUBERT; GROUP INTEGRITY, L.L.C. d/b/a KELLER
WILLIAMS REALTY; JACKIE E. STALEY; JEAN BROWN; WILLIAM
STONE HATCHETT, III; JOHN J. HENRY; JOHN J. HENRY & ASSOCIATES,
L.L.C. d/b/a HATCHETT INSPECTION SERVICES, L.L.C d/b/a HENRY &
HATCHETT INSPECTION SERVICES

Judgment Rendered: APR 25 2014

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2003-13648

Honorable William J. Knight, Presiding

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* * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

GUIDRY, J.

Sherie Landry and Raymond Burkart, Jr. (the Burkarts) appeal from a trial court judgment granting summary judgment in favor of defendants, Group Integrity, L.L.C. d/b/a Keller Williams Realty, Jackie E. Staley, and Jean Brown (collectively Keller Williams), and dismissing their claims against Keller Williams with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 28, 2002, the Burkarts purchased a home located at 806 Heather Hollow in the Highlands Subdivision in Covington, Louisiana, from Elaine and James Williamson, who were represented in the sale by real estate agents with Keller Williams. On or about September 26, 2002, water started leaking into the home during periods of rainfall. Consequently, on August 1, 2003, the Burkarts filed a petition in redhibition and for damages, naming as defendants the Williamsons; all prior homeowners in the chain of title, including Rhonda Hemelt, wife of/and Christopher Aubert and William Dunford; Keller Williams; and the Burkarts' home inspector. The Burkarts alleged that Keller Williams presented a property disclosure form and represented to them that the lakes and private roads had no material defects, the residence was free from material defects, the roof did not leak, and the residence was fit for human habitation. Accordingly, the Burkarts alleged that Keller Williams failed to supply the Burkarts with sufficient accurate information about the land and improvements at 806 Heather Hollow and the private roads and lakes in the subdivision and breached its duty to inspect the property for physical defects and to disclose the defects in the property it lists for sale.

On April 24, 2008, Keller Williams filed a motion for summary judgment, asserting that the Burkarts will be unable to establish that Keller Williams, as the seller's agent, had any specific knowledge as to any defects or owed any duties to

undertake an investigation for the benefit of the Burkarts. The Burkarts opposed Keller Williams' motion, attaching several documents, including diary entries from Jean Brown, the purchasing agent for the sale of 806 Heather Hollow from William Dunford to the Williamsons and the co-listing agent for the sale from the Williamsons to the Burkarts. Following a hearing, the trial court signed a judgment denying Keller Williams' motion.

Thereafter, the presiding trial judge recused himself to avoid the appearance of any impropriety. The case was then re-alloted to another trial judge, and the matter was set for jury trial to begin on July 22, 2013. However, on November 2, 2012, Keller Williams filed another motion for summary judgment, asserting: there is no evidence that Keller Williams owed, much less breached, a duty to inspect the property at 806 Heather Hollow; Keller Williams was entitled to rely on the Williamsons' disclosures regarding the condition of the property; and there is no evidence that Keller Williams had actual knowledge of any defects in the property. In conjunction with its motion for summary judgment, Keller Williams submitted: depositions of Elaine Williamson, James Williamson, and Raymond Burkart, Jr.; affidavits of Jean Brown and Jackie Staley; the property disclosure form; the inspection report; the deposition and report of Larry Jones, P.E.; and the purchase agreement.

The Burkarts filed an opposition to Keller Williams' motion, asserting that Keller Williams should have made reasonable inquiries; however, the Burkarts neither cited any evidence in their brief nor submitted any evidence in support of their claims against Keller Williams.¹ At the hearing on Keller Williams' motion

¹ The Burkarts submitted one combined opposition addressing the motions for summary judgment individually filed by defendants, Keller Williams, Rhonda Hemelt wife of/and Christopher Aubert (Auberts), and Scottsdale Insurance Company (Scottsdale). The Burkarts referenced evidence in their arguments in opposition to the motions for summary judgment filed by the Auberts and Scottsdale and attached this evidence to their opposition; however, this evidence is not relevant to the arguments raised by the Burkarts in their opposition to Keller Williams' motion for summary judgment.

for summary judgment on January 9, 2013, the Burkarts referenced Jean Brown's diary entries as evidence of what Keller Williams knew or should have known prior to or at the time of sale of the subject property to the Burkarts. However, these diary entries were neither referenced in nor attached to the Burkarts' opposition to the instant motion for summary judgment. Accordingly, the trial court ordered the Burkarts to provide the diary entries to the court by the following day.

After receiving and reviewing the diary entries, the trial court noted in its reasons for judgment that the diary entries did not reflect that Keller Williams knew or should have known that the cause of the water issues with the residence, when it was later purchased by the Burkarts, was the absence of a secondary water barrier. The court also noted that the diary entries showed that any issues present at that time were resolved. Further, the trial court noted that, based on the deposition testimony and affidavits submitted by Keller Williams, it was clear that any defects that existed in the property prior to the sale to the Burkarts had, to Keller Williams' knowledge, been identified and repaired. Accordingly, the trial court granted Keller Williams' motion for summary judgment and dismissed the Burkarts' claims against Keller Williams with prejudice.

The Burkarts now appeal from the trial court's judgment.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. Johnson v. Evan Hall Sugar Cooperative, Inc., 01-2956, p. 3 (La. App. 1st Cir. 12/30/02), 836 So. 2d 484, 486. A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter

of law. La. C.C.P. art. 966(B)(2). Only evidence admitted for purposes of the motion for summary judgment shall be considered by the court in its ruling on the motion. La. C.C.P. art. 966(F)(2).²

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Lieux v. Mitchell, 06-0382, p. 9 (La. App. 1st Cir. 12/28/06), 951 So. 2d 307, 314, writ denied, 07-0905 (La. 6/15/07), 958 So. 2d 1199. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Smith v. Kopynec, 12-1472, p. 4 (La. App. 1st Cir. 6/7/13), 119 So. 3d 835, 837.

A purchaser's remedy against a real estate broker is limited to damages for fraud under La. C.C. art. 1953,³ *et seq.* or for negligent misrepresentation under La.

² Louisiana Code of Civil Procedure article 966 was amended by 2013 La. Acts No. 391, § 1, and the content of former subparagraph (E)(2) was reenacted in subparagraph (F)(2).

³ Louisiana Civil Code article 1953 provides:

C.C. art. 2315. Duplechin v. Adams, 95-0480, p. 5 (La. App. 1st Cir. 11/09/95), 665 So. 2d 80, 84, writ denied, 95-2918 (La. 2/2/96), 666 So. 2d 1104.

The action for negligent misrepresentation arises *ex delicto*, rather than from contract. In order for a plaintiff to recover for negligent misrepresentation, there must be a legal duty on the part of the defendant to supply correct information, a breach of that duty, and damage to the plaintiff caused by the breach. Duplechin, 95-0480 at p. 6, 665 So. 2d at 84. A real estate broker or agent owes a specific duty to communicate accurate information to the seller and the purchaser and may be held liable for negligent misrepresentation. Duplechin, 95-0480 at p. 6, 665 So. 2d at 84. However, the duty to disclose any material defects extends only to those defects of which the broker or agent is aware. See Reeves v. Weber, 509 So. 2d 158, 160 (La. App. 1st Cir. 1987).

In seeking summary judgment in their favor, Keller Williams submitted affidavits from Jackie Staley⁴ and Jean Brown, the co-listing agents for the sale of the home from the Williamsons to the Burkarts. In their affidavits, both Ms. Staley and Ms. Brown stated that they were not aware of the existence of any defects in the home that were not disclosed to the Burkarts by the Williamsons, nor were they independently aware of any material defects in the home. Further, Ms. Staley and Ms. Brown stated that any deficiencies that existed in the home or were perceived by the Williamsons to exist in the home were repaired and/or remedied, and they relied on the Williamsons' disclosures regarding these deficiencies.

In opposing Keller Williams' motion, the Burkarts merely asserted that Keller Williams failed to make reasonable inquiries, and neither cited any supporting evidence nor offered any supporting evidence in conjunction with their

Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience for the other. Fraud may also result from silence or inaction.

⁴ Ms. Staley indicated in her affidavit that since being named as a defendant in this litigation, she has married and her name is now Jackie Esparros.

opposition. However, at the hearing, the Burkarts asserted, for the first time, that diary entries from Jean Brown during the sale from Dunford to the Williamsons and during the sale from the Williamsons to the Burkarts evidenced Keller Williams' knowledge of defects in the property. Without addressing whether the evidence offered by the Burkarts was even properly before the court on the motion for summary judgment,⁵ we find that such evidence was insufficient for the Burkarts to establish that they would be able to prove at trial that Keller Williams failed to communicate accurate information regarding the property to the Burkarts, or that Keller Williams had a duty to inspect the property and disclose any defects in the property to the Burkarts.

According to these diary entries, Keller Williams was aware of certain issues during the sale of the home from Dunford to the Williamsons in August and September of 2001. Particularly, the diary entries noted water intrusion from windows and the roof and damage to the floors, pool, and sprinkler system. However, these diary entries also indicate that these issues were remedied by Dunford prior to the sale of the home to the Williamsons. There is no evidence in these diary entries that Keller Williams was aware of a construction defect in the home, i.e., the absence of a secondary water barrier, or that it was aware that a construction defect was the cause of the various problems with the house. In fact, it was not until 2004, after the property had been examined by several previous home inspectors who failed to detect any defect in the construction of the home, that plaintiff's expert, Larry Jones, examined the property and determined that the builder failed to install a secondary water barrier, which was allowing moisture to enter the home. According to Mr. Jones, this defect was not obvious and would

⁵ This court has held that a document that is not an affidavit or sworn to in any way, or is not certified or attached to an affidavit, is not of sufficient evidentiary quality on a motion for summary judgment to be given weight in determining whether or not there remain genuine issues of material fact. Boland v. West Feliciana Parish Police Jury, 03-1297, pp. 5-6 (La. App. 1st Cir. 6/25/04), 878 So. 2d 808, 813, writ denied, 04-2286 (La. 11/24/04), 888 So. 2d 231.

not have been discoverable by a simple visual inspection, without an expert or contractor opening a wall.

Furthermore, the diary entries from the sale of the home from the Williamsons to the Burkarts further establish that any issues that were present during the sale from Dunford to the Williamsons were resolved. The entries note that in July and August of 2002, there was no water entering the home during heavy rainfall, there were no cracks in the stones, and there were no signs of termite damage.

Accordingly, from our review of the record, we find that the Burkarts failed to present any evidence establishing that Keller Williams negligently or intentionally failed to disclose any material defects in the property of which it was aware. See Orr v. Jones, 11-1085, pp. 6-7 (La. App. 5th Cir. 5/31/12), 95 So. 3d 583, 587, writ denied, 12-1977 (La. 11/9/12), 100 So. 3d 846 (finding no error in trial court's determination that plaintiff did not prove his cause of action for negligent misrepresentation or fraud, because the testimony showed that the realtors believed the defect to be repaired). Because the Burkarts failed to present evidence sufficient to demonstrate that they will be able to satisfy their evidentiary burden of proof at trial relative to their claims for negligent misrepresentation and/or fraud against Keller Williams, we find no error in the trial court's judgment granting summary judgment in favor of Keller Williams and dismissing the Burkarts' claims against them with prejudice.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to the plaintiffs, Sherie Landry and Raymond Burkart.

AFFIRMED.