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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 1767

CHAD TYSON AND TANYA TYSON

VERSUS

BRENTLEY MARCHAND

Judgment Rendered: JUN 05 2015

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension, Louisiana
Docket Number 109,215

Honorable Jesse LeBlanc, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

PM McClendon, J. concurs with the result reached by the majority.

WHIPPLE, C.J.,

This matter is before us on appeal by plaintiffs from a judgment of the trial court granting defendant's motion for summary judgment and dismissing plaintiffs' claims for rescission of an act of sale because of alleged defects in the home that defendant did not disclose prior to selling the home to plaintiffs. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On January 31, 2013, plaintiffs, Chad Tyson and Tanya Tyson, purchased a home in Ascension Parish from defendant, Brentley Marchand. The act of sale transferring the home from Marchand to the Tysons contained a "waiver of warranties clause," stating in pertinent part that the property was "sold 'as-is, where-is' without any warranties whatsoever."

On January 31, 2014, one year after purchasing of the home, the Tysons filed a "Petition for Redhibition," naming Marchand as defendant and seeking rescission of the sale and damages. The petition alleged that following their purchase of the home, the Tysons discovered: (1) mold throughout the home; (2) that the home had asbestos siding; and (3) that the home had termite damage. The petition further alleged that these conditions were expressly denied by Marchand on the property disclosure statement that he signed and reviewed with the Tysons prior to their purchase of the home, and that the Tysons would not have purchased the home if they had been made aware of these hazardous conditions.

On April 4, 2014, Marchand filed a motion for summary judgment, seeking dismissal of the Tysons' claims on the basis that the act of sale for the home contained a waiver of warranties, which was initialed by the Tysons. The Tysons filed an opposition to the motion averring that multiple issues of fact remain which preclude summary judgment based on the purported waiver. In support, the Tysons submitted affidavits and documentary evidence of the existence of the

defective conditions of the home and facts supporting their claim that Marchand knew these defects existed. Specifically, the Tysons countered that Marchand was not entitled to summary judgment premised on any purported waiver, where issues of fact remain as to whether the waiver was "fully explained" to them, as required by the clear and unambiguous language of the waiver, and as to whether they were "fraudulently induced" into purchasing the home by Marchand's untruthful answers on the property disclosure statement.

Prior to the hearing on the motion for summary judgment, Marchand filed a reply memorandum, wherein he attached an affidavit from the closing attorney for the sale, who attested that she brought the waiver-of-warranties paragraph in the act of sale to the Tysons' attention, and that they initialed below it. Marchand additionally contended in his reply memorandum that the Tysons had not alleged fraud with "particularity," as required by LSA-C.C.P. art. 856[1], and that accordingly, the court should not consider any argument or evidence based on fraud.

Following a hearing, the trial court rendered judgment, granting Marchand's motion for summary judgment and dismissing, with prejudice, the Tysons' claims against him. The trial court concluded that summary judgment in favor of Marchand was proper because the waiver of warranties in the act of sale was clear and unambiguous, and it was brought to the Tysons' attention. The trial court further concluded that it did not see anything within the Tysons' petition specifically pleading fraud and, thus, it would not consider plaintiffs' arguments regarding the invalidity of the waiver for fraud, i.e., the "fraud argument."

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[1] Louisiana Code of Civil Procedure article 856 states:

> In pleading fraud or mistake, the circumstances constituting fraud or mistake shall be alleged with particularity. Malice, intent, knowledge, and other condition of mind of a person may be alleged generally.

From this judgment, the Tysons now appeal, assigning the following as error:

(1) The trial court erred in failing to find that the allegations of fraud and misrepresentations in the property disclosure statement, as set forth in their petition and opposition affidavits, raise genuine issues of material fact.

(2) The trial court erred in finding that it did "not see anything within the petition specifically pleading fraud," when the willful misrepresentation on a residential property disclosure statement constitutes fraud.

(3) The trial court erred in finding that the waiver was enforceable despite evidence that clearly calls into question whether the waiver was, in fact, explained to the Tysons correctly, if at all.

DISCUSSION

Summary Judgment Based on the Insufficiency of the Petition

For ease of discussion, we first address the Tysons' argument in the second assignment of error that the trial court erred in refusing to consider the evidence supporting their "fraud argument" when hearing the motion for summary judgment, after erroneously concluding that it "did not see anything within the petition specifically pleading fraud."

In pleading fraud or mistake, the circumstances constituting fraud or mistake shall be alleged with particularity. Malice, intent, knowledge, and other condition of mind of a person may be alleged generally. LSA-C.C.P. art. 856 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 to the other. Fraud may also result from silence or inaction. LSA-C.C. art. 1953.

Initially, we note that to the extent that Marchand was challenging the sufficiency of the Tysons' petition, vagueness or ambiguity of a petition is raised

by filing a dilatory exception. LSA-C.C.P. art. 926.[2] However, Marchand did not file a dilatory exception raising an objection of vagueness or ambiguity to the petition herein. Rather, Marchand only raised this issue in a reply memorandum submitted in support of his motion for summary judgment. Accordingly, by failing to properly file a dilatory exception raising the objection of vagueness, Marchand arguably waived any objection he may have had to the sufficiency of the Tysons' petition, LSA-C.C.P. art. 926(B); Rowan Companies, Inc. v. Powell, 2002-1894, 2002-1895 (La. App. 1st Cir. 7/2/03), 858 So. 2d 676, 679, writ denied, 2003-2177 (La. 11/14/03), 858 So. 2d 425, and a judgment premised on the trial court finding that it did "not see anything within the petition specifically pleading fraud" would be interdicted by error and subject to *de novo* review if based on an objection that was waived or not properly raised. However, because our review of a summary judgment is *de novo*, we will review the merits of the court's ruling, including the "fraud argument," in determining whether the pleadings and evidentiary showing made by the Tysons in their opposition disclose disputed material facts which preclude summary judgment.

Here, the petition alleges that based on Marchand's ownership of the property and other circumstances, he: (1) knew or should have known of the defects, and (2) was not truthful in the representations that he made on the property disclosure statement. Additionally, the petition further sets forth various facts

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[2]Louisiana Code of Civil Procedure article 926 states:

> A. The objections which may be raised through the dilatory exception include but are not limited to the following:
> (1) Prematurity.
> (2) Want of amicable demand.
> (3) Unauthorized use of summary proceeding.
> (4) Nonconformity of the petition with any of the requirements of Article 891.
> (5) Vagueness or ambiguity of the petition.
> (6) Lack of procedural capacity.
> (7) Improper cumulation of actions, including improper joinder of parties.
> (8) Discussion.
> B. All objections which may be raised through the dilatory exception are waived unless pleaded therein.

supporting the allegations that Marchand knew or should have known of the defects.[3]

There is no jurisprudential bright line test for determining when fraud is sufficiently pled. However, the allegations made by the Tysons in their petition are substantially similar to those made in the factually similar case of Helwick v. Montgomery Ventures Ltd., 95-0765 (La. App. 4th Cir. 12/14/95), 665 So. 2d 1303, writ denied, 96-0175 (La. 3/15/96), 669 So. 2d 424, wherein the court found that the plaintiffs' allegations of fraud were alleged with sufficient specificity, as required by LSA-C.C.P. art. 856, stating as follows:

> Plaintiffs' petition meets [the requirements of LSA-C.C.P. art. 856]. They say because of [defendant's] ownership and use of the property he knew or had to know of the defects and failed to disclose them; they specifically allege that [defendant] "misrepresented that there were no other underground storage tanks" and they relied upon his "misrepresentations" when they took title. We are aware that the word "fraud" is not used in plaintiffs' petition, but art. 856 does not mandate the use of that word in the petition.

Helwick, 665 So. 2d at 1306.

In the matter before us, we likewise find that the Tysons' petition, alleging that certain misrepresentations were made by Marchand as to specific alleged defects in the home and that they relied on these misrepresentations in purchasing the home, satisfies the specificity requirements of LSA-C.C.P. art. 856 for pleading fraud. Consequently, considering the Tysons' allegations of fraud, we find that the

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[3]Specifically, the petition alleges, in pertinent part:

> In the course of minor repairs, petitioners discovered areas of the home that showed obvious signs of termite damage. Defendant's property disclosure statement denied any termite damage yet petitioners have confirmed through the same company that was contracted by defendant for termite protection that there was a prior infestation with repairs being done to damaged areas of the home.
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> * * * *
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> Petitioners contend that the defendant knew or should have known of the existence of these defects and was not truthful in the representations made in the property disclosure statement, which they relied upon in making the decision to purchase the home. Further, petitioners would not have purchased the home at issue if they had been made aware of the existence, nature and extent of the hazardous conditions of the home.

trial court erred in granting the motion for summary judgment, to the extent that the ruling was premised on the court's finding that it did "not see anything within the petition specifically pleading fraud."

Propriety of Summary Judgment

Inasmuch as we have determined that the Tysons pled fraud with sufficient specificity, and that as a result the trial court erred in refusing to consider plaintiffs' "pleadings on file" and affidavits regarding fraud, we next consider whether, on the record before us, all material facts are resolved such that summary judgment is proper herein.

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. All Crane Rental of Georgia, Inc. v. Vincent, 10-0116 (La. App. 1st Cir. 9/10/10), 47 So. 3d 1024, 1027, writ denied, 10-2227 (La. 11/19/10), 49 So. 3d 387. While summary judgments are now favored, a motion for summary judgment nonetheless should only be granted if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to a material fact, and that the movant is entitled to summary judgment as a matter of law. LSA-C.C.P. art. 966(A)(2) and (B)(2).

The burden of proof on a motion for summary judgment remains with the movant. If the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to 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, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden

of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2). However, when the mover will bear the burden of proof on an issue at trial, that party must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. Only after such an affirmative showing will the burden of production shift to the party opposing the motion, requiring the opposing party either to produce evidentiary materials that demonstrate the existence of a genuine issue for trial or to submit an affidavit requesting additional time for discovery. Hines v. Garrett, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 766-67.

As noted above, in determining whether summary judgment is proper, appellate courts review evidence *de novo* under the same criteria that governs the trial court's determination of whether summary judgment is appropriate. Sanders v. Ashland Oil, Inc., 96-1751 (La. App. 1st Cir. 6/20/97), 696 So. 2d 1031, 1035, writ denied, 97-1911 (La. 10/31/97), 703 So. 2d 29. Material facts are those that potentially ensure or preclude recovery, affect the litigant's success, or determine the outcome of a legal dispute. Populis v. Home Depot, Inc., 2007-2449 (La. App. 1st Cir. 5/2/08), 991 So. 2d 23, 25, writ denied, 2008-1155 (La. 9/19/08), 992 So. 2d 943. 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. Christakis v. Clipper Construction, L.L.C., 2012-1638 (La. App. 1st Cir. 4/26/13), 117 So. 3d 168, 170, writ denied, 2013-1913 (La. 11/8/13), 125 So. 3d 454.

Louisiana Civil Code article 2520 provides a warranty to buyers against redhibitory defects, or vices, in the thing sold. A defect is redhibitory when the defect renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought it had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale. A defect is

also redhibitory when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it, but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price. LSA-C.C. art. 2520.

A purchaser is entitled to the warranty against redhibitory defects; however, parties may agree to an exclusion or limitation of the warranty against redhibitory defects. The terms of the exclusion or limitation must be clear and unambiguous and must be brought to the attention of the buyer. LSA-C.C. art. 2548. Moreover, the **seller** bears the burden of proving the warranty against such defects has been waived. Bo-Pic Foods, Inc. v. Polyflex Film and Converting, Inc., 95-0889 (La. App. 1st Cir. 12/15/95), 665 So. 2d 787, 791. Waivers of warranties against redhibitory defects are strictly construed against the seller. Berney v. Rountree Olds-Cadillac Co., Inc., 33,388 (La. App. 2nd Cir. 6/21/00), 763 So. 2d 799, 805; Boos v. Benson Jeep-Eagle Company, Inc., 98-1424 (La. App. 4th Cir. 6/24/98), 717 So. 2d 661, 664, writ denied, 98-2008 (La. 10/30/98), 728 So. 2d 387. Moreover, pursuant to LSA-C.C. art. 2548, **even when the parties agree to a valid waiver of redhibitory defects, the waiver is not binding in circumstances where the seller has declared that the thing has a quality that he knew it did not have.**

In the factually similar case of Shelton v. Standard/700 Associates, 2001-0587 (La. 10/16/2001), 798 So. 2d 60, 64, the Supreme Court explained the relationship between allegations of fraud and a waiver of redhibitory defects, as follows:

> While an exclusion or limitation of the warranty against redhibitory defects is usually effective, LSA-C.C. art. 2548 ... provides that "[a] buyer is not bound by an otherwise effective exclusion or limitation of the warranty when the seller has declared that the thing has a quality that he knew it did not have." Under this article, an otherwise effective exclusion or limitation of the warranty against redhibitory defects is not effective if the seller commits fraud,

as defined in the civil code, upon the buyer. Thus, although the warranty against redhibitory defects may be excluded or limited, a seller cannot contract against his own fraud and relieve himself of liability to fraudulently induced buyers. See Roby Motors Co. v. Price, 173 So. 793, 796 (La. App. 2nd Cir. 1937). Indeed, such a contract would *be contra bonos mores* and unenforceable.

A contract is formed by the consent of the parties. LSA-C.C. art. 1927. However, consent may be vitiated by error, fraud, or duress. LSA-C.C. art. 1948. "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 to the other. Fraud may also result from silence or inaction." LSA-C.C. art. 1953. "Error induced by fraud need not concern the cause of the obligation to vitiate consent, but it must concern a circumstance that has substantially influenced that consent." LSA-C.C. art. 1955.

Nevertheless, fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill. However, this exception does not apply when a relation of confidence has reasonably induced a party to rely on the other's assertions or representations. LSA-C.C. art. 1954.

Here, Marchand's motion for summary judgment was based on the fact that the act of sale transferring the home to the Tysons contained a waiver of warranties, which undisputedly was signed by the Tysons. Accordingly, Marchand contends, the Tysons' lawsuit should be dismissed on summary judgment, as they are seeking legal remedies and warranties which they expressly waived by signing the act of sale.

We recognize that the act of sale transferring the home from Marchand to the Tysons undisputedly contains a waiver of redhibitory defects.[4] However, the

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[4]The waiver at issue states:

PURCHASER(S) agrees and stipulates that the property, including the improvements located thereon, is conveyed and sold "as-is, where-is" without any warranties whatsoever as to fitness or condition, whether express or implied, and Purchaser expressly waives the warranty of fitness and the guarantee against hidden or latent vices (defects in the property sold which render i[t] useless or render its use so inconvenient or imperfect that Purchaser would not have purchased it had she known of the vice or defect) provided by law in Louisiana, more specifically, that warranty imposed by Louisiana Civil Code art. 2520, *et. seq.* with respect to Seller's warranty against latent or hidden defects of the property sold, or any other applicable law, not even for a return of the purchase price. Purchaser forfeits the right to avoid [sic] the sale or reduce the purchase price on account of some hidden or latent vice or defect in the property sold. Seller expressly subrogates Purchaser to all rights, claims and causes of action

inquiry does not end there as, for purposes of this appeal, we must also determine if any issues of fact remain as to the **validity** of this waiver.

The Tysons make two alternative arguments as to why the waiver is invalid and whether issues of fact remain as to its validity. The Tysons first argue that the waiver is invalid because Marchand made declarations that the home had qualities that he knew it did not have, and knowingly did not disclose the presence of mold, asbestos, or termite damage on the property disclosure statement. Second, the Tysons argue that the waiver should be set aside as it was not properly explained to them, as required by the clear language of the waiver.[5]

In opposition to the motion for summary judgment and in support of their argument that material issues of fact remain as to whether the waiver was invalid

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> Seller may have arising from or relating to any hidden or latent defects in the property. **This provision** has been called to the attention of the PURCHASER(S) and fully explained to the PURCHASER(S), and the PURCHASER(S) acknowledges that he/she has read and understands this waiver of all express or implied warranties and accepts the property without any express or implied warranties.

[5]In this second argument, the Tysons allege that material issues of fact remain as to whether the waiver was sufficiently explained to them, or explained to them at all. In granting summary judgment, the trial court commented that a waiver "is not required to be fully explained to the buyer but must be brought to the attention of the buyer, which, in fact, the [Tysons] did initial that it was brought to their attention." The Tysons note that while generally, a waiver is required only to be brought to the attention of the buyer, the waiver in the act of sale that they signed states not only that it was brought to their attention, but also that it was "fully explained" to them. Thus, the Tysons contend, the trial court erred in granting summary judgment based on its finding that the waiver was brought to their attention, when issues of fact remain as to whether the waiver was valid and whether it was also "fully explained" to them, as required by the clear language of the waiver.

As noted by the Tysons, the only evidence offered by Marchand in support of his motion for summary judgment was a copy of the act of sale and the affidavit of the closing attorney. Notably, the affidavit of the closing attorney states that the waiver provision "was explained to [the Tysons] in detail." However, **this statement was crossed-out**, apparently by the closing attorney. Mr. and Mrs. Tyson's affidavits submitted in opposition to the motion for summary judgment state that the only discussion of the waiver was "a brief statement from the closing attorney that the home was being purchased 'as-is' and that [Marchand] would not be doing any additional repairs to the home....No one explained what redhibition meant or what the Civil Code Article referenced in the sale document pertained to."

The Tysons aver that the disparity between the language in the actual waiver and the closing attorney striking out the words "fully explained" in her affidavit, and their affidavits reciting what they were told about the waiver, alone raise questions of fact as to the validity of the waiver that require resolution at a trial, and not on summary judgment. Because we find that genuine issues of material fact remain as to the validity of the waiver, *ab initio*, which precludes summary judgment, we pretermit further discussion of plaintiffs' argument that the waiver was invalid and should have been set aside because of material facts remaining as to whether it was brought to their attention and/or fully explained to them.

as based on Marchand's fraud, the Tysons submitted: (1) a copy of the property disclosure statement signed by Marchand; (2) a copy of the mold test conducted on the home after their purchase; (3) a repair estimate for mold remediation costs; and (4) their affidavits. In their respective affidavits, the Tysons attest that when they began minor repairs on the home, they discovered mold behind the walls and areas of repair where new wood was butted up against old wood with mold. Moreover, when they began repairs on the home, they found signs of a prior termite infestation and damage, prompting them to contact the pest control company with whom the home had been was under contract. The pest control company then provided the Tysons with documentation of a prior infestation, showing damaged areas of the home.

The only evidence submitted by Marchand in support of the motion for summary judgment initially was a copy of the cash sale transferring the home. This evidence does not address (or refute) the showing that the waiver was invalid and unenforceable; nor does it address whether Marchand had knowledge of the alleged defects at the time of the sale, whether he knew or should have known of the defects, or that he purposefully failed to disclose the defects. Moreover, although Marchand filed a reply memorandum to the Tysons' opposition, he did not address the Tysons' allegations that he knew or should have known of the existence of the alleged defects and that he failed to disclose them to the Tysons. Likewise, the only evidence attached to Marchand's reply memorandum, i.e., the affidavit of the closing attorney, does not address whether (or refute that) Marchand knew or should have known of the existence of the defects at the time of the sale.

In sum, on the record before us, Marchand's submission does not address or deny plaintiffs' allegations and evidentiary showing that the waiver was invalid and unenforceable because he knew or should have known of the alleged defects in

the home and fraudulently failed to disclose the same.[6] These disputed facts are material because the waiver of warranties, upon which Marchand relies and which served as the basis for the grant of summary judgment, is invalid and unenforceable if Marchand made fraudulent declarations on the property disclosure statement as to qualities of the home that he knew it did not have.[7] See LSA-C.C. art. 2548. Accordingly, after *de novo* review, we conclude that Marchand did not meet his requisite burden of proof on the motion for summary judgment such that he would be entitled to summary judgment in his favor as a matter of law. Consequently, on the record before us, we find that the trial court erred in granting summary judgment in favor of Marchand and in dismissing the Tysons' claims against him with prejudice.

CONCLUSION

For the above reasons, the July 16, 2014 judgment of the trial court, granting Brentley Marchand's motion for summary judgment and dismissing Chad and Tanya Tyson's claims against him, with prejudice, is hereby reversed. The case is remanded to the trial court for further proceedings. Costs of this appeal are assessed to defendant, Brentley Marchand.

REVERSED AND REMANDED.

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[6]In his brief filed with this court, Marchand raises an additional argument that a warranty was not owed to the Tysons because the alleged defects were known to the Tysons at the time of the sale or could have been reasonably discovered by the Tysons, citing LSA-C.C. art. 2521. In support of this argument, Marchand discusses a home inspection report done by the Tysons prior to their purchase of the home. However, Marchand did not submit into evidence a copy of the home inspection report or any other evidence in support of this argument. Thus, we find that this additional argument is unsupported and lacks merit.

[7]As noted by the Tysons, the alleged misrepresentations on the property disclosure statement also raise issues of fact as to whether the plaintiffs are entitled to rescind the sale under the Residential Property Disclosure Act ("RPDA"), LSA-R.S. 9:3196, *et seq.* The RPDA applies to "the transfer of any interest in residential real property, whether by sale, exchange, bond for deed, lease with option to purchase, or any other option to purchase, including transactions in which the assistance of a real estate licensee is utilized and those in which such assistance is not utilized." LSA-R.S. 9:3197(A). Pursuant to the RPDA, "[t]he seller of residential real property shall complete a property disclosure document in a form prescribed by the Louisiana Real Estate Commission ...". LSA-R.S. 9:3198(A)(1). This form is known as the Residential Property Disclosure Statement. In completing the form, "[t]he seller shall complete the property disclosure document in good faith to the best of the seller's belief and knowledge as of the date the disclosure is completed and signed by the seller ....". LSA-R.S. 9:3198(B)(1); See Stutts v. Melton, 2013-0557 (La. 10/15/13), 130 So. 3d 808, 812-813.