

NOT DESIGNATED FOR PUBLICATION

**ELIZABETH JOHNSON TELL
AND LOUISE SMITH**

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NO. 2001-CA-0965

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**JOYE DURR BODE,
CHRISTIAN MATTHEW
BODE, MARK LOUIS BODE
AND KATHERINE CLAIRE
BODE**

*

STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-10330, DIVISION "H"
Honorable Michael G. Bagneris, Judge**

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Chief Judge William H. Byrnes III

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(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge Patricia Rivet Murray)

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REVERSED AND REMANDED

The plaintiffs-appellants, Elizabeth Tell and Louise Smith, appeal the summary judgment dismissal of their claim in redhibition for termite damage against the defendants-appellees, Joye Bode, Christian Bode, Mark Bode, and Katherine Bode in connection with the purchase by plaintiff of the residence located at 4117-19 North Derbigny Street. Plaintiffs' petition asks to rescind the sale along with all expenses incurred in bringing the action, including reasonable attorney's fees, or in the alternative for *quanti minoris*.

The defendants initially raised the issue of prescription below, but it is not at issue in this appeal. The defendants contend that the plaintiffs either knew or should have known of the termite damage and the plaintiffs counter that summary judgment on this issue was improper because they raised genuine issues of material fact in this regard.

Edwin Rhodes of Rhodes Termite and Pest Control ("Rhodes") contracted to inspect the house and treat it for termites. Plaintiffs contend that before the inspection took place they were asked to sign a blank Wood Destroying Insect Report ("WDIR"), which they were told was needed by the inspector. After performing the inspection, Rhodes completed the WDIR

showing active termite infestation (subterranean) and the chemicals he used to treat the property. Because of the treatment, the certificate was considered to be “clear” and that the problem was considered to be eliminated.

Plaintiffs contend that the completed WDIR was not given to Ms. Tell until two weeks after the act of sale. Defendants contend that it was given to plaintiffs at the act of sale. Plaintiffs further contend that the WDIR was not explained to them at the act of sale. Plaintiffs also contend that the record reflects that their assertion that no mention was made of termites or termite damage at the act of sale is supported by the witness, Barbara Dunams.

Plaintiffs filed this suit on June 15, 1998. On October 5, 1998, the Bodes filed an answer and on June 23, 1999, the Bodes filed a third party claim against Rhodes for misrepresenting that the plaintiffs were informed of the termite damage. On June 23, 2000, the Bodes’ claim against Rhodes was dismissed on summary judgment.

Elizabeth Ashe, Ms. Tell’s real estate agent from Demand Realty, testified by deposition that she informed Ms. Tell that the property “had termites and had to be treated.”

Plaintiff, Elizabeth Tell, and Albert Bernard executed a purchase agreement on March 28, 1997, to purchase of the property at 4117 North

Derbigny Street. This agreement was amended by addendum on May 30, 1997, whereby the property address given was 4117-19 North Derbigny Street; plaintiff, Louise Smith was substituted as purchaser for Albert Bernard; and the seller, defendant Joye Bode (signature dated June 19, 1997) agreed to do \$4,000.00 worth of repairs and treat the property for termites at a cost not to exceed \$500.00.

The WDIR shows that it was signed by the inspector on June 25, 1997. It shows that it was signed by the purchasers – plaintiffs, Elizabeth Johnson Tell and Louise Smith, on June 30 1997. Below that the signatures of the plaintiffs appear again along with the date, June 30, 1997, acknowledging that they had received a copy of the form. The form states that: “Visible evidence of **active** infestation of native subterranean termites was found.” This case turns on the answer to two questions: (1) Is the statement on the WDIR sufficient to put the plaintiffs on notice to do further inspection for termite damage? (2) Were the plaintiffs furnished with a copy of the WDIR at or before the act of sale or was it only furnished to them subsequently? If the answer to the first question is, “No,” then we do not reach the second question.

None of the reports in the record, including the appraisal report and the WDIR make any mention of any termite damage, visible or invisible.

Section 9 of the WDIR which contains the above quoted reference to visible evidence of active infestation for which “[p]roper control measures were performed,” also contains space for noting visible damage. None is noted.

As noted above, the addendum to the purchase agreement required the sellers to perform \$4,000.00 worth of repairs, but there is nothing in the record to show that the repairs were for termite damage. Defendants do not even contend that the repairs were for termite damage. Moreover, there is no evidence in the record that any termite damage was visible:

Typically, when *all* of the termite damage is concealed within the home’s structure (e.g., walls and floors) it is considered unapparent because it is not discoverable by simple inspection. . . .
[Citations omitted.] **In such situations, there is no obligation on the part of the buyer to inspect further.** [Emphasis added. Citations omitted.] On the other hand, when *some* of the termite damage is detectable by simple inspection, the buyer has a duty to investigate further.

Amend v. McCabe, 95-0316, p. 10 (La. 12/1/95), 664 So.2d 1183, 1188.

Whether termite damage should be apparent to the buyer of a home is a question of fact. *Id.* In this case whether the damage is apparent and whether the buyer had sufficient notice that further inspection is necessary are material facts. There is no evidence that the damage was apparent. In fact, the failure of all inspection reports to note any termite damage and the fact that there is no other evidence in the record suggesting termite damage,

creates, at the very least, a genuine issue of material fact as to whether there was any evidence of termite damage that could have been noted by simple inspection.

But the real crux of this case is whether the mention of active infestation on the WDIR was sufficient to put a reasonable purchaser on notice of the need to do further inspection. The WDIR indicates that the infestation was treated. No damage was noted. LSA-C.C. art. 2521 provides:

The seller owes no warranty for defects in the thing that were known to the buyer at the time of the sale, or for defects that should have been discovered by a reasonably prudent buyer of such things.

Revision Comment (c) under this Article provides:

Under this Article the standard of diligence that must be exercised by the buyer in determining whether the thing purchased is defective is that of a prudent administrator. See *Barker v. Tangi Exterminating Co.*, 448 So.2d 690 (La.App. 1st Cir.1984).

What *Barker*, 448 So.2d at 692, actually says is:

Simple inspection is one made by a reasonably prudent buyer, with no special knowledge, and under no obligation to deface the thing purchased while inspecting it.

Under this standard, and as the record currently stands, there is

nothing to indicate that the plaintiffs were not reasonably prudent in relying on inspection reports showing no evidence of termite damage. There is no evidence that a simple inspection would have revealed any termite damage. To the contrary, neither the HUD inspection form nor the WDIR revealed any damage. There is also nothing in the record to indicate that the plaintiffs could not have reasonably concluded from the WDIR that what termites there were had been eliminated before they could cause any damage.

Summary judgment procedure is favored. LSA-C.C.P. art.966A(2). However, the burden of proof remains with the movant. LSA-C.C.P. art. 966C(2). Accordingly, we find that a genuine issue of material fact still exists as to whether the plaintiffs knew or should have known of the existence of the termite damage.

For the foregoing reasons, the judgment of the trial court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED