

NOT DESIGNATED FOR PUBLICATION

PAOLO RAGGI * **NO. 2002-CA-0983**

VERSUS * **COURT OF APPEAL**

RICHARD L. LUMAN AND * **FOURTH CIRCUIT**
SHARA L. LUMAN * **STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-15440, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge
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Judge Miriam G. Waltzer
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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer,
Judge Patricia Rivet Murray)

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AFFIRMED.

Plaintiff/appellant, Dr. Paola Raggi, appeals the trial court's grant of summary judgment in favor of defendants/appellees, Richard L. Luman and Shara L. Luman ("the Lumans"), and the resulting dismissal of this litigation.

FACTS AND PROCEDURAL HISTORY

This action arises out of the sale of the property located at 1140 Fourth Street, New Orleans, Louisiana, from the Lumans to Dr. Raggi. According to the petition, the sale took place in late September 2000, and Dr. Raggi moved into the home at the end of that month. Dr. Raggi alleged that during the first week of October 2000, he noticed many defects that had not been disclosed to him at the time of the sale, most notably large areas of flooding in the basement. He filed this suit for redhibition against the Lumans on 21 September 2001. Therein he alleged that the flooding was due to "structural problems with drainage from the basement", which

problems were known to the Lumans at the time of the sale and deliberately and fraudulently concealed from him. Dr. Raggi further alleged that had he known of the defective nature of the home, he would not have gone forward with the purchase. By way of damages, Dr. Raggi sought rescission of the sale and return of the purchase price, or reduction of the purchase price to reflect the homes defective condition, and attorney's fees.

The Lumans answered Dr. Raggi's petition and, on 14 November 2001, filed a Motion for Summary Judgment wherein they argued that Dr. Raggi was precluded from maintaining a redhibition action against them because he had notice of the alleged defect at the time of the sale and because he had waived the right to any such recovery. In support of their motion, the Lumans attached various exhibits concerning the sale. First, was a copy of the Agreement to Purchase or Sell, which they had entered into with Dr. Raggi on 10 August 2000, and which contained the following notation: "Property sold 'As Is' with waiver of redhibition." Next was a copy of a document entitled "“AS IS” CLAUSE Waiver of Warranty & Redhibition Rights Addendum", which, according to the affidavit of Mrs. Luman, accompanied the purchase agreement, and which stated in pertinent part:

Purchaser expressly waives the warranty of fitness and the warranty against redhibitory vices and defects, whether apparent or latent, imposed by Louisiana Civil Code Articles

2520 through 2548, inclusive, and any other applicable state or federal law and the jurisprudence thereunder.

Purchaser also waives any rights Purchaser may have in redhibition or reduction of the purchase price pursuant to Louisiana Civil Code Articles 2520 through 2548, inclusive, in connection with the property hereby conveyed to Purchaser by Seller. By Purchaser's signature Purchaser expressly acknowledges all such waivers, and Purchaser's exercise of Purchaser's right to waive warranty pursuant to Louisiana Civil Code Articles 2520 through 2548, inclusive.

The Lumans additionally provided the court with a copy of a Property Disclosure (Addendum), which had been attached to the purchase agreement, in which the Lumans had written in the statement "minor seepage in basement/extreme rain".

According to the Lumans, Dr. Raggi had contracted with Gurtler Brothers Consultants to inspect the home prior to the act of sale, and on 24 August 2000 had received an inspection report that noted "evidence of seepage in the basement." Following his receipt of that report, Dr. Raggi submitted to the Lumans a list of requested repairs, including a request that the basement be waterproofed. The Lumans responded with a Property Condition Clause Response in which they declined to complete some of the requested repairs, including waterproofing the basement. Their stated reason for declining to make that specific repair was that "[s]eller previously disclosed seepage in basement and it has not been a problem. As stated in

the report waterproofing is for future prevention.” Dr. Raggi accepted the Luman’s Response and agreed to proceed with the act of sale.

Finally, the Lumans provided the trial court with a copy of the 2 October 2000 Act of Cash Sale that provided: “PROPERTY BEING SOLD IN “AS IS” CONDITION. SEE ATTACHED AS IS ADDENDUM.” That addendum echoed the sentiments found in the “As Is” Clause that had been attached to the purchase agreement, namely that except for the warranty of title, the purchaser [Dr. Raggi] acknowledged that the sellers [the Lumans] made no representations or warranties with respect to the property. More specifically, it specified that the Lumans did not warranty the property free from redhibitory or latent vices or defects, and that Dr. Raggi waived and released the Lumans from liability under Louisiana Civil Code Articles 2520 through 2548. Additionally, the addendum expressly provided that:

Sellers and Buyer acknowledges and stipulate that the sale price was negotiated and agreed upon after consideration of the wavier [sic] of warranty herein set forth. Buyers further declares and acknowledges that Buyers have read these waiver provisions and that the foregoing waivers have been brought to the attention of Buyers and explained in detail to Buyers and that Buyers have voluntarily and knowingly consented to the foregoing waivers.

Dr. Raggi opposed the Luman’s motion for summary judgment, arguing that the Lumans had actual notice that the basement had a serious

flooding and plumbing problem, and that they had fraudulently concealed the problem from him by filling in the drains with sand and by failing to disclose that the plumbing was broken and that the basement flooded during even the smallest bouts of rain. Dr. Raggi also claimed that the home's prior owners had disclosed, without qualification, that the basement had flooded when the Lumans purchased the home, but the Lumans purposefully omitted that fact in their disclosures to him. The Lumans filed a reply to Dr. Raggi's opposition.

The motion for summary judgment came up for contradictory hearing on 11 January 2002, and the trial court, for reasons orally assigned, granted the motion on that date, dismissing Dr. Raggi's petition against the Lumans with prejudice. A written judgment to that effect was signed by the trial court on 16 January 2002. Dr. Raggi now appeals from that ruling.

DISCUSSION

Appellate courts review summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/00), 755 So. 2d 226, 230.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored

and shall be construed to accomplish these ends. LSA - C.C.P. art. 966 A
(2). A summary judgment shall be rendered forthwith if the pleadings,
depositions, answers to interrogatories, and admissions on file, together with
the affidavits, if any, show that there is no genuine issue as to material fact,
and that the mover is entitled to judgment as a matter of law. LSA - C.C.P. art. 966
B.

Dr. Raggi assigns two errors in this appeal. First, he claims that the
trial court erred in granting summary judgment where there were disputed
issues of fact as to whether the defective condition of the basement was
disclosed to him. Second, he claims that the trial court erred in disregarding
this court's decision in Larimer v. Harper, 99-2951 (La. App. 4 Cir.
11/8/00), 773 So. 2d 218, which he submits is on point and controlling.

Dr. Raggi's arguments are without merit.

The trial judge succinctly summed up the essence of this case at the
start of the hearing on the Lumans motion for summary judgment:

During the time of the negotiations for the sale of this
piece of property the plaintiffs asked for an inspection on the
property because of the basement see [sic] if there had been any
water entry.

His inspection came back, the only one that he paid for
said yes, there was. He made a demand on the sellers to fix it,
the seller said, no we are not fixing it and he still buys the
house.

. . .

[A]nd when the house was sold the house was sold as is
and his claim today is that I didn't know it was sold as is....

[H]ow you think you got a redhibition claim here when he knew all of this.

At the end of the hearing, counsel for the Lumans summarized why his clients were entitled to be dismissed from this lawsuit on summary judgment, as follows:

Dr. Raggi is a physician, he is a sophisticated purchaser. My client put him on notice, his own inspector put him on notice. He was clearly concerned enough to ask my clients to do something about it. When they said no, he apparently liked this house enough to buy it anyway.

The trial court, in agreement with the Lumans, responded, “That’s what I say too, I’m going to grant your motion for summary judgment.”

In a case factually similar to the matter before us, this court held that “[h]aving agreed to a comprehensive waiver of latent defects even as to the suitability of the property, plaintiffs’ proper remedy was a pre-purchase plumbing inspection for code violations or a refusal to consummate the sale.” Jeffers v. Thorpe, 95-1731 (La. App. 4 Cir. 1/19/96), 673 So. 2d 202. We thus upheld the trial court’s grant of summary judgment in favor of the defendant sellers of a residence based on the buyers’ waiver of their redhibitory rights. Id.

Based upon our review of the entire record, we conclude that Dr. Raggi was clearly put on notice that the basement leaked.

We further hold that Dr. Raggi’s having alleged fraud against the

Lumans does not prevent our upholding of the trial court's dismissal of his action on summary judgment. According to LSA - C.C. art. 1954, 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. Even if we were to assume that the Lumans fraudulently concealed the true extent of the basement's flooding and plumbing problems, Dr. Raggi's inspectors should have discovered the basement's defective condition. Here, the inspection did reveal some evidence of water seepage in the basement. Based on the results of that inspection, Dr. Raggi requested that the Lumans waterproof the basement. When they declined to do so, Dr. Raggi chose to go forward with his "as is" purchase of the home. We agree with the Luman's argument that, Dr. Raggi, by his own actions, lost his right to recover in redhibition and is now precluded from now assailing the terms of a bargain that he knowingly made.

Finally, this court's narrow holding in Larimer is not dispositive of the instant matter. In that case, the purchaser of a residential duplex sought review of the trial court's grant of the defendants/sellers' exception of no cause of action and no right of action. In reversing the trial court's judgment and remanding the matter for further proceedings, we noted that for purposes of ruling on the defendants' exception of no cause of action, all well pleaded

factual allegations of the petition must be accepted as true. We further noted that while the defendants' continuous reference to evidence that supported the trial court's granting of the exception of no cause of action may have been valid in other summary proceedings, such evidence was immaterial because the only item relevant to our review was the petition itself. Based upon our reading of the petition, we concluded that the purchaser had a valid cause of action against the defendants for reduction of the purchase price. Additionally, without addressing the merits of the purchaser's claims against the defendants, we concluded that the purchaser of the house belonged to the class of individuals to whom the law granted a remedy under redhibition.

Larimer, 99-2951, p. 4-5, 773 So. 2d at 221.

In contrast, the judgment under review in this matter is one granting a motion for summary judgment, not an exception of no cause of action or no right of action. As such, both the trial court and this court were able to consider the evidence presented by the Lumans, rather than being restrained to accept as true the allegations made in Dr. Raggi's petition. Based upon our review of that evidence, summary judgment was properly rendered in favor of the Lumans.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED