NOT DESIGNATED FOR PUBLICATION

LAURIE FRUGE DRAGO, WIFE OF/AND MICHAEL T. DRAGO	*	**NO. 2002-CA-1663**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
VERVIAN ELAINE PATIN, WIFE OF/AND MERRILL A. PATIN, AND ABC INSURANCE COMPANY	*	**STATE OF LOUISIANA**
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APPEAL FROM
SECOND CITY COURT OF NEW ORLEANS
NO. 98-528, "A"
Honorable Mary "KK" Norman, Judge
* * * * * *
Judge Patricia Rivet Murray
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(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III, Judge David S. Gorbaty)

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AFFIRMED

This is a redhibition action stemming from the purchase of a house. From an adverse judgment in favor of the plaintiffs-purchasers, Mr. and Mrs. Michael Drago, the defendants-sellers, Dr. and Mrs. Merrill Patin, appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On October 29, 1997, the Dragos purchased a house from the Patins located at 4055 S. Inwood Avenue in New Orleans for $135,000. Before purchasing the property, the Dragos were provided an inspection report dated July 1997 that had been prepared for another prospective purchaser; the report stated that "[t]he patio slopes slightly toward the house, causing water to stand against the slab. No evidence of water entering the house was observed." However, in October 1997, as part of the purchase agreement, the Patins signed a disclosure statement in which they checked "no" to the question "[d]oes the property have any drainage problems?"

In their petition, filed October 28, 1998, the Dragos alleged that shortly after taking possession of the property "during the first substantial rainfall the house was caused to flood by inadequate drainage systems." In

their amended petition, they alleged that the house flooded during the weeks of January 4th and 11th, 1998. At trial, the Dragos acknowledged that the drainage problem was corrected in March 1998 as a result of the repairs performed by Troy Dunham of Drainage Plus, Inc.. The total cost of those repairs was $2,746.00.

Following a bench trial, the trial court awarded the Dragos *quanti minoris* damages totaling $4,981.00, which it itemized as follows:

Damage repair -- $2,746.00

Inconvenience allowance -- $1,000.00

One-half drainage estimate -- $60.00

One-half witness fee -- $175.00

One-half attorney's fees -- $1,000.00

On appeal, the Patins assert that the trial court erred in three respects: (1) awarding the Dragos damages despite their failure to meet their burden of proving the house was susceptible to flooding and their failure to provide them with the mandatory notice required by La. C.C. art. 2522; (2) failing to find that the defect was either known or easily discoverable by a reasonably prudent buyer under La. C.C. art. 2521; and (3) awarding damages beyond the scope of La. C.C. art. 2531, especially attorney's fees, and failing to give them a credit for use as provided by that article.

ANALYSIS

Quanti minoris actions for reduction of price are governed by the same rules that govern redhibition actions. *Bunch v. Hirn*, 94-2096 (La. App. 4 Cir. 11/20/95), 665 So. 2d 1181; La. C.C. art. 2541. To recover, a purchaser must prove three things: (1) a latent defect, (2) that the defect existed at the time of sale, and (3) the extent of reduction of price. *Bunch, supra.*

The jurisprudence has recognized that the propensity of a house to flood is a redhibitory defect; the test for determining this defect is not actual flooding, but the proneness of the property to flood. *See Smith v. Kennedy*, 393 So.2d 177 (La. App. 2 Cir. 1990); *Rabai v. First National Bank of Commerce*, 492 So.2d 90 (La. App. 1 Cir. 1986); *Ford v. Broussard*, 248 So.2d 629 (La. App. 3 Cir. 1971); *Cox v. Moore*, 367 So.2d 424 (La.App. 2 Cir. 1979).

Because the implied warranty against redhibitory defects covers only latent (*i.e.*, hidden) defects, the purchaser cannot recover if the defect is apparent. *Bunch, supra.* Apparent defects are those that the buyer might have observed by simple inspection; hidden or non-apparent defects are those that a buyer could not have discovered by simple inspection. *Grimaldi Const., Inc. v. J.P. and Sons Contractors, Inc*., 96-470 (La. App. 5 Cir.

12/11/96), 686 So.2d 935, 938; *Landaiche v. Supreme Chevrolet, Inc.,* 602 So.2d 1127 (La.App. 1 Cir.1992). Simple inspection requires more than mere casual observation; it requires the buyer who observes defects to conduct further investigation as would be conducted by a reasonably prudent buyer acting under similar circumstances. Whether an inspection is reasonable depends upon the facts of the case. A trial court's determination that a defect is hidden is subject to the manifest error standard on appellate review. *Reilly v. Gene Ducote Volkswagen,* 549 So.2d 428 (La.App. 5 Cir.1989).

In defining the remedies available to a successful plaintiff-purchaser, the redhibition articles create two categories of defendant-sellers: (1) sellers without knowledge of the defect, La. C.C. art. 2531; and (2) sellers with knowledge of the defect, La. C.C. art. 2545. Under these articles, a significant difference in the remedies is that sellers without knowledge of the defect are not liable for attorney's fees or non-pecuniary damages; whereas, sellers with knowledge are liable for such damages. Another significant difference is that only sellers without actual knowledge are entitled to mandatory notice under La. C.C. art. 2522; sellers with such knowledge are not entitled to such notice. La. C.C. art. 2522, comment (b).

The trial court was faced with conflicting testimony concerning the

existence of a redhibitory defect and the Patins' knowledge of that defect. Summarizing that evidence and finding a defect and finding that the Patins had knowledge of that defect, the trial court stated in its written reasons for judgment:

> The plaintiffs testified that soon after taking possession of the property, a substantial (meaning normal to heavy rainfall as opposed to extraordinary) rain occurred at their said residence. The plaintiffs also stated that three areas of the yard at 4055 S. Inwood Avenue flooded. Sometime later, after another rainfall, the said home's interior was flooded.
>
> The defendants never informed plaintiffs of the home's susceptibility to flooding. . . . At trial, the plaintiffs did not submit any evidence that would demonstrate that the defendants had knowledge at any time during defendants' tenancy in the home that water had entered the home as a result of a flood. In fact, the defendants denied the fact that water had ever entered the home during their tenancy. The defendants also denied the fact that they were aware of any drainage problems on the premises in question, although the defendants did admit that water would accumulate in or near some of the entrances to the home. Additionally, the witness, a next door neighbor, corroborated the defendants' testimony.

Continuing, the trial court reasoned:

> The testimony was that the plaintiffs, as concerned purchasers, asked about possible flooding problems due to a substantial rain, and were assured by the real estate agent that there was no such problem. To their detriment, the plaintiffs also relied on the defendant's disclosure statement at the time of the purchase that denied any flooding problems. The Court believes that the type of flooding and drainage problems the plaintiffs testified to is of a longstanding nature. And, therefore, the Court can relate it back to the defendants' ownership and tenancy. Furthermore, the defendants should have disclosed this defect to the plaintiffs. Even though both defendants denied ever having water in the home, the fact that water would collect in and

> around the entrances to the home after a substantial rain is reason enough for the defendants to have disclosed a flooding problem. The Court believes the defendants testimony that there was no water intrusion to the home during the defendants ownership and tenancy; however, yard flooding does make the house susceptible to flooding.

The trial court's findings are supported by the testimony of not only the Dragos, but also their expert, Mr. Dunham, who the trial court qualified as an expert on drainage problems. Mr. Dunham testified that the Dragos hired his company to repair the drainage problem and that he drew a plan to address the problem. In so doing, he stated that he found a fourteen-inch fall sloping towards the foundation in the rear yard. He also found flood planes on the driveway and near the right corner and side of the house. He opined that these angles were sufficient to cause standing water or flooding or both in ordinary rainfalls. He indicated that standing water in an area creates flooding. He also testified that he was virtually certain that there was standing water and flooding during the four years that the Patins lived in the house.

The Dragos testified regarding their drainage problems and introduced a videotape and photographs depicting the problems. They also testified that the house flooded approximately four times between the time they moved in and the repairs were competed in March 1998.

The trial court was also presented with testimony by Dr. and Mrs.

Patin. Mrs. Patin testified that during the period they lived in the house, from 1993 to 1997, it never flooded. Likewise, she acknowledged executing a disclosure statement before the act of sale indicating that the house did not have any drainage problems. Mrs. Patin also testified that she had never been given information that water went into the house before they purchased it in 1993 and that she and her husband never experienced any drainage problems with the house. However, she acknowledged that water would accumulate on the patio and the driveway during a heavy rain, but that it would run off quickly. On cross-examination, she admitted that water also would accumulate around the back wall and the doors after a heavy rain. Dr. Patin stated that his testimony would be substantially the same as his wife. He admitted that during the four years they lived in the house there was standing water from time to time in the driveway. He further admitted that after a rain there would be standing water along the back wall behind the den for a short time period. However, he testified that the house did not flood during the heavy rains of May 1995.

Given the above evidence, we find no manifest error in the trial court's finding of a defect. Nor do we find persuasive the Patins' argument that the Dragos should have discovered the defect. Although the Dragos acknowledged that before they purchased the house they saw the July 1997

inspection report that mentioned the sloping patio and water collecting in that spot, the Patins subsequently signed a disclosure statement stating the house had no drainage problems. Moreover, the Dragos testified that, on the occasions that they inspected the house before purchasing it, the weather was dry and it had not rained for a day or two before. Given this chronology of events, the record does not support a finding that the Dragos could have discovered the defect by simple inspection.

The Patins next contend that they lacked knowledge of the defect and that the trial court so held. Contrary to the Patins' contention, the trial court categorized them as sellers with knowledge of the defect. This categorization is evidenced by the trial court's award of non-pecuniary damages for inconvenience and attorney's fees; neither of those types of damage is recoverable against a seller without knowledge. *See* La. C.C. art. 2545 and 2531. The Patins mistakenly suggest that the defect was the actual flooding of the house. However, the trial court clearly stated that the defect was the susceptibility of the house to flood given the accumulation of standing water after substantial rainfalls. Such a finding was supported by the testimony of the Drago's expert, Mr. Dunham, who stated that he was virtually certain the house had standing water and flooding during the period the Patins lived there. The record thus supports the trial court's finding that

the Patins had knowledge of the defect—the house's propensity to flood.

In an apparent attempt to craft an equitable judgment, the trial court reduced certain categories of the damage awards in half due to the failure of the Dragos to give notice to the Patins before commencing suit. In so doing, the court reasoned:

> The Court is further of the opinion that the plaintiffs should have made amicable demand on the defendants prior to repairs being done which would have allowed the defendants to get their own estimates and have an opportunity to mitigate their own damages or at the very least the plaintiffs could have billed the defendants for the cost of the damages prior to employing an attorney and filing suit. Therefore defendant will be responsible for only one-half of the attorney's fees, witness fees, drainage estimate and court costs.

Premised apparently on the assumption that the trial court categorized them as sellers without knowledge, the Patins argue that the reduction was pursuant to La. C.C. art. 2522 and that the reduction should have been greater—a zero damage award. We disagree. As discussed above, the Patins were categorized as sellers with knowledge of the defect; hence, the exception in the last paragraph of the notice provision applies. Particularly, that paragraph provides that "[s]uch notice is not required when the seller has actual knowledge of the existence of a redhibitory defect in the thing sold." La. C.C. art. 2522. To the extent the trial court reduced the damages, it was not mandated to do so under La. C.C. art. 2522; rather, it was simply a discretionary decision.

The Patins' final argument is that the trial court should have given them a credit for the Dragos' months of use of the house because that use was of value to them. While it is true that La. C.C. art. 2531 provides that a seller shall receive a "credit for the value of any fruits or use which the purchaser has drawn" from the property, that article governs only sellers without knowledge. As noted above, the Patins were categorized as sellers with knowledge. The governing article is thus La. C.C. art. 2545, which provides the trial court with discretion to grant such a credit. Regardless, this court has held that the credit for use is not applicable in *quanti minoris* actions because the buyer retains the thing sold as owner and is entitled to its fruits and use. *See Weber v. Crescent Ford Truck Sales, Inc.*, 393 So. 2d 919, 924 (La. App. 4 Cir. 1981). The trial court thus did not err in failing to give them a credit for use.

DECREE

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

AFFIRMED