

NOT DESIGNATED FOR PUBLICATION

FRANK ROMANO, III, ET AL. * **NO. 2007-CA-1102**
VERSUS * **COURT OF APPEAL**
GBS PROPERTIES, LLC., ET * **FOURTH CIRCUIT**
AL. * **STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-18537, DIVISION "H-12"
Honorable Michael G. Bagneris, Judge

* * * * *

Judge Patricia Rivet Murray

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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

Plaintiffs, Frank and Joann Romano, appeal the trial court's granting of the motion for summary judgment filed by three defendants: GBS Properties d/b/a Prudential Gardner Realtors, Brenda Hollins and Janet Lapeyre [hereinafter collectively referred to as "the Prudential defendants"]. For the reasons that follow, we affirm.

FACTS AND PROCEEDINGS BELOW

Mr. and Mrs. Romano filed the instant lawsuit on December 12, 2003 alleging that the Prudential defendants had negligently misrepresented the zoning classification of a piece of property that the Romano's had purchased in February, 2003, with the intent of using the property as a automobile body repair shop. At the time of the transaction, Prudential was the realty company that held the licenses of the two individual defendants: Ms. Hollins, who listed the property on behalf of the sellers; and Ms. Lapeyre, who represented the Romano's. The Romano's alleged that they had relied upon both real estate agents' representation that the applicable zoning regulations would allow the property, which had been used as an

auto body shop prior to the sale, to continue to be so used. However, according to the plaintiffs' petition, after the sale they were advised by the City of New Orleans [hereinafter "the City"] that the property was not zoned for use as a body shop, and their attempt to have the property re-zoned was denied. In addition to the negligent misrepresentation claim, the plaintiffs asserted a detrimental reliance claim under the Louisiana Unfair Trade Practices Act.

The Prudential defendants filed a third party demand against the sellers of the property, Leroy and Gloria Holly. Then, in February, 2004, the Romano's filed an amended petition naming as additional defendants the Holly's and a group of appraisers: Wayne Sandoz and Associates, Inc.; Wayne C. Sandoz; and Stephen J. Champagne [hereinafter collectively referred to as "the Sandoz defendants"]. The amended petition alleged that the Sandoz defendants had represented in their January 13, 2003 appraisal report that the property was zoned "C-1," which classification would permit its use as an auto body shop. The petition further alleged that, prior to the sale, the seller Mr. Holly had signed a Property Disclosure Addendum misrepresenting that his present usage of the property did not conflict with zoning restrictions and also had failed to advise the plaintiffs that the property had not been continuously operated as an auto body shop for a period exceeding six months prior to the date of sale.

The Sandoz defendants filed exceptions of no cause of action, no right of action and prescription, all of which the trial court denied. They also filed an answer and a third party demand against the City. On September 27, 2004, this

Court granted the writ application filed by the Sandoz defendants and reversed the trial court's denial of the exceptions. Specifically, this Court found that the plaintiffs had failed to state a cause of action against the Sandoz defendants for negligent misrepresentation or detrimental reliance because there was no indication that the Sandoz defendants owed the plaintiffs a duty that could have been breached. In addition, this Court held that the plaintiffs' claims against the Sandoz defendants were prescribed, and we dismissed those claims. Upon the Sandoz defendants' motion, the trial court signed an order dismissing their third party demand against the City.

On January 26, 2005, the Prudential defendants filed a motion for summary judgment asserting that the real estate agents had accurately communicated to the Romano's all of the information that the agents had received from the sellers of the property, and that the agents had no duty to do anything further in this regard. The Prudential defendants also asserted that on the day prior to the sale, the Romano's had signed an " 'As Is' Clause, Waiver of Warranty & Redhibition Rights Addendum," by which they had acknowledged they were accepting the property without warranties of any kind, including warranties as to zoning and/or the suitability of the property for the use intended by the purchaser.

The trial court heard the motion for summary judgment on March 16, 2007. After hearing the arguments, the trial judge granted the motion, stating on the record:

The Prudential defendants' motion for summary judgment is granted. It's granted for all the reasons cited in the Fourth Circuit decision as it relates to the appraisers, but the Court was also

persuaded by the language that was in the purchase agreement, particularly the addendum wherein it waived any warranties whatsoever as it relates to the suitability of the property for the use intended by the purchaser.

Clearly, the misinformation that the agents perpetuated in this case came from the City of New Orleans. And as a result of the previous discussion, this Court is convinced that the fault rests firmly on the head of the City as it relates to bad information.

On June 11, 2007, the trial court signed a written judgment granting the motion and dismissing the plaintiffs' claims against the Prudential defendants. The plaintiffs now appeal that judgment.

ISSUES

The plaintiffs have raised four assignments of error, namely:

- (1) The trial court erred by finding there were no genuine issues of material fact as to the negligent misrepresentation and detrimental reliance claims;
- (2) The trial court erred to the extent that it relied upon La. R.S. 9:3894 as exonerating the Prudential defendants;
- (3) The trial court erred by finding there were no genuine issues of material fact as to whether the actions of the Prudential defendants violated the Louisiana Unfair Trade Practices Act;
- (4) The trial court erred by rendering summary judgment regarding Ms. Lapeyre, who lacked procedural capacity to participate in the proceedings.

STANDARD OF REVIEW

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Schroeder v. Board of Supervisors of Louisiana State University*, 591 So.2d 342, 345 (La. 1991). A motion for summary judgment is properly

granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. *Id.*; La. C.C.P. art. 966; *Vermilion Corp. v. Vaughn*, 397 So.2d 490, 493 (La.1981). With respect to issues of law, the appellate court is required to determine whether the trial court applied the law correctly. *Glass v. Alton Ochsner Medical Foundation*, 02-0412, p.3 (La. App 4 Cir. 11/6/02), 832 So.2d 403, 405.

DISCUSSION

Assignments of Error Nos.1 and 2

To establish the tort of negligent misrepresentation, plaintiffs must show the existence of a legal duty on the part of the defendant to supply correct information, a breach of that duty, and that the breach caused the plaintiffs' damages. *Barrie v. V.P. Exerminators, Inc.*, 625 So.2d 1007, 1015 (La. 1993). In the instant case, the plaintiffs failed to establish that the Prudential defendants had a duty to do anything more than pass on the information they had received from the sellers regarding the zoning of the property. In support of their argument that they had no duty to independently investigate or check the zoning information they received from the sellers, the Prudential defendants relied upon La. R.S. 9:3894 (B), applicable to real estate agents ("licensees"):

B. A licensee shall not be liable to a customer for providing false information to the customer if the false information was provided to the licensee by the licensee's client or client's agent and the licensee did not have actual knowledge that the information was false.¹

On appeal, plaintiffs argue that this statute affords protection to Ms. Hollins, the sellers' agent, but not to Ms. Lapeyre, the plaintiffs' agent, because Ms. Lapeyre

was not passing on information she had received from her clients. However, La. R.S. 9:3893, entitled “Duties of Licensees representing clients,” contains a companion provision, which states:

D. A licensee shall not be liable to a client for providing false information to the client if the false information was provided to the licensee by a customer unless the licensee knew or should have known the information was false.

To defeat the motion for summary judgment, the plaintiffs had to show that Ms. Hollins and/or Ms. Lapeyre had a legal duty to independently check the accuracy of the zoning information under the circumstances presented herein. The plaintiffs presented no law establishing such a duty. It is undisputed that all parties involved—the sellers, both real estate agents, and the appraisers---believed at the time of the sale that the applicable zoning regulations would allow the property to continue to be used as an automobile body shop. In a similar case, the Fifth Circuit held that where the real estate agent and the appraisers were under the mistaken belief that a lot up for sale was zoned “C-2, Commercial,” the agent was not liable for negligent misrepresentation to the buyers, who after the sale were informed that only a small portion of the lot was so zoned, with the rest of it being zoned “Residential.” See *Dawley v. Sinclair*, 419 So.2d 534 (La. App. 5th Cir. 1982.)

Because the City is no longer a party to the instant case, the actual zoning classification of the property at the time of the sale is unknown; it is known that approximately one month after the sale the Romano’s were informed by the City that the property was zoned “B-1, Residential,” which would not allow the operation of an automobile body shop. The record, however, also contains a

¹ La. R.S. 9:3891 defines “client” as “one who engages the professional advice and services of a licensee as his

Zoning Verification Certificate dated March 8, 2004, approximately one year after the sale, stating that the property was zoned “C-1, Commercial.”² In the absence of a duty on the part of the Prudential defendants to independently verify the zoning information, the trial court placed the blame on the City. That statement regarding blame has no bearing upon this appeal, as the City is not a party. Nevertheless, we agree with the trial court that the plaintiffs failed to establish that the defendants owed them a duty that was breached.

In addition to pointing out the absence of a duty on their part, the Prudential defendants also argued that the plaintiffs waived their right to seek recovery of damages by signing an addendum to the Purchase Agreement whereby they agreed to purchase the property “As Is,” without warranties of any kind whatsoever, “even as to the metes and bounds, zoning, operation or suitability of such properties for the use intended by the Purchaser.” In light of our holding that the plaintiffs failed to establish that the Prudential defendants breached any duty owed to them, we need not discuss the waiver argument.

We therefore reject the plaintiffs’ first two assignments of error.

Assignment of Error No. 3

Plaintiffs next argue that the trial court erred by dismissing their claim for violation of the Louisiana Unfair Trade Practices and Consumer Protection Law, La. R.S. 51:1401 *et seq.* The plaintiffs’ petition contains no facts to support this claim, only a conclusory allegation that the actions of the Prudential defendants violated this statute. Plaintiffs also failed to allege any such facts in opposing the motion for summary judgment. La. R.S. 51:1405 indicates that the statute applies

agent. “Customer” is defined as “a person who is not being represented by a licensee but for whom the licensee is performing ministerial acts.”

² This zoning certificate was submitted by the Sandoz defendants as evidence in support of their motions.

to “unfair” or “deceptive” acts or practices in the conduct of any trade or commerce. As the plaintiffs do not dispute that the Prudential defendants actually believed the zoning information they transmitted was correct, their transmission cannot be considered deceptive or unfair. We therefore agree with the trial court’s granting of summary judgment dismissing this claim.

Assignment of Error No. 4

In their final assignment, plaintiffs contend the trial court erred by granting the motion for summary judgment in favor of Ms. Lapeyre, who died on August 15, 2006, because neither her succession representative nor her heirs have been substituted as the proper defendant pursuant to La. C.C.P. art. 801. This argument is misplaced. Article 801 permits, but does not *require*, the ex parte substitution of the legal successor of any party that dies during the pendency of an action. Plaintiffs have cited no authority indicating that Ms. Lapeyre’s death invalidates the summary judgment rendered in her favor under the circumstances presented herein.

CONCLUSION

Accordingly, for the reasons stated, we affirm the trial court’s granting of summary judgment dismissing plaintiffs’ claims against the Prudential defendants.

AFFIRMED

