NO. COA00-1328

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

ROBERT W. WHITE and wife,
WENDY E. WHITE,
Plaintiffs

v. Perquimans County
No. 97 CVS 186

ALMEDA S. HUETT,
Defendant

Appeal by plaintiffs from order entered 10 February 2000 by Judge Richard Parker in Perquimans County Superior Court. Heard in the Court of Appeals 18 September 2001.

The Twiford Law Firm, L.L.P., by Edward A. O'Neal, for plaintiff-appellants.

Hornthal, Riley, Ellis, & Maland, L.L.P., by John D. Leidy, for defendant-appellee.

CAMPBELL, Judge.

Robert and Wendy White ("plaintiffs") appeal the trial court's order granting defendant's motion for a directed verdict on plaintiffs' claim seeking damages from defendant for allegedly failing to disclose latent defects in the log house she sold to them. We affirm.

In July of 1995, plaintiffs, residents of Virginia, contacted ERA Sasser Realty Company ("Sasser Realty"), a Virginia realty firm, seeking to purchase a house. Diane Parsons-Powers (now "Mrs.

Whicker"), a licensed Virginia real estate agent working at Sasser Realty, informed plaintiffs of defendant's log house located on lots fifty-two and fifty-three on Holiday Island in Perquimans County, North Carolina. The listing agent for defendant's house, James Schmidtke, was also a real estate agent working at Sasser Realty. The log house was listed for sale at $69,500.00.

Plaintiffs were first shown the log house by Mr. and Mrs. Jump, friends of defendant from Portsmouth, Virginia. During this visit, plaintiffs noticed a black tarp on part of the floor and mildew stains on the ceiling and walls. Plaintiffs also noticed a log broken off from an exterior corner of the house. Mr. Jump informed plaintiffs that the broken log was due to the roof not being extended far enough to cover that portion of the log and that the roof leaked.

After a second visit, Mrs. Whicker (acting as the buyer's agent) submitted plaintiffs' offer to purchase the log house for $56,900.00 to defendant. The offer was on a standard purchase agreement form developed by the Virginia Real Estate Commission. Defendant's son, Thomas M. Huett, III, acting under his mother's power of attorney, countered plaintiffs' offer by inserting a disclaimer clause stating that the "property [was] to be sold 'as is' with no expressed or implied warranties" and returned the form to plaintiffs. Mrs. Whicker told plaintiffs that the "as is" language referred only to those conditions which plaintiffs were made aware of or saw through visual inspections. Neither defendant nor her son authorized Mrs. Whicker to make this representation.

With respect to disclosures, the purchase agreement stated:

> The Virginia Residential Property Disclosure Act requires sellers of residential real property to either disclose to buyers certain information known to the sellers regarding the condition of the property to be purchased or to provide a disclaimer statement that the property is being sold "as is," except as otherwise provided in the purchase agreement. Seller and Buyer acknowledge that a RESIDENTIAL PROPERTY DISCLOSURE / DISCLAIMER STATEMENT (circle either disclosure or disclaimer), attached hereto and incorporated by reference into this Purchase Agreement, has been provided by Seller to Buyer prior to acceptance of this Purchase Agreement.

The agreement further provided that the contract was contingent on plaintiffs' acceptance of a home inspection, which was to be done within ten working days from the date of the contract. However, Mrs. Whicker later testified at trial that she was unable to locate an independent home inspector in North Carolina or Virginia within this time frame and thus no independent home inspection was done. The only inspection done on the log house was by the Department of Veteran Affairs (the "VA") for a loan guaranty officer. Thereafter, the VA issued a Certificate of Reasonable Value on 24 August 1995, which estimated the reasonable value of the property at $63,000.00 "based upon [an] observation of the property in its 'as is' condition." The certificate did not mention any defects or anything else about the condition of the log house.

Plaintiffs closed on the log house on 12 September 1995 at a law office in Portsmouth, Virginia. Plaintiffs attended the closing, but defendant and her son did not. Prior to the closing, plaintiffs did not communicate with defendant regarding the log

house. Also, neither defendant nor her son personally made any representations to plaintiffs or any agents for plaintiffs about the condition of the property before the closing.

After moving into the log house, plaintiffs began noticing water damage and leakage inside the house. Plaintiffs subsequently learned from other individuals in the community that the exterior logs of their house were installed upside down thus preventing the logs from properly shedding water. Instead, water collected between the logs resulting in damage to the interior of the house as the wood rotted away.

On 6 October 1997, plaintiffs filed a complaint in the Perquimans County Superior Court alleging:

> 17. Defendant failed to disclose the [latent] defective condition of the logs in her home with an intent to deceive and defraud the plaintiffs and with an intent to induce plaintiffs (sic) reliance on the nondisclosure.
>
> 18. Plaintiffs reasonably relied upon the defendant's silence as an indication that the property was not defective and in justifiable reliance thereon, entered into a contract to purchase the property from the defendant, and have suffered injury as a proximate result of defendant's nondisclosure.

Defendant answered, denying any liability and alleging, in part, that she had "sold the subject property to Plaintiffs 'as is,' and made no warranties, express or implied, nor other representations about the condition of the property." Following the court's denial of motions by both parties for summary judgment, the matter was heard on 7 February 2000 before Judge Richard Parker ("Judge Parker"). At the close of plaintiffs' evidence, defendant moved

for a directed verdict. An order directing a verdict and dismissing plaintiffs' action with prejudice was entered on 10 February 2000. Plaintiffs appealed.

By plaintiffs' sole assignment of error they argue the trial court erred in granting defendant's motion for a directed verdict. "A motion for directed verdict tests the sufficiency of the evidence to take [a] case to the jury." *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993). It is appropriately granted only when by looking at the evidence in the light most favorable to the non-movant, and giving the non-movant the benefit of every reasonable inference arising from the evidence, the evidence is insufficient for submission to the jury. *Streeter v. Cotton*, 133 N.C. App. 80, 514 S.E.2d 539 (1999). The trial court's decision to grant or deny a motion for a directed verdict will not be disturbed on appeal absent an abuse of discretion. *G.P. Publications, Inc. v. Quebecor Printing-St. Paul, Inc.*, 125 N.C. App. 424, 481 S.E.2d 674 (1997).

Plaintiffs contend that defendant's motion should not have been granted because, despite the presence of an "as is" disclaimer clause in their agreement with defendant, the evidence presented was sufficient to support a jury verdict on the issue of fraudulent non-disclosure of a latent defect (a tort under North Carolina law). In support of their argument, plaintiffs focus primarily on the representation made by Mrs. Whicker regarding the condition of the log house. We are not persuaded by plaintiffs' argument.

"Where the parties have put their agreement in writing, it is presumed that the writing embodies their entire agreement." *Dellinger v. Lamb*, 79 N.C. App. 404, 408, 339 S.E.2d 480, 482 (1986). As a general rule, the construction and validity of such an agreement are to be determined by the law of the place where the agreement was made. *Construction Co. v. Bank*, 30 N.C. App. 155, 159, 226 S.E.2d 408, 410 (1976) (citing *Davis v. Davis*, 269 N.C. 120, 152 S.E.2d 306 (1967)). Our Supreme Court has held that the place where the agreement was made is determined by "the place at which the last act was done by either of the parties essential to a meeting of the minds[.]" *Construction Co.*, 30 N.C. App. at 159, 226 S.E.2d at 410-11 (citing *Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967)).

In the case *sub judice,* plaintiffs' testimony confirmed that all acts relevant to the making of the purchase agreement between the parties occurred in Virginia. Also, the closing, which was the last act done by the parties essential to a meeting of the minds, took place at a law office in Portsmouth, Virginia. Thus, the interpretation of the parties' agreement is governed by the laws of Virginia.

Additionally, the agreement between plaintiffs and defendant provided that the Virginia Residential Property Disclosure Act ("Act") was incorporated by reference. In part, this Act states:

> [T]he owner of the residential real property shall furnish to a purchaser . . . [a] residential property disclaimer statement in a form provided by the Real Estate Board stating that the owner makes no representations or warranties as to the condition of the real

> property or any improvements thereon, and that the purchaser will be receiving the real property 'as is,' that is, with all defects which may exist, if any, except as otherwise provided in the real estate purchase contract[.]

Va. Code Ann. § 55-519(A)(1) (Michie 1999). However, an owner of property may not intentionally conceal known material defects and agree to sell the property knowing that the purchaser is unaware of the defects. *See Van Deusen v. Snead*, 247 Va. 324, 441 S.E.2d 207 (1994). The Act specifically preserves all remedies at law or equity otherwise available against an owner in the event of the owner's intentional or willful misrepresentation of the property's condition. *See* § 55-524.

In the present case, plaintiffs' complaint alleged that defendant intentionally misrepresented the condition of the log house. Although Virginia law recognizes such an action, plaintiffs failed to offer evidence to establish any intentional or willful misrepresentation on the part of defendant. Pursuant to the Act, the parties' agreement included a residential disclaimer clause which provided that the log house was being sold "as is" with no expressed or implied warranties. *See* § 55-520(A) (providing that such a disclaimer can be included in a real estate purchase agreement). Prior to the signing of the agreement, there was no effort by either defendant or her son: (1) to conceal the defects in the log house, (2) to discourage plaintiffs from obtaining an inspection of the house, or (3) to make any representations at all relating to the condition of the house that contradicted the "as is" disclaimer clause. The only representations made to plaintiffs

which might be construed as contradicting this clause were made by Mrs. Whicker, the plaintiffs' agent who was not acting on behalf of defendant nor authorized by defendant or her son to make any representations on their behalf. Furthermore, plaintiffs signed the purchase agreement which clearly stated that the "Buyer . . . acknowledges that he has not received or relied upon any representations made by the Listing Firm, the Selling Firm or the Seller with respect to the condition of the Property which are not contained in [the] Purchase Agreement." Thus, there was no abuse of discretion by the trial court in not submitting to the jury the issue of defendant's alleged failure to disclose a latent defect because there was no evidence to support plaintiffs' allegations that defendant made any intentional or willful misrepresentations.

Finally, we note that plaintiffs argue that their claim against defendant for the fraudulent concealment of a material defect should be decided under North Carolina law. However, in order to prevail on this claim in North Carolina, plaintiffs would have to show that "a material defect is known to the seller, and [she] knows that the buyer is unaware of the defect and that it is not discoverable in the exercise of the buyer's diligent attention or observation . . . ." *See Carver v. Roberts*, 78 N.C. App. 511, 512-13, 337 S.E.2d 126, 128 (1985). Here, despite seeing mildew, a leaking roof, and a broken log on the house, plaintiffs signed the purchase agreement (1) with full knowledge that the agreement contained an "as is" disclaimer clause, (2) without ever speaking to defendant or her son about the problems plaintiffs had noticed

with the house, and (3) without obtaining a home inspection. With respect to the home inspection, there was testimony presented by plaintiffs from a home inspector that it was apparent to him that the logs were incorrectly installed. There was no evidence that defendant or her son did anything to prevent plaintiffs from obtaining an independent home inspection or concealing the condition of the log house from either plaintiffs or an inspector had plaintiffs been diligent in obtaining an inspection. Thus, defendant cannot be held liable under North Carolina law for fraudulent concealment of a material defect because of plaintiffs' lack of diligence in discovering the logs were inverted.

Accordingly, we conclude that the trial court did not abuse its discretion in granting defendant's motion for a directed verdict.

Affirmed.

Judges GREENE and THOMAS concur.

Report per Rule 30(e).