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NO. COA06-1088

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

ELEANOR S. MACFADDEN,
PLAINTIFF

v.

Craven County
No. 04 CVS 741

DOROTHEA S. LOUF, HOME
INSPECTION SERVICES OF
NEW BERN, INC., and
JOHN G. AUDILET,
DEFENDANTS.

Appeal by plaintiff from judgment entered 22 March 2006 by Judge Benjamin G. Alford in Superior Court, Craven County. Heard in the Court of Appeals 6 March 2007.

Harvell and Collins, P.A., by Wesley A. Collins and Amy C. Shea, for Plaintiff-appellant.

Harris, Creech, Ward and Blackerby, P.A., by Thomas M. Ward, Charles E. Simpson, Jr., and Jay C. Salsman, for Defendant-appellee.

WYNN, Judge.

This is a companion appeal to *MacFadden v. Louf*, ___ N.C. App. ___, ___ S.E.2d. __ (April 17, 2007) (No. 06-647). In that decision, we addressed the issues arising from an action by home buyer, Eleanor MacFadden ("Plaintiff"), against the home seller, Dorothea S. Louf ("Defendant"), for alleged undisclosed defects in the property. After careful review of the record, we upheld the trial court summary judgment against Plaintiff's claims of unfair and

deceptive trade practices, fraud and negligent misrepresentation. This appeal arises from the trial court's determination that "Defendant Louf's Motion for Summary Judgment on Counterclaim should be and is GRANTED and Motion for Sanctions is GRANTED." The trial court made findings of fact and concluded that,

4. Pursuant to N.C.G.S. § 75-16.1, this Court has the discretionary authority to allow a reasonable attorney fee for the attorneys representing Defendant Louf as Plaintiff MacFadden instituted an action for unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1.1 when Plaintiff MacFadden knew or should have known the action was frivolous and malicious.

5. Plaintiff MacFadden knew or should have known as a matter of law that Defendant Louf was selling her residence and therefore not subject to the provisions of North Carolina's Unfair and Deceptive Trade Practices Act at the time Plaintiff MacFadden filed her Complaint.

Accordingly, the trial court, after considering evidence that Defendant incurred attorney fees in the amount of \$32,822.75, ordered Plaintiff to pay counsel for Defendant a sanction of \$7,500.00.

Plaintiff appeals contending that the trial court erred by (I) finding that her claim for unfair and deceptive trade practices were frivolous and malicious; and (II) granting Ms. Louf's motion for sanctions and awarding attorney's fees.

I.

Ms. MacFadden first argues that the trial court "abused its discretion in awarding attorney fees under N.C.G.S. § 75-16.1" because her claim for unfair and deceptive trade practices was not

frivolous and malicious, and she posed a good faith extension of the law. We disagree.

As stated in the companion appeal, *MacFadden v. Louf*, ___ N.C. App. ___, ___, ___ S.E.2d. ___, ___ (April 17, 2007) (No. 06-647):

It is well established in North Carolina that ". . .private homeowners selling their private residences are not subject to unfair and deceptive practice liability." *Davis v. Sellers*, 115 N.C. App. 1, 7, 443 S.E.2d 879, 883 (1994); see also *Stolfo v. Kernodle*, 118 N.C. App. 580, 455 S.E.2d 869 (1995); *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979). Here, the undisputed evidence shows that the house sold to Plaintiff was Defendant's private residence.

The record on appeal shows that Ms. MacFadden knew that the home was Defendant's private residence because she lived with Defendant from approximately 25 August 2002 until the home closed on approximately 16 September 2002. Moreover, Plaintiff presented no evidence to support her contention that Ms. Louf was in the business of buying and fixing houses as a commercial business or realtor. Under Plaintiff's reasoning, vast number of home sellers would be subject to the application of the unfair and deceptive trade practices statute. We do not believe the trial court abused its discretion in determining that Plaintiff did not pose a good faith argument for the extension of existing law. Accordingly, we reject this assignment of error.

II.

Plaintiff next argues that the trial court abused its discretion by granting sanctions and awarding attorney's fees to Defendant. Specifically, Plaintiff argues that she is not a skilled

attorney, and thus she relied on her attorney to select the appropriate claims for relief. This argument is without merit.

Pursuant to section 75-16.1 of the North Carolina General Statutes,

[i]n any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee ... to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that: ... (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen.Stat. § 75-16.1 (2004). "The award of attorneys' fees under section 75-16.1 of the North Carolina General Statutes is within the sound discretion of the trial judge." *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 421-22 (citing *Borders v. Newton*, 68 N.C. App. 768, 770, 315 S.E.2d 731, 732 (1984)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.*, 610 S.E.2d at 422 (citing *Smith v. Beaufort County Hosp. Ass'n, Inc.*, 141 N.C. App. 203, 210, 540 S.E.2d 775, 780 (2000)).

Here, the plain language of section 75-16.1 of the North Carolina General Statutes, allows "a reasonable attorney fee . . . to be taxed as a part of the court costs and payable by the losing party" when the "party instituting the action knew or should have known that the action was frivolous and malicious." The evidence clearly indicated that Defendant, as a seller of her private residence, was exempt from the application of the unfair and

deceptive trade practices statute. Plaintiff, having lived in the home with Defendant before she purchased it, knew that the property was the private residence of Defendant. Thus, we cannot say that the trial court abused its discretion by granting sanctions and ordering attorney's fees to Defendant.

Affirmed.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).