

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-344

Filed: 3 December 2019

Wake County, No. 17-CVS-015449

THOMAS A. STEVENS, ELLEN M. STEVENS, and MARYLYNN STEVENS,
Plaintiffs,

v.

SHANDA HELLER, JOHN BOSTON HELLER, and BFD PROPERTIES INC. d/b/a
RE/MAX UNITED, Defendants.

Appeal by Plaintiffs from order entered 11 October 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 3 October 2019.

Thomas A. Stevens, pro se.

Manning Fulton & Skinner P.A., by William C. Smith, Jr., for the Defendants.

BROOK, Judge.

Thomas A. Stevens, Ellen M. Stevens, and MaryLynn Stevens (“Plaintiffs”) appeal the trial court’s order granting summary judgment in favor of Shanda Heller, John Boston Heller, and BFD Properties, Inc. d/b/a RE/MAX United (“Defendants”) and denying their partial cross-motion for summary judgment. We affirm.

I. Background

Thomas Stevens is a lawyer who lives in Delaware with his wife, Ellen Stevens. Shanda Heller and John Boston Heller are married and live in North Carolina. The

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Hellers own BFD Properties, Inc. (“BFD Properties”), a real estate agency located in Cary, North Carolina that does business as RE/MAX United. Ms. Heller is a real estate broker and an independent contractor and agent of BFD Properties.

On 29 June 2017 a real estate broker engaged by Mr. Stevens presented an offer to Ms. Heller to purchase real property located at 1431 Collegiate Circle in Raleigh, North Carolina. Ms. Heller counter-offered the following day. In her counter-offer Ms. Heller explained that she and her husband owned the property as an investment but had decided to sell it because their son was leaving home for college, presenting the Hellers with the opportunity to obtain housing for their son for his college years through a tax-deferred exchange. Attaching residential property disclosures to her counter-offer, Ms. Heller noted:

I have checked a few items as “No Representation” because we’ve never lived in the property and I am not 100% sure (i.e. type of plumbing, age of roof) of ages or types of systems. To our knowledge everything is in good working order. I can try to verify when roof was replaced and plumbing with management company

Mr. Stevens and his broker both electronically confirmed receipt of the disclosures and Mr. Stevens and Ms. Heller then executed a purchase agreement for the property that same day, on 30 June 2017. The purchase agreement set 14 July 2017 as the settlement date for the transaction. It stipulated that Mr. Stevens’s due diligence period began on 30 June 2017, the date of the purchase agreement, and concluded at 5:00 p.m. on 13 July 2017, the day before the date set for settlement.

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On 14 July 2017, the date set for settlement and the day after the expiration of the due diligence period, a contractor performed maintenance on the HVAC system in the property, damaging the system in the process. The contractor informed the Hellers of the damage and that the damage had been repaired and Ms. Heller conveyed this information to Mr. Stevens, providing Mr. Stevens with copies of invoices for the work. The transaction then closed three days later on 17 July 2017. Ultimately, no inspection of the property was conducted by Mr. Stevens or anyone acting on his behalf prior to the closing of the transaction.¹

Plaintiffs thereafter initiated the present action in Wake County Superior Court. In their first amended complaint, Plaintiffs asserted claims for breach of contract, fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive practices, alleging essentially that the HVAC system in the property needed to be completely replaced and that Defendants knew or should have known about this defect but failed to disclose it to Mr. Stevens prior to the closing of the transaction. Throughout their complaint, Plaintiffs advanced the theory that the duty of Ms. Heller to disclose information about latent defects of which she was or

¹ In reply to a congratulatory e-mail from his broker sent over the weekend following the execution of the purchase agreement, Mr. Stevens related that because of the “tight closing schedule,” he was disinclined to conduct an inspection of the property prior to closing, unless his broker advised otherwise. His broker inquired in response: “Are you 100% sure you don’t want an inspection? Just want to make sure[.]” Mr. Stevens replied by stating that it was “up to ML,” meaning MaryLynn Stevens, his daughter. However, no inspection was conducted by either Mr. Stevens or his daughter or anyone acting on their behalf before the transaction closed.

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should have been aware was heightened because she was both an owner of the property and a licensed real estate broker.

On 23 July 2018 Defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 13 September 2018 Plaintiffs filed a partial cross-motion for summary judgment on liability only. The motions came on for hearing on 24 September 2018 before the Honorable A. Graham Shirley, II. In an order entered on 11 October 2018, Judge Shirley granted Defendants' motion and denied Plaintiffs' motion. Plaintiffs entered timely written notice of appeal on 8 November 2018.

II. Analysis

Mr. Stevens makes several arguments on appeal, which we address after resolving a pending motion to dismiss the appeal.

A. Motion to Dismiss

While Plaintiffs' notice of appeal was timely, Mr. Stevens's appellate brief was not timely filed.

On 10 May 2019, Mr. Stevens filed a motion requesting an extension of the time to file an appellate brief. This Court allowed the motion in a 14 May 2019 order, setting a new deadline of 20 May 2019 for filing and service of Mr. Stevens's appellate brief.

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By 20 May 2019, however, Mr. Stevens did not file and serve his appellate brief, as ordered on 14 May 2019, nor did he request a second extension prior to the new deadline set on 14 May 2019 expiring.

On 22 May 2019, two days after the deadline set on 14 May 2019 had expired, Mr. Stevens filed a second motion requesting an extension of time to file an appellate brief. This Court allowed the motion in a 23 May 2019 order, setting a new deadline of 24 May 2019 for filing and service of Mr. Stevens's appellate brief.

That same day, Defendants filed a motion requesting that the Court reconsider or vacate its 23 May 2019 order allowing Mr. Stevens an additional extension to file and serve his appellate brief because of his failure to file or request an extension of the time to file his appellate brief by 20 May 2019. This Court denied the motion on 24 May 2019.

Mr. Stevens finally filed and served his appellate brief on 24 May 2019.

Defendants therefore move that this appeal be dismissed for non-compliance with Rule 13(a) of the North Carolina Rules of Appellate Procedure based on Mr. Stevens's failure to file and serve his appellate brief or request an extension of the time to file and serve his appellate brief by 20 May 2019. *See* N.C. R. App. P. 13(a) ("Within thirty days after the record on appeal has been filed . . . , the appellant shall file a brief . . . and serve copies thereof upon all other parties").

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Mr. Stevens’s two-day period of non-compliance with Rule 13(a) constitutes a non-jurisdictional violation of the appellate rules. *See Dogwood Dev. and Mgmt. v. White Oak Transp.*, 362 N.C. 191, 197-98, 657 S.E.2d 361, 364-65 (2008) (observing that jurisdictional rule violations consist of failures to comply with the rules “necessary to vest jurisdiction in the appellate court,” such as Rule 3 and Rule 4(a)(2)). “[A] party’s failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal.” *Id.* at 198, 657 S.E.2d at 365. We hold that Mr. Stevens’s non-compliance with Rule 13(a) does not rise to the level of a “substantial failure or gross violation” justifying the “extreme sanction” of dismissal because in the present case the non-compliance has not impaired our “task of review[,] and . . . review on the merits would [not] frustrate the adversarial process.” *Id.* at 200, 657 S.E.2d at 366-67. Defendants’ motion to dismiss the appeal is therefore denied.

B. Motions for Summary Judgment

Mr. Stevens argues that the trial court erred by granting summary judgment in favor of Defendants and denying Plaintiffs’ partial cross-motion for summary judgment on liability only because there were genuine issues of material fact regarding Defendants’ alleged misrepresentations and Ms. Heller owed him a heightened duty of disclosure as both an owner of the real property and a licensed real estate broker. We disagree.

1. Introduction and Standard of Review

Under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment is proper “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 any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56 (2017). “[A]n issue is genuine if it is supported by substantial evidence[.]” *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal marks and citation omitted). “[A]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action[.]” *Id.* (internal marks and citation omitted). “Substantial evidence is . . . evidence [] a reasonable mind might accept as adequate to support a conclusion[.]” *Id.* (internal marks and citation omitted).

However, when ruling on a motion for summary judgment or reviewing such a ruling on appeal, “[a]ll facts asserted by the adverse party are taken as true . . . and their inferences must be viewed in the light most favorable to that party[.]” *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal marks and citation omitted). “The Court must look at the evidence in the light most favorable to the non-moving party and with the benefit of all reasonable inferences.” *Jenkins v. Lake Montonia Club*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997) (citation omitted).

“The party moving for summary judgment bears the burden of establishing the lack of a triable issue of fact.” *Purcell v. Downey*, 162 N.C. App. 529, 531-32, 591 S.E.2d 556, 558 (2004).

The standard of review in an appeal from an order granting a motion for summary judgment and denying a partial cross-motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007). “Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court.” *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32, 732 S.E.2d 614, 618 (2012) (citation omitted).

2. Buyer’s and Seller’s Duties

In North Carolina, the Residential Property Disclosure Act (“the Act”) applies to sales of “residential real property consisting of not less than one nor more than four dwelling units, whether or not the transaction is with the assistance of a licensed real estate broker or salesman[.]” N.C. Gen. Stat. § 47E-4(a)(1) (2017). The Act in relevant part requires that “the owner of real property [] furnish to a purchaser a residential property disclosure statement,” including information about the “characteristics and conditions of the . . . plumbing, electrical, heating, cooling, and other mechanical systems[.]” *Id.* § 47E-4(b)(3). However, unless an owner of real property chooses to make no representation with respect to a “characteristic or condition” about which N.C. Gen. Stat. § 47E-4(b) requires disclosure, the Act does

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not affect “[t]he rights of the parties to a real estate contract as to conditions of the property of which the owner ha[s] no actual knowledge[.]” *Id.* § 47E-6. The Act additionally provides as follows:

the owner may discharge the duty to disclose . . . by providing a written report attached to the residential property disclosure statement by a public agency or by an attorney, engineer, land surveyor, geologist, pest control operator, contractor, home inspector or other expert, dealing with matters within the scope of the public agency’s functions or the expert’s license or expertise. The owner shall not be liable for any error, inaccuracy, or omission of any information delivered pursuant to this section if the error, inaccuracy, or omission was made in reasonable reliance upon the information provided by the public agency or expert and the owner was not grossly negligent in obtaining the information or transmitting it.

Id. § 47E-7.

However, while a seller of real property is entitled to reasonable reliance on the opinions and information provided by professionals when discharging the duties of disclosure imposed by N.C. Gen. Stat. § 47E-4(b), *see id.*, “a purchaser [] [who] has the opportunity to exercise reasonable diligence and fails to do so . . . has no action for fraud,” *MacFadden v. Louf*, 182 N.C. App. 745, 748, 643 S.E.2d 432, 434 (2007) (citation omitted). This Court has held:

[w]ith respect to the purchase of property, reliance is not reasonable if a plaintiff fails to make any independent investigation unless the plaintiff can demonstrate: (1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property’s condition by exercise of reasonable diligence, or (3) it was

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induced to forego additional investigation by the defendant's misrepresentations.

RD&J Props. v. Lauralea-Dilton Enters., 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2004) (internal marks and citation omitted). A buyer of real property is therefore not entitled to rely solely on the property disclosure statement prepared by the seller and conduct no independent due diligence and then subsequently maintain an action against the seller for failure to disclose a latent defect unless the buyer can show that the seller's misrepresentations caused the lack of reasonable diligence. *See Folmar v. Kesiah*, 235 N.C. App. 20, 26-27, 760 S.E.2d 365, 369-70 (2014) (affirming summary judgment on claim by buyer based on content of disclosure statement where buyer's inspection report notified buyer of defects before closing but buyer chose to consummate sale anyway); *MacFadden*, 182 N.C. App. at 748-49, 643 S.E.2d at 434-35 (same); *Swain v. Preston Falls East*, 156 N.C. App. 357, 361-62, 576 S.E.2d 699, 702-03 (2003) (affirming summary judgment on claim by buyer notified in addendum to purchase contract about potential exterior coating defect, noting language from disclosure statement encouraging buyer to obtain independent inspection prior to closing).

3. Mr. Stevens's Failure to Conduct Reasonable Diligence

In the present case, the purchase agreement entered into by Mr. Stevens and the Hellers provided in relevant part as follows:

4. BUYER'S DUE DILIGENCE PROCESS:

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...

During the Due Diligence Period, Buyer or Buyer's agents or representatives, at Buyer's expense, shall be entitled to conduct all desired tests, surveys, appraisals, investigations, examinations and inspections of the Property as Buyer deems appropriate, including but NOT limited to the following:

(i) Inspections: Inspections to determine the condition of any improvements on the Property, the presence of unusual drainage conditions or evidence of excessive moisture adversely affecting any improvements on the Property, the presence of asbestos or existing environmental contamination, evidence of wood-destroying insects or damage therefrom, and the presence and level of radon gas on the Property.

...

Buyer acknowledges and understands that unless the parties agree otherwise, **THE PROPERTY IS BEING SOLD IN ITS CURRENT CONDITION**. Buyer and Seller acknowledge and understand that they may, but are not required to, engage in negotiations for repairs/improvements to the Property. Buyer is advised to make any repair/improvement requests in sufficient time to allow repair/improvement negotiations to be concluded prior to the expiration of the Due Diligence Period.

(Emphasis in original.) The purchase agreement also required the Hellers to provide Mr. Stevens with “reasonable access to the Property (including working, existing utilities) the earlier of Closing or possession by Buyer, including, but not limited to, allowing Buyer an opportunity to conduct a final walk-through inspection of the Property.”

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As required by N.C. Gen. Stat. § 47E-4(b), the residential property disclosure statement prepared by Ms. Heller stated as follows:

2. You must respond to each of the questions on the following pages of this form by filling in the requested information or by placing a check in the appropriate box. In responding to the questions, you are only obligated to disclose information about which you have actual knowledge.

a. If you check “Yes” for any question, you must explain your answer and either describe any problem or attach a report from an attorney, engineer, contractor, pest control operator or other expert or public agency describing it. If you attach a report, you will not be liable for any inaccurate or incomplete information contained in it so long as you were not grossly negligent in obtaining or transmitting the information.

b. If you check “No,” you are stating that you have no actual knowledge of any problem. If you check “No” and you know there is a problem, you may be liable for making an intentional misstatement.

c. If you check “No Representation,” you are choosing not to disclose the conditions or characteristics of the property, even if you have actual knowledge of them or should have known of them.

d. If you check “Yes” or “No” and something happens to the property to make your Disclosure Statement incorrect or inaccurate (for example, the roof begins to leak), you must promptly give the purchaser a corrected Disclosure Statement or correct the problem.

The first page of the disclosure statement additionally noted that it was “not a substitute for any inspections [the purchasers] may wish to obtain,” stating further

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that “[p]urchasers are strongly encouraged to obtain their own inspections from a licensed home inspector[.]”

The second page of the disclosure statement went on to specify that the representations it contained only concerned characteristics or conditions of the property about which the owners had “actual knowledge,” consistent with N.C. Gen. Stat. § 47E-6. Question nine on the following page of the disclosure statement asked:

9. Is there any problem, malfunction or defect with the dwelling’s heating and/or air conditioning?

Ms. Heller checked the box indicating that the answer to this question was “No,” representing that she had no actual knowledge of any defects with the HVAC system as of 30 June 2017, the date Ms. Heller executed the disclosure and Mr. Stevens acknowledged it.

Ms. Heller supplemented her response to question nine of the disclosure statement by providing Mr. Stevens with “written report[s]” within the meaning of N.C. Gen. Stat. § 47E-7 on 14 July 2017 in the form of invoices from the HVAC contractor that performed the maintenance and repair work on the system. By this point, Mr. Stevens had chosen not to conduct an inspection during the due diligence period, and Mr. Stevens did not investigate the issues with the HVAC system prior to the closing of the transaction on 17 July 2017. There is no record evidence supporting an inference that the Hellers’ disclosures on 30 July 2017 in the residential disclosure statement were knowing misrepresentations or that the

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Hellers were grossly negligent in their choice of HVAC contractor. Viewing the evidence in the light most favorable to Plaintiffs and giving Plaintiffs the benefit of every *reasonable* inference, as we are required to do, we hold that the failure of Mr. Stevens to conduct any inspection of the property during the due diligence period or prior to closing, after being notified of potential problems with the HVAC system, constituted a failure by Mr. Stevens to conduct reasonable diligence under the circumstances. Accordingly, with respect to Defendants' motion, we affirm the trial court's decision to grant summary judgment in favor of Defendants; likewise, we therefore affirm the trial court's decision to deny Plaintiffs' partial cross-motion on liability only, as our determination that Defendants were entitled to judgment as a matter of law entails.

4. Duty of Sellers Who Are Licensed Real Estate Brokers

As noted previously, throughout the amended complaint and the appellate brief filed by Mr. Stevens, Mr. Stevens repeatedly asserts that Ms. Heller owed him a heightened duty of disclosure compared to an ordinary seller of real property because she was a licensed real estate broker and an owner of the property, not an ordinary seller. Mr. Stevens repeats this assertion often but offers no authority to support it.² We are not aware of any either. We therefore decline to endorse the

² The best Mr. Stevens does to support this proposition is to cite provisions of Chapter 93A of the General Statutes, which sets out the regulatory requirements applicable to licensed real estate brokers, such as the prohibition in N.C. Gen. Stat. § 93A-6(a)(1) against "willful or negligent

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viewpoint advocated by Mr. Stevens that licensed real estate brokers owe buyers they do not represent as agents any heightened duty of disclosure when they also own the property they are selling; that is, we expressly reject the argument that owners of real property who sell that property while also acting in the capacity of a licensed real estate broker with respect to such sales are transformed into buyer's agents or dual agents by operation of law. Accordingly, we reiterate our holding that the trial court correctly concluded that Plaintiffs were not entitled to judgment as a matter of law on liability only.

III. Conclusion

The trial court correctly concluded that Defendants were entitled to judgment as a matter of law where there is no genuine issue of material fact that Mr. Stevens failed to exercise reasonable diligence prior to consummating the purchase from the Hellers. Additionally, despite being a licensed real estate broker, Ms. Heller owed Mr. Stevens no duty to him greater than that owed by an ordinary seller to an ordinary buyer of real property. We therefore affirm the order of the trial court.

AFFIRMED.

misrepresentation or any willful or negligent omission of material fact.” N.C. Gen. Stat. § 93A-6(a)(1) (2017). This provision sets out an instance of conduct that is subject to discipline by the North Carolina Real Estate Commission, the body tasked with enforcing the regulatory requirements applicable to real estate brokers in North Carolina; it does not support the proposition that real estate brokers who own property they are also engaged in selling in their capacity as brokers owe a heightened duty to the *buyers* of such property. Licensed real estate brokers who are selling property they own do not become the buyers' fiduciaries simply by virtue of being both brokers and self-represented sellers in the transaction.

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Judges DIETZ and INMAN concur.