

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Carol Fleck, et al.

Court of Appeals No. WD-10-011

Appellants

Trial Court No. 2008-CV-0923

v.

Loss Realty Group, et al.

DECISION AND JUDGMENT

Appellees

Decided: January 14, 2011

* * * * *

Richard M. Kerger and Kimberly A. Conklin, for appellants.

Teresa L. Grigsby, for appellee Loss Realty Group.

David A. Wallace, Angela P. Whitfield, and Joel E. Sechler,
for appellees GMAC Mortgage Corporation and Deutsche Bank
National Trust Company.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that granted appellees' motions for summary judgment upon appellants' claims of

fraudulent or negligent misrepresentation. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} This case arose from appellants' purchase of a home which suffered significant flood damage shortly after the couple moved in. The following facts are not in dispute. Carol and Paul Fleck ("appellants") moved to Ohio in early 2008. In May 2008, their real estate agent, Jill Perry, showed them a residential property located at 9633 Grassy Creek in Perrysburg, Ohio.

{¶ 3} The Grassy Creek property ("property") was owned by appellee Deutsche Bank ("Deutsche"). Appellee GMAC Mortgage Corporation ("GMAC") was the service provider for Deutsche and had contracted with appellee Loss Realty Group ("Loss") to list the property for sale. The Loss listing agent was Linda Drews.

{¶ 4} The record reflects that in January 2008, a member of the local homeowners' association told Drews that the Grassy Creek property had flooded multiple times. In February 2008, Grassy Creek, which traverses the front yard of the property in question, overflowed and the basement of the house at 9633 Grassy Creek flooded. Immediately thereafter, the property was cleaned and dried.

{¶ 5} When Perry showed the property to appellants, she told them that it was a foreclosed property, that the bank had no firsthand knowledge of the property and that it was up to appellants to determine the condition of the property. The property's listing stated: "Home sold 'as is' – seller has no knowledge of property condition." Appellants viewed the interior of the home on two occasions and the outside areas on two other

occasions. Paul Fleck observed sandbags near the house; noticed evidence of water damage in the finished basement, including removal of drywall, insulation and cabinetry, and saw a sump pump in the basement.

{¶ 6} Appellants made an initial offer on the property on June 4, 2008.

Thereafter, Drews told Perry that Grassy Creek had flooded in February and that water had gone into the garage and basement at that time. Drews also reported that a county official had told her the creek likely was clogged with debris and that the county would have to dredge it. Perry passed on this information to appellants, recommending that they delay the closing in order to investigate further. The following day, Perry sent appellants an e-mail indicating that she had called the Wood County Engineer's Office and had spoken with someone from the planning commission. She told appellants that "* * * the guy there said [the property] looked like it needed flood insurance and that he believes due to the calls they receive from nearby areas that it is likely that the creek could flood again . . . could you hire anyone to look at the lot and see what could be done?"

{¶ 7} Perry also provided appellants with the Standard Flood Hazard Determination on the property. Although the document indicated that the home was not in a "special flood hazard area," the box indicating "flood zone" was marked with an "X." Nevertheless, appellants concluded that the property was not in a flood zone.

{¶ 8} During the course of negotiations, Drews stated in an e-mail "no problem with you doing any inspection that you like." Appellants asked Deutsche /GMAC to

perform a mold inspection and provide a report of prior insurance claims. The request was denied and appellants did not pursue the matter.

{¶ 9} On June 11, 2008, the parties executed a purchase agreement which provided that the property was purchased in "as is" condition. Under Paragraph 2, "Condition of Premises," the "Rider to Purchase Agreement" stated as follows: "Buyer understands that Seller has never lived in or on the Property. The Property is being sold and purchased in 'as is-where is condition without representations and warranties' expressed or implied. * * * Buyer acknowledges that they are not relying on any representations, statements, guarantees or warranties of any kind including, without limitation, the physical condition of the property * * *. Buyer shall rely on its investigations of the property in determining whether to acquire it. The provisions of this paragraph are a material part of the consideration for seller entering into this agreement, and shall survive closing."

{¶ 10} Appellants did not obtain any expert inspection of the home or the premises and closed on the sale on June 20, 2008. Several days later, the creek overflowed and the property flooded, damaging the basement and some of appellants' personal belongings. Shortly thereafter, appellants learned from a neighbor that the property had flooded numerous times and that the neighbor had given Drews this information before appellants purchased the house.

{¶ 11} On September 29, 2008, appellants filed an action in the trial court alleging that appellees had committed fraudulent or negligent misrepresentation in the sale of the

property. Appellees filed their answers and, following discovery, Loss Realty and GMAC Mortgage Corp./Deutsche Bank filed motions for summary judgment on the grounds that appellants could not establish the requisite elements of fraudulent misrepresentation and that the "as is" clause in the purchase agreement mandates that the doctrine of caveat emptor be applied.

{¶ 12} On February 17, 2010, the trial court granted summary judgment in favor of appellees, finding that appellants could not prove justifiable reliance, an essential element of both fraudulent and negligent misrepresentation. The court reasoned that even if Drews' failure to communicate the information she obtained from the neighbor amounted to misrepresentation, any reliance by the Flecks was not justifiable.

{¶ 13} Appellants now set forth the following as their sole assignment of error:

{¶ 14} "The trial court erred when it granted summary judgment in favor of appellees."

{¶ 15} We note at the outset that an appellate court reviews a trial court's grant of summary judgment de novo, applying the same standard used by the lower court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is granted where there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 16} The Supreme Court of Ohio has held that a plaintiff must establish the following elements to prove actual fraud: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance. *Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 42, 49.

{¶ 17} Therefore, in order to maintain a successful fraudulent misrepresentation claim, appellants were required to prove: that appellees made a representation, or where there was a duty to disclose, concealed a fact which was material to the transaction at hand; that the misrepresentation was made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it was true or false that knowledge may have been inferred, with the intent of misleading appellants into relying on it; their own justifiable reliance upon the representation or concealment, and a resulting injury that was proximately caused by the reliance. *Cardi v. Gump* (1997), 121 Ohio App.3d 16, 22.

{¶ 18} The trial court in this case determined that the relevant factor herein was justifiable reliance. We agree with the trial court's conclusion that appellants were not justified in their reliance on any of the statements made regarding the Grassy Creek property.

{¶ 19} "Factors to be considered in determining whether reliance is reasonable include 'the nature of the transaction, the form and materiality of the representation, the relationship of the parties, the respective intelligence, experience, age and mental and physical condition of the parties, and their respective knowledge and means of knowledge.' An individual 'has no right to rely on misrepresentations when the true facts are equally open to both parties.'" *Harshman II Dev. Co., LLC v. Meijer Stores L.P.*, 2d Dist. No. 23355, 2010-Ohio-381, ¶ 22 (citations omitted).

{¶ 20} In *Cardi*, supra, the appellant alleged that the seller of the home appellant purchased had fraudulently misrepresented defects in the basement which led to water leakage and water accumulation. While a property disclosure form signed by the seller indicated the basement had no current water leakage, inspectors warned appellant prior to the purchase that he should inquire further into the drainage system. After appellant took possession, the basement flooded and appellant brought an action for fraud. The Eighth District affirmed the trial court's grant of summary judgment in favor of the seller, holding that, even though appellant presented evidence that the seller knowingly misrepresented the extent of water damage in the basement, appellant could not show justifiable reliance. The appellate court's holding was based on its finding that appellant "was on notice of potential problems through his own observations and the inspection reports * * *." *Cardi* at 22.

{¶ 21} This same issue was addressed in *Christian v. McLaughlin* (Dec. 30, 1998), 9th Dist. No. 19064. In that case, the Ninth District court concluded that the purchasers

of a home did not rely on a real estate agent's representations because the buyers continued to investigate possible problems on their own. "Their resort to these outside sources and the continuing suspicion of problems with the house show that any reliance on [the agent's] representations was no longer justified." *Id.*

{¶ 22} Applying the law to the undisputed facts as set forth above, we find that an essential element of fraud is lacking, as appellants are unable to establish justifiable reliance. The record reflects that appellants were told by their agent, Linda Perry, that the home was a foreclosed property owned by a bank that had no first-hand knowledge of the property. Further, appellants are both well-educated, well-traveled individuals who have lived and worked in several foreign countries. They have purchased four other homes in the past and were represented by a real estate agent throughout the process of purchasing the Grassy Creek property. When viewing the property, Paul Fleck saw sandbags near the house and evidence of water damage in the finished basement where drywall, insulation and cabinetry had been removed. At deposition, Paul Fleck stated that when he saw the sandbags he "assumed it was to stop some water from getting into the house." Fleck also saw a sump pump in the finished basement. Appellants did not inquire of any nearby residents as to whether they knew of the creek flooding.

{¶ 23} Additionally, appellants' agent informed them of her conversation with the Wood County Engineer's Office wherein she was told it was likely the creek could flood again. Perry provided appellants with the "Standard Flood Hazard Determination" form for the property, which indicated that the land was in a "flood zone." The form indicated

that federal flood insurance was available on the property, but appellants declined to purchase it. Thereafter, appellants submitted a second offer on the property and asked the bank to perform a mold inspection and provide a report of prior insurance claims. When the bank declined to do so, appellants did not pursue the matter. Paul Fleck admitted at deposition that prior to closing he researched various options that might be available "to mitigate water entry into the house." Also at deposition, Fleck stated: "We didn't know that flooding would occur again but common sense would dictate that if water came in the first time, it might come again with a rain storm." As explained above, appellants executed a purchase agreement providing that the property was purchased in "as is" condition. The agreement granted appellants the right to obtain inspections of the property. They did not obtain a home inspection and closed on the property on June 20, 2008. Several days later, the property flooded.

{¶ 24} Based on the foregoing, we find that appellants should have known that the information supplied by Drews was, at a minimum, incomplete and they should have conducted a more thorough investigation of the flooding issue. Therefore, appellants have not proved justifiable reliance. Accordingly, we find no genuine issue of material fact and that appellees were entitled to judgment as a matter of law. Accordingly, the trial court did not err by granting appellees' motions for summary judgment and appellants' sole assignment of error is not well-taken.

{¶ 25} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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