



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00177-CV

BENJAMIN MEAD AND CLAIRE
MEAD

APPELLANTS

V.

PAUL GRAY AND LINDA GRAY

APPELLEES

FROM THE 158TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 16-02110-158

MEMORANDUM OPINION¹

I. INTRODUCTION

This is a summary-judgment appeal. Appellees Paul and Linda Gray built a large, lake-front home and about eight years later in May 2015 sold it to Appellants Benjamin and Claire Mead. Mead had been a licensed relator for over eight years at the time of the purchase. Before the sale, the Meads retained

¹See Tex. R. App. P. 47.4.

their own property inspector, whom Claire selected and whom she had used previously to inspect properties she had sold. The inspector performed an independent inspection of the home. His report noted, in part, “signs of minimal foundation settlement” in two areas of the home and documented “deficiencies” existed in the home, including hairline cracks and patching on interior walls, cracks in the exterior brick veneer, open caulk joints around the exterior sides of windows, a cracked floor tile, open grout joints and caulk separation in the kitchen’s backsplash, and deficiencies in five interior and three exterior doors. The Meads ultimately purchased the home; their purchase contract contained an “as is” clause.

After the Meads noticed cracks in the interior and exterior of the home, windows and doors that would not operate properly, and an unlevel floor upstairs, they contacted a foundation-repair contractor and, subsequently, sued the Grays for violations of the Deceptive Trade Practices Act (DTPA), for fraud in the inducement/fraud by nondisclosure, fraud in a real estate transaction, negligent misrepresentation, negligence, and gross negligence. The Grays filed a traditional motion for summary judgment asserting that, as a matter of law, the reliance and/or causation elements of all of the Meads’ claims² were conclusively negated for two reasons: the Meads obtained their own independent inspection

²The parties agree that reliance and/or causation are elements of each of the Meads’ DTPA, fraud in the inducement/fraud by nondisclosure, fraud in a real estate transaction, negligent misrepresentation, negligence, and gross negligence claims against the Grays.

and report, and the purchase contract contained an “as is” clause. The trial court granted summary judgment for the Grays on all of the Meads’ claims without stating the basis for the ruling and granted the Grays’ summary-judgment motion for attorney’s fees predicated on the purchase contract’s provision that the prevailing party in a suit relating to the contract is entitled to attorney’s fees.³

The Meads perfected this appeal and raise three issues. The Meads argue in two issues that neither their independent inspection nor the purchase contract’s “as-is” clause negate the reliance and/or causation elements of their claims. In their third issue, the Meads argue that the trial court erred by granting attorney’s fees to the Grays because the trial court erred in granting summary judgment for the Grays. For the reasons set forth below, we will affirm.

II. STANDARD OF REVIEW

Courts review a traditional motion for summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A

³The trial court signed three separate summary judgments: one on all claims except the claims for breach of contract and violation of Texas property code section 5.008(d); one on the Meads’ claims for breach of contract and violation of Texas property code section 5.008(d); and one on the Grays’ claim for attorney’s fees. See Tex. Prop. Code Ann. § 5.008(d) (West Supp. 2016). The Meads do not challenge on appeal the trial court’s summary judgment for the Grays on their claims for breach of contract and violation of Texas property code section 5.008(d). The Meads’ issues on appeal argue that the reliance and/or causation elements of their DTPA, fraud in the inducement/fraud by nondisclosure, fraud in a real estate transaction, negligent misrepresentation, negligence, and gross negligence claims were not conclusively negated. The Grays obtained severance of their summary judgments; the Meads’ claims against the other defendants, including their inspector, remain pending in the trial court.

traditional motion for summary judgment is granted only when the movant establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on the grounds expressly set forth in the motion. *Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). When reviewing an order granting a traditional motion for summary judgment, courts take evidence favorable to the nonmovant as true and indulge every reasonable inference from the evidence in favor of the nonmovant. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

III. THE INDEPENDENT INSPECTION AND REPORT NEGATED THE CAUSATION AND RELIANCE ELEMENTS OF THE MEADS' CLAIMS⁴

In support of their motion for summary judgment, the Grays offered deposition excerpts from the Meads in which they testified that they would not have purchased the Grays' property without having an independent inspection performed; Claire testified that she "trusted" her inspector. The inspector's report contains his professional expert observations, conclusions, and photographs, as well as warnings that when the report indicates a deficiency, it is "the client's"

⁴The Meads' brief points to copious summary-judgment evidence concerning their inspector; Claire alleges that she asked him numerous questions about the deficiencies, that he provided her with various reassurances, and even that he reduced the fee for his inspection because it was an easy inspection. Because the inspector is not a party to this appeal and because any reassurances by him concerning the deficiencies noted in his report do not alter the summary-judgment evidence that the existence of the deficiencies were documented in the report and therefore known to the Meads, we omit most of the Meads' summary-judgment evidence pertaining solely to their inspector. As previously mentioned, the Meads' suit against their inspector remains pending in the trial court.

responsibility to obtain further evaluations and/or cost estimates and that such further evaluations could lead to the discovery of additional deficiencies, which may involve additional repair costs.

The Meads concede in their brief that “Texas courts have consistently concluded that a buyer’s independent inspection precludes a showing of causation and reliance if it reveals to the buyer the same information that the seller allegedly failed to disclose.” As noted by the Meads, “This is consistent with the principle that a party who has actual knowledge of specific facts cannot have relied on a misrepresentation of the same facts.” See, e.g., *Birnbaum v. Atwell*, No. 01-14-00556-CV, 2015 WL 4967057, at *8 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, pet. denied) (mem. op.); *Volmich v. Neiman*, No. 02-12-00050-CV, 2013 WL 978770, at *6 (Tex. App.—Fort Worth Mar. 14, 2013, no pet.) (mem. op.); *Williams v. Dardenne*, 345 S.W.3d 118, 126 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Camden Machine & Tool, Inc. v. Cascade Co.*, 870 S.W.2d 304, 311 (Tex. App.—Fort Worth 1993, no writ); *Dubow v. Dragon*, 746 S.W.2d 857, 860 (Tex. App.—Dallas 1988, no writ).

To defeat application of this rule—that the Meads’ (buyers’) independent inspection precludes a showing of reliance and causation in their claims against the Grays (sellers) when the inspection reveals the same information that the buyers allege the sellers failed to disclose—the Meads raise two arguments. First, the Meads argue that the rule is inapplicable here because the Meads’ independent “inspection report did not disclose problems with the house

foundation,” which is the information the Meads contend the Grays, as sellers, failed to disclose or concealed. Second, the Meads argue that the Grays actively concealed information concerning prior foundation problems by failing to disclose prior problems in their “Seller’s Disclosure Notice,” by failing to disclose photos they had submitted to the Denton County Appraisal District (DCAD) in an effort to lower the appraised value of the home, and by failing to disclose an addendum to a January 2011 termite-inspection report. The Meads argue that this concealment by the Grays renders the general rule inapplicable.

In determining whether a buyer’s independent inspection conclusively negates reliance and causation in a buyer’s claim based on a seller’s failure to disclose information, courts look to whether the buyer ultimately possessed the same information and knowledge as the seller. See, e.g., *Birnbaum*, 2015 WL 4967057, at *8; *Williams*, 345 S.W.3d at 125–26. That is, regardless of whether the seller failed to disclose information or concealed information, when the buyer ultimately possesses that same information (albeit from a different source than the seller) and nonetheless proceeds to purchase the home, then the buyer cannot have relied on the seller’s failure to disclose or misrepresentation of those same facts in making the decision to purchase the home. Reliance and causation are negated as a matter of law in the buyer’s claims against the seller under such circumstances. *Birnbaum*, 2015 WL 4967057, at *8; *Volmich*, 2013 WL 978770, at *7; *Williams*, 345 S.W.3d at 126.

Concerning the Meads' argument that their inspector's report did not provide them with information that the home may have foundation issues, the report specifically documents that although the foundation was performing its intended function for the type, age, and location of the home, "signs of minimal foundation settlement were noted at the west side adjacent to the pantry and southwest corner of the kitchen." The report documents "deficiencies" on both interior and exterior walls:

INTERIOR WALL OBSERVATIONS- Typical hairline cracks and past patching were noted in areas.

EXTERIOR WALL OBSERVATIONS- Open areas were noted at the soffit overhang at the upper west side north and south of the front entry. Frieze board separation was noted at the upper west side adjacent to the southwest corner of the pantry. Brick veneer cracks were noted at the west side adjacent to the kitchen and above the overhead garage doors. Separation was noted at the vertical brick veneer expansion joint above the overhead garage doors.

The report noted a "deficiency" for a cracked floor tile near the rear patio door. "Deficiencies" were marked regarding the home's windows with the notation that "[o]pen caulk joints were noted at the exterior side of the windows in areas." "Deficiencies" were noted regarding five interior and three exterior doors. Three interior doors "rubbed" during operation or dragged on the carpet. Regarding exterior doors, the report noted damaged weather stripping at the door to the garage and open caulk joints at the exterior side of the front entry door casing, as well as that the upper east balcony door did not seal properly and had signs of water penetration on the lower portion of the door. The report documented other

“deficiencies,” including “[o]pen grout joints and caulk separation was noted at the western kitchen backsplash.” The report stated that the range exhaust fan in the kitchen “vibrated and scraped during operation” and noted a warped tread on the upper portion of the stairs. The report recommended corrections to each of these items.

These deficiencies noted in the Meads’ inspector’s report are the same problems the Meads claim that they did not know about and first discovered only after moving into the house; the Meads pleaded that “[a]fter [they] moved into the home, cracks appeared throughout the interior and exterior of the home, windows and doors would not operate properly, and the upstairs floor is noticeably unlevel.” We overrule the portion of the Meads’ first issue claiming that their inspector’s report did not disclose to them the same information that they allege the Grays failed to disclose.

Concerning the Meads’ argument that the four photos submitted by the Grays to the DCAD were concealed by the Grays and showed “significant foundation issues with the home[,]” the four photos document the same issues reflected in the Meads’ inspector’s report.⁵ In fact, the inspector’s report prepared for the Meads includes photographs of some of the deficiencies noted by the report, and the Grays’ cracked tile photo and the photo of the crack along

⁵The photos are of a cracked tile, a caulk separation on a cosmetic beam, a crack along the exterior of a window, and tape and bedding that pulled apart in the garage.

the exterior of a window are very similar to photographs contained in the inspector's report. Thus, again, the deficiencies noted in the Meads' inspector's report are the same problems that the Meads complain the Grays concealed from them by not disclosing the four pictures the Grays had submitted to DCAD. We overrule the portion of the Meads' first issue claiming that their inspector's report did not disclose to them the same information contained in the four photos submitted by the Grays to DCAD. *Compare Lesieur v. Fryar*, 325 S.W.3d 242, 247 (Tex. App.—San Antonio 2010, pet. denied) (holding reliance and causation negated as a matter of law in buyer's claims against seller because, although seller withheld from buyer "Adams report" documenting foundation problems, seller did not know anything more or different than buyer knew from report of independent inspector), *with DeVoll v. Demonbreun*, No. 04-10-00375-CV, 2012 WL 983107, at *9 (Tex. App.—San Antonio Mar. 21, 2012, pet. denied) (mem. op.) (holding reliance and causation were not conclusively negated in buyer's claims against seller because, although buyer obtained independent inspection, defects were not discoverable by inspection because "roof leaks were hidden by the heavy acoustic spray and the plumbing problems were concealed behind the wall" so that information about existence of defects was not equally available to buyer and seller).

Concerning the Meads' argument that the Grays failed to disclose information in their Seller's Disclosure Notice, the Meads point to Claire's affidavit. Claire's affidavit states, "My husband and I . . . (stupidly) assumed the

Grays would not lie on a seller's disclosure, but to our detriment, we trusted what the Grays had provided." Claire's affidavit also states, "I fully relied on the seller's disclosure and its representation of no foundation issues." But nowhere in Claire's affidavit or in the Meads' brief on appeal do the Meads point to any specific item in, or portion of, the Seller's Disclosure Notice that they allege was incorrectly or incompletely filled out by the Grays.

The Seller's Disclosure Notice addressed foundation issues in two spots. In one place, it provided four boxes and required the Grays to check one box indicating whether the foundation was "N/A" (for items the home did not have), "Working Condition," "Has Been Replaced," or "In Need of Repair." The Grays checked the "Working Condition" box. In another place, the Seller's Disclosure Notice states "Information About Foundation" and asks:

27. Has the Seller ever obtained a written report about the condition of the foundation from any engineer, contractor, inspector, or expert?

Yes No Unknown

- If "Yes", identify the report by stating the date of the report, the person or company who made the report, and its content:

28. Have repairs been made to the foundation of the Property since its original construction?

Yes No Unknown

- If "yes", explain what repairs you know or believe to have been made:

The Grays marked an X in the “No” boxes for both questions. Although the Meads claim these “No” answers are “untruthful” and “lies,” the Meads offer no summary-judgment evidence that the Grays ever obtained a written report about the condition of the foundation and offer no summary-judgment evidence that any repairs had ever been made to the foundation. By failing to point to any specific statement, falsity, or omission made by the Grays in their Seller’s Disclosure Notice, the Meads have failed to raise a genuine issue of material fact that somehow the Seller’s Disclosure Notice established that the Grays knew something more or different than the Meads did about the condition of the home. See, e.g., *Birnbaum*, 2015 WL 4967057, at *8 (affirming summary judgment for seller on reliance and causation elements of buyer’s claims because “[n]o evidence shows that either [the seller] or the realtors failed to disclose any knowledge or material facts concerning defective or unrepaired conditions in the condominium unit beyond those the [buyers] independently discovered before they purchased it); *Volmich*, 2013 WL 978770, at *7 (affirming summary judgment for seller on reliance and causation elements of buyers’ claims because buyers produced no controverting summary-judgment evidence “that [sellers] knew of the alleged roof leak when they completed the Seller’s Disclosure Notice” and because buyers’ independent inspection that revealed previous roof repairs, leaks, and moisture damage conclusively negated reliance and causation elements); *Williams*, 345 S.W.3d at 128 (holding reliance conclusively negated when, “[i]n sum, the reports disclosed to [the buyers] by

[the sellers] contain the same information as the Knight Engineering letter” that was not disclosed by the sellers); *Lim v. Lomeli*, No. 04-06-00389-CV, 2007 WL 2428078, at *4 (Tex. App.—San Antonio Aug. 29, 2007, no pet.) (mem. op.) (affirming summary judgment for seller on causation element of buyers’ claims because “[buyers] have failed to present more than a scintilla of evidence that [realtor] knew anything more or different than [buyers] did about the condition of the home”).

Concerning the Meads’ argument that the Grays concealed an addendum to a January 2011 termite inspection report, the form addendum listed “Foundation cracks” as one of twenty-nine possible conditions that may exist on property or in a home that are conducive to wood-destroying organisms. The termite inspector found no wood-destroying organisms. On the addendum, next to the possible condition of “Foundation cracks[,]” two boxes exist—one for “discovered” and one for “suspected/likely.” On the addendum completed for the Grays’ property, the box next to “suspected/likely” is marked. But the line immediately under the foundation-cracks-discovered-or-suspected/likely line states, “This report does not address the structural significance/insignificance of foundation cracks.” Thus, this addendum, even if concealed by the Grays, provides no information concerning any foundation problems; it states only that cracks in the foundation (whether because of normal settling or because of foundation problems) provide a condition conducive for wood-destroying organisms to enter the home. Contrary to the Meads’ contention, the

addendum—even if concealed by the Grays—does not raise a genuine issue of material fact that the Grays knew anything more or different about the foundation than what was known to the Meads.⁶ *Cf. DeVoll*, 2012 WL 983107, at *9 (holding summary-judgment evidence that “roof leaks were hidden by the heavy acoustic spray and the plumbing problems were concealed behind the wall” did raise genuine issue of material fact as to whether seller knew more about roof leaks and plumbing problems than buyer).

The Meads assert, however, that Claire’s affidavit—attached to their response as controverting summary-judgment evidence—raises a genuine issue of material fact on the reliance and causation elements of the Meads’ causes of action. We have thoroughly reviewed Claire’s affidavit in the light most favorable to the Meads. The affidavit, however, merely explains that Claire did not understand that the deficiencies marked by the inspector on his report were serious or were related to any foundation issues; she also states that she asked questions about the deficiencies in the report and that her inspector reassured

⁶The Meads attempt to link the termite report and the Seller’s Disclosure Notice together, arguing that the “Grays denied ever obtaining a written report about active termites or wood[-]destroying insects,” but “[d]uring this case, the Grays produced in discovery a termite inspection report for the house dated 1/17/2011 that specifically disclosed ‘suspected foundation cracks.’” But the Seller’s Disclosure Notice did not require the Grays to disclose the termite report because it was not a report about *active* termites or wood-destroying insects; the report reflected that the Grays’ home *did not have* wood-destroying insects. And, as set forth above, suspected foundation cracks were marked on the report as a condition conducive to wood-destroying organisms, and the report specifically stated that the report did not address the structural significance/insignificance of foundation cracks.

her. Claire also states in her affidavit that the Grays were untruthful in their Seller's Disclosure Notice concerning the foundation, and if they had been truthful, she would not have purchased the home. But, like the Meads' brief, Claire's affidavit points to no particular spot or place in the Seller's Disclosure Notice where she alleges that the Grays provided an untruthful answer. Claire's affidavit mentions the addendum to the January 2011 termite inspection report and the photos that the Grays provided to DCAD as summary-judgment evidence that the Grays fraudulently concealed foundation problems. We have addressed each of these contentions above.

In short, viewing the summary-judgment evidence in the light most favorable to the Meads, the Meads have failed to present more than a scintilla of evidence that the Grays knew anything more or different than the Meads did about the condition of the home's foundation. Accordingly, the trial court properly granted summary judgment for the Grays on the reliance and causation elements of the Meads' claims. We overrule the Meads' first issue.

IV. CONCLUSION

Because the Meads did not challenge on appeal the summary judgment granted for the Grays on the Meads' claims for breach of contract and violation of Texas property code section 5.008(d), we affirm the trial court's summary judgment on those claims.

Having overruled the Meads' first issue and affirmed the trial court's summary judgment for the Grays on the ground that the summary-judgment

evidence conclusively negates the reliance and/or causation elements of the Meads' claims under the DTPA, for fraud in the inducement/fraud by nondisclosure, for fraud in a real estate transaction, for negligent misrepresentation, for negligence, and for gross negligence, we affirm the trial court's summary judgment for the Grays on these claims. Having affirmed the trial court's summary judgment on the Meads claims under the DTPA, for fraud in the inducement/fraud by nondisclosure, for fraud in a real estate transaction, for negligent misrepresentation, for negligence, and for gross negligence, we need not address the Meads' second issue, challenging an alternative ground for summary judgment asserted by the Grays—that they were entitled to summary judgment based on the “as-is” clause in the purchase contract.⁷

Having overruled the Meads' first issue and having affirmed the trial court's summary judgment for the Grays on the Meads' claims under the DTPA, for fraud in the inducement/fraud by nondisclosure, for fraud in a real estate transaction, for negligent misrepresentation, for negligence, and for gross negligence, we overrule the Meads' third, conditional issue—asserting that if we reverse the trial court's summary judgment, we should also reverse the trial court's award of attorney's fees for the Grays.

⁷See, e.g., *Prudential Ins. Co. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995) (explaining that a valid “as is” agreement “prevents a buyer from holding a seller liable if the thing sold turns out to be worth less than the price paid because it is impossible for the buyer's injury on account of this disparity to have been caused by the seller”).

Having addressed the issues necessary for the disposition of this appeal,
we affirm the trial court's summary judgments.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and PITTMAN, JJ.

DELIVERED: May 4, 2017