

IN THE UTAH COURT OF APPEALS

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Sharree Rodgers,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20070094-CA
v.)	
)	
Floyd Asher and Melanie Asher,)	F I L E D
)	(May 22, 2008)
)	
Defendants, Third-party)	2008 UT App 183
Plaintiffs, and)	
Appellants,)	
)	
v.)	
)	
TLC Construction, Inc.,)	
)	
Third-party Defendant.)	

Second District, Layton Department, 040602561
The Honorable Thomas L. Kay

Attorneys: Edward M. Garrett, Salt Lake City, for Appellants
George K. Fadel, Bountiful, for Appellee

Before Judges Greenwood, Thorne, and Billings.

THORNE, Associate Presiding Judge:

Floyd and Melanie Asher appeal from a district court judgment in favor of Sharree Rodgers on a claim of breach of contract and fraud arising out of the Ashers' sale of a house to Rodgers without disclosing prior water problems. We affirm.

The Ashers raise multiple issues on appeal. First, they argue that the district court erred in failing to grant their motion for summary judgment. The basis for the Ashers' motion was that the real estate purchase contract (REPC) forming the basis of Rodgers's action was signed only by Melanie Asher, and only in her capacity as trustee of the Melanie Asher Trust. Accordingly, the Ashers argue, no legal liability can lie against them individually.

We disagree. The evidence below created, at the very least, a factual question as to whether the Ashers were individually liable to Rodgers. The REPC did not identify the Melanie Asher Trust as the seller of the property, and Melanie Asher signed that document without limiting her signature to her trustee capacity. See DBL Distrib., Inc. v. 1 Cache, LLC, 2006 UT App 400, ¶ 14, 147 P.3d 478 (holding that a "bare" signature creates a fact question as to individual liability despite preprinted language indicating corporate capacity). Additionally, the property disclosure form that formally denied any prior water problems in the house listed Floyd and Melanie Asher as the sellers and was signed and initialed by Melanie Asher with no indication of trustee status. Floyd Asher was also alleged to have made specific verbal misrepresentations to Rodgers about the house's prior history with water leakage, alternately stating that there had never been water in the house and that prior water leakage had been minimal and inconsequential. Finally, as the district court noted in its order denying the Ashers' motion for new trial on this issue, there was substantial evidence that various entities created by the Ashers, including the Melanie Asher Trust, were in fact alter-egos of the Ashers individually. For these reasons, it is clear that the Ashers were not entitled to summary judgment on this issue, and the district court appropriately denied their motion.

Second, the Ashers argue that there was insufficient evidence to support the jury's verdict in favor of Rodgers. The Ashers argue two supposed shortcomings in the evidence: (1) that the water leaking into the house in 2004 came from a different source than the water that entered the house in 2002, and (2) Rodgers was aware of the 2002 incident because the Ashers had informed Rodgers's real estate agent about it. These issues appear to be factual ones that were simply resolved against the Ashers by the jury.

However, even assuming that Rodgers was aware of some 2002 incident and that the water in the 2004 incident came from a different source, the jury could still have reasonably found for Rodgers. The evidence, viewed in a light most favorable to the jury verdict, supports a conclusion that the house was subject to water leaks at the time of sale; that the Ashers minimized the 2002 incident; that full disclosure would have resulted either in remedial action or Rodgers's failure to purchase the property; and that remedial action taken in response to the 2002 incident would have prevented the 2004 incident, even if the water in the two incidents came from different sources. Because there is evidence to support the jury verdict, we will not disturb that verdict despite other possible interpretations of the evidence. See Water & Energy Sys. Tech., Inc. v. Keil, 2002 UT 32, ¶ 2, 48 P.3d 888 ("On appeal from a jury verdict, we view the evidence

and all reasonable inferences drawn therefrom in the light most favorable to that verdict.'" (quoting Pratt v. Prodata, Inc., 885 P.2d 786, 787 (Utah 1994))).

Third, the Ashers complain that the jury was improperly instructed that the Ashers could be held individually liable for the acts of Asher Homestead, LLC if the jury determined that Asher Homestead, LLC was merely an alter-ego of the Ashers. The Ashers argue that there was no evidence at trial to support such an instruction. We disagree. The instruction stated that a corporation can be considered an alter-ego when "[t]here is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist" and "observance of the corporate form would sanction a fraud, promote injustice, or produce an inequitable result." Factors indicating the required unity of interest listed in the instruction included undercapitalization and use of the corporation as a facade for operations of the dominant shareholders. There appears to have been at least circumstantial evidence that would support the giving of the instruction, including the Ashers' individual dealings with Rodgers, the existence of multiple Asher entities and the transfer of title between them, and the underlying misrepresentation and fraud that was found by the jury.

Fourth, the Ashers argue that the damages awarded by the jury were excessive because Rodgers increased the cost of installing a drainage system by insisting on a lifetime warranty against future leaks. The Ashers argue, without citation to authority, that the measure of damages for injury to property is limited to the reasonable cost of restoration and cannot include the additional cost of a lifetime warranty.¹ We see no error here. Even if we were to agree with the Ashers' assertion as a general matter, the circumstances of this case are that Rodgers had both a particular aversion to water leakage due to prior bad experiences and a job that required Rodgers to be away from home for extended periods of time. Rodgers had made these concerns clear to the Ashers, and it was in this context that the Ashers fraudulently represented that the house had not had a water problem. Given these circumstances, Rodgers's procurement of a lifetime warranty appears reasonable, and we cannot say that its inclusion in the damages awarded by the jury, i.e., the total cost of the drain installation, was unreasonable or excessive.

Fifth, the Ashers argue that the trial court erred in allowing Rodgers's counsel to read a portion of Rodgers's log notes pertaining to the water problems to the jury during his

1. The warranty was not billed as a separate item but was merely a part of the total cost of the drain installation.

closing argument. However, Rodgers read from these same notes during her trial testimony without objection from the Ashers. We see no error in the district court's overruling of the Ashers' objection at closing argument because the Ashers' previous failure to object to the same testimony during Rodgers's testimony operated as a waiver of any objection to its further use in closing argument.² Cf. Franklin v. Stevenson, 1999 UT 61, ¶¶ 22-23, 987 P.2d 22 (discussing necessity of timely objection to preserve evidentiary issues). Further, because the notes were employed during the evidentiary stage of the trial, the Ashers had the opportunity to examine the notes and cross-examine Rodgers regarding their contents. And, if we were to find some error in Rodgers's counsel reading from the notes rather than arguing from memory, any error would likely be deemed harmless in light of the jury's previous exposure to the same information in the same format.

Sixth, the Ashers argue that Rodgers could not prevail on a claim for fraud because there was no evidence that Rodgers relied on any statement by the Ashers that there had never been water in the house. See Conder v. Hunt, 2000 UT App 105, ¶ 15, 1 P.3d 558 (listing elements of fraud, including reliance). The Ashers base this argument on allegedly uncontroverted testimony that Floyd Asher had informed Rodgers's real estate agent that a small amount of water had entered the basement through a window well. Assuming that this is the case, we see no resulting flaw in the jury's fraud verdict. The jury could reasonably have found that the amount of water entering the basement through the window well was far greater than that disclosed by Asher, that the disparity between the truth and Asher's disclosure was substantial enough to amount to a material misrepresentation, and that Rodgers reasonably relied on that misrepresentation to her detriment. Thus, viewing the evidence and reasonable inferences in a light most favorable to the jury verdict, the jury could still have properly found that the Ashers acted fraudulently by failing to disclose the full extent of the prior water problem. See Water & Energy Sys. Tech., 2002 UT 32, ¶ 2 (stating deferential standard of review of jury verdicts).

Finally, the Ashers argue that the district court's award of attorney fees to Rodgers is improper because Rodgers failed to segregate work performed in pursuit of her successful versus unsuccessful claims. See Eqgett v. Wasatch Energy Corp., 2004 UT 28, ¶ 36, 94 P.3d 193 ("In order to recover any attorney fees at all, the prevailing party must apportion or separate out the recoverable fees from the nonrecoverable ones."); see also

2. We note that counsel's objection at closing argument was that the notes were not in evidence.

Cottonwood Mall Co. v. Sine, 830 P.2d 266, 269-70 (Utah 1992). We disagree with the Ashers' characterization that Rodgers's amended complaint presented two separate claims and that Rodgers was only successful on one of those claims. Rather, Rodgers presented a single claim for misrepresentation and breach of contract, upon which she prevailed and recovered substantial damages. Rodgers's assertion of other damages in the amended complaint that were not awarded by the jury does not serve as a basis for reducing or precluding attorney fees when Rodgers otherwise successfully prosecuted her case.

For these reasons, we affirm the judgment of the district court. Because Rodgers prevailed on appeal and was awarded attorney fees below, we remand this matter for an appropriate determination and award of Rodgers's attorney fees on appeal.

William A. Thorne Jr.,
Associate Presiding Judge

WE CONCUR:

Pamela T. Greenwood,
Presiding Judge

Judith M. Billings, Judge