Kaiser v. Cyr, No. 247-11-06 Oecv (Teachout, J., Dec. 29, 2008)

STATE OF VERMONT
ORANGE COUNTY

PHILLIP G. KAISER and	)	
BEVERLY KAISER	)	
	)	**Orange Superior Court**
	)	**Docket No. 247-11-06 Oecv**
v.	)	
	)	
JOSEPH A. CYR,	)	
RITA A. CYR, and	)	
ROBERT J. GAUTHIER	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came before the court for final hearing on September 22, 2008. Plaintiffs were present and represented by Attorney Andrea L. Gallitano. Defendants Joseph and Rita Cyr were present and represented by Attorney John F. Nicholls. Defendant Robert J. Gauthier was present representing himself pro se. Post-trial memoranda of law were filed by both attorneys.

Plaintiffs purchased property in the Town of Washington consisting of a residence, barns, and land. They seek contract, consumer fraud, and other remedies from the sellers of the parcel and the realtor based on a claim that the parcel was represented to consist of 75 acres +/-, but a survey completed after the sale revealed that the parcel contains only 39 acres.

Findings of Fact

Plaintiffs Phillip and Beverly Kaiser (hereinafter "Kaisers"), who had owned a home and rural property in Moretown, Vermont since the 1970's, began looking in 2002 for another property to buy so that they could move away from the Moretown landfill next to their home. In May of 2004, they contacted realtor Joan Gingras. On May 10, 2004, Ms. Gingras and the Kaisers signed a disclosure showing the Kaisers that Ms. Gingras was agent for sellers and other brokers, and not their agent as buyers. Ms. Gingras then took the Kaisers to see the Cyr property in Washington, Vermont where they met Robert Gauthier, the seller's listing agent for Defendants Joseph and Rita Cyr (hereinafter "Cyrs"). It is the Cyrs' home property that is at issue in this case.

The Cyrs bought in 1949, and their deed identified the property as a 220 acre parcel located on both the east and west sides of Route 110. The residence and barns were on the west side of Route 110. They sold off various lots over the years. Specifically, in 1982, they sold 79.7 surveyed acres on the east side of the road to the FAA. In the late 1980's, they sold 48.4 surveyed acres to the Johnson Company for logging. Some time in the period 2002-2004, they conveyed a 1.6 acre surveyed piece on the east side to a relative. Subtraction of these acreages from the original 220 acres leaves 90.3 acres. Their 2003 tax bill shows the Town used an acreage figure of 97.96 acres on both sides of the road.

On the east side of the road, the Cyrs owned, in 2004, a 4.3 acre parcel that had been surveyed in preparation for subdivision but not yet conveyed, and a 21.66 acre parcel that had been surveyed. It was on this remaining piece of land that they intended to build a new home for themselves. Thus, on the east side they owned 4.3 + 21.66 = 25.96 acres.

If their original 220 acre figure was correct, the land on the westerly side would have been 90.3 – 25.96 = 64.34 acres. If the figure from the tax bill is used, the balance would be 97.96 – 25.96 = 72.00 acres for the west side.

The property consists of open land with a residence and outbuildings fronting on the westerly side of Route 110. The land then slopes downward away from the road, and the open land gives way to trees. There are four corners, two on Route 110 and two on the back end of the property.

The Cyrs began attempting to sell their home property on the west side of Route 110 in 2000. After two unsuccessful listing attempts with other realtors, they contacted Robert Gauthier, a realtor in business as Robert J. Gauthier Real Estate. They told him that they wished to sell it for $297,000. At the time they listed it with Mr. Gauthier, they did not know the exact acreage. Mr. Cyr estimated it at 75 acres, based on the town records.

Mr. Gauthier went to the town records to check basic facts about the property before listing it. His interpretation of the town records was that the Cyrs were taxed on 98 acres, and that they owned 25 acres on the east side of Route 110. 98 – 25 = 73, and he concluded that the Cyrs' acreage figure of 75 acres for the west side land was reasonable, and he used it to describe the property on the MLS internal listing sheet, which also showed that the property was not surveyed.

On the Kaisers' first visit to the property with Mr. Gauthier, Mr. Cyr drove them along Route 110 and pointed out the southeast corner from the car. This corner is on Route 110 at the southern end of the property, toward Chelsea. He then drove them into the open field where they stood on a knoll and he pointed generally left and back toward the southwest corner, and said the corner was "down there," marked by a stone wall. He then pointed generally right and back, indicating the general direction of the northwest

corner. He then drove them along Route 110 north toward Washington and pointed out the northeast corner, on Route 110, but he made a mistake: he indicated that an abandoned road at that location was on the Cyr property, whereas it was later determined that at least part of it was not. He then drove them down the abandoned dirt road toward the northwest corner, but they encountered a tree across the road and stopped. He indicated that the corner was "down there," 200-300 yards further. They did not get out of the car and continue to it on foot. The Kaisers did not ask to walk the boundaries, and neither the Cyrs nor Mr. Gauthier took them to do so. They returned to the house to talk.

The Kaisers visited the property a second time with Mr. Gauthier and Ms. Gingras, approximately two weeks later. They did not walk the perimeter of the property.

The evidence is clear that a conversation took place on one of these visits between the Kaisers and Mr. Gauthier, while standing out in the field, in which the Kaisers asked Mr. Gauthier how he knew the amount of acreage. He answered that you could not know without a survey. He also indicated that the property included wooded area "down there." While there is conflicting evidence about whether this took place on the first or second visit, there is no dispute that it took place. The court finds that it is more likely than not that it took place on the first visit.

On May 23, 2004, the Kaisers signed the Seller's Property Information Sheet, which stated that the property was not surveyed, but that the boundaries were marked. There is no evidence that the boundaries were not marked. The boundaries were all readily ascertainable, and the size of the property was visible. The property was developed and had many characteristics affecting market value.

On June 14, 2004, the Kaisers signed a written offer for the full asking price of $297,000. It was a standard form realtor's contract that had been prepared by Ms. Gingras, with an Addendum, also on a standard realtor's addendum form. The Kaisers had had their attorney, Dorothy Helling, review it before they signed it. The property was described as: "All of the land and buildings on the westerly side of Route 110 with 75 acres +/-; Property address: [Address redacted], Washington, VT 05675." The Addendum included terms that the Cyrs would remain in the house for one year while the Kaisers had use of the barns and included a contingency based upon the Kaisers' sale of their home. Attorney Helling added a handwritten paragraph 7 following the six typewritten paragraphs of the Addendum. Paragraph 7 stated: "Property must be separated by listers from adjacent property and assigned a grand list value and tax rate solely for this property before closing." The Kaisers signed the contract and Addendum on June 14, 2004. However, on June 15, 2004 the Kaisers signed an Addendum No. 2 that specifically deleted #7 of Addendum 1. The Cyrs signed the contract and both addenda on June 16, 2004.

The closing took place in July, 2004. The description of the property in the deed makes no reference to an amount of acreage. The property transfer tax return, the seller's certification, and the lease agreement between the parties all describe the property as a

house and buildings on 75 +/- acres. Pursuant to the contract, the Cyrs occupied the premises, except for one barn, for the next year while they built themselves a new house on their remaining land across the road. The Kaisers spent part of the winter in Florida.

In the fall of 2004, the Kaisers contacted Jonathan Abst, a surveyor, to prepare a professional survey of what they had purchased. He finished his survey in May of 2005. His survey shows that the actual size of the parcel is 38.77 acres. His results are not disputed.

The Kaisers presented testimony from a real estate appraiser that 36 acres of wooded remote land with limited access in July of 2004 would have been worth $42,000. In his opinion, diminishing the July, 2004 sale price of $297,000 by $42,000 for the missing 36 acres (75-39=36) produces a fair market value of $255,000 for the parcel actually sold.

There is no testimony that either of the Cyrs or Mr. Gauthier made any willfully false or deceptive statements, or that they intended any ill will to the Kaisers. The Kaisers believe that they were entitled to rely on a statement by a farmer about how much land he owned, and a statement by a realtor about how much land he was selling.

Conclusions of Law

Plaintiffs have set forth several causes of action. The complaint specifies that the first two claims (breach of contract and breach of express warranty) involve only the Cyrs, and that Plaintiffs seek damages on the remaining claims (unjust enrichment, constructive fraud, negligent misrepresentation, consumer fraud, and "bad faith") from both the Cyrs and Mr. Gauthier.

Mr. Gauthier filed a counterclaim based on abuse of process and defamation. However, he did not introduce evidence in support of these claims, and they are therefore dismissed with prejudice.

Breach of contract claim against Cyrs

Plaintiffs contend that the Cyrs breached the sale contract by selling a property that did not contain "75 acres +/-" as represented in the contract, but rather contained 38.77 acres. Plaintiffs seek abatement of the purchase price as damages, relying upon the appraiser's testimony that 36 acres of remote wooded land with limited access was worth $42,000 in July 2004.

There are a number of reported cases involving discrepancies between the number of acres estimated in a contract for the sale of land, and the number of acres actually sold. *Cunningham v. Miller*, 150 Vt. 263 (1988); *Bourne v. Lajoie*, 149 Vt. 45 (1987); *Corti v. Lussier*, 140 Vt. 421 (1981); *Shavell v. Thurber*, 138 Vt. 217 (1980); *Moonves v. Hill*, 134 Vt. 352 (1976); *Enequist v. Bemis*, 115 Vt. 209 (1947); *Darling v. Osborne*, 51 Vt.

148 (1878). The general rule that emerges from these cases is that rescission may be available to the injured party under certain defined circumstances when there is a palpable discrepancy between estimated acreage and the actual quantity of land.

Plaintiffs do not seek rescission of the contract. Instead, they seek money damages in the form of abatement of the purchase price. Money damages are not available as a contractual remedy to a buyer of an identified parcel who shows a discrepancy between the number of acres estimated in a contract and the number of acres actually sold. *Cunningham*, 150 Vt. at 267; *Moonves*, 134 Vt. at 354. The reason is that abatement of the purchase price changes the terms of the parties' bargain. *Moonves*, 134 Vt. at 354. The value of a property is frequently influenced not only by acreage, but also by the value of buildings, improvements, location, neighborhood, slope, access, frontage, view, or any number of other considerations or characteristics. *Id.*

Reducing the price in an amount "corresponding" to the reduced acreage does not necessarily reflect the other valuable characteristics of the property, or the bargain struck by the parties. For these reasons, the general rule is that buyers "are not entitled to a monetary recovery while retaining the property." *Cunningham*, 150 Vt. at 267.

Plaintiffs argue that abatement is appropriate because the sale was for a specific number of acres, and because the exact acreage was a determining factor in the sale.

The facts show that the sale was for an identified parcel of land containing a residence and outbuildings, rather than for a specific number of acres. The sale was for a rural property with a residence, barns, land, and other features. The contract described the property to be sold as "all of the land and buildings on the westerly side of Route 110 with 75 acres +/-" at the specified address, which suggests the sale of an identified homestead rather than sale of a specific number of acres. The property was wholly visible at the time of the transaction, the boundaries were identified, and the parcel actually sold was the one identified in the contract. *Moonves*, 134 Vt. at 353.

The facts do not show that a specific number of acres was central to the Plaintiffs' agreement to buy, despite personal thoughts and plans they may have had in mind. The contract describes the sale of a whole property with residential buildings and improvements; the inclusion of the estimated acreage figure is descriptive in a supplementary manner, rather than as an identification of the basis of the bargain. These circumstances are in contrast to those in *Bourne v. Lajoie*, 149 Vt. 45, 47, 51 (1987), in which buyers required 160 tillable acres to support their dairy herd, with each tillable acre a material component of the bargain.

Moreover, the value of the property did not consist solely of its acreage, but rather was affected by the residence and outbuildings, as well as other considerations including location. The bargain was not struck on a price-per-acre basis, and there is no evidence that the sale price would have been $42,000 less but for the acreage discrepancy. Under these circumstances, reducing the purchase price in an amount "corresponding" to the reduced acreage would not reflect the bargain struck by the parties.

The court concludes that abatement of the purchase price is an unavailable remedy under the principles of the cases cited above. Plaintiffs have sought only abatement of the purchase price, and do not seek rescission of the contract. It is therefore unnecessary to undertake an analysis to determine whether rescission would be appropriate in this case. *Cunningham*, 150 Vt. at 267.

Breach of express warranty against Cyrs

Plaintiffs contend that the Cyrs breached a promise to sell 75 acres, but do not specify the representation upon which this claim is based. There is no breach of express warranty with respect to the contract for the reasons stated above. The policies expressed in *Moonves* preclude a claim for money damages.

Neither can a breach of warranty claim succeed based on the terms of the warranty deed. The deed does not contain any language or promises regarding the number of acres conveyed, but rather describes the property as "all of the remaining lands and premises of the grantors located on the general westerly side of Vermont Route 110 in the Town of Washington, Vermont." Therefore there can be no breach of an express warranty with respect to the deed.

Unjust enrichment against Cyrs and Gauthier

Unjust enrichment is a remedy available where there is no enforceable agreement between the parties, and the cause of action is one of implied or quasi-contract. Calamari & Perillo, The Law of Contracts 2 (3d ed. 1987); *DJ Painting, Inc. v. Baraw Enters., Inc.*, 172 Vt. 239, 242–43 (2001); *In re Estate of Elliott*, 149 Vt. 248, 252–53 (1988). It may be considered under circumstances where there is a contract that is unenforceable, or in the absence of a specific contract, *Johnson v. Harwood*, 2008 VT 4, and a contract is implied because it would be inequitable for a defendant to retain a benefit received.

Plaintiffs have not shown a basis for a quasi-contractual cause of action against the Cyrs, as there was an express contract governing the relationship between the sellers and the buyers, and available relief for a breach of that contract based on an acreage discrepancy does not permit the award of money damages. *Moonves*, 134 Vt. at 354.

Plaintiffs have also not shown a basis for a quasi-contractual cause of action against Mr. Gauthier He did not represent the Plaintiffs or otherwise act on their behalf, or obtain a benefit from them. He was paid by the Cyrs for services to them, and the Cyrs' relationship with the Plaintiffs was based on express written contract.

Constructive fraud against Cyrs and Gauthier

Fraud normally consists of a fraudulent misrepresentation of fact for the purpose of inducing another to act in reliance on it, and is actionable so long as the recipient's reliance upon the misrepresentation is justifiable. Restatement (Second) of Torts § 525.

Actual fraud requires an intent to defraud or mislead. *Sugarline Assocs. v. Alpen Assocs.*, 155 Vt. 437, 444 (1990) (internal quotations omitted). Constructive fraud does not require intent to mislead so long as the other elements of fraud are met. *Id.* There is no evidence of intent to defraud or mislead in this case, so the only possible claim is one of constructive fraud.

"Constructive fraud may occur where a wrongful act injures another but is done without bad faith or a malevolent purpose on the part of the perpetrator. It may be found in cases involving misrepresentations that do not rise to the level of deceit, or actual fraud (citations omitted), and in cases where a party in a position of superior knowledge or influence intentionally gains an unfair advantage at the expense of another person." *Hardwick-Morrison Co. v. Albertsson*, 158 Vt. 145, 150 (1992). Plaintiffs contend that Defendants had superior knowledge of the property, and intentionally gained an unfair advantage in the transaction by misrepresenting the number of acres to be sold. The claim of superior knowledge is based upon the assertion that the Cyrs are farmers who knew how much land they owned, and how much land they had left after making several outconveyances, and that Mr. Gauthier is a real estate agent who knew how much land he was selling.

Constructive fraud requires proof that the defendant knew or believed that the representation was false or inaccurate when made. Restatement (Second) of Torts § 526. Proof of scienter cannot simply be inferred from the mere fact that the statement turned out to be inaccurate. *Cunningham*, 150 Vt. at 266. In this case, Plaintiffs have not shown any evidence that either the Cyrs or Mr. Gauthier knew that their statements regarding the size of the property were false or inaccurate to the extent of the difference between 75 +/- and 39 acres.

The Cyrs estimated the number of acres by relying on town tax information, which indicated the size of the property on the westerly side of the road to be about 72 acres. The Cyrs paid taxes on their property as if this number were correct, and had no reason to believe that the tax maps were substantially inaccurate. It is reasonable to infer that if they had known that they owned only 39 acres on the western side of Route 110, they would not have willingly paid taxes on nearly twice that amount. The fact that the Cyrs were farmers does not mean that they in fact knew the actual number of acres they owned. Plaintiffs have not proved that the Cyrs had superior knowledge.

With respect to Mr. Gauthier, he did not simply accept the Cyrs' estimation of acreage; he checked the town records himself. The town records showed that the Cyrs were taxed on 97 acres and that they owned 25 acres on the east side of the road. Mr. Gauthier therefore accepted the estimation of 75 acres as reasonable and used it. There is no evidence that Mr. Gauthier knew or had any reason to know that the estimate was wrong.

Furthermore, Mr. Gauthier did not falsely represent that the acreage was based on a survey. He told Plaintiffs that the only way to know whether the acreage was accurate was by conducting a survey. Real estate agents are not under a duty to conduct a survey

before listing a property. See *Cunningham*, 150 Vt. at 266 (a broker is not guilty of fraud for making untrue statements based on information supplied by the seller); *Carter v. Gugliuzzi*, 168 Vt. 48, 55 (1998) (broker's duty to disclose extends only to material facts within his or her knowledge); *Lopata v. Miller*, 712 A.2d 24, 31 (Md. Ct. App. 1998) (real estate agents do not owe a duty to verify lot size information relayed to them by the seller).

Plaintiffs have not met their burden of proving that Defendants knew that the acreage estimation was false and therefore cannot succeed on their claims for constructive fraud.

Negligent misrepresentation against Cyrs and Gauthier

The elements of negligent misrepresentation are that one who (1) in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, (2) supplies false information (3) for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them (4) by their justifiable reliance upon the information, if the representer (5) fails to exercise reasonable care or competence in obtaining or communicating the information. Restatement (Second) of Torts § 552(1); *Howard v. Usiak*, 172 Vt. 227, 230–31 (2001) (quoting *Limoge v. People's Trust Co.*, 168 Vt. 265, 268–69 (1998)).

Plaintiffs contend that the Cyrs and Mr. Gauthier negligently estimated the number of acres in the property based on "guess work and unreliable town records," and that Plaintiffs relied on those representations to their detriment.

The fourth required element is justifiable reliance upon the information represented. The evidence is not clear that Plaintiffs actually relied upon the figure of 75 acres in deciding to purchase the property. In their pre-contract conversations, they did not do more than ask one question about the reliability of the 75-acre figure, and were told it was not reliable. The boundaries were wholly visible so that property size could be evaluated by themselves or any consultant on their behalf, and Plaintiffs were told that the property had not been surveyed and that the only way of knowing the exact acreage was by conducting a survey. Plaintiffs were not justified in relying upon the 75-acre estimation as fact merely because Mr. Cyr was a farmer and because Mr. Gauthier was a real estate agent, when they could see the property for themselves.

Moreover, the fifth element of negligent misrepresentation requires proof that Defendants failed to exercise reasonable care or competence with respect to the acreage figure. "What is reasonable is, as in other cases of negligence, dependent upon the circumstances. It is, in general, a matter of the care and competence that the recipient of the information is entitled to expect in the light of the circumstances and this will vary according to a good many factors." *Limoge v. People's Trust Co.*, 168 Vt. 265, 270 (1998) (quoting Restatement (Second) of Torts § 552(1), cmt. e).

Defendants showed the Plaintiffs the actual extent of the property as it was physically laid out on the ground so Plaintiffs had full opportunity to evaluate acreage for themselves. Defendants' reliance on the tax maps was reasonable, in the light of the use of the tax maps and the history of the property and outconveyances. The only way of arriving at a more accurate figure would have been to conduct a survey of the property, and the Defendants had no duty to do that. Mr. Gauthier clearly informed the Plaintiffs that there was no survey and the only way to know whether the acreage was accurate was to perform a survey. Plaintiffs have not met their burden of showing that Defendants failed to exercise reasonable care or competence with respect to the representation of acreage.

Consumer fraud against Cyrs and Gauthier

The Consumer Fraud Act prohibits "unfair or deceptive acts or practices in commerce." 9 V.S.A. § 2453(a). Under the Act, a plaintiff must show that a defendant made a representation likely to mislead the consumer, that the plaintiff interpreted the representation reasonably under the circumstances, and that the misleading nature of the representation was likely to affect the plaintiff's conduct or decision with respect to the transaction. *Vastano v. Killington Valley Real Estate*, 2007 VT 33, ¶ 8, 182 Vt. 550 (mem.).

The Act allows recovery from the "seller, solicitor or other violator" responsible for the deceptive commercial act. 9 V.S.A. § 2461(b). The statute defines a "seller" as "a person regularly and principally engaged in a business of selling goods or services to consumer." *Id*. § 2451a(c). The terms "solicitor or other violator" are not defined by statute, but are given their plain meaning so that the Act applies to anyone engaged in an unfair or deceptive commercial practice. *Sawyer v. Robson*, 2006 VT 136, ¶ 12, 181 Vt. 216.

The CFA does not apply to the Cyrs, who were private sellers of an individual home, and are not regularly and principally engaged in commerce. *Lantner v. Carson*, 373 N.E.2d 973, 977 (Mass. 1978); see also *Carter*, 168 Vt. at 54 (differentiating between private vendors and real estate brokers for purposes of determining liability under the CFA). The CFA is intended to deter unfair and deceptive business practices, and to "encourage a commercial environment highlighted by integrity and fairness." *Gramatan Home Investors Corp. v. Starling*, 143 Vt. 527, 536 (1983). These purposes would not be furthered by applying the CFA to individuals who sell their own residences, as they are not regularly engaged in the business of selling homes.

Mr. Gauthier, as a realtor, qualifies as a proper defendant for a consumer fraud claim. *Carter*, 168 Vt. at 54.

The first element of consumer fraud requires a showing of a representation likely to mislead the consumer. When determining whether a representation is deceptive, the representation must be interpreted in the context of all of the other facts communicated by the defendant, and the plaintiff must show that the representation was deceptive in

light of all of the information they were given. *Jordan v. Nissan North America, Inc.*, 2004 VT 27, ¶¶ 7–8, 176 Vt. 465.

Plaintiffs contend that this element is met by proof that the Defendants inaccurately represented that the property contained "75 acres more or less." The court cannot conclude, however, that this representation was deceptive in light of all of the information that Mr. Gauthier gave the Plaintiffs. Mr. Gauthier expressly told them that there was no way to know the exact amount of acreage without conducting a survey. The representations regarding the acreage estimations were not deceptive because the consumers (Plaintiffs) were expressly informed that they were only estimations, and the entire extent of the land area was pointed out to the plaintiffs with marked boundaries identified.

Plaintiffs argue that Mr. Gauthier's representations were deceptive because he did not tell them to get a survey. However, failure to make such a recommendation did not amount to a deception about the size of the property where the boundaries were marked and observable, where town records showed the property to be close to 75 acres, and where Plaintiffs were told that the property had not been surveyed. Given this context, the representation was not deceptive.

Although the CFA does not require a showing of intent to mislead, *Winton v. Johnson & Dix Fuel Corp.*, 147 Vt. 236, 244 (1986), this does not require the conclusion that an erroneous statement is deceptive when the defendant reasonably believed that the representation was accurate. *Byrd v. South Meadow Housing Assocs.*, No. 2005-228 (unpub. mem.) (Vt. Nov. 2005).

Bad faith against Cyrs and Gauthier

Plaintiffs' final claim is for "bad faith." Based on the allegations in the complaint and in the trial memorandum filed September 18, 2008, the court interprets this as a claim against the Cyrs for breach of the implied covenant of good faith and fair dealing. The facts do not show that the Cyrs intended any ill will to Plaintiffs, or that they violated the "community standards of decency, fairness or reasonableness that the covenant of good faith and fair dealing seeks to protect." *Boulton v. CLD Consulting Eng.*, 2003 VT 72, ¶ 12, 175 Vt. 413. Moreover, there was no contract between the Plaintiffs and Mr. Gauthier that would support such a claim against him.

Punitive Damages

Plaintiffs have not proved grounds for compensatory damages on any count, and are therefore not entitled to recovery for punitive damages. Additionally, grounds have not been shown for punitive damages.

ORDER

For the foregoing reasons,

1) Judgment is entered in favor of Defendants by separate document, and

2) Mr. Gauthier's counterclaims are dismissed with prejudice.

Dated at Chelsea, Vermont this ____ day of December, 2008.

_____
Hon. Mary Miles Teachout
Presiding Superior Court Judge

_____
Hon. Maurice Brown (as to facts)
Assistant Judge