STATE OF VERMONT
WINDSOR COUNTY, SS

Peter Dernier Nicole Dernier Plaintiffs v. Mary Mitchell Real Estate, LLC Claudia Harris Matthew & Merry Kujovsky Defendants	SUPERIOR COURT Docket No. 635-9-07 Wrcv

DECISION ON MOTION FOR RECONSIDERATION

Plaintiffs Peter and Nicole Dernier filed a complaint alleging that they recently purchased a home from the defendants, and that during the negotiations, the defendants failed to disclose an incident involving petroleum contamination in the residential water supply. The plaintiffs seek damages under theories of consumer fraud, actual fraud, and negligent misrepresentation. In August 2009, this court denied the plaintiffs' motion for summary judgment for the reason that the record showed genuine issues for trial that precluded the establishment of liability as a matter of law. The present matter before the court is the plaintiffs' motion for reconsideration.

The following facts were established for purposes of summary judgment. Defendants Matthew and Merry Kujovsky were the owners of residential property. In April 2003, there was an oil tank spill on the neighboring property.

ANR tested the defendants' water supply shortly after the spill. The test revealed the presence of six petroleum compounds in the groundwater at concentrations which were well below the federal and state advisory standards—e.g., MTBE was found at concentrations of 2 parts per billion, whereas the advisory standard is 40 parts per billion. Nevertheless, ANR offered free bottled water to the defendants and advised them that "mixtures of chemicals in a water supply may be below advisory concentrations, but still might pose a health threat, particularly to special populations such as children."

ANR then engaged in remediation efforts on the neighboring property. Subsequent testing of the Kujovsky well in August 2003 and February 2004 showed that two petroleum compounds, including MTBE, were still present in the well, but that the concentrations were declining. A final test in July 2004 showed that there was no longer any petroleum contamination in the water supply. ANR accordingly told the defendants that it would continue to monitor the well for the rest of the year, and that if no additional contaminants were found, it would reevaluate whether additional monitoring or water deliveries were warranted.

The defendants did not hear from ANR again about any further testing. The deliveries of free bottled water apparently continued, however, until the family requested discontinuance sometime shortly before they sold the property to the Derniers in October 2005. It is disputed whether the defendants intentionally or negligently concealed the bottled water from the Derniers during the sale negotiations.

The defendants prepared a sellers' information property report (SPIR) in connection with the listing of their home for sale in 2005. The following questions and answers appeared on the defendants' completed form:

> Q: Has the water been tested for coliform bacteria?
> A: Yes. July 2004.
> Q: By whom?
> A: Agency of Natural Resourcse
> Q: Results?
> A: None.
>
> Q: Has any other water quality or water chemistry testing been done?
> A: Yes. July 2004.
> Q: By whom?
> A: Agency of Natural Resources
> Q: Results?
> A: Nothing found.
>
> Q: Please explain any other problems you have had with your water system, including water quality or quantity?
> A: [Left blank]
>
> Q: Are you aware of any off-site conditions in your neighborhood/community that could adversely affect the value or desirability of the property, such as noise, proposed major new development, relocation or major reconstruction of roads or highways, proposed zoning changes, etc.?
> A: No.
>
> Q: Is there anything else that should be disclosed about the property?
> A: No.

Defendant Claudia Harris was the listing agent for the sale. She had also been the listing agent in the 2003 sale of the neighboring property, so she was aware of that there had been an oil spill next door. She was also aware that low levels of contamination had been found in the defendants' well. For purposes of summary judgment, however, it is established that she was under the impression that the situation had been completely resolved, and that the oil spill did not cross her mind when she reviewed the SPIR.

Plaintiffs purchased the property and lived in the home for about a year and a half before learning about the oil spill. They had a water test done which showed that there were no petroleum contaminants in the water. They have not alleged any adverse health effects from drinking the water, but contend that they would not have purchased the home if they had known about the oil spill. They also contend that their property value has been diminished.

On these facts, the plaintiffs seek a ruling that the defendants violated the consumer fraud statute by failing to fully disclose the prior petroleum contamination of the water supply.

Consumer Fraud

The Consumer Fraud Act prohibits "unfair or deceptive acts or practices in commerce," 9 V.S.A. § 2453(a), and is intended to "protect this state's citizens from 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). In order to establish a violation of the CFA, the plaintiffs must demonstrate that (1) there was a representation or omission that was deceptive or likely to mislead them; (2) their interpretation of the representation was reasonable under the circumstances; and (3) the misleading representation or omission was material in that it was likely to affect their purchasing decision. *Greene v. Stevens Gas Serv.*, 2004 VT 67, ¶ 15, 177 Vt. 90.

The CFA operates under an objective standard. The first element requires the consumer to prove that "the representation or omission had the tendency or capacity to deceive a reasonable consumer" when viewed in light of all the circumstances, and the second element measures the reasonableness of the plaintiff's interpretation. *Jordan v. Nissan N. Am., Inc.*, 2004 VT 27, ¶¶ 5–8, 176 Vt. 465. The third element, of materiality, is also "generally measured by an objective standard, premised on what a reasonable person would regard as important in making a decision." *Carter v. Gugliuzzi*, 168 Vt. 48, 56 (1998).

The plaintiffs contend that they have established these elements as a matter of law under *Vastano v. Killington Valley Real Estate*, 2007 VT 33, 182 Vt. 550 (mem.). In that case, CFA liability was established where the sellers failed to disclose that the water well was being monitored on an ongoing basis for possible gasoline-related contamination from a nearby leaking underground storage tank. The Vermont Supreme Court explained that this information was material as a matter of law because "a reasonable person would consider the information possessed by [the sellers]—that the well of their prospective home was being monitored on an ongoing basis for possible gasoline contamination from a nearby LUST site—to be important in deciding whether to purchase the property or calculating how much to pay for it." *Id.*, ¶ 9 (emphasis added). In reaching this conclusion, the Court relied on a position statement from the FTC indicating that omissions in real estate transactions are presumptively material when they "significantly involve health, safety, or other areas with which the reasonable consumer would be concerned." *Id.*, ¶ 10 (citation omitted).

It is true that both *Vastano* and the present case involve the topic of gasoline-related contamination of a residential water supply. Yet the similarities end there, and it does not follow that CFA liability is established in any case where there has been undisclosed

petroleum contamination of a water supply sometime in the past, regardless of the deceptiveness or materiality of the omission.

Here, when the facts are viewed in the light most favorable to the non-moving party, *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 5, 175 Vt. 413, it is apparent that the alleged omissions here did not involve present or future health risks on the property, but rather only the facts that (1) there had been an oil spill next door several years before the sale, (2) the spill resulted in trace contamination of the defendants' water supply, (3) the spill was remediated, and (4) at the time of the sale there were no longer any contaminants in the water supply.

In other words, at the time of the sale, the water was clean. The most recent round of testing had shown that there were no contaminants to be found in the well. There was no ongoing monitoring, and no suggestion of any future health risks on the property.

The importance of the omissions are genuinely disputed. Reasonable jurors might disagree whether the prior occurrence of trace amounts of contamination in the water supply presented a significant ongoing health issue, or whether information about the incident would have been important in making a decision about buying the property. Reasonable jurors might also disagree whether it was deceptive for the sellers to state that the well had been tested in 2004 and that nothing had been found, without mentioning the prior contamination. There are also questions about whether the buyers had any responsibility to inquire further about the water testing that had been done.

It is not enough to say that CFA liability has been established in this case simply because the buyers were deprived of some information during a real estate transaction. While it may be that the industry standard is full disclosure, it does not follow that something less than full disclosure equates to a consumer-fraud violation as a matter of law. One can imagine any number of unpleasant facts about a newly-purchased home that a buyer can say in retrospect they would have liked to know before closing. In some cases, reasonable jurors might agree with the buyer that the omitted information was objectively important in making a decision about whether to buy the home. In other cases, they might not. In other words, while something less than full disclosure might create a question for the jury about the deceptiveness and materiality of the omission, it does not establish CFA liability as a matter of law.

Nor is it an answer to say that gasoline-related contamination is different. The trigger for CFA liability is not the subject matter of the omission, but rather whether the omission was likely to mislead consumers and whether the omission was material to the transaction. One need only contemplate the number of family farms on which gasoline has been spilled over time, or the number of driveways in which motor oil has been emptied directly into the dirt, to appreciate that not every oil spill results in a property with ongoing "contamination issues," the non-disclosure of which would establish CFA liability as a matter of law. Such a standard would not keep consumer-fraud liability tethered by the principle of materiality. *Vastano*, 2007 VT 33, ¶ 10.

Finally, the court has in mind that actual damage is not an element of consumer fraud. *Peabody v. P.J.'s Auto Village, Inc.*, 153 Vt. 55, 58 (1989). The focus here is not whether the plaintiffs have suffered any damage from the omission, but rather whether the omission was

deceptive in light of all the circumstances, and whether a reasonable person would consider the information to have been important in making a decision about whether or not to buy the property, and what price to pay. Since there are genuine disputes in the record as to these questions, the court cannot conclude that the plaintiffs have proven that they are entitled to judgment as a matter of law. The motion for reconsideration is accordingly denied.

Actual Fraud and Negligent Misrepresentation

The plaintiffs have also sought reconsideration on the claims for actual fraud and negligent misrepresentation. Here, as above, there are genuine issues regarding the materiality of any omissions regarding the history of trace contamination on the property.

There are additional disputes regarding the intent of the defendants in deciding not to answer the question on the SPIR about water problems, in omitting other reference to the prior contamination, and in not disclosing the bottled water during the sale negotiations. Summary judgment is generally not the time or place for resolving disputed questions of intent. *Stamp Tech, Inc. v. Lydall/Thermal Acoustical, Inc.*, 2009 VT 91, ¶ 31.

Finally, on these claims, there are questions about whether or not the plaintiffs have actually suffered any damages as a result of the misrepresentations or omissions. To the extent that the mortgage lender testified that financing is generally not extended to properties with contamination issues, it remains disputed whether this property is one that should be considered to have a "contamination issue."

Accordingly, the plaintiffs are not entitled to summary judgment on the claims for actual fraud and negligent misrepresentation. The motion for reconsideration is denied as to these claims as well.

ORDER

Plaintiffs' Motion for Reconsideration (MPR #11) is ***denied***.

Dated at Woodstock, Vermont this ____ day of December, 2009.

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Hon. Harold E. Eaton, Jr.
Presiding Judge