

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002506-MR

CHRISTINE McLELLAN

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 00-CI-004343

MICHAEL YEAGER AND
IRENE YEAGER

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: This is an appeal from a summary judgment entered in favor of the sellers in an action brought by the buyer of a house for breach of contract/warranty and fraud as a result of the sellers misrepresenting how often the basement of the house leaked. The buyer argues that the trial court erred in ruling that the Seller's Disclosure of Property Condition form was not a warranty even though it was explicitly incorporated into the purchase contract as a warranty. We agree with the buyer that the disclosures made by sellers in that form did constitute a warranty since the parties agreed to incorporate the

disclosure form into the purchase contract as a warranty. However, we decline to adjudge that summary judgment should have been entered in the buyer's favor as there exist issues of material fact as to the breach of warranty/contract claim. Hence, we reverse and remand for further proceedings.

In September of 1997, appellees, Michael and Irene Yeager, listed their residential property for sale. On September 22, 1997, the Yeagers filled out and signed the Seller's Disclosure of Property Condition form as required by KRS 324.360. On September 24, 1997, the Yeagers and the appellant, Christine McLellan, executed a purchase contract for the property. Paragraph 11.A of the contract stated as follows:

Buyer acknowledges receipt of a Seller's Disclosure of Property Condition (as required by 201 KAR 11:350) from Seller. Seller represents and warrants to Buyer, the Listing Company, the Cooperating Company, and their respective sales associates, the Louisville Board of REALTORS, Inc., Metro Search, Inc., participants in this Multiple Listing Service, that the information provided in the Seller's Disclosure of Property Condition is true, accurate and complete to the best of their knowledge. Seller and/or Buyer shall indemnify and hold harmless all the foregoing parties from any liabilities, damages, costs, fees and expenses resulting from any incorrect information provided herein, in the Listing Contract, or in the Seller's Disclosure of Property Condition.

The disclosure form at issue had a checklist as to various aspects of the property. The first item on the checklist was an inquiry as to whether the basement leaks. The Yeagers marked Yes.@ Immediately following that question, the form

asks, "If yes, when?" to which the Yeagers replied, "March 1989 & 1997." The next question states, "If yes, has the leak been repaired or treated?" In response to this question, the Yeagers marked "No."

The purchase contract also contained a provision allowing for inspection of the property by the buyer and reporting to the seller any substantial defect found by the inspection which the buyer wishes to be remedied by the seller. Under this provision, the seller has the opportunity to correct or repair the reported defect and if unable to do so, the buyer may terminate the purchase contract.

Pursuant to the above provision, McLellan hired Inspection Group, Inc. to inspect the house. The inspection report notes cracks in the basement wall and suggests further inquiry. McLellan thereafter made no request for the seller to repair any reported defect.

On October 20, 1997, the Yeagers deeded McLellan the house for the purchase price of \$117,000. According to McLellan, almost immediately after she moved into the house, she began having problems with the basement leaking. On July 10, 2000, McLellan filed an action against the Yeagers alleging breach of contract/warranty. The substance of the claim was that the Yeagers had falsely filled out the Seller's Disclosure of Property Condition form, intentionally misrepresenting that the basement had leaked only twice.

During a discovery deposition, Michael Yeager admitted that the floor drain in the basement backed up occasionally ~~A~~when it rained a lot.~~@~~ When asked if he recalled how many times there was water in the basement because of the backup of the floor drain, Yeager responded, ~~A~~No, I really don't. I mean, 19 years, I couldn't say, you know, whether it was 16 times or 3, or you know, whatever.~~@~~ Yeager, who was a licensed architect, admitted that he had concluded there was an underground spring under the house. Yeager also cited two other occasions when water came in the basement through the wall by the front bedroom, but explained that it was the result of failing to clean out and maintain the gutters. Finally, Yeager conceded that he did not tell the listing agent about the backing up of the floor drain and about the two instances of water leaking in the basement from the front window.

On May 8, 2001, the Yeagers filed a motion for partial summary judgment on the breach of contract/warranty claim, citing 201 KAR 11:350 Section 2 which specifically provides that seller's disclosure statements are not warranties. On July 14, 2001, McLellan filed her own motion for partial summary judgment, contending that despite the language in 201 KAR 11:350, because the disclosure statement was expressly incorporated as a warranty into the purchase contract, the disclosure statement was enforceable as a warranty. McLellan further argued that Michael Yeager's admissions in his deposition conclusively proved that

the information in the disclosure statement was false and, thus, the breach of warranty claim had been established.

On October 9, 2001, the trial court entered an order denying McLellan's motion for partial summary judgment on the fraud claim on grounds that there were issues of fact which precluded summary judgment. In this same order, the court granted the Yeagers' motion for partial summary judgment, ruling that the disclosure statement could not constitute a warranty under 201 KAR 11:350. Accordingly, the trial court dismissed McLellan's breach of contract/warranty claim. Because the breach of contract/warranty claim was the essence of McLellan's case, she moved the court to dismiss all the claims against the Yeagers with prejudice except the claim for breach of contract/warranty and to certify the summary judgment in favor of the Yeagers on that issue as a final and appealable order. The court obliged McLellan and entered the requested order on October 22, 2001. From that order, McLellan now appeals.

McLellan first argues that the trial court erred in ruling that the disclosure statement did not constitute a warranty even though it was expressly incorporated into the purchase contract as a warranty. McLellan concedes that the disclosure statement by itself could not be a warranty pursuant to the language in 201 KAR 11:350. However, she maintains that there is no reason why the parties could not agree to have the disclosure statement operate as a warranty by incorporating it

into the purchase contract as a warranty as was done in this case. We agree.

KRS 324.360 mandates that the seller of single-family residential real estate dwellings complete a ~~Aseller's~~ disclosure of conditions form@if a real estate licensee receives compensation for the transaction. KRS 324.360(2) and (3) provide as follows:

(2) The [Kentucky Real Estate] commission shall promulgate an administrative regulation authorizing a ~~Aseller's~~ disclosure of conditions form.@

(3) The form shall provide for disclosure by the seller of the following:

(a) Basement condition and whether it leaks;

. . .

201 KAR 11:350 Section 2 provides in pertinent part:

PURPOSE OF STATEMENT: Completion of this form shall satisfy the requirements of KRS 324.360 which mandates the seller's disclosure of information about the property he is about to sell. This disclosure is based solely on the seller's observation and knowledge of the property's condition and the improvements thereon. This statement shall not be a warranty by the seller or seller's agent and shall not be intended as a substitute for an inspection or warranty the purchaser may wish to obtain. (emphasis added.)

Contracts are an essential basis of property rights, and their performance must be strictly maintained by law, although society, in the interest of public good, may dictate alteration or abrogation of contracts that are inimical to that good. In re American Fuel & Power Co., 122 F.2d 223 (6th Cir. 1941). Only where the contract has a direct objective or purpose

which violates the federal or a state Constitution, a statute, an ordinance or common law will a court refuse to enforce a contract on grounds of illegality. Zeitz v. Foley, Ky., 264 S.W.2d 267 (1954); Bar-Del, Inc. v. Oz, Inc., Ky. App., 850 S.W.2d 855 (1993); see also Hennis v. B.F. Goodrich Co., Ky., 349 S.W.2d 680 (1961). Af the legality of the contract can be sustained in whole or in part under any reasonable interpretation of its provisions, courts should not hesitate to decree enforcement.@ Zeitz, 264 S.W.2d at 268.

From our reading of the regulation at issue, there is no question that the seller's disclosure of condition form cannot in and of itself constitute a warranty. However, when the parties specifically agreed in their purchase contract to incorporate the disclosure statement as a warranty, the purpose of that inclusion was not to violate or circumvent KRS 324.360 or 201 KAR 11:350 Section 2. In fact, there had already been compliance with that statute and regulation when the realtor provided McLellan with a completed seller's disclosure form. The parties simply sought to give greater weight to the seller's disclosure form by contract than was statutorily required. In Munday v. Mayfair Diagnostic Laboratory, Ky., 831 S.W.2d 912 (1992), the Court held that parties can agree to extend the statute of limitations after a cause of action has accrued. Likewise, in Johnson v. Calvert Fire Ins. Co., 298 Ky. 669, 183 S.W.2d 941 (1944), the Court held that A[p]arties are at liberty

to contract for a limitation period less than the period fixed by statute.@ Munday, 831 S.W.2d at 914.

We could find no case on point as this appears to be an issue of first impression. However, in Snierson v. Scruton, 145 N.H. 73, 761 A.2d 1046 (2000), the Supreme Court of New Hampshire addressed a related issue in an action by the buyer of a home against the seller for fraud and negligent representation based on information allegedly misrepresented in the seller's disclosure form. The Court stated:

The [sellers] argue that because the seller's disclosure form expressly warned that it did not constitute a warranty and was not a substitute for a buyer's inspection, it would be illogical to conclude that [they] intended the [plaintiffs] to rely upon their statements in the form. We disagree. The warning in the disclosure form does not preclude the finder of fact from determining in the context of a fraud or negligent misrepresentation claim that the [sellers] intended to induce the plaintiffs' reliance with their written disclosures.

Id., 145 N.H. at 78, 761 A.2d at 1050. While the parties in the case at bar went a step further and had the disclosure form incorporated as a warranty into the purchase contract, the above case from New Hampshire recognizes the fact that despite the warranty disclaimer language in seller's disclosure forms, buyers do rely on the representations contained therein. Simply because the disclosure form does not constitute a warranty does not mean that sellers can escape liability when they make fraudulent misrepresentations therein.

In sum, we adjudge that the trial court in the instant case erred in ruling as a matter of law that the seller's disclosure form could not constitute a warranty under these circumstances. Accordingly, we reverse that portion of the summary judgment so holding.

McLellan's next argument, which was contingent on our aforementioned holding that the disclosure statement could constitute a warranty, is that her motion for summary judgment should therefore have been granted because the record has established that the information given on the Yeager's disclosure form was false. Summary judgment is proper only where the trial court, drawing all factual inferences in favor of the nonmoving party, can conclude that there are no issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fischer v. Jeffries, Ky. App., 697 S.W.2d 159 (1985). Summary judgment should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

McLellan maintains there are no issues of fact because Michael Yeager's deposition testimony conclusively established that the Yeagers lied on the disclosure form. We do not agree. As noted earlier, the Yeagers admitted on the disclosure form that the basement leaked and further checked And, that the

problem had not been rectified. In response to the question asking when the basement leaked, the Yeagers answered, "March 1989 and 1997." McLellan contends that this answer was contradicted by Michael Yeager's deposition testimony. Michael Yeager admitted in his deposition that the basement leaked due to water coming in from the wall by the front bedroom on two occasions and due to the backup of the floor drain when it rained a lot, at least three times. It is McLellan's position that the Yeager's response, "March 1989 and 1997" was an indication of only two occasions when the basement leaked. In our view, the "March 1989 and 1997" response could also be interpreted to mean multiple occasions during the month of March 1989 and the year 1997. Hence, there is an issue of fact as to whether the Yeagers lied on the disclosure form and, thus, breached the warranty. Accordingly, the trial court did not err in refusing to grant summary judgment in McLellan's favor.

For the reasons stated above, the summary judgment in favor of the Yeagers is reversed and the matter is remanded for further proceedings consistent with this opinion.

TACKETT, JUDGE, CONCURS.

EMBERTON, CHIEF JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, CHIEF JUDGE, DISSENTING. I respectfully dissent from the majority opinion.

The disclosure statement asked the seller if the basement leaked and the dates it occurred. The seller responded that it did leak and cited two dates on which it occurred. The

buyer made no request for further information but did have the house inspected prior to purchase. The inspector noted problems with the leakage, but, again, the buyer made no further inquiry and executed the sale.

The disclosure statement alone is not a warranty.¹ The issue here is whether the language in the contract is a warranty.

The contract states only that the seller warrants the information in the disclosure statement to be true. It does not state that the seller warrants that the residence is free from defects.

The seller, in fact, truthfully answered the questions asked. He stated the basement leaked. If the precise dates or even the frequency were not correctly stated, that does not seem to me to be sufficient to establish fraud. The central issue is whether the seller revealed that the basement leaked.

I would affirm.

BRIEF FOR APPELLANT:

Bruce A. Brightwell
Louisville, Kentucky

BRIEF FOR APPELLEES:

David A. McCullough
Louisville, Kentucky

¹ 201 KAR 11:350.