

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001692-MR

REBECCA FLORA AND
ALLEN FLORA

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 99-CI-01150

MARC MORRIS AND
JANIE MORRIS

APPELLEES

OPINION

AFFIRMING

** **

BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Rebecca Flora and Allen Flora (hereinafter "the Floras") have appealed from the judgment of the Franklin Circuit Court awarding Marc Morris and Janie Morris (hereinafter "the Morrises") \$7300 for the cost of repairing a concealed defect in the property the Morrises purchased from them. We affirm.

Most of the underlying facts in this matter are not in dispute, so we shall only briefly summarize the relevant information. On January 15, 1999, the Morrises purchased real estate at 210 Stevenson Drive, in Frankfort, Kentucky, from the Floras for \$67,500. Allen Flora had purchased the property in 1990 prior to his marriage to Rebecca. Upon taking possession of the house, the Morrises discovered that a foundation wall in the basement was cracked and bowed.

The Morrises visited the home several times prior to the closing and hired an inspector to inspect the house. On the Seller Disclosure form, the Floras indicated that they did not know whether there were any problems to the foundation or slab. In the basement of the house, boxes and other items lined one of the walls, while the other three were open to view. Neither the inspector nor the Morrises detected anything wrong with the three visible walls, and Marc Morris assumed that the fourth wall was in good condition as well. In his report, the inspector did not indicate that there were any problems with the basement, but indicated that visibility was limited due to some basement storage. In any event, the Morrises did not become aware of the problems with the basement wall until they took possession of the house a few days following the January 15, 1999, closing when the Floras vacated it. A civil engineer inspected the house on February 16, 1999, and indicated that the

bowed and cracked wall in the basement needed to be repaired because it was a load-bearing wall. The Morrisises had the wall repaired for \$7300.

On October 4, 1999, the Morrisises filed a complaint in Franklin Circuit Court alleging fraud in that the Floras misrepresented the condition of the basement wall, entitling them to damages for money expended in repairing the wall as well as punitive damages. The matter proceeded to a bench trial on March 25, 2002, after which the trial court allowed the parties to submit memoranda in support of their respective positions. On July 10, 2002, the trial court entered its judgment as set forth below:

This matter came on for a trial before the Court sitting without a jury on March 25, 2002. The Plaintiffs, Marc Morris and Janie Morris, were represented by counsel, Hon. John Baughman. The Defendants, Rebecca Flora and Allen Flora, were represented by counsel, Hon. James Dean Liebman.

I. FINDINGS OF FACT

1. The Plaintiffs purchased a home located at 210 Stevenson Drive, Frankfort, Kentucky from the Defendants.
2. The purchase price of the home was \$67,500.00.
3. The Sellers, Allen and Rebecca Flora, completed a seller disclosure form. The form was marked "unknown" as to the condition of the

"Foundation/Structure Basement."

All other information on the disclosure form regarding the structure, foundation, or slab of the house was marked "unknown."

4. Marking unknown on the seller disclosure form meant that the seller is without knowledge of the current condition of the subject matter.
5. The Buyer, Marc and Janie Morris, toured the home prior to closing at least three times.
6. A professional home inspector, Norman Cobb, conducted an inspection prior to the closing of the sale of the home. The inspector reported that he could not establish the condition of the front basement wall because of boxes and other impediments stacked in front of the front wall. It was not the inspector's customary practice to move objects in a home during an inspection.
7. Mr. Cobb testified that the Defendants were not cooperative in removal of the items in front of the wall.
8. A material defect existed in the front wall of the house prior to and subsequent to the home purchase. The wall had an inward bulge from overstress. The bulge had accompanying cracks which overall compromised the wall's load capacity.
9. A professional engineer, Joseph Pyles, inspected the wall upon request by the Plaintiffs, subsequent to the closing date.

Mr. Pyles' report indicates that he spoke with the Defendants who indicated that the cracks were present when the home was purchased by them over nine years ago. Defendants further informed Pyles that these cracks did not leak significantly nor did the cracks increase in size during their nine years of ownership.

10. The repairs to the front wall consisted of digging out the dirt in front of the wall. The existing defective wall was torn down and rebuilt with concrete block reinforced with steel. A drain tile and water-proofing were also included as necessary repairs to the wall. The total cost of the repair to the wall was \$7,300.00.

II. CONCLUSIONS OF LAW

11. To recover from the Defendants, the Plaintiffs must show that the Defendants violated a legal duty. *Commonwealth of Kentucky v. Roof*, 913 S.W.2d 322 (1976).
12. In real estate transactions the rule of *caveat emptor* applies, unless "the vendor does something to prevent the prospective purchaser from making a thorough examination of the premises to ascertain its nature and value." *Osborne v. Howard*, Ky., 242 S.W. 852 (1922). A purchaser must have "sufficient opportunity to observe the condition of the premises" in order for caveat emptor to apply. *Fannon v. Carden*, Ky., 240 S.W.2d 101, 103 (1951).
13. "In the sale of real estate the intentional suppression of facts

known to the seller and unknown to the purchase is ground for an action for deceit if the purchaser was damaged. . . ." *Bryant v. Troutman*, Ky., 287 S.W.2d 918, 920 (1956). The seller must know that the buyer is acting on the assumption that no defect exists. *Id.* at 920.

14. In a claim for fraud based upon suppression of facts the plaintiffs must prove that the defendants had a duty to disclose the facts; that the defendants failed to disclose the facts; that the defendants' failure to disclose material facts induced him to act; and the plaintiff suffered damages. *Willits v. Peabody Coal Co.*, U.S. App. Lexis 21096 (6th Cir. 1999).

III. JUDGMENT

15. The Defendants knew of the defect in the front basement wall prior to the purchase of the house by the plaintiffs.
16. The Plaintiffs were not given an opportunity to fully inspect the house due to boxes and other impediments used to conceal the defect.
17. The Plaintiffs have proven by clear and convincing evidence that the Defendants knew the defect in the wall existed; that the Defendants did not disclose the defect in the wall to the Plaintiffs; that the facts were material to the Plaintiffs' purchase of the home; the Plaintiffs have been damaged by the Defendants' failure to disclose the defect.

18. The damages to the Plaintiffs are in the amount of \$7,300.00 for repairs to the wall.

ACCORDINGLY:

19. The Plaintiffs are entitled to Judgment in the amount of \$7,300.00

WHEREFORE, the Judgment of this Court is in favor of the Plaintiffs in the amount of \$7,300.00 plus interest at the legal rate until paid in full.

This appeal followed.

On appeal, the Floras contend that several of the trial court's findings of fact were clearly erroneous, that the Morrises did not prove a cause of action against them, and that they were therefore entitled to a judgment as a matter of law. On the other hand, the Morrises argue that the trial court's findings of fact were supported by substantial evidence so that its findings and judgment should not be disturbed. In addition, the trial court properly found that the Floras were liable for their damages.

CR 52.01 addresses the proper procedure to be followed in bench trials:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of

the trial court to judge the credibility of the witnesses.

In Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777, 782 (2002), this Court stated that “[a] factual finding is not clearly erroneous if it is supported by substantial evidence. [] ‘Substantial evidence’ is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” (Citations omitted). Furthermore, this Court is not permitted to substitute its judgment for that of the trial court regarding the weight of the evidence so long as substantial evidence supports its decision. Leveridge v. Leveridge, Ky., 997 S.W.2d 1 (1999). Therefore, we shall first determine whether the trial court’s findings of fact are supported by substantial evidence.

In their brief, the Floras point to three statements in the trial court’s judgment that they contend are not supported by the record. As the Morrises indicate, only one of those statements is actually a finding of fact for which substantial evidence must exist. That particular finding is that “Mr. Cobb testified that the Defendants were not cooperative in removal of the items in front of the wall.” While we agree that Mr. Cobb did not testify in exactly this way, we believe that the finding of fact is supported by substantial evidence and not clearly erroneous as the Floras

argue. Other testimony established that the Floras had not moved the boxes covering the wall in question to allow the inspector a full view of the basement and that there was some difficulty in removing boxes from a closet in order to access the attic.

The remaining two statements the Floras contend are not supported by substantial evidence are not findings of fact, but rather conclusions of law. The two statements concern the Floras' knowledge of the defect prior to the Morrises' purchase and the Morrises' opportunity to fully inspect the house. However, our review of the record reveals that each of the conclusions of law is supported by the record.

Because the trial court's findings of fact are supported by substantial evidence, they are not clearly erroneous. Therefore, we shall continue with our de novo review of the trial court's application of the law to its findings of fact.

We agree with the Morrises' argument that the trial court did not commit any error in holding the Floras liable for damages and in awarding a judgment in favor of the Morrises. In this Commonwealth,

[T]o establish an actionable case of fraud based upon suppression of facts, plaintiff must demonstrate (1) that defendant had a duty to disclose the material facts, (2) that defendant failed to disclose same, (3)

that defendant's failure to disclose the material facts induced him to act, and (4) that he suffered actual damages therefrom.

Willits v. Peabody Coal Co., 1999 WL 701916 (6th Cir. 1999).¹ In order to recover, the Morrises had to establish that the Floras violated a legal duty to them in failing to disclose the defect in the basement wall. Commonwealth of Kentucky v. Roof, Ky., 913 S.W.2d 322 (1996).

It is well settled that the rule of *caveat emptor* is in force in the Commonwealth.

It is an ancient rule, inherited from the common law and well established in our jurisprudence, that in land deals, like the one under consideration, the rule of *caveat emptor* applied, and it is only relaxed when it is shown that the vendor does something to prevent the prospective purchaser from making a thorough examination of the premise to ascertain its nature and value.

Osborne v. Howard, 195 Ky. 533, 536, 242 S.W. 852, 853 (1922).

"As a general rule where no direct representation is made by the vendor concerning definite facts and the purchaser has sufficient opportunity to observe the condition of the premises, the maxim of *caveat emptor* is applicable." Fannon v. Carden, Ky., 340 S.W.2d 101, 103 (1951). Finally, in Bryant v. Troutman, Ky., 287 S.W.2d 918, 920 (1956), the former Court of Appeals held:

¹ This opinion was not recommended for full-text publication.

In the sale of real estate the intentional suppression of facts known to the seller and unknown to the purchaser is ground for an action for deceit if the purchaser was damaged by reason of the fraudulent concealment. Where there is a latent defect known to the seller and he remains silent with the knowledge that the buyer is acting on the assumption that no defect exists, the buyer has a cause of action against the seller for an intentional omission to disclose such latent defect.

In the present matter, the Floras, as the sellers, had the duty to disclose the latent defect in the basement wall that was blocked from view by boxes and other items. Because the defect was not readily viewable, the Floras should have informed the Morrises about the bulge and cracks in the wall, or at least have moved the boxes from the wall, so that they would have been able to properly and accurately inspect its condition. Based upon the circumstances of this case, the notation of "unknown" as to the condition of the foundation or slab on the Seller Disclosure form is not enough to allow the Floras to comply with their duty to inform the Morrises.

Therefore, based upon the facts of this case, the trial court did not commit any error in holding the Floras liable for damages. The Floras had a duty to disclose the latent defect in the basement wall, which they did not disclose. The failure to disclose induced the Morrises to continue with the real estate transaction and purchase the home. Finally, the

Morrises suffered actual damages in the amount of \$7300, the cost to repair the defect in the wall.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James D. Liebman
Frankfort, KY

BRIEF FOR APPELLEES:

John B. Baughman
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