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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001793-MR

STEVE MARKOVICH;
CHARLOTTE MARKOVICH

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 03-CI-02087

FISCHER SINGLE FAMILY
HOMES, LTD.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOFF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Steve Markovich and Charlotte Markovich appeal from the decision of the Kenton Circuit Court granting summary judgment to Fischer Single Family Homes, Ltd. in this action for fraud and misrepresentation, negligence, breach of contract and breach of the covenant of good faith and fair dealing surrounding the purchase of their home in Crescent Springs, Kentucky. The Markoviches argue on appeal that summary judgment

was improper because there was a genuine issue of material fact to be determined by a jury, and that it was not impossible for them to prevail at trial. We disagree, and affirm.

The action stems from the agreement between the Markoviches and Fischer to build a new home in the Crossings of Meadow Wood subdivision in Crescent Springs. The sales counselor for Fischer, John Lorms, showed the Markoviches the model home in the subdivision, and Mr. Markovich noticed the area map on the wall with the location of nearby Cincinnati/Northern Kentucky Airport. Markovich asked Lorms if there was "much noise" from the airplanes flying overhead. Lorms replied that there was "not that much" noise from the airplanes. Ms. Markovich, following up, asked, "You live here, what do you think?" regarding whether the noise bothered Lorms personally, and Lorms said that it did not bother him or his wife. It appears from the recitation of facts in the parties' briefs as well as the record that the above conversation, a very short part of the much longer discussion between the Markoviches and Lorms over the possibility of building in that subdivision, represents the sum total of the discussion between the parties about the noise level from the airport. The Markoviches signed an agreement with Fischer to build a home in the neighborhood.

More than a year later, the Markoviches filed suit seeking damages, advancing several theories of liability

including fraud, negligence, breach of contract and breach of the covenant of good faith and fair dealing. The Markoviches' claims are based solely on the noise level from the airport, which they claim is so severe that it has caused Mr. Markovich to resort to sleeping in the children's room with the fans turned up to mask the noise. All the theories of liability are rooted in the conversation with Lorms about the noise level, upon which the Markoviches place great significance. First, they claim that the conversation placed Fischer on notice that the Markoviches were deeply concerned about the potential noise level. They claim that Lorms made material misrepresentations about the noise level in the neighborhood, upon which they reasonably relied, finding themselves in an intolerable situation which has placed a strain on their health and family life. They claim that Fischer was negligent in failing to reasonably inform them of the condition of the property prior to the purchase of the house. By failing to inform them of a noise level they find objectionable, they argue, Fischer breached a duty to them. The Kenton Circuit Court, however, granted summary judgment to Fischer, holding that Fischer had no duty to them beyond the scope of the agreement, which it did not breach, and that the statement by Lorms did not support a cause of action for fraud or for negligence. This appeal followed.

At the outset, we note for emphasis that virtually the entire action rests on the conversation with Lorms. The two statements by Lorms, that there was "not that much" noise and that the noise did not bother him or his wife, are plainly statements of opinion. The evidence indicates that the Markoviches understood at the time the statements were made that Lorms was expressing an opinion. Lorms specifically did not state that there was no noise from the airplanes, only that the noise level did not bother him. Since an action for fraud must be based on a clearly and objectively false statement of fact as distinguished from an expression of opinion,¹ summary judgment on the counts of fraud and misrepresentation was proper, as it was impossible for the plaintiffs to produce evidence that would entitle them to prevail on the claim. Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky. 1985). There are other critical flaws in the fraud claim, but in the interest of judicial economy, we need not reach those issues.

Turning to the argument that Fischer breached the implied covenant of good faith and fair dealing, there was no evidence produced by the plaintiffs that supported this claim, and thus summary judgment was proper. Their argument on appeal is merely a bald assertion that the failure to disclose the noise level was a breach of the covenant, and out of line with

¹ Church v. Eastham, 331 S.W.2d 718, 719 (Ky. 1960).

the reasonable commercial standard of disclosing the condition and character of the property. This argument is little more than the fraud claim above, couched in different terms. For the same reasons, therefore, it must fail. The Markoviches cite no authority nor point to any fact other than the statement by Lorms that there was "not that much" noise from the airplanes. Since there was no genuine issue of material fact (the substance of the conversation with Lorms is not in dispute, only its meaning) to be tried on this claim, the court had the authority to decide the case by summary judgment, and we decline to disturb its decision on appeal.

With respect to the negligence claim, we agree with the finding of the circuit court that Fischer had no duty to appellants beyond that established in the contract. The Markoviches contend that there existed a general duty to inform them of the noise level, under a nebulous notion of a duty to reasonably inform the buyer of the character and condition of the property. While the Markoviches contend that the question of whether a duty was breached is for a jury to decide, the question of whether a duty existed is clearly for the court, Mullins v. Commonwealth Life Insurance Co., 839 S.W.2d 249, 248 (Ky. 1992) and the court correctly held that no such duty existed. The Markoviches, in support of their position that a duty existed, and that a reasonably prudent seller would have

informed them of the noise level, point to the testimony of Robert Hawksley that Fischer had a practice of referring buyers who expressed concern about airplane noise to the appropriate authority, the Airport Noise Abatement Department. As has been stated, there existed no genuine issue of material fact with respect to the conversation with Lorms. The Markoviches' evidence falls far short of establishing that they expressed "serious concerns" about the noise level; they asked two questions, and were apparently satisfied with the answers, which were plainly statement of opinion and understood by them to be such. They were aware of the proximity of the airport, and if they truly had such serious concerns they had many opportunities to discover that, as the evidence showed that they spoke to people who had also purchased homes in the neighborhood and did not ask any of them about the noise level. The Markoviches may argue now that they were acting in reliance on Lorms's opinion, and therefore did not ask; for reasons already discussed, this argument holds no water. Summary judgment was properly granted.

On the breach of contract claim, the Markoviches cannot point to any provision of the contract that Fischer actually breached. Instead, the Markoviches repeat the same theory they advance to support a negligence claim, couched in terms of breach of contract. They rely on Paintsville Hospital for the singularly weak argument that "the evidence thus far

neither establishes the existence or nonexistence of a genuine issue of material fact" and therefore Fischer's motion was premature. The Markoviches apparently argue that there are issues of material fact as to what Fischer's duties under the contract actually were, which demonstrates a serious misunderstanding of the law. A contract, on its face, establishes the duties of the parties to one another. Unless those contractual provisions are vague, which is not alleged here, the court must look within the 'four corners' of the document to discern the intent of the parties in making their agreement. Friction Materials Co., Inc. v. Stinson, 833 S.W.2d 388, 391 (Ky. App. 1992). The court did so, and determined that there was no duty established in the contract that Fischer could have breached under the undisputed facts as they existed. Therefore, summary judgment was appropriate.

The remainder of Appellants' brief concerns itself with the theories of respondeat superior, a claim for loss of consortium, and punitive damages. We need not address the first of these matters, as no one disputes that Lorms was acting in the course of his employment. Loss of consortium is an item of special damages which our law recognizes to be recoverable in tort cases. There is nothing about the loss of consortium claim alone that would allow the Markoviches to defeat summary judgment, as they seem to claim. Lastly, punitive damages do

not lie because the Markoviches have completely failed to demonstrate that they have a cognizable claim for fraud, malice, or conscious wrongdoing.

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

ALL CONCUR.

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