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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001934-MR

DONNIE HATFIELD — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 01-CI-00958

CHRISTINA BLAIR — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.[1]

POTTER, SENIOR JUDGE: This case arises from the alleged breach of an express warranty contained in a real estate contract. The trial court directed a verdict on the grounds that both parties entered into the contract under a mutual mistake as to the meaning of the warranty; ordered the contract voided; and ordered that the seller, Donnie Hatfield, reimburse the purchase price to Blair and that the buyer, Christina Blair, transfer the property back to Hatfield. We find that the trial court erred when it found the contract void.

[1] Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On May 11, 2000, Hatfield and Blair entered into a real estate contract for the purchase of an existing residence. The purchase contract was a preprinted form and contained the following typed provision:

> 18. SELLER DISCLOSURE OF PROPERTY CONDITION: Seller has disclosed in writing all information, which seller knows, which may affect the value or condition of the property. **(CHOOSE A OR B)**
> **A.** (_____) Buyer acknowledges receipt of a Seller Disclosure of Property Condition form (as required by 201 KAR 11:350 from Seller. Seller represents and warrants to Buyer... that the information provided...is true...[Seller will hold various parties harmless]. **OR**
> **B. (_____)** Property is new construction and will carry a minimum of a one-year warranty from Builder.

Contrary to the procedure that was evidently envisioned by the form's drafters, both provisions were checked. To complicate matters further, directly below the "B" paragraph, the parties inserted a handwritten provision which read, "Seller will provide 1yr. warranty from date of purchase." Hatfield, his agent and Blair initialed this addition.

The residence on the property did not fall neatly into the dichotomy apparently envisioned by the form's drafters, new construction versus old construction. While the house was over thirty years old, at the time of the sale Hatfield was performing extensive remodeling work.

After Blair moved into the residence, she noticed numerous problems including termite damage, cracked tile in the

kitchen and floor, cracks in a bathtub, and defects in the hardwood flooring.

On June 19, 2001, Blair sent Hatfield a certified letter demanding reimbursement for repairs made, or to be made, which she felt were covered by the warranty. After Hatfield refused payment, Blair filed this action alleging that the defects in the workmanship performed by Hatfield were covered under the warranty provision in the real estate contract and ultimately requested damages in the amount of $24,860. She did not plead either a mutual or unilateral mistake and did not request a rescission of the contract.

At trial Blair testified as to the problems with the residence and that, at the time the purchase contract was signed, it was her understanding that the one year warranty provision covered all defects in the residence without limitation to the residence being a "new" construction. At the close of Blair's proof, Hatfield moved for a directed verdict on the basis of *caveat emptor* and on the basis that the warranty applied only to houses newly constructed. During the course of his argument on the motion, Hatfield's attorney stated that it would be Hatfield's testimony that he believed the warranty provision applied only to new construction and not to the remodeled, yet older home purchased by Blair. The trial court denied the motion to dismiss. However the trial court did not

stop there. Without a motion for directed verdict by Blair, it held that:

> Based upon representations of Counsel as to what further testimony would be from the Defendant, the Court finds that there was not a meeting of the minds in this contract, that there was a mutual mistake on both sides; and, the Court hereby VOIDS the contract and directs that the Defendant to reimburse the Plaintiffs for cost of the purchase price, including financing, closing costs and so forth,. . . .

First Hatfield argues that the trial court should have granted the motion for a directed verdict. The trial court correctly denied this motion. *Caveat emptor* (literally, let the buyer beware) excludes implied warranties and is applicable to real estate purchases. Although the courts have found implied warranties applicable to the purchase of a new home, in the absence of fraud, the buyer of an older home takes it without any implied warranty. Craig v. Keene, 32 S.W.3d 90 (Ky.App. 2000). However, Blair's claim is based on an express warranty found in the purchase contract. Therefore she is not relying on an implied warranty and the rule of *caveat emptor* has no effect.

As noted, after the court denied the motion for a directed verdict it declared the purchase void. The court gave the basis for this ruling as being "that there was not a meeting of the minds in this contract, that there was a mutual mistake...." The phrases "mutual mistake" and "meeting of the

minds," terms heard more in law school than at the bar, denote two separate concepts.

In Pryor's Restaurants Inc. v. Beliles, 560 S.W.2d 25, 27 (Ky.App. 1977) the court defined mutual mistake as follows:

> A mutual mistake occurs when both parties participate in the transaction and **each** labor(s) under the **same** conception of the alleged agreement....
>
> ...a mistake vitally affecting a **fact or facts** on the basis of which the parties contracted renders their contract voidable by an injured party. That is, where the parties assumed a certain state of fact to exist, and contracted on the faith of that assumption, they should be relieved from their bargain if the assumption is erroneous, and the materiality of the state of facts is weighty evidence of the assumption. Id. (citations omitted)(emphasis added).

To successfully prove that the contract was entered into under mutual mistake a party must prove by clear and convincing evidence that when executing the contract, both parties labored under the same misconception concerning a material issue of fact. Flimin's Adm'x v. Metropolitan Life Ins. Co., 255 Ky. 621, 75 S.W.2d 207 (Ky. 1934). Those elements are not present here. Hatfield and Blair may have both been mistaken, but their mistake, if any, was neither mutual nor factual. Therefore the court erred when it found that the parties entered into the contract by mutual mistake.

Turning to the second ground relied upon by the trial court, assuming that there no actual "meeting of the mind", does this fact render the contract void?

All that is required to create a contract is that both parties make a "manifestation of intention." RESTATEMENT (SECOND) OF CONTRACTS §§ 2, 17, 18 (1981). "The phrase 'manifestation of intention' adopts the external expression of intention as distinguished from undisclosed intention." *Id.,* § 2, comment b. Here both parties made such an external expression when each signed the contract. As the Restatement notes, "[M]any contract disputes arise because different people attach different meanings to the same words or conduct." *Id.* Therefore, even assuming that the parties, at the time of contracting as well as at the time of trial, attached different meaning to the disputed provision, the contract remains valid.

The judgment is reversed and this case is remanded to the Circuit Court for a new trial.

ALL CONCUR.

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