IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 19, 2006 Session

HARVEY M. ABOUELATA and KRISTIN G. ABOUELATA, v. SCOTT W. DAVIS and HOPE DAVIS

Direct Appeal from the Circuit Court for Knox County
No. 3-21-04 Hon. Wheeler Rosenbalm, Circuit Judge

No. E2005-02616-COA-R3-CV - FILED NOVEMBER 6, 2006

In this action for damages before a jury, based on claims for fraud, breach of contract and violations of the Tennessee Residential Property Disclosure Act and the Tennessee Consumer Protection Act, the Trial Court directed a verdict for defendants at the conclusion of plaintiffs' proof. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

Raymond E. Lacy, Knoxville, Tennessee, for appellants.

Lewis S. Howard, Jr., and Heather G. Anderson, Knoxville, Tennessee, for appellees.

OPINION

In this action, the Trial Court directed a verdict in favor of the defendants-appellees, dismissing the plaintiffs-appellants' claims for fraud, breach of contract, violation of the Tennessee Residential Property Disclosure Act, and violation of the Tennessee Consumer Protection Act. The Court also awarded attorneys' fees to the defendants.

We are required to take the strongest legitimate view of the evidence in the plaintiffs' favor in this appeal.

Scott and Hope Davis conveyed a residence (the "Residence") to Harvey and Kristin Abouelata, and the Abouelatas subsequently discovered defects in the heating system and other components. The parties had signed a Real Estate Sales Contract (the "Sales Contract") on April 29, 2003. The Sales Contract set the purchase price at $380,000.00, and set August 30, 2003 as the closing date. The sale was conditioned upon the Abouelatas obtaining a home inspection, and the Davises prepared a "Tennessee Residential Property Condition Disclosure" (the "Initial Disclosure"), which Mrs. Abouelata acknowledged receiving on May 2. The Initial Disclosure indicated that the Davises were unaware of any defects in the Residence.

After the Abouelatas obtained a home inspection,[1] the parties executed an Addendum to the Sales Contract (the "First Addendum") on May 17. The Addendum reduced the purchase price to $378,000.00 and listed numerous items for inspection or repair. These items of concern resulted from the Abouelatas' home inspection report and included a request for "[e]valuation-repairs of HVAC by R&M Climate Control[,] clean duct work."

On June 13, the parties executed a second Addendum to the Sales Contract (the "Second Addendum"). This Addendum moved the closing date from August 30, 2003 to June 30, 2003 and stated:

> Seller to complete all or as many repairs as possible prior to closing (repairs stipulated on addendum of 5/17/03 [i.e., the First Addendum] [)]. . . . If necessary[,] money will be escrowed at closing to cover the estimated expense of any repairs that have not been completed and any repairs that do not meet with satisfaction after the inspector's review of same.

The Second Addendum also referred to an attached document entitled "Seller to Retain Possession After Closing" (the "Lease"). The Lease would allow the Davises to retain possession of the Residence after closing until August 30, 2003. The Lease also states, "Seller(s) agree to maintain, at own expense, all heating, cooling, plumbing, and electrical systems and any appliances and equipment in normal working order, to keep the roof watertight, and maintain the grounds during the term of this agreement."

On June 20, Heath Betts, a salesman from R&M Climate Control ("R&M"), inspected the HVAC system and found a hole in the unit's heat exchanger. He provided Mrs. Davis with an inspection report,[2] estimated a repair cost of $5,636.00, and told Mrs. Davis that she should get a second opinion. Mrs. Abouelata testified that she never received a copy of the R&M report and she did nothing to determine whether R&M inspected the HVAC system because "that wasn't our responsibility." Mrs. Davis testified that she assumed that R&M also gave a copy of the report to the Abouelatas.

The Davises testified they hired Carroll Heating and Air ("Carroll") to inspect and repair the HVAC system. They also testified they told Carroll about the R&M report. Mrs.

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1 The Parties did not introduce the home inspection report into evidence.

2 This report states, "found gas package unit . . . to have cracked . . . heat exchanger cell, very large & visible."

Davis testified that Carroll told her that they had fixed "the problem." The invoice from Carroll, however, does not mention the heat exchanger, and the invoice amounted to only $70.50.

The night before closing, the Abouelatas made their final inspection of the Residence. Only the Abouelatas, their realtor, and their home inspector were present at the final inspection. The Davises left a punch-list summarizing the progress made on the repairs requested in the First Addendum. Regarding the HVAC system, the punch-list stated,

> The HVAC system was inspected by Carrol Heating and Air . . . . The return vent in the downstairs hall has been replaced to accommodate a standard filter. The stairwell and master bedroom return vents will be replaced to accommodate a standard filter. The system duc[t] work will be cleaned when return vents are replaced.

On the closing date, June 30, the parties executed a "Sellers Final Property Disclosure" (the "Final Disclosure"), which stated, "[I]tems requested in [the] home inspection report [are] remedied [with the] exception of duct work clean[ing] [and] chimney repair which are being paid to [the] buyer in [the amount] of $1,700." In addition, the two realtors partially forgave their commissions so that the Abouelatas would have another $1,700.00 for repairs. The Abouelatas also executed an "Inspection Walk-Thru" confirmation stating,

> This is to confirm that I (we), the Buyer(s) have exercised my (our), privilege and responsibility of conducting a walk-thru inspection of the above referenced property prior to closing.
>
> I (we) have found, where applicable, that all electrical, plumbing, heating, cooling appliances, swimming pool, septic tank, security system, etc. are in acceptable working order. . . .
>
> . . . .
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> Exceptions to the above statements are as follows: No further repairs to be completed by Seller.

Finally, the Abouelatas accepted the deed to the Residence.

After closing, the Abouelatas asked R&M to finish the duct cleaning. R&M sent Mr. Betts to the Residence. As a result, the Abouelatas learned that the heat exchanger had a breach. The Abouelatas replaced the HVAC system with a higher capacity "split system" with one unit downstairs and a separate unit upstairs. The new unit cost $17,758.00.

At the close of plaintiffs' case in chief, the defendants moved for a directed verdict which was granted by the Trial Court, dismissing plaintiffs' Complaint. The Court also entered an Order awarding $9,786.00 in attorney's fees to defendants pursuant to the Sales Contract. Plaintiffs filed a timely Notice of Appeal.

These issues are raised on appeal:

A. Whether the Circuit Court erred in granting a directed verdict dismissing the Plaintiffs' fraud claim.

B. Whether the Circuit Court erred in granting a directed verdict dismissing the Plaintiffs' breach of contract claim.

C. Whether the Circuit Court erred in granting a directed verdict dismissing the Plaintiffs' TCPA claim.

D. Whether the Circuit Court erred in awarding attorney's fees to the Defendants pursuant to the Sales Contract.

E. Whether the Defendants-Appellees are entitled to damages against the Plaintiffs-Appellants for filing a frivolous appeal.

As previously stated, we must take the strongest legitimate view of the evidence in favor of the party opposing the motion, draw all reasonable inferences from the evidence in the opponent's favor, discard all countervailing evidence, and affirm the directed verdict only if reasonable minds could reach only one conclusion. *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994).

The Complaint asserts that the defendants engaged in fraud when they intentionally concealed the [R&M] report from the plaintiffs [because the report detailed defects in the HVAC system], purposefully concealed the rotted wood roof sheathing," and knew of the defective operation of the swimming pool filtration system and concealed the same from the Plaintiffs.[3]

Essentially, the majority of the trial evidence dealt with only one allegation, i.e., the alleged concealment of the R&M report.

The Trial Court gave reasons for dismissing plaintiffs' fraud claim. First, the plaintiffs knew that the Sales Contract required an inspection of the HVAC system by R&M, but they closed on the Residence "without any request whatsoever for any such report or any information about the findings of R&M." Also, the plaintiffs did not present proof regarding the value of the property as allegedly represented by the defendants versus the value of the property in its actual condition (i.e., the plaintiffs failed to prove damages).

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[3] The Complaint also asserted that the Defendants "intentionally misrepresented the supposed inability of [R&M] to inspect the HVAC system prior to closing." This misrepresentation allegedly occurred at the closing when the Plaintiffs were told that R&M was unable to schedule an inspection prior to closing. There is no evidence in the Record of any such misrepresentation, and the Plaintiffs never reasserted this allegation at trial or in their Appellate brief. Mrs. Abouelata testified that the Defendants were not at the closing, and none of the closing documents entered as exhibits mention R&M.

On appeal, plaintiffs argue that the "trial court erred in granting Defendants' Motion for Directed Verdict . . . based on [the] failure to prove damages under the fraud/misrepresentation theory." Thus, plaintiffs challenge only the Court's conclusion regarding damages. The plaintiffs' do not challenge the Circuit Court's conclusions that the alleged concealment of the R&M report was the sole basis of the fraud claim and that the claim could not succeed because plaintiffs failed to request the R&M report prior to closing.[4] This Court will not review these unchallenged conclusions. Tenn. R. App. P. 13(b), Advisory Commission Comment ("[R]eview will typically extend only to the issues set forth in the briefs."). The Circuit Court's conclusion regarding damages was an alternate reason for dismissing the fraud claim; it was not a necessary condition of the dismissal. Plaintiffs only challenged one of two alternate reasons for the dismissal, rather than the Court's entire reasoning. Thus, plaintiffs waived the fraud issue. We affirm the Trial Court's dismissing the plaintiffs' fraud claim.

Next, the Complaint asserts that defendants breached the sale of contract by failing to provide the plaintiffs with (1) "a properly functioning HVAC system," (2) "a properly repaired roof," (3) "a properly functioning pool filtration system," (4) "a non-defective foundation on the home," and (5) "a yard free of debris." The Circuit Court dismissed the breach of contract claim, reasoning that plaintiffs accepted $3,400.00 from the defendants and the realtors at closing in exchange for releasing the defendants from further responsibility for repairs. Plaintiffs argue that "the Record contains considerable evidence that this compensation was in no way related to conditions which were unknown to the Plaintiffs and misrepresented or concealed by the Defendants . . . ." .

However, the Record establishes that plaintiffs knew, prior to closing, that the Residence had various defects. As early as May 17, 2003, the plaintiffs listed their "Major Concerns" in the First Addendum. These concerns included the HVAC system, roof leaks, pool equipment, and yard debris. In the Second Addendum, the plaintiffs accelerated the closing date to June 30 so they could obtain favorable financing, and Mrs. Abouelata testified that because the accelerated closing date reduced the time for making repairs, the Second Addendum provided that the defendants were only responsible for "as many repairs as possible prior to closing," subject to inspection by the Plaintiffs' home inspector

On June 29, plaintiffs had the opportunity to inspect the Residence with the aid of their home inspector and in the absence of the defendants. During this inspection, the plaintiffs found the defendants' punch-list disclosing the existence of a crack on a foundational pier as well as items which the defendants failed to repair. In the punch-list, the defendants offered to provide $2,500.00 to repair these items. Mrs. Abouelata testified that they discovered numerous other items which the defendants failed to repair. Mrs. Abouelata testified that "we thought the

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[4] The Court provided two alternate reasons for dismissing the plaintiffs' fraud claim. First, the plaintiffs knew that the Sales Contract required an inspection of the HVAC system by R&M, but they closed on the Residence "without any request whatsoever for any such report or any information about the findings of R&M." Second, the plaintiffs did not present proof regarding the value of the property as allegedly represented by the defendants versus the value of the property in its actual condition (i.e., the plaintiffs failed to prove damages).

$2,500.00 would have recovered the repairs that [the Defendants] admit to not having done, but not the ones that our home inspector said that weren't done as well."

Mrs. Abouelata further testified that at closing they requested additional compensation to cover the unrepaired items and agreed upon $3,400.00. At that time, the plaintiffs executed the "Inspection/Walk-Thru" confirmation providing, "I (we) have found, where applicable, that all electrical, plumbing, heating, cooling appliances, swimming pool, septic tank, security system, etc. are in acceptable working order. . . ." This document also stated, "No further repairs to be completed by seller." Although plaintiffs argue the Record contains "considerable evidence" that this arrangement did not apply to the defects at issue, the plaintiffs provide no reference to the Record where such "considerable evidence" is recorded.[5] Moreover, plaintiffs cannot bolster their breach of contract claim with allegations of fraud, which they have waived on appeal. The only reasonable conclusion that may be drawn from the evidence, is that plaintiffs were aware that the Residence contained numerous unrepaired defects, and negotiated $3,400.00 in additional compensation for those defects, and released defendants from further responsibility for repairs.

The fact that the plaintiffs never received the R&M inspection report regarding the HVAC system does not change this conclusion. The First Addendum specifically stated that R&M was to conduct the evaluation and repairs of the HVAC system, and plaintiffs signed this document. Despite this fact, Mrs. Abouelata testified that they never requested a copy of the R&M report. Because plaintiffs knew that the R&M report was required,[6] but declined to request a copy, they are deemed to know the report's contents. *Hill v. John Banks Buick, Inc.*, 875 S.W.2d 667, 670 (Tenn. Ct. App. 1993) ("[A] person who has notice of facts which would cause a reasonably prudent person to inquire as to further facts is chargeable with notice of the further facts discoverable by proper inquiry.").

Next, plaintiffs argue that the defendants' failure to repair the alleged defects is in breach of the Parties' Lease. We are not persuaded. The Lease and the Second Addendum were executed contemporaneously as part of the same transaction and are construed together. *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 599 (Tenn. Ct. App. 1999). Prior to the Second Addendum, the defendants were obligated to make all the repairs listed in the First Addendum. The plaintiffs executed the Second Addendum to accelerate the closing date. To prevent the accelerated closing date from inconveniencing the defendants, the plaintiffs provided two concessions: (1) the defendants were now only obligated to make "as many repairs as possible prior to closing" and (2) they were permitted to lease the Residence after closing until the original closing date. If the plaintiffs were correct and the parties truly intended for the Lease

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5 "[T]his Court is under no duty to blindly search the record in order to find proof to substantiate the factual allegations of the parties or any other evidence to support a party's contentions." *Pearman v. Pearman*, 781 S.W.2d 585, 588 (Tenn. Ct. App. 1989). "No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded." Tenn. Ct. App. R. 6(b).

6 When individuals sign a contract they are "'conclusively presumed to know the contents of the contract.'" *Beasley v. Metropolitan Life Ins. Co.*, 229 S.W.2d 146, 148 (Tenn. 1950) (quoting 17 C. J. S. *Contracts*, § 137).

to impose the heavier, original repair obligations, there would be no need for the Second Addendum to reduce those repair obligations. Plaintiffs' interpretation would render the Second Addendum meaningless. *Vantage Technology, LLC v. Cross*, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999) ("Contracts must be construed, as far as is reasonable, so as to give effect to every term."). Our interpretation of the documents establishes the Lease obligated the defendants to maintain the Residence, but not to make further significant repairs following the closing. Based on the foregoing, we affirm the directed verdict dismissing the plaintiffs' breach of contract claim.

Plaintiffs advanced a TCPA claim against defendants alleging defendants' conduct constituted unfair and deceptive acts and practices.[7] Defendants relied upon *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997) for the proposition that the TCPA does not apply because the transaction was "the isolated sale of real estate between private parties." The Trial Court followed *Ganzevoort* and held that the "casual sale of a person's personal residence" does not fall within the ambit of the Act.

In *Ganzevoort*, the Supreme Court relied heavily on two of the General Assembly's stated purposes for the TCPA: T.C.A. § 47-18-102(2), (4) (2001) and reasoned that "[a]lthough this language does not explicitly exclude from the Act sellers not in the business of selling property as owners or brokers, a reasonable construction is that they are not included." *Ganzevoort*, 949 S.W.2d at 298.

Plaintiffs counter that *Ganzevoort* is distinguishable, since *Ganzevoort* involved a seller who had no professional connection to the real estate industry, while in this case defendants had occupied and sold 15 homes in the span of 17 years, and Davis is a residential real estate developer.

The distinguishing characteristics relied upon by plaintiffs, such as the prior home sales and Mr. Davis's experience as a real estate developer, focus on Mr. Davis's superior knowledge of the real estate trade rather than on the Davises' role in the transaction. "As we read *Ganzevoort*, the criteria for applying the Act is not the extent of a seller's knowledge . . . but whether or not the seller is engaged in the business of selling houses." *Murvin v. Cofer*, 968 S.W.2d 304, 309 (Tenn. Ct. App. 1997). Whether the defendants were engaged in business depends upon their role in the particular transaction at issue (i.e., were the defendants acting in a

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[7] The TCPA prohibits "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce." T.C.A. § 47-18-104(a) (Supp. 2005). The TCPA also creates a private right of action:

> Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.

T.C.A. § 47-18-109(a)(1) (2001).

business capacity or a personal capacity when they sold their Residence). This has consistently been the analytical focus of Tennessee's courts when dealing with this issue.[8]

The defendants in *Ganzevoort* and this case share a key characteristic, they were selling a personal residence, and the parties do not dispute that the Residence was defendants' personal home at the time of the transaction. The only evidence of any connection between Davis's business and the sale of his personal residence is his company's payment of a $70.50 repair bill. There is no assertion that Davis's company built the Residence or ever owned it. We conclude the defendants acted as individuals selling their personal residence in a personal capacity, and were not engaged in business when they sold their home. We affirm the Trial Court's grant of a directed verdict dismissing plaintiffs' TCPA claim.

The Circuit Court awarded $9,786.00 in attorney's fees to the defendants pursuant to the Sales Contract. The Sales Contract provides:

> In the event legal action is instituted by the Agent, or any party to this contract, to enforce the terms of this contract or arising out of the execution of this contract or the sale, or to collect commissions, the prevailing party shall be entitled to receive from the other party all costs of enforcing this agreement, including a reasonable attorney fee.

Plaintiffs' argument against the award of attorney's fees is "if the trial court's decision is reversed there would e no basis for an attorney's fee award." Since we are affirming the Circuit Judge's dismissal of plaintiffs' claims, the award of attorney's fees to the prevailing party was appropriate.

On appeal, defendants request damages against plaintiffs, pursuant to T.C.A. § 27-1-122, for filing a frivolous appeal. We note this statute "must be interpreted and applied strictly so as not to discourage legitimate appeals." *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977). While plaintiffs' argument regarding their fraud claim was sufficiently incomplete to constitute a waiver of the issue and their breach of contract argument was devoid of useful citations to the Record, their argument regarding the applicability of the TCPA presented a debatable issue of law. Accordingly, an award of damages for filing a frivolous appeal is not warranted in this case.

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[8] *Ganzevoort*, 949 S.W.2d at 297-98 (holding that an individual selling his personal residence was not engaged in the business of selling houses, but the realtor selling the residence was "in the course of the real estate trade"); *Murvin v. Cofer*, 968 S.W.2d at 308-09 (holding that an individual selling his personal residence was not engaged in the business of selling houses, although he supervised the construction of the house); *Colquette v. Zaloum*, No. E2003-2301-COA-R3-CV, 2004 WL 1924022 (Tenn. Ct. App. May 14, 2004) (holding that an individual selling his automobile dismantling business "was not in the business of selling automobile dismantling businesses"); *White v. Eastland*, No. 01-A-019009CV00329, 1991 WL 149735 (Tenn. Ct. App. Aug. 9, 1991) (holding that an individual selling his personal automobile was not engaged in the business of selling automobiles).

In sum, the Circuit Court's grant of a directed verdict dismissing plaintiffs' claims and its award of attorney's fees to the defendants is affirmed. The plaintiffs' appeal was not sufficiently frivolous to justify an award of damages to the defendants. The cause is remanded with the cost of the appeal assessed to Harvey M. And Kristin G. Abouelata.

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HERSCHEL PICKENS FRANKS, P.J.