

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

**FILED**  
September 20, 1995  
Cecil Crowson, Jr.  
Appellate Court Clerk

PAUL A. ATTANASIO, et ux,	)	C/A NO. 03A01-95-00173
JERRI A. ATTANASIO,	)	
	)	KNOX CHANCERY
Plaintiffs-Appellants,	)	
v.	)	HON. FREDERICK D. McDONALD,
	)	CHANCELLOR
	)	
MIKE UNDERWOOD, Individually,	)	
and MIKE UNDERWOOD BUILDERS,	)	
INC.,	)	AFFIRMED
	)	AND
Defendants-Appellees.	)	REMANDED

RAYMOND E. LACY and ANTHONY R. STEELE, LACY & WINCHESTER, P.C., Knoxville, for Plaintiffs-Appellants.

MORTON & MORTON, Knoxville, for Defendants-Appellees.

O P I N I O N

Franks. J.

Plaintiff homebuyers appeal the Trial Court's dismissal of their suit for rescission of a real estate contract entered with Defendant.

Plaintiffs contracted to purchase a home under construction by Defendant in October of 1993. The contract included a Builder Warranty warranting against any structural defects for a period of 12 months from the time of closing or possession whichever occurred earlier. At the time the agreement was made, construction had progressed to the point that the foundation footings were covered, rendering personal inspection by plaintiffs impractical.

Construction was completed and the parties closed on the house in November of 1993. At the closing Plaintiffs

received a Registered Builder New Home Limited Warranty. The warranty recited the following:

PURCHASER AGREES THAT THIS REGISTERED BUILDER WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, STATUTORY OR OTHERWISE, EXPRESSED OR IMPLIED, ALL OTHER REPRESENTATIONS MADE BY BUILDER AND ALL OTHER OBLIGATIONS OR LIABILITIES WITH RESPECT TO SAID PROPERTY. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS ARE SPECIFICALLY EXCLUDED, AND THE BUILDER'S OBLIGATION SHALL NOT EXCEED ITS OBLIGATION SET FORTH IN SAID REGISTERED BUILDER WARRANTY.

The warranty lists various types of possible deficiencies under specific categories. It also specifies "Exclusions from New Home Limited Warranty." In addition, the Plaintiffs received a "Warranty of Completion of Construction in Substantial Conformity with Approved Plans and Specifications." This warranty, as its title suggests, warranted that the construction substantially conformed with the plans and specifications, providing coverage for non-conformities where the purchasers give written notice of such within one year from the date of conveyance or occupation, whichever occurs first. Both warranties were signed by the parties.

The Plaintiffs occupied the home and the following January they noticed cracks in the brick veneer of the house in three different places and informed the Defendant of the problem. Defendant inspected the cracks shortly thereafter and suggested that any action be delayed for several weeks in order to monitor any progression of whatever the underlying problem might be. The following May, Defendant removed the cracked brick veneer, and when he attempted to replace the veneer, the Plaintiffs would not permit him to make repairs. Instead, upon consulting an attorney, plaintiffs had an engineer excavate the areas around the fractured bricks. The

engineer determined there were fractures in the concrete block foundation walls and footings, although the fractured footings were not displaced. He also determined that parts of the house had been constructed on various types of soil, some of which were inappropriate to support foundation structures.

At that juncture, plaintiffs' counsel advised defendant of the engineer's findings and demanded rescission of the sale, as well as restitution for all of the expenses and expenditures incurred by the Plaintiffs in connection with the house, including attorney's fees. In response, Defendant offered to purchase the property, reimburse the Plaintiffs for their closing costs, and return the fixtures installed in the home, such as the custom drapes, etc. Plaintiffs rejected this offer and filed suit for rescission. Defendant answered the complaint and made an Offer of Judgment pursuant to Rule 68 of the Tennessee Rules of Civil Procedure, essentially offering the same terms which had previously been rejected. Plaintiffs responded by ostensibly accepting the Defendant's offer of "rescission" but moving the Court to issue a Writ of Inquiry and Hearing thereon to determine the proper amount for restitution. The Court denied the motion, deeming the tender of judgment to have been rejected.

Following a trial of the issues, the Court dismissed the action and this appeal followed.

Plaintiffs raise a number of issues on appeal, the essence of which is whether the Trial Court erred in failing to award rescission and restitution as the appropriate remedy. They rely mainly on the case of *Robinson v. Brooks*, 577 S.W.2d 207 (Tenn.App. 1978), arguing that case, where the Court awarded rescission as the proper remedy, controls this case. We cannot agree.

In *Robinson* the plaintiffs purchased a new home and moved in in January of 1976. The home was situated on a relatively steep slope. In February of the following year a landslide occurred, causing the house to lean and eventually forcing its occupants to vacate the following July. By contrast, in this case, the evidence reveals that the house, although having sustained significant cracks in its foundations, remains level and the walls in plumb. Apparently everything, including the windows and doors, work properly, without binding, and the house itself is habitable.

The basis of the *Robinson* decision to award rescission was a mutual mistake. Neither plaintiffs nor defendants knew of the soil problems which resulted in the landslide and uninhabitability of the house. In the instant case, no landslide has occurred. Although it appears that the Defendant and the Plaintiff were both unaware of the soil problems, it appears all that has occurred at this juncture is a fairly significant settling of the house. We agree with the Trial Court who concluded that at this point in time a mutual mistake has not been established which creates a basis for rescission.

The Chancellor found, and we agree, that the documents comprising the contractual agreement between the parties provide a "comprehensive and complete warranty with respect to workmanship and materials with respect to the house" and obligate the Defendant to repair defects appearing within the first year which are not specifically excluded. By implication, they also require the Plaintiffs to permit the Defendant an opportunity to make repairs. Plaintiffs' argument that the limited builder's warranty does not specifically include structural defects in the foundation

footings and therefore excludes them is without merit. Moreover, the evidence adduced at trial by both parties indicates the defects can be repaired and the Defendant was ready and willing to undertake the needed repairs.

Finally, we note as the *Robinson* Court did, that "rescission of a contract is not looked upon lightly. It is available only under the most demanding circumstances." We also note that "the remedy is a discretionary matter which should be exercised sparingly and only when the situation demands such." *James Cable Partners v. Jamestown*, 818 S.W.2d 338(Tenn.App. 1991). In this case, the Chancellor observed that future events may establish a basis of rescission and restitution as an appropriate remedy, if repairs prove to be inadequate to solve the problem. However, the evidence to date is that the problems relating to the defects do not rise to the level necessary to require rescission as the appropriate remedy.

We echo the Chancellor's remarks:

We understand the feeling of dissatisfaction that plaintiffs have with defendant because it is defendant's work that was not up to satisfaction, structurally speaking, but defendant warranted the work and we think was obligated to correct the work, and had the right to undertake to do so under the contract.

Defendant Underwood testifies that it can be corrected and plaintiffs, through Mr. Mishu, has demonstrated that the problem can be corrected. We think this is not the type of case that occurred in *Robinson* where there was extreme damage, and there is no indication that it would have been reasonable to correct the problem.

That being the case, we conclude that this litigation is presently premature and should be dismissed.

We affirm the judgment of the Trial Court at Appellants' cost and remand to the Trial Court.

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Herschel P. Franks, J.

CONCUR:

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Don T. McMurray, J.

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Clifford E. Sanders, Sr.J.