IN THE COURT OF APPEALS OF TENNESSEE

FILED

January 29, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

JAMES HOLDEN and MARINA HOLDEN	:	HAMBLEN CHANCERY
	:	CA No. 03A01-9508-CH-00293
Plaintiffs-Appellees	:	
	:	
	:	
vs.	:	
	:	
	:	HON. DENNIS H. INMAN
	:	CHANCELLOR
BOBBY L. FRAZIER,	:	
DORIS J. FRAZIER,	:	
D. D. ROBERTS, EDITH ROBERTS,	:	
MONTY F. SAMS, and	:	
REMAX REAL ESTATE ONE OF	:	
MORRISTOWN, INC.	:	AFFIRMED IN PART,
	:	REVERSED IN PART, AND
Defendants-Appellants	:	REMANDED

CLINTON R. ANDERSON, OF MORRISTOWN, TENNESSEE, FOR APPELLANTS BOBBY L. FRAZIER AND DORIS J. FRAZIER

C. DWAINE EVANS, OF MORRISTOWN, TENNESSEE, FOR APPELLANTS D. D. ROBERTS AND EDITH ROBERTS

VIRGINIA A. SCHWAMM, WITH TOWLE & SCHWAMM, OF KNOXVILLE, TENNESSEE, FOR APPELLEES

O P I N I O N

Sanders, Sr.J.

The pivotal issue on this appeal is, where the purchasers of a residence sue their grantors and the grantors to plaintiffs' grantors for damages based on a defective

septic tank sewer system which did not conform to the restrictive covenants relating to a sub-surface sewage disposal system, may the trial court, in lieu of awarding or denying damages, sua sponte, order and decree as follow: "1. The defendants, jointly and severally, shall do either of the following: (a) install a sub-surface sewage disposal system in conformance with the directives of the Hamblen County Health Department...or (b) refund to the Plaintiffs all monies paid by them regarding their purchase of the house..." including mortgage payments and other expenses? We hold the answer is negative, and reverse.

In August, 1992, the Plaintiffs-Appellees, James Holden and Marina Holden, entered into a contract with Defendants-Appellants, Bobby Frazier and wife, Doris Frazier to purchase Lot No. 11 of the Musick Acres Subdivision located in Hamblen County outside the corporate limits of Morristown. The lot was improved with a four-bedroom residence which had been constructed in 1989. The sale of the property was closed in November, 1992, and the Fraziers executed a general warranty deed for the property.

Approximately one year later Plaintiffs Holden filed suit against the Fraziers and Defendants-Appellants, D. D. Roberts and Edith Roberts, who had sold the property to the Fraziers in 1989. They also sued Defendants, Monty F. Sams and ReMax Real Estate One of Morristown, Inc. (ReMax). Mr. Sams was an employee of ReMax which was a real estate broker representing the Fraziers in the sale of the property.

The Plaintiffs alleged in their complaint that soon after moving into the residence they began experiencing problems with the house, including electrical problems, plumbing problems, water leaks and septic tank and field line problems. They also alleged the lots in the subdivision, including their lot, had the following sewage disposal restrictions: "No individual sewage disposal system shall be permitted on any lot unless such system is designed, located and constructed in accordance with the requirements, standards, and recommendations of the Hamblen County Health Authority. Approval of such system as installed shall be obtained from such Authority." They alleged: "[U]pon information and belief that the sewage disposal system on the property was not designed, located, or constructed in accordance with the requirements, standards, and recommendations of the Hamblen County Health Authority", as required by the aforesaid restrictive covenant. "Sellers knew or reasonable [sic] should have known of the material defects and electrical system defects, and were under a duty to disclose their existence, nature, and extent to Buyers. These material defects were both unknown to and generally undiscovered by Buyers before the closing, and Sellers hid and concealed these matters from Buyers instead of making full disclosure of them as the law and their agreement required. Such concealment and nondisclosure were intended to induce Buyers to purchase a parcel of real property which they would not have purchased if the truth had been disclosed to them and Buyers reasonably relied upon such concealment and nondisclosure by Sellers. The presence of these undisclosed and hidden material defects has greatly diminished the fair market value of their property."

The relief for which the Plaintiffs prayed in their complaint was as follows: "Plaintiffs pray that they be awarded the following: 1. Damages for their financial and non-financial losses and injuries. As to Defendants Sams and ReMax, all damages awarded should be trebled pursuant to T.C.A. 47-18-101 et seq.; 2. Punitive damages as provided by law; 3. Prejudgment interest; 4. Attorneys fees and costs; 5. Such other, further and general relief as Plaintiffs may show themselves entitled to upon final hearing of this cause."

The Fraziers, for answer, admitted the Plaintiffs had a blockage in the sewer system soon after moving into the residence and a minor electrical problem, but said they paid for unstopping the sewer and repairing the electrical problem. They denied these conditions existed prior to the Fraziers' moving out of the property. They denied there were any electrical, sewer, plumbing, or septic tank problems existing at the time they vacated the property or that they concealed from the Plaintiffs any knowledge they had of any defects in the property at the time of sale. Defendants said they had no knowledge at the time of sale whether the sewer system had been approved. But after suit was filed, they received a copy of the original approval of the septic system from the Hamblen County Department of Health and attached a copy as an exhibit to their answer. Defendants denied any liability to Plaintiffs and joined issue on all allegations.

Defendants Roberts, for answer, denied any liability to the Plaintiffs. They denied the Plaintiffs had any standing to maintain a cause of action against them. They denied they had made any misrepresentations or concealed any

information they had of any defects in the property or its sewer disposal system. They disclaimed all liability to Plaintiffs.

Summary judgment was granted in favor of Defendants Sams and ReMax. Answers filed by them, if any, are not in the record before us nor is the action of the court in granting summary judgment to these Defendants before us on this appeal.

Upon the trial of the case, as pertinent to the issues on this appeal, the proof showed a declaration of restrictions was filed which imposed numerous restrictions on the lots in the subdivision, one of them being the sewage disposal restrictions. The record also shows that in May, 1978, a permit for the construction of a sub-surface sewage disposal system on Lot 11 was issued by the Health Department to Jean Evans and Wayne Musick. The permit was for a three-bedroom residence. The construction of the system was approved by the Health Department on May 23, 1978. In the interim, a residence was erected on the lot but was subsequently destroyed by fire.

In January, 1989, Defendant Roberts purchased the lot and entered into a contract with Frank Cheatum and Jerry Holt to erect a new four-bedroom house on the same foundation on which the original house was erected. They also connected the new house to the same sewer system.

In November, 1989, the Roberts sold the property to the Fraziers. Although the deed from the Roberts to the Fraziers contains the following paragraph: "This conveyance

is made subject to the restrictions of record in the Register's Office of Hamilton County, Tennessee, in Warranty Deed Book 214, page 433, and shown on plat of record," there is no showing either the Roberts or the Fraziers had any knowledge of what the restrictions were.

After the trial of the case, the chancellor took the case under advisement and filed a memorandum opinion finding the Plaintiffs had failed to carry the burden of proof to recover damages as alleged in their complaint but held the Fraziers and Roberts were ordered to either construct a sub-surface sewage disposal system or refund Plaintiffs' purchase price and damages as set out above in this opinion, and that the Roberts shall indemnify and hold the Fraziers harmless from any liability resulting from the judgment. The chancellor's memorandum opinion is attached as Appendix "A" to this opinion.

We concur with the chancellor in his holding the Plaintiffs failed to carry their burden of proof that the Defendants were liable in damages to the Plaintiffs. This issue, however, is not before us on this appeal.

In view of the findings of the chancellor in his memorandum opinion, to further summarize the testimony of the parties and witnesses would serve only to lengthen this opinion.

The salient facts in the case are not really in dispute. There is no proof in the record to show the Defendants made any misrepresentations to the Plaintiffs nor

is there any proof the Defendants concealed anything they knew or even should have known about defects in the property. We think the proof establishes that the property which the Plaintiffs purchased from the Fraziers had some defects which manifested themselves after the Plaintiffs purchased the property. The worst of these defects was in the septic tank and field line system. There is no proof, however, that these same defects manifested themselves while the Defendants owned the property or that the Defendants had knowledge of them.

For a seller of real estate to be liable under the theories of either fraudulent misrepresentation or failure to disclose, he must have actual knowledge of the defect. In **Akbari v. Horn**, 641 S.W.2d 506 (Tenn.App.1982), which involved the structural supports of an attic, the defendant was not liable to the purchasers when he was not, in fact, aware of the damage. Purchasers there bought an old theater. Before the purchase, the owner did disclose that the roof had been leaking. The water leaks had deteriorated the wooden trusses but there was no evidence the defendant had knowledge of this damage. In affirming a judgment for defendant, the court stated: "[This Court does not believe] that a seller is liable for failure to disclose that which he should have known if he did not in fact know it." Id. at 507.

The majority rule corresponds with **Akbari's** holding that actual fraud or reckless disregard for its truth is necessary before a non-commercial owner is liable to purchasers.

> The general rule in most jurisdictions is that representations by a seller or vendor as to the subject matter of the sale must be made with an

> intent to deceive in order to be fraudulent. This is especially true if the seller in good faith believed his representations to be true and did not make them recklessly or regardless of whether they were true. Likewise, it is the general rule in most jurisdictions that it is necessary to show scienter or knowledge on a vendor's part of the falsity of his representations in order to sustain a charge of fraud against him.

37 Am.Jur.2d Fraud & Deceit § 217.

A "misrepresentation" must be a "fact," not merely an opinion. **Dozier v. Hawthorne Development Co.**, 37 Tenn. App. 279, 292, 262 S.W.2d 705, 711 (1953).

A vendor may also be liable by failing to disclose a defect of which he had knowledge if the vendor (a) is aware the vendee would not discover the defect upon inspection, (2) actively conceals the defect, or (3) affirmatively states the defect does not exist. **Belote v. Memphis Development Co.**, 208 Tenn. 434, 346 S.W.2d 441, 443 (1961). See also **Cooper v. Cordova Sand and Gravel Co.**, 485 S.W.2d 261, 266-67 (1971). This approach, however, also requires actual knowledge of the defect by the owner.

The judgment that was entered after the filing of the chancellor's memorandum opinion did not recite the holding of the chancellor that Plaintiffs failed to carry their burden of proof. The judgment recited instead: "The Court finds that the memorandum opinion of the court entered on December 1, 1994, shall be, and the same hereby is, the judgment of this court." The pertinent part of the court's holding which was not in the draft of the judgment is: "Regarding all the other problems - sewage odor, water leakage problems, electrical aberrations, etc. - the defendants insist that they

had no previous difficulties in any of those particulars, that they made no misrepresentation of fact to the plaintiffs, and that they withheld no material information.

"The most that can be said regarding these issues is that the evidence is evenly balanced and thus the defendants must prevail." We affirm this portion of the judgment of the court.

This brings us to consideration of the other portion of the judgment which, as pertinent, provides: "[I]t is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Defendants, jointly and severally, shall do either of the following:

(a) install a sub-surface sewage disposal system in conformance with the directives of the Hamblen County Health Department with regard to a four-bedroom home and which ultimately is approved by the Health Department; or (b) refund to the Plaintiffs all monies paid by them regarding their purchase of this house including all payments made toward the principal amount of the mortgage indebtedness and all sums paid by them for plumbing and electrical repairs during their occupancy.

2. Defendants Roberts shall indemnify and hold harmless Defendants Frazier from any liability resulting from this Judgment.

3. The costs of this cause shall be taxed to Defendants Roberts for which execution may issue if necessary."

Defendants Fraziers and Roberts have appealed, saying the court was in error, and their issues for review may be summarized as follows: (1) Does the evidence preponderate

against or support the findings of the court? (2) Does the judgment exceed the relief requested in the pleadings and did the court err in granting the alternative of injunctive relief or rescission, as well as indemnification when neither was requested in the pleadings? (3) Did the court error in finding the subdivision restrictions had been violated? If not, (a) does a subsequent purchaser have a cause of action against a remote grantor and (b) did the court err in finding an implied warranty on the part of an immediate vendor and a remote vendor in favor of the purchaser? We find the first two issues controlling, and reverse for the following reasons.

The only relief asked for by the Plaintiffs in their pleadings was compensatory "damages for their financial and non-financial losses and injuries"; (2) "punitive damages as provided by law"; (3) "prejudgment interest"; (4) "attorneys fees and cost"; and (5) general relief. At no time in the proceedings did the Plaintiffs ask for or offer evidence in support of mandatory injunctive relief or rescission of their deed to the property, nor were the Defendants given an opportunity to respond to such relief. The judgment, however, holds the Defendants "jointly and severally" responsible for the directives of the decree. Also, Paragraph 2 of the decree, which provides: "Defendants Roberts shall indemnify and hold harmless Defendants Frazier from any liability resulting from the judgment," is outside the pleadings and the proof.

The Fraziers filed no pleading asking that they be indemnified or held harmless by the Roberts for liability resulting from a judgment. No evidence was offered in support

of such judgment nor were the Roberts given an opportunity to defend against such judgment.

In addressing the necessity for matters to be alleged in the pleadings and supported by evidence before they can be adjudicated by the chancery court, Gibson's Suits in Chancery, Seventh Edition, Section 218, Grounds of a Decree, p. 213, as pertinent, states:

> A Court of Chancery has no jurisdiction of any matter not submitted to it in a pleading for adjudication; nor can the defendant be called on to respond to anything not alleged against him. Neither can a Court consider any evidence which does not directly, or indirectly, tend to prove or disprove the allegations contained in the pleadings. A decree can neither be based on allegations without corresponding proof, nor on proof without corresponding allegations. All decrees must be the concurring result of allegations justified by proof, and proof justified by allegations. A decree based on pleadings without proof, will be reversed on appeal, but will be good against collateral attack. A decree based on proof, without pleadings, will not only be reversed on appeal, but will also yield to a collateral attack because such a decree is coram non judice, and absolutely void.

In the case of **Cardwell v. Hackett**, 579 S.W.2d 186 (Tenn.App.1978) the plaintiff sued the defendant for implied warranty of a mobile home purchased by the plaintiff from the defendant. Upon the trial, the judge rendered a judgment for the return of the purchase price of the mobile home to the purchaser by the defendant and a return of the mobile home to the defendant. In reversing the judgment on appeal, this court said: "Thus, his judgment is a rescission of the contract and an effort to restore the parties to status quo. It seems to us that this is error...because the pleadings do not encompass a suit for rescission." Id. 191.

In the unreported case of **Southern College of Optometry v. Tennessee Academy of Ophthalmology, Inc., et al.**, 1989 WL 105635 (Tenn.App.1989), the trial court granted injunctive relief which had not been asked for in the pleadings. In reversing the trial court on appeal, this court said, as pertinent:

> Under the facts of the case at bar, we find that the failure of SCO [the plaintiff] to specifically plead the injunctive relief granted resulted in TAO's and Hiatt's [defendants] being denied the opportunity sufficiently to defend against its being granted. The proof at trial was insufficient to allow the injunction granted by the trial court. The order granting permanent injunctive relief is accordingly reversed and the matter is dismissed.

In the case of **Fidelity-Phenix Fire Ins. Co. of New York v. Jackson, et al.**, 181 Tenn. 453, 181 S.W.2d 625, 629 (1944), our supreme court said:

> No rule is better settled than that both allegations and proof are essential to a decree or judgment and that there can be no valid decree unless the matter on which the decree is rested is plainly within the scope of the pleadings.

The court also quoted with approval:

> "In order to give a judgment the merit and finality of an adjudication between the parties, it must be responsive not only to the proof but to the issues tendered by the pleadings, because pleadings are the very foundation of judgments and decrees. A judgment will be void which is a departure from the pleadings, and based upon a case not averred therein, since if allowed to stand it would be altogether arbitrary and unjust and conclude a point upon which the parties had not been heard....Therefore, the rule is firmly established that irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his bill or other pleadings."

Id. 629. Also see **John J. Heirigs Const. Co. v. Exide**, et al., 709 S.W.2d 604 (Tenn.App.1986).

Since the first two issues presented by the Appellants are controlling, the remaining issues are pretermitted.

The judgment of the trial court, insofar as it orders the Defendants to either construct a sub-surface sewage disposal system or refund Plaintiffs' purchase price, mortgage payments, and expenses, and for Roberts to hold Fraziers harmless from the judgment, is reversed.

The judgment of the court is affirmed in part and reversed in part. The cost of this appeal is taxed to the Appellees and the case is remanded to the trial court for the entry of a decree in keeping with this opinion.

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Clifford E. Sanders, Sr.J.

CONCUR:

_____
Herschel P. Franks, J.

_____
Don T. McMurray, J.