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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-108

No. COA19-1165

Filed 6 April 2021

Carteret County, No. 17 CVS 738

JENNIFER CZECH, GRACE CZECH, and DAVID HENZLER, Plaintiffs,

v.

JAMES COLE and ANNA COLE, Defendants.

Appeal by plaintiffs from order entered 5 August 2019 by Judge John Nobles in Carteret County Superior Court. Heard in the Court of Appeals 25 August 2020.

Harris, Creech, Ward & Blackerby, P.A., by Jay C. Salsman and A. Ruthie Sheets, for plaintiffs-appellants.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, and Greene & Wilson, P.A., by Thomas R. Wilson, for defendants-appellees.

DIETZ, Judge.

¶ 1 Jennifer Czech and her family bought a home near Bogue Sound in Newport. The Czechs later discovered extensive water damage to the home's subflooring. The Czechs sued the sellers, James and Anna Cole, for fraud and related claims on the ground that the Coles knew of the damage and failed to disclose it.

¶ 2 The Coles, in response, argued that any alleged damage should have been discovered by the Czechs in the exercise of reasonable diligence and thus the Czechs'

claims fail as a matter of law. The Coles point to findings by the Czechs' home inspectors of water penetration to exterior door frames. The Czechs acknowledge these findings by their inspectors but insist that they referred only to the exterior of the home and that no reasonable person, in light of the inspectors' findings, would have sought to pull up the laminate flooring and investigate the subflooring in interior areas such as the kitchen and bathroom.

¶ 3

The trial court granted summary judgment in favor of the Coles, presumably because the court determined that the Czechs failed to exercise reasonable due diligence. We are not persuaded that this question can be resolved as a matter of law. Reasonableness is a fact question and, here, there is evidence supporting both parties' interpretations of the home inspectors' findings. Assessing what further investigation was reasonable under these circumstances is, therefore, a genuine issue of material fact and not something that can be resolved at the summary judgment stage. Accordingly, we reverse the entry of summary judgment with respect to the fraud and negligent misrepresentation claims and remand for further proceedings.

Facts and Procedural History

¶ 4

In 2014, James and Anna Cole decided to sell their home. The home was located near Bogue Sound in Newport. It was a single-story home with visible rotting and weathering on various parts of the exterior, including doors, windows, and decking. The interior of the home had laminate flooring in every room.

¶ 5 At one point while living there, before the home was for sale, James Cole noticed paint bubbling on the door jamb of the kitchen door. Cole replaced the jamb. He also lifted up the laminate flooring around the door. Cole did not recall seeing any water or dampness when he did so, but a portion of the wood floor beneath the laminate was “discolored and soft,” so Cole replaced it.

¶ 6 The Coles later moved out of the home but regularly stopped by while it was up for sale. At one point, James Cole checked on the property and noticed that the toilet in the hall bathroom had “leaked” and the laminate flooring was “swelling up.” He removed the laminate flooring in the bathroom to allow the flooring to dry out. Cole acknowledged that the wood beneath the laminate flooring was “damp” when he lifted up the laminate.

¶ 7 Later, during a walk-through, the Coles’ real estate agent noticed soft flooring in the same bathroom and reported it to James Cole. Cole returned and found a “soft spot in the middle of the bathroom floor by the bathtub” so he replaced that portion of the flooring.

¶ 8 When the Coles put the property up for sale, they prepared and signed a residential property owner’s disclosure statement. The Coles answered “no” to the following questions on the statement:

(2) Is there any problem, malfunction or defect with the dwelling’s foundation, slab, fireplace/chimneys, floors, windows (including storm windows and screens), doors,

ceilings, interior and exterior walls, attached garage, patio, deck or other structural components including modifications to them?

...

(6) Is there any water seepage, leakage, dampness or standing water in the dwelling's basement, crawl space or slab?

...

(9) Is there any problem, malfunction or defect with the dwelling's heating and/or air conditioning?

...

(21) Is there any problem with present infestation of the dwelling, or damage from past infestation of wood destroying insects or organisms which has not been repaired?

¶ 9

In 2015, Jennifer Czech informed the Coles that she was interested in buying the property with financial assistance from her mother Grace Czech and step-father David Henzler. Jennifer Czech sent a written offer to the Coles expressing her interest in the property. She explained that the offer was below the asking price because the home “clearly needed work,” “the deck was in really bad shape, the railings were in horrible condition,” and there was other “exterior stuff” that concerned her. In the offer letter, Czech wrote, “I have taken all of the work that needs to be done into serious consideration.” She offered to purchase the home for \$240,000. The Coles made a counter-offer of \$265,000 with an agreement to make some limited repairs.

¶ 10

After further negotiations, the Czech and Cole families entered into a contract with a purchase price of \$252,500. In exchange for the lowered purchase price, the

Czechs agreed to accept the house with an “As Is-Where Is” clause. The parties used a form contract but, in a section titled “other provisions and conditions,” the parties typed in the following: “As Is-Where Is”; Seller to make no repairs.”

¶ 11 During the 30-day due diligence period, the Czechs conducted a series of inspections. A home inspector found that “[a]ll of the front doorframes and fixed panel frames are damaged at bottom (majority on left sides) from moisture penetration. The door frames need to be evaluated for repair/replacement by a qualified contractor before damage extends.” Similarly, a termite inspector reported, “[w]ood decay and high moisture content found on the front door frames and high moisture found in the baseboard near the front door frames.”

¶ 12 Based on these inspection reports, the Czechs requested a credit of several thousand dollars “for correcting door moisture issues.” The Coles declined. Nevertheless, the Czechs moved forward with the purchase of the home.

¶ 13 After closing, Jennifer Czech requested estimates from a handyman for the repairs needed for the decking on the exterior of the home and the exterior door frame. The handyman pulled back some of the interior laminate flooring near the door frame. The subflooring underneath had moisture damage. After further investigation, the Czechs discovered extensive water damage, moisture damage, rot, mold, and other related issues throughout the subflooring of the home.

¶ 14 The Czechs sued the Coles for fraud, negligent misrepresentations, and

negligence. After discovery, the Coles moved for summary judgment. Following a hearing, the trial court granted summary judgment in favor of the Coles and against the Czechs and dismissed all claims in the complaint with prejudice. The Czechs appealed.

Analysis

¶ 15 This Court reviews a trial court’s entry of summary judgment *de novo*. *Virginia Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191 (1986). On appeal, we determine whether the forecast of evidence in the trial record creates genuine issues of material fact or whether, because there are no genuine issues of material fact, the movant is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980).

I. Fraud

¶ 16 We begin with the Czechs’ fraud claim. The essential elements of fraud are “(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.” *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 744–45, 600 S.E.2d 492, 498 (2004). Because the plaintiff must have been deceived by the false statement, there is a reliance component to a fraud claim. *State Props., LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002). “With respect to the purchase of property, reliance is not reasonable if a plaintiff fails to

make any independent investigation unless the plaintiff can demonstrate: (1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations." *RD&J Props.*, 165 N.C. App. at 746, 600 S.E.2d at 499 (brackets omitted).

¶ 17 In addition, this Court has recognized a claim for fraud in the context of a home sale even without an affirmative false representation. This fraud claim arises when "a material defect is known to the seller, and he knows that the buyer is unaware of the defect and that it is not discoverable in the exercise of the buyer's diligent attention or observation." *Everts v. Parkinson*, 147 N.C. App. 315, 321, 555 S.E.2d 667, 672 (2001). The Court reasoned that a seller has a duty to disclose a known and otherwise undiscoverable defect in these circumstances because "*suppressio veri* (a failure to disclose the truth) is as much fraud as *suggestio falsi* (an affirmative false representation)." *Id.*

¶ 18 With the elements of these fraud claims in mind, we turn to the parties' arguments. The Coles first contend that the fraud claims fail as a matter of law because, in exchange for a reduction in the sale price, the Czechs "explicitly agreed to accept the house 'As-Is.'" But the Coles cite no authority providing that an "As-Is" clause in a contract for the sale of property waives the common law duty to disclose known and otherwise undiscoverable defects. And, in any event, the Czechs alleged

affirmative misrepresentations in the residential property owners' disclosure statement and the meager "As-Is" language, typed into a line on a form contract, did not withdraw or disclaim those earlier representations. We therefore reject the argument that the "As-Is" language defeats the fraud claim as a matter of law.

¶ 19 With that argument resolved, the remainder of the parties' fraud arguments amount to a factual dispute about what the parties knew, or should have known, about the condition of the home's subflooring. The Czechs contend that James Cole must have known about the moisture issues in the subflooring because he admitted to removing the laminate flooring and viewing the subflooring beneath it at least twice before the sale of the property. The Czechs also assert that, although their home inspector and termite inspector found moisture penetration on the outer doorframes and baseboards, the inspections only revealed issues in the home's exterior and it was "not reasonable for a prospective buyer to pull up surface flooring as part of the inspection" to search for potential moisture damage in the interior subflooring of the home.

¶ 20 The Coles, by contrast, point to the home inspector's finding that "[a]ll of the front doorframes and fixed panel frames are damaged at bottom (majority on left sides) from moisture penetration. The door frames need to be evaluated for repair/replacement by a qualified contractor before damage extends." They also point to a similar finding by the termite inspector about "[w]ood decay and high moisture

content . . . in the baseboard near the front door frames.” The Coles then argue that, taking these inspectors’ findings together, the Czechs would have discovered the alleged damage had they taken reasonable steps to follow-up on their own inspectors’ findings and recommendations.

¶ 21 Assessing these competing factual arguments is beyond the scope of this Court’s review of a summary judgment ruling. The key question on appeal—and the parties largely agree on this in their appellate briefing—is whether the Czechs could have discovered the alleged defects in the property’s condition through the exercise of reasonable diligence. Reasonableness is the quintessential example of a fact question that must be resolved by a jury. *Alston v. Herrick*, 76 N.C. App. 246, 249, 332 S.E.2d 720, 722 (1985), *aff’d*, 315 N.C. 386, 337 S.E.2d 851 (1986). This Court is simply not in a position, on this record, to assess whether it was reasonable to pursue further investigation of the interior subflooring based on the information disclosed by the inspectors. We therefore conclude that there are genuine issues of material fact that preclude the entry of summary judgment on the Czechs’ fraud claims.

II. Negligent Misrepresentation

¶ 22 We next address the Czechs’ claim for negligent misrepresentations. Negligent misrepresentation occurs when “(1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care.” *Walker v. Town of Stoneville*, 211 N.C. App. 24, 30, 712 S.E.2d

239, 244 (2011). Importantly, justifiable reliance is an essential element of a claim for negligent misrepresentation, just as it is for a claim of fraud. *C.F.R. Foods, Inc. v. Randolph Dev. Co.*, 107 N.C. App. 584, 588, 421 S.E.2d 386, 389 (1992). And, as with fraud, reliance “is not reasonable if a plaintiff fails to make any independent investigation, or fails to demonstrate he was prevented from doing so.” *Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 35, 817 S.E.2d 247, 254 (2018). “[T]o establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the misrepresentation and allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.” *Id.*

¶ 23 For the reasons explained in our fraud analysis, there are genuine issues of material fact with respect to the reliance element. Thus, the claim is not suited for summary judgment.

III. Negligence

¶ 24 Finally, we address the Czechs’ negligence claim. The Czechs allege that the Coles negligently constructed the garage without a permit, negligently failed to use pressure-treated wood and proper termiticide treatment, and engaged in various other faulty construction practices that caused the garage to suffer moisture damage and termite infestation.

¶ 25 The essential elements of a negligence claim are “(1) that defendant failed to

exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances.” *Harris v. Tri-Arc Food Sys.*, 165 N.C. App. 495, 498, 598 S.E.2d 644, 647 (2004). Here, the Coles owed no legal duty to the Czechs with respect to the actual construction of the garage. The Coles constructed that garage not for the Czechs, but for themselves, and then sold the property “as is.” The only conceivable duty the Coles owed the Czechs in these circumstances is a seller’s legal duty to disclose a known, latent defect not otherwise discoverable by the buyer in the exercise of due diligence. We addressed that claim in section II of the opinion. Beyond this negligent misrepresentation claim, which survives a motion for summary judgment, the Czechs have not forecast any evidence supporting a negligence claim, and we therefore affirm the trial court’s entry of summary judgment on the negligence claim.

Conclusion

¶ 26 We reverse the entry of summary judgment with respect to the fraud and negligent misrepresentation claims and remand for further proceedings. We affirm the trial court’s entry of summary judgment on the negligence claim.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge STROUD and Judge ZACHARY concur.

Report per Rule 30(e).