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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-675

No. COA20-788

Filed 7 December 2021

Alleghany County, No. 19 CVD 108

JOHN KANDARAS and RUTH KANDARAS, Plaintiffs,

v.

HAROLD JONES and SUSAN JONES, Defendants.

Appeal by Defendants from judgment entered 13 April 2020 by Judge Jeanie R. Houston in Alleghany County District Court. Heard in the Court of Appeals 25 August 2021.

Reeves DiVenere Wright, by Anné C. Wright and John Benjamin "Jak" Reeves, for Plaintiffs-Appellees.

The Law Office of Heather R. Klein, by Jill M. Dawkins, for Defendants-Appellants.

INMAN, Judge.

¶ 1 Defendants Harold and Susan Jones ("Defendants") appeal from a judgment awarding Plaintiffs John and Ruth Kandaras ("Plaintiffs") $9,000 for breach of contract in connection with the sale of a home. On appeal, Defendants contend that the trial court erred as a matter of law in concluding that misrepresentations in the North Carolina Residential Property Owners' Association Disclosure Statement (the

"Disclosure Statement") executed by Defendants constituted a breach of the Offer to Purchase and Contract (the "Contract") for the sale of the home. After careful review, and in light of binding precedent, we agree with Defendants and reverse the trial court's judgment as to breach of contract. Because this holding is dispositive, we do not address Defendants' alternative arguments, and we leave the judgment otherwise undisturbed.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below discloses the following:

¶ 3 Defendants signed a Disclosure Statement in connection with the sale of their home in Sparta, North Carolina, on 7 June 2017. Per the Disclosure Statement, Defendants checked boxes indicating that there were no construction issues with the roof or water intrusion problems with the basement or crawlspace. The Disclosure Statement also included a notice to Defendants that "[i]f you check 'No' and you know there is a problem, you may be liable for making an intentional misstatement."

¶ 4 On 7 September 2017, Plaintiffs signed the Contract and acknowledged receipt of the Disclosure Statement signed by the Defendants three months earlier. By signing the Disclosure Statement, Plaintiffs acknowledged that "*they underst[oo]d that this [Disclosure Statement was] not a warranty by [Defendants]*." (Emphasis in original).

¶ 5 Defendants signed the Contract five days later on 12 September 2017. The

Contract provided that it became effective upon Defendants signing, "contain[ed] the entire agreement of the parties and[,] there [were] no representations, inducements or other provisions other than those expressed herein." It further provided that Defendants offered no warranty, "THE PROPERTY IS BEING SOLD IN ITS CURRENT CONDITION," and "CLOSING SHALL CONSTITUTE ACCEPTANCE OF THE PROPERTY IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING."

¶ 6 The parties closed on the home and Plaintiffs moved in at the end of 2017. Less than a year later, a strong wind blew the roof off half of the house. Plaintiffs replaced the roof and installed a French drain to address water intrusion into the crawlspace. After completing those repairs, Plaintiffs filed suit against Defendants on 17 June 2019 for breach of contract, fraud, and unjust enrichment. The complaint's factual allegations asserted that Defendants knew or should have known about problems with the roof and crawlspace at the time they executed the Disclosure Statement and intentionally deceived Plaintiffs in representing otherwise.

¶ 7 The trial court held a bench trial on 11 February 2020 and entered its judgment on 13 April 2020. The trial court found that Defendants knew or should have known about the problems with the roof and crawlspace and were untruthful in their disclosures, though it nonetheless concluded that Plaintiffs failed to show sufficient evidence of fraud and unjust enrichment. The trial court did conclude, however, that

Defendants were liable for breach of contract and awarded Plaintiffs $9,000 in damages. Defendants appealed.

II. ANALYSIS

¶ 8 Defendants argue on appeal that their misrepresentations in the Disclosure Statement cannot support Plaintiffs' breach of contract claim, relying on this Court's decision in *Cummings v. Carroll*, 270 N.C. App. 204, 841 S.E.2d 555, *disc. rev. allowed*, 376 N.C. 525, 851 S.E.2d 42 (2020). Because *Cummings* is controlling on this point, that decision has not been stayed or overturned by our Supreme Court, and Plaintiffs' counterarguments are unavailing, we agree with Defendants and reverse the trial court's judgment.

1. Standard of Review

¶ 9 Our standard of review on appeal from a bench trial is well-established:

> In a bench trial in which the . . . court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (cleaned up) (citations omitted).

2. **Cummings** *Precludes Plaintiffs' Breach of Contract Claim*

¶ 10 The trial court found Defendants liable for breach of contract based solely on their misrepresentations in the Disclosure Statement. In *Cummings*, this Court addressed an identical claim and held that "while a false representation within [a] Disclosure Statement may give [p]laintiffs a basis for [a] cause of action alleging fraud[,] . . . such a false representation cannot support [p]laintiffs' cause of action alleging breach of the [Offer to Purchase and] Contract." 270 N.C. App. at 228, 841 S.E.2d at 573. We did so based in part on a prior holding of our Supreme Court that "it is elementary that where a contract or transaction was induced by false representations, the representations and the contract are distinct and separable—that is, the representations are usually not regarded as merged in the contract." *Fox v. S. Appliances, Inc.*, 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965) (cleaned up) (citation omitted).

¶ 11 *Cummings* has not been stayed or overturned by our Supreme Court; it thus remains binding precedent. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). We are compelled to follow *Cummings* and hold that the trial court erred in concluding that Defendants'

misrepresentations in the Disclosure Statement constituted a breach of the Contract.[1]

¶ 12 Plaintiffs' counterarguments do not frustrate this result. They first assert that the Disclosure Statement and Contract were contemporaneously executed and should thus be construed together, despite the fact that Defendants made the representations in the Disclosure Statement—"as of the date signed"—three months prior to entering into the Contract. Plaintiffs attempt to bridge that lengthy gap in time by asserting that Defendants had statutory duties to deliver the Disclosure Statement at or prior to the time of Plaintiffs' offer and to update the Disclosure Statement under certain circumstances. N.C. Gen. Stat. §§ 47E-5, -7 (2019). But Plaintiffs did not allege that the Disclosure Statement and Contract were merged as contemporaneously executed documents pursuant to these statutory duties in their complaint, nor did they make such a legal argument at the bench trial. As our Supreme Court has long held, "[t]he theory upon which a cause is tried must prevail in considering the appeal, and in interpreting a record and in determining the validity of exceptions." *Potts v. Life Ins. Co. of Va.*, 206 N.C. 257, 260, 174 S.E. 123, 124-25

[1] Plaintiffs argue that we should not rely on *Cummings* to reverse the trial court's judgment because Defendants failed to raise the issue at trial. To the contrary, Defendants argued to the trial court that Plaintiffs' breach of contract claim based on misrepresentations in the Disclosure Statement was, in effect, a claim for fraud—the precise conclusion reached by this Court in *Cummings*. 270 N.C. App. at 228, 841 S.E.2d at 573. We further note that *Cummings* was published after the bench trial in this case.

(1934) (citations omitted). Furthermore, Plaintiffs offer no published North Carolina authority suggesting that these statutory duties suffice to render documents signed three months apart "contemporaneous" under our law. *Cummings* prohibits us from reaching such a conclusion, as the sellers there were subject to the same statutory obligations that failed to give rise to liability for breach of contract in that case.[2]

¶ 13 Plaintiffs next assert that we may consider the Disclosure Statement and Contract together as a single agreement based on our unpublished decision in *Anderson v. Mystic Lands, Inc.*, holding a purchasing developer had a duty to pave the streets in a subdivision in part because it received a Property Information Sheet imposing such a requirement as part of the transaction. 852 S.E.2d 735, 2020 WL 7974280, *7 (2020) (unpublished). *Anderson* is not binding on this Court. *Cummings*, as previously stated, is binding precedent, and it forecloses Plaintiffs' argument. In *Cummings*, as here, the only mention of the sellers' disclosure statement in the sale contract was an "acknowledgment by [the] [p]laintiffs that they had received the [d]isclosure [s]tatement," 270 N.C. App. at 210, 841 S.E.2d at 562, and we expressly held that such language did not integrate the disclosure statement into the sale

[2] Plaintiffs assert that *Cummings* is distinguishable because the parties in that case executed the sale contract several days after delivery of the disclosures, while Plaintiffs here signed the Contract on the same day they acknowledged receipt of the Disclosure Statement. Plaintiffs, however, fail to explain the legal significance of this factual distinction or how it relates to their argument that Defendants' statutory duties regarding the Disclosure Statement served to render that document and the Contract contemporaneously executed.

contract. *Id.* at 228, 841 S.E.2d at 573 ("Neither Plaintiffs' amended complaint nor their brief on appeal direct our attention to any particular provision setting forth that the representations made within the Disclosure Statement are terms of the Contract, and after careful review of the Contract, we discern no provision reasonably read as creating such terms."). We are thus compelled by *Cummings* to reach the same result in this case.

¶ 14 Plaintiffs also argue that the trial court "found that [Defendants] were willfully or intentionally dishonest in their dealings with [Plaintiffs]," and we may therefore affirm the trial court's judgment on the basis that Defendants breached the implied covenants of good faith and fair dealing.[3] But the trial court found only that "Defendants knew or should have known of these and other issues with the home but failed to disclose said information to the Plaintiffs" and that "[t]he Defendants were untruthful in their disclosures to the Plaintiffs." Neither finding suggests that the Defendants acted with willful intent rather than by unintentional, forgetful omission. *See Untruthful*, Merriam-Wesbter.com, https://www.merriam-webster.com/dictionary/untruthful (last visited Nov. 29, 2021) (defining "untruthful"

[3] We note that Plaintiffs did not specifically allege these implied covenants were breached in their complaint, nor did they raise or refer to them in their argument at trial. Again, "[t]he theory upon which a cause is tried must prevail in considering the appeal, and in interpreting a record and in determining the validity of exceptions." *Potts*, 206 N.C. at 260, 174 S.E. at 124-25.

as "not containing or telling the truth," and offering "an unintentionally untruthful statement that the candidate later corrected" as an example of appropriate usage). Indeed, the trial court concluded that Plaintiffs had failed to prove their claim for fraud, which required them to show that Defendants' misrepresentations were "made with knowledge of [their] falsity and with intent to deceive." *Moore v. Wachovia Bank & Trust Co.*, 30 N.C. App. 390, 391, 226 S.E.2d 833, 834 (1976) (citations omitted). Because the trial court did not make the findings Plaintiffs contend amount to a breach of the implied warranties of good faith and fair dealing—and *Cummings* otherwise precludes Plaintiffs' breach of contract claim—we reverse[4] the trial court's judgment awarding damages on this claim.

III. CONCLUSION

¶ 15 For the foregoing reasons, we reverse the trial court's judgment as to breach of contract and leave the remainder of the judgment undisturbed.

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[4] Plaintiffs rely on *Capps v. Lynch*, 253 N.C. 18, 116 S.E.2d 137 (1960), to posit that, in the event we agree with Defendants, the proper disposition is to remand for rehearing based on the trial court's misapprehension of the law. *Capps*, which examined whether the trial court properly exercised its *discretionary* authority, *id.* at 22, 116 S.E.2d at 141, is simply inapposite to our *de novo* application of the law to the facts found by the trial court in this case. *See Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) ("[A]n appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." (citation and quotation marks omitted)). In other words, because we "consider[] the issue anew and substitute[] [our] own judgment for the trial court's judgment," *Miller v. Carolina Coast Emergency Physicians, LLC*, 2021-NCCOA-212, ¶ 45 (citation omitted), we need not remand the matter back to the trial court to resolve a legal question we are fully capable of deciding on appeal.

REVERSED IN PART AND AFFIRMED IN PART.

Judges WOOD and JACKSON concur.

Report per Rule 30(e).