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O/A 1-11-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,330

CLARENCE H. JOHNSON and
DANA JOHNSON, his wife,

Petitioners,

vs.

MORTON DAVIS and ESTHER DAVIS,
his wife,

Respondents.

INITIAL BRIEF OF PETITIONERS ~~IN OPPOSITION TO JURISDICTION~~

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INTRODUCTION

For purposes of this proceeding, Petitioners CLARENCE JOHNSON and DANA JOHNSON, who were the Defendants/Counterclaimants in the trial Court, will be referred to as "JOHNSON" or "Seller" as may be appropriate.

Respondents MORTON DAVIS and ESTHER DAVIS, who were the Plaintiffs/Counter-Defendants in the trial Court, will be referred to as "DAVIS" or "Purchaser", as may be appropriate. The symbol "R" will be used to designate the record on appeal. The symbol "TR" will be used to designate the transcript of the trial held on April 5 and 6, 1983 before the Honorable Robert H. Newman. The symbol "EX" shall be used to designate the exhibits introduced into evidence during the trial.

STATEMENT OF THE CASE AND FACTS

DAVIS filed an amended three-count Complaint against JOHNSON seeking damages and rescission of a Purchase and Sales Contract of a home. (R 16-26). Count I sought damages for breach of the Contract in the amount of Thirty-One Thousand ($31,000.00) Dollars, the deposit. DAVIS alleged that JOHNSON breached the Contract by failing to deliver the house with a roof in a "water-tight condition". (R 16). Count II sought damages for fraud alleging that after the Contract was entered into JOHNSON represented to DAVIS that the roof was in a watertight condition, that JOHNSON knew that the representation was a material fact known to DAVIS and that DAVIS was misled by said representation. The Amended Complaint did not allege (and nor was there any proof at trial) that JOHNSON knew the representation was false at the time it was made. (R 16). Count III sought rescission of the Agreement due to JOHNSON's "misrepresentations" and the "reliance" by DAVIS. Jeanne Baker, Inc. was also joined as a Defendant by virtue of being the escrow agent and holder of the Thirty-One Thousand ($31,000.00) Dollar deposit. No allegation was made in the Amended Complaint as to any misrepresentation made by the real estate agent.

JOHNSON denied the allegations of the Complaint and set forth four (4) affirmative defenses. JOHNSON also counterclaimed for breach of contract alleging that DAVIS breached the Agreement entitling JOHNSON to damages in excess of Thirty-One Thousand ($31,000.00) Dollars.

A trial was had before the Court. A judgment was entered on May 27, 1983. (R 153-154). The trial Court made no findings of fact, but awarded DAVIS Twenty-Six Thousand ($26,000.00) Dollars plus interest and awarded JOHNSON Five Thousand ($5,000.00) Dollars plus interest. Each party was to bear their own attorneys' fees. Motions for rehearing were filed and denied by the trial Court. (R 156).

An appeal to the District Court of Appeal, Third District, ensued. The Third District, in its opinion of April 3, 1984, found that it did not need to address the questions of who breached the Contract or what the Contract required as to the condition of the roof.

Rather, the Court found that there was an affirmative duty imposed upon the Seller to disclose the existence of defects in the house.[1] The Third District and the trial Court did not find that there were defects existing in the house on May 13, 1982, the date the Contract was signed. The reason this finding is conspicuously absent is that no evidence was presented to such effect. Nor was there any finding, by either the trial Court or the Third District, that JOHNSON knew of any defects in the roof at the time of the purported misrepresentation. Once again, the record is devoid of such evidence. Notwithstanding, the Third

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1 This issue was first raised by the Third District Court of Appeals. It was not pled. Nor was it tried with the consent of the parties.

District reversed that portion of the trial Court's Order awarding Five Thousand ($5,000.00) Dollars to JOHNSON and remanded the case with directions. A Motion for Rehearing was filed and denied by the Third District. (R 165).

JOHNSON then sought relief from this Court and requested this Court to invoke its discretionary conflict jurisdiction.

Since the trial Court did not make any specific findings of fact and the Third District backstepped into certain findings in an attempt to pronounce a new rule of law, a complete recitation of facts is warranted.

When JOHNSON purchased their new home at the end of 1979, there were minor leaks which were repaired in January of 1980 by the developer. (TR 563). From January of 1980 until May 18, 1982, the date JOHNSON moved to Chicago, there were no further problems with leakage or water penetration. (TR 563).

On May 11, 1982, MRS. DAVIS a real estate agent and one of the contract purchasers, first saw the JOHNSON's house. (TR 324). MRS. DAVIS did not have any conversations with JOHNSON at that time, although she saw stains in the ceiling of the kitchen and family room. (TR 324, 340 and 341). MRS. DAVIS liked the house and brought her husband back (MR. DAVIS who is also a real estate broker), later that day. During the second visit, there were no specific conversations with JOHNSON. (TR 326).

After their visits, DAVIS went to Jeanne Baker's office to prepare an offer to purchase. (TR 321, 322, 328). (A proposed

contract was drawn.) DAVIS did not request that the Contract being prepared provide that the roof be guaranteed to be water-tight for a certain period of time. (TR 328).

An oral agreement was reached between the Buyers and the Sellers on May 11 or May 12. A Deposit and Receipt Agreement, a form contract, was executed by the parties on May 13, 1982. (TR 329). The Contract contained all the agreements of the parties. As MRS. DAVIS candidly admitted "whatever was on the Contract is what was agreed upon". (TR 329). There were no discussions between DAVIS and JOHNSON regarding the Contract, its terms or the condition of the house at the time the Contract was signed.

The purchase price was Three Hundred Ten Thousand ($310,000.00) Dollars. DAVIS was required to pay Eighty Thousand ($80,000.00) Dollars in cash at the time of closing. JOHNSON agreed to hold a substantial purchase money mortgage over five (5) years. Closing was to be on or before June 21, 1982. (R 19). The pertinent portion of the Agreement relating to the roof provides:

> F. Roof Inspection: Prior to closing at Buyer's expense, Buyer shall have the right to obtain a written report from a licensed roofer stating that the roof is in a watertight condition. In the event repairs are required either to correct leaks or to replace damage to facia or soffit, Seller shall pay for said repairs which shall be performed by a licensed roofing contractor. (R 20).

Three (3) days after the Contract was signed on May 16, 1982, MRS. DAVIS went to the house and spoke with MR. JOHNSON. She testified she asked him "what seems to be problem with the window?" (TR 339). According to DAVIS, JOHNSON then responded "there was a minor problem quite a long time ago and it was taken care of". DAVIS then quoted JOHNSON as saying there were no problems with the ceilings. Although they appeared to be stained. (TR 339). MR. JOHNSON testified that when asked by MRS. DAVIS about prior problems with the roof, he responded "yes, I did". (TR 502).

Several days later, DAVIS placed an additional Twenty-Six Thousand ($26,000.00) Dollar deposit that was required pursuant to the Contract.

At DAVIS' request pursuant to Paragraph F of the Contract, Jeanne Baker contacted a roofer to inspect the roof. On May 20, 1982, Bushloper on behalf of Andrews Roofing Company, inspected the roof and found that repairs were necessary in the amount of Four Hundred Thirty ($430.00) Dollars. (TR 222). If the repairs were effectuated, the roof would have been watertight and free of leaks. (TR 224).

A few days later MRS. DAVIS again visited the house, this time to show it to her mother. MRS. DAVIS testified that she saw rain coming in through the sliding glass doors and thought she saw stains in the kitchen area. (TR 346). She then called Andrews Roofing Company who made a second inspection on May 28. This was

only the second inspection of the seven (7) called for by DAVIS. The following is a summary of the inspections of the five (5) roofers who inspected the roof over the course of two (2) months:

Date	Name	Company	Estimate to Repair	Condition
5/20/82	T.J. Bushloper	Andrews Roofing Co.	$ 432.00	Leak on wall, NE corner of patio, asbestos to roof near entrance; roof satisfactory (TR 222; EX 7, A-1*).
5/28/82	T.J. Bushloper	Andrews Roofing Co.	$ 890.00	Leaking at sliding glass doors and over hood in kitchen area plus one wall leak. (TR 226; EX 7, A-1*).
6/3/82	Charles Almyda	Tomco Roofing Co.	None given	Leaks or evidence of leaks in kitchen area and on one wall. (TR 17, 18).
6/4/82	T.J. Bushloper	Andrews Roofing Co.	$ 890.00	Same condition as existed on May 28, 1982. (TR 230, 235; EX 7, A-1).
6/12/82	Paul T. Hayes	Paul T. Hayes Roofing Co.	$1,490.00	No leaks, but evidence of staining Roof satisfactory. (TR 58; EX 1).
6/16/82	Charles Walton	Bob Hilson & Company	$1,000.00	Evidence of stains. (TR 103, 110).

On June 11, 1982, DAVIS, through their attorney, advised JOHNSON that the closing would not take place because the roof could not be placed in a watertight condition. (EX D). As of this time the highest repair estimate DAVIS had received was Eight Hundred Ninety ($890.00) Dollars. (EX 7). Almyda, who did not

render a written report and made his examination "as a personal thing", thought that the roof was slipping and could not say how long the roof would continue in its present condition ("it is hard to say"). (TR 19, 22). Almyda did not know whether the slippage was causing the leaks. (TR 35-36). He acknowledged that a new roof could start to slip six (6) months after installation. (TR 38-39). Almyda admitted that if the slipping was not attended to but the leaks were fixed, he could not say if the roof would leak or if it would, when a leak would appear. (TR 40).

On June 14, 1982, DAVIS formally and unilaterally cancelled the closing. DAVIS' attorney stated:

> "My understanding is that the report will indicate that the roof cannot be placed in a watertight condition and my clients will be insisting on a new roof. The estimated cost of that roof will be Twenty-Five Thousand ($25,000.00) Dollars and your clients would therefore be responsible for payment of the replacement of the roof and possibly a portion of the walls which are also inadequate." (EX D).

No report ever surfaced and no roofer ever testified that the cost of a new roof was Twenty-Five Thousand ($25,000.00) Dollars. Nor did any engineer render a report or testify as to the integrity of the walls.

On June 18, 1982, DAVIS advised JOHNSON that one of its roofer could not attest to the "future watertight integrity of the roof and the cost of replacement is Fourteen Thousand Six Hundred Fifty ($14,650.00) Dollars." (EX G). However, this roofer did not recommend the replacement of the roof. (TR 105). The estimate was given of at the request of DAVIS.

On June 21, 1982, JOHNSON demanded that the closing take place and advised of JOHNSON's willingness to either repair the roof or give DAVIS a credit for the amount of the repairs as is required under Paragraph F at the Contract. (EX E).

On June 25, 1982, DAVIS advised JOHNSON that since the roof was not:

> "...in a watertight condition and cannot be placed in a watertight condition unless the entire roof is replaced and damage to the walls corrected, your clients are not in position to finalize this transaction." (EX F).

DAVIS had unilaterally decided not to buy the house. JOHNSON's actions or statements were not the basis of DAVIS' decision. There is no mention in any of the lawyer's letters asserting that JOHNSON committed a fraud. Certainly, if a fraud was committed, DAVIS would have made such an accusation. The basis of DAVIS' decision is best evidenced by MRS. DAVIS' own testimony.

> Q. How about this letter of Mr. Newmark of June 25, indicating a copy going to you after receipt of your letter of June 21, 1982?
>
> 'I met with my clients and discussed fully all ramifications involved in this matter. It is still our position that since the roof is not in a watertight condition'--does that refresh your recollection that you knew about MR. and MRS. JOHNSON's offer to repair the roof?'

A. The answer to that conversation must have gone on with my husband, MR. DAVIS, and all I know we were not interested in repairing, whatsoever. We were not interested in repairing and if my husband--

Q. Or replacing?

A. I was not only concerned with the roof at that time, but with the construction problem, because of cracks and water getting in it and from what I heard from these two men that severe damage was possible. I did not want it...

Q. MRS. DAVIS, did you call up a structural engineer or professional engineer to inspect the house to determine whether it was built according to plans and specifications, whether it was structurally sound, whether in a professional engineer's opinion, the house could withstand a hurricane?

A. No. I went by what the two roofers said...

Q. Is it your testimony MRS. DAVIS, that the conversations reflected in this letter of June 25, 1982, from Mr. Newmark to Mr. Fine--the conversations--your husband and you were not at all involved?

A. I knew what the issue was. I do not know all the documentation. I have not read it. I know the essence, what was going on. I knew what we didn't want and what we wanted and we left it up to Mr. Newmark to handle it and I trusted my husband's judgment in following up on it and that is what he must have done.

Q. Is it true, MRS. DAVIS, that MR. and MRS. JOHNSON did not refuse to do anything--

A. I had no contact with them.

Q. So you don't know whether they refused to do anything that was required of them under this contract do you?

A. If they offered-I had no contract. I don't remember any contact with them regarding this.

Q. You know whether they ever refused to do anything with regard to this house or this contract of closing?

A. No, I don't remember anything.

Q. Did they ever neglect to do anything that was necessary according to the contract?

A. The only thing that was necessary for the contract was to put a new roof on and to substantiate the walls. I don't know how they would do that.

Q. Did they refuse to do it?

A. We did not ask them to do it.

Q. So they couldn't refuse did they?

A. Well, we did not ask her so they could not refuse it if we did not ask them. (TR 447-451). (Emphasis supplied).

Accordingly, a closing was never had.

JOHNSON then relisted the house for sale with Jeanne Baker. Repairs to the roof were made by Pierce Roofing Company at a cost of Nine Hundred Eighty-Five ($985.00) Dollars. When Pierce completed the repairs it issued a report stating that the roof was watertight and guaranteed for ninety (90) days. (TR 276, EX D).

During the entire guaranty period no complaints were made about any further leaks. (TR 276). Coincidently, a contract was entered into for the sale of the house to Mr. and Mrs. Blank on September 13, 1982. (EX 4). Pierce at Mr. Blank's request, who was also a real estate broker, inspected the roof in October of 1982 and found the roof still to be in a watertight condition. (TR 278).

MR. JOHNSON testified as to the damages he sustained as a result of DAVIS' failure to close. Those damages totalled Sixty-Four Thousand One Hundred Thirty 96/100 ($64,130.96) Dollars. (TR 571-577).

Notwithstanding JOHNSON's lack of knowledge of any latent defects and his intention to perform his obligations, JOHNSON has been charged and found guilty of fraud.

ARGUMENT

I. RESCISSION OF A CONTRACT OF PURCHASE AND SALE OF A USED HOME IS IMPROPER WHEN THE BUYER BREACHED THE CONTRACT AND THE CONTRACT ITSELF WAS NOT FRAUDULENTLY INDUCED.

A. THE BUYER BREACHED THE CONTRACT.

On June 11, 1982, DAVIS' attorney advised JOHNSON that DAVIS was not closing. On June 14, 1982, DAVIS confirmed this by letter. (EX D). The only written roofing reports in existence as of this time were those of Andrews Roofing and Paul T. Hayes. (A-1, TR 230, 235, EX 7). Andrews Roofing indicated repairs were needed in the amount of Eight Hundred Ninety ($890.00) Dollars. Andrews indicated upon completion of the repairs the roof would be watertight. (TR 224, 245, 260).

Paul Hayes stated repairs were needed in the amount of One Thousand Four Hundred Ninety ($1,490.00) Dollars and guaranteed for a period of one (1) year. (EX 1). There was simply no legal basis existing on June 11 or June 14, 1982 for cancelling the Contract.

Prior to June 14, 1982, DAVIS did not demand that JOHNSON repair the roof. Nor did DAVIS demand replacement of the roof pursuant to Paragraph F of the Contract. At no time did DAVIS demand that JOHNSON pay for repairs or replacement of the roof. (TR 450-451). Nor did DAVIS as of the time of the cancellation of the Contract assert that there was any fraud or misrepresentation on the part of JOHNSON.

The reason is clear. DAVIS did not want the house, not even with a new roof. (TR 450, 451).

DAVIS did not have the right to unilaterally cancel the Contract because the roof leaked. The only right DAVIS had was to demand that repairs be performed by a licensed roofing contractor at JOHNSON's expense. (Paragraph F under the Contract, R 20.) The effectuation of those repairs prior to closing would render the roof watertight on the date of closing. That is all that is required by the Contract. There is no guaranty or warranty other than the roof being watertight (at the time of the closing) or provisions for its repair. It is well established that when parties contract to a specific matter, the terms of the contract control. Monrose, Inc. v. Baldrige, 423 So.2d 467 (Fla. 2d DCA 1982). Parties sui juris have the privilege to contract as they desire concerning any legal subject. Coble v. Leknidis, 372 So.2d 506 (Fla. 1st DCA 1979). Courts may not rewrite a contract and relieve any of the parties from an apparent hardship from that bargain. Bella Vista, Inc. v. Interior and Exterior Specialties Co., 436 So.2d 1107 (Fla. 4th DCA 1983). Therefore, performance should be dictated by the terms of this clear and unambiguous Contract entered into in as a result of arms' length negotiations.

Notwithstanding DAVIS' failure to demand JOHNSON to have the roof repaired and/or pay for such repairs, JOHNSON offered to pay for the repairs set forth in the roofing report and give DAVIS a credit for the cost at closing. (EX E). DAVIS rejected the offer.

DAVIS' actions constituted an anticipatory breach of the Contract. The roof on the subject property was in generally good condition, even according to DAVIS' expert roofers. (TR 245, 59, EX A).

DAVIS also made additional and improper demands outside the scope of the Contract. DAVIS advised JOHNSON that they would be liable for the payment of the replacement of the walls. (EX D). There is nothing in the Contract which gives DAVIS the right to demand that a portion of the walls be replaced. There are no warranties or guaranties of the walls. There is also nothing in the record to indicate that any portion of the walls needed replacement, were inadequate, unsound, unfit and/or in such a deteriorated condition that warranted replacement or justified rescission.

DAVIS also attempted to impose another condition upon JOHNSON, i.e., that JOHNSON guarantee the future integrity of the roof. Once again there is simply no such contractual obligation. The word "guaranty" does not appear in the Contract.

DAVIS' demand for performance outside the scope of the Contract constituted an anticipatory breach and required no further action by JOHNSON. There was no need for JOHNSON to repair the leaks, replace the roof or repair the walls. DAVIS sought any excuse to avoid their obligations under the Contract since they changed their mind about buying the house.

A similar issue arose in 24 Collection, Inc. v. N.

Weimbaum Construction, Inc., 427 So.2d 110 (Fla. 3d DCA 1983), where one party to the contract demanded performance by the other of a condition that was outside the scope of the agreement. The Third District found that the threat to cancel the contract unless performance of the demand was made, constituted an anticipatory breach.

As a matter of law, DAVIS anticipatorily breached the Contract on June 11, 14 and 18 by refusing to close and demanding performance not required by the Contract. JOHNSON is entitled to recover on their Counterclaim.

B. THE CONTRACT WAS NOT FRAUDULENTLY INDUCED BY AFFIRMATIVE MISREPRESENTATION.

DAVIS did not assert in the Amended Complaint that any affirmative representations were made by JOHNSON prior to the entering into of the Contract on May 13, 1982. Not one (1) person testified at trial that any affirmative representations were made by JOHNSON to DAVIS concerning the condition of the house prior to the Contract. The trial Court did not find any such affirmative misrepresentations prior to Contract. Even the Third District did not find any such representations prior to Contract.

The elements of the tort of fraudulent representation have been stated time and time again: a false statement concerning a specific material fact, the representor's knowledge that the representation is false, the intention that the representation induce another to act on it, and consequent injury by the other party acting in justifiable reliance on the representation.

Amazon v. Davidson, 390 So.2d 383 (Fla. 5th DCA 1980). All such elements are absent in this case. There were no statements, true or false, made to induce the execution of the Contract. What DAVIS complained of were statements purportedly made by JOHNSON after the Contract was signed upon viewing the house and again noticing stains which had been noticed during DAVIS' first visit to the house before the Contract was signed.

We have been unable to find one case in this state that stands for the proposition that a contract can be rescinded based upon fraud where: (a) the statement is not shown to be false at the time it was made, (b) the representor is not shown to know that the representation is false, (c) the statement was not made to induce another person to act on it, (d) that the purported reliance on the statement is in compliance with a contractual obligation, and (e) the contract contemplates the existence of such defect.

The purported fraudulent inducement relates to not the Contract, but the performance of an act that DAVIS was legally bound to perform, i.e., placing the additional deposit. Respectfully, how can a person fraudulently induce another to perform a legal act which he is already contractually bound to do? He cannot. New York State Urban Development Corp. v. Marcus Garvey Brownstone Houses, Inc., 469 N.Y.S.2d 789 (A.D.2 Dept. 1983); Dopp v. Franklyn Nat. Bank, 461 Fed. 873 (2d Cir. 1972); Ryan J. Walter Thompson Company, 453 F.2d 444 (2d Cir. 1972); 12 Williston, Contracts [3d Ed.].

It appears that the Trial Judge felt there was no fraud and stated, in response to JOHNSON's Motion for Involuntary Dismissal:

> "There is very little to indicate any fraud as to this point in time, but I am not going to grant the Motion. I am going to take it under advisement." (TR 525).

The Ohio Court of Appeals was confronted with a very similar issue. In Kaye v. Buehrle, 8 Ohio App.3d 381, 457 N.E.2d 373 (Ohio App. 1983), the purchasers brought an action against the seller of a used home for breach of warranty and fraud since the house leaked the day after they moved in. In finding that the purchasers could not recover on the basis of fraud, the Court stated:

> "...No statements were made by the Buehrles with respect to the condition of the house prior to its sale. Thus, the critical element of reliance is not present." Kaye v. Buehrle, supra, at p. 376.

In the case sub judice no statements were made prior to the Contract relating to the condition of the house. There is just no reliance by DAVIS upon any affirmative representation of JOHNSON. If there was a fraudulent inducement it had to exist at the time of the execution of the Contract, not subsequent.

In addition to there being no reliance, there is no evidence in this record showing that there were leaks in the roof on May 16, 1982 at the time of the conversation between MR. JOHNSON and MRS. DAVIS. The only evidence is that there did

exist leaks at the end of 1979 and were repaired in January 1980. Not one (1) person during the trial of this cause testified that the stains observed by MRS. DAVIS during her first visit and again on May 16 were of recent vintage and did not relate back to January of 1979. As such, there is no evidence in this record of the condition of the roof on May 16, 1982, or JOHNSON's knowledge of any defect, if one existed. It is clear rescission of the Contract was improper and erroneous.

II. A SELLER OF A USED HOME HAS NO DUTY TO DISCLOSE THE EXISTENCE OF POSSIBLE DEFECTS TO A POTENTIAL PURCHASER IN AN ARMS LENGTH TRANSACTION.

The Third District's opinion in this cause evidences the final destruction of the doctrine of caveat emptor in connection with the sale of real property. The Court imposed a duty upon JOHNSON to disclose the existence of defects in the roof and walls to a purchaser, who was also a real estate broker, in an arms' length transaction.

The defects addressed by the Third District in its opinion, were roof leaks and wall defects. However, there is absolutely no evidence in this record concerning the nature of the purported wall defects, which according to the Third District would cost Ten Thousand ($10,000.00) Dollars to repair. Nor was there any testimony that JOHNSON knew of the existence of any problems with the walls.

This case centered around roof leaks. The Amended Complaint complained of roof leaks as the basis of rescission. It did not complain of wall defects or structural infirmities. No evidence was presented as to the existence of such a latent defect. During the course of discovery and during the trial of this cause, not one question was asked of JOHNSON as to the existence of wall defects or wall deficiencies. Therefore, there is absolutely no evidence in the record to show JOHNSON's purported knowledge of the same.

The Third District's opinion cannot withstanding scrutiny as to wall defects. If such defects existed, they were latent and unknown to JOHNSON. Even under the erroneous duty placed upon

JOHNSON by the Third District, JOHNSON cannot be guilty of fraud as to the wall defects.

Therefore, for purposes of this point, the condition of the house in question will be limited to the condition of the roof.

The Contract of Purchase and Sale provided for roof inspections and repairs of the roof by the Seller if leaks were found.

The Fourth District Court of Appeal decided a case very similar to the one at bar. In Banks v. Salina, 413 So.2d 851 (Fla. 4th DCA 1982), the buyers sued the purchasers arising from the sale of a fifteen (15) year old house that contained a defective swimming pool, a leaking roof and other minor defects. The trial Court had awarded a judgment for the buyer for the cost of roof replacement, carpentry cost to repair the damage caused by the leaks and costs to repair the swimming pool. The Fourth District reversed the award as to the cost to repair the pool and the carpentry costs. In so doing, the Court held

> "The Contract of Sale contained no warranties, nor were there material misrepresentations relative to the pool although there was testimony that the sellers knew it was not in good condition. In Florida, there is no duty to disclose when the parties are dealing at arms length." Banks v. Selina, supra, at p. 852.

The Court also found that there were minor items included in the carpentry bill for which no warranty was given and therefore the buyers were not entitled to recover the costs of repairing the same.

With regard to the roof, the contract had imposed upon the seller a duty to repair the roof. Although the sellers had attempted to repair the roof, the purchasers imposed the additional requirement of a guaranty and prevented repair. That is precisely what happened in this case. The Fourt District stated:

> "The agreement to repair the roof made no mention of guaranties and it is common knowledge that roofers do not normally guarantee spot repairs. Thus, we are of the opinion that the buyers' demands of the roofers were unreasonable...." Banks v. Selina, supra, at p. 853.

Therefore, the sellers were not responsible for any damages occurring after the sale which were occasioned by the leaks. It is interesting to note that the trial Court had awarded the cost of replacing the roof as opposed to the cost of repairing the roof. The Fourth District stated:

> "We are not too happy with this result, but there is no competent substantial evidence in the record that might support this particular award and we will not substitute our judgment for that of the trial Judge." Banks v. Selina, supra, at p. 853.

By so holding, the Fourth District recognized that the Contract in question calling for repairs of the roof required the Seller to replace the roof, if necessary. This is a logical result in light of the Contract provisions.

The parties at the time of making their contract provided for the contingency of roof leaks and as such, there was a requirement that the roof not have leaks at the time of closing.

DAVIS expressly assumed the responsibility of determining that the roof was to his satisfaction and free of leaks. If DAVIS was not satisfied, he could demand repair. In the case sub judice, DAVIS did not demand repair of the roof. Nor did DAVIS demand replacement of the roof after learning that there were some leaks. Nor did DAVIS accept JOHNSON's offer to repair the roof. DAVIS unilaterally cancelled the Contract.

The Second District Court of Appeal has also held that there is no affirmative duty to disclose the existence of defects in the sale of a home in an arms length transaction. In Ramel v. Chasebrook Construction Co., 135 So.2d 876 (Fla. 2d DCA 1961), the buyer sued the sellers for rescission of the contract to purchase a home after finding that the pool and patio began pulling way from the house foundation. The Second District stated that:

> "In the absence of a fiduciary relationship, mere nondisclosure of all material facts in an arms length transaction is ordinarily not actual misrepresentation." Ramel v. Chasebrook Construction Co., supra, at p. 882.

The Second District established an exception to this rule and reversed on other grounds. This exception is not applicable herein.

The Third District in this case chose not to follow the Second and Fourth District Court of Appeals and relied on this Court's decision of Bessett v. Basnett, 389 So.2d 995 (Fla. 1980) to impose such an affirmative duty. However, Bessett v. Basnett does not provide a source for the imposition of an affirmative duty to disclose.

In Bessett v. Bassnett, 389 So.2d 995 (Fla. 1980), the sellers made affirmative misrepresentations prior to the contract. One of the affirmative misrepresentations concerned the roof. The sellers represented prior to the contract that the roof was brand new. In truth and in fact at the time of this representation the roof was not new and leaked. This Court held

> ...A recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation unless he knows the representation to be false or its falsity is obvious to him. Bessett v. Basnett, supra, at p. 998.

Each case decided subsequent to Bessett v. Basnett, with the exception of the subject case, did not deal with the duty to disclose, but rather dealt with affirmative representations. In Levey v. Getelman, 408 So.2d 663 (Fla. 3d DCA 1981) an affirmative representation was made as to the lack of knowledge regarding the city's interest in the property for condemnation. In Held v. Trafford Realty Co., 414 So.2d 631 (Fla. 5th DCA 1982) there were affirmative misrepresentations concerning the boundary of the property involved. In Gold v. Wolkowitz, 430 So.2d 556 (Fla. 3d DCA 1983) there was an affidavit given at closing regarding title that specifically recited it was made to induce the purchase and failed to reveal the pendency of the appeal of a judgment of foreclosure from which the seller derived title. In Foxfire Inn of Stuart, Florida, Inc. v. Neff, 433 So.2d 1304 (Fla. 2d DCA 1983), the seller affirmatively represented that the financial statements

furnished to the buyer were true and correct but it was contended that there were false entries in the books and misrepresentations as to profits. In Ton-Wiel Enterprises, Inc. v. T & J Cosurdo, Inc., 440 So.2d 621 (Fla. 2d DCA 1983), an affirmative representation was made prior to the contract concerning the probability of the business. See also Cas-Kay Enterprises, Inc. v. Snapper Creek Trading Center, Inc., 453 So.2d 1147 (Fla. 3d DCA 1984).

The Bessett v. Basnett progeny primarily concerned the issue of reliance upon affirmative representations. They are predicated upon Section 541 of Restatement (Second) of Torts which provides:

> "1. The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him...
>
> Comment a:
>
> (A recipient of a fraudulent misrepresentation)... is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation, the falsity of which would be patent to him if he had utilized the opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus, a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who had no experience with horses."

Even assuming arguendo, a duty to disclose could be inferred from the foregoing, it cannot be applied to the facts in this case. The reason is clear MRS. DAVIS testified that at the first visit to the house she noted water stains. They were open, obvious and patent and could be seen by the naked eye by the Purchasers who were real estate brokers and familiar with the condition of real property and improvements thereon. Therefore, DAVIS had no right to rely on JOHNSON's silence concerning the condition of the roof when DAVIS, noticed stains at the very first visit and did not even initiate discussions regarding the same prior to entering into the Contract.

There was no need to because the question of possible leaks or defects in the roof were covered by Paragraph F of the Contract. The duty to disclose, if one existed, was dispelled upon the signing of the Contract. Kaye v. Buehrle, 8 Oh.App.3d 381, 457 N.E.2d 373 (Oh.App. 1983).

The Fifth District Court of Appeals recently decided a case which appears to bridge the gap between the Third District's opinion in this cause and the Fourth District's opinion in Banks v. Selina, 413 So.2d 851 (Fla. 4th DCA 1982). In Roberts v. Rivera, 9 F.L.W. 2152 (5th DCA Oct. 11, 1984). (Case Nos. 83-614, 83-680, 83-687, 83-1017), the purchaser sued the seller for fraudulent misrepresentation and concealment seeking damages and rescission and sued the real estate brokers for breach of fiduciary duties. A verdict and judgment was entered finding that the seller was liable for fraudulent concealment. The purchaser,

Rivera, had visited the property three (3) times before signing the contract to purchase. The purchaser asked the real estate brokers to check the property to see if the elevation prevented the development. The purchaser understood that the brokers would have an engineer inspect the property and the brokers told the purchaser before closing that an engineer had checked the property and found it suitable for development. The purchaser first met the seller on the day the contract was signed.

> "The contract contained no warranties or representations concerning the elevation of the property, and at Roberts' insistence a clause making the closing subject to a satisfactory soil test report was excised. Rivera testified Roberts told him that there were 'no problems' with the property..." Roberts v. Rivera, supra, at p. 2153.

Closing was had and afterwards an engineer was retained to do soil boring tests, the results of which indicated the property was difficult to develop. The purchase price was Ninety-Eight Thousand ($98,000.00) Dollars. The true value of the property was approximately Forty-Seven Thousand Four Hundred ($47,400.00) Dollars. The Court stated:

> "It is clear that the Riveras did not receive the kind of real estate they intended to buy and that they paid more for it than it was worth. However, to hold the sellers liable for this unfortunate outcome, there must be proved some misrepresentation on the part of the sellers, or some concealment of facts known to them under circumstances impelling disclosure, i.e., a hidden defect, Sun Life Assurance Company v. Land Concepts, Inc., 435 So.2d 862 (Fla. 4th DCA 1983); Amazon v. Davidson, 390 So.2d 383 (Fla. 5th DCA 1980), and the buyers must show they reasonably relied on the sellers' actions in such regard.

> Here there was no proof the Roberts made any oral or written representation to the Riveras regarding the soil conditions. Nor did they conceal any facts they knew about the property which the Riveras did not already know or could easily have discovered. Further, there was no proof the Riveras relied upon anything the Roberts did or did not say. In fact, the evidence is clear that regarding the soil condition the Riveras relied upon their two real estate agents and the supposedly satisfactory engineering report. Further, it would not have been reasonable for the Riveras to have relied upon the Roberts on this point since they were neither experts, nor had they made soil tests on the property. This is a case where the doctrine of caveat emptor should apply." Roberts v. Rivera, supra, at p. 2153. (Emphasis supplied).

It is clear from the foregoing that the Fifth District held there must be either an affirmative misrepresentation and reliance or a concealment of a hidden defect and reliance on such concealment, failing which buyer beware. The Court did not find the low elevation to be such a hidden defect requiring disclosure.

If the rule pronounced by the Fifth District is applied to the case sub judice, it is clear that the doctrine of caveat emptor applies. There was no misrepresentation on the part of JOHNSON. There was no concealment of facts known to JOHNSON under circumstances impelling disclosure. Roof leaks, if there were any, were not hidden defects for they or at least stains indicating water were noticed by DAVIS. JOHNSON were not experts roofers and had less experience in connection with real estate transactions and buildings than DAVIS, real estate brokers.

JOHNSON did not know that the roof was slipping, if it was. Even if JOHNSON had known that the roof was slipping, should JOHNSON be required to disclose that slippage some time in the future could possibly cause leaks? Even the roofers did not know the effect of the slipping. For example, Walton testified that "it is a strong possibility the roof could stay in its present state for a number of years... or it could continue to slip. Whether it be a month from now, five years from now, maybe it would slip a little more. Every roof is different." (TR 101). Should JOHNSON be compelled to disclose a condition which may or may not affect the integrity of the roof at some future point? Sellers in most instances are not experts on the condition and/or integrity of the house in which they are living. They are usually in no better position than the buyer to determine the condition of the premises. That is why all real estate contracts, including the subject Contract, permits the buyers to make inspections as to the roof, termites, electrical, plumbing, etc., with appropriate credits made at or prior to the time of the closing.

In addition, DAVIS must also show that they reasonably relied on the Sellers' actions in failing to disclose hidden defects, i.e., the roof leaks. There is no such reliance shown in this cause. What action did DAVIS take? They contracted to purchase a house they liked because of its location, neighborhood, proximity to religious and educational facilities, and its lay-out. DAVIS did not contract to purchase the house because the

roof was in perfect condition. Replacement of the roof was not acceptable to DAVIS. Some other reason therefore motivated the purchase and the attempted cancellation. Where is the reliance?

No person should be permitted to defraud another. Sellers and purchasers, alike, are presently guided by not only legal obligations, but moral obligations as well. Why should a greater burden be imposed upon a seller of property than that imposed upon the purchaser of property? Why is it necessary to protect a purchaser by the imposition of a duty to disclose the existence of defects, especially when that purchaser has sought to protect himself in his contract? If both the purchaser and seller recognize there may be leaks or defects in a roof and the purchaser at the time of contracting is satisfied to have the seller repair them in a method prescribed by an expert, is there a need for the Courts to further protect the purchaser? Respectfully, there is not. To hold otherwise would vest the Courts with the authority to readjust the rights and obligations of the parties and rewrite their contracts. It is black letter law that Courts are prohibited from rewriting contracts. Bella Vista, Inc. v. Interior and Exterior Specialties Co., 436 So.2d 1107 (Fla. 4th DCA 1983). Purchasers and sellers should be left in the position that they find acceptable at the time they make their contracts.

If the rights and obligations of the parties are changed by law and an increased burden is placed upon the seller to disclose the existence of defects, is the seller now required, con-

trary to the standard form contracts presently used in connection with the sale of homes, to have his property inspected by a professional and make that inspection available to the prospective purchaser? If so, that is contrary to the long-standing practice in the real estate industry. It would in effect impose strict liability upon the seller for all defects, known or unknown, latent or patent. It would increase the purchase price of property within the state. It would provide buyers the opportunity to unilaterally cancel an agreement. This would be devastating and inject the Courts into every single contract for purchase of sale of realty within this state.

Where special protection is needed by a party, the Courts have fashioned appropriate relief. However, the parties in every real estate transaction do not need special protection and a seller of property should not be prejudiced for no reason. A seller of property should not be required to disclose defects to a potential purchaser of his property absent a compelling reason therefore.

CONCLUSION

Based upon the foregoing citations and authorities, Petitioners CLARENCE H. JOHNSON and DANA JOHNSON respectfully request this Court to reverse the Third District's opinion and remand this cause with directions to enter judgments in favor of Petitioners JOHNSON in the amount of Sixty-Four Thousand One Hundred Thirty 96/100 ($64,130.96) Dollars, together with prejudgment interest from June 21, 1982, and for the award of costs and attorneys' fees incurred by JOHNSON pursuant to the Contract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioners has been furnished by mail to JOE N. UNGER, ESQ., 66 West Flagler Street, Suite 606, Miami, Florida 33130, STANLEY N. NEWMARK, ESQ., 9400 South Dadeland Boulevard, Suite 300, Miami, Florida 33156, and to JOSEPH G. ABROMOVITZ, ESQ., on this 1st day of November, 1984.

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