OA 1-11-85
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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.

_____/

REPLY BRIEF OF PETITIONERS

SMITH & MANDLER, P.A.
Attorneys for Petitioners
800 Brickell Avenue, Suite 700
Miami, Florida 33131
Tel: (305) 374-2800

By: PATRICIA M. SILVER

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ARGUMENT

I. RECISSION 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 FRADULENTLY INDUCED.

A. PURCHASER BREACHED THE CONTRACT.

Purchasers assert that it was the Sellers who breached the contract and therefore Purchasers were entitled to recission. This contention is erroneous.

First it assumes that the term "watertight" set forth in Paragraph F of the Contract "means free of leaks and any present condition likely to cause leaks". (At Respondents' Brief, p. 14). Nowhere in the record is there any testimony or evidence imposing "and any present condition likely to cause leaks" within the definition of watertight. That is an addition to the established definition of watertight and as testified to during the trial of this cause. Not one person believed, not even the Purchaser, that watertight meant free of any present condition likely to cause leaks at some time in the future.[1]

This assertion likewise ignores the provision in Paragraph F that

> "In the event repairs are required either to correct leaks or to replace damage to facia or soffit, Seller shall pay for said repairs..." (R 20).

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1 As stated in Petitioners' Initial Brief, not even the Purchaser's expert testified with reasonable certainty that the slipping of the roof would cause leaks at some time in the future. (TR 35-36, 40).

Purchasers ignore the obligation on the part of the Sellers to pay for repairs. Rather they insist that the roof be watertight at the time of inspection, failing which there is a breach in the contract justifying recission. This is preposterous. The contract contemplated the possibility that the roof may not be watertight at the time of inspection and provided a remedy if it was not. The contract did not impose any obligation beyoned the Seller repairing the leaks and replacing damage to the facia and soffit. However, Purchasers in this instance, never demanded that the areas of leakage be repaired either by way of repair or replacement. Yet Purchasers insist Sellers breached the contract justifying recission.

Purchasers' argument ignores well established law. For example, Purchasers cite Sun City Holding Company v. Schoenfeld, 97 Fla 777, 122 So.2d 252 (1929) to support the proposition that recission is justified. However, in Sun City Holding Company v. Schoenfeld, there was a breach of a dependent covenant to improve the property which justified recission, not an independent covenant. As this Court stated in Steak House, Inc. v. Barnett, 65 So.2d 736, 737 (1953)

> A covenant is independent where it does not go to the whole consideration of the contract but is only subordinate and incidental to its main purpose, and a breach of such a covenant will not ordinarily constitute a sufficient reason for recission.
>
> A covenant is dependent where it goes to the whole consideration of the contract; where it is such an essential part of the bargain that the failure of it

> must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted. A breach of such a covenant amounts to a breach of the entire contract; it gives to the injured party the right to sue at law for damages, or Courts of equity may grant recission in such instances if the remedy at law will not be full and adequate." (Citations omitted).

Certainly the covenant to pay for repairs to correct leaks is not a dependent covenant but rather is an independent covenant which does not justify recission.

Purchasers' argument fails for yet another reason. Assuming arguendo that the Purchaser wanted the Sellers to repair or even replace the roof and the Sellers refused to do so (which is denied and contrary to the evidence in this cause because Purchasers did not want the house even with a new roof), such a breach is an immaterial breach and does not justify recission. It is well established that an immaterial or insubstantial breach does not justify recission of the contract. Gittlin Companies, Inc. v. David and Dash, Inc., 390 So.2d 86 (Fla. 3rd DCA 1980); Hyman v Cohen, 73 So.2d 393, 397 (Fla. 1954). The purchase price of the house was Three Hundred and Ten Thousand ($310,000.00) Dollars. Is the failure to pay for repairs ranging in cost from Four Hundred Thirty Two ($432.00) Dollars to One Thousand Four Hundred Ninety ($1,490.00) Dollars a material breach? It is not as a matter of law. In Gittlin Companies, Inc. v. David and Dash, Inc., 390 So.2d 86 (Fla. 3rd DCA 1980), the Third District Court of Appeal affirmed a Summary Judgment and stated:

> "Purportedly because the Appellee David and Dash's employees made $597.08 in direct sales of wallpaper in violation of the exclusive distribution provision of the parties' agreement, the Appellant, Gittlin, repudiated the entire contract, and thus refused to honor its undertaking to purchase well over $100,000.00 of material from the Appellee. On Cross-Motions for Summary Judgment, the trial court held that David and Dash's breach was not a material or substantial one and therefore did not justify the recission of the contract by the Appellant. We entirely agree with that determination." Gittlin Companies, Inc. v. David and Dash, Inc., Supra at p. 86 (Citations omitted). (Emphasis supplied).

Even assuming a new roof was required, the cost of which is approximately Fourteen Thousand ($14,000.00) Dollars, the failure to replace the roof is immaterial and insubstantial not justifying recission.

Purchasers' contention as to who breached the contract ignores the testimony of each one of the roofers. Purchasers try to assert that Mr. Bushloper of Andrews Roofing Company and Mr. Greenleaf of Pierce Roofing Company were not licensed roofers. Donald Greenleaf of Pierce Roofing Company testified that he was a state licensed roofer.

> Q: Are you a licensed roofer?
>
> A: State licensed, yes. (TR 270)

Mr. Bushloper of Andrews Roofing, although not licensed personally, worked for Andrews Roofing Company which is licensed by the State. (TR 236). Mr. Bushloper has been in the roofing business for thirty (30) to forty (40) years. (TR 235, 236).

Purchasers' attempt to ignore the qualifications of these two roofers is unavailing.

Each roofing company who inspected the roof was licensed. (TR 236, 270). Each one of the roofers, Bushloper, Almyda, Hayes, Walton and Greenleaf testified that if the leaks noted by them were repaired by them, the roof would be watertight. (Andrews Roofing Company, TR 224, 226, 235; Tomco Roofing Company, TR 49, 50; Paul T. Hayes Roofing Company, TR 73, 82, 83; Bob Hillson and Company, TR 103, 120; Pierce Roofing Company, TR 274).

Not one of the roofers testified that the roof could not be made watertight by repair and/or that replacement was the only method to insure that the roof was watertight on the date of closing. (TR 233, 82, 112 - 113, 275).

It is clear that as a matter of law recission of the contract was not warranted based on the Sellers' purported breach of contract.

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

Purchsers did not and have not asserted that the contract itself was fradulently induced by affirmative misrepresentation. No reply was made by Purchasers to Seller's Point IB. As such, Purchasers acknowledge that they have no right to recind the contract which was admittedly not fradulently induced. Reversal is mandated.

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.

In an attempt to create fraud justifying the return of the deposit to the Purchasers, the Purchasers have "supplemented" the record in their brief. For example, to supply the requisite intention that is lacking from the record in this cause, Purchasers state, "Mr. Johnson made the remark with the intention that the Davises rely on it so that any problems with the roof would not delay the closing." (Respondent's Brief, p. 17). Where is the evidence in the record?

Further Purchasers state, "Had Mr. Johnson accurately described the roof problems to Mrs. Davis prior to Appellees' making the Twenty Six Thousand ($26,000.00) Dollar deposit, they would have called in a licensed roofer. They then would have realized at that time rather than after paying the Twenty Six Thousand ($26,000.00) Dollars that the roof was not and could not be put in a watertight condition before closing." (Respondent's brief P 20). Where is the evidence in the record that the roof could not be put in a watertight condition before closing? The evidence in the record is to the contrary. Where is the evidence in the record that the Purchasers would have called in a roofer before they did? There is none.

Where is the evidence in the record to support Respondent's statement that, "At the time of payment of the Five Thousand ($5,000.00) Dollars the roof problems constituted a

hidden defect known by the Seller which would materially affect the desirability of the property"? There is none. There is no evidence showing that the roof leak was a hidden defect. If Mrs. Davis noticed stains, be it on the first visit or the second visit, leakage was not hidden but rather open and obvious.

Purchasers also ignore the element of reliance necessary to establish actionable fraud. Purchasers have not cited one single case to this Court that stands for the proposition that an act which is required to be done contractually can constitute the detrimental reliance required to support a judgment of fraud. Sellers respectfully assert that there is no such case. There is no reliance as a matter of law.

Furthermore, the record in this cause is totally devoid of any evidence of a fraudulent representation. The evidence is uncontroverted that from January, 1979, when the developer repaired the initial roof leaks until the time the Sellers moved from the house, there were no leaks. Not one scintilla of evidence appears to the contrary. Not one person testified that the "stains" noticed by the Purchaser was caused by leaks occurring after January, 1979. Not even an expert "roofer" or engineer was brought in by the Purchaser to assert that from the stain it could be determined when the leaks occurred. There is no permissible inference to be made from the record in this cause that any leaks continued to exist from January of 1979 until the time the Sellers moved from their house. Nor is there any evidence that if such a leak existed (which is denied) that the Sellers were aware of it. If the Sellers knew that there was a

leak in the roof of the house, certainly the Sellers would not have agreed to take back a purchase money mortgage in the amount of $114,000.00 from the Purchasers for five (5) years. Would a Seller who is defrauding a Purchaser agree that the Purchaser can make payments to the Seller for a five (5) year period and risk the amount of the purchase money mortgage? A defrauding Seller would want all his money at one time and would not give financing to the purchaser.

There was no fraud in the inducement of the contract. Nor is there any duty to disclose the existence of possible defects to a potential purchaser in an arms length transaction which would justify the return of all or a portion of the deposit placed by the purchasers pursuant to a contract.

It is interesting that the Purchasers assert that the leaks and/or condition of the roof was not readily observable and not known to the Buyer. There is no question that the Purchasers noticed the stains. Admittedly the stains were readily observable. What other defect or "fact" materially affected the value of the property which was not known to the Buyer and known to the Seller? There are none. As such the Third District's opinion must be reversed.

III. PETITIONERS, NOT RESPONDENTS, ARE ENTITLED TO AN AWARD OF ATTORNEYS FEES AND COSTS

There is no justification or principle of law to support the return of the deposit, or any portion of the deposit to the Purchasers. As such the Purchasers are not entitled to an award of attorneys' fees. The Sellers are entitled to such an award.

IV. SELLERS SUSTAINED ACTUAL DAMAGES IN THE AMOUNT OF SIXTY FOUR THOUSAND ONE HUNDRED THIRTY and 96/100 ($64,130.96) DOLLARS.

Purchsers assert that the Sellers sustained little or no damages. The uncontroverted damages sustained by Johnson consist of:

(A) $37,500.00 (The difference between the Davis contract of $310,000.00 and the subsequent Blank contract of $272,500.00 which closed November 5, 1982);

(B) $274.00 representing the insurance carried on the house at $2.00 per day for 137 days;

(C) $240.00 representing the maintenance incurred to keep the pool clean and free of algae calculated at 4 months at $60.00 per month;

(D) $390.00 representing lawn maintenance, 13 cuttings at $30.00 per cutting;

(E) $430.53 representing utility charges from June 21 through and including November 5, 1982 for operating lights, air conditioning and other miscellaneous charges;

(F) $1,189.16 representing real estate taxes on the house for the period of June 21 through November 5, 1982, calculated $8.68 per day time 137 days;

(G) $15.69 representing water charges from June 21, 1982 through November 5, 1982;

(H) $3,675.70 representing the interest and carrying charges on the existing first mortgage from June 21, 1982 thorugh November 5, 1982;

(I) $1,057.54 representing miscellaneous maintenance from June 21 through November 5, 1982;

(J) $1,209.65 representing payment to Jeffrey Fine, Esquire, for costs and fees incurred in connection with the aborted closing;

(K) $550.00 representing the fees and costs paid to Jeffrey Fine, Esquire, for services rendered with the Blank contract;

(L) $2,397.50 representing interest at 8% on the $80,000.00 that Johnson should have received from Davis at the closing on June 21, 1982 and calculated through November 5, 1982;

(M) $3,385.01 representing the interest that Johnson would have received from June 21 through November 5, 1982 on a purchase money second mortgage calculated at 8% interest on $114,000.00 for 137 days; and

(N) $13,625.00 representing the brokerage commission paid under the Blank contract (5% of $272,500.00).

The Purchasers assert that the second contract was more valuable than the subject contract. However, that argument misses the mark in that it assumes that their convuluted reasoning has an affect on the actual monetary damages sustained. For example, the Purchasers contend that the Blank contract is more favorable because the second mortgage was less than the Blank's equity in the house whereas the Davis' mortgage was more than the equity. Even if this statement is true, that has nothing to do with the actual monetary damages sustained. If there is sufficient equity in the house beyond the amount of the debt, it makes no difference to the sellers as to that amount of equity.

The Purchasers also contend that the Davis' second mortgage at 8% for five (5) years ballooning at the end of five (5) years was less favorable than the Blank's second mortgage at 10% ballooning at the end of one (1) year. This contention has no relationship to the actual monetary damages sustained by the Sellers. The Purchasers have failed to set forth how this statement is true.

In addition, the Purchsers contend that under the Blank contract, the Johnsons would receive all of their monies by November 5, 1983 whereas the Davis' contract would have permitted the Johnsons to receiving interest payments and principal amortized over 25 years ballooning in 5 years. These statements have no bearing on the actual damages sustained. A person's preference to receive a sum of money in one year versus payments over five years is a matter of personal preference, not bearing on the issue of actual monetary damages. In fact, Mr. Johnson testified that in computing the interest, principal and present value of the mortgages, the Davis' contract was still more favorable. (TR 593 - 617).

The Purchasers' argument relating to the amount of cash received by the Seller in an attempt to reduce the amount of actual damages is a fiction. It completely ignores the total sales price, the amount of the second mortgages and the interest rate of the second mortgages. It does not demonstrate the lack of the Seller's actual damages after comparing the two contracts in their entirety.

If the present value analysis is used as contended by the Purchasers, the Sellers did lose $36,916.00 after reducing both contracts to present value, just $600.00 less than the difference between the face amounts of the two contracts. (TR 46).

The Purchasers have likewise completely ignored the additional expenses that the Seller incurred over the 137 days that it took to close with the second purchaser.

As such, Johnsons are entitled to the entry of a Judgment in the amount of $64,130.96 together with interest, court costs and attorneys fees.

CONCLUSION

Based upon the foregoing citations and authorities, Petitioners respectfully request the Court to reverse the Third District's opinion and remand this cause with directions to enter judgment in favor of Petitioners, JOHNSON.

Respectfully submitted,

SMITH & MANDLER, P.A.
Attorneys for Petitioners
800 Brickell Avenue, Suite 700
Miami, Florida 33131
Tel: (305) 374-2800

By: Patricia M Silver
PATRICIA M. SILVER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by mail to STANLEY N. NEWMARK, ESQUIRE, 9400 South Dadeland Boulevard, Suite 300, Miami, Florida 33156 and to JOSEPH G. ABROMOWITZ, ESQUIRE, 77 North Washington Street, 9th Floor, Boston, Massachusetts 02114, on this 17th day of December, 1984.

SMITH & MANDLER, P.A.
Attorneys for Petitioners
800 Brickell Avenue, Suite 700
Miami, FL 33131
Telephone: (305) 374-2800

By: Patricia M. Silver
PATRICIA M. SILVER

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