

2011 PA Super 254

JANET S. MILLIKEN,

Appellant

v.

KATHLEEN JACONO AND JOSEPH
JACONO AND CASCIA CORPORATION,
TRADING AS RE/MAX TOWN & COUNTRY
AND FRAN DAY AND THOMAS O'NEILL
AND JOHN RESTREPO AND FOX &
ROACH LP, TRADING AS PRUDENTIAL
FOX & ROACH REALTORS,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2731 EDA 2010

Appeal from the Order Entered August 9, 2010
In the Court of Common Pleas of Delaware County
Civil Division at No. 08-15684

BEFORE: FORD ELLIOTT, P.J.E., BENDER and MUNDY, JJ.

OPINION BY BENDER, J.:

Filed: November 29, 2011

Janet S. Milliken (Buyer) appeals from the order granting summary judgment in favor of Kathleen and Joseph Jacono (Sellers) and their agents, Fran Day and Thomas O'Neil, employed by the Cascia Corporation, trading as RE/MAX Town & Country (Agents). Buyer claims that the trial court erred in granting Sellers' and Agents' motions for summary judgment on several claims arising from the 2007 sale of a house to Buyer without Sellers or Agents disclosing to Buyer that a murder/suicide of a husband and wife had occurred in the house in 2006. For the reasons that follow, we reverse and remand.

The trial court set forth the procedural and factual history of this case as follows:

PROCEDURAL HISTORY

On November 24, 2008, Plaintiff Janet S. Milliken filed a Complaint against Defendants Kathleen Jacono and Joseph Jacono (hereinafter the "Jacono Defendants"), as well as the two real estate firms in the underlying transaction. The Jacono Defendants were the prior owners and sellers of the property to the Plaintiff Milliken. Defendants, Cascia Corporation, trading as Re/Max Town & Country, Fran Day and Thomas O'Neill (hereinafter, the "Re/Max Defendants") were the listing agents that represented the Jacono Defendants for the sale of the property. Defendants, Fox & Roach, LP, trading as Prudential Fox & Roach Realtors, John Restrepo (hereinafter "Fox & Roach Defendants"), represented the Plaintiff in the purchase of the property as her broker and agent.

Plaintiff's Complaint alleges fraud and misrepresentation regarding the sale of the property without disclosing the death of the individuals who owned the property prior to the Jacono Defendants owning it. The Complaint sets forth four (4) counts against the Jacono Defendants: Count I – Breach of Real Estate Seller Disclosure Law, Count III – Negligent Representation, Count V – Fraud, and Count VII – violation of the Unfair Trade Practices and Consumer Protection Law. The Jacono Defendants filed an Answer with New Matter and Crossclaims on May 18, 2009. On June 10, 2010, the Jacono Defendants filed [motions] for Summary Judgment, which this Court granted. Plaintiff appealed.

FACTS

1. On February 11, 2006, the owner of the property prior to the Jacono Defendants, Konstantinos Doumboulis, allegedly shot his wife and himself at that property.
2. The Jacono Defendants purchased the property from the Koumboulis Estate at a real estate auction on September 23, 2006.

3. On May 1, 2007, a Consumer Notice was signed by Plaintiff Milliken and Mr. Restrepo regarding duties of real estate professionals which notes that buyer's agents have a duty of confidentiality except for the disclosure of known material defects about the property.
4. Defendant, Mr. Jacono, spoke with Brian Collins and Judith Schulder, representatives of the Pennsylvania Real Estate Commission, who confirmed that the murder/suicide was not a material defect that needed to be disclosed.
5. Mr. Jacono's conversation with Ms. Schulder of the Pennsylvania Real Estate Commission was later memorialized in electronic correspondence.
6. After Mr. Jacono's conversations with the representatives of the Pennsylvania Real Estate Commission, the Jacono Defendants entered into a Listing Agreement for sale of the property with the Re/Max Defendants on June 4, 2007.
7. After entering into the Listing Agreement with the Jacono Defendants, the Re/Max Defendants called the Pennsylvania Association of Realtors Legal Hotline and were told that the murder/suicide was not a material defect which required disclosure.
8. The Re/Max Defendants also performed internet research to confirm these findings and produced an article regarding disclosure of material defects.
9. On June 17, 2007, an Agreement of Sale for 12 Pickering Trail was signed by Plaintiff and the Jacono Defendants.
10. The Seller Property Disclosure Statement dated June 17, 2007 does not disclose the murder/suicide as a known material defect.
11. The Seller Property Disclosure Statement indicates that the property was last occupied in March 2006, and that the Jaconos have owned the property for seven months.

12. Plaintiff alleges that she was unaware of the murder/suicide until three weeks after she moved into the property, allegedly sometime in September 2007.

13. Plaintiff also alleges that she proceeded with the transaction under the presumption that there was a foreclosure involved with the Jacono Defendants' purchase of the property.

14. On June 20, 2007, the Re/Max Defendants mailed the Thornbury Hunt Owners' Association Documents to Plaintiff Milliken which listed Konstantinos Koumboulis as the owner of the Property.

15. On July 6, 2007, Plaintiff Milliken signed an acknowledgement of receipt of the Thornbury Hunt Owners' Association Documents.

16. Despite receiving the Thornbury Hunt Owners' Association Documents before closing, Plaintiff did not review them or investigate Mr. Koumboulis' ownership.

17. Plaintiff admits at her deposition that she reviewed the Title Report from Trident dated July 18, 2007 before closing.

18. The Title Report included a statement that this property was conveyed by the Estate of Kostantinos Koumboulis and Estate of Georgia Koumboulis to the Jaconos by Deed dated October 31, 2006 and recorded January 19, 2007.

19. The Title report, Schedule C, Description and Recital, states as follows:

Being the same premises which Estate of Kostantinos Koumboulis and Estate of George Koumboulis, William C. Mackrides, Esq. and Constantine Economides, Esq., Co-Administrators of Estates by Deed dated 10/31/2006 and recorded 1/19/2007 in Delaware County in Volume 4008 Page 630 conveyed unto Joseph Jacono and Kathleen M. Jacono, husband and wife, in fee.

20. Plaintiff testified that she read the Title Report and recognized that the Jacono Defendants had purchased the

property from the Koumboulis Estate, but proceeded with the transaction.

21. On August 10, 2007, Plaintiff closed on the property for \$610,000,00, but was not present at the closing.

Trial Court Opinion (T.C.O.), 4/6/11, at 1-4. In this appeal, Buyer presents the following four questions for our review:

- I. Whether the trial court erred in granting summary judgment in favor of Defendants on the claim of a violation of the Real Estate Disclosure Law because a material issue of fact existed as to whether the murder/suicide which occurred in the home constituted a "material defect" because it had a significant adverse impact on the value of the property?
- II. Whether the trial court erred in granting summary judgment in favor of Defendants on the fraud claim because a material issue of fact existed as to whether their intentional concealment and non-disclosure of the murder/suicide led to a viable claim for fraud?
- III. Whether the trial court erred in granting summary judgment in favor of Defendants on the claim of negligent misrepresentation because a material issue of fact existed as to whether Mrs. Milliken had a viable claim for negligent misrepresentation?
- IV. Whether the trial court erred in granting summary judgment in favor of the Defendants on the claim of a violation of the unfair Trade Practices and Consumer Protection Law because a material issue of fact existed as to whether Mrs. Milliken had a viable claim for common law fraud which would lead to a claim under the statute?

Brief for Appellant at 4.

Pursuant to Pa.R.C.P. 1035.2, summary judgment is appropriate where "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action . . . which in a

jury trial would require the issues to be submitted to a jury.” Pa.R.C.P. 1035.2(1).

“In reviewing this matter, as with all summary judgment cases, we view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.” *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1041 (Pa. 1996). However, the “failure of a non-moving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict in its favor establishes the entitlement of the moving party to judgment as a matter of law.” *Young v. Com. Dept. of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000).

In the first question presented for our review, Buyer claims that the trial court erred in determining that as a matter of law, the murder/suicide could not qualify as a material defect requiring disclosure under the Real Estate Seller Disclosure Law (RESDL). *See* 68 Pa.C.S. §§ 7301-7315. The RESDL requires that a seller of residential real estate disclose to a buyer any material defect with the property. *See* 68 Pa.C.S. § 7303. A material defect is defined as follows:

A problem with a residential real property or any portion of it that would have a **significant adverse impact on the value of the property** or that involves an unreasonable risk to people on the property. The fact that a structural element, system or subsystem is near, at or beyond the end of the normal useful life of such a structural element, system or subsystem is not by itself a material defect.

68 Pa.C.S. § 7102 (emphasis added). Buyer argues that the suicide/murder was a material defect because it had a substantial impact on the value of the house. In support of this claim, Buyer cites the reports from two real estate appraisers retained by Buyer. Both appraisers were of the opinion that the murder/suicide lowered the value of the property between ten and fifteen percent. Reproduced Record (R.) at 312a, 778a. Certainly, this is sufficient evidence to submit the issue to a jury for a factual determination. The question then is whether the RESDL requires a disclosure of a material defect of this nature.

The RESDL states that a seller shall comply with the law by “completing a property disclosure statement which satisfies the requirements of section 7304.” **See** 68 Pa.C.S. § 7303. Section 7304 states:

(a) General rule.--A form of property disclosure statement that satisfies the requirements of this chapter shall be promulgated by the State Real Estate Commission. **Nothing in this chapter shall preclude a seller from using a form of property disclosure statement that contains additional provisions that require greater specificity or that call for the disclosure of the condition or existence of other features of the property.**

(b) Contents of property disclosure statement.--The form of property disclosure statement promulgated by the State Real Estate Commission shall call for disclosures with respect to all of the following subjects:

- (1) Seller's expertise in contracting, engineering, architecture or other areas related to the construction and conditions of the property and its improvements.

- (2) When the property was last occupied by the seller.
- (3) Roof.
- (4) Basements and crawl spaces.
- (5) Termites/wood destroying insects, dry rot and pests.
- (6) Structural problems.
- (7) Additions, remodeling and structural changes to the property.
- (8) Water and sewage systems or service.
- (9) Plumbing system.
- (10) Heating and air conditioning.
- (11) Electrical system.
- (12) Other equipment and appliances included in the sale.
- (13) Soils, drainage and boundaries.
- (14) Presence of hazardous substances.
- (15) Condominiums and other homeowners associations.
- (16) Legal issues affecting title or that would interfere with use and enjoyment of the property.

68 Pa.C.S. § 7304 (emphasis added). Section 7304 accomplishes two things. It sets forth a list of items or issues that must be included in the disclosure statement and it expressly allows for a seller to utilize a disclosure statement that contains additional provisions disclosing the existence of other conditions affecting the property. However, in the instant case, the trial court interpreted the statute as only constituting an exhaustive list of

what a seller is obligated to disclose and since a murder/suicide could not fall under any of the items on the list, Sellers were not required to disclose it. Thus, the court stated that the RESDL "delineates sixteen areas where the seller must make a disclosure relating to the property, none of which can be reasonably interpreted to require the disclosure of a death at the property." T.C.O., 4/6/11, at 5. We find such a conclusion to be a misinterpretation of the law and incongruous with the facts of this case.

The disclosure statement utilized by Sellers in this case states: "While the Law requires certain disclosures, this disclosure statement covers common topics **beyond the basic requirements of the Law** in an effort to assist sellers in complying with disclosure requirements and to assist buyers in evaluating the property being considered." R. at 146a (emphasis added). Furthermore, on the last page, the statement required Sellers to disclose any material defects "not disclosed elsewhere on this form." R. at 150a. When we view this statement in conjunction with the provision of Section 7304 permitting additional disclosure, we conclude that if a jury in fact determined that the murder/suicide was a material defect, then pursuant to the disclosure statement used in this case, Sellers and Agents were required to disclose the murder/suicide to Buyer. As such, the trial court erred in granting Sellers' and Agents' motions for summary judgment on Buyer's claim of a violation of the RESDL.

In the second question presented for our review, Buyer claims that the trial court erred in granting Sellers' and Agents' motions for summary judgment on Buyer's fraud claim. "The essence of fraud is deceit intentionally and successfully practiced to induce another to part with property or with some legal right. Fraud is practiced when deception of another to his damage is brought about by a misrepresentation of fact or **by silence when good faith required expression.**" *In re Adoption of R.J.S.*, 889 A.2d 92, 98 (Pa. Super. 2005) (quoting *Thorne's Estate*, 25 A.2d 811, 816 (Pa. 1942)). "In real estate transactions, fraud arises when a seller knowingly makes a misrepresentation, undertakes a concealment calculated to deceive, or commits non-privileged failure to disclose." *Blumenstock v. Gibson*, 811 A.2d 1029, 1034 (Pa. Super. 2002).

The trial court found that Buyer could not establish her fraud claim because she would not be able to prove that Sellers failed to disclose "any condition of the property that was *material* to the sale of the home." T.C.O., 4/6/11, at 9. This conclusion was based on the trial court's prior determination that the murder/suicide could not constitute a material defect under the RESDL. However, we conclude that whether the murder/suicide constituted a material defect under the RESDL has no bearing on Buyer's fraud claim against Sellers and Agents.

Whether a fact is material in the context of a fraud claim hinges on whether the transaction would have been consummated if the other party

knew of the fact. **See *Skurnowicz v. Lucci***, 798 A.2d 788, 793 (Pa. Super. 2002). Here, Buyer has alleged that had she known of the murder suicide, she would not have purchased the property. R. at 268a. Based on the foregoing, we conclude that whether Sellers and Agents failed to disclose a material fact was a question for the jury. **See *Alloway v. Martin***, 644 A.2d 201, 204 (Pa. Super. 1994) (stating that “fraud is a question of fact for the trier-of-fact to decide”). Accordingly, we conclude that the trial court erred in granting Sellers and Agents summary judgment on Buyer’s fraud claim.

In the third question presented for our review, Buyer claims that the trial court erred in granting summary judgment on her claim for negligent misrepresentation.

Negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.

Bortz v. Noon, 729 A.2d 555, 561 (Pa. 1999). The trial court granted summary judgment on this claim for the same reason it granted it on the fraud claim, *i.e.*, the purported inability of Buyer to establish a material defect under the RESDL. Therefore, for the reasons stated above, we conclude that this ruling was in error as well.

In the fourth question presented for our review, Buyer claims that the trial court erred in granting summary judgment on her claim under the Unfair Trade Practices and Consumer Protection Law (UTCPL). **See 73 P.S.**

201-1 – 201-9.3. “An individual who purchases goods, including real estate, may bring a private action to recover damages caused by another's act or practice declared unlawful by the UTPCPL.” *Skurnowicz v. Lucci*, 798 A.2d 788, 794 (Pa. Super. 2002). Buyer asserted a claim under Section 201-2(4)(xxi).

[T]he Act provides that “engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding” constitutes an “unfair or deceptive act or practice.” 73 P.S. § 201-2(4)(xxi). In order to establish a violation of this catchall provision, a plaintiff must prove all of the elements of common-law fraud.

Id. (third quotation marks omitted).

In the instant case, the trial court determined that since Buyer could not establish her claim for fraud, she could not establish her claim under the UTPCPL. As we have already determined that Buyer’s fraud claim should be permitted to proceed, we also conclude that Sellers and Agents should not have been granted summary judgment on Buyer’s UTPCPL claim.

In conclusion, we note that one may argue that by permitting a claim such as this to survive summary judgment we are proceeding down a slippery slope. However, suffice it to say that we doubt that our trial courts will encounter many instances in which the parties demonstrated so unequivocally their knowledge that their non-disclosure was material to the transaction at hand. As the trial court stated, the Sellers and Agents made multiple inquiries to determine whether they were required to disclose the murder/suicide to Buyer. Instead of expending this effort, they would have

been better served by simply acting in good faith and disclosing this fact. They did not, and one possible explanation for their failing to do so was that they knew the house would sell for a higher price if it was sold to a buyer who did not know about the murder/suicide. However, such a determination is clearly not within our purview, but instead is a question for a jury.

Order Reversed. Case Remanded for further proceedings consistent with this decision. Jurisdiction Relinquished.

President Judge Emeritus Ford Elliott files a dissenting opinion.

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BEFORE: FORD ELLIOTT, P.J.E., BENDER AND MUNDY, JJ.

DISSENTING OPINION BY FORD ELLIOTT, P.J.E.:

I must respectfully dissent from the considered opinion of the Majority. Appellant has raised four issues on appeal, all of which ultimately depend on whether the fact that a murder/suicide occurred in a house is a material defect that must be disclosed prior to sale of the property. The Majority finds that this presents a question for the jury such that the case should survive a motion for summary judgment, while I would agree with the trial court that it is not a material defect as a matter of law.

I first disagree with the Majority in its reasoning that the real estate disclosure made in this case was broad enough that it should include a requirement to reveal the murder/suicide at issue. The Majority states:

The disclosure statement utilized by Sellers in this case states: "While the Law requires certain disclosures, this disclosure statement covers common topics **beyond the basic requirements of the Law** in an effort to assist sellers in complying with disclosure requirements and to assist buyers in evaluating the property being considered." R. at 146a (emphasis added). Furthermore, on the last page, the statement required Sellers to disclose any material defects "not disclosed elsewhere on this form." R. at 150a. When we view this statement in conjunction with the provision of Section 7304 permitting additional disclosure, we conclude that if a jury in fact determined that the murder/suicide was a material defect, then pursuant to the disclosure statement used in this case, Sellers and Agents were required to disclose the murder/suicide to Buyer.

Slip opinion at 9.

The fact that the Sellers' disclosure statement purported to go beyond the basic requirements of the law does not lead to a conclusion that it therefore must have intended to include the murder/suicide in its disclosure. A review of the Sellers' disclosure statement reveals that it very closely tracks the requirements of the Real Estate Seller Disclosure Law, 68 Pa.C.S.A. § 7301 *et seq.*, except that on each required disclosure, the statement goes into much more detail. I believe this is what the Sellers meant when they stated that their disclosure went beyond what the law required.

This analysis leads to an examination of the Real Estate Seller Disclosure Law itself. In particular, I call attention to the section pertaining to those disclosures that the Legislature chose to make mandatory:

- (a) **General rule.**--A form of property disclosure statement that satisfies the requirements of this chapter shall be promulgated by the State Real Estate Commission. Nothing in this chapter shall preclude a seller from using a form of property disclosure statement that contains additional provisions that require greater specificity or that call for the disclosure of the condition or existence of other features of the property.
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 - (2) When the property was last occupied by the seller.
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- (8) Water and sewage systems or service.
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- (10) Heating and air conditioning.
- (11) Electrical system.
- (12) Other equipment and appliances included in the sale.
- (13) Soils, drainage and boundaries.
- (14) Presence of hazardous substances.
- (15) Condominiums and other homeowners associations.
- (16) Legal issues affecting title or that would interfere with use and enjoyment of the property.

68 Pa.C.S.A. § 7304(a) and (b).

An examination of the mandatory disclosures reveals that each deals with either the actual physical structure of the house, its components, and the condition of the curtilage (3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13), potential legal impairments attached to the property (15, 16), and hazardous substances on the property (14). A requirement that sellers of real estate reveal that a murder once occurred on the property goes to the reputation of the property and not its actual physical structure. Plainly, the Legislature did not require disclosure of psychological damage to a property. Because the Legislature limited required disclosures to structural matters, legal impairments, and hazardous materials, I find the extension proposed by the

Majority to be both unwarranted and legislative in nature. There are other problems as well.

First, how recent must the murder be that the seller must inform the buyer? What if the murder happened 100 years ago? What if numerous owners have lived in the house in the interim? In fact, the appellants here are themselves one buyer removed from the murder/suicide at issue. This raises another concern. This sort of psychological damage to a house will obviously decrease over time as the memory of the murder recedes from public knowledge. Requiring a seller to reveal this information may force the seller to sell the house under market value and allow the buyer to realize a windfall when the house is resold 10 years later and memories have faded. The passage of time has no similar curative effect on structural damage, legal impairments, or hazardous materials.

Second, how can a monetary value possibly be assigned to the psychological damage to a house caused by a murder? The psychological effect will vary greatly from person to person. There are persons for whom no amount of money would induce them to live in such a house, while others may not care at all, or even find it adventurous. Further, as noted, the monetary value of such a psychological defect will dissipate with the passage of time as the memory of the murder recedes.

Third, is this disclosure limited to murder, or must other crimes be revealed also? A buyer might want to know that a house has been burgled

10 times in the last year because that would indicate that the neighborhood is dangerous. What about crimes that did not occur on the property itself? Suppose numerous burglaries had occurred in other homes in the neighborhood. Further, a buyer might want to know that a child molester lived in the neighborhood.

I think the fact that a murder once occurred in a house falls into that category of homebuyer concerns best left to *caveat emptor*,¹ such as the fact that a next-door neighbor is loud and obnoxious, or on some days you can smell a nearby sewage plant, or that the house was built on an old Indian burial ground. Sellers should only be required to reveal material defects with the actual physical structure of the house, with legal impairments on the property, and with hazardous materials located there. To allow consideration of possible psychological defects opens a myriad of disclosures that sellers will need to reveal, and, as the Majority concedes, starts a descent down a very slippery slope. I would find that this does not constitute a material defect and would affirm.

¹ Certainly, in the age of the internet the modern home buyer has a powerful tool to uncover the notorious history of a house or neighborhood.