IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01340 COA

TONY V. SEARCY AND KATHY A. SEARCY APPELLANTS

v.

LEECH REAL ESTATE, INC.

AND W.W. SHOWS APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM HALE SINGLETARY

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: JOSEPH E. ROBERTS, JR.

ATTORNEY FOR APPELLEES: JOHN H. DOWNEY

NATURE OF THE CASE: TORT LIABILITY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO APPELLEES.

MANDATE ISSUED: 9/2/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

HERRING, J., FOR THE COURT:

This case involves a request for recission of a contract and charges of fraudulent and negligent misrepresentations, as well as breach of contract and breach of warranty, in regard to the condition of a house prior to its sale to the Appellants, Tony and Kathy Searcy. After the original and two amended complaints were filed by the Searcys, the Chancery Court of the First Judicial District of Hinds County, Mississippi, eventually granted a summary judgment in favor of the real estate company and the real estate appraiser that were named as defendants in the case. Tony and Kathy Searcy have now appealed the chancellor's ruling to this Court and cite as their single assignment of error, the following:

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THIS CAUSE.

The real estate appraiser, W. W. Shows, concedes that summary judgment was incorrectly granted in his favor since he filed no motion requesting summary judgment. Therefore, we reverse and remand the judgment of the trial court in regard to W. W. Shows. However, we affirm the summary judgment rendered in favor of the real estate broker, Leech Real Estate, Inc.

I. THE FACTS

Hildred and Mary Helen Hickman conveyed a house and lot located in Hinds County, Mississippi, to Anthony and Kathy Searcy on October 22, 1990. Prior to this date, Mr. and Mrs. Hickman obtained the services of Leech Real Estate, Inc. (Leech) to help them sell the property. In this regard, a representative of Leech named Bo Dulaney inspected the premises and observed nothing which indicated serious foundation or structural problems. In addition, W. W. Shows appraised the property for Trustmark National Bank, which had been selected by the Appellants to finance their purchase of the property. His inspection of the house in question also revealed no foundation or structural defects. Prior to the closing of the sale on October 22, 1990, the Hickmans vacated the premises and the Searcys once again inspected the premises. They were better able to inspect the house this time because there was no furniture in it. According to the affidavit of Bo Dulaney, Mr. and Mrs. Searcy called him and stated that one of the rooms appeared to be unlevel. Dulaney then called the Hickmans and asked them if the house had foundation problems. Mrs. Hickman responded that during their five years of occupancy, they had not had any foundation work done on the house and knew of no previous foundation work being done on the premises. This was the second time Dulaney had inquired about whether the house had experienced foundation problems in the past. Mr. and Mrs. Searcy then bought the house. Finally, Dulaney stated in his affidavit that at no time in his dealings

with Mr. or Mrs. Searcy did he have any knowledge or reason to believe or suspect that the Hickman residence was suffering from foundation or structural problems.

According to the motion for summary judgment filed by Leech, it was later discovered that the house sold by Mr. and Mrs. Hickman had suffered from cracks in its foundation and walls prior to Leech being retained to help sell the premises. However, no evidence was ever presented which inferred that any representative of Leech was aware of these foundation and structural problems prior to the house being sold to Mr. and Mrs. Searcy.

The Searcys filed suit against the Hickmans on February 1l, 1991, charging fraudulent misrepresentation by the Hickmans concerning the condition of the house and requesting *inter alia* a recission of the transaction. After the Hickmans filed for bankruptcy, the Searcy complaint was later amended on two occasions in order to add Leech and Shows as defendants and to charge them with negligent misrepresentations concerning the condition of the premises. The second amended complaint was filed on January 20, 1993. Little or no action was taken thereafter by the Appellants to pursue their claim, and the trial court dismissed the action as a stale case on April 13, 1995, at a hearing not attended by Mr. and Mrs. Searcy. However, the action was reinstated, apparently based in part upon the Searcys's explanation that the delay in the resolution of their case was partially caused by the fact that they were in the process of getting a divorce. Immediately thereafter, Leech filed its motion for summary judgment asking that the entire case be dismissed as to all defendants. Leech filed Bo Dulaney's affidavit in support of its motion, but the Searcys apparently did not actively oppose the motion. No affidavits or other pleadings were filed by the Searcys in opposition to Leech's motion for summary judgment, which was granted by the trial court on November 16, 1995.

II. ANALYSIS

The single issue before the Court is whether the trial court was correct in granting Leech's motion for summary judgment. However, since Leech was the only defendant to file a motion for summary judgment, we must also determine whether the court was correct not only in granting the motion in favor of Leech, but whether it was correct in granting the motion as to W. W. Shows as well.

A. Leech Real Estate, Inc.

Miss. R. Civ. P. 56(c) allows summary judgment where there are no genuine issues of material fact which would prevent a party from receiving a judgment as a matter of law. Where the trial court has granted summary judgment, the standard of review employed by the appellate court on appeal is well established:

The Court employs a de novo standard of review in reviewing a lower court's grant of summary judgment. Evidentiary matters are viewed in the light most favorable to the non-moving party. If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise, the decision is affirmed.

Richmond v. Benchmark Construction Corp., 692 So. 2d 60, 61 (Miss. 1997). In the case *sub judice*, Leech's motion for summary judgment appears from the record before us to have been unchallenged

by the Searcys. In such a situation our supreme court has stated on numerous occasions that the party defending against a motion must be diligent in his response. *Id*. at 61-62. In fact, Rule 56(e) itself says it best:

Where a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Appellants have, for whatever reason, failed to challenge the facts as set out in Bo Dulaney's affidavit and other documents executed by the parties pursuant to the sale of the house and lot by the Hickmans to the Searcys. Dulaney and Shows assert that they found no cracks or other indications of a faulty foundation or other structural problems when they inspected the premises. The Hickmans informed Dulaney on more than one occasion that there had been no foundation repairs, and they knew of no such problems. He passed this information on to the Searcys. Moreover, Mr. and Mrs. Searcy signed a contract to purchase the property in question which states the following in paragraph 15 thereof:

Buyer hereby represents that he has personally inspected and examined the above mentioned premises and all improvements thereon *and accepts the property in its "as is" and present condition* except for items in Paragraphs 13 and 14 above [termite certificate and mechanical equipment and appliances]. Buyer hereby acknowledges that unless otherwise set forth in writing elsewhere in this contract, *neither Broker nor Seller nor their representatives have made any representations concerning the present or past structural condition of the slab or foundations of this property.* Buyer also hereby agrees that he will not hold either Broker or Seller or their representatives responsible or liable for any present or future structural problems or damage to the foundation or slab of said property. Seller hereby represents that he is not aware of any defects of subject property except as stated in Paragraph 9 hereof. [Paragraph 9 is not relevant to these proceedings].

(emphasis added). In paragraph 20 of the contract, the parties acknowledge that Leech represented Mr. and Mrs. Hickman and did not represent the purchasers. Furthermore, the Searcys acknowledged in paragraph 20 that in purchasing the house in question, they were not relying upon any statements of the broker (Leech) as to the condition of the property and agreed to hold Leech harmless from any liability for any failure to inform them of shortcomings in the condition of the house.

In summary, the Appellants admit that they did not rely on Leech's representations when they purchased the house in question and have provided no evidence to show that Leech withheld or concealed material information from them concerning its condition. In *Stoneciper v. Kornhaus*, 623 So. 2d 955 (Miss. 1993), our supreme court faced a similar situation, where the purchasers of a home sued the vendors and alleged that the vendors made negligent misrepresentations concerning the condition of a tree on the premises, which later fell on the purchaser and caused serious injuries to the purchaser and her unborn child. The trial court granted summary judgment. The supreme court affirmed the trial court's decision and held:

[T]hat the Stoneciphers' acceptance of the "as is" clause found in the sales contract precludes them

from maintaining an action against Kornhaus and Moorman, who had transferred ownership and control of the premises five months prior to the accident.

Id. at 956. In the case *sub judice*, the Searcys are similarly precluded from pursuing their negligent misrepresentation claim against Leech, since they specifically agreed to assume the responsibility of making their own inspection and to purchase the property in its "as is" condition. Moreover, the general rule is that a real estate broker has no duty to the purchaser unless the broker intentionally and fraudulently misleads the purchaser in some material way concerning the condition of the premises or intentionally conceals prior defects. *See Century 21 Deep South Property v. Corson*, 612 So. 2d 359, 368 (Miss. 1992); *Stonecipher v. Kornhaus*, 623 So. 2d at 961-62 (citing *Great Atlantic and Pacific Tea Co. v. Wilson*, 408 N.E.2d 144, 147 (Ind. Ct. App. 1980)).

In the present case, Mr. and Mrs. Searcy do not charge Leech with fraud and only allege that Leech should have been put on notice, based upon their conversation with the parties and its inspection of the premises and the foundation problems which later manifested themselves after the Appellants had moved onto the property. Employing the rationale adopted in the *Stonecipher* case, we hold that this argument has no merit. We affirm the trial court's decision to grant summary judgment in favor of Leech.

B. W. W. Shows

The Appellants assert that the trial court erred in granting summary judgment in favor of W. W. Shows. Shows, himself, concedes that the summary judgment was incorrectly granted, since he filed no motion requesting such relief as required by Miss. R. Civ. P. 56(b). In addition, Rule 56(c) requires that a motion for summary judgment be served upon the opposite party at least ten (10) days prior to the time fixed for hearing. No such notice was given to Mr. and Mrs. Searcy on behalf of Shows.

Shows nevertheless contends that we should affirm the trial court's summary judgment in his favor on the basis that any action against him as a result of his real estate appraisal would be barred by the sovereign immunity of the United States, pursuant to 28 U.S.C. § 2680(a) and (h). In this case, Shows was retained by Trustmark National Bank to perform an appraisal pursuant to Department of Housing and Urban Development guidelines. It is noteworthy that a sovereign immunity defense was not raised by Shows in his pleadings and is raised for the first time on appeal. In essence, Shows is asking the Court to grant summary judgment *sua sponte*.

Some federal courts have granted summary judgments *sua sponte* or in the context of ruling on pretrial motions. *See, i.e., Freeman v. City of Inglewood*, 113 F. 3d 1241 (9th Cir. 1997). However, proper notice to opposing parties of possible final disposition have been required in those limited cases. Thus, we decline the invitation to grant summary judgment as to Shows and remand this case to the trial court for further proceedings in regard to Shows.

THE JUDGMENT OF THE CHANCERY COURT OF HINDS COUNTY IS AFFIRMED WITH REGARD TO THE SUMMARY JUDGMENT RENDERED IN FAVOR OF THE REAL ESTATE BROKER, LEECH REAL ESTATE, INC., AND REVERSED AND REMANDED WITH REGARD TO THE REAL ESTATE APPRAISER, W. W. SHOWS, FOR

FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED EQUALLY BETWEEN THE APPELLANTS AND THE APPELLEE, SHOWS.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.