REL: December 3, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200678

Sandra Gleason

v.

Charles Halsey

Appeal from Baldwin Circuit Court
(CV-19-901205)

MENDHEIM, Justice.

Sandra Gleason commenced an action in the Mobile Circuit Court, which was subsequently transferred to the Baldwin Circuit Court ("the

circuit court"), against Charles Halsey and Jim McDonough d/b/a Jim McDonough Home Inspection ("McDonough"), seeking to recover for damage that Gleason allegedly incurred as a result of the defendants' allegedly negligent and/or fraudulent conduct associated with Gleason's purchase of a house ("the house") from Halsey and McDonough's inspection of the house. The circuit court entered a summary judgment in favor of Halsey and certified the judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. Gleason appealed. We dismiss the appeal.

Facts and Procedural History

In 2005, Halsey, who resided in Las Vegas, Nevada, purchased the house. Halsey's parents and his niece lived in the house. In the spring of 2014, there was an intrusion of water into the house; the amount of water that intruded into the house and the extent of the damage caused thereby is in dispute.

In July 2017, Halsey listed the house for sale with Kathy Fuller, a realtor with Coldwell Banker, Reehl Properties, Inc. A "Seller's Disclosure" form dated November 5, 2017, and signed by Halsey and Gleason on February 7, 2018, indicates that Halsey had never lived in the

house, that he was not aware of the house ever having mold inside of it, and that he was not aware of the house having any "[f]looding, drainage, grading, or erosion problems."

On January 25, 2018, Jennifer Hudson entered into a purchase agreement with Halsey to purchase the house. On January 30, 2018, Hudson hired McDonough to inspect the house. After conducting the inspection, McDonough prepared an inspection report, which did not indicate that the house had any previous instances of water intrusion and/or flooding. Hudson ultimately decided not to purchase the house; her reason for seeking a release from the purchase agreement with Halsey is not evident from the record.

On February 6, 2018, the day before Gleason entered into a purchase agreement with Halsey to purchase the house, Gleason signed a "buyer's disclosure statement" concerning the house. The buyer's disclosure statement states that the "[b]uyer should either personally or through others of [b]uyer's choosing, inspect the property, verify material facts including but not limited to those addressed below and not rely on any verbal, printed or written description of the property by any [r]eal [e]state

[b]roker or [s]alesperson." The buyer's disclosure statement further states that "[a] [p]rofessional home inspection is recommended to help determine the condition of the property" and that "[a] [h]ome [w]arranty is recommended but not in lieu of a professional home inspection." (Emphasis in original.)

On February 7, 2018, Gleason entered into a purchase agreement with Halsey to purchase the house ("the purchase agreement"). The purchase agreement states that "[t]his contract constitutes the sole agreement between the parties hereto and any modifications of this contract shall be signed by all parties to this agreement. No representation, promise, or inducement not included in this contract shall be binding upon any party hereto." The purchase agreement also states that Gleason "accepts this property in its as is, whereis [sic] condition." Addendum B to the purchase agreement further states that the "[h]ome [is being] sold as is with no repairs." The purchase agreement also indicates that the "only contingency is inspection," and Addendum B to the purchase agreement provides that the January 30, 2018, inspection report prepared by McDonough on behalf of Hudson would be sent to

Gleason. Neither the seller's disclosure form nor the buyer's disclosure statement were incorporated into the purchase agreement.

Gleason, having received the inspection report, decided not to have her own professional inspection of the house conducted based on the fact that her realtor, Ron Lattrell, had told her that McDonough is the inspector that he would have recommended Gleason use if she were to obtain her own professional inspection and on the fact that she and Lattrell agreed to walk through the house themselves and discuss any issues she might have concerning the condition of the house directly with McDonough. On February 9, 2018, Gleason and Lattrell discussed the inspection report with McDonough via telephone while walking through and personally inspecting the house. Gleason's deposition testimony indicates that, during her personal inspection of the house, she noticed and asked McDonough about "what looked like bore holes into the mortar between bricks spaced so far apart." Gleason's deposition testimony further indicates that Lattrell "asked [McDonough] about an area of the roof that looked darker around the chimney" and that, in response to Lattrell's question, McDonough indicated that there were "[n]o apparent

leaks" in the roof based on his inspection. Gleason indicated in her deposition testimony that, despite McDonough's opinion, Lattrell entered the attic of the house to try to determine if any water had leaked into the attic from the "darker" portion of the roof "around the chimney"; according to Gleason, Lattrell indicated that there was no evidence of a leak. Gleason did not discover any issues with the house as a result of her personal inspection.

On February 16, 2018, Gleason and Halsey closed on the sale of the house, and Gleason moved into the house on the same day. Gleason's deposition testimony indicates that, shortly after she moved into the house, she began having "coughing episodes." According to Gleason's deposition testimony, the heating, ventilation, and air-conditioning ("HVAC") system for the house "failed" in the summer of 2018. Gleason stated in her deposition testimony that she had the HVAC system inspected by an HVAC technician, who discovered that there was mold "[i]n the coils and in the blower" of the system. Gleason's deposition testimony indicates that the HVAC technician "was pulling out the coils and blower, that were chockablock full of mold." Gleason stated in her

deposition testimony that it took the HVAC technician six and a half hours to clean the coils and blower and that he had stated that "it was the worst he's ever seen in his life."

In August 2018, Gleason's deposition testimony indicates, Gleason personally removed the carpet from the house due to mold. Gleason's deposition testimony indicates that "the carpet tacks ... were black and rusted, the nails were rusted," and that she discovered "like red clay dirt had washed into the home on all of those areas" and there was "black growth" on some of "the very bottom of the ... sheetrock." Gleason's deposition testimony also indicates that, after she removed the carpet from the house, she began to experience "chronic coughing and asthma," "fatigue, insomnia, anxiety, headaches," and "[c]hronic ... malaise."

On April 9, 2019, Gleason filed a complaint against Halsey and McDonough. Gleason asserted claims of fraudulent suppression and misrepresentation against Halsey, on the basis that Halsey had allegedly failed to inform Gleason that "the [h]ouse had previously flooded and that the [h]ouse was infested with mold," and a claim of negligence against McDonough, based on McDonough's inspection of the house. On March 1,

2021, Gleason filed an amended complaint asserting a claim of negligent misrepresentation against McDonough, on the basis that "McDonough negligently represented to Gleason that he had inspected the air conditioning system and that it was in good working order."

On April 9, 2021, McDonough filed a motion for a summary judgment. On April 15, 2021, Halsey also filed a motion for a summary judgment. On June 18, 2021, Gleason filed a response to Halsey's and McDonough's motions for a summary judgment. The contents of the defendants' respective summary-judgment motions and Gleason's response are discussed below.

On June 23, 2021, following oral argument on the summary-judgment motions, the circuit court entered an order denying McDonough's summary-judgment motion and a separate order granting Halsey's summary-judgment motion. In its order granting Halsey's summary-judgment motion, the circuit court stated that it "expressly determines that there is no just reason for delay and expressly directs an entry of judgment consistent with this order, in accordance with ...

[Rule] 54(b)[, Ala. R. Civ. P.]." Gleason timely appealed the circuit court's order granting Halsey's summary-judgment motion.

Analysis

As noted, the circuit court certified as final, pursuant to Rule 54(b), its June 23, 2021, order granting Halsey's summary-judgment motion. Although neither party challenges on appeal the appropriateness of the circuit court's Rule 54(b) certification, "this Court may consider that issue ex mero motu because the issue whether a judgment or order is sufficiently final to support an appeal is a jurisdictional one." Barrett v. Roman, 143 So. 3d 144, 148 (Ala. 2013) (citing Robinson v. Computer Servicenters, Inc., 360 So. 2d 299, 302 (Ala. 1978)).

Rule 54(b) states, in pertinent part:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

In Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1263-64 (Ala. 2010), this Court provided the following explanation of the standard for reviewing Rule 54(b) certifications:

> "'"If a trial court certifies a judgment as final pursuant to Rule 54(b), an appeal will generally lie from that judgment." Baugus v. City of Florence, 968 So. 2d 529, 531 (Ala. 2007).
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> "'Although the order made the basis of the Rule 54(b) certification disposes of the entire claim against [the defendant in this case], thus satisfying the requirements of Rule 54(b) dealing with eligibility for consideration as a final judgment, there remains the additional requirement that there be no just reason for delay. A trial court's conclusion to that effect is subject to review by this Court to determine whether the trial court exceeded its discretion in so concluding.'
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> "Centennial Assocs. v. Guthrie, 20 So. 3d 1277, 1279 (Ala. 2009). Reviewing the trial court's finding in Schlarb v. Lee, 955 So. 2d 418, 419-20 (Ala. 2006), that there was no just reason for delay, this Court explained that certifications under Rule 54(b) are disfavored:
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> "'This Court looks with some disfavor upon certifications under Rule 54(b).
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> "'"It bears repeating, here, that '"[c]ertifications under Rule 54(b) should be entered only in exceptional cases and should not be entered

> routinely."' State v. Lawhorn, 830 So. 2d 720, 725 (Ala. 2002) (quoting Baker v. Bennett, 644 So. 2d 901, 903 (Ala. 1994), citing in turn Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373 (Ala. 1987)). '"'Appellate review in a piecemeal fashion is not favored.'"' Goldome Credit Corp. [v. Player, 869 So. 2d 1146, 1148 (Ala. Civ. App. 2003)] (quoting Harper Sales Co. v. Brown, Stagner, Richardson, Inc., 742 So. 2d 190, 192 (Ala. Civ. App. 1999), quoting in turn Brown v. Whitaker Contracting Corp., 681 So. 2d 226, 229 (Ala. Civ. App. 1996)) ..."
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> "'Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 363 (Ala. 2004).'

"In considering whether a trial court has exceeded its discretion in determining that there is no just reason for delay in entering a judgment, this Court has considered whether 'the issues in the claim being certified and a claim that will remain pending in the trial court "'are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results.'"' Schlarb, 955 So. 2d at 419-20 (quoting Clarke-Mobile Counties Gas Dist. v. Prior Energy Corp., 834 So. 2d 88, 95 (Ala. 2002), quoting in turn Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373, 1374 (Ala. 1987), and concluding that conversion and fraud claims were too intertwined with a pending breach-of-contract claim for Rule 54(b) certification when the propositions on which the appellant relied to support the claims were identical). See also Centennial Assocs., 20 So. 3d at 1281 (concluding that claims against an attorney certified as final under Rule 54(b) were too

> closely intertwined with pending claims against other defendants when the pending claims required 'resolution of the same issue' as issue pending on appeal); and Howard v. Allstate Ins. Co., 9 So. 3d 1213, 1215 (Ala. 2008) (concluding that the judgments on the claims against certain of the defendants had been improperly certified as final under Rule 54(b) because the pending claims against the remaining defendants depended upon the resolution of common issues)."

(Emphasis omitted.)

In the present case, Gleason asserted claims of fraudulent suppression and misrepresentation against Halsey, arguing that Halsey had allegedly suppressed and/or misrepresented the alleged facts that "the [h]ouse had previously flooded and that the [h]ouse was infested with mold." In his summary-judgment motion, Halsey argued that the doctrine of caveat emptor and the fact that the purchase agreement included an "as is" clause protects him from liability based on theories of fraud and misrepresentation. See Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 897-98 (Ala. 2006). In response, Gleason argued that, although the doctrine of caveat emptor generally applies to a sale of used property, the health or safety exception to the doctrine of caveat

emptor[1] allows her to pursue her claims against Halsey. Halsey, however, argued that, based on Gleason's alleged failure to inspect the house, Gleason cannot avail herself of the health or safety exception to the doctrine of caveat emptor. See Nesbitt v. Frederick, 941 So. 2d 950, 957-59 (Ala. 2006) (discussing Hope v. Brannon, 557 So. 2d 1208 (Ala. 1989), and holding that the buyer of used property involving an "as is" clause in the purchase contract cannot take advantage of an exception to the doctrine of caveat emptor if the buyer failed to thoroughly inspect the property). Gleason argued that McDonough's inspection of the house, which was conducted on behalf of Hudson, is an inspection that should be credited to her because she was given the inspection report and inspected

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[1]The health or safety exception to the doctrine of caveat emptor was explained in Nesbitt v. Frederick, 941 So. 2d 950, 956 (Ala. 2006), as follows:

> "If the seller ' "has knowledge of a material defect or condition that affects health or safety and the defect is not known to or readily observable by the buyer," ' then the seller has a duty to disclose the defect. Moore [v. Prudential Residential Servs. Ltd. P'ship], 849 So. 2d [914,] 923 [(Ala. 2002)] (quoting Fennell Realty Co. v. Martin, 529 So. 2d 1003, 1005 (Ala. 1988))."

the house herself in consultation with McDonough. Gleason further argued that, based on the inspection conducted by McDonough, she should be permitted to take advantage of the health or safety exception to the doctrine of caveat emptor. The parties raise those same arguments on appeal. Central to the arguments raised by the parties is whether Gleason inspected the house, which necessarily involves consideration of whether McDonough's inspection of the house may be credited to Gleason. According to Halsey's argument, assuming that Gleason did inspect the house, Gleason's argument under the health or safety exception to the doctrine of caveat emptor may be considered.

Gleason's claims against McDonough raise essentially the same issue. Gleason asserted claims of negligence and negligent misrepresentation against McDonough, based on McDonough's inspection of the house, which was performed on behalf of Hudson when she was under contract to purchase the house. In his summary-judgment motion, McDonough argued that he owed no duty to Gleason because he had conducted the inspection of the house on behalf of Hudson; McDonough argued that Gleason was "a stranger to the [h]ome [i]nspection

[a]greement and [r]eport of the subject property dated January 30, 2018." McDonough further argued that, "should [the circuit] court find that ... McDonough assumed a legal duty by discussing his written report with [Gleason], [Gleason's] damages are subject to the limitation of liability provision contained in the ... inspection agreement." In response, Gleason argued that McDonough owed her a duty because he "voluntarily undertook to explain his report to Gleason and to answer her questions about his inspection." Based on the arguments raised by the parties, the issue to be decided in considering Gleason's claims against McDonough is whether McDonough owed Gleason a duty; in other words, the issue is whether McDonough inspected the house on behalf of Gleason.

Although Gleason's claims against Halsey and McDonough involve different legal theories, the issue underlying the claims is essentially the same. Pertinent to the claims against both Halsey and McDonough is whether the house was inspected. The issue underlying Gleason's claims against Halsey is whether McDonough's inspection of the house may be credited to Gleason for purposes of determining whether Gleason may assert an argument under the health or safety exception to the doctrine

of caveat emptor; the issue underlying Gleason's claims against McDonough appears to be whether McDonough owed Gleason a duty in inspecting the house or in consulting with Gleason as she personally inspected the house. Even viewing the issue through the lens of different legal theories, the issue to be decided concerning the claims against both Halsey and McDonough is whether Gleason inspected the house.

Conclusion

Accordingly, Gleason's claims against Halsey, the judgment on which was certified as final under Rule 54(b), and Gleason's claims against McDonough that remain pending in the circuit court "are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results." Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373, 1374 (Ala. 1987). As a result, we conclude that the circuit court exceeded its discretion in certifying the June 23, 2021, order granting Halsey's summary-judgment motion as final. We therefore dismiss the appeal.

APPEAL DISMISSED.

Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur.

Parker, C.J., concurs in the result.