Rel: September 4, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1190413

James C. Kidd, Jr., and Carolyn P. Kidd

v.

Edwin A. Benson and Dianne A. Benson

Appeal from Baldwin Circuit Court
(CV-19-900371)

SELLERS, Justice.

James C. Kidd, Jr., and Carolyn P. Kidd appeal from a summary judgment in favor of Edwin A. Benson and Dianne A. Benson in their action against the Bensons arising out of a real-estate transaction. We affirm.

Facts and Procedural History

In 1995, Mr. Benson purchased a house and property on the Fish River;[1] the property itself included a bluff area overlooking the river. It is well known to people living in the Fish River community that hurricanes, floods, and high water levels have a detrimental impact on the banks of the river, thus requiring substantial shore protection. In September 1999, Mr. Benson hired a contractor to stabilize the bluff on his property, which stabilization consisted of, among other things, the construction of three retaining walls that terraced the bluff from the upper level down to the river. The retaining wall bordering the river is referred to as the bulkhead wall. According to the Bensons, the bluff area required ongoing maintenance. For example, Mr. Benson stated that, after major storm events, sinkholes would develop on the bluff area and that he normally filled the sinkholes with dirt or concrete. Mr. Benson also stated that, in either 2015 or 2016, the stairs from the upper level to the middle area of the bluff had separated from the bluff about three-quarters of an inch on one side, indicating to him that one of retaining

[1]Mr. Benson married Dianne in 2004; she became a co-owner of the property in 2013.

walls had moved. Mr. Benson talked to Joshua Fields and Troy Stewart, marine contractors, about the movement of the steps and/or the bluff area in general. According to Stewart, the entire bluff area had been leaning forward for several years, and he recommended that Mr. Benson install anchors to secure it. Rather than installing anchors to secure the bluff, Mr. Benson hired a contractor, who installed large rocks referred to as "rip rap" in front of the bulkhead wall. According to Mr. Benson, the rip rap stabilized the bluff area because he did not notice any further movement in the stairs.

On July 18, 2018, the Kidds signed an agreement to purchase the Bensons' property for $475,000.[2] The first paragraph of the purchase agreement stated, in pertinent part: "This contract constitutes the sole agreement between the parties" and "[n]o representation, promise, or inducement not included in this contract shall be binding upon any party hereto." Additionally, the purchase agreement contained a clause stating that the Kidds accepted the property in its "AS IS, WHERE IS, CONDITION." Before signing the purchase agreement, the Kidds visited the property two or three times,

[2]The Kidds, who were from Georgia, claimed that they were not very familiar with the Fish River community.

and they sent an e-mail through their real-estate agent asking the Bensons to respond to the following question: "Looks like the bluff area was stabilized. Was there a problem or is this preventive?" The Bensons responded that the stabilization of the bluff area was "preventive." The Kidds did not have the bluff area or any of its structures inspected before signing the purchase agreement or before the closing.

A few months after the Kidds took possession of the property, Mr. Kidd discovered a large sinkhole that had opened near the steps to the boathouse. The sinkhole had actually developed while the Bensons owned the property, and Mr. Benson had backfilled it with concrete. The Kidds hired Stewart, who at the time was working on the neighboring property, to repair the sinkhole, replace the upper deck of the boathouse with a metal roof, and remove a closet from the boathouse. Stewart stated that, to install the metal roof, he removed the deck from the boathouse as well as the closet, at which time he noticed that some of the pilings behind the boathouse were cracked. Approximately two weeks later, before Stewart resumed any work on the Kidds' property, the bluff area collapsed and portions of the bulkhead wall and the boathouse fell into the

Fish River; the evidence was disputed concerning the cause of the collapse.[3]

The Kidds sued the Bensons, alleging negligence, wantonness, and various claims of fraud. Their claims were based on the Bensons' representation that the stabilization that the Bensons had undertaken of the bluff area was "preventive," which, they contended, was untrue and induced them into signing the purchase agreement. They contended that the Bensons had a duty to disclose the problems with the bluff area because, they say, those problems were material defects that posed a direct threat to health or safety. The Bensons moved for a summary judgment on the basis that the Kidds' claims were barred by both the doctrine of caveat emptor and the "as is" clause in the purchase agreement. Following a

[3]In his deposition, Mr. Benson stated that the boathouse was an integral part of the stabilization system, and he hypothesized that Stewart had caused the bluff area to collapse by removing the "linear bracing" from the boathouse and by failing to stabilize the ground behind the boathouse before making modifications to the boathouse. Stewart, on the other hand, stated in his affidavit that the linear bracing was not structural in nature and, thus, that its removal did not cause and/or contribute to the collapse of the boathouse or bluff area. The Kidds and the Bensons each hired structural engineers, who reached differing conclusions as to what caused the bluff area to collapse.

hearing, the trial court granted the Bensons' motion for a summary judgment. This appeal followed.

Standard of Review

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952–53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797–98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

Discussion

In Alabama, the doctrine of caveat emptor, "let the buyer beware," applies to the sale of used real estate and

ordinarily relieves a seller of any duty to disclose to a buyer defects in the property. Nesbitt v. Frederick, 941 So. 2d 950, 956 (Ala. 2006). This Court, however, has recognized three exceptions to the doctrine that require a seller to disclose to the buyer known defects in the property: (1) a seller has a duty, under § 6-5-102, Ala. Code 1975, to disclose known defects if a fiduciary relationship exists between the buyer and the seller; (2) a seller has a duty to disclose material defects affecting health or safety not known to or readily observable by the buyer; and (3) a seller has a duty to disclose if the buyer inquires directly about a material defect or condition of the property. Nesbitt, 941 So. 2d at 956.

In this case, the Kidds argue only that the second exception to the doctrine of caveat emptor -- the health-and-safety exception -- applies, asserting that the problems with the bluff area were material defects that posed a direct threat to health or safety, and they further claim that those problems were not known to or readily observable by them.[4]

[4]In its order entering a summary judgment in favor of the Bensons, the trial court rejected the Kidds' argument regarding the health-or-safety exception, noting that the Kidds clearly knew of the potential problems with the bluff

The Kidds contend that the "as is" provision in the purchase agreement does not foreclose the applicability of the health-or-safety exception to the caveat emptor doctrine. For the reasons discussed below, we disagree with the latter argument and clarify the law in Alabama regarding the doctrine of caveat emptor and "as is" language in a purchase contract for real property.

In Clay Kilgore Construction, Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 897-98 (Ala. 2006), this Court discussed the interplay between the doctrine of caveat emptor and the "as is" clause in a purchase contract, explaining that

> "[u]nder a growing body of Alabama caselaw involving circumstances in which the rule of caveat emptor is applicable, a fraud or fraudulent-suppression claim is foreclosed by a clause in a purchase contract providing that the purchaser of real property accepts the property 'as is.' Moore v. Prudential Residential Servs. [Ltd. P'ship], 849 So. 2d [914] at 923 [(2002)]; Leatherwood, Inc. v. Baker, 619 So. 2d 1273, 1274 (Ala. 1992); Haygood v. Burl Pounders Realty, Inc., 571 So. 2d 1086, 1089 (Ala. 1990); and Massey v. Weeks Realty Co., 511 So. 2d 171 (Ala. 1987). This is so, because an 'as is' clause negates the element of reliance essential to any claim of fraud and/or fraudulent suppression."

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area and even inquired about them before closing on the property.

Thus, under Alabama law, when a buyer elects to purchase real property subject to an "as is" clause in the purchase agreement and neglects to inspect the property, the buyer cannot take advantage of any exceptions to the doctrine of caveat emptor. See Nesbitt v. Frederick, 941 So. 2d at 959 (declining to apply the specific-inquiry exception to the doctrine of caveat emptor when buyers signed a contract containing an "as is" clause and failed to inspect the property); Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 924 (Ala. 2002) (holding that, "[w]here a purchaser's direct inquiry would otherwise impose a duty of truthful disclosure, this Court has held that a purchaser's fraud claim is precluded by language in a sales contract stating that the purchase is 'as is'"); Hope v. Brannan, 557 So. 2d 1208, 1211 (Ala. 1989)(holding that buyers could not take advantage of the specific-inquiry exception to caveat emptor doctrine because they signed an "as is" purchase contract and neglected to inspect the house); and Ray v. Montgomery, 399 So. 2d 230, 233 (Ala. 1980)(holding that seller had no duty to disclose dangerous, known, and latent defect in a residence, when buyer signed "as is" contract and

had ample opportunity to inspect bearing timbers of house before purchasing it). We also note that several federal district courts interpreting Alabama law have understood that the exceptions to the doctrine of caveat emptor do not apply when a buyer purchases real property subject to an "as is" clause, without inspecting the property. See Seong Ho Hwang v. Gladden, No. 3:16-CV-502-SMD, Jan. 31, 2020 (M.D. Ala. 2020)(not reported in F. Supp.)(noting that "as is" clause in real-estate purchase contract "effectively vitiates any recognized exceptions to caveat emptor"); Shelby Res., Inc. v. J.P. Morgan Chase Nat'l Corp. Servs, Inc., No. CV-07-BE-0170-S, May 28, 2008 (N.D. Ala. 2008)(not reported in F. Supp.)(explaining that, "where a buyer has failed to inspect a property he is purchasing pursuant to a contract containing an 'as is' clause, he cannot later invoke an exception to caveat emptor in an attempt to impose upon the seller a duty to disclose").

The language of a real-estate sales contract defines the responsibilities of each party to the contract. Use of "as is" language in a contract effectively places the burden on the buyer to confirm the suitability of the property; after all,

it is the buyer who initiates the offer to purchase. See Teer v. Johnston, 60 So. 3d 253, 261 (Ala. 2010)(explaining that a buyer's awareness should be heightened even more when signing a purchase agreement containing an "as is" clause because such a clause "serves as a clear and common disclaimer of any previous representations" regarding the condition of the property). Real-estate purchase agreements allow a period of time between execution and closing. During that time, the buyer should confirm not only that the seller has good and marketable title to the property, but also that the property is structurally sound and mechanically sufficient and that all systems are in good working order. A buyer cannot rely on a seller with only practical experience and no specialized knowledge to confirm the suitability of the property; rather, the buyer should engage inspectors to thoroughly assess the condition of the property before purchase. Once a transaction is closed under the terms of an agreement containing "as is" language and property is conveyed, the seller should have no further risk that liability for the condition of the property would remain.

In this case, the Kidds signed a purchase agreement expressly stating that they were accepting the property in its "AS IS, WHERE IS, CONDITION." Before signing the purchase agreement, the Kidds had knowledge that the bluff area had been stabilized; despite this heightened knowledge, they did not have the bluff or its structures professionally inspected. Rather, they chose to rely on the Bensons' representation that the stabilization of the bluff was merely "preventive." Because the Kidds purchased the property in its "as is" condition, without having the bluff area inspected, they cannot invoke the health-or-safety exception to the doctrine of caveat emptor in an attempt to impose upon the Bensons a duty to disclose. Accordingly, the Kidds have failed to present sufficient evidence creating a genuine issue of material fact not only as to their fraud claims, but also as to their negligence and wantonness claims. See Leatherwood, Inc. v. Baker, 619 So. 2d 1273, 1274 (Ala. 1992) (holding that an "as is" clause in a contract for the purchase of used real estate barred both fraud and negligence claims).

Conclusion

For the reasons stated above, the summary judgment in favor of the Bensons is affirmed.

AFFIRMED.

Wise and Mitchell, JJ., concur.

Parker, C.J., and Bolin, Shaw, Bryan, Mendheim, and Stewart, JJ., concur in the result.