

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000050-MR

MILLARD GRAVES;
TONELLA GRAVES

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 96-CI-003337

EUGENIA YOKLEY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Millard and Tonella Graves appeal from a December 7, 2000 order of the Jefferson Circuit Court granting summary judgment to Eugenia Yokley. We affirm.

In February of 1995 while shopping for a home, the Graves looked at a five bedroom, two and a half bathroom home owned by George Yokley, now deceased, and Eugenia Yokley. The Graves toured the house with their real estate agent, Cathy Franck. The Yokleys and their real estate agent, Delores White, were present. During the tour, Tonella pointed out multiple

water marks upon the walls and ceiling. Yokley indicated these would be repaired should the Graves decide to purchase.

On March 8, 1995, the Graves tendered an offer to purchase the home. The Yokleys accepted the following day. At that time, the Yokleys tendered a "Seller's Disclosure" to the Graves. The question "Does the roof leak?" was answered by a check next to the word "unknown." Upon seeing this answer, Tonella informed Franck the Graves would not purchase the house unless they were certain it did not leak. White gave assurances the roof did not leak.

On March 16, 1995, the Graves hired a home inspector to inspect the house. His report concerning the roof indicated the main slope was "damaged," "patched," and "cracked." The main flat was "damaged" and "patched." The flashing on the hip and ridge was "damaged," other flashing, including that on the chimney and dormers, was "patched" and the gutters and downspouts were "clogged." Additionally, both chimneys had cracked mortar and one had a crack at the top. The home inspector also told the Graves a new roof would be necessary in three to five years.¹ The Federal House Authority (FHA) also inspected the house prior to closing. Prior roof damage and repair were noted in the FHA report. Some repairs not involving the roof were mandated. The Yokleys made the mandated repairs. The house closed on May 4, 1995, and the Graves moved in the next day.

¹The multiple page report indicated several potentially serious problems with the house.

In June, 1995, during a heavy rain, the Graves' house leaked substantially in several places throughout. Shortly thereafter, Eugenia came to the house on an unrelated errand. Tonella complained to Eugenia about the leaks. In response, the Yokleys paid for some repairs, but the roof continued to leak. On June 7, 1996, the Graves filed the instant action against the Yokleys and their real estate agent alleging fraudulent misrepresentation in the sale of the home.² On December 7, 2000, the Jefferson Circuit Court granted summary judgment in favor of the Yokleys. Ky. R. Civ. P. 56. This appeal followed.

The Graves contend the circuit court erred in granting summary judgment in favor of the Yokleys. Summary judgment is appropriate when it would be impossible for the non-movant to produce evidence at trial warranting a judgment in his favor, and against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). In the case *sub judice*, the Graves allege the Yokleys committed fraud by materially misrepresenting the condition of the roof in order to induce the Graves to buy the house. The elements necessary to establish fraud are set out in United Parcel Service Company v. Rickert, Ky., 996 S.W.2d 464 (1999). In Rickert, the Court holds:

[T]he party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in

²Summary judgment was granted by the Jefferson Circuit Court in favor of real estate agent Delores White, and Vantage 7 Realtors on November 2, 2000. Ky. R. Civ. P. 56.

reliance thereon and f) causing injury.
(Citation omitted).

Id. at 468.

The Yokleys informed the Graves the roof leaked in the past and had been repaired. The Seller's Disclosure indicated the Yokleys did not know whether the roof still leaked. The circuit court found this insufficient to demonstrate the required scienter or recklessness on the part of the Yokleys. We are constrained to agree with the circuit court. Thus, we do not believe there is sufficient evidence to demonstrate the Yokleys materially misrepresented the condition of the roof.

Even if the Yokleys had materially misrepresented the condition of the roof, we note the Graves paid for an independent home inspection. We believe the independent inspection indicates the Graves did not rely upon the Yokleys' representations. As such, we are of the opinion there is insufficient evidence to demonstrate the Graves relied upon the Yokleys representations. Additionally, we think the myriad serious problems indicated in the home inspection clearly put the Graves on notice of potential problems with the roof. "[The law will not] come to the relief of those who with their eyes open understandingly and freely make a bad bargain." Mathis v. O'Brien, 137 Ky. 651, 126 S.W. 156, 158 (1910).

As it would be impossible for the Graves to prove the elements of fraud at trial, we are of the opinion the circuit court did not err granting summary judgment in favor of the Yokleys.

We deem the Graves other assignment of error to be without merit.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

Kimberly L. Smith Head
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