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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
FEBRAURY 13, 2008
(2007-SC-0317-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001049-MR

GEORGE MILLER; and
GENEVA MILLER

APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 04-CI-00085

DONNA HUTSON,
D/B/A SCOTT PARTIN BUILDERS

APPELLEE

OPINION AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: George and Geneva Miller appeal from the Whitley Circuit Court's order granting partial summary judgment and dismissing Donna Hutson from a civil action regarding the construction of a house. The Millers argue that the circuit court erred by dismissing, as to Hutson, their claims of breach of the implied warranty of

construction in a workmanlike manner and breach of an express warranty. For the following reasons, we affirm.

Hutson contracted with Scott Partin in November 2002 to build a single-family home for Hutson, as the developer of a subdivision, to sell. In February 2003 the Millers, through their realtor, contracted to purchase the home. The Millers visited the site several times prior to the home's completion and more thoroughly inspected the home on the closing date. After the Millers moved into the home, they discovered several flaws including a creaking wood floor, cracks in the ceilings, non-closing closet doors, water in the crawl space, improper yard drainage, no landscaping, and cracks in the outdoor concrete.

At some point, Partin provided various kinds of remedial work at the Millers' home, for which he charged them \$1725. The Millers did not pay the bill and further obtained estimates to landscape the yard, regrade the lawn for drainage, have the crawl space waterproofed, and fix the flooring. The Millers also filed suit in February 2004 against Partin, his business, and his father-in-law, Stanley Ellison, who had advised him on building the Millers' home. The Millers subsequently amended their complaint to include Hutson as a defendant in the matter.

After several depositions were taken, Hutson moved for partial summary judgment in her favor, arguing that because she was not a builder of the home, she was not liable for the damages the Millers claimed. The circuit court granted Hutson's motion and dismissed her from the action. This appeal followed.

First, the Millers argue that the circuit court erred by granting partial summary judgment in Hutson's favor regarding their claim of breach of the implied warranty of construction in a workmanlike manner. We disagree.

When ruling upon a summary judgment motion, a trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment[.]” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Ultimately, summary judgment shall be granted only if “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR¹ 56.03. On appeal, we “will review the issue *de novo* because only legal questions and no factual findings are involved.” *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

In Kentucky, the doctrine of *caveat emptor* applies to the sale of a house. *Craig v. Keene*, 32 S.W.3d 90, 91 (Ky.App. 2000) (citing *Vanada's Heirs v. Hopkins' Adm'r.*, 24 Ky. 285 (1 J.J. Marsh. 285) (1829)). An exception to this rule was established in *Crawley v. Terhune*, 437 S.W.2d 743, 745 (Ky. 1969), wherein the court held:

Because the caveat emptor rule is completely unrealistic and inequitable as applied in the case of the ordinarily inexperienced buyer of a new house from the professional builder-seller, and because a contract by the builder to sell a new house is not much distinguishable from a contract to build a house for another . . . in the sale of a new dwelling by the builder there is an implied warranty that in its major structural features the dwelling was constructed in a workmanlike manner and using suitable materials.

Here, the circuit court did not err by granting partial summary judgment in Hutson's favor, as there was no genuine issue as to whether Hutson was a builder-seller as

¹ Kentucky Rules of Civil Procedure.

described in *Crawley*. In addition to the evidence set forth above which shows that Hutson was the seller and Partin was the builder of the home, Geneva Miller testified by deposition that Partin and Ellison were the builders. While the Millers had never met Hutson, Geneva had heard Hutson was the seller although she thought the real estate agent sold the house to the Millers. In any event, Geneva testified that Hutson was not the builder. Similarly, George Miller testified by deposition that he believed they bought the home from the real estate agent but that Hutson's name was on the sales contract. He also testified that they went to the site about four times, that Partin and Ellison were the builders, and that he never saw or met Hutson.

Additionally, Hutson filed several affidavits to support her claim that she was not a builder. Partin swore by affidavit that he constructed the Millers' home pursuant to a contract with Hutson, who was the owner of the lot, and that he and Hutson were never in a partnership, joint venture, or the like. Ten other affiants, including the Millers' real estate agent, Corbin's building inspector, and Corbin's city manager, stated that Hutson was not and had never been a homebuilder. As there was no evidence to the contrary, the circuit court did not err by finding that there was no genuine issue that Hutson was not the builder-seller of the Millers' home.

The fact that Hutson signed a Warranty of Completion of Construction as “Donna Hutson DBA Scott Partin Builders” does not compel a different result. Both Hutson and Partin stated that Veterans Affairs required the signed form in order to process the Millers' loan, and that Hutson signed the form on Partin's behalf, with his permission, because Partin was unavailable at the time to sign the document. As such,

Hutson's signature alone, on Partin's behalf, did not create a genuine issue as to whether Hutson was the builder-seller of the Millers' home.

We recognize that other jurisdictions have held developer-sellers liable for breach of the implied warranty of workmanlike construction. *E.g.*, *Wash. Road Developers v. Weeks*, 549 S.E.2d 416 (Ga. Ct. App. 2001). However, we are bound to follow the doctrine of *caveat emptor*. The *Crawley* exception to that doctrine simply does not apply to the matter now before us, and we are unwilling to extend the exception to include developer-sellers in addition to builder-sellers.

Next, the Millers argue that the circuit court erred by granting partial summary judgment for Hutson on their claim that she breached an express warranty. We disagree.

The Warranty of Completion of Construction, signed by “Donna Hutson DBA Scott Partin Builders” as Warrantor, both 1) warranted that the dwelling was “constructed in substantial conformity with the plans and specifications (including any amendments thereof, or changes and variations therein)” and 2) warranted “against defects in equipment, material, or workmanship and materials supplied or performed by the Warrantor or any subcontractor or supplier at any tier resulting in noncompliance with standards of quality as measured by acceptable trade practices.” In addition to the fact that Hutson signed this warranty only on Partin's behalf with his permission as described above, the Millers have not questioned the home's conformity with the plans or specifications. Neither have they shown that Hutson supplied equipment, materials, or workmanship in building the home. Nor have they shown that Hutson dealt directly with any subcontractors or suppliers, or that any defects were caused by a subcontractor or

supplier. Accordingly, the circuit court did not err by granting Hutson's motion seeking partial summary judgment as to this claim.

The Whitley Circuit Court's order is affirmed.

DIXON, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I can see absolutely no rational basis for our reluctance to apply the *Crawley* exception to the doctrine of *caveat emptor* to developer-sellers. *Crawley* crafted the exception to protect unwary buyers of newly constructed houses from faulty construction and to extend to them warranties that houses would be constructed in workmanlike fashion.

In this case, Hutson as developer-seller employed Partin to construct a house for sale. She signed the Warranty of Completion of Construction in such a manner as to indicate her participation, association, and identity with Partin as builder: “Donna Hutson DBA Scott Partin Builders.” The more reasonable and just result would be for us to extend the *Crawley* exception to developer-sellers rather than restricting its applicability solely to builder-sellers. The Georgia rule (*Wash. Road Developers v. Weeks*, 549 S.E.2d 416 (Ga. Ct. App. 2001)) is the better approach to this issue, and I would urge that Kentucky follow the enlightened example of many of our sister states to hold developer-sellers liable for breach of warranties – at the very least, at the summary judgment stage of litigation.

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