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Judge Catherine Shaffer
KING COUNTY, 2013
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 12-2-08537-4 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

HARTLEY McGRATH,

Plaintiff,

v.

VESTUS LLC; WINDERMERE REAL
ESTATE/EAST, INC., and CHRISTOPHER
HALL and JANE DOE HALL and the Marital
Community of CHRISTOPHER AND JANE
DOE HALL,

Defendants.

NO. 12-2-08537-4 SEA

DEFENDANTS' MOTION FOR
PARTIAL RECONSIDERATION OF
ORDER DENYING (IN PART)
MOTION FOR SUMMARY
JUDGMENT

I. Relief Requested / Introduction

The above-captioned defendants, through counsel, move the court for reconsideration of that portion of the court's Order of January 11, 2013 that denied summary judgment dismissal of plaintiff's claim of fraudulent concealment. Plaintiff, as buyer of an investment property with a foundation defect, was required to present clear, cogent, and convincing evidence that the defect would not have been discovered through a reasonably diligent inspection. Plaintiff herself immediately saw the defect from a distance when she looked at the property for the first time the day after her purchase. Therefore, as a matter of law, her fraudulent concealment claim must fail.

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II. Summary of Facts

Defendants assisted plaintiff in the search for and purchase of an investment property at a foreclosure sale. *See* Motion for Summary Judgment, part II, pp. 2-6, and Plaintiff's Response to Defendant's Motion for Summary Judgment, part I, pp. 1-8, and citations to the record in the Motion and the Response.

The day after purchasing such an investment property, plaintiff looked at the property for the first time. In looking at the house from a public area to the rear, plaintiff immediately saw problems with the foundation. *See* quotations and citations to the record in part V below. Plaintiff now seeks to hold defendants liable for not disclosing these problems.

In its Order on Defendants' Motion for Summary Judgment, a copy of which is attached to this Motion as Appendix 1, the court dismissed plaintiff's claims for fraud and intentional misrepresentation but refused to dismiss plaintiff's claims for breach of contract, fraudulent concealment, negligent misrepresentation, Consumer Protection Act, and violation of RCW 18.86 (agency statute).

III. Issue

Was the court's denial of summary judgment dismissal of plaintiff's claim for fraudulent concealment an error in law given the undisputed evidence in the record that the defect complained of was readily visible to the plaintiff upon her first viewing of the house from a distance?

IV. Evidence Relied Upon

1. Order on Defendant's Motion for Summary Judgment (copy attached)
2. Plaintiff's Motion for Summary Judgment, Defendant's Response to Motion for Summary Judgment, and evidence submitted with such Motion and Response (see recitation in part I of attached Order). In particular, portions of the record quoted and cited in part V below.

1 V. Authority and Argument

2 5.1 CR 59 standard. CR 59, a complete copy of which is attached as Appendix 2,
3 authorizes a motion for reconsideration of an order for nine different grounds, including:

4 (8) Error in law occurring at the trial and objected to at the time by the party
5 making the application.

6 Reading all of CR 59 in context, an error in law can be the basis of a motion for
7 reconsideration of any order, including an order of summary judgment. Tegland, 4 Washington
8 Practice: Rules Practice, pp. 471-72 (2006).

9 5.2 The critical element of fraudulent concealment involved here. One of the
10 elements of fraudulent concealment that plaintiff must prove is that "the defect would not be
11 disclosed by a careful, reasonable inspection by the purchaser". Alejandre v. Bull, 159 Wn.2d
12 674, 689, 153 P.3d 864 (2007). This element of fraudulent concealment, like all the other
13 elements, must be proved by clear, cogent, and convincing evidence. Hughes v. Stusser, 68
14 Wn.2d 707, 709, 415 P.2d 89 (1966). This heightened standard of proof must be taken into
15 account in a motion for summary judgment. Herron v. King Broadcasting Co., 112 Wn.2d 762,
16 768, 776 P.2d 98 (1989), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56, 84 S.Ct.
17 710, 11 L.Ed.2d 686 (1964).

18 5.3 Lack of plaintiff evidence on this critical element. Plaintiff's Response included
19 no discussion or argument whatsoever concerning this particular element. The Response
20 included one solitary sentence in the "Facts" section that could have any bearing at all on this
21 element: "Had McGrath had an opportunity to look at the house before purchasing it, she would
22 have discovered these problems." Response, p. 7, lines 23-24, citing "McGrath Dep 14". But
23 plaintiff presented no evidence that she lacked such opportunity. In that part of the deposition,
24 Ms. McGrath had just finished describing how, before contacting defendants or considering the
25 subject property, she and her boyfriend had looked at two different houses and had decided not
26 to purchase because of evident foundation problems. McGrath Dep. p. 13, line 1 through p. 14,
line 5. Then follows this question and answer concerning the subject property:

1
2 Q. Had you been able to conduct the same kind of inspection of
3 the subject property prior to purchasing it, would you have been able
4 to identify foundation issues?

5 A. Walking up to that house, looking on public property from behind,
6 you could see that there were three decks that were sloping
7 downward, which to me is a sign that it's not constructed well.
8 And it's on a slope. So that gives me -- first of all, I'm questionable
9 about how that's being supported.

10 But then the next thing was seeing that the foundation cement and the
11 cement posts that hold the deck were not covered with dirt anymore,
12 so it had eroded underneath it. The chimney was also twisted. And
13 if you looked down in the bottom, it had been mortared by somebody
14 to try to even it out and keep it stable.

15 And then a window right next to that chimney was at an angle that
16 was concerning, that it was -- and then there was cracks up the side
17 of a wall on the outside that gave me the indication that the house
18 was moving.

19 Q. And this was all based on just a visual inspection of the exterior
20 of the property?

21 A. Yes.

22 McGrath Dep. 14:12 to 15:7. (This testimony was quoted in both the Motion and the Response.)

23 Plaintiff saw the defects without even stepping foot on the subject property -- when questioned
24 further about her first observation of the problems at the property the day after her purchase,
25 plaintiff testified:

26 Q. How did you gain access to the property?

A. There's a public trail and public land right behind the property.

Q. And you were able from that to look up at the property and
see these defects?

A. Yes.

1 Q. Did you actually access the property itself, go onto it?

2 A. I stayed on public property.

3 Q. How come?

4 A. The public property brings you up pretty close to the property
5 line, so I didn't really need to go up more at that point.

6 McGrath Dep. p. 66 line 21 to p. 67 line 8.

7 Plaintiff presented *no evidence* that she in fact did not have the opportunity to look at the
8 subject property before buying. On the contrary, the undisputed evidence is that plaintiff was
9 aware of the subject property as a possible "buy" no later than the Monday prior to the Friday
10 that she purchased it at the foreclosure sale. McGrath Dep. p. 27 line 23 to p. 28 line 7. (Exh. 1
11 to Mattern Decl. in moving papers). As of that Monday before sale, she was considering "10 to
12 20" properties. McGrath Dep., p. 29 lines 1-5.

13
14 Plaintiff points out that she did not narrow her choices down to four properties until
15 defendants' presentation the evening prior to the foreclosure sale. McGrath Dep., p. 62, lines 21-
16 25. However, this does not eviscerate the element of fraudulent concealment that "the defect
17 would not be disclosed by a careful, reasonable inspection by the purchaser". First, plaintiff
18 admitted that she *did* look at the other three possible properties *after* defendants' Thursday
19 evening presentation:

20
21 When this house was recommended to me, it was at 8 o'clock at
22 night. *So we drove properties after that*, but by the time we were
23 on the fourth property [the subject property], it was about 11:30 at
24 night.

25 McGrath Dep. p. 62, lines 21-24 (italics added, bracketed phrase inserted because this is clear
26 from other testimony). Second, before spending over \$333,000 to purchase the property
(McGrath Dep. p. 94, lines 12-14), a "careful, reasonable inspection" would have included at

1 least the same cursory look at the property from a public place behind the property during
2 daylight hours that later revealed the problems. Given the amount of money at stake, plaintiff
3 could have and should have looked at all 10 to 20 properties she knew to be possible purchases
4 during the three or four days of daylight she had available before the Friday foreclosure sales.

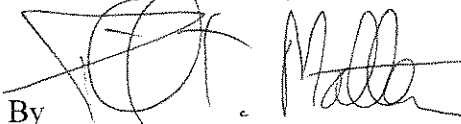
5 5.4 Summary judgment standard: plaintiff must establish her claims with evidence.
6 In resisting a motion for summary judgment, it is no longer sufficient to just present evidence of
7 "issues of material fact". Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d
8 182 (1989); Tegland, 4 Washington Practice: Rules Practice, p. 383 (2006). Instead, once a
9 moving defendant meets its initial burden by showing a lack of evidence to sustain plaintiff's
10 case, plaintiff then must produce admissible facts sufficient to establish the essential elements to
11 its claims or they must be dismissed. *Id.* In other words, once defendant moving party has
12 presented its prima facie evidence, "summary judgment should be denied only 'if the evidence is
13 such that a reasonable jury could return a verdict for the nonmoving party'". Tegland, *supra*, at
14 p. 383, quoting from Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S.Ct. 2505, 2511,
15 91 L.Ed.2d 202 (1986).
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18 5.5 Conclusion. The court made an error in law when it denied summary judgment
19 dismissal of plaintiff's fraudulent concealment claim even though plaintiff produced no evidence
20 that a careful, reasonable inspection by her would have revealed the defect prior to her purchase.

21 A proposed Order is included.

22 DATED this 18th day of January, 2013

23 DEMCO LAW FIRM, P.S.

24 

25 By
26 Lars E. Neste, WSBA #28781
Philip T. Mattern, WSBA #16986
Attorneys for Defendants

APPENDIX 1

Signed Order on Defendants'
Motion for Summary Judgment

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HARTLEY McGRATH,
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HALL and JANE DOE HALL and the Marital
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DOE HALL,
Defendants.

NO. 12-2-08537-4 SEA
ORDER ON DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

I. Hearing

This matter duly came on for hearing before the undersigned Judge on January 11, 2013
at 10:00 a.m., on Defendants' Motion for Summary Judgment of Dismissal.

Each party appeared through such party's counsel of record.

The Court considered the following materials:

Defendant's Motion and supporting documents:

Declaration of Brian Jessen and attached Exhibits:

- 1 A. Compensation/Confidentiality Client Agreement
2 B. PowerPoint slides - "7 Critical Mistakes You Do Not Want To
3 Make When Buying Foreclosures"

4 Declaration of Philip T. Mattern and attached Exhibits:

- 5 1. Transcript of Deposition of Harley McGrath
6 2. Excerpts from transcript of Deposition of Mark R. Cooley
7

8 Plaintiff's Response and supporting materials:

9 Declaration of Sylvia Luppert in Opposition, and attached Exhibits:

- 10 1. Excerpts from Deposition of Hartley McGrath
11 2. Excerpts from Deposition of Mark Cooley
12 3. Excerpts from Deposition of Christopher Hall
13 4. Excerpts from Deposition of Chris Nelson
14 5. "Vestus Fact Sheet" from "Deposition Exhibit 8"
15 6. "Agent Report" from "Deposition Exhibit 8"
16 7. Pages from Vestus Website from "Deposition Exhibit 9"
17

18 Defendants' Reply Supporting Motion for Summary Judgment

19 The Court also considered the oral arguments of counsel and the records and files herein.

20 II. Order

21 ~~After considering the foregoing, the Court finds no genuine issue as to any material fact~~
22 ~~by which the defendants could be found liable. Therefore, it is~~

23 ORDERED, ADJUDGED and DECREED that ~~all claims~~ ^{PLAINTIFFS CLAIMS FOR} herein against defendants
24 ^{AFRAUD, INTENTIONAL}
^{MIS REPRESENTATION}

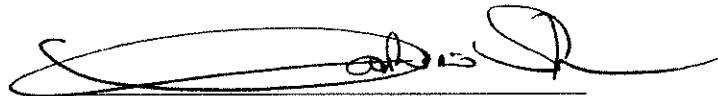
25 Vestus, LLC; Windermere Real Estate/East, Inc.; Christopher Hall and Jane Doe Hall and the

26 ~~but not fraudulent concealment, and claims of~~
~~agency pursuant to RCW 18.86~~ ^{SLY}

1 marital community of Christopher and Jane Doe Hall, be and hereby are dismissed with
2 prejudice by way of summary judgment.

3 DEFENDANTS' MOTION IS DENIED AS TO PLAINTIFF'S
4 BASIS OF CONTRACT, FRAUDULENT CONCEALMENT, NEARLY
5 MISREPRESENTATION, CONSUMER PROTECTION ACT, AND
6 BREACH OF RCW 19.86. *SH LEM*


7 DONE IN OPEN COURT this 11 day of January, 2013.

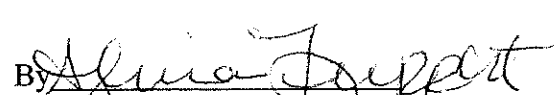
8 
9 Judge Catherine Shaffer

10 Presented by:

11 Approved for entry by:

12 Demco Law Firm, P.S.

13
14 By 
15 Lars E. Neste, WSBA #28781
16 Attorney for Defendants

17
18 By 
19 Sylvia Luppert, WSBA #14802
20 Attorney for Plaintiff

APPENDIX 2

Civil Rule 59

West's Revised Code of Washington Annotated
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
7. Judgment (Rules 54-63)

Superior Court Civil Rules, CR 59

RULE 59. NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

Currentness

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.

A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Hearing on Motion. When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) *Time of Hearing.* Whether the motion shall be heard before the entry of judgment;

(2) *Consolidation of Hearings.* Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) *Nature of Hearing.* Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion to Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) Alternative Motions, etc. Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made, without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

Credits

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005.]

Notes of Decisions (988)

CR 59, WA R SUPER CT CIV CR 59

Current with amendments received through 12/1/12

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