STATE OF MICHIGAN

COURT OF APPEALS

ANTOINETTE HUNT,

Plaintiff-Appellee,

v

ELEPHANT REAL ESTATE, INC.,

Defendant-Appellant,

and

EASTERN SAVINGS BANK, GENERAL MOTORS ACCEPTANCE CORPORATION, PAT PARROTT, RE/MAX ACCLAIM, JENNINE MURPHY and ASSOCIATES GROUP REAL ESTATE, INC. d/b/a GREAT LAKES GMAC REAL ESTATE,

Defendants.

UNPUBLISHED
October 13, 2009

No. 284663
Oakland Circuit Court
LC No. 2006-074815-CH

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

In this contract action, defendant appeals as of right the trial court's judgment in plaintiff's favor rescinding the subject real estate transaction. We reverse.

I. Basic Facts

The property involved in this litigation is a home that defendant acquired title to in April 2005 in a foreclosure proceeding. Defendant obtained possession of the premises at the end of May 2005. Before putting the house on the market for sale, defendant became aware of numerous repairs that needed to be made, including leaks in the roof and a water leak in the basement caused by a cracks in the driveway. Defendant had the driveway repaired and the home was sealed to prevent any further water leaks. The roof was also repaired. These repairs were completed by July 25, 2005, after which defendant believed the problems had been fully resolved based on defendant's agents' visits to the premises. Thereafter, the house was put up for sale.

Defendant entered into a purchase agreement for the sale of the home with plaintiff, closing on September 12, 2005. The agreement entitled plaintiff to an inspection of the home before the sale became final. Pursuant to the agreement, if problems were discovered during this due diligence inspection, plaintiff could either void the agreement or apply the repair cost against the purchase price if she contacted defendant within a certain number of days. The contract also included the following clause:

> BUYER ACCEPTANCE OF CONDITION: If buyer elects to close regardless of conditions disclosed in due diligence period, Buyer shall be deemed to have accepted property in its "AS IS" condition. Buyer hereby knowingly waives, releases and relinquishes any and all claims or causes of action against Brokers, their officers, directors, employees and/or their agents for condition of property.

In addition, the contract provided plaintiff with the right to a walk-through 48 hours before closing, to ascertain whether the terms of the agreement had been met.

Plaintiff elected to have an inspection done before completing the sale, which was completed sometime during the week of August 7, 2005. The inspection did not reveal that there were any leaks in either the roof or the basement. However, the report did indicate that there was water damage in the basement's wood trimming along the floor and that moisture and efflorescence[1] was present. Plaintiff did not ask the inspector about these problems because she believed the air conditioner hose had caused the damage. Plaintiff also did not contact defendant or the real estate agents to indicate that she was dissatisfied with the home's condition. Plaintiff next visited the house again on the closing date, September 12, when she completed her purchase of the home pursuant to the purchase agreement. She did not have a walk-through 48 hours prior to closing.

Subsequently, plaintiff moved into the home and noticed that the basement wall was stained and that there were puddles on the basement floor. Plaintiff sought outside advice regarding the problem in October 2005 and it was revealed that the basement contained stachybotrys pithomyces, a toxic type of mold. A home inspector company advised plaintiff that she could get rid of this problem through a multi-step process. In February 2006, plaintiff noticed that her children were starting to get sick, and on the advice of her doctor that their condition was caused by the mold, she moved out of the home in July 2006.

Plaintiff filed this lawsuit against defendant, alleging fraud, misrepresentation, silent fraud, mutual mistake, and violations of the Michigan Consumer Protection Act. The matter proceeded to a three day bench trial, after which the trial court found that the sale was premised on a mutual mistake as neither party was aware of the existence of black mold at the time of the transaction and that plaintiff was entitled to rescission of the contract. The court ruled that plaintiff had no cause of action on other grounds. This appeal followed.

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[1] Efflorescence is a process by which the integrity of a concrete structure is weakened by outside influences.

II. Mutual Mistake

Defendant first argues that the trial court erred by ordering rescission of the contract based on mutual mistake because the purchase agreement contained an "as is" clause. We agree, but on slightly different grounds. We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *City of Flint v Chrisdom Properties, Ltd*, 283 Mich App 494, 498; ___ NW2d ___ (2009).

In our view, plaintiff is not entitled to rescission of the contract on the basis of mutual mistake. Clear and satisfactory evidence of a mutual mistake by the contracting parties may warrant rescission or reformation of a contract. *Urick v Burge*, 350 Mich 165, 169; 86 NW2d 543 (1957). Here, it is plain from the record that a mutual mistake was made. Neither party was aware of the existence of mold in the basement until after the sale was completed. However, this is not the type of mutual mistake that, in a legal sense, warrants rescission of, or otherwise allows a party to avoid, the contract.

Generally, a party may avoid a contract when the mutual mistake goes to the basic essence, form or substance of the contract, not some collateral aspect affecting quality or value. See, e.g., *Lenawee Bd of Health v Messerly*, 417 Mich 17, 26-29; 331 NW2d 203 (1982); *Gorden v City of Warren Planning & Urban Renewal Comm'n*, 388 Mich 82, 88-89; 199 NW2d 465 (1972); *Sherwood v Walker*, 66 Mich 568, 577-578; 33 NW 919 (1887). Such a determination is made on a case-by-case basis, in which it must be determined whether the mistake relates to some basic assumption upon which the contract is made and which materially affects the performance of the parties. *Lenawee Bd of Health, supra* at 29. If a mutual mistake has been made then rescission or reformation may be granted by a court sitting in equity, in its discretion, unless the parties have allocated the risk of loss in their contractual agreement. *Id*. at 31-32.

Here, defendant assumes that a mutual mistake warranting relief occurred, and argues that rescission is not appropriate on the basis that the "as is" clause of the purchase agreement allocated the risk of loss to plaintiff. It is our view, however, that no mutual mistake affecting the essence or basic assumption of the contract occurred. The mistake shared by both parties in this case does not affect the "very essence of the consideration," but merely affected the home's value and could have been remedied. *Id*. at 29. Thus, the trial court erred in determining that plaintiff prevailed on a theory of mutual mistake. Accordingly, the trial court's order must be reversed and a no cause of action order must be entered in defendant's favor.

Further, even if a mutual mistake warranting some type of relief had occurred, plaintiff's claim would nonetheless fail. The contract between the parties specifically allocated the risk of loss to plaintiff. The contract explicitly stated, "If buyer elects to close regardless of conditions disclosed in due diligence period, Buyer shall be deemed to have accepted property in its "AS IS" condition." This provision indicates that the parties intended that any risks related to the property's condition after the due diligence period, whether known or not, should lie with the buyer. Thus, the parties themselves assigned the risk of loss to plaintiff and plaintiff was not entitled to rescission. Because we are granting defendant the relief it requested on this basis, we do not consider its remaining arguments raised on appeal.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald