97 Mass.App.Ct. 1122
Unpublished Disposition

Appeals Court of Massachusetts.

Ida CANCE
v.
Heather CARBONE & Another;[1] Gary Garland, Third-party Defendant.[2]
19-P-1004
|
Entered: June 5, 2020.

By the Court (Rubin, Maldonado & Shin, JJ.[3]),

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** This matter arises out of the plaintiff's purchase of a South Boston condominium unit from defendant Heather Carbone (defendant), who was both the owner of the unit and its listing agent. The listing described the unit as having a new roof deck, which was a major factor in the plaintiff's decision to purchase the home. After the closing, however, the plaintiff discovered to her surprise that the roof deck had not received final inspection and approval from the city of Boston's inspectional services department (ISD). She also discovered that the deck had several structural defects and would need to be torn down and rebuilt. This led the plaintiff to file suit against the defendant, raising, as pertinent here, claims for intentional and negligent misrepresentation and violation of G. L. c. 93A.[4] After a jury-waived trial, the judge ruled for the defendant on all three claims. With respect to negligent misrepresentation, the judge found that, while the defendant had in fact acted negligently, the plaintiff's claim still failed because her reliance on the defendant's misrepresentation was not reasonable. The judge went on to find that, had the plaintiff prevailed on her negligent misrepresentation claim, her damages would have been $36,500.[5] We conclude that the evidence did not support the judge's finding on reasonable reliance, and we thus reverse so much of the judgment as found in favor of the defendant on the negligent misrepresentation claim and remand for entry of judgment for the plaintiff on that claim. In all other respects, we affirm.

Background. The following facts are uncontested. The defendant, a licensed real estate agent, originally bought the property in 2011. In 2013 she decided to add a roof deck and hired an architect, Frank Mazzulli, to design it. The defendant submitted Mazzulli's design plans as part of her permit application to ISD, which approved the application and issued a building permit in the defendant's name. The defendant posted the permit in the front window of the unit and hired Gary Garland to build the deck. Once Garland completed the construction, in May 2014, the defendant removed the permit from the window.

In March 2015 the defendant listed the unit for sale on the multiple listing service (MLS). The listing prominently featured the roof deck, including a photograph and the following description:

> "STUNNING VIEWS ABOUND! Sun drenched penthouse unit with private double decks. Entertain in style on the massive 14'X18' roof deck while overlooking Dorchester Bay! Roof deck has running water and electricity to make it truly an outdoor oasis! Roof deck new as of May 2014."

***2** The plaintiff, a recent college graduate, saw the listing and thought the unit was "exactly what [she] was looking for." She was particularly drawn to the description of the roof deck as "new," which she believed meant "it would be up to the latest kind of code standards." At the open house, which the plaintiff attended with her mother, the plaintiff viewed the roof deck and observed that the wood looked to be new. When she asked the defendant about staining, the defendant replied that that could not be done

for a year. The defendant also stated that she had "built [the deck] because [of] the view" and "had multiple parties with multiple people up [there]" without any issue. The plaintiff saw nothing about the deck that was cause for concern.

After viewing the property two more times with her realtor, the plaintiff made an aggressively priced offer, which included waiver of her right to a home inspection. The plaintiff increased her offer in a bidding war. The defendant accepted the plaintiff's increased offer, and the parties executed a purchase and sale agreement. Closing occurred in June 2015.

Thereafter, the plaintiff met with a contractor, Joseph Gearhart, to discuss possible kitchen work. When Gearhart saw the roof deck, he "wasn't too happy with it" and recommended that the plaintiff hire a professional to determine whether it was structurally sound. The plaintiff then hired architect Stephen Reilly, as well as an engineer, who reported that there were multiple problems with the deck. On their advice the plaintiff obtained a copy of the building permit from ISD and discovered that the boxes for the building inspector and other inspectors to write about their inspections were all empty. The plaintiff returned to ISD to see "if a permit had been closed, if this had been approved" and was told that it was not.

In May 2016 ISD issued a violation notice to the plaintiff, identifying the violation as: "Approved plans not followed to include but not limited to attachments of roof deck and stairs structural components to building permit ALT318465." The notice required the plaintiff to remedy the violation by "furnish[ing] ... plans from a registered structural engineer for change to the approved plans and secure building department's approvals or comply with the approved plans structural attachment details for permit ALT318465." Upon receiving the notice, the plaintiff sent a c. 93A letter to the defendant, claiming that the defendant never secured ISD's final signoff on the permit. The defendant then sent a c. 93A letter to Garland, claiming that he deviated from Mazzulli's design plans.

Discussion. At the start of trial, the parties agreed, pursuant to Rule 20 (2) (h) of the Rules of the Superior Court (2018), to waive detailed written findings of fact and rulings of law in favor of special questions to be answered by the judge. Our standard of review is therefore the same "standard of review that would apply to a verdict by a jury in a case tried to a jury and to the judgment entered thereon." Rule 20 (8) (b) of the Rules of the Superior Court (2018). That standard requires us to determine whether "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be made in favor of the" prevailing party at trial. O'Brien v. Pearson, 449 Mass. 377, 383 (2007), quoting Turnpike Motors, Inc. v. Newbury Group, Inc., 413 Mass. 119, 121 (1992).

1. Negligent misrepresentation. The judge found on the special verdict form that the defendant negligently made at least one materially false statement of fact to the plaintiff with the intent to induce the plaintiff to rely on the false statements.[6] The judge went on to find, however, that the plaintiff did not "reasonably and to her detriment rely upon" any of the false statements. The plaintiff challenges this latter finding; in particular, she argues that no reasonable view of the evidence supports a finding that her reliance was not justifiable.[7] See DeWolfe v. Hingham Ctr., Ltd., 464 Mass. 795, 799-800 (2013) (tort of negligent misrepresentation requires proof of plaintiff's "justifiable reliance on the [false] information"). We agree.

***3** The plaintiff could reasonably rely on the defendant's representations in the MLS listing that the property had a new and usable roof deck. Those representations were neither "preposterous" nor "palpably false." Yorke v. Taylor, 332 Mass. 368, 374 (1955). Moreover, the defendant was both the listing agent and the owner, and she confirmed to the plaintiff during the open house that the roof deck was new, that she had it built during her ownership, and that she had used it multiple times to entertain. The plaintiff saw nothing about the deck that was cause for concern, nor, for that matter, did the defendant. The plaintiff was justified in these circumstances in accepting the statements in the listing to be true.

Indeed, the defendant points to no evidence suggesting that the plaintiff either knew or should have known that the roof deck had not been inspected and approved for use. The defendant relies instead on the fact that the plaintiff chose to waive a home inspection. As the defendant notes, the purchase and sale agreement gave the plaintiff the right to conduct an inspection before closing, and the plaintiff's attorney had recommended Reilly to her as an expert in zoning and permitting issues.[8] Because the plaintiff still waived the inspection, and did not take the opportunity to investigate the ISD file, the defendant contends that she cannot now claim justifiable reliance.

The defendant's argument is contrary to the settled principle that a plaintiff's failure to conduct an independent investigation of a false statement does not, without more, negate the reasonableness of her reliance.

See Snyder v. Sperry & Hutchinson Co., 368 Mass. 433, 446 (1975); Yorke, 332 Mass. at 374; Zimmerman v. Kent, 31 Mass. App. Ct. 72, 81 (1991). This is so even where the defendant's statement was "not consciously false." Yorke, supra. Accord Snyder, supra. The relevant inquiry is whether it was reasonable for the plaintiff to accept the defendant's representations without an independent investigation, see Yorke, supra, and here, we conclude it was. Again, the listing was not "preposterous or palpably false," id., and the defects in the roof deck were not obvious. The defendant's status as owner also lent credibility to her statements. That is, the plaintiff could justifiably have relied on the defendant's representation that this was a usable roof deck "as being a fact within [her] knowledge and ... was not obliged to go further and ascertain its truth." Id. See Snyder, supra ("if the seller's representations are such as to induce the buyer not to undertake an independent examination of the pertinent facts, lulling him into placing confidence in the seller's assurances, his failure to ascertain the truth through investigation does not preclude recovery"). Accord Zimmerman, supra at 80-81.

The defendant further argues that paragraph twenty-six of the purchase and sale agreement -- in which the plaintiff acknowledged that she did not "rel[y] upon any warranties or representations not set forth or incorporated in this agreement or previously made in writing" -- renders the plaintiff's reliance on the defendant's prior oral statements unreasonable. This misses the mark, as the MLS listing was of course in writing and the plaintiff was entitled to rely on it. See DeWolfe, 464 Mass. at 806 (construing similar "warranties and representations" clause to "permit[ ] reliance on prior written representations not set forth or incorporated in the agreement"). The defendant's oral statements at the open house, which were consistent with the statements in the listing, merely provide additional (but not necessary) support for the plaintiff's claim of justifiable reliance.

***4** 2. Fraudulent misrepresentation. Given our disposition of the negligent misrepresentation claim, it appears unnecessary for us to address the plaintiff's challenge to the judge's finding on fraudulent misrepresentation. This is because the plaintiff fails to identify what additional damages she would be entitled to on her fraudulent misrepresentation claim that would not be duplicative of the award for negligent misrepresentation. See Szalla v. Locke, 421 Mass. 448, 453 (1995) ("Recovery of duplicative damages under multiple counts of a complaint is not permissible").

In any event we conclude that there was evidence to support the judge's finding that the defendant's misrepresentations were merely negligent, not fraudulent. The defendant hired licensed professionals to design and build the roof deck. She testified that she was unaware that ISD had not done a final inspection, as it was her understanding that Garland was handling everything relating to the building permit. Only once the work was complete did the defendant remove the permit from the window, and ISD never contacted her about any issues with the permit or the deck itself. Based on these facts, the judge could have found that the defendant did not act intentionally or recklessly. See Christian v. Mooney, 400 Mass. 753, 764 (1987), cert. denied, 484 U.S. 1053 (1988) (to recover for fraudulent misrepresentation, plaintiff must prove among other things that defendant acted "with knowledge of the falsity of the misrepresentation or with reckless disregard of the actual facts").

3. G. L. c. 93A. For much the same reasons, we conclude that the evidence supported the judge's finding that the defendant did not engage in unfair or deceptive acts under G. L. c. 93A. "[A] violation of G. L. c. 93A requires, at the very least, more than a finding of mere negligence." Darviris v. Petros, 442 Mass. 274, 278 (2004). Because the evidence warranted a finding of mere negligence, the judge could rationally have found that the defendant did not violate c. 93A.

4. Damages. Finally, the plaintiff argues, in summary fashion, that the judge erred by finding that she sustained only $36,500 in damages. The plaintiff acknowledges that the judge's finding is supported by Garland's testimony that it would cost approximately $36,500 to remove and replace the roof deck according to Mazzulli's plans. The plaintiff suggests, however, that the judge erred in admitting Garland's testimony because his estimate was an "off-the-cuff," "last-minute response" to the judge's solicitation of additional evidence on damages, and because Garland had "an extreme bias" as a third-party defendant. These arguments are waived. The plaintiff did not object to the judge's solicitation or admission of Garland's testimony at trial and may not do so for the first time on appeal. See R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66, 73-74 (2001).

The plaintiff also argues that Garland's testimony was unreliable because he did not consider engineering, architectural, or masonry costs, all of which the plaintiff says "is needed to build a code-compliant roof deck." But the plaintiff does not specify what she means by engineering and architectural costs, nor does she provide record citations to support her assertion that this work is necessary under the building code. Furthermore, while both Gearhart and Mazzulli testified that the height of the

chimneys was not compliant with the code, the judge was still not required to find that the plaintiff would incur the costs of masonry work. Gearhart "presumed that both chimneys ... would have to be extended to satisfy [ISD]," but there was evidence to the contrary -- in particular, the undisputed evidence that ISD approved the Mazzulli plans, which did not include any work on the chimneys. Consistent with that original approval, the May 2016 violation notice identified the violation as, "[a]pproved plans not followed," and indicated that the violation could be remedied by "comply[ing] with the approved plans." Gearhart admitted that he did not evaluate the Mazzulli plans or speak to ISD about the violation notice and what it would take to remedy the violation.[9] In addition, Mazzulli testified that it was likely that the chimneys were the responsibility of the condominium association, a possibility that Gearhart had not considered. The evidence therefore did not compel the judge to include the costs of masonry work in the damages award. Cf. O'Brien, 449 Mass. at 384 (appellate review of jury verdict is for "minimal necessary factual support").[10]

***5** Conclusion. So much of the judgment as dismissed the plaintiff's negligent misrepresentation claim as to the defendant is reversed, and the case is remanded for entry of judgment for the plaintiff and against the defendant on that claim in accordance with this memorandum and order. In all other respects, the judgment is affirmed.

So ordered.

Reversed in part and remanded; otherwise affirmed

All Citations

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Footnotes

1 Boston Realty Sales and Services, Inc.

2 Doing business as Century Roofing, Inc.

3 The panelists are listed in order of seniority.

4 The plaintiff also named Boston Realty Sales and Services, Inc. as a defendant. The defendant, in turn, brought third-party claims against Gary Garland, the contractor who built the roof deck. None of these additional claims are at issue in this appeal.

5 The parties agreed to have the judge reach the issue of damages regardless of how he ruled on liability.

6 This finding is uncontested on appeal. In addition, there is no dispute that the false statements are the defendant's representations in the MLS listing that the property had a usable roof deck.

7 There is no dispute that the plaintiff relied on the statements to her detriment.

8 Contrary to the defendant's characterization of the evidence, the attorney did not "advi[se]" the plaintiff "to retain Mr. Reilly to undertake the recommended zoning and permitting due diligence on the [p]roperty prior to closing." Reilly's contact information was included in a resource guide, entitled "Buying a House," that the attorney gave to the plaintiff. The guide simply notes that the attorney's law firm "does [not] represent a buyer concerning ... [z]oning or building permits" and that "Reilly has been fantastic ... in the past."

9 The plaintiff also offered evidence through Reilly that the roof deck would have to be redesigned and rebuilt because its current square footage was too large relative to the size of the stairs. The plaintiff does not raise this issue on appeal. We note that Reilly admitted that it was a fair inference from ISD's approval of the Mazzulli plans that ISD had found those plans to be code compliant. Also, like Gearhart, Reilly admitted that he had conducted no analysis of what it would take to remedy the violation specified in the notice.

[10] We do not decide whether the plaintiff would be precluded from filing a new lawsuit against the defendant should it turn out that ISD will not approve a deck that is built according to the Mazzulli plans.

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