COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2131 **Cir. Ct. No. 2006CV387**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JAMES BERARD AND BARBARA BERARD,

PLAINTIFFS-APPELLANTS,

V.

BRIAN SCHERTZ, PAMELA SCHERTZ AND COUNTRY AIRE REALTY, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Reversed and cause remanded for further proceedings*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. James and Barbara Berard appeal a summary judgment dismissing their breach of contract warranty, false advertising, and theft by fraud claims against Brian and Pamela Schertz, as well as a false advertising

claim against Country Aire Realty, Inc., following a home purchase. The Berards contend their claims are not barred by an "as is" clause in their home purchase contract and that genuine issues of material fact exist on their claims. We reverse the summary judgment and remand to the circuit court for further proceedings.

BACKGROUND

¶2 The home at issue was built in 1945 and owned by the Schertzes since 1994. In 2006, the Schertzes listed the home for sale with Country Aire Realty, which placed online and print advertisements for the home. The advertisements stated the Schertzes' house had been "totally remodeled inside & out," "completely remodeled," and included a four-season gazebo, "new … windows," "[a]ll new plumbing and electrical[,]" among other things.

¶3 The Berards read the advertisements and arranged a tour. After touring the home, the Berards reviewed a real estate condition report, which stated the Schertzes were unaware of any defects in the home. The Berards then submitted an offer to purchase, which the Schertzes accepted. The offer included an inspection contingency, but the Berards did not have an inspection performed.

¶4 At closing, the Berards signed an amended offer to purchase. Language from that amended offer included an "as is" clause and other language:

> Notice is given that: Buyers and sellers are aware that the buyers were given full opportunity to inspect the property and are hereby satisfied. Buyers are aware that they are purchasing the property in "where is" and "as is" condition with no warranties from sellers, sellers agents, or Country Aire Realty, Inc. … Seller hereby certifies to Buyer and Broker that Seller knows of no change in the structure or mechanical components of the premises, or the operability thereof, since the premises were last shown to Buyer, other than those previously disclosed and that the premises are as stated in [the] contract and the Real Estate Property Condition Report.

¶5 After closing, the Berards discovered a number of alleged defects in the home. They filed this action against the Schertzes and Country Aire. Their claims against the Schertzes included breach of contract warranty, false advertising under WIS. STAT. § 100.18, and theft by fraud under WIS. STAT. §§ 943.20(1)(d) and 895.446,[1] all based on the Schertzes' failure to disclose known defects in the real estate condition report. The Berards also asserted a false advertising claim against Country Aire, based upon allegedly untrue, deceptive, or misleading statements in Country Aire's advertisements.

¶6 The circuit court entered summary judgment dismissing the Berards' claims. The court concluded the Berards' claims were barred by the "as is" clause in the amended offer.

DISCUSSION

¶7 We review summary judgments de novo, applying the same methodology as the circuit court. ***Park Bancorporation, Inc. v. Stetteland***, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

I. Whether genuine issues of material fact exist on the Berards' claims

A. Breach of contract warranty

¶8 The elements of a breach of contract warranty claim are: (1) an affirmation of fact; (2) inducement to the buyer; and (3) reliance by the buyer. ***Selzer v. Brunsell Bros., Ltd.***, 2002 WI App 232, ¶13, 257 Wis. 2d 809, 652 N.W.2d 806. The warranty here is found in the initial offer, which was written on the WB-11 residential offer to purchase form. Regarding the condition of the property, the offer stated:

> PROPERTY CONDITION REPRESENTATIONS: Seller represents to Buyer that as of the date of acceptance Seller has no notice or knowledge of conditions affecting the Property or transaction … other than those identified in Seller's Real Estate Condition Report … which was received by Buyer prior to Buyer signing this Offer and which is made a part of this Offer by reference….

"Conditions affecting the property or transaction" are defined in the offer and include, among other things, "other conditions or occurrences which would significantly reduce the value of the Property to a reasonable person with knowledge of the nature and scope of the condition or occurrence." The real estate condition report requires homeowners to disclose known "defects" in the property. *See* WIS. STAT. §§ 709.02-709.04. As defined in the condition report, a "defect" includes a "condition that would have a significant adverse effect on the value of the property…."

¶9 The Schertzes did not disclose any defects in the condition report. The factual issue on the Berards' breach of contract warranty claim is whether the Schertzes were aware of defects that they failed to disclose. The Berards claim a litany of defects, but do not develop coherent arguments for most of them.

However, we conclude there is sufficient evidence to create genuine issues of material fact regarding the following alleged defects: rotted upstairs windows; foundation problems and basement leaks; water leaking from a chimney utility door; exterior foundation surface defects; and gazebo foundation issues. The parties dispute whether these constitute defects and whether there is evidence the Schertzes were aware of them.

¶10 In preparing this case, the Berards had the home inspected. A home inspection report states, "The second floor windows have advanced rot/weathering and will need attention soon. I would recommend complete replacement." Barbara Berard also submitted an affidavit stating, "the upstairs windows had rotten frames (one was falling out) and we replaced them." If the windows were as rotted as the above statements suggest, a factfinder could conclude they were defects. A factfinder could also infer from the nature of the defects that the Schertzes knew about them from living in the house.

¶11 The Berards also claim defects related to the basement and foundation of the house. One alleged defect is water leaking into the basement. In Barbara Berard's affidavit, she testified that the basement leaked and they had to tear out the carpet and portions of the interior basement walls. She also stated there was mold on some drywall in the basement and on some baseboard. An inspection report confirmed that there was some "water staining … on a finished portion of the wall … [and] a black substance visible that may be a type of mildew on the wall." That report also stated that "these symptoms are the result of poor drainage around the entire foundation that has gone on for years." The basement was finished while the Schertzes owned the house. A factfinder could conclude that the basement leaking was a defect and infer that the Schertzes were aware of it.

¶12 Additionally, the Berards claim defects in the foundation of part of the house that does not have a basement, but only a crawl space. James Berard testified in a deposition that there were cracks in the crawl space walls wide enough for him to look through and see the neighbor's house. He also testified that the crawl space walls are breaking away from the rest of the house and that the crawl space foundation is sinking. He further stated that a window in the house above the crawl space did not work correctly because of the foundation problems. A home inspection report noted that there was insulation stuffed into the cracks of the crawl space wall and that there was a crack running the full length of the crawl space slab. Based on this evidence, a factfinder could infer that the crawl space problems were defects and the Schertzes were aware of them.

¶13 A separate issue of water leaking relates to a utility chimney door in the basement. James Berard stated that water leaked through this door when it rained. He also stated the Schertzes left a pan under the chimney to collect the leaking water. This evidence is sufficient to create a genuine issue of material fact on this alleged defect.

¶14 The Berards also contend there were defects in the exterior walls of the foundation. According to James Berard, there was some "crumbling cement and exposed rebar" on a portion of the exterior surface of the foundation. A home inspection report stated that a part of the foundation has "advanced weathering which is referred to [as] spalling. This is most likely the result of splash back from roof run off and the use of snow/ice melting chemicals." The report recommended "that the foundation be cleared of loose materials by pressure washing and then be filled with mortar…." To show the Schertzes' knowledge of this alleged defect, the Berards assert the Schertzes placed a flower pot in front of the defect. Ultimately, there is sufficient evidence for a factfinder to decide

whether this alleged defect was, in fact, a defect and whether the Schertzes were aware of it.

¶15 Finally, the Berards assert defects in the foundation of the gazebo. A contractor testified in his deposition that the enclosed gazebo shifted when the frost set in, causing windows to crack. He stated that the weight in the gazebo was not distributed evenly and, as a result, the frost heaved one side of the gazebo. He also stated the water in the gazebo's hot tub was not level and a patio door in the gazebo was out of adjustment in the winter. From this evidence, a jury could infer that this heaving of the gazebo constituted a defect of which the Schertzes would have been aware.

B. Theft by fraud

¶16 The Berards' second claim against the Schertzes is theft by fraud under WIS. STAT. § 943.20(1)(d), which is a criminal statute made actionable by WIS. STAT. § 895.446. Section 943.20(1)(d) makes it illegal to: "Obtain[] title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made." Obtaining title to property includes obtaining money. *See* ***State v. O'Neil***, 141 Wis. 2d 535, 539-40, 416 N.W.2d 77 (Ct. App. 1987).

¶17 For this claim, the Berards also rely on the Schertzes' failure to disclose known defects in the condition report. As discussed above, a factfinder could find the Schertzes were aware of some of the alleged defects. A factfinder could also infer the Schertzes failed to disclose these known defects for the purpose of defrauding someone like the Berards by inducing them to buy the

home. Thus, we conclude genuine issues of material fact exist on the Berards' theft by fraud claim.

C. False advertising

¶18 The Berards' third claim is false advertising under WIS. STAT. § 100.18. Section 100.18(1) states:

> No person, firm, … with intent to sell … any real estate, … directly or indirectly, to the public … or with intent to induce the public in any manner to enter into any contract or obligation relating to the … sale … of any real estate … shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such … sale … of such real estate … which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

While this language does not require knowledge that an advertisement is untrue, deceptive, or misleading, such knowledge must be proven when the claim is against a real estate broker. WIS. STAT. § 100.18(12)(b).

¶19 The Berards assert false advertising claims against both the Schertzes and Country Aire. They contend Country Aire's advertisements were untrue, deceptive, or misleading because not all the windows and electrical were new, the gazebo was three-season, not four-season, and the home was not "totally" or "completely" remodeled. Deposition testimony from Country Aire's agent suggests he knew that not all the windows and electrical in the house were new.

There is also evidence in the record indicating the gazebo was three-season, not four-season.

¶20 We conclude there are genuine issues of material fact as to the advertisements' references to new windows and electrical and the house being "totally" or "completely remodeled." A factfinder could determine that these statements were untrue, deceptive, or misleading and that Country Aire was aware of that fact based upon its agent's admission that he knew not all the windows and electrical were new. Regarding the gazebo, however, the Berards point to no evidence from which a jury could reasonably infer that Country Aire knew it was not a four-season gazebo.

¶21 The Berards also assert a false advertising claim against the Schertzes based upon the condition report's statement that the Schertzes were unaware of any defects. Representations in a condition report can form the basis of a WIS. STAT. § 100.18 claim because, until a contract is formed, the potential buyers are members of the public. *See* ***Below v. Norton***, 2007 WI App 9, ¶¶2, 11-13, 297 Wis. 2d 781, 728 N.W.2d 156; ***Kailin v. Armstrong***, 2002 WI App 70, ¶44, 252 Wis. 2d 676, 643 N.W.2d 132. Thus, because there is a genuine factual dispute as to whether the Schertzes failed to disclose known defects, there is a genuine issue of material fact on the Berards' false advertising claim against the Schertzes.[2]

[2] The Berards also attempt to rely on the condition report as an advertisement by Country Aire. The Berards argue that a factfinder could infer that Country Aire knew that the Schertzes knew of undisclosed defects. We are not convinced that there is sufficient evidence in the record to support this inference.

II. The effect of the "as is" clause on the Berards' claims

¶22 We next address whether the amended offer, including the "as is" clause bars the Berards' claims; we conclude it does not.[3] First, the Berards' breach of contract warranty claim is not affected by the amended offer's own terms. While the amended offer states that the Berards are purchasing the property in "as is" condition with no warranties, it subsequently contains a certification from the Schertzes "that the premises are as stated in [the] contract and the Real Estate Property Condition Report." Thus, the amended offer reaffirms the original warranty that the Schertzes were unaware of any conditions affecting the property, except those disclosed in the condition report. The contract, as amended, therefore does not bar the Berards' breach of contract of warranty claim.[4]

¶23 We also conclude the amended offer does not bar the Berards' false advertising claims under WIS. STAT. § 100.18 or theft by fraud claim under WIS. STAT. §§ 943.20(1)(d) and 895.446. Two cases relevant to this issue are ***Grube v. Daun***, 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992), and ***Peterson v. Cornerstone Prop. Dev., LLC***, 2006 WI App 132, 294 Wis. 2d 800, 720 N.W.2d 716. In ***Grube***, a contract stated the buyer was purchasing the property in "as is

[3] The Berards also argue the amended offer is void for lack of consideration and unconscionable. Because we conclude the Berards' claims are not barred by the amended offer, we do not address these other arguments.

[4] The circuit court relied partly on the fact that the Berards did not have an inspection performed when concluding the "as is" clause barred their contract claim. There is case law holding that reliance on a condition report is unreasonable as a matter of law when the general nature of a defect is disclosed and a party then waives the right to an inspection that would allow the party to discover the true nature of the defect. *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶¶14-16, 296 Wis. 2d 98, 723 N.W.2d 156; ***Lambert v. Hein***, 218 Wis. 2d 712, 726-30, 582 N.W.2d 84 (Ct. App. 1998). However, these cases are inapplicable here because the Schertzes did not disclose any defects, generally or otherwise, so the Berards had no notice of defects to investigate.

condition without any warranties." ***Grube***, 173 Wis. 2d at 47. The court held that the buyer's tort misrepresentation claims were not barred by the "as is" clause, stating:

> as a matter of public policy, tort disclaimers in contracts will not be honored unless the disclaimer is specific as to the tort it wishes to disclaim. *In order to be effective, the disclaimer must make it apparent that an express bargain was struck to forgo the possibility of tort recovery* in exchange for negotiated alternate economic damages.

Id. at 60-62 (emphasis added).

¶24 In ***Peterson***, which involved an "as is" clause and a false advertising claim, the court distinguished ***Grube*** because the contract in ***Peterson*** also contained integration provisions stating: that the offer and any amendments constituted the "entire agreement;" "[a]ll prior negotiations and discussions have been merged into this Offer[;]" and "*[buyer] has not relied on any representations made by the Seller in entering into the [offer to purchase]*." ***Peterson***, 294 Wis. 2d 800, ¶¶3, 7, 37 (emphasis added). The ***Peterson*** court concluded this was the type of disclaimer permitted under ***Grube*** because it specifically "disclaim[ed] the purchaser's right to rely on any alleged fraudulent misrepresentations[,]" thereby indicating that the parties bargained for the disclaimer of liability for those misrepresentations. ***Peterson***, 294 Wis. 2d 800, ¶37.

¶25 The parties appear to agree that the analysis in ***Peterson*** applies here. Based upon ***Peterson***, we conclude the Berards' false advertising and theft by fraud claims are not barred by the contract. In ***Peterson***, the court's holding was supported by language in an integration clause, and an integration clause also existed here, stating, "ENTIRE CONTRACT. This Offer, including any amendments to it, contains the entire agreement of the Buyer and Seller regarding

the transaction. All prior negotiations and discussions have been merged into this Offer."

¶26 However, unlike ***Peterson***, the integration clause here cannot be read to disclaim fraudulent misrepresentations. While the ***Peterson*** integration clause contained language stating that the buyer was not relying on *any* representations of the seller, no language here that can be read as disclaiming liability for the Schertzes' representation that they were unaware of defects in the property or Country Aire's allegedly untrue, deceptive, or misleading advertisements. The integration clause here is merely standard-form language in the WB-11 residential offer to purchase. It is not a bargained-for disclaimer of liability for fraudulent conduct.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.