IN THE

Supreme Court of Virginia

RECORD NO. 091546

PHILLIP ABI-NAJM, et al.,

Appellants,

v.

CONCORD CONDOMINIUM, LLC,

Appellee.

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANT

Appellants Philip Abi-Najm et al. (the "Homeowners") file this brief in reply to the Brief for the Appellee Concord Condominium, LLC ("Concord's Brief").

ARGUMENT

I. THE MERGER DOCTRINE DOES NOT BAR THE BREACH OF CONTRACT CLAIMS

A. Beck v. Smith Is Controlling

Concord makes no attempt to distinguish the case at bar from the numerous cases coming before this one in which this Court found the merger doctrine did not prevent suits to enforce various contractual provisions because they were collateral to the passage of title that did not merge with the deed at closing. Instead, Concord relies *entirely* on merger language in the Purchase Contract in support of its claim that the merger doctrine bars the Homeowner's breach of contract claim. However, in Beck v. Smith, 260 Va. 452, 538 S.E.2d 312 (2000) this Court considered precisely the same sort of merger provision and concluded that merger doctrine did *not* bar the plaintiff's breach of contract claim. Rather than holding that the contractual

merger language barred recovery in Beck (and as urged by Concord here), this Court engaged in its customary analysis used in its several prior rulings on application of the merger doctrine. See Id. at 456, S.E.2d at 315. The same sort of analysis here leads to the inescapable conclusion that the trial court erred in dismissing the Homeowners' breach of contract claims.

Notwithstanding the clear import of this Court's holding in Beck, Concord's Brief devotes only two lines to distinguish it. Concord claims Beck can be distinguished because it involved an easement and not a fixture as here. This is wrong.

Contrary to Concord's suggestion, this Court's prior analysis of the merger doctrine has not turned on whether alleged the contract breach involved a fixture, an easement or anything else in particular. Instead, this Court uniformly focused on whether there were "conflicts between the terms of the prior agreements and the terms of the deed." Id. at 456, S.E.2d at 314-15. Where the terms of the prior agreement conflict with the deed, the prior agreement merges with and is extinguished by the deed. See e.g. Woodson v. Smith, 128 Va. 652, 104 S.E. 794

(1920). Where the terms of the prior agreement do *not* conflict with the deed, the merger doctrine has no application. See e.g. Davis v. Tazewell, 254 Va. 257, 492 S.E.2d 162 (1997). Here, there is no conflict between the provision of the Purchase Agreement and the deed; therefore, the merger doctrine has no application.

B. Rights to Inspection And Warranty Do Not Excuse The Trial Court's Error Or Concord's Breach

Concord's Brief suggests that somehow the Homeowners' right of inspection in the Purchase Agreements provide an additional justification for dismissing the breach of contract claims. But the plaintiff in Beck performed the type of inspection suggested by Concord's Brief and it did not impact this Court's merger doctrine analysis. The same analysis leads to the same result here. Moreover, Concord did not raise this issue in its demurrer and the trial court granted the demurrer to the breach of contract claim on the merger doctrine. Consequently, this issue is not properly before this Court on this appeal. Rule 5:25.

Concord's Brief suggests that the Homeowners' warranty claims sufficiently protect them from Concord's breach of

contract. The Homeowners paid for a particular kind of flooring; Concord supplied and installed the *wrong* flooring (at significant cost savings). The Homeowners have the right to benefit of their bargain and to require Concord to restore them to the position they would have enjoyed had Concord installed the flooring it promised. Concord's warranty is limited in duration; moreover, the inconvenience and uncertainty of repeatedly repairing a substandard floor is no substitute for the damages the Homeowners are entitled to under Virginia law. This Court should ignore Concord's insinuation that the existence of a warranty here (1) excused its breach of the Purchase Agreements, or (2) justified the trial court's error.

II. THE ECONOMIC LOSS DOCTRINE DOES NOT BAR THE HOMEOWNERS' VCPA AND FRAUD CLAIMS

A. Concord's Reliance On Ju v. Mark Is Misplaced

Concord's Brief reliance on Ju v. Mark, 2006 WL 1647266 (E.D. Va 2006) is misplaced. In Ju, the court dismissed plaintiffs' negligence claim[1] partly because the plaintiffs relied on CRESPA

[1] It is notable that in Mark, the court did not dismiss the plaintiffs' fraud claims.

to establish a duty on the part of defendant. The court concluded that Consumer Real Estate Settlement Protection Act ("CRESPA") under Virginia Code §6.1-2.20 et seq. was not kind of act imposed to protect broad interests of society. Id. at *3. CRESPA imposes, among other things, obligations on those who escrow funds used in connection with real estate transactions. Concord suggests that CRESPA and the Virginia Consumer Protection Act (the "VCPA") are comparable. But the VCPA is clearly broader in its scope and purpose than CRESPA. The VCPA provides a host of important civil remedies to consumers where suppliers, among other things, make misrepresentations in consumer transactions. While CRESPA may not be, the VCPA surely is the sort of act imposed to protect broad interests of society and provides the source of a duty beyond the Purchase Agreements.

B. Concord's Reliance On Casa Clara Is Misplaced

Concord's Brief relies Casa Clara Condominium Assoc., Inc. v. Charley Toppino & Sons, Inc., 620 So.2d 1244 (Fla. 1993) for the proposition that there is no common law duty owing to a home buyer. This is wrong. In Casa Clara, the buyer of a home

sued a concrete supplier for damages resulting from its use of an inappropriate concrete mixture. The court concluded that the buyer's suit for negligence was barred by the economic loss doctrine.

Casa Clara differed from the case at bar in important ways and sheds no light on whether a duty existed on the part of Concord not to defraud the Homeowners. This case is unlike Casa Clara or Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 374 S.E.2d 55 (1988) where the buyer was suing a third party in negligence. Here, the Homeowners (the buyers) are suing Concord (the seller) for fraud. Extensive case precedent suggests a common law duty exists under the circumstances here.

C. Concord's Contention That The Homeowners Failed to Allege Materiality Was Not Preserved For Appeal

Concord's Brief contends the Homeowners' allegation of fraud should be dismissed because the subject of the fraud was allegedly not a material element of the Purchase Agreements. Concord did not raise this issue in its demurrer and the trial court granted the demurrer solely on the basis of the economic loss

rule. Consequently, this issue is not properly before this Court on appeal. Rule 5:25. Moreover, whether or not the subject of the fraud was material is question of fact not properly disposed of by demurrer. See e.g. Model Jury Istruction No. 39.020.

D. The Economic Loss Doctrine Does Not Apply Here

Concord essentially suggests that this Court (without expressly saying so) has overruled extensive precedent recognizing the tort of fraud in the inducement of a contract. None of the precedent cited in Concord's Brief suggests the economic loss rule eliminated fraud in the inducement of a real estate contract (especially where, as here, the VCPA is implicated in the sale). Other courts considering how far to extend the economic loss rule have concluded that it should not extend so far as to eliminate the tort of fraud in the inducement. See e.g. EED Holdings v. Palmer Johnson Acquisition Corp., 387 F.Supp.2d 265, 277 (S.D.N.Y. 2004) (under New York law fraudulent inducement collateral to contract and fraud claim not barred by economic loss rule); Robinson Helicopter Co., Inc. v. Dana Corp., 102 P.3d 268, 272-3 (Cal. 2004) (under California law economic

loss rule does not extend to fraud in the inducement). See also City of Richmond v. Madison Management Group, Inc., 918 F.2d 438, 446-7 (4th Cir. 1990) (noting that Virginia law recognizes that fraud exists where parties have a contract where alleged that defendant never intended to keep promise made to induce contract[2]).

CONCLUSION

For the reasons stated above and in Appellants' Brief in Support of Appeal, the Court should reverse the trial court's sustaining of the Concord's demurrer as to (1) the Homeowners' breach of contract claim and (2) the Homeowners' claims under the VCPA and for common law fraud.

Respectfully submitted,

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[2] See Complaint paragraphs 33, 64 and 66.

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April 1, 2010

CERTIFICATE

We, Douglas R. Kay and Steven D. Briglia, as counsel for the Appellants, certify the following was done on April 1, 2010:

Fifteen copies of this brief have been simultaneously filed with the clerk of this Court along with an electronic copy sent in PDF format by email and three copies have been mailed to opposing counsel, Christopher C. Nolan, NOLAN, MROZ & McCORMICK, 130 Park Street, S.E., Suite 200,Vienna, Virginia 22180.

Douglas R. Kay