IN THE

Supreme Court of Virginia

RECORD NO. 091546

PHILLIP ABI-NAJM, et al.,

Appellants,

v.

CONCORD CONDOMINIUM, LLC,

Appellee.

BRIEF OF APPELLANTS

Douglas R. Kay, Esq. (VSB No. 35468)
Steven D. Briglia, Esq. (VSB No. 29102)
BRIGLIA HUNDLEY NUTTALL & KAY, P. C.
1921 Gallows Road, Suite 750
Vienna, Virginia 22182
(703) 883-0206
Fax: (703) 883-0899
dkay@bhnklaw.com

Counsel for Appellants

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

IN THE

SUPREME COURT

OF VIRGINIA

PHILLIP ABI-NAJM, ET AL.,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Record No. 091546**
	:	
CONCORD CONDOMINIUM, LLC,	:	
	:	
Respondent.	:	

BRIEF IN SUPPORT OF APPEAL

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA

The Appellants, by counsel, file this Brief in Support of their Appeal and state that reversible errors were committed in the Circuit Court of Arlington County, Virginia.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii - iv

ASSIGNMENTS OF ERROR v

QUESTIONS PRESENTED vi

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1-4

ARGUMENT ..... 4 - 15

CONCLUSION 15

CERTIFICATE PURSUANT TO RULE 5:26 16

TABLE OF AUTHORITIES

Cases:

Barnette v. Brook Road, Inc., 429 F. Supp. 2d 741 (E.D.Va. 2006) 14-15

Beck v. Smith, 260 Va. 452, 538 S.E.2d 312 (2000) 6, 9-10

Boykin v. Heritage Realty, 234 Va. 26, 360 S.E.2d 177 (1987) 13

Davis v. Tazewell Place Assoc., 254 Va. 257, 492 S.E.2d 162 (1997) 7-8

Empire Management & Development Co., Inc., 255 Va. 49, 496 Va. 440 (1998) 5, 6

Filak v. George, 267 Va. 612, 594 S.E.2d 610 (2004) 12

Glazebrook v. Board of Sup'rs of Spotsylvania County, 266 Va. 550, 587 S.E.2d 589 (2003) 4-5

Miller v. Reynolds, 216 Va. 852, 223 S.E.2d 883 (1976) 6

Lloyd v. Smith, 150 Va. 132, 142 S.E. 363 (1928) 14

Prospect Development Co., Inc. v. Bershader, 258 Va. 75, 515 S.E.2d 291 (1999) 14

Rosillo v. Winters, 235 Va. 268, 367 S.E.2d 717 (1988) 4

Sensenbrenner v. Rust, Orling & Neal, Architects, Inc., 236 Va. 419, 374 S.E.2d 55 (1988) 12

Shelor Motor Co., Inc. v. Miller, 261 Va. 473, 544 S.E.2d 345 (2001) 4

Tribby v. Tribby, 241 B.R. 380 (E.D. Va. 1999) 6

Woodson v. Smith, 128 Va. 652, 104 S.E. 794 (1920) 8 - 9

Statutes:

Virginia Code §59.1-197 12

Virginia Code §59.1-200 13

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENT'S DEMURRER AND DISMISSED PETITIONERS' BREACH OF CONTRACT CLAIM ON THE GROUNDS THAT THE CLAIM WAS BARRED BY THE MERGER DOCTRINE.

II. THE TRIAL COURT ERRED WHEN IT GRANTED RESPONDENT'S DEMURRER AND DISMISSED PETITIONERS' CLAIMS UNDER THE VIRGINIA CONSUMER PROTECTION ACT AND FOR FRAUD IN THE INDUCEMENT ON THE GROUNDS THAT THE CLAIMS WERE BARRED BY THE ECONOMIC LOSS DOCTRINE.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR WHEN IT GRANTED RESPONDENT'S DEMURRER AND DISMISSED PETITIONERS' BREACH OF CONTRACT CLAIM ON THE GROUNDS THAT THE CLAIM WAS BARRED BY THE MERGER DOCTRINE? (AE 1)

II. DID THE TRIAL COURT ERR WHEN IT GRANTED RESPONDENT'S DEMURRER AND DISMISSED PETITIONERS' CLAIMS UNDER THE VIRGINIA CONSUMER PROTECTION ACT AND FOR FRAUD IN THE INDUCEMENT ON THE GROUNDS THAT THE CLAIMS WERE BARRED BY THE ECONOMIC LOSS DOCTRINE? (AE 2)

Appellants Philip Abi-Najm et al. (the "Homeowners") file this brief in support of their appeal.

STATEMENT OF THE CASE

Appellee Concord Condominium, LLC ("Concord") made written promises to install hardwood flooring in the condominium units it sold to the Homeowners. To increase its profits, Concord instead installed decidedly inferior less expensive flooring. The Homeowners filed a consolidated complaint[1] against Concord alleging breach of contract, common law fraud and violations of the Virginia Consumer Protection Act.[2] Concord responded to the complaint with demurrers later sustained by the trial court, the Honorable Benjamin Kendrick presiding. This appeal follows.

FACTS

Concord is a single purpose entity created to purchase, renovate and then sell condominium units to the Homeowners

---

[1] The Homeowners filed two separate cases with substantially identical claims. CL 09-172 involved a consolidated complaint with twenty-five plaintiffs (the "Consolidated Case"). CL 09-158 had only two plaintiffs – Laura and Bradford Reed (the "Reed Case"). The trial court simultaneously granted the demurrers in both cases. The Homeowners noted a single appeal for both cases pursuant to Rule 5:9(c).

[2] The complaint in the Consolidated Case had five counts. Counts II and V are not part of this appeal. The Reed Case had three counts which are identical to the remaining three counts in the Consolidated Case.

and other consumers. Complaint ("Compl.") ¶ 25[3]. The Homeowners (twenty-seven in all) are individuals and married couples who entered into identical agreements to purchase (the "Purchase Agreements") individual condominium units for their primary residences. Compl. ¶ 27. At the time the Homeowners entered into their respective Purchase Agreements, the condominium complex and the units in question were either under construction or to be constructed within two years. Compl. ¶¶ 25 - 27.

An identical schedule of standard finishes (the "Schedule") was incorporated into each Purchase Agreement.[4] Compl. ¶ 28. The Schedule listed the various finishes and fixtures that Concord promised it would deliver during construction of each condominium unit. The Schedule described, among other things, the type of kitchen counter tops (granite top with 4" backsplash),

---

[3] For consistency, references to specific paragraphs noted herein are to the complaint in the Consolidated Case found in the Joint Appendix ("JA") beginning at p. 23. The allegations in both cases are substantially the same. (The complaint in the Reed Case is found at JA 1.)

[4] The Schedule and Purchase Agreements are substantially the same for all of the Homeowners. To reduce the size of the appendix, the parties agreed to attach a single Purchase Agreement for the Consolidated Complaint. See JA 35-42. The Schedule is at JA 43-45.

the model of the dishwasher (GE Model #GSD4260JSS) and the kind of walls (white semi-gloss paint on drywall). Compl. ¶¶ 28 - 29. Significantly, the Schedule promised that Concord would deliver to each of the Homeowners certain hardwood flooring ("¾" Bruce Oak hardwood"). Compl. ¶ 31.

Unbeknownst to the Homeowners and with an eye towards cost-savings, Concord never intended to deliver the promised hardwood flooring. Compl. ¶¶ 33, 38. Instead Concord delivered an inferior engineered wood floor. Compl. ¶ 37. Concord concealed its unilateral flooring switch from the Homeowners throughout the construction of the various units over the course of many months, and, in some cases, years. Compl. ¶ 35. The fact that the engineered flooring (when brand new) appears similar to the promised hardwood flooring made Concord's deceptive concealment relatively simple. Compl. ¶¶ 39 - 40. However, it took only a little while before the inferior engineered flooring began showing obvious signs of wear. It was only then that the Homeowners recognized they had been duped. Compl. ¶ 40. The cost to replace the inferior engineered flooring with real

hardwood flooring will cost each of the Homeowners tens of thousands of dollars. Compl. ¶ 47. Moreover, the substandard flooring actually installed by Concord adversely affects the property value of each unit. Compl. ¶¶ 62, 71.

ARGUMENT

A. Standard of review.

A demurrer tests whether a complaint states a claim upon which relief may be granted. Shelor Motor Co., Inc. v. Miller, 261 Va. 473, 544 S.E.2d 345 (2001). All facts pled in the complaint are admitted by Concord for the purposes of its demurrer. More precisely, "the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged." Rosillo v. Winters, 235 Va. 268, 270, 367 S.E.2d 717 (1988). Thus, "[a] demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." Glazebrook v. Board of Sup'rs of Spotsylvania County, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). This Court must review de novo the trial court's

sustaining of Concord's demurrer. Id. With this framework in mind, this Court must reverse the order of the trial court.

B. Judge Kendrick Erred When He Dismissed The Homeowners' Breach Of Contract Claim On The Basis Of The Merger Doctrine.

The trial court held the Homeowners cannot enforce the Purchase Agreements because they merged with and were extinguished by the deed of conveyance delivered by Concord to the Homeowners at closing. This is wrong. The merger doctrine *only* applies to matters specifically covered by the deed and not collateral to the passage of title. Empire Management & Development Co., Inc., 255 Va. 49, 54, 496 Va. 440, 443 (1998). Here, the hardwood flooring promised by Concord was not mentioned or otherwise covered in the deed and was wholly collateral to delivery of title. Therefore, the merger doctrine has no application here.

The merger doctrine is a rule of contract construction which provides that parts of executory real estate contracts are extinguished by the delivery of a deed at closing. The doctrine simply recognizes that, in the time between execution of such a

contract and delivery of the deed, the parties frequently continue to negotiate and modify the terms of their agreement. Thus, the merger doctrine provides that, upon delivery of the deed, the prior agreements are merged into the final agreement – the deed. See Tribby v. Tribby, 241 B.R. 380, 382-384 (E.D. Va. 1999) (rejecting application of the merger doctrine for a time of the essence provision in real estate purchase contract).

Ample precedent establishes that the merger doctrine has very limited application. The deed is only final as to the subjects described therein, and, typically, a deed "is a mere transfer of title." Beck v. Smith, 260 Va. 452, 456, 538 S.E.2d 312, 314 (2000) quoting Miller v. Reynolds, 216 Va. 852, 855, 223 S.E.2d 883, 885 (1976). Consequently, this Court has repeatedly refused to apply the merger doctrine to forgive a seller of its executory real estate contract obligations. See e.g. Miller v. Reynolds, 216 Va. 852, 223 S.E.2d 883 (1976); Empire Management & Development Co., Inc., 255 Va. 49, 496 Va. 852 (1998); Beck v. Smith, 260 Va. 452, 538 S.E.2d 312 (2000).

In Davis v. Tazewell Place Assoc., 254 Va. 257, 492 S.E.2d 162 (1997), this Court refused to apply the merger doctrine to the contract for the sale and construction of a townhouse. In Davis, plaintiffs entered into a contract in which, among other things, defendant promised to construct the townhouse "in a good and workmanlike manner in substantial accordance with the plans and specifications." Id., at 163, 492 S.E.2d at 258. Upon completion of construction, defendant conveyed a deed to the townhouse which made no mention of the workmanship warranty in the contract. Thereafter, plaintiffs noted defects in the construction and sued defendant for breach of contract. The trial court granted summary judgment in part because it concluded the sales contract merged with the deed at closing and extinguished the warranty. In reversing the trial court, this Court held:

> "the express warranty contained in the contract between the plaintiffs and defendant did not merge with the deed at closing and is enforceable. The defendant's warranty to construct the townhouse in a good and workmanlike manner is collateral to the sale of the property and did not qualify, or in any way affect, title to the land."

Id., at 263, 492 S.E.2d at 165.

Here, the same analysis leads to the same result. The Homeowners and Concord entered into a contract for the construction and sale of newly renovated condominium units. Concord promised in the Purchase Agreement to provide certain hardwood flooring, and, like the defendant in Davis, failed to deliver what it promised. Nothing in the record here suggests the deeds tendered by Concord did anything more than convey real estate.[5] Concord's promise to install hardwood flooring (1) is wholly collateral to the conveyance of the condominium units and (2) does not affect title in the slightest. Thus, the merger doctrine has no application here.

This Court has concluded that a contract merges with a deed only where the terms of the contract conflict with the terms of the deed. In Woodson v. Smith, 128 Va. 652, 104 S.E. 794 (1920), seller entered into a contract to sell real estate to two buyers on February 19, 1919. The contract indicated the seller would have

---

[5] The deeds in question are not part of the record. As with the deeds in the cases cited herein, the Court can and should infer that the deeds in question do nothing more than convey title to the condominium units in question and make no reference to the Schedule or the flooring. At this stage all inferences must be resolved in favor the Homeowners.

the right to possess the real estate until November 1919. Thereafter, on February 27, 1919 the buyers tendered payment to seller and seller conveyed the property to the buyers. The deed of conveyance had standard warranties, made no reference to the contract and did not reserve possession of the property in seller post conveyance.

This Court held the contract merged with deed since contract and deed were in "irreconcilable conflict" in that contract indicated that seller would retain possession after execution of deed but deed granted immediate possession. Id. at 652, 104 S.E. at 795. Here, no conflict exists between the Purchase Agreements and the deeds. Thus, no merger of the contractual provisions at issue occurred.

Finally, the contractual provision in Concord's form contract stating that the Purchase Agreements will merge with the deed at settlement is not dispositive. In Beck v. Smith, 260 Va. 452, 538 S.E.2d 312 (2000), this Court refused to apply the merger doctrine in a case with a nearly identical contract provision. In Beck, the parties entered into a contract for the sale of real

estate which included a provision requiring the seller to convey a deed without utility easements that would adversely affect the buyer's intended use of the property. Id. at 454, 538 S.E.2d at 314. The contract provided that all warranties of the seller "SHALL BE DEEMED MERGED INTO THE DEED DELIVERED AT SETTLEMENT AND SHALL NOT SURVIVE SETTLEMENT." Id. at 455, 538 S.E.2d at 314 [Emphasis in original]. After entering into the contract but before closing, the seller granted a utility easement but never revealed this fact to the buyer.

The buyer sued the seller for breach of contract and fraud. Following a jury verdict in buyer's favor, the trial court struck the jury verdict ruling in part that the capitalized language in the contract resulted in the contract being extinguished by the deed pursuant to the merger doctrine. This Court reversed the trial court and reinstated the jury verdict. In doing so this Court held that the provision in the sales contract regarding easements "was not merged into the deed and survived execution of the deed." Id. at 456, 538 S.E.2d at 315.

Here, the same result is required. The contract language in question is practically identical to that in Beck with the exception that here the merger provision is *not* in all capital letters. The trial court in Beck vacated the jury verdict in part because of this very contractual language and this Court determined that the trial court erred in doing so. Here, as in Beck, the agreement by Concord to deliver certain flooring "was collateral to the transfer of title, was not merged with the deed, and survived the execution of the deed." Id.

It is clear that the merger doctrine and the contractual merger language do *not* justify dismissal of the Homeowners' breach of contract claim. Accordingly, the Court should reverse the trial court's sustaining of the demurrer as to Homeowners' breach of contract claim.

C. Judge Kendrick Erred When He Ruled That The Economic Loss Rule Barred The Homeowners' Claims Under The VCPA And For Common Law Fraud.

The trial court incorrectly held that the Homeowners' claims for violation of the Virginia Consumer Protection Act ("VCPA") and fraud are barred by the economic loss rule. Concord asserts the

Homeowners' VCPA and fraud claims fail because Concord owes no duty other than a contractual duty. This is incorrect. Here, enactment of the VCPA by the Virginia Legislature established a duty on the part of Concord (a supplier) to not make misrepresentations to the Homeowners (part of the "consuming public"). See Va. Code §59.1-197. Thus, Concord owed the Homeowners a duty other than by contract and the economic loss rule is inapplicable.

The economic loss rule is a judicially created remedies rule which provides that "losses suffered as a result of a breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts." Filak v. George, 267 Va. 612, 618, 594 S.E.2d 610, 613 (2004). However, tort law will "offer redress for losses suffered by reason of a breach of some duty imposed by law to protect the broad interests of social policy." Sensenbrenner v. Rust, Orling & Neal, Architects, Inc., 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988) [Internal citations and quotations omitted].

Here, the VCPA imposes on certain persons - and entities like Concord - precisely the sort of legal duty anticipated by this Court when it limited the reach of the economic loss rule. The Homeowners allege Concord violated the VCPA by, among other things, misrepresenting it would deliver to the Homeowners certain hardwood flooring. The VCPA imposes a duty on Concord not to lie to the consuming public including the Homeowners. See e.g. Va. Code 59.1-200(A)(6) (prohibiting "misreprenting that goods are of a particular standard, quality, grade, *style or model*") (emphasis added). Therefore, the economic loss rule has no application here since Concord owed a duty to the Homeowners beyond its duties under the Purchase Agreement.

Indeed, were Concord's theory accurate, the judicially created economic loss rule would wholly swallow up the causes of action and remedies embodied in the VCPA. Undeniably, the prohibited practices proscribed by the VCPA entirely entail commercial transactions. See e.g. Va. Code §59.1-200(A)(1)-(15). Utilizing the economic loss rule to preclude such claims in protected consumer transactions would eviscerate the VCPA since

the practices prohibited by the VCPA obviously and necessarily (1) involve individuals brought together by contract and (2) provide remedies for "disappointed economic expectations."

As to the Homeowners' fraud in the inducement claim, the same analysis above applies. The duty imposed by the VCPA provides a duty "imposed by law" beyond the Purchase Agreement. In addition to the statutory duty under the VCPA, voluminous case law of this Court suggests the presence of a common law duty of a seller to not fraudulently induce a buyer to enter into a real estate transaction. See e.g. Prospect Development Co., Inc. v. Bershader, 258 Va. 75, 515 S.E.2d 291 (1999) (affirming buyer's award of damages for fraud against seller of real property); Boykin v. Heritage Realty, 234 Va. 26, 360 S.E.2d 177 (1987) (recognizing that a condominium purchaser can sue broker for fraud in the inducement); Lloyd v. Smith, 150 Va. 132, 142 S.E. 363 (1928) (noting that seller's promises made without intention to perform states claim for fraud on buyer of real property); see also Barnette v. Brook Road, Inc., 429 F. Supp. 2d 741, 749-752 (E.D.Va. 2006) (determining that

a fraud in the inducement claim fell outside of the economic loss rule and noting that Virginia Supreme Court has not expressly overruled "extensive precedent recognizing the tort of fraud in the inducement").

This Court should reverse the trial court's dismissal of Petitioner's claims under the VCPA and for common law fraud in the inducement.

CONCLUSION

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

Respectfully submitted,

PHILLIP ABI-NAJM, ET AL.

By: _____
Counsel

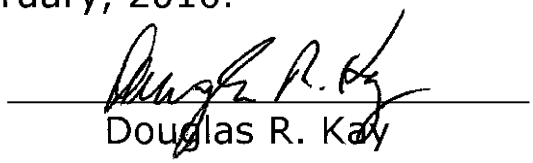
Douglas R. Kay (VSB No. 35468)
Steven D. Briglia (VSB No. 29102)
BRIGLIA HUNDLEY NUTTALL & KAY, P.C.
1921 Gallows Road, Suite 750
Vienna, Virginia 22182
Telephone: (703) 883-0880
Facsimile: (703) 883-0899

February 23, 2010

CERTIFICATE

We, Douglas R. Kay and Steven D. Briglia, as counsel for the Appellants, certify the following:

Fifteen copies of this brief have been simultaneously filed with the clerk of this Court 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, on this 23rd day of February, 2010.



Douglas R. Kay