

11-0595

IN THE CIRCUIT COURT OF MONONGALIA COUNTY  
STATE OF WEST VIRGINIA

RAYMOND A. HINERMAN, and  
BARBARA B. HINERMAN,  
husband and wife,

Plaintiffs,

Civil Action No. 10-C-896

v.

RICHARD A. RODRIGUEZ and  
RITA C. RODRIGUEZ,  
husband and wife,

Defendants.

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ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO THE DEFENDANTS,  
AND DENYING THE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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On February 2, 2011, the parties appeared before the Court on the Plaintiffs' motion for summary judgment, and on the Defendants' cross motion for summary judgment. Gary Wigal appeared for Richard A. and Rita C. Rodriguez, and Raymond Hinerman, a licensed attorney practicing in West Virginia, appeared *pro se* and for Barbara B. Hinerman.

The Court heard the argument of defense counsel on Richard A. Rodriguez's and Rita C. Rodriguez's Motion for Summary Judgment and the Plaintiffs' response to the motion. The Defendants alleged in their motion that there are no genuine issues of material fact, and that they are entitled to judgment as a matter of law on the Plaintiffs' claims. Additionally, the Court heard the Plaintiffs' motion for partial summary judgment, and the Defendants' response to the motion.

The Defendants argued that they were entitled to judgment as a matter of law, as the specific language contained in the Uniform Purchase Agreement supports their position that there are no genuine issues of material fact concerning the Plaintiffs' breach of contract or fraudulent concealment of a defect claims.

The case involves a home owned by the Defendants at Cheat Lake, West Virginia, which was being sold due to the owners' relocation. The Plaintiffs offered to purchase the home following negotiations conducted by KLM Properties, a Morgantown, West Virginia real estate company. The parties entered into a Uniform Purchase Agreement on October 5, 2010 that memorialized and formalized their negotiations. Paragraph 25 of the Uniform Purchase Agreement, signed by both parties, contains the language that "it is understood that this Property is being sold "as is" and Seller will make no repairs." The Uniform Purchase Agreement contains the standard real estate contingency that permitted the Plaintiffs to have the house inspected for defects in its various systems prior to purchase. Nevertheless, the Plaintiffs did not have the house professionally inspected as provided for in the contract, but relied solely on inspections they personally made.

Prior to the scheduled closing of the sale, Rita Rodriguez discovered a water leak in a basement room when she traveled from Michigan to remove personal property from the house. Rita Rodriguez immediately disclosed the water leak to the real estate agent who was marketing the property. In turn, the real estate agent disclosed the basement leak to the Plaintiffs prior to the scheduled closing of the sales transaction. Christopher A. Barnum, the Rodriguezes' real estate attorney, wrote to Raymond Hinerman prior to the scheduled closing, and unilaterally continued the closing date to permit the

Hinermans to have the house inspected to determine the cause and the effect of the water leak, and to permit them to withdraw from the Uniform Purchase Contract if they wished to do so.

Following the disclosure, the Plaintiffs did not avail themselves of their right to have the house inspected to discover the cause and the extent of the water leak. Instead, prior to the closing of the sale of the residence, the Plaintiffs filed a lawsuit against the Defendants on December 27, 2010, alleging that they breached the terms of the Uniform Purchase Contract when they refused to repair the water leak. The Plaintiffs also alleged that the Defendants committed fraud by intentionally concealing a defect in the house, which they specifically identified as the water leak.

The Defendants' motion for summary judgment focused on the language contained in Paragraph 25 of the Uniform Purchase Agreement, which they argued confirmed that the record could not lead a rational trier of fact to find for the Plaintiffs, because they cannot make a sufficient showing on the essential elements of both the breach of contract and fraud allegations, which they had the burden to prove. Syl. Pt 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

After reviewing the parties' written briefs, hearing the arguments of counsel, and considering the record as it existed at the time of the hearing, the Court makes the following findings of fact and conclusions of law.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Court concludes that the rule of law applicable to the Plaintiffs' fraud claim is found in *Thacker v. Tyree*, 171 W. Va. 110, 112, 297 S.E.2d 885, 888 (1982). The

burden of proof in a *Thacker* type of latent defect case requires proof that the seller was aware of a defect, but breached the duty of care to disclose the known defect.

2. The Court finds that in this case, the Rodriguezes did disclose the defect, the water leak in the specific room at issue in this litigation, prior to the Hinermans' purchase of the property. The disclosure gave the Hinermans the contractual option to investigate the defect to determine if they still wanted to purchase the property with their actual knowledge that Paragraph 25 of the Uniform Purchase Agreement excuses the Rodriguezes from repairing the water leak or any other defect.
3. The existence of an "as is" clause in a contract of sale for real estate will not relieve the vendor of his obligation to disclose a condition which substantially affects the value or habitability of the property, if the condition is known to the vendor, but not to the purchaser, and would not be disclosed by a reasonable and diligent inspection. A failure to disclose a defect under the above circumstances constitutes fraud. *Logue v. Flanagan*, 213 W. Va. 552, 584 S.E.2d 186 (2003).
4. Under a *Logue* analysis of the Hinerman facts, while an "as is" contract requires a seller to disclose a defective condition which they have knowledge of, the condition must be unknown to the purchaser, and the defective condition must be one that would not be disclosed by a reasonable and diligent inspection.
5. Applying a *Logue* analysis to the facts, the Court finds that while the Rodriguez "as is" contract required a disclosure of the water leak, the disclosure was made. Therefore, Hinerman purchasers had actual knowledge of the water leak at issue in this case, and the Court further finds that the water leak would have been

discovered by the Plaintiffs had they initiated a reasonable and diligent inspection of the property after receiving notice of the condition.

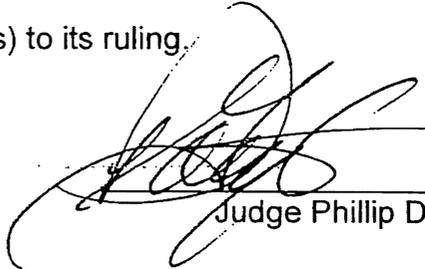
6. The Court finds that if an inspection would have been made after the water leak's disclosure, the Hinermans would have been able to discover the extent of the water problem that existed in the room.
7. The Court further finds that an inspection after the disclosure would have provided the Hinermans the opportunity to withdraw from the purchase of the property had they desired to do so.
8. The Court concludes that the disposition of Hinermans' breach of contract claim must focus on the "as-is" language in the contract. When the "as-is" language is considered, the Hinermans received the benefit of the bargain when they received the Rodriguez house in its existing condition, because Paragraph 25 of the Uniform Purchase Agreement expands the "as-is" language by stating that "Sellers will make no repairs."
9. Based on the above findings of fact and conclusions of law and the entire record, the Court grants the Rodriguez motion for summary judgment as there are no genuine issues of material fact on the fraud count or the breach of contract count, and the Rodriguezes are entitled to judgment as a matter of law on these two causes of action.
10. The Court finds that there are genuine issues of material fact on the alleged sale of the Four Winds boat related to the communications between KLM Properties and the parties. Therefore, the Court denies the Rodriguezes' motion for summary judgment on this issue.

11. Based on the Court's findings of fact and conclusions of law, and its grant of summary judgment to the Defendants on the breach of contract and fraud causes of action, the Court denies the Plaintiffs' motion for summary judgment.

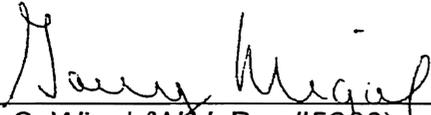
12. The Court denies the Hinermans' motion to stay the execution of the grant of summary judgment.

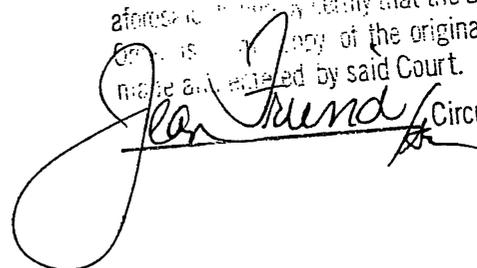
The Court notes the Plaintiffs' objection(s) to its ruling.

ENTER: March 4, 2011

  
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Judge Phillip D. Gaujot

Prepared by:

  
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Gary S. Wigal (W.V. Bar #5803)  
Gianola, Barnum, Wigal & London, L.C.  
1714 Mileground Rd.  
Morgantown, WV 26505  
Phone: 304-291-6300

STATE OF WEST VIRGINIA SS:  
I, Jean Friend, Clerk of the Circuit Court and Family Court in Wayne County State of West Virginia, do hereby certify that the attached copy is a true and correct copy of the original Order made and entered by said Court.  
  
\_\_\_\_\_  
Jean Friend  
Circuit Clerk

IN THE CIRCUIT COURT OF MONONGALIA COUNTY  
STATE OF WEST VIRGINIA

RAYMOND A. HINERMAN, SR.  
and BARBARA B. HINERMAN,  
husband and wife,

Plaintiffs,

v.

CIVIL ACTION NO: 10-C-896

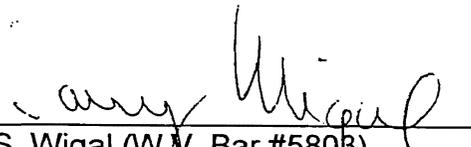
RICHARD A. RODRIQUEZ and  
RITA C. RODRIQUEZ,  
husband and wife,

Defendants.

CERTIFICATE OF SERVICE

I, Gary S. Wigal, certify that on February 21, 2011, I served a copy of the Court's ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO THE DEFENDANTS, AND DENYING THE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT by first class United States Mail, addressed to:

Raymond A. Hinerman, Sr.  
Hinerman & Associates, PLLC  
P. O. Box 2465  
Weirton, WV 26062

  
\_\_\_\_\_  
Gary S. Wigal (W.V. Bar #5803)  
Gianola, Barnum, Wigal & London, L.C.  
1714 Mileground Rd.  
Morgantown, WV 26505  
Phone: 304-291-6300

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA  
DIVISION NO. 3

RAYMOND A. HINERMAN, SR. and  
BARBARA B. HINERMAN, Husband  
Wife,

Plaintiffs,

Civil Action No. 10-C-896  
Judge Phillip D. Gaujot

v.

RICHARD A. RODRIGUEZ and  
RITA C. RODRIGUEZ,

Defendants.

**ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

On June 6, 2011, the parties appeared before the Court for a hearing on Plaintiffs' Motion for Reconsideration.<sup>1</sup> Raymond A. Hinerman, Sr., a duly admitted attorney in this state, appeared in person, *pro se*, and as counsel for Barbara B. Hinerman; the Defendants appeared by and through their counsel, Gary S. Wigal. Having considered the parties' written submissions, having heard the arguments of counsel, and having consulted pertinent legal authority, the Court finds that the Plaintiffs' motion should be, and hereby is, DENIED.

By their Motion for Reconsideration, the Plaintiffs ask the Court to reverse its order of March 4, 2011, which granted the Defendants partial summary judgment, and denied same for the Plaintiffs.<sup>2</sup> The Plaintiffs rely, in large part, on *Bryant v. Willison*, 177 W. Va. 120, 350 S.E.2d 748 (1986), to support the idea that, under the circumstances of this case, they are entitled to pursue damages under the theory of diminution of fair market value. The Defendants argue that the Plaintiffs' reliance on *Bryant* is misplaced.

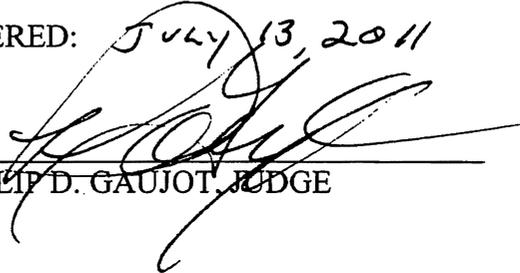
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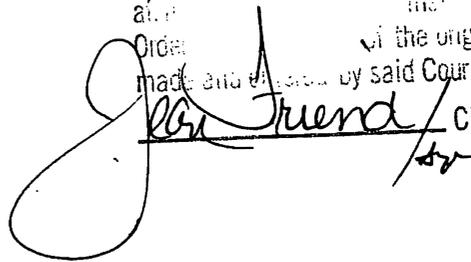
<sup>1</sup> The Court addressed the Plaintiff's Motion for Reconsideration as a Motion to Alter or Amend Judgment pursuant to W. Va. R. Civ. P. 59(e).

<sup>2</sup> During the hearing of June 6, 2011, Mr. Hinerman informed the Court that the Plaintiffs did not intend to address the Court's disposal of their claim for fraudulent concealment.

Without belaboring the point, the Court is unwilling to alter or amend its ruling of March 4, 2011. The Court relies upon the reasoning set forth in its order of March 4, 2011. Accordingly, the Plaintiffs' motion is **DENIED**.

The Circuit Clerk is directed to provide copies of this order to counsel of record.

ENTERED: *July 13, 2011*  
  
\_\_\_\_\_  
PHILIP D. GAUJOT, JUDGE

STATE OF WEST VIRGINIA SS:  
I, Jean Freund, Clerk of the Circuit Court and  
Federal Marshal for Lincoln County State  
at \_\_\_\_\_, do hereby certify that the attached  
Order is a true and correct copy of the original Order  
made and entered by said Court.  
  
\_\_\_\_\_  
Jean Freund / Circuit Clerk