

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0595

Raymond A. Hinerman, Sr., and
Barbara B. Hinerman, husband
and wife, Plaintiffs below,

Petitioners

v.

Appeal from a final order
of the Circuit Court of
Monongalia County (10-C-896)

Richard A. Rodriguez and
Rita C. Rodriguez, husband
and wife, Defendants below,

Respondents

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

**II. REPLY TO RESPONDENTS' SUPPLEMENT TO
PETITIONERS' STATEMENT OF THE CASE**

Imprecise or Misstatements of the Record.

On Page 2 of the Respondents' Brief, the Respondents appear to be adding "facts" not in the record. The record cited by them does not support their statements, e.g., "Other purchasers had signed a 'backup' contract to purchase the Respondents' house...." A.R. at page 4, Complaint, paragraph 16, does not even mention a "backup contract".

Respondents state at page 2 of their Brief that the damage was "not substantial" and refer to A.R. at 27. No such evidence is in the record at A.R. 27. On page 2 of their Brief, Respondents also state:

Moreover, based on belief (Respondents) the threat of the backup purchasers buying the house if the Petitioners did not purchase it, before their date to purchase the house expired, motivated the Petitioners to close the sale quickly.

Apparently, this is Respondents' opinion but it is not in the record of this appeal.

Page 2 of the Respondents' brief states: "The 'wet carpet' damage to the house was 'not substantial'". A.R. 27 does not support this statement and it is incorrect. "A statement made on the record by the Petitioners' counsel disclosed that a loose downspout may have caused the unsubstantial [sic] leak."

Respondents do not even relate this statement to the record and, likewise, it is not correct. Respondents nor Petitioners know the extent of the damages but they are far more than a "wet carpet". In any event, Respondents are making numerous assertions which are not in the record. Respondents have taken excessive liberty with what are referred to as "Factual Issues".

III. PETITIONERS' REPLY TO RESPONDENTS' SUMMARY OF ARGUMENT

Petitioners disagree with the factual assumptions made by Respondents to support Respondents' *Summary of Argument*. One of the "errors" by Respondents was the citation of A.R. at 241, which page does not exist. This is probably a typographical error. Possibly, the Order being referred to is at A.R. 0194 to A.R. 0200.

IV. ARGUMENT

(1) Deed Issue

Regarding the issue of Petitioners' entitlement to a General Warranty Deed, free and clear of all liens and encumbrances, which is set forth in the Purchase Agreement, A.R. 1-3, Respondents' explanation is that there are no liens and Petitioners knew it. This is not in the record. If it is not a big deal, which is Respondents' argument, why didn't Respondents do what the Purchase Agreement required them to do and deliver a General Warranty Deed, free and clear of all liens and encumbrances?

Respondents state, "The Petitioners received a General Warranty Deed at the closing which provided them with the best warranty of title that a grantor can provide in West Virginia."

This statement ignores the Purchase Agreement, paragraph 5, which requires a "General Warranty Deed, free and clear of all liens and encumbrances" and does not explain or argue the differences in the two (2) types of Deeds in West Virginia Code §36-4-2 and §36-4-6. Respondents failed to address these issues; therefore, they should be considered as non-contested. Rule 10 of the Revised Rules of Appellate Procedure, Briefs, paragraph (d), states, in pertinent part, as follows: "If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with petitioner's view of the issue."

Petitioners believe that this language requires a "meaningful response" which the Respondents have not made. They did not discuss the statutes or the mandate of the Purchase Agreement. Respondents ignored the statutes and the Purchase Agreement.

Regarding the second full paragraph (page 12, last paragraph) wherein Respondents state, "Not only were there no liens or encumbrances on the property as of October 21, 2010, there were no liens or encumbrances on the property on the date of closing...." This is a statement of counsel for which there

is no factual or legal basis. In any event, Petitioners want the protection they bargained for. As an example, sales of real estate sometimes involve title insurance to cover losses from errors which may have occurred as a result of an incomplete or inaccurate title exam. Further, there are liens such as "mechanics liens" which can be filed after the sale is completed and they are retroactive to a date before the sale is consummated.

The "argument" of Respondents is not only devoid of facts, the statutes regarding the two (2) Deeds by law make them different, and the Purchase Agreement requires a "General Warranty Deed, free and clear of all liens and encumbrances."

In this case, the argument "no harm-no foul" clearly does not apply since possible harm may be in the future. Further, the Respondents argue throughout their brief that they never breached the Purchase Agreement and this issue belies that argument. Clearly, only delivering a General Warranty Deed is a breach.

(2) Is the Order of March 4, 2011, a Final Appealable Order?

Regarding Respondents' claim that there is no final appealable Order in this matter, the Petitioners have established that the Order "approximates a final order in its nature and effect."

(1) The Court denied a continuance for discovery which would indicate that the Court felt that its decision regarding the granting of summary judgment was a final appealable Order.

(2) The Court denied a stay pursuant to Rule 62(h) of the W.Va.R.Civ.P., which would also indicate that the Court felt that the Order was final and appealable.

(3) The most telling information in the record is that Petitioners, when they requested a stay, advised the Court that they wanted the stay to avoid multiple appeals. The Court, without comment, denied the Motion to Stay and the Respondents simply stated that they "object" without further comment. The transcript from the February 2, 2011, hearing regarding the granting of a partial summary judgment to Respondents, at page 27, reflects the following:

MR. HINERMAN: I understand the Court's order. I would ask the Court to stay that order until the main case is over with so that it does not involve possible duplicate appeals. I don't want to have to appeal the case seriatim. I would like to do it if necessary at the right time.

THE COURT: What do you say about that? Do you have any objection to that?

MR. WIGAL: Yes, Your Honor, I do object.

THE COURT: Sustained. Show that in the order.

(4) Finally, the failure to "reconsider" the granting of the Motion for Summary Judgment is further evidence that the Court "considered the Order final and appealable". Thus, the

Court and the Petitioners acted as though and treated the Order of March 4, 2011, as a final appealable Order.

Cited by Respondents, at page 6 of their brief:

A lower court's decision is final only if it ends the litigation on the merits and leaves nothing for the circuit court to do but execute the judgment.

The house claim has been litigated and a stay of execution was denied which leads to one conclusion—the granting of summary judgment to Respondents regarding the house issue, which was pled separately from the boat issue, is a final Order regarding the house. It “approximates a final order in its nature and effect.”

See Bowers v. Wurzburg, 205 W.Va. 450, 519 S.E.2d 148 (1999). Syllabus 3 of the West Virginia Reports holds as follows:

Order refusing plaintiff's argument that the Circuit Court alter or amend its judgment of dismissal of non-resident defendants was appealable. Rules of Civil Procedure 59(e).

It would seem as though granting summary judgment on a specifically designated claim which is independent of another claim should also be appealable.

Petitioners' Complaint explicitly separated “The House Agreement” and “The Boat Agreement”. See First Amended Complaint at pages A.R. 58-65.

Further, “An appeal may be taken from a final order disposing of a motion under Rule 59(e) at any time within the

appeal period." See discussion at Chapter VII, page 1317(d), APPEAL, in *Litigation Handbook on West Virginia Rules of Civil Procedure, Second Edition*, Cleckley, Davis and Palmer.

(3) Granting Partial Summary Judgment to Respondents.

Respondents argue that the Purchase Agreement is unambiguous. We agree that when appropriate West Virginia law is applied to the Purchase Agreement, it is clear October 5, 2010, the date of execution, is the controlling date, not December 30, 2010, when the sale was closed. See Bryant v. Willison, 177 W.Va. 120, 350 S.E.2d 248 (1986). The Purchase Agreement speaks as of the date of its execution and the risk of loss provision in the Purchase Agreement makes that clear. Loss before sale is the responsibility of the Sellers. A. R. at page 8, paragraph 6, "Risk of Loss Before Consummation of Sale".

Where the risk of loss is on the vendor and the casualty damage to the property is not substantial, the purchaser is (177 W.Va. 122) entitled to sue for specific performance, and the purchase price is abated to the extent the property was damaged.

(Bryant v. Willison, Id., page 752 and Syllabus 4.)

(4) Were Petitioners Entitled to Summary Judgment?

Respondents argue that Petitioners cannot prove a case and that is why partial summary judgment was awarded to the Respondents. Respondents also argue to grant summary judgment to the Petitioners, Petitioners must prove the following:

(A-1) Petitioners must demonstrate the Purchase Agreement permits a monetary recovery.

There is no issue that there was damage to the house, not just a wet carpet. See paragraph 4 of the Purchase Agreement, A.R. 7, which states: "If the Seller defaults (a) may recover expenses and (b) pursue any and all remedies available to the Buyer against Seller as a result of such default." This certainly would cover specific performance and damages. The Purchase Agreement does not prohibit a monetary recovery. While it is difficult to prove a negative, we can. See paragraph 6 of the Purchase Agreement, A.R. 8. Respondents argue that upon loss due to fire, flood or an act of nature, Buyers remedies are limited to rescission of the Purchase Agreement or to take the property and any insurance proceeds...not to exceed purchase price. Respondents argue this is a limitation of recovery, it is not. The Purchase Agreement does not state this is the exclusive remedy, and when read in pari materia with paragraph 4 of the Purchase Agreement, is clear, if the Seller defaults, Buyers may pursue any and all remedies available. However, the most glaring flaw in Respondents' argument is that the damage in this case was not caused by "fire, flood or an act of nature". Therefore, this "limiting provision" does not apply. See paragraph 5, page A.R. 59, *First Amended Complaint*, which

describes the damage as being caused by a "water leak", not a fire, flood or act of nature.

The loss was due to some fault or negligence of the Sellers. Further, the Court did not consider these matters in its denial of Petitioners' Motion for Summary Judgment, simply stated there was no breach of contract by Respondents. So unless there is a finding by the Circuit Court that the loss in this case was caused by fire, flood or other act of nature, e.g., lighting, excessive wind, or other causes which cannot be predicated or controlled, the argument of Respondents is without merit.

See Bryant v. Willison, Id., at page 748, Syllabus 1:

The doctrine of equitable conversion provides that where an executory contract for the sale of real property does not contain a provision allocating the risk of loss and the property is damaged by fire or some other casualty not due to the fault or neglect of the vendor, the risk of loss is on the purchaser. This assumes the vendor has good title. (Our emphasis.)

Thus, Petitioners are entitled to money damages beyond insurance. (There is no insurance in this case and neglect or lack of maintenance would ordinarily not be covered by insurance.)

Thus equitable conversion does not apply and Respondents are responsible for the loss for the following reasons:

(1) There was a risk of loss provision in the Purchase Agreement placing risk on Seller;

(2) There was no evidence that the Respondents (Sellers) were faultless which is required for equitable conversion to apply.

(3) Syllabus 4 of Bryant v. Willison, Id., is as follows:

Where risk of loss is on vendor and the casualty damage to the property is not substantial, the purchaser is [177 W.Va. 122] entitled to sue for specific performance, and the purchase price is abated to the extent the property was damaged.

Since the full purchase price has been paid, Sellers (Respondents) are obligated to return to Buyers (Petitioners) a portion of the purchase price to cover the damages or the diminution of the fair market value caused by the damage.

On page 29 of Respondents' brief is the following statement:

The Rodriguezes did not file an insurance claim because the wet carpet was quickly, easily and inexpensively dried at their expense by professionals. A.R. at 118, Rita C. Rodriguezes Affidavit, paragraph 11.

What in fact was contained in paragraph 11 is the following, "I had the toy storage room professionally dried out after I discovered the leak on December 19, 2010."

Again, the Respondents have exceeded any literary freedom available to them.

(A-2) Respondents repeatedly argue the Petitioners did not have the house professionally inspected.

First, there was no requirement that the inspection had to be by a professional. The Petitioners inspected the house on numerous occasions and the toy room was always filled with toys until they were removed on December 19, 2010, which is the day the Respondents claim to have discovered the leak. (Rita C. Rodriguez Affidavit at paragraphs 5, 7 and 9.) No person, professional or otherwise, could have inspected the toy room with the toys wall to wall and floor to ceiling. (See *First Amended Complaint*, at page A.R. 59, paragraphs 3, 4 and 5.) Further, the leak was disclosed to Petitioners on December 21, 2010, the day before a final walk through by Petitioners, yet Rita C. Rodriguez discovered the leak two (2) days before, but apparently tried to clean it up before Petitioners even knew about it. Since this failed, the water damage was disclosed.

At page 35 of Respondents' brief, Respondents state as follows: "Consequently, the Petitioners can only recover monetary damages if the Rodriguez family defaulted in an obligation they were required to perform under the Purchase Agreement."

Petitioners do not necessarily agree with Respondents' limitation regarding damage but will respond nevertheless.

(1) Respondents breached the agreement when they failed to deliver a General Warranty Deed, free and clear of all liens and encumbrances.

(2) Petitioners (see Amended Complaint, A.R. page 60, paragraph 7) allege a breach. The conclusion by the Circuit Court that Respondents did not breach the contract was incorrect and certainly premature, at best. A breach therefore should preclude Respondents from receiving a summary judgment.

(3) Amended Complaint, A.R. 62, page 5, paragraph 1, which alleges in part the following: "Buyers did not receive full value for what they purchased...." Therefore, obviously (the house) is of lesser value than when the Purchase Agreement was signed on October 5, 2010.

Petitioners were denied a continuance to complete discovery. Had the continuance been granted and discovery completed, the issue of whether or not there was or was not fraud would be clearer.

Petitioners concede, without the deposition of Kathy L. Martin, realtor, and the two Respondents, the issue of fraud is "thin". However, the Court in denying the continuance, prevented the issue from being fully developed. Further, only seventeen (17) days expired between the filing of the lawsuit, which was on December 27, 2011, and an *Amended Complaint* filed on January 7, 2011, and the Petitioners' Motion for a Continuance filed on

January 24, 2011. Summary judgment for Respondents was orally granted on February 2, 2011, and on March 4, 2011, the Order granting summary judgment was entered--a total of sixty-two (62) days.

V. CONCLUSION

Respondents argue they did not breach the Purchase Agreement and even if they did, there are no recoverable damages. They agree that the Purchase Agreement has a risk of loss provision, making Respondents responsible for the loss which they contend is only "a wet carpet". Respondents also contend Petitioners really did not sustain a loss, and even if they did, there should be no recovery because Petitioners failed to have a professional inspection. Respondents ignore Respondents' Disclosure Statement dated October 13, 2010, which did not disclose any existing water problems. Therefore, if Respondents stated there were no water problems in the area of the basement and crawl spaces, which was the "toy room", Petitioners would have no reason to inspect or hire a professional inspection. Respondents further argue that the Disclosure Statement required by the Purchase Agreement does not matter either because the Purchase Agreement stated "no repairs" and property sold "as is". Gently inferring such provision voided the implied warranty that the property at closing would be in the same condition as it was on October 5, 2010, the date

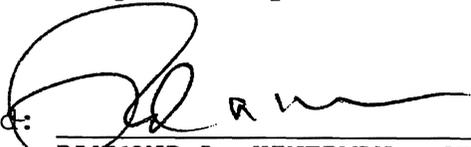
of the Purchase Agreement. Likewise, Respondents ignored the reasoning and holding in Bryant v. Willison, 177 W.Va. 120, 350 S.E.2d 248 (1986).

As soon as one accepts that the Purchase Agreement speaks as of October 5, 2010, and "as is" means "as is" on October 5, 2010, and "no repairs" means "no repairs" that were needed on October 5, 2010, the resolution of all house issues is clear. Water damage occurred after October 13, 2010, according to both Respondents' Disclosure Statement; risk of loss on Respondents, extent of damages yet to be ascertained; and full purchase price paid. Therefore, Petitioners are entitled to partial summary judgment.

At Page 35 of their Brief, Respondents make the following statement, "Consequently, the Petitioners can only recover monetary damages if the Rodriguez family defaulted in an obligation they were required to perform under the Purchase Agreement."

Clearly, Respondents breached the Purchase Agreement (1) in failing to deliver a proper Deed; and (2) in failing to deliver the real property to the Petitioners in the same condition it was on October 5, 2010, the date of the Purchase Agreement. Petitioners accepted the property on that date "as is" and agreed any repairs needed at that time were not Respondents' responsibility.

Respectfully submitted,

Signed: 

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Counsel of record for Petitioners

VI. CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2011, true and accurate copies of the PETITIONERS' REPLY BRIEF were deposited in the United States mail, contained in postage-paid envelopes, addressed to counsel for all other parties to this appeal as follows:

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