

Circuit Court for Prince George's County
Case No. CAL-17-03910

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 848

September Term, 2018

LEONARD MERRIMAN, IV

v.

AXE PROPERTIES & MANAGEMENT, LLC

Wright,*
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: July 28, 2020

*Wright, J., now retired, participated in the hearing of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion

**This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The parties to this appeal from the Circuit Court for Prince George’s County are Leonard Merriman, IV and AXE Properties and Management, LLC, as purchaser and seller, respectively, of residential real estate located in Capital Heights.

The question before us is whether the evidence produced by Merriman, plaintiff below, was sufficient to withstand AXE’s motion for judgment at the close of Merriman’s case-in-chief, which was granted by the trial court.¹ Merriman argues that his evidence was sufficient to withstand AXE’s motion and asks us to reverse the judgment of the circuit court and remand to that court for a new trial.

Concluding that the evidence was sufficient to withstand appellee’s motion, we shall vacate the judgment and remand for further proceedings.

BACKGROUND

AXE Properties & Management, solely owned by Weichin “Eric” Wang,² is a limited liability corporation in the business of buying improved real estate, foreclosed or otherwise, renovating and reselling them. In the parlance of the day, AXE is a “property flipper.” In late July 2015, AXE purchased the “[d]istressed” property, 4925 Gunther Street, in a foreclosure sale from the foreclosing bank and renovated it for resale. Merriman, a first-time homebuyer in Maryland, purchased the renovated property from

¹ In his opening brief, appellant asks:

1. When viewed in the light most favorable to Appellant, was sufficient evidence presented to survive a motion for judgment?

² AXE’s principal/agent was identified as Eric Wang, who testified as having the birthname of “Weichin.”

AXE in November 2015. In the contract documents, Wang, as the principal of AXE, executed a disclaimer and conveyed the property “as is.” Shortly before moving into the home in February 2016, Merriman and his wife, Jeanine Young Merriman,³ noticed several instances of water intrusion into the basement which, Merriman avers, was, or should have been, apparent to AXE, but had not been disclosed prior to the sale. That condition continued even after they had moved into the home.

In the months that followed, Merriman and his wife experienced several additional problems with the house, including faulty electrical wiring and a roof leak that appeared to be related to the removal of a load-bearing wall. To assess the full extent of the defects, Merriman retained architect Kevin J. Driscoll, A.I.A., who, in September 2016, performed a code compliance inspection of the property. Driscoll’s report noted 20 various defects throughout the interior and exterior of the property, including code compliance failures. Thus, Merriman asserts, there were latent defects of which AXE ought to have known that required disclosure.

In February 2017, Merriman filed this action against AXE in the Circuit Court for Prince George’s County. Charging that undisclosed latent defects existed in the property that he purchased from AXE, Merriman asserted claims for breach of contract, fraudulent inducement/deceit, fraud/concealment, negligent misrepresentation, unfair or deceptive

³ Mrs. Merriman was not a party to the contract documents, is not a title owner and is not a party to the lawsuit.

trade practices in violation of the Maryland Consumer Protection Act (MCPA),⁴ rescission, and unjust enrichment. Following discovery, the case proceeded to a jury trial with a two-judge panel presiding.⁵ At the conclusion of Merriman’s case-in-chief, on the second day of trial, AXE moved for judgment on all counts, which the court granted.

We shall develop additional facts as necessary to our discussion of the issues.

DISCUSSION

Standard of Review

Governing motions for judgment, Maryland Rule 2-519 provides, in relevant part:

(b) **Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

Rule 2-519(b).

This Court “employ[s] a *de novo* standard of review when considering both a trial court’s grant of a motion for judgment and its legal conclusions.” *White v. Kennedy Krieger Inst., Inc.*, 221 Md. App. 601, 635 (2015) (citation omitted). *See also* Rule 8-

⁴ The MCPA has been codified under Maryland Code (1975, 2013 Repl. Vol.) Commercial Law Article §§ 13-101 through 13-501.

⁵ The record does not explain the presence of a second judge at the trial, but does disclose that the trial, including jury selection, rulings, orders, etc., was managed by Hon. William A. Snoddy. Also present was Hon. Judy L. Woodall who, we conclude, was at that time newly appointed to the court and was participating as a function of her new trial judge orientation requirement.

131(c); *Torbit v. Baltimore City Police Dep't*, 231 Md. App. 573, 587 (2017) (quoting *Thomas v. Panco Mgmt. of Maryland, LLC*, 423 Md. 387, 393–94 (2011)). We undertake our review under the established maxim that a plaintiff's case should be submitted to the jury on the evidence adduced by the plaintiff, "however slight." See *Beall v. Holloway-Johnson*, 446 Md. 48, 69 (2016) (explaining the legal precept that, "if there is any evidence adduced, however slight, from which reasonable jurors [applying the appropriate standard of proof] could find in favor of the plaintiff on the claims presented, the trial court should deny the defendant's motion for judgment ... and submit the claims to the jury for decision." (quoting *Hoffman v. Stamper*, 385 Md. 1, 16 (2005))).

We have explained the proper analysis trial courts should undertake when ruling on motions for judgment:

"[W]hen ruling on a motion for a judgment the trial judge must consider the evidence, including the inferences reasonably and logically drawn therefrom, *in the light most favorable to the party against whom the motion is made*. If there is any evidence, no matter how slight, legally sufficient to generate a jury question, the motion must be denied.... An appellate court reviewing the propriety of the grant or denial of a motion for judgment by a trial judge must conduct the same analysis."

Tate v. Bd. of Educ., Prince George's County, 155 Md. App. 536, 545 (2004) (emphasis in *Tate*) (citation omitted).

Indeed, "[b]ecause meeting the burden of production requires different quanta of evidence depending on the burden of persuasion, a judge must account for and consider the appropriate burden of persuasion in deciding whether to allow the jury to decide an issue." *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 270 (2004). Typically, in civil actions, a trial court "must grant a ... motion for judgment as a matter

of law if the plaintiff failed to present evidence that could persuade the jury of the elements of the tort *by a preponderance of the evidence.*” *Id.* (emphasis in original). However, when the torts charged are in fraud, “liability must be proven by clear and convincing evidence.” *Id.* at 272.

The Grant of AXE’s Motion for Judgment

Merriman’s claims against AXE stem from whether AXE had actual knowledge of latent defects and, if so, whether its disclaimer/disclosure form accurately reflected that knowledge. At the conclusion of Merriman’s case-in-chief, AXE moved for judgment on all counts, contending: that the alleged defects were visible and apparent, as identified by Merriman’s expert witness, Driscoll; that AXE had made no representation as to the condition of the property; and that Merriman had knowingly signed an “as is” clause in the sales contract.

In response to AXE’s motion for judgment, Merriman argued that he had presented sufficient evidence of AXE’s knowledge and the existence of the latent defects by showing: that an ongoing water infiltration was covered up during the renovation; that a structural wall was removed; that no required building permits were obtained; that there were electrical system problems, including wiring, that were not code-compliant. He also contended that AXE misrepresented the condition of the property by publishing photographs of the property in a “for sale” listing and advertising the property as “a renovation, a stunning renovation, a high-end reservation (sic) justifying a purchase price of 255,000 dollars.”

AXE took the position that it performed every obligation in the contract, that Merriman “knew there was a gap outside between the slab and the wall that will allow big bugs to come in.” AXE posited, “[i]f bugs can come in, water ... could come in.” It also argued that, while Merriman seeks to rely on the language in the MRIS⁶ listing, that listing includes a reliance disclaimer, and that the contract of sale expressly provides a merger clause that only the contract and attached documentation are part of the final contract. The MRIS listing documents were not included.⁷ Further, AXE argued that its agent, Wang, had testified that he was rarely at the property and that he hired contractors to perform and oversee the renovations.

The trial court, in its review of the evidence in response to AXE’s motion for judgment, considered each count separately in ruling that the evidence was insufficient to require AXE to proceed. In its oral ruling on the motion, the court made several factual findings with respect to the existence of latent defects, and explained:

So the question that I have to answer is whether the Defendant knew of this infiltration of water in the basement, was it a latent defect. And the parties have conceded that if it were, it would effect [sic] the health, safety and welfare of anybody living in that house, so that’s been conceded.

But the question is was it a latent defect. And I listened very carefully to the testimony and every single person who testified, every single person who took that witness stand said that they were able to see what was going

⁶ The MRIS abbreviation stands for the Metropolitan Regional Information Systems website. The MRIS website was characterized by AXE’s counsel as “a multi listing service” that gets a property’s “record from their broker” and allows websites to “pull[] the record from MRIS[.]”

⁷ An incomplete copy of the online post-sale Redfin listing for the property, that appears to be screenshots from a cell phone of the online listing’s summary description of the property and the listing’s images of the house, was admitted into evidence.

on in that property, and nobody picked up the fact that there was something going on, okay.

So there was, it was nothing, you know, everybody walked in. You had the first inspector who walked in, he made a report, nothing visible, nothing hidden.

The termite inspector walked in, he did a report, nothing hidden, everything visible.

Then you have, you know, again, the parties love the home because they purchased it, they paid a higher price for it than it was offered, slightly higher price, they walked in, they didn't see anything wrong with it.

The things that were wrong with it appeared to be visible, so I didn't, I could not find based on the testimony, and then you had the expert witness come in and he said as soon as he walked in he was able to point out things that were wrong with it, again, things that were visible, things that were noticeable. Nothing was hidden.

* * *

No testimony as to how or who removed that load bearing wall. So again, while I was listening very carefully for testimony to suggest that the Defendant in some way contributed to some of the problems with this house or knew of the problems in this house, I could not find that testimony.

Because we conclude that the evidence was sufficient to survive AXE's motion for judgment, and thus will vacate the court's judgment and remand for a new trial, we focus on the sufficiency of the evidence as to AXE's actual knowledge of latent defects. On remand, should there be a new trial, the trier of fact at that trial will be asked to apply the evidence produced to each of the theories advanced by Merriman to determine AXE's liability, if any. *See Beall*, 446 Md. at 69 (explaining that because, in our review, "[w]e are concerned only with whether [plaintiff] adduced enough evidence on each element of

... [the] substantive causes of action to have a jury consider them[,]” we do not determine who should prevail on the merits of those claims”).

Evidence of the Existence of Latent Defects

Maryland law requires that the seller of a single-family residential property provide the buyer with a completed State Real Estate Commission Disclosure and Disclaimer Statement, in which the seller must either disclose all known defects in the physical condition of the property or disclaim any representations or warranties of the condition of the property. *See* Maryland Code (1974, 2015 Repl. Vol.), Real Property Article (RP), § 10-702(c)–(f). The caveat being that, regardless of the seller’s decision to disclose or disclaim, the seller must still disclose any and all latent defects of which the seller has actual knowledge.⁸ *See* RP §§ 10-702(d)(1) and 10-702(e)(2).

A “latent defect” is defined in the statute as:

[M]aterial defects in real property or an improvement to real property that:

- (1) A purchaser would not reasonably be expected to ascertain or observe by a careful visual inspection of the real property; and
- (2) Would pose a direct threat to the health or safety of:
 - (i) The purchaser; or
 - (ii) An occupant of the real property, including a tenant or invitee of the purchaser.

RP § 10-702(a).

⁸ There are, of course, no disclosure requirements for latent defects that are unknown to the seller. RP §§ 10-702(d)(1)–(2) and 10-702(e)(1)–(4). Furthermore, there is no requirement that the seller undertake an investigation of the property to ascertain whether any latent or material defects exist. RP §§ 10-702(d)(2)(i)–(ii) and 10-702(e)(4).

Wang completed the Disclosure and Disclaimer Statement form, by marking a large “X” across the center of each of the two disclosure pages. Wang added, in his own hand, the comments “Don’t live” and “Don’t know” on each page. Wang signed only the disclaimer portion of the form, while Merriman signed both the disclosure pages containing the “X” and the disclaimer portion. Wang did not identify any latent defects in his completion of the disclaimer. *See* RP § 10-702(d)(1).

As we have noted, Merriman’s complaint asserted several counts: breach of contract, fraudulent inducement, concealment, negligent misrepresentation, unfair or deceptive trade practices, rescission, and unjust enrichment. Those counts were based on allegations of the existence of latent defects and AXE’s knowledge and non-disclosure of those defects. The focus of Merriman’s complaint is that there was found, after closing and after habitation of the house, damage from the infiltration of water that was, in his belief, known, or should have been known, to AXE and its agent at the time of renovation, and was in his words “covered up.”

As presented in this appeal, the issue is the same as presented and argued before the trial court when the court was considering AXE’s motion.

As we recognized, *supra*, we will conduct our *de novo* review of the relevant evidence produced⁹ “in the light most favorable to the party against whom the motion is

⁹ The record extracts submitted to this Court do not accurately reflect which “exhibits” were admitted into evidence for the trial court’s consideration, and thus, properly before this Court. “As this Court has noted, ‘an appellate court must confine its review to the evidence actually before the trial court when it reached its decision.’” *Franklin Credit Mgmt. Corp. v. Nefflen*, 208 Md. App. 712, 724 (2012) (quoting *Cochran v. Griffith Energy*

made” to determine whether “there is any evidence, no matter how slight, legally sufficient to generate a jury question[.]” *Tate v. Board of Education, supra*, at 545 (emphasis and citation omitted); Rule 5-219(b). The degree of legally sufficient evidence required to satisfy the standard is “slight.” *Univ. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012) (citing *Hoffman*, 385 Md. at 16). We have described the requisite burden of production for “slight” as requiring that “a party must establish ‘some minimal evidence.’” *Smith v. Howard County*, 177 Md. App. 327, 332 (2007) (quoting *Darcars Motors of Silver Spring, Inc. v. Borzym*, 150 Md. App. 18, 53 (2003)). Further, that “‘more than a mere scintilla of evidence, ... more than surmise, possibility, or conjecture’ is required.” *Id.* (cleaned up) (quoting *McQuay v. Schertle*, 126 Md. App. 556, 569 (1999)).

In Merriman’s case-in-chief, he presented testimony from four witnesses: Driscoll, his expert witness; Wang, as the principal of AXE who had executed the contract documents and had hired contractors for the renovation; Merriman’s wife, Jeanine, as to her experience with the property’s problems; and Merriman himself.

Driscoll was offered by Merriman, and qualified without objection, as an expert in the field of forensic architecture. Driscoll testified that he viewed the property in September 2016 because he “was asked by Mr. Merriman to look it over and see what kind of defects [he] could find, if there were any.” In response to a general question as to his observations during his personal inspection of the property, he said:

Service Inc., 191 Md. App. 625, 663 (2010)). Accordingly, we consider only those exhibits, or portions thereof, that were admitted into evidence.

I noticed that there was moisture, ... I saw evidence of past moisture in the basement ..., down by the gas meter. And actually when I went into the laundry room, there was a duct work that had penetrated to the wall, I was able to get my hand back in there and feel moisture against ... the insulation that was against that wall.

I also noticed that there was a sump pump in the basement which clearly indicated that there was a water issue in the past and as a professional, a big indicator is the fact that somebody had put in concrete down along the foundation, which to me, to somebody [who][] works in the industry, ... that's a clear indicator that there's -- you don't pour concrete against a foundation, like a sidewalk against the foundation unless you're trying to get water away[.]

Driscoll testified further as to other defects and adverse conditions observed by him in his inspection. Among the concerns discussed and included in his report¹⁰ were several electrical deficiencies and many items that were non-compliant with building and electrical codes. He testified that a load-bearing wall on the main floor had been removed, which, if not properly designed, will result in sagging and “it could fall down.” Significantly, Driscoll also testified that all of the renovation work was done without appropriate permits having been applied for or issued by the County, save for an electrical “heavy up” permit, which allows for an increase of power into the house, that had not been properly closed by the county.

AXE's principal, Wang, called by Merriman in his case-in-chief, testified that he is the sole owner of AXE Properties & Management, LLC, which has been in operation since 2008 and is in the business of buying investment properties to either keep as rentals or to renovate for resale. He also testified that he holds both a realtor's license and a Maryland

¹⁰ Although Driscoll's written report was admitted into evidence, the record also makes clear that he testified with reference to it.

home improvement license, but that he has always relied on his “trustworthy” contractors that he has worked with for years to do the work and pull the necessary permits, and that he does not supervise them. Wang denied any knowledge of water infiltration into the basement as well as any electrical, structural, or structural roof concerns.

Jeanine Merriman testified as to the sequence of events from the purchase of the property to the discovery of the water infiltration and the remedial measures thereafter. She also testified that the basement water infiltration began before they moved in, and the water appeared to come from inside the house and not from outside of the house.

Lastly, Merriman testified that, shortly before taking occupancy of the house, water was found to be seeping into the basement. He described his need for continued use of a “wet vac” (a vacuum for liquids) to take up and dispose of the water. Merriman explained that he had the basement’s sump pump replaced in an unsuccessful attempt to remedy the problem. He further testified that approximately two weeks later, after he and his wife had moved into the house, there was another instance of water infiltration in the basement. The water saturated a portion of the carpeted basement floor and he discovered, after taking up a section of the carpet, that the carpet had been stretched to cover “a gap from the tile on the floor to the baseboard,” that had “[o]ld rocks, old carpet tacks and a lot of water[,]” in it.

We recall that Wang testified that he left the permit obligations to his contractors. That, in our view, does not relieve AXE from the responsibility for work performed absent permits, which are required by State and Prince George’s County law. The record does not suggest a finding that AXE’s contractors were not its agents.

It is clear from an essentially uncontested record that there were defects present that predated Merriman’s purchase of the property. It may be that certain defects, particularly the presence of water seepage into the basement and the removal of the load-bearing wall, were made to be latent by the efforts of the renovating contractors, thereby imputing knowledge to AXE. We also believe it significant that the renovation work was done without proper permits having been applied for, which avoided scrutiny by the licensing agencies. Whether the evidence produced by Merriman was sufficient to charge AXE with knowledge of latent defects in violation of laws requiring disclosure or in violation of the parties’ contract of sale, is, in our view, a question of fact to be decided by a trier of fact. *See Terumo Med. Corp. v. Greenway*, 171 Md. App. 617, 623 (2006) (explaining that “[a] motion for judgment pursuant to Rule 2-519, by contrast to a jury argument, is concerned only with whether the plaintiff has met the burden of *prima facie* production, as a matter of law, and not with the weight of the evidence, as a matter of fact”).

We conclude that, on this record, the evidence produced in Merriman’s case-in-chief was legally relevant and competent and satisfied at least the “however slight” standard established by Maryland caselaw and was, therefore, sufficient to withstand the grant of AXE’s motion for judgment.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
VACATED; CASE REMANDED TO THAT
COURT FOR A NEW TRIAL. COSTS
ASSESSED TO APPELLEE.**

The correction notice(s) for this opinion(s) can be found here:

<https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0848s18cn.pdf>