

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5222-05T1

JONATHAN LANE and ROBIN LANE,

Plaintiffs-Appellants/
Cross-Respondents,

vs.

ARNOLD SCHMIED and ANGELA M.
SCHMIED,

Defendants-Respondents/
Cross-Appellants,

and

GALAXY REAL ESTATE, INC., NANCY
BUNIN, GUARDIAN HOME, OMAR
DUARTE, ILEANA DUARTE, VITTORIO
LA PIRA, ROSE LA PIRA, HARESH
SAVALIA, SHANTA SAVALIA, and
JEFF COSTA,

Defendants.

Argued: January 16, 2008 - Decided: February 11, 2008

Before Judges Cuff, Lisa and Simonelli.

On appeal from the Superior Court of New
Jersey, Chancery Division, Bergen County,
Docket No. C-39-07.

Robert E. Margulies argued the cause for
appellants/cross-respondents (Margulies
Wind, attorneys; Mr. Margulies, of counsel;
Jeffrey R. Kivetz, on the brief).

Frederick W. Alworth argued the cause for respondents/cross-appellants (Gibbons P.C., attorneys; Mr. Alworth and Lisa Lombardo, on the brief).

PER CURIAM

Plaintiffs Jonathan and Robin Lane purchased a house and soon thereafter experienced water problems in their yard. Plaintiffs filed a complaint against neighboring property owners, the home inspector, and the real estate broker. Plaintiffs also named the former owners of the property, Arnold and Angela Schmied, as defendants and sought rescission of the contract of sale or damages. The matter proceeded to trial solely against the former owners of the property. Following a bench trial, a judgment of no cause for action was entered in favor of defendants Schmied. It is from this judgment that plaintiffs appeal. We affirm.

Plaintiffs alleged that Jonathan Lane asked Angela Schmied a direct question on two occasions about the history of water problems on the property and that she replied that there were no problems. At trial, Jonathan Lane testified that the first conversation about water on the property occurred when Angela Schmied and he were standing near a pond located on a neighbor's property. According to Jonathan Lane,

A. I had asked if they had a mosquito problem on the property. [] I asked this

pond, is it an issue, and she told me it wasn't a stagnant pond, that the neighbor had a switch she could flip on and it moved the water and they never had any problems.

Q. Any other issue you discussed?

A. She told me there weren't water problems on the property. One time the property had been flooded during Hurricane Floyd and everybody in the neighborhood had basically been flooded as well and after Hurricane Floyd they decided to put in a 30 to \$35,000 system and they were assured that wouldn't happen after.

At their second meeting, Jonathan Lane stated that "she told me exactly the same thing she told me the first time . . . and they were putting something in to fix it and that was pretty much it."

Arnold Schmied testified that Jonathan Lane asked him nothing about drainage issues. Angela Schmied testified that at the time she and her husband purchased the house from the company for which her husband worked, they were satisfied that the drainage problem had been rectified. She recounted the design and installation of a drainage system that included piping and two catch basins and the installation of a silt fence along the property line.

When defendants listed the house for sale, Angela Schmied testified that the drainage issue had been fixed, and "we had a slight conversation or minimal conversation with [the listing

agent] where she had asked me something and I wasn't quite sure what she said and I said, do you mean the water situation with the pool, and she said when was that and I said a year ago."

Angela Schmied related a single conversation with Jonathan Lane during his visit to the house as follows:

A. Yes, we were outside in the back yard and we were discussing the catch basin, I believe, with the home inspector, and he asked me if I thought there would be any future water problems or something like that, and I said to him I think you shouldn't have any more problems except for something unforeseen like Hurricane Floyd.

She also related that Jonathan Lane and the home inspector walked in the yard and saw the drainage system.

Following trial, Judge Escala rendered a written opinion in which he found that the drainage problem on the site was caused by activities on neighboring properties. He also found Angela Schmied's statement to Lane was "more of a statement of opinion than a statement of fact." The judge found that this statement of opinion could not be considered fraudulent or a negligent misrepresentation. Therefore, by order dated February 23, 2006, the complaint was dismissed.

On appeal, plaintiffs argue that the trial judge's findings of fact are not supported by substantial credible evidence in the record. They contend that defendant's opinion regarding the drainage system does not negate her failure to disclose the

history of flooding on the site. Furthermore, plaintiffs argue that the evidence supports a finding that defendants fraudulently concealed the drainage condition of the property; therefore, they are entitled to rescind the sale. Defendants respond that the factual findings are well-supported by the evidence and that plaintiffs are entitled to neither rescission nor damages. In their cross-appeal, they contend they were entitled to an award of reasonable attorneys' fees.

Our scope of review is extremely narrow. We review the record to determine whether the findings of fact are supported by substantial credible evidence in the record. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). If the findings are supported by the evidence, we will not disturb them. Ibid. "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Plaintiffs urge that the findings of fact are not entitled to special deference because the trial judge did not make express credibility findings. Our review of his opinion, however, convinces us that the judge implicitly accepted the credibility of Angela Schmied. In doing so, he accepted her testimony that plaintiffs were aware of the drainage system on

the property and that she provided no more than an opinion on the future efficacy of the drainage system to address drainage issues on the site.

An essential element of fraud is a material representation of a presently existing or past fact. Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 624 (1981); N.J. Econ. Dev. Auth. v. Pavonia Rest., Inc., 319 N.J. Super. 435, 445-46 (App. Div. 1998). Fraud in the context of a real estate transaction is the deliberate concealment or nondisclosure of a material fact or defect not readily observable to the purchaser. Simon v. Deptford Twp., 272 N.J. Super. 21, 29 (App. Div.) (citing Dep't of Env'tl. Prot. v. Ventron Corp., 94 N.J. 473, 503 (1983)), certif. denied, 137 N.J. 310 (1994). When the buyer makes an independent investigation, they are "accountable for everything such party could have discerned by employing reasonable diligence." House of Drugs, Inc. v. RD Elmwood Assocs., 251 B.R. 206, 211 (Bankr. D.N.J. 2000).

Here, Judge Escala found that Angela Schmied did not offer a statement of a presently existing or past fact. Rather, she expressed an opinion about the future function of the drainage system installed on the property. Plaintiffs' knowledge of the drainage system should have served as some notice of a drainage problem to the home inspector, who clearly took note of the

existence of the system and expressed an opinion of its efficacy. Under these circumstances, we cannot hold that the trial judge misapplied the law to the facts as found by him.

Defendants' cross appeal is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Rules 4:58-3(c)(1) and (2) expressly prohibit an award of attorneys' fees in this situation.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION