IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION AT JACKSON

ROBERT L. BRANNON and, MARILYN M. BRANNON,	)	Shelby County Chancery Court No. 101646-1 R.D.
Plaintiff/Counter-Defendants/Appellees	)	
VS.	)	C. A. No. 02A01-9409-CH-00219
CHARLES E. NOVEL and, SANDRA L. NOVEL,	)	
Defendants/Counter-Plaintiffs/Appellants	)	

From the Chancery Court of Shelby County at Memphis.
Honorable Neal Small, Chancellor

FILED

December 21, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

James B. Summers,
Richard H. Allen,
NEELY, GREEN, FARGARSON & BROOKE, Memphis, Tennessee
Attorney for Defendants/Counter-Plaintiffs/Appellants.

Blanchard E. Tual, Memphis, Tennessee
Attorney for Plaintiffs/Counter-Defendants/Appellees.

OPINION FILED:

AFFIRMED

FARMER, J.

CRAWFORD, P.J., W.S. : (Concurs)

TOMLIN, Sp. J. : (Concurs)

This is a breach of contract case involving the sale of real property. After the buyers failed to close on the property, the sellers initiated the present action seeking money damages. The buyers counterclaimed alleging fraud, violation of Tennessee's Consumer Protection Act and/or negligent misrepresentation. A bench trial on the merits resulted in a damages award for the sellers in the amount of $53,484.92 and a dismissal of the counterclaim. The trial court expressly found no misrepresentation by the sellers. The buyers have appealed. For reasons hereinafter set forth, we affirm.

On February 28, 1992, Charles E. and Sandra L. Novel ("Novels" or "Appellants"), contracted to purchase the home of Robert L. and Marilyn M. Brannon ("Brannons" or "Appellees"), located in the Gardens of River Oaks Subdivision, at 440 River Oaks Place, Memphis, for a purchase price of $432,500. Sweetbriar Creek is located approximately 20 feet from the rear of the property. Appellants deposited $7,500 as earnest money, with the closing scheduled on or before June 6, 1992. The closing was expressly made contingent upon the appellants obtaining loan approval and an appraisal for at least the sales price, within a time certain.

Appellees filed their lawsuit on July 7, 1992, seeking to recover the earnest money, all compensatory damages and related expenses[1] incurred as a result of Appellants' failure to close and their attorney's fees. For answer, Appellants denied that all contingencies in the contract had been met; admitted informing their realtor, Bruce Baskette, by written notice on May 22, 1992, that they would not close on the property; and affirmatively alleged that Appellees negligently misrepresented the property and fraudulently concealed material facts which induced them to enter into the contract. Appellants' counterclaim alleged that subsequent to the contract's execution, but prior to closing, they discovered the proposed concrete channelization of Sweetbriar Creek. Appellants alleged that Appellees never informed them of this construction, of which they knew or had reason to know, and which "dramatically change[d] the reason for [Appellants] entering into [the] [c]ontract . . . ." Appellants averred that the proposed construction would significantly change the aesthetic value of the backyard and adjacent property. Appellants sought rescission of the contract and recovery of compensatory and punitive damages as well as the earnest money.

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[1]Appellees ultimately sold their home in October 1992 for $425,000.

Appellants' amended answer and countercomplaint specifically alleges that such construction did not coincide with their future landscaping plans, which included "open[ing] up" the backyard property (by removing an existing fence) to reveal the "heavily treed, natural wildlife creek." They described the creek as a "focal point" of their future landscaping plans and alleged that Appellees' failure to disclose and/or concealment of the plans for the project, on which Appellants relied, deprived them of the opportunity to make an informed decision regarding the purchase of the property.

In ruling from the bench, the trial court reasoned as follows:

> [T]he Court has had difficulty following the [Appellants'] line of reasoning almost from the inception of the hearing. The proof offered seemed to emphasize that the ditch, which incidentally is not on the property. . . . But it was described alternatively by the [Appellant] as being a flowing creek in a pastoral setting which is going to be completely disrupted and changed and rendered a liability instead of an asset by the proposed concrete lining that apparently will be put in very shortly.
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> On the other hand, a good part of the proof was dealing with the erosion aspect of the creek, the disease that breeds in the area, the mosquitoes that are there and the stagnate water pools. Well, obviously there's all kinds of contrast there. You can't have a pastoral setting and a flowing creek when you've got a stagnated creek and mosquito infested, disease ridden, eroding type situation. . . . Certainly there has been some erosion but not the excessive type that some seem to feel.
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> . . . .
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> It just appears to this Court that if an astute businessman decided to breach a $400,000 contract that he just executed, that he's going to do his dead level best to smooth it over and try to justify what he's doing from the start. That was not the case here. . . . So when the selling agent gets a letter back in effect apologizing for backing out of the contract explaining that, you know, there are going to be some damages. I hope it won't be any more than the earnest money put up. And don't forget, you're supposed to mitigate your damages. This Court interprets that at least at that point to be an admission that you're not only breaching the contract but you know that you're going to be held accountable for it. I don't see any other way to look at it.
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> . . . . We have examples of contrasting statements and proof all through this. We have a buyer who has decided that because of a creek, either the disadvantages of the creek or the fact that there's going to be a concrete liner put in, it makes the first piece of property unacceptable, but yet another piece of property 3 or 400 feet down the creek is acceptable.[2] And the only difference, except maybe the shape

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[2]Proof at trial revealed that in July 1993, the Novels purchased a home at 400 River Oaks Road, located in the Gardens of River Oaks, for approximately $100,000 more than the contract

> of the lot and the house itself, is the fact that the second piece of property is a greater distance from the creek than the first piece of property. Neither piece of property abuts the creek.
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> . . . .
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> But there has to be something in the Court's opinion that accounts for the change in opinion of the [Appellant] buyers' opinion of this property . . . . the only thing that the Court could figure out had practically nothing to do with the creek but rather with the layout of the two lots and the configuration of the houses and other improvements on the property.
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> . . . .
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> It just seems to this Court from all the proof that the reason, the most likely reason that . . . the [Appellants] decided not to go through with this lot was not the situation with the creek, what the creek looked like or what the creek attributes or liabilities were, but rather the size, shape of the lot and the configuration of the improvements to the lot which would, granted, make it very difficult to landscape the back part of that lot in such a way that it would really add to overall appearance of the house and the backyard, ...

The trial court was also impressed by the fact that the concrete channelization would eliminate any of the Novels' expressed concerns regarding erosion, mosquitoes, stagnate water and disease. The court viewed such construction as "a positive rather than a negative to [the subject] property as well as all the property around it" and did not consider it a material fact that had to be disclosed. As to the advantages of a "free flowing creek," the court found them "almost negligible," in this case, considering the fact that the property owners could not even see it, with it being "twelve feet underground almost."

We perceive the issue on appeal as whether the trial court erred in holding Appellants in breach of the contract and awarding damages to Appellees. Our review is in accordance with Rule 13(d) T.R.A.P., which provides for a ***de novo*** review, accompanied by a presumption of correctness of the trial court's findings of fact, unless the evidence preponderates otherwise. The record includes Mr. Novel's May 22, 1992 correspondence to his realtor, informing him of his intention not to close on the property. Novel concludes the letter by stating, "Sandy and I apologize for the inconvenience this has caused." On June 2, 1992, counsel for Appellants informed the appellees' attorney:

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price on the Brannon home.

> [The Novels] are not in a position to purchase your clients' home . . . . Therefore, the residence should be placed back on the market and sold . . . .
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> . . . .
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> My client expects Mr. Brannon to make every effort to mitigate any alleged damages which may result from the transaction . . . .

On June 25, 1992, Mr. Novel wrote his real estate agency's president explaining that he and his wife had not detailed the reasons for their decision so that they could "remove [them]selves amicably." Novel then makes reference to an appraisal conducted by the Shelby County Assessor's office valuing the property "for a good bit less than the purchase price" and suggests that both realty agencies involved in the transaction were aware of the lower appraisal at the time the parties were in negotiations regarding the sale. Finally, in correspondence to counsel for the Brannons' realtor,[3] dated July 28, 1992, Appellants' counsel states:

> As you are aware, the [contract] was contingent upon [the Novels] being able to obtain loan approval and an appraisal for at least the sales price in the contract. Unfortunately, the bank did not grant loan approval nor was an appraisal obtained for at least the sales price of the contract. Further, at the time the agreement was entered into between the parties, [the Brannons] failed to disclose the future construction and enlargement of the drainage ditch running through the property. Obviously, this information should have been legally disclosed.

At trial, Mr. Novel was asked, "was there any other reason, other than the proposed channelization of Sweetbriar Creek, that caused you to not go forward with that contract?", to which he responded, "[n]o sir, there was not."[4]

From the trial court's ruling, it is clear that he considered this simply a case of buyers' remorse and that the Novels' failure to close was not due to any of their purported reasons, but because they found a more preferred home after execution of the contract. The record indicates that

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[3]Actions pursued by and against the Brannons' real estate agency were subsequently dismissed.

[4]It is not disputed that Mr. Brannon was aware of the proposed channelization prior to execution of the contract, but did not disclose the information to the Novels.

the Novels initially provided no explanation for their failure to go forward with the contract. They argue that they were never asked to explain their decision and simply failed to extend a reason, hoping to end things amicably. Mr. Baskette, indeed, testified that he did not ask for an explanation when Appellants informed him of their intention not to proceed. Once reasons were extended, they ranged from an inadequate appraisal of the property by the county tax assessor (prior to the filing of the lawsuit), to a failure to meet the contingencies provided for in the contract[5] and the Brannons' failure to disclose information pertaining to the proposed channelization (asserted initially by counsel in correspondence subsequent to the filing of the lawsuit) and, finally, to the Brannons' failure to disclose erosion and flooding problems associated with the area (asserted at trial).

On appeal, the Novels contend that they did not discover the eroding and flooding problems until shortly before trial in February 1994, thus, explaining their actions in not setting forth these reasons in their original and amended pleadings. As previously indicated, however, Mr. Novel considered the proposed channelization the only reason for the failure to close. The record reveals that the Novels discovered this proposed project no later than May 1992, but did not relate that their failure to proceed was due to the Brannons' failure to disclose such until counsel's July 28, 1992 correspondence, after suit was filed. Apparently, this "eleventh hour" defense was not accepted by the trial judge after hearing all the testimony and discerning each witness' credibility. We must agree as we find the Novels' initial letter to their agent as well as their attorney's correspondence with counsel for the Brannons, to clearly suggest that the Novels considered themselves accountable for their actions. We conclude that a preponderance of the evidence supports the trial court's findings.

We, therefore, affirm the judgment of the trial court and access costs to Charles E. and Sandra L. Novel, for which execution may issue if necessary.

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[5]At trial, Mr. Novel testified that "the financing was in place" for the closing and that the second contingency was waived. A March 6, 1992 letter from the Novels' realtor to the Brannons' real estate agent confirms this when stating: "Mr. Novel has elected not to have the house appraised at this time thus waiving the appraisal requirement in our contract."

FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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TOMLIN, Sp. J. (Concurs)