

2020 IL App (2d) 190686-U
No. 2-19-0686
Order filed December 14, 2020

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

RALEIGH KALBFLEISCH and)	Appeal from the Circuit Court
WILLIAM KALBFLEISCH,)	of Du Page County.
)	
Plaintiffs-Appellees and)	
Cross-Appellants,)	
v.)	No. 16-L-364
)	
MARIE G. GIAMBRONE,)	
)	Honorable
Defendant-Appellant and)	Dorothy French Mallen,
Cross-Appellee.)	Judge, Presiding.

PRESIDING JUSTICE BRIDGES delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in *sua sponte* vacating its directed finding against plaintiffs on their breach-of-contract claim, where the court based the vacatur on a point that plaintiffs could have raised, but did not, in opposing the motion for a directed finding.

¶ 2 Defendant, Marie G. Giambrone, appeals from the judgment of the circuit court of Du Page County awarding plaintiffs, Raleigh and William Kalbfleisch, money damages and attorney fees on their claim that defendant breached a contract for the sale of a home by failing to disclose that

the home's windows leaked rain water. Because the trial court erred in awarding damages and attorney fees under a breach-of-contract theory, we reverse.

¶ 3

I. BACKGROUND

¶ 4 Plaintiffs filed a three-count complaint seeking damages and attorney fees against defendant based on undisclosed defects in a home that plaintiffs purchased from defendant. Count I pled common-law fraud, count II pled a violation of the Residential Real Property Disclosure Act (Act) 765 ILCS 77/1 *et seq.* (West 2014)), and count III pled a breach of the real estate sales contract. The alleged defects were leaking upstairs windows, a dangerous condition in a brick chimney façade, and a leaking toilet in the second-story master bathroom.

¶ 5 The following facts were established at the bench trial. Defendant owned a home at 534 Parkside Drive in Carol Stream.¹ She listed it for sale in the spring of 2015. Plaintiffs were interested in purchasing a home.

¶ 6 In April 2015, Raleigh, along with her real estate agent, walked through the home. According to Raleigh, all of the windows were open and there were plug-in air fresheners in every room. She did not smell or observe anything unusual during that visit.

¶ 7 Later in April 2015, Raleigh, her husband William, and their son visited the home again. During that second visit, neither Raleigh nor William smelled or observed anything unusual. Again, all the windows were open and there were plug-in air fresheners in every room.

¹ We note that, although defendant lived there with her husband, she was the sole owner of the home.

¶ 8 On April 23, 2015, the parties entered a contract for sale and purchase of the home. Included with the contract was a disclosure statement under the Act. The statement disclosed no knowledge of any defects in the home's windows or of any water leakage from any windows.

¶ 9 Plaintiffs obtained a home inspection report that did not indicate any problems with any windows or any evidence of water leakage. A wood-destroying-insect inspection also did not reveal any insect-related issues.

¶ 10 On May 29, 2015, the parties closed the sale. Because they needed to finish up the sale of their current home, plaintiffs did not move into the Parkside Drive residence until 10 days after the closing.

¶ 11 When plaintiffs entered the home, they immediately detected a moldy, musty, wet-dog, smell. Because they had planned to do some remodeling, including installing new carpeting in all upstairs bedrooms, they began to remove the upstairs carpeting. When they did, they discovered extensive water stains on the backside of the carpet and wet and rotting wood on the tack strips of the carpet. They discussed the situation with their home remodeling contractor who suggested that they cut away some of the drywall around the windows. In doing so, they discovered more wet and rotting wood and an infestation of carpenter ants.

¶ 12 When the contractor performed a water test, which involved running a water hose on the outside of an upstairs bedroom window, the water immediately leaked around the window frame. Raleigh could see the water coming into the bedroom. When the contractor examined the windows closely, he discovered that the windows had been installed defectively in that they did not have the proper framing and water barriers installed. According to the contractor, the windows had been leaking for at least eight months before the sale of the home.

¶ 13 The evidence also showed that, when wall mirrors flanking the fireplace were removed, the brick chimney façade was no longer safely attached to the wall. Plaintiffs also discovered that the toilet flange in the master bedroom was leaking water into the room below.

¶ 14 At the close of plaintiffs' case, defendant moved for a directed finding on all three counts. After plaintiffs argued against the motion, the trial court asked plaintiffs' counsel, as to count III, what provision of the contract he was claiming was breached. Counsel answered that it was paragraph five of the contract, in which defendant stated that she owned the fixtures in the home, such as heating, electrical, and plumbing, and that they were in operating condition. When the court asked in what way the toilet was not in operating condition, counsel answered that there was evidence that the toilet leaked around the base. When the court asked counsel if there was "[a]nything else," he responded, "I won't deny, Judge. For the contract action, that's about *** what we have, Judge." The court then granted in its entirety defendant's motion for a directed finding as to count III, because, although the toilet leaked, there was no evidence that it was not functioning. The court also granted a directed finding as to count I to the extent that it was based on the leaking toilet and the condition of the brick chimney façade. The court then denied the motion for a directed finding as to counts I and II to the extent that those counts were premised upon the leaking windows. The court added that the "only thing that defense has to defend against is the water intrusion on Count I and Count II."

¶ 15 In her case in chief, defendant testified that, in 2002, Feldco replaced all upstairs windows in the home. According to her husband, he and defendant had the windows replaced because the upstairs was hard to heat and cool and not because water leaked through the windows. Both defendant and her husband denied knowing that the upstairs bedroom carpeting was ever wet or that any of the replacement windows leaked when it rained. Defendant testified that they kept the

windows closed at all times because of her husband's heart condition. Her husband testified that they kept the windows closed because of their daughter's allergies. According to defendant's husband, who was present on the days when plaintiffs visited the home, all windows were closed during those visits. He further testified that, although he had the windows caulked several years after they had been installed, he did so not because they leaked water but because the rooms were drafty, particularly his daughter's room. He explained that by drafty he meant hard to heat.

¶ 16 During closing argument, plaintiffs' counsel reminded the trial court that there were only two counts at issue, count I (common-law fraud) and count II (violation of the Act). Defense counsel likewise reminded the court that count III had been dismissed and that the only remaining issue as to counts I and II was related to the windows. The court took the matter under advisement and stated that it would issue a written order. The court also reserved the issue of attorney fees until after it ruled on the issues of liability and damages.

¶ 17 On April 10, 2019, the trial court issued a written order stating that it had questions regarding three issues: (1) whether plaintiffs had to establish a violation of the Act by a preponderance of the evidence or by clear and convincing evidence, (2) whether a violation of the Act could also be a breach of the sales contract, and (3) what standard of proof would govern a breach-of-contract claim based on a violation of the Act. The court set April 17, 2019, as its date for decision and invited the parties to provide, on or before that date, any authority they wished on the foregoing issues, including whether the court should vacate its prior directed finding as to count III.

¶ 18 On April 17, 2019, the trial court issued a written order vacating its prior directed finding as to count III and reinstating that count. The order continued the matter to May 21, 2019, and

added that defendant could reopen the proofs as to count III and that both parties could make additional arguments regarding count III.

¶ 19 On May 21, 2019, the trial court issued a memorandum opinion. That same day, the parties appeared before the trial court for decision. Defense counsel declined the court's invitation to present further evidence on count III. When the trial court invited the parties to present further argument on count III, plaintiffs' counsel declined but defense counsel accepted. Defense counsel commented that the only remaining issue was the burden of proof. Counsel maintained that nondisclosure alone would not establish a breach of contract under count III; rather, plaintiffs would still have to prove a violation of the Act. The court noted that it had found no cases discussing the proper standard of proof for a breach-of-contract claim based on a violation of the Act.

¶ 20 The court proceeded to deliver its decision. The court ruled that plaintiffs had not met their burden of proving, by clear and convincing evidence, that defendant had committed common-law fraud as alleged in count I or had violated the Act as alleged in count II. Thus, the court entered judgment in favor of defendants on counts I and II.

¶ 21 The court then turned to count III, which it interpreted as a claim for breach of contract based on a violation of the Act. The court determined, "having no other authority to the contrary, that the burden of proof for a breach of contract [claim] is by the preponderance of the evidence." Thus, though the breach-of-contract claim in count III was predicated on a violation of the Act, and so plaintiffs had to establish actual knowledge, their burden of proof under count III was preponderance-of-the-evidence, not clear-and-convincing. Applying that standard, the court found that plaintiffs had proved, as required by the Act, that defendant knew that there was a material defect in the windows and yet failed to disclose it. Thus, the court entered judgment in favor of

plaintiff on count III. The court awarded damages to plaintiffs in the amount of \$10,309.69. The court continued the matter for a hearing on attorney fees.

¶ 22 Following the hearing on attorney fees, the trial court denied defendant's petition for attorney fees as the prevailing party under count II and awarded plaintiffs \$13,240 in attorney fees under count III. Defendant, in turn, filed a timely notice of appeal. Plaintiffs filed a cross-appeal.

¶ 23

II. ANALYSIS

¶ 24 On appeal, defendant contends that (1) the trial court applied the wrong standard of proof to the breach-of-contract claim in count III, (2) the court erred in vacating its directed finding as to count III and later ruling that plaintiffs proved a breach of the sales contract based on a violation of the Act, (3) the court erred in allowing plaintiffs to amend their complaint to request attorney fees under count III, and (4) the court erred in awarding plaintiffs \$13,240 in attorney fees.

¶ 25 Plaintiffs have filed neither a brief in support of their cross-appeal nor a response brief in defendant's appeal. Because plaintiffs have not filed a brief in support of their cross-appeal, they have forfeited any claims in that regard. See *Klesowitch v. Smith*, 2016 IL App (1st) 150414, ¶ 49; see also *People v. Mannino*, 184 Ill. App 3d 130, 131 (1989) (failure to file a brief in support of cross-appeal is failure to perfect that appeal). As for plaintiffs' failure to file a response brief, because the record is simple and the claimed errors are such that we can easily decide them without the aid of an appellee's brief, we will decide the merits of the appeal. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 26 Because it is dispositive, we begin with defendant's contention that the trial court erred in *sua sponte* vacating its directed finding on count III and later ruling that plaintiffs had proved a breach-of-contract claim based on a violation of the Act.

¶ 27 Plaintiffs realleged in count III of their complaint that defendant attempted to conceal and hide evidence of the leaky windows. They further alleged in count III that the real estate sales contract provided for disclosures under the Act and that defendant's violation of the Act constituted a breach of the contract.

¶ 28 However, when defendant moved for a directed finding on all three counts, including the contract claim in count III, the trial court asked plaintiffs' counsel what specific provisions of the contract he claimed were breached. Counsel pointed to defendant's representation in the contract that the fixtures, including the toilet, were operational. When the court asked plaintiffs' counsel if there was "[a]nything else," counsel responded that, regarding the contract claim, "that's about *** what we have, Judge." Counsel never mentioned any claim in count III regarding the leaky windows or a violation of the Act. Based on counsel's response, the court found that there was no evidence that the toilet did not function, and thus, entered a directed finding on count III. Plaintiffs neither objected to that ruling nor offered any further argument regarding count III. After denying defendant's motion for a directed verdict on counts I and II to the extent they were premised upon the leaky windows, the court added that the only remaining issue for trial was the leaky-windows claim as alleged in counts I and II. Again, plaintiffs' counsel did not object. Finally, following the close of evidence, plaintiffs never moved for reconsideration of the directed finding on count III.

¶ 29 Nonetheless, the trial court, without any motion from plaintiffs to do so, reinstated count III. Plaintiffs had already been given the opportunity to assert their claim in count III based on the leaky windows and declined to do so. Trial courts should not permit a litigant to stand mute, lose a motion, and then frantically gather new material to show that the court erred in its ruling. *Liceaga v. Baez*, 2019 IL App (1st) 181170, ¶ 25. Here, plaintiffs did not attempt to demonstrate error in

the grant of the directed finding. Nor did they need to, for the trial court effectively acted on behalf of plaintiffs in *sua sponte* reinstating count III. This itself was error. Because the trial court erred in reinstating count III, it necessarily erred in granting plaintiffs relief on the breach-of-contract claim. Thus, we reverse the judgment as to damages on count III.

¶ 30 We turn next to the issue of attorney fees. A plaintiff seeking an award of attorney fees has the burden of proving an entitlement to such fees. *Kroot v. Chan*, 2019 IL App (1st) 181392, ¶ 5. At common law, the unsuccessful party in a civil action ordinarily is not liable for the payment of attorney fees incurred by the successful party. *Kroot*, 2019 IL App (1st) 181392, ¶ 5. In the absence of a statute providing otherwise, attorney fees are not allowable. *Kroot*, 2019 IL App (1st) 181392, ¶ 5. However, section 55 of the Act expressly provides for reasonable attorney fees to the prevailing party. 765 ILCS 77/55 (West 2014).

¶ 31 In this case, however, plaintiffs did not prevail under the Act. Accordingly, they were not entitled to fees under section 55 for their claim under count II or count III. Thus, we need not determine if the fees awarded were otherwise reasonable.

¶ 32 **III. CONCLUSION**

¶ 33 For the reasons stated, we reverse the judgment of the circuit court of Du Page County.

¶ 34 Reversed.