THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ruth Roberts, ... Appellant,

v.

Edgar Leo Waters, Mary Gertrude Waters, Howell and Associates, Inc., Charles R. Ratledge, Special Properties, Inc., and Baxter B. Kelly, ... Defendants,

of Whom Howell and Associates, Inc., and Charles R. Ratledge are . . . . Respondents.

Appeal From Charleston County
Daniel E. Martin, Sr., Circuit Court Judge

Unpublished Opinion No. 98-UP-274
Heard May 7, 1998 - Filed May 27, 1998

REVERSED AND REMANDED

Justin O'Toole Lucey, of Mt. Pleasant, for appellant.

William C. Cleveland and Gina Lynn Campano, of Haynsworth, Marion, McKay & Guerard, of Charleston, for respondents.

PER CURIAM: Ruth Roberts brought this action, which relates to the sale of residential real estate, against sellers Edgar and Mary Waters, Roberts's real estate agent Special Properties, Inc., closing attorney Baxter Kelly, and selling agent Charles Ratledge and his employer Howell and Associates, Inc. ("Howell"). Roberts appeals the trial court's grant of summary judgment in favor of Ratledge and Howell on her negligent misrepresentation claim. We reverse.

ROBERTS v. WATERS

FACTS

In late 1993, Roberts decided to purchase property from Edgar and Mary Waters. The property had a septic system on it instead of being serviced by a municipal sewer system. Roberts expressed to her real estate agent her requirement that the property "perk" so that she could place a residence on the lot. Her agent conveyed this requirement to the Waterses' listing agent, Ratledge. At all times, Ratledge stated the property perked and the septic tank worked.

Roberts included in her offer that the contract was contingent upon the septic tank working. Edgar Waters, however, refused to accept this contingency. He crossed through the provision and added that the septic tank was working to the best of his knowledge when the last tenant lived there more than two years before.

In an apparent effort to save the sale, on March 7, 1994, Ratledge met with a representative of the Department of Health and Environmental Control, who inspected the property. Because there was no load on the existing system, the DHEC representative could not determine whether the existing system would work. He advised Ratledge of this problem at the site. He also informed Ratledge that the site and the existing system did not meet DHEC standards. In addition, he advised Ratledge that DHEC would not withhold power to the property but he did not expect the existing system to function properly. The representative repeated this information in a letter to Ratledge written the next day. Ratledge maintained that he faxed this letter to the closing attorney, Baxter Kelly, upon receipt.

After the meeting with the DHEC representative, Ratledge informed Roberts's real estate agent that the property passed DHEC inspection and that the septic system worked. Roberts then accepted the revised contract. On March 11, 1994, she closed on the property. At the closing, Roberts's real estate agent and attorney Kelly questioned Ratledge about the DHEC inspection. Ratledge stated that he did not have his copy of the representative's letter, but would forward a copy after the closing, and he represented that the property had "passed" the DHEC inspection. He did not mention he had faxed a copy of the letter to Kelly.

In granting Ratledge and Howell summary judgment, the trial court ruled Roberts could not have relied on Ratledge's representations because (1) she did not bargain in her contract that the property would pass the DHEC test and (2) the closing attorney's knowledge of the results of the test through the faxed letter was imputed to her.[1]

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[1] The trial court characterized Roberts's claim as one for negligent misrepresentation. Because Roberts did not challenge this ruling with a post-trial motion, she cannot assert on appeal that her cause of action is for intentional rather than negligent

DISCUSSION

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Wilson v. Moseley, 327 S.C. 144, 488 S.E.2d 862 (1997). In ruling on a motion for summary judgment, the court must view the evidence and the inferences that can be drawn therefrom in the light most favorable to the non-moving party. Id.

A. Negligent Misrepresentation

To defeat Ratledge's motion for summary judgment, Roberts must show the existence of some issue of material fact from which a jury could infer she justifiably relied upon Ratledge's representations. See AMA Management Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992). We believe she presented evidence from which the jury could so infer.

Ratledge arranged the meeting with the DHEC representative because Roberts refused to agree to the Waterses' counter-offer, which did not include a guarantee that the septic system would perk. Although the DHEC representative informed Ratledge that the system would likely fail, Ratledge informed Roberts that the property passed the DHEC inspection and that the septic system worked fine. Roberts accepted the revised contract only after Ratledge's representation. Although Ratledge knew he had faxed the DHEC report to the closing attorney, at the closing, upon questioning about the report, Ratledge failed to inform Roberts that the report had already been faxed.

Ratledge relies upon AMA Management Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992). We find Strasburger distinguishable. There, the purchaser of an assignment of a proof of a claim in bankruptcy sued the seller because the guaranties associated with the claim were invalid. AMA, the purchaser, argued the seller misrepresented that the guaranties were valid in order to induce AMA to take the assignment. The seller, through its negotiator, refused to warrant in the written assignment agreement that the guaranties were valid, but the seller's negotiator assured AMA the guaranties were good. This court found AMA could not reasonably have relied upon the negotiator's statements "as a substitute for a contractual warranty concerning the guaranties." Id. at 225, 420 S.E.2d at 875.

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misrepresentation. Cash v. Cash, 320 S.C. 388, 465 S.E.2d 371 (Ct. App. 1995) (holding failure to make post-trial motion renders issue procedurally barred).

This case, however, involves a purchaser suing not the seller, but the seller's agent and agency, who are not parties to the contract. Roberts has sued Ratledge and Howell for Ratledge's affirmative act to induce Roberts to accept the Waterses' counter-offer. Further, in Strasburger the parties to the contract were represented by negotiators. The seller's negotiator allegedly misrepresented the validity of the guaranties to AMA's negotiator. Here, however, the seller directly refused the buyer's request for a guarantee that the property's septic system worked. The seller's agent, Ratledge, then attempted to induce Roberts to purchase the property by representing to her that the system worked.

Although no liability exists for "matters which [Roberts] could ascertain on h[er] own in the exercise of due diligence," id. at 223, 420 S.E.2d at 874, we believe a question of fact exists regarding whether Roberts should have exercised due diligence in the face of Ratledge's affirmative action to misrepresent the septic system's condition.

B. Closing Attorney's Agency

The trial court found that the closing attorney was Roberts's agent and that she, therefore, had constructive notice of the DHEC report faxed to the closing attorney.

We hold the jury should decide whether the closing attorney was Roberts's agent. Ratledge argues that Roberts chose the closing attorney, offering the Agreement to Buy and Sell as evidence of agency. Roberts, however, offers the Settlement Statement, which lists Kelly as the "settlement agent," as evidence that the closing attorney was the seller's attorney. Neither document, however, is conclusive on the issue; therefore, a jury question exists. See Jones v. Thomas & Hill, Inc., 265 S.C. 66, 216 S.E.2d 871 (1975) (holding question of agency is question of fact); cf. McFarlane v. Manly, 274 S.C. 392, 264 S.E.2d 838 (1980) (holding summary judgment improper when parties disputed whether termite inspector was agent of buyer).

REVERSED AND REMANDED.

HOWELL, C.J., CURETON and GOOLSBY, JJ., concur.