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2018 IL App (3d) 170192-U

Order filed February 28, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

KELLI BACON,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Plaintiff-Appellee,)	La Salle County, Illinois.
)	
v.)	Appeal No. 3-17-0192
)	Circuit No. 14-LM-388
DALE RALSTON and JUDY RALSTON,)	
)	Honorable
Defendants-Appellants.)	Joseph P. Hettel,
)	Judge, presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion in denying defendants' request for attorney fees made pursuant to section 55 of the Residential Real Property Disclosure Act (765 ILCS 77/55 (West 2016)) and Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018).
- ¶ 2 Plaintiff, Kelli Bacon, filed a three-count complaint against defendants, Dale and Judy Ralston, stemming from plaintiff purchasing a home from defendants. Following a bench trial, the trial court entered a judgment in favor of defendants, finding plaintiff failed to prove her claims at trial. The trial court denied defendants' subsequent request for the trial court to award

them attorney fees. Defendants appeal the trial court's denial of their request for attorney fees. We affirm.

¶ 3

FACTS

¶ 4

On June 6, 2013, plaintiff entered into a contract with defendants for plaintiff to purchase defendants' home located in Streator, Illinois. In a disclosure report executed by defendants on May 23, 2013, defendants had indicated that they had no knowledge of unsafe conditions relating to asbestos on the property. On June 11, 2013, plaintiff had the home inspected prior to closing on the purchase of the home. The home inspector noted, among other things, that the asbestos wrap on the heating ducts posed a health hazard and should be removed. Based on the inspection, plaintiff requested that the asbestos be remediated. On August 7, 2013, the parties closed on the sale of the home.

¶ 5

On August 7, 2014, the plaintiff filed a complaint for damages from defendants. In count I, plaintiff alleged that defendants violated the Illinois Residential Real Property Disclosure Act (Disclosure Act) (765 ILCS 77/55 (West 2016)) because defendants personally removed the asbestos wrapping from the visible duct work but failed to remove any asbestos wrapping from the areas of the heating ducts that were not visible to the naked eye, which included the defendants having removed the asbestos wrap from the bottom of the heating ducts but not from the top of the same ducts; defendants failed to provide a supplemental disclosure indicating that not all of the asbestos had been remediated; defendants knew or should have known of the presence of the remaining asbestos on the property because the asbestos was only partially removed from some of the heating ducts; and plaintiff became aware of the significant nature of the asbestos issue after taking possession of the home and expending in excess of \$11,000 to remediate the remaining asbestos from the property. In count II, plaintiff alleged defendants

made fraudulent misrepresentations that the asbestos repair request had been completed by proceeding with the real estate closing when the asbestos repair was a necessary condition of the closing; by only partially removing the asbestos in visible areas with the intent to induce plaintiff into completing the purchase of the real estate; and by intentionally misrepresenting the status of the asbestos. In count III, plaintiff alleged that defendants had negligently removed the asbestos wrap from the visible areas of the duct work, ripping and tearing the asbestos wrap in such a manner that asbestos particles were released into the air and pieces of asbestos wrap were left in the basement and on the front porch, creating a dangerous health hazard and necessitating a licensed asbestos removal company to complete the asbestos removal at the costs of over \$11,000.

¶ 6 At trial, plaintiff testified that prior to closing she was in the house only for the showing, the home inspection, and the final walk-through on the day before the closing. Her home inspector showed her the asbestos wrap at specific points in the home. The inspection report only had two photographs of the asbestos-wrapped ducts because there was so much asbestos wrap it could not fit on the report. Plaintiff testified that the specific portions of the asbestos wrap that the inspector had noted, as far as plaintiff could see, had been removed prior to the closing. Plaintiff believed that all of the asbestos wrap in the home had been removed. After the closing, plaintiff was notified by her contractor that there was asbestos remaining in the home. Plaintiff hired Clyde Keller of Asbestos Project Management to remediate the asbestos. Plaintiff testified that she did not have any evidence that defendants knew of asbestos in the home prior to the closing.

¶ 7 Keller, plaintiff's asbestos remediation expert, testified that he collected samples from the home on September 3, 2013, and the laboratory report indicated an asbestos level of 80%, with

the legal limit being 1%. Keller testified that asbestos wrap was found in the basement on the outside and inside of the duct work and there was a trail of small pieces of asbestos from the basement out the front door. Keller testified that asbestos paper could also be seen through the floor grills, indicating asbestos wrap was also on the inside of the ductwork, “which is pretty rare.” Keller testified that asbestos on the inside of the duct work created much more of a potential and eminent “health hazard.” Keller testified that there had “obviously been a partial, unprofessional removal” of some of the asbestos, which was much worse than doing nothing because the torn material could become airborne. Keller testified that the ductwork had to be removed because the asbestos wrap had been glued to the ductwork, with remaining asbestos pieces stuck so that the area could not be decontaminated properly. Keller testified that asbestos wrap had been removed “up to a certain point” but it remained where it was harder to reach. Keller testified that he would absolutely not have recommended the plaintiff and her children live in the home prior to the asbestos removal because the potential for airborne asbestos was far too great. Keller testified that it was “clearly visible” that the asbestos wrap beyond the point of where it had been removed carried into the walls. After Keller removed the asbestos from the home, the air test was zero. Keller testified that more than 50% of the asbestos had been behind the wall but quite a bit of asbestos material was on the exposed ductwork in the basement. Keller testified that it was “obvious that something had happened in the basement because of the partial removal” and that it was “obvious that there was a trail [of asbestos pieces] going out the front door.”

¶ 8 Plaintiff’s husband testified that he and plaintiff have two children. He testified that the home inspection prior to the closing indicated asbestos was present in the home and defendants had agreed to have the asbestos removed. Plaintiff’s husband testified that he was present for the

final walk through of the home and it appeared that the ductwork had been cleaned and that the white paper substance (asbestos paper) looked like it had been removed from the ductwork. Plaintiff's husband testified that "it was a general walk through" and no ladders were used. At the closing, defendants did not indicate that they were unable to remove any of the asbestos. After the closing, plaintiff and her husband became aware that there may be asbestos remaining in the home when a contractor working on the house noticed a lining in the ductwork and indicated that it was asbestos paper. When Keller came to the home, he identified white paper-like fibers stuck to areas of the visible ductwork as being asbestos fibers. Keller also had observed small pieces of asbestos near the front door and mentioned that whoever had partially removed the asbestos appeared to have drug it out of the front door. Plaintiff's husband testified that he had no knowledge that defendants knew there was asbestos behind the walls prior to the closing and he did not know what defendants may have done prior to the closing to clean the property. Plaintiff's husband testified that during the final walk-through they were not looking for any debris on the floor and described the walk through as "pretty short and sweet."

¶ 9 The plaintiff's home inspector, Eric Kelley, testified that during the home inspection prior to closing, he found what appeared to be asbestos on the visible heating ducts in the basement. Kelley attached two pictures of the visible ductwork to his report. In Kelley's opinion, it was reasonable to believe that there was additional asbestos behind the walls but he could not have definitely known because he could not see through walls. Kelly discussed the asbestos with plaintiff in the basement during the inspection.

¶ 10 Plaintiff rested and presented no further evidence. At the close of plaintiff's evidence, defendants' attorney motioned for a directed finding in defendants' favor. Defendants' attorney argued that there was no evidence that defendants had removed the asbestos negligently or that

defendants were aware of unsafe conditions of asbestos behind the walls. Defendants' attorney argued that defendants had not been called to testify and there was no indication that they knew of the asbestos behind the walls or what they knew about the case.

¶ 11 The trial court found the evidence showed that plaintiff had become aware of the presence of the asbestos through her home inspector prior to closing. The trial court found "overwhelming circumstantial evidence" that defendants knew asbestos was present and that some type of a removal effort was made. The trial court concluded that plaintiff failed to prove defendants had knowledge that the remaining visible asbestos was a serious problem. The trial court found that plaintiff failed to establish a *prima facie* case as to all three counts of her complaint and entered a judgment in favor of defendant and against plaintiff, plus costs of suit.

¶ 12 On October 12, 2016, defendants filed a petition to recover attorney fees from plaintiff in the amount of \$11,831.64, with defendants alleging that plaintiff's complaint was not well-grounded in fact violation of Illinois Supreme Court Rule 137 and that the trial court may award reasonable attorney fees to them, as the prevailing party, pursuant to section 55 of the Disclosure Act (765 ILCS 77/55 (West 2016)). On February 1, 2017, a hearing on defendants' motion for attorney fees took place. The trial court found plaintiff's claims were not meritless, although plaintiff had failed to meet her burden of proof in order to prevail at trial. The trial court found that defendants' attorney fees were reasonable and necessary but denied defendants' motion for plaintiff to pay those attorney fees.

¶ 13 On February 24, 2017, defendants filed a motion to reconsider. Defendants argued that plaintiff had filed the complaint in bad faith because she knew her claim that defendants had negligently removed asbestos was false, there was no evidence to support her claim of defendants' violation of the Disclosure Act, and there was no evidence to support her claim of

fraudulent misrepresentation regarding defendants' alleged knowledge of the continued presence of asbestos in the property. The trial court denied the motion to reconsider. Defendants appealed.

¶ 14

ANALYSIS

¶ 15

On appeal, defendants argue that the trial court erred in denying their petition for attorney fees and erred in denying their motion to reconsider. Defendants argue that there was no evidence to support plaintiff's claims in Counts I and II that defendants knew of the presence of asbestos in the property. Defendants also argue that on the day plaintiff filed her complaint, she knew that the facts set forth in Count III were not true because, at trial, plaintiff and her husband had testified that the house was clean at the time of the final walk through and the debris found by the plaintiff's expert four weeks after the closing was generated by the plaintiff, not defendants. Defendants contend that the trial court abused its discretion in denying their request for attorney fees because plaintiff's testimony showed that she knew at the time she signed the complaint all three counts had no basis in fact.

¶ 16

We note that no appellee's brief was filed in this case. We, nonetheless, will address the merits of this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (in the absence of an appellee's brief, a reviewing court should address the appeal on the merits where the record is simple and the claimed errors are such that the court may easily decide the issues raised by the appellant).

¶ 17

Section 55 of the Disclosure Act provides:

“A person who knowingly violates or fails to perform any duty prescribed any provision of this Act or who discloses any information on the Residential Real Property Disclosure Report that he knows to be false shall be liable in the

amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party.” 765 ILCS 77/55 (West 2016).

¶ 18 Section 55 of the Disclosure Act is not limited to the award of attorney fees to a specific party but allows for the award of attorney fees to any “prevailing party.” *Id.*; *Miller v. Bizzell*, 311 Ill. App. 3d 971, 975 (2000). Either plaintiffs or defendants may recover fees under the Disclosure Act if they were the prevailing party. *Miller*, 311 Ill. App. 3d at 975. For a prevailing plaintiff to recover attorney fees, plaintiff must show knowing misconduct on the part of defendant. *Id.* at 976. A prevailing defendant seeking attorney fees should similarly be required to establish knowing misconduct on the part of the plaintiff. *Id.*

¶ 19 Awarding attorney fees pursuant to section 55 of the Disclosure Act is not mandatory, but lies within the discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. *Id.* In exercising its discretion in determining whether to award attorney fees under the Disclosure Act, the trial court should consider factors consistent with Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018). Under Rule 137, the court may impose sanctions, including an order to pay reasonable attorney fees if either party files a pleading, motion, or other document that: (1) to the best of the filing parties’ knowledge, information, and belief is not well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; or (2) the pleading, motion, or other document was interposed for an improper purpose, such as to harass, cause unnecessary delay, or cause a needless increase in the cost of litigation. The purpose of Rule 137 is not to penalize a party who is unsuccessful, but to deter frivolous pleadings or suits with no basis in law. *Miller*, 311 Ill. App. 3d at 976. Factors that a trial court may consider in determining whether to award attorney fees include: (1) the degree of bad faith by the opposing party; (2) whether the award of fees

would deter others from acting under similar circumstances; and (3) the relative merits of the parties' positions. *Id.* at 976-77.

¶ 20 Here, the trial court did not award attorney fees, finding that plaintiff's claims were not brought in bad faith and that plaintiff had simply failed to present sufficient evidence at trial to meet her burden of proof. See *Butler v. Harris*, 2014 IL App (5th) 130163, ¶¶ 28, 31 (fraud and a violation of the Disclosure Act must be proven by clear and convincing evidence); *State Farm Fire & Casualty Company v. Welbourne*, 2017 IL App (3d) 160231, ¶ 15 (to sustain a cause of action for negligence, a plaintiff must plead and prove his or her by a preponderance of the evidence). After reviewing the record in this case, we cannot say that plaintiff's claims were meritless or brought in bad faith. Accordingly, we conclude that the trial court did not court abuse its discretion in denying defendants' request for attorney fees and affirm the trial court's denial of defendants' request for attorney fees.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of La Salle County is affirmed.

¶ 23 Affirmed.