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**IN THE
COURT OF APPEALS OF INDIANA**

MITCHELL LYNN,

Appellant-Plaintiff,

vs.

JANET S. GREER and JAMES L. GREER,

Appellees-Defendants.

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No. 45A05-1102-PL-83

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Calvin D. Hawkins, Judge
Cause No. 45D02-0901-PL-65

SEPTEMBER 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Appellant Mitchell Lynn seeks review of the trial court's grant of Appellees Janet S. Greer and James L. Greer's ("the Greers") motion for judgment on the evidence. We affirm.

The Greers owned a house in Crown Point, Indiana. Janet Greer lived in the home for over forty years prior to the sale, and James also lived there for several decades. It is a ranch-style house, built on a concrete block foundation, with a crawl space underneath. There is a concrete patio and a detached garage behind the house.

In early 2007, Lynn and the Greers negotiated an agreement for the sale of the property. As part of the transaction, on January 26, 2007, the Greers filled out a "Residential Real Estate Sales Disclosure" ("the Disclosure"). Tr. Vol. 2, Ex. 5, p. 12. The Disclosure included the question, "Are there moisture and/or water problems in the basement, crawl space area, or any other area?" Id. at 13. The Greers checked a box indicating, "Do Not Know." Id. The Disclosure also included the following comments, handwritten by Janet Greer: "Every once in awhile Mr. Wirtz the plumber has to come and clear the sewer because the tree roots grow. Also, in a heavy rain water will come in the garage." Id.

Lynn hired a home inspector, who visited the property on June 26, 2007. The inspector noted in his report that the crawl space was in "Marginal" condition and that there was "Evidence of prior water penetration." Tr. Vol. 2., Ex. A, p. 1. According to the report, "Marginal" is defined as follows: "The system was marginally acceptable and may require imminent repair." Id. at 6. The inspector further noted in his report that there was water present in the crawl space at the time of inspection. Lynn did not provide

the report to the Greers and did not ask the Greers to make any repairs based on the report. On June 27, 2007, Lynn accepted the house in the condition described in the inspection reports.

After the sale, Lynn discovered that rainwater entered the crawl space through a buried electrical conduit that ran between the crawl space and the garage. On occasion, rainwater filled the crawl space to a depth of several inches. After discovering the rainwater infiltration, Lynn installed a concrete floor and a sump pump in the crawl space and replaced the concrete patio behind the house. Next, he sued the Greers, alleging that they had deceived him as to the nature and extent of water infiltration in the crawl space.

The case was tried to the bench. At the close of Lynn's case, the Greers filed a motion for judgment on the evidence. The trial court granted the Greers' motion, stating, "From the evidence that's been presented, I just don't find any fraud. I don't see it." Tr. p. 128. In a subsequent written order, the trial court determined that Lynn "failed to present a preponderance of evidence to find in [Lynn's] favor." Appellant's App. p. 7.

Before turning to the merits of the appeal, we note that a motion for judgment on the evidence is not proper in a trial to the bench. Michael v. Wolfe, 737 N.E.2d 820, 822 (Ind. Ct. App. 2000). Such a motion addresses the issue of whether there is sufficient evidence to justify submitting the case to a jury. Id. Because the case at bar was tried to the bench, the Greers' motion should be treated as a motion for involuntary dismissal pursuant to Indiana Trial Rule 41(B). Id. That rule provides, in relevant part:

After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer

evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision or subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.

Ind. Trial Rule 41(B). Pursuant to this rule, the trial court may weigh evidence, judge witness credibility, and decide whether the party with the burden of proof has established a right to relief during the case-in-chief. Michael, 737 N.E.2d at 822.

Our standard of review with regard to rulings on motions for involuntary dismissal pursuant to Indiana Trial Rule 41(B) is well-settled. This Court does not reweigh the evidence or judge the credibility of the witnesses; rather we only consider the evidence most favorable to the judgment and the reasonable inferences from that evidence. See Taflinger Farm v. Uhl, 815 N.E.2d 1015, 1017 (Ind. Ct. App. 2004). We will reverse the trial court only if the trial court's judgment is clearly erroneous. Id. at 1017-18.¹

Lynn contends that the Greers committed fraudulent misrepresentation. Pursuant to Indiana Code section 35-43-5-3(a) (1996), "A person who . . . knowingly or intentionally makes a false or misleading written statement with intent to obtain property . . . commits deception, a Class A misdemeanor." In addition, "If a person . . . suffers a

¹ Lynn notes that the Greers are arguing for the first time on appeal that the trial court's ruling was, in substance, a grant of involuntary dismissal under Trial Rule 41(B) rather than a grant of a motion for judgment on the evidence under Trial Rule 50. Lynn argues that this appeal should be reviewed as if from the grant of a motion for judgment on the evidence because the standard of review for a grant of involuntary dismissal is more favorable to the Greers, and they "should not be able to benefit from a poorly worded motion . . ." Appellant's Reply Br. p. 2. Regardless of the wording of the motion below, this Court is obligated to apply the appropriate standard of review to this appeal. Therefore, we reject Lynn's argument.

pecuniary loss as a result of a violation of IC 35-43, . . . the person may bring a civil action against the person who caused the loss” Ind. Code § 34-24-3-1 (1998).

To establish a cause of action for fraudulent misrepresentation, the plaintiff must demonstrate: (1) that the defendant made false statements of past or existing material facts; (2) that the defendant made such statements knowing them to be false or recklessly without knowledge as to their truth or falsity; (3) that the defendant made the statements to induce the plaintiff to act upon them; (4) that the plaintiff justifiably relied and acted upon the statements; and (5) that the plaintiff suffered injury. Breeden Revocable Trust v. Hoffmeister-Repp, 941 N.E.2d 1045, 1053 (Ind. Ct. App. 2010).

When selling a home, a homeowner “must complete and sign a disclosure form and submit the form to a prospective buyer before an offer for the sale of the residential real estate is accepted.” Ind. Code § 32-21-5-10(a) (2002). The seller must disclose “the known condition” of the foundation and the building structure, among other information. Ind. Code § 32-21-5-7(1) (2003). If, at the time the disclosure statement is executed and given to the buyer, “an item of information required to be disclosed is unknown or not available to the owner, the owner may state that the information is unknown.” Ind. Code § 32-21-5-12(b) (2002). A homeowner is not liable for any omission of information required to be disclosed to the buyer if the omission “was not within the actual knowledge of the owner.” Ind. Code § 32-21-5-11 (2002).

Lynn asserts that the trial court’s grant of judgment to the Greers was erroneous because he presented evidence that the Greers intentionally misled him in the Disclosure about the nature of water infiltration in the crawlspace. Specifically, Lynn claims that the

evidence at trial established that the Greers were aware prior to the sale that rainwater flowed into the crawl space via the buried electrical conduit, but they did not disclose that problem to him.

Viewing the facts in the light most favorable to the trial court's ruling, we cannot agree with Lynn's claim. At trial, Janet Greer conceded that in 2006, well before the parties' transaction, a plumber had told her that water flowed into the crawl space via a conduit. However, Janet had disagreed with the plumber's assessment, stating, "[I]t's impossible [that the conduit carried water into the crawl space] because there's no outside exposure to that line." Tr. p. 37. Furthermore, Janet denied being aware of water infiltration via the conduit at any time, asserting, "I can see, I can hear, and there wasn't." Id. She further stated, "I never had a problem with no drip, nothing." Id. at 43. In the absence of any observation of water entering the crawl space through the conduit, Janet concluded that she "had no reason" to mention the subject on the Disclosure. Id.

Janet conceded that water appeared in the crawl space on occasion, but she asserted that the infiltration was caused by the sewer pipe being clogged with tree roots and backing up sewage. When a backup occurred, she hired a plumber, Mr. Wirtz, to clear out the roots. James also stated that water infiltration in the crawl space was caused by tree roots blocking the sewer pipe. He further asserted that the infiltration problem stopped after Mr. Wirtz cleared out the roots.

Finally, Lynn argued at trial that the pitch of the patio in the backyard was tilted toward the house so that water pooled against the back of the house and entered the crawl space via the conduit. However, the contractor Lynn hired to tear out the patio stated that

although the patio was pitched toward the house, causing water to flow toward the house, a casual observer such as the Greers would not notice the pitch.

Based upon the foregoing discussion, there is an absence of evidence, or reasonable inferences to be drawn from the evidence, that the Greers knew that there was a problem with water infiltration via the conduit and knowingly or recklessly omitted any reference to the conduit in the Disclosure. Consequently, Lynn's claim for fraudulent misrepresentation must fail in regard to the conduit. See Reum v. Mercer, 817 N.E.2d 1267, 1273 (Ind. Ct. App. 2004) (concluding that the seller did not fraudulently fail to disclose to the buyer that the septic system had been repaired in the past because, at the time the seller executed the disclosure, she did not believe that there were problems with the septic system).

Lynn further claims that the Greers committed fraudulent misrepresentation by failing to adequately describe in the Disclosure the nature of the sewage backup into the crawl space. Specifically, Lynn argues that the Greers should have clearly stated that tree roots growing into the sewer line caused sewage backups, which resulted in standing water in the crawl space. In the Disclosure, the Greers stated, "Every once in awhile Mr. Wirtz the plumber has to come and clear the sewer because the tree roots grow." Tr. Vol. 2, Ex. 5, p. 13. It is reasonable to infer from this statement that the sewer pipe becomes blocked due to tree roots, and to further infer that the blockage will cause sewage backups. The Greers could have more thoroughly explained the consequences of tree roots growing in the sewer pipe, but their comment does not rise to the level of a false or

knowingly reckless statement or omission. Consequently, Lynn's claim for fraudulent misrepresentation as to the backups caused by the sewer line also fails.

Lynn cites several cases in support of his claim, but they are not controlling. This Court's decision in Hizer v. Holt, 937 N.E.2d 1 (Ind. Ct. App. 2010), addressed an appeal from the grant of a motion for summary judgment. Therefore, that case is distinguishable from the current case due to different standards of review in that the Hizer Court was required to consider the facts in the light most favorable to the nonmovant, and we are obligated to consider the evidence that is favorable to the judgment.

In Vanderwier v. Baker, 937 N.E.2d 396 (Ind. Ct. App. 2010), homebuyers sued the sellers for fraudulent misrepresentation on the sales disclosure form. Specifically, the homebuyers alleged that the sellers stated in the disclosure form that there was only minor water seepage in the garage and indicated no other water problems when, in fact, there had been prior flooding in the home's basement. After moving in, the buyers discovered water marks on the walls and rotted boards from prior damage. The damage was not discovered by the buyers' inspector prior to the sale because the sellers had concealed the damaged walls. After a bench trial, the trial court entered judgment for the buyers. On appeal, the sellers challenged the sufficiency of the evidence supporting the judgment. A panel of this Court affirmed the trial court's judgment, determining that the buyers demonstrated that the sellers had to have been aware of water infiltration problems in the past and that the sellers concealed signs of water infiltration from the buyers' inspector. See id. at 401.

By contrast, in the current case there is no evidence that the Greers impeded Lynn's inspector. To the contrary, Lynn's inspector examined the crawl space and noted on the report that water was present. In addition, in Vanderwier the buyers proved that the sellers had actual knowledge of water infiltration because the buyers' contractor noted that a person who had lived in the house for longer than a year would have seen some type of visible water. In the current case, Lynn's concrete contractor conceded that the pitch of the patio, which Lynn alleged caused water to flow toward the back of the house and into the buried conduit, would not have been visible to a casual observer. Furthermore, Janet Greer asserted that the conduit could not have been a source of water infiltration because it was not exposed, and she was not aware of water flowing into the crawl space via the conduit. Therefore, Vanderwier is distinguishable.

Again, the crucial factor is that the trial court as the trier of fact is empowered to weigh the evidence, to determine the facts, and to render judgment accordingly. The trial court did so here, and we are unable to hold that the decision is clearly erroneous.

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

NAJAM, J., and RILEY, J., concur.