HOMEBUILDERS AND CONSTRUCTION INDUSTRY ALERT

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Don’t Muck Up Your Case by Failing to Gather and Present the Right Evidence

By Tom Wert, Board Certified Specialist – Construction Law

On May 22, 2015, a Florida appellate court issued an opinion, which highlights the importance of gathering and presenting sufficient evidence to support claims, especially when bringing a claim for misrepresentation concerning a seller’s failure to disclose hidden defects in the sale of development property. *Eiman v. Sullivan*, 2015 WL 2432024 (Fla. 2d DCA May 22, 2015). In the sale of residential property, if a seller has knowledge of facts materially affecting the value of the property, which are not readily observable and are unknown to the purchaser, the seller is under a duty to disclose them to the purchaser. *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985). If the seller fails to do so, the purchaser may have a claim for fraud or misrepresentation against the seller. To hold the seller of property liable under *Johnson v. Davis* for failure to disclose a material defect, the buyer must prove by substantial, competent evidence the seller's actual knowledge of an undisclosed material defect. “Substantial competent evidence,” as defined by the Florida Supreme Court, means that “the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957).

In *Eiman*, purchasers of an undeveloped parcel of waterfront property brought a lawsuit against the sellers for misrepresentation based upon the sellers’ failure to disclose the existence of muck under the lot. Unbeknownst to the purchasers at the time of sale, the sellers had removed trees and stabilized part of the land near the shoreline as part of their planned construction of a home on the property. Ultimately, the sellers decided to purchase an existing house in a different area, instead of building on the property, and they sold the lot to the purchasers. After the sale, the purchasers discovered muck in the area where they planned to build their house, which required deep foundations and large timber piles to support construction of a house. This increased construction costs by $65,000 and, as a result, the purchasers sued the sellers for failing to disclose the adverse soil conditions.

In attempting to show that the sellers had actual knowledge of the muck on the lot, the purchasers presented the testimony of a geotechnical engineer, who testified that when he performed soil borings along the filled-in area, he observed a layer of silty soil, commonly referred to as “muck,” three feet below the surface. According to the engineer, the layer of muck appeared “dark in color” and its presence indicated that “something special would need to be done to prepare the site in order to build a residence on it.” The sellers’ lawyer asked the engineer: “If there were no fill dirt on top of that muck layer, would it be visible to the naked eye, what would it look like?” The engineer responded: “It could be if you were to walk on a site prior to the filling and you saw the exposed ground, it would appear very dark.”

The *Eiman* court held that the engineer’s testimony did not satisfy the knowledge element required by Johnson because his qualified statement that the muck could have been visible if one saw the exposed ground is not substantial, competent evidence of actual knowledge on the part of the sellers. The purchasers presented no evidence that, prior to the sellers filling in the portion of the property near the shoreline, the ground had been exposed or the muck was visible. Although one of the sellers testified he visited the property “several times” while it was being cleared and filled, there was no

testimony that he or any other witness observed dark soil in the area or that the seller even would have known what the dark soil was if he had observed it. Moreover, even if the sellers had observed dark soil underneath the filled-in area, there was no evidence that the sellers knew anything about the subsurface conditions in the specific area where the purchasers intended to build their home. Ultimately, the Second District Court of Appeal held that the presence of muck in the area which had been filled in by the sellers, which was not specifically located in the actual building site, was not material to whether the sellers should have disclosed the presence of muck under the building site and was not substantial competent evidence that the sellers had actual knowledge of muck on the property. Because the purchasers failed to present any evidence that the sellers had actual knowledge of the subsurface conditions, the court held that the trial court erred in finding the sellers liable under *Johnson*.

This case demonstrates the inherent difficulty in proving fraud claims: It is no simple task proving the intent or knowledge of the perpetrator. We simply cannot look into the head or mind of another person. The alleged fraudster will invariably say, "I didn't know about the defective condition at the time." Because knowledge and intent are subjective states of mind, courts permit these elements to be inferred from all of the facts and circumstances, i.e., to be proven by circumstantial evidence. Thus, it is critical for a claimant to develop and correctly present circumstantial evidence of the defendant's knowledge. To be persuasive, circumstantial evidence must (1) be relevant, i.e., not the presence of muck in an area away from the building site; (2) be cumulative, i.e., not one isolated piece of evidence that the sellers possibly knew there was muck near the shoreline; (3) be organized; and (4) exclude all plausible innocent explanations. The availability of such evidence should be intensely considered early in the legal process, preferably during the initial evaluation of the claim. Otherwise, claimants and their lawyers may find themselves in the undesirable position of pursuing a "mucked up" case, which is impossible to prove.

Please address any questions with regard to the subject matter of this Alert to the following Roetzel Construction Law attorneys.

Tom Wert
Board Certified Construction Law Attorney
Certified Circuit Court Mediator
Roetzel & Andress LPA
420 South Orange Avenue
CNL Center II, 7th Floor
Orlando, Florida. 32801
407.835.8548 | twert@ralaw.com

Bob Menzies
Practice Group Manager
Business Litigation
239.649.2701 | rmenzies@ralaw.com

Mike Furbush
Board Certified Specialist – Business Litigation
407.835.8557 | mfurbush@ralaw.com