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Contracts: Caveat Emptor in Real Estate Transactions

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CONTRACTS: CAVEAT EMPTOR IN REAL ESTATE TRANSACTIONS

Davis v. Dunn, 58 So.2d 539 (Fla. 1952)

Plaintiffs purchased defendants' house after being informed by defendants' broker that the house was in sound condition and that previous inspections showed no signs of termites. They paid part cash and executed a purchase money mortgage for the remainder of the purchase price. Four months after taking possession plaintiffs discovered that the house was heavily infested with termites and thereupon brought suit to rescind the sale and to cancel the mortgage on the ground of fraud. Defendants counterclaimed to foreclose the mortgage. Denying the recommendations of the special master that the sale be rescinded because of false representation as to material facts,[1] the circuit court found for defendants and entered a decree foreclosing the mortgage. On appeal, HELD, plaintiffs, having had full and ample opportunity to inspect the premises, had no right of reliance. Decree affirmed.

It has generally been held that a material misrepresentation of fact as to the quality or condition of real property furnishes an equitable ground for rescission.[2] This result follows even though the vendor believed it to be true and did not knowingly make the misrepresentation.[3] There is no right of reliance, however, when the misrepresentation is not a statement of fact but rather a mere qualitative expression of opinion, belief, or expectation.[4] Nevertheless, if the opinion is stated as an affirmation of fact, that is, in a positive

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[1]At pp. 540, 541 the special master's findings of fact are substantially set out.

[2]Smith v. Richards, 13 Pet. 26 (U.S. 1839); Rawlins v. Myers, 96 Neb. 819, 148 N.W. 915 (1914); 2 BLACK, RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS §425 (2d ed. 1929).

[3]Smith v. Richards, 13 Pet. 26, 36 (U.S. 1839); Peace River Phosphate Mining Co. v. Green, 102 Fla. 370, 135 So. 828 (1931); Jones v. Hardesty, Inc., 100 Fla. 155, 129 So. 497 (1930); Langley v. Irons Land and Devel. Co., 94 Fla. 1010, 114 So. 769 (1927). But see 3 POMEROY, EQUITY JURISPRUDENCE §888 (5th ed. 1941).

[4]*E.g.*, Johansson v. Stephanson, 154 U.S. 625 (1877); Glass v. Craig, 83 Fla. 408, 91 So. 332 (1922); Hart v. Marbury, 82 Fla. 317, 90 So. 173 (1921); Stackpole v. Hancock, 40 Fla. 362, 24 So. 914 (1898); 3 POMEROY, EQUITY JURISPRUDENCE §878 (5th ed. 1941); 29 MICH. L. REV. 1099 (1931). Expert opinions may be treated otherwise. See Harper and McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 952 (1938).

manner, the courts generally will construe the representation as one of fact, not opinion.[5]

Furthermore, it is well settled that even when the representation is one of fact the purchaser is under a duty to use ordinary care and diligence in ascertaining the truth of the representation;[6] thus clearly there is no right of reliance when the purchaser undertakes an independent examination,[7] or if he is an experienced person in the field of the misrepresentation,[8] or if the misrepresented defect is patent to any ordinary observer.[9] The cases nevertheless are in confusion as to when this duty to use ordinary care and diligence requires an inspection on the part of the purchaser. In *Williams v. McFadden*[10] the Florida Court held that an inspection was necessary even though inconvenient and unreasonable, requiring the purchaser to come to Florida from Kentucky to examine the property involved in order to determine the truth of the vendor's representations. This holding early established the view that the doctrine of caveat emptor was applicable to transactions involving realty. Later cases indicate that the duty of inspection exists only when sufficient opportunity is given the purchaser to inspect.[11] Even with this apparently rigid background, however, the Florida Court in *Morris v. Ingraffia*[12] held that the mere opportunity of inspection was not sufficient to make inspection a prerequisite to rescission.

The Court in the instant case apparently interprets the broker's representation as one of opinion rather than fact, for in its extensively quoted authority, *Greenberg v. Berger*,[13] a representation as to the maximum OPA rental price on an apartment house was held to be mere opinion. Unquestionably statements concerning the stability

[5]Willis v. Fowler, 102 Fla. 35, 136 So. 358 (1931); 3 POMEROY, EQUITY JURISPRUDENCE §878 (5th ed. 1941); 29 MICH. L. REV. 1099 (1931).

[6]Pepple v. Rogers, 104 Fla. 462, 140 So. 205 (1932); Hancoy Holding Co. v. Lambright, 101 Fla. 128, 133 So. 631 (1931); Langley v. Irons Land & Devel. Co., *supra* note 3; Hirschman v. Hodges, 59 Fla. 517, 51 So. 550 (1910).

[7]Hancoy Holding Co. v. Lambright, 101 Fla. 128, 133 So. 631 (1931).

[8]Fote v. Reitano, 46 So.2d 891 (Fla. 1950).

[9]McDonald v. Rose, 50 So.2d 878 (Fla. 1951); 3 POMEROY, EQUITY JURISPRUDENCE §894 (5th ed. 1941).

[10]23 Fla. 143, 1 So. 618 (1887).

[11]Hancoy Holding Co. v. Lambright, *supra* note 7; Hirschman v. Hodges, *supra* note 6.

[12]154 Fla. 432, 18 So.2d 1 (1944) (purchaser not required to inspect public records on options).

[13]46 So.2d 609 (Fla. 1950).

of the peanut market[14] or the value of real estate[15] are matters of opinion and generally cannot be relied upon no matter how expressed;[16] yet, considering the positive manner in which the statement of the absence of termites was made, the implication of the Court that it was an opinion is questionable.

Assuming that the Court found the statement to be opinion, no consideration of the duty of inspection would have been necessary, because the right of reliance would have been immediately cut off.[17] Despite this questionable implication the Court considered it the duty of the plaintiffs to use reasonable care and diligence, indicating a finding that the representation was a statement of fact, and held that, since the purchaser was not denied the right of inspection, he had no right of reliance. By assuming from the Court's findings of fact that a reasonable inspection would have disclosed the presence of termites[18] the Court reaffirmed the doctrine of caveat emptor in real estate transactions.

The reasoning is in direct conflict with the increasing trend toward the doctrine of justifiable reliance.[19] Recognition of this doctrine in Florida would minimize the making of careless representations as to the quality or condition of property involved in real estate transactions. Under the present law a purchaser, to protect himself, either should require an express warranty within the deed or should make a thorough and complete investigation into the matter in question.

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[14]Hart v. Marbury, 82 Fla. 317, 90 So. 173 (1921).

[15]Glass v. Craig, 83 Fla. 408, 91 So. 332 (1922).

[16]See note 4 *supra.*

[17]*Ibid.*

[18]At p. 541. This is questionable, since the special master found that only by breaking the stucco on the outside or the plaster on the inside could the presence of termites be ascertained. *Cf.* Blackman v. Howes, 82 Cal. App.2d 275, 185 P.2d 1019 (1947) (filled lot); Welch v. Reeves, 142 Neb. 171, 5 N.W.2d 275 (1942) (covered floor joists).

[19]See PROSSER, HANDBOOK OF THE LAW OF TORTS §749 (1941); Harper and McNeely, *supra* note 4.