

Carroll Neill

Plaintiffs

v.

Judith Perito Miller, et al.

Defendants

* * * * *

* **IN THE**
* **CIRCUIT COURT**
* **FOR**
* **BALTIMORE CITY**
* **Case No.: 24-C-03-006709**

MEMORANDUM OPINION

Defendants Judith and Michael Miller filed a motion for judgment notwithstanding verdict after a jury returned a verdict against them and in favor of Plaintiff Carroll Neill for \$64,500.00. The verdict was against Defendant Judith Miller for breach of contract, negligent misrepresentation, and a violation of Maryland’s Consumer Protection Act and against Defendant Michael Miller on negligent misrepresentation.¹ The jury returned a verdict in favor of the Millers on fraud and civil conspiracy counts. The jury also found that Plaintiff Neill breached a provision in the contract for sale that required that the dispute be mediated. Defendant Judith Miller filed a Petition for Attorney Fees for Plaintiff’s failure to mediate and Plaintiff filed a Petition for Contractual and Statutory Attorney Fees.

A hearing was held on the motions on April 29, 2005.

FACTS

During June and July of 2000, Plaintiff visited 114 E. Randall Street, Baltimore, Maryland (“the Property”) on one or more occasions. During these visits, Plaintiff noticed a backyard area which included a courtyard and gazebo which he believed to part of the

¹The Court granted judgment to Defendants on Plaintiff’s claims of unjust enrichment and breach of covenant for further assurances. Prior to trial Plaintiff voluntarily dismissed partnership liability and recession of contract claims.

Property. Plaintiff's belief was based on his own inspection and oral representations made by Defendants as well as by oral and graphic representations made by two real estate agents.

With that understanding, on July 18, 2000, Plaintiff entered into a Maryland Residential Real Estate Contract of Sale ("the Contract") with Defendant Judith Miller for the purchase price of \$274,500.00.² The Contract identified the property to be conveyed as follows:

4. PROPERTY DESCRIPTION: Seller [Defendant Judith Miller] does sell to Buyer [Plaintiff] and Buyer does purchase from Seller, all of the following described Property (hereinafter "Property") known as 114 E. Randall Street located in Baltimore City, Maryland, Zip 21230 together with the improvements thereon, and all rights and appurtenances thereto.

(Bold type and underlining appear in the Contract).

The closing for the Property occurred on or about September 21, 2000, at which time Plaintiff and Defendants still believed that the Property included the courtyard and gazebo. Near the end of March 2001, over six months after the closing on the Property, Plaintiff's neighbor James Kaczorowski informed him that the two of them were partners because the backyard was actually a part of a parcel known as 1532 Byrd Street ("1532 Parcel") which Kaczorowski and Defendant Michael Miller purchased as joint tenants. The 1532 parcel included Kaczorowski's backyard. Although Kaczorowski believed the one-half interest in the 1532 Parcel was vested in Plaintiff as result of the conveyance of the Property, Defendant Michael Miller actually never conveyed his interest.³ Later that Spring Plaintiff learned that

²Although the Millers treated the property as if they jointly owned it, it was titled only in Defendant Judith Miller's name.

³Defendant Michael Miller and Kaczorowski purchased the 1532 Parcel several years before
(continued...)

the Property is also encumbered by a “paper-alley” easement in favor of the City of Baltimore. The easement is a three feet wide and ninety feet long alley adjacent to the Property and six other properties on that block.

Plaintiff filed title insurance claims with the title company arguing that the easement and the failure to convey the backyard were title defects. The title company denied Plaintiff’s claims. Plaintiff then attempted to negotiate with the City and adjoining property owners concerning the easement without success. Plaintiff then sued Judith and Michael Miller as well as various others involved in the advertising, sale, and closing of the Property. Every defendant except the Millers were granted summary judgment. The case against the Millers went to trial in February 2005 and the jury returned a verdict in favor of Plaintiff for \$64,500.00.

For the reasons discussed below, this Court will issue an order granting the Motion for Judgment Notwithstanding Verdict; denying Plaintiff’s Petition for Attorney Fees; and granting Defendant Judith Miller’s Petition for Attorney Fees.

DISCUSSION

Maryland Rule 2-532 governs motions for judgment notwithstanding the verdict (JNOV). A party is entitled to a JNOV when the evidence at the close of the case, taken in

³(...continued)

Plaintiff purchased the Property. Both Millers testified that they had forgotten that the 1532 Parcel was separate from the Property and that it was jointly owned by Michael Miller and Kaczorowski. They testified that they thought they had conveyed it to Plaintiff as part of the Property.

After Plaintiff’s discovery, Defendant Michael Miller was prepared to convey his interest in the 1532 Parcel to Plaintiff but because the lot is not subdivided the most he could convey is a joint interest with Kaczorowski. Further, as discussed above, between the yard and the house, there is a “paper-alley” easement in favor of the City. Defendants testified that they were unaware of the easement until this dispute arose.

the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense. *Bartholomee v. Casey*, 103 Md. App. 34, 51 (1994), *cert. denied*, 338 Md. 557 (1995). The Court, in deciding whether to grant a motion for JNOV, must consider all the evidence and all logical and reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Lusby v. First National Bank*, 263 Md. 492, 499 (1971). If the evidence leads to the conclusions from which reasonable minds could not differ, then the issue is one of law for the court, and not one of fact for the jury. *Montgomery Ward & Co. v. McFarland*, 21 Md. App. 501, 513 (1974). If there is any competent evidence, however slight, tending to support the plaintiff's right to recover, the motion for must be denied. *Id. See also I.O.A. Leasing Corp. v. Merle Thomas Corp.*, 260 Md. 243, 250 (1971).

Defendants argue that the Court should grant this motion for JNOV because Plaintiff failed to prove Defendants' liability for breach of contract, negligent misrepresentation, or a violation of Maryland's Consumer Protection Act. Defendants also argue that the damage award of \$64,500.00 was not supported by competent or credible evidence and thus even if they are liable, Plaintiff is only entitled to nominal damages. The Court will address each of the claims below.

Breach of Contract

_____ Plaintiff argues that Defendant Judith Miller breached the Contract because all parties contemplated that the backyard which contained the courtyard and gazebo were part of the Property conveyed. Defendant Judith Miller argues that there was no breach of the Contract as a matter of law because she complied with the clear and unambiguous terms of the Contract. Therefore, she argues that it was improper for the question of breach to go to the

jury because the Contract is not ambiguous and evidence of oral representations made before the Contract was signed were not admissible under the parol evidence rule.

Whether the Contract is ambiguous is a question of law determined by the court, not the jury. *Calomiris v. Woods*, 353 Md. 425, 434 (1999); *see also JBG/Twinbrook Metro Ltd. v. Wheeler*, 346 Md. 601, 625 (1997) (“[T]he interpretation of a written contract is ordinarily a question of law for the court.”); *Rothman v. Silver*, 245 Md. 292, 296 (1967) (“If a written contract is susceptible of a clear, unambiguous and definite understanding, ... its construction is for the court to determine.”).

The Contract describes the Property as 114 E. Randall Street, Baltimore, Maryland:

4. PROPERTY DESCRIPTION: Seller does sell to Buyer and Buyer does purchase from Seller, all of the following described Property (hereinafter “Property”) known as 114 E. Randall Street located in Baltimore City, Maryland, Zip 21230 together with the improvements thereon, and all rights and appurtenances thereto.

(Bold type and underlining appear in the Contract). Plaintiff argues that this description is ambiguous because the term 114 E. Randall Street “could mean anything since it is merely a mail box address.” Therefore, Plaintiff asserts that since the mailing address was ambiguous, the jury should have been allowed to use extrinsic evidence, including oral representations made to Plaintiff before the execution of the Contract, to establish the description of the Property.

This Court need not decide whether the Contract is ambiguous because the doctrine of merger makes clear that once the deed was accepted by Plaintiff, his rights are governed by it, not the Contract. *Dillow v. Magraw*, 102 Md. App. 343, 375 (1994) (citations omitted).

[T]he general rule is that the acceptance of a deed conveying real estate gives rise to a *prima facie* presumption that it is an

execution of the entire contract of sale and that the rights of the parties are to be determined by the deed,

Gilbert Const. Co. v. Gross, 212 Md. 402, 409 (1957). The presumption that the execution of the deed satisfies all terms of the contract may be negated by a provision in the contract that a term will “survive settlement,” *Dillow*, 102 Md. App. at 375, or where on the face of the contract, it appears that execution of “the deed is only a partial execution of the contract.” *Gilbert Const. Co.*, 212 Md. at 409.

There is nothing in this Contract to suggest that the deed was only a partial execution of it. Furthermore, the only term in the Contract that “survive[d] settlement” is the mediation clause. The mediation term explicitly provides: “THE PROVISIONS OF THIS PARAGRAPH SHALL SURVIVE CLOSING AND SHALL NOT BE DEEMED TO HAVE BEEN EXTINGUISHED BY MERGER WITH THE DEED.” Thus the Contract is explicit that the mediation requirement “survive[d] settlement.” *Dillow*, 102 Md. App. at 375. This language underscores that the parties understood that the other terms of the Contract *would not* survive settlement. Therefore, evidence that the Contract had been breached was inadmissible because, except for the meditation clause, the Contract was discharged once the deed was accepted.⁴ *See also Canatella v. Davis*, 264 Md. 190, 205 (1972) (contract of sale merged into the deed although there was a misrepresentation made on the size of the property by the real estate agent).

A second, independent reason requiring judgment notwithstanding verdict on the contract claim is that the integration or merger clause in the Contract provides that the parties

⁴There is no dispute that the Property is accurately described in the deed, and that Plaintiff accepted the deed.

are bound only by the written terms of the Contract. Thus, a claim for breach of contract based upon oral representations made before the Contract was signed is prohibited by explicit language in the Contract. The Contract provides:

45. ENTIRE AGREEMENT: This Contract ... contain[s] the final and entire agreement between the parties, and neither they nor their agents shall be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.

(Bold type appears in the Contract). Therefore the only terms, conditions, statements, warranties, or representations that apply are those written in the Contract and evidence of any representations made before the Contract was signed was barred by the parol evidence rule. “A rigid enforcement of the parol evidence rule should occur in cases involving the sale of an interest in land in which the Statute of Frauds . . . requires that the contract be evidenced by a writing, signed by the party to be charged, in order to be enforced.” *Pumphrey v. Kehoe*, 261 Md. 496, 504 (1971); *cited in Calomiris*, 353 Md. at 444.

The fact that Defendants also thought that the backyard was part of the Property does not lead to a different result. In *Creamer v. Helferstay*, 294 Md. 107, 107 (1982), the trial court found that there had been an “honest misrepresentation,” and the appellate court noted that the parol evidence rule nonetheless precluded evidence contradicting the contract.

The parol evidence rule precludes the granting of relief for unintentional representations preceding the contract which conflict with the terms of the contract.

Calomiris, 353 Md. at 438 (citations omitted) (emphasis in original).

No principle of law is more firmly settled than that which excludes parol evidence from being used either at law or in equity for the purpose of contradicting, adding to, subtracting from, or varying the terms of a deed, or controlling its legal operation and effect, except where it is impeached for fraud, or where it is sought to be reformed upon the allegations of fraud,

accident or mistake. It would be useless to cite the numerous instances in which our predecessors have enforced this doctrine, and held that all oral negotiations or stipulations between the parties preceding or accompanying the execution of a written instrument, are to be regarded as merged in it, and the latter treated as the exclusive medium of ascertaining the agreement by which the contracting parties bound themselves.

Canatella, 264 Md. at 202 (citations omitted).

Therefore, the contract claim fails.⁵

Negligent Misrepresentation

Judgment in favor of Defendants must also be granted on the claim for negligent misrepresentation because as a matter of law the evidence is deficient on three required elements. In order to prove a claim for negligent misrepresentation, Plaintiff had to prove that:

- (1) the defendant(s), owing the plaintiff a duty of care, negligently misrepresented a material fact;
- (2) the defendant(s) intended that the plaintiff would act in reliance upon the misrepresentation;
- (3) the defendant(s) knew the plaintiff probably would rely on the misrepresentation, which if false would cause damages to the plaintiff;
- (4) the plaintiff justifiably acted in reliance on the misrepresentation; and
- (5) the plaintiff suffered damages as a result of the reliance on the misrepresentation.

MPJI-Cv 19:6. Plaintiff failed to prove elements (2), (3) and (4).

Element (2) required Plaintiff to show that Defendants intended that he rely upon their

⁵As pointed out earlier, reformation was not an option here because Kaczorowski and the City have an interest in the backyard that Defendant Michael Miller cannot convey.

oral representations, but the terms of the Contract clearly contemplated that Plaintiff would **not** rely on oral representations about the size and location of the Property. The Contract explicitly provided that Plaintiff could hire a surveyor and rely on the surveyor for the size and location of the lot:

NOTICE TO THE PARTIES: THE BROKERS, THEIR AGENTS, SUBAGENTS, AND EMPLOYEES MAKE NO REPRESENTATIONS WITH RESPECT TO THE FOLLOWING:

D. Lot size and exact location: If the subject Property is part of a recorded subdivision, the Buyer can review the plat upon request at the Record Office. If the subject Property is not part of a recorded subdivision, the Buyer may verify exact size and location through survey by a registered engineer or Land Surveyor at Buyer's expense.

(Bold type appears in the Contract). Although this language specifically references brokers and their agents and employees, and not the seller, in combination with the merger clause discussed above, it makes clear that the Defendants did not intend that Plaintiff rely on oral representations. Further the Contract explicitly provided that Plaintiff could hire his own attorney:

8. SETTLEMENT COSTS: NOTICE TO BUYER: BUYER HAS THE RIGHT TO SELECT BUYER'S OWN TITLE INSURANCE COMPANY, TITLE LAWYER, SETTLEMENT COMPANY....

Thus the clear language of the Contract was that Plaintiff would not be relying on oral representations, and evidence to the contrary was not admissible.

Plaintiff did in fact employ a surveyor⁶ who provided him with a survey that did not

⁶Defendants cite *Steele v. Goettee*, 313 Md. 11, 27 (1988), in support of their argument that the fact that a survey was done means that the contract was unambiguous. However, *Steele* provides (continued...)

include the backyard, and he hired the title company who provided him with an attorney who drafted the deed that also described the Property with dimensions that did not include the backyard. Thus Plaintiff failed to prove that Defendants intended that he would act in reliance upon their oral representations. For the same reasons the terms of the Contract make clear that Defendants did not know that Plaintiff would in fact rely on their oral representations (the third element). In fact, the language of the Contract requires the conclusion that Defendants had every expectation that Plaintiff would rely, not on oral representations, but on his attorney and surveyor.

The fourth element, that Plaintiff “justifiably acted in reliance” on the oral representations, is refuted by the fact that Plaintiff did hire his own lawyer and surveyor, both of whom provided him with accurate information on the Property. *Ryan v. Brady*, 34 Md. App. 41, 41 (1976), makes clear that if Plaintiff did rely on the oral representations from Defendants and not the written information he had from his attorney and surveyor, that reliance was not justified. In *Ryan*, the appellant’s lawyer drafted the contract of sale, did the title examination, and prepared the deed, and thus had either “actual knowledge or was

⁶(...continued)

no support for Defendants because in *Steele* the judge was the trier of facts and the question before the appellate court was whether the evidence supported the judge’s findings of fact.

[The trial judge] rejected a contention that the description of the land was insufficient, rendering the contract voidable, saying, “The testimony showed that a survey was made of the lot. The surveyors had no trouble locating the tract in order to perform the survey.” He did not clearly err in any of those findings. There was evidence to support him.

Id. at 27. That is a substantially different standard than the one a court applies on a motion for judgment notwithstanding verdict after a jury trial.

affected with notice of the true” facts. *Id.* at 54. “[T]his knowledge was imputed to [the appellant] so that the appellant knew, at the time he signed the agreement and accepted the deed to the property,” the true boundaries of the property. *Id.* “[N]otice to an attorney is notice to his client.” *Id.* (citations omitted). *See also Boring v. Jungers*, 222 Md. 458, 463 (1960) (attorney’s knowledge of the actual frontage “was the knowledge of his principals.”) (citations omitted).

Although those cases involved a claim for rescission, a key element was the reasonableness of the purchaser’s reliance on the seller’s representations. What the Court said with respect to those claims is equally applicable in a claim for misrepresentation:

The logical extension of these principles and their legal effect is that although a purchaser of land has a right to real [sic] upon a representation made to him by the seller or his agents, as to the boundaries, without being required to conduct an independent investigation of the land records, *once the purchaser assumes the burden of an examination he cannot say that he was deceived to his injury where such examination discloses the correct information.*

Ryan, 34 Md. App. at 55 (*citing Piper v. Jenkins*, 207 Md. 308, 314 (1955)) (emphasis added). “[W]here the means of knowledge are at hand, and the purchaser undertakes to make an examination of the land records, he cannot say that he was deceived and injured by misrepresentations of the vendor.” *Id.* (citations and internal quotations omitted); *See also Shappirio v. Goldberg*, 192 U.S. 232, 241 (1904) (a purchaser’s agent’s “knowledge and means of information” are imputed to the purchaser).

When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor.

Shappirio, 192 U.S. at 241-42 (citations and internal quotations omitted).

Unlike the situation in *Chesapeake Homes v. McGrath*, 249 Md. 480, 480 (1968), there was no evidence that any effort was made to prevent Plaintiff from discovering the true state of affairs or to distort information in the land records. And contrary to what happened in *Chesapeake Homes*, the true state of affairs was in fact known by both Plaintiff's attorney and surveyor. Thus, the correct boundary of the Property was known to Plaintiff as a matter of law, even if Plaintiff did not know the boundary as a matter of fact. Thus, his testimony that he did not in fact know was irrelevant and inadmissible.

Maryland Consumer Protection Act

Consistent with the provisions of the Consumer Protection Act ("the Act"), the jury was instructed that the Maryland Consumer Protection Statute prohibits any seller of consumer real property from doing any unfair trade practices, and that unfair or deceptive trade practices include any representation that: "consumer realty... [has a] use, benefit, or quantity which [it does] not have;" "[f]ailure to state a material fact if the failure deceives or tends to deceive;" or the "[a]dvertisement or offer of consumer realty . . . (i) [w]ithout intent to sell, . . . as advertised or offered." Commercial Law §§ 13-301(2)(i), (3) and (5)(i).

In *Citaramanis v. Hallowell*, 328 Md. 142, 151 (1992), the Court of Appeals made clear that a private enforcement action under the Consumer Protection Act requires proof that the consumer was harmed by the prohibited practice.

It is manifest from the language employed in §§ 13-408(a) that the General Assembly intended that a plaintiff pursuing a private action under the CPA prove actual "injury or loss sustained."

Id. at 151 (citation omitted). The Court noted that the Act establishes a "clear distinction between the elements necessary to maintain a public enforcement proceeding versus a private

enforcement proceeding.” *Id.* at 152. A public enforcement action does not require proof of damages or harm, but a private one does:

In a public enforcement proceeding “[a]ny practice prohibited by this title is a violation ... whether or not any consumer in fact has been misled, deceived, or damaged as a result of that practice.” §§ 13-302. In contrast, *a private enforcement proceeding pursuant to §§ 13-408(a) expressly only permits a consumer “to recover for injury or loss sustained by him as the result of a practice prohibited by this title.”* §§ 13-408(a).

Id. (emphasis added).

Thus, there must be proof of injury sustained “as a result of the prohibited practice.”

Id. The jury was instructed that “[i]n order for Plaintiff to recover damages from the defendants under any of the counts . . . , the defendant(s)’ wrongdoing must be a cause of the plaintiff’s injuries.” As discussed above, Defendants wrongdoing was not the cause of any injury to Plaintiff because the knowledge of the attorney and surveyor is the knowledge of Plaintiff, and thus as a matter of law Plaintiff knew that the backyard was not included in the sale. If he did not know as a matter of fact, it is because he failed to read the information provided to him by his attorney and his surveyor, not because of Defendants’ actions.

Fair Market Value

_____ Finally, Defendants argue that Plaintiff failed to present competent evidence of damages because the Court erred in admitting Plaintiff’s testimony as to the value of the Property without the backyard. Plaintiff argues that as owner of the Property he could testify as to its value at the date of trial and at some point in the past. While Defendants agree that there is a body of case law that permits an owner to testify as to the value of his property, Defendants argue that that law does not apply here for several reasons.

During discovery, Defendants asked Plaintiff an interrogatory on the issue of damages

and Plaintiff responded that damages would have to be determined by an expert.

Interrogatory Number 11: Itemize and show how you calculate any economic damages claimed by you in the action, and describe any non-economic damages claimed.

Plaintiff Responded: Economic damages would have to be determined by a trained appraiser looking at the fair market value of the property as represented as compared to actually conveyed.

Relying on *Cofflin v. State*, 230 Md. 139, 139 (1962), Defendants argue that Plaintiff's testimony on value is inadmissible because the answer to the interrogatory is a binding admission that Plaintiff was not competent to testify as to value.

In *Cofflin*, the State's witness in a burglary trial testified that she was the custodian of several items of personal property, and she initially testified that she could not place a value on them. After being pressed by the State for a value, she placed a number on some of the items. She then testified that she had arranged for an appraiser to value them, and she testified about the value that the appraiser placed on the items.

The witness . . . replied: 'very frankly I don't believe I could answer'. When asked about the value of an antique clock she replied: 'I'm sorry, I had a gentleman looking at it now to go all over everything but I don't have it with me'. When asked about the value of the silverware shown in a photograph taken at the police station, she replied: 'I wouldn't know'.

Despite the repeated protestations of [the witness] that she did not know the value of any of the articles taken, some of which she identified by the initials thereon, she was pressed by counsel for the State to state a value 'just merely as the custodian of this property'. She then estimated the value of one of the clocks listed in indictment No. 30 at 'about \$90'. She also valued the two swords listed in indictment No. 30 at 'say a hundred dollars. Of course, there is sentimental value attached to that'. The swords had belonged to her father and to Miss Mills' brother, respectively. She admitted that she had employed an appraiser, . . . , to go to the police station and appraise the articles there assembled.

Id. at 142. The Court recognized that as a general rule the owner of property can testify as to its value but pointed out that the testimony is admissible in recognition of the fact that “ordinarily an owner knows the property intimately and is familiar with its value.” *Id.* at 143. The witness testimony on value was inadmissible because the presumption that she had knowledge was rebutted by her disavowal of such knowledge and the fact that she sought an expert opinion on value. *Id.* at 143-44. Defendants argue that Plaintiff’s answer to the interrogatory stating that the damages required an expert appraiser is similarly a disavowal of knowledge of the value of the property.

Plaintiff argues that the answer to the interrogatory only goes to impeachment and is a credibility issue that the jury resolved in his favor. Although he does not cite it, *Pittman v. Atlantic Realty Co.*, 359 Md. 513, 513 (2000), appears to lend some support to Plaintiff’s argument.⁷ There the Court held that the trial court erred by striking a plaintiff’s summary judgment affidavits which differed significantly from information provided previously in deposition and answer to interrogatories. *Id.* at 539. However, Plaintiff’s response to the interrogatory is more similar to the State’s witness’ response in *Cofflin* than it is to the change of testimony in *Pittman*.

The question asked of Plaintiff, which he avoided, was ---- what do you claim the value of the Property is without the backyard? Plaintiff’s response that an expert was required to answer that question was an admission that there was no evidentiary foundation for Plaintiff to give a value for the Property. See *United States v. Sowards*, 370 F. 2d 87, 92 (10th Cir. 1966) (“where the presumption of the owner’s special knowledge is negated by his

⁷This Court does agree with Plaintiff that his admission in the two deeds of trust as to the value of the property goes to impeachment and credibility.

own testimony, his opinion has no probative value. . . .”). This fact combined with the fact that no expert was named and no value was stated meant that even if he won, all Plaintiff could recover was nominal damages. *Asibem Associates Ltd. v. Rill*, 264 Md. 272, 276 (1972). Thus, it was not merely incomplete or inaccurate information, nor was it simply information that misled Defendants to put themselves in a position where they could not refute Plaintiff’s testimony.⁸ It was an admission that Plaintiff was not competent to answer the question. Therefore, it was erroneous to permit Plaintiff to rely on his estimation of value after he answered an interrogatory admitting that he was not competent to answer the question.

Plaintiff argues that the issue of discovery was not the basis of the motion in limine or the motion for judgment notwithstanding verdict and therefore should not be considered by the Court. Plaintiff misunderstands. This Court is not ruling that the testimony of Plaintiff on value is inadmissible as a discovery sanction. In the motion in limine Defendants state: “That Plaintiff [seeks to offer his opinion on value] ...because he was so late designating an expert on value (appraiser),” that he was not permitted to do so. Further in the motion for judgment notwithstanding verdict (and at trial) Defendants argue that Plaintiff’s response to the interrogatory on damages is an admission that he was not competent to testify as to value and that an expert was needed. Thus Defendants are arguing that the admission rendered Plaintiff incompetent to answer the question. This Court agrees.

⁸If Plaintiff had named an expert or proffered his own opinion on value, Defendants may well have named an expert themselves but the timing was such that that was not an option. There was no supplemental response ever filed, so there was no opportunity for Defendants to retain an expert to counter the Plaintiff’s testimony on value. Nor was there any reason given for answering the question one way and later proffering the Plaintiff’s testimony on value.

There is a second, independent reason why Plaintiff's testimony on value should not have been permitted. In *Hall v. Lovell Regency Homes Ltd. Partnership*, 121 Md. App. 1, 1 (1998), the appellate court affirmed the trial judge's ruling that a homeowner's testimony as to the value of his property without the defects that formed the basis of the suit was incompetent. When asked about the basis for the valuation of a comparable house without defects, the witness in *Hall* "cited only his 'general knowledge of what houses like mine tend to sell for,' which he characterized as a 'guess.'" *Id.* at 20.

There was no evidence [that the witness] . . . was familiar with or had any knowledge about non-defective properties in the neighborhood that were similar to his property and, further, that he was informed about sales of any such properties and the sums for which the properties had been sold.

Id.

Plaintiff argues that *Hall* is distinguishable because the witness had never owned the house without the alleged defects and therefore could not testify as to what its value would have been absent the defects. Plaintiff argues that in contrast he, as an owner of the Property, was permitted to testify as to its value because he owns the house without the backyard; the evidence of the value with the backyard was the contract price; and the jury was free to rely on Plaintiff's testimony to determine the value of the Property without the backyard.

Defendants counter that Plaintiff was not the owner of the Property at the time of the sale. *Beard v. S/E Joint Venture*, 321 Md. 126, 141 (1990) (breach of a contract to sell real property occurs when the performance was due). Defendants argue that at the time the contract was allegedly breached, Defendant Judith Miller, the seller was the owner, and she, not Plaintiff, could give testimony on the value of the Property. At the time of the sale, Plaintiff had no "familiarity" or "intimate experience" with the Property because he had

never owned it or lived in it, but simply viewed it for purchasing purposes. Further, during the first seven months that he lived there he had no knowledge of the Property without the backyard because he was operating under the assumption that he owned it. Defendants argue that under these circumstances, Plaintiff should not have been permitted to testify as to the value of the Property without the backyard because no matter how it was phrased, all Plaintiff was doing was speculating, which was what the appellate court prohibited the witness from doing in *Hall*. This Court agrees with Defendants.

CONCLUSION

For the reasons stated above, the Court will issue an order granting the Judgment Notwithstanding Verdict; denying Plaintiff's Petition for Contractual and Statutory Fees; and granting Defendant Judith Miller's Petition for Attorney Fees.

Dated: May 5, 2005

JUDGE EVELYN OMEGA CANNON

cc: F. Gregory Shepperd
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Carroll Neill

Plaintiffs

v.

Judith Perito Miller, et al.

Defendants

* * * * *

ORDER

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY
* Case No.: 24-C-03-006709

For the reasons stated in the attached Memorandum Opinion,

- (1) Defendants Judith and Michael Miller’s Motion for Judgement Notwithstanding Verdict is GRANTED;
- (2) Plaintiff’s Petition for Contractual and Statutory Attorney Fees is DENIED;
- and
- (3) Defendant/Counter Petitioner Judith Miller’s Petition for Attorney Fees is GRANTED and

the Clerk is directed to enter judgment in favor of Defendants Michael and Judith Miller and against Plaintiff and to enter judgment in favor of Defendant Judith Miller and against Plaintiff for three thousand seven hundred twenty-two dollars (\$3,722.00) for attorney fees. Plaintiff to pay costs.

Dated: May 5, 2005

JUDGE EVELYN OMEGA CANNON

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