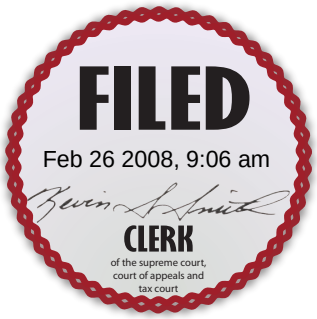


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# IN THE
# COURT OF APPEALS OF INDIANA

JOHN BEATY and DOROTHY BEATY,

Appellants-Plaintiffs,

vs.

JOE R. WALTERS, CHERYL J. WALTERS, BRAD MCELHENY d/b/a Brad McElheny Construction and CHUCK M. RUSSELL, JR., d/b/a Russell's Pest Control,

Appellees-Defendants.

No. 61A01-0704-CV-171

APPEAL FROM THE PARKE CIRCUIT COURT
The Honorable Robert Hall, Special Judge
Cause No. 61C01-0307-CT-235

**February 26, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

John and Dorothy Beaty appeal the trial court's decision in favor of Joe and Cheryl Walters, Brad McElheny d/b/a Brad McElhney Construction ("McElheny"), and Chuck M. Russell d/b/a Russell's Pest Control ("Russell"). We affirm.

## Issues

The Beatys present three issues, which we reorder and restate as follows:

I. whether the trial court's judgment awarding no damages for the alleged negligence and fraud of Russell is contrary to law;

II. whether the trial court's judgment in favor of McElheny is contrary to law; and

III. whether the trial court's judgment in favor of the Walters is contrary to law.

## Facts

In the summer of 2001, the Beatys purchased a home in Parke County from the Walters. The property included a 100-year-old farm house, a pole barn, a carriage house, and nine acres of land. The Beatys agreed to allow the Walters to select a home inspector and pay for the home inspection. Prior to the sale, McElheny performed the home inspection and Russell performed the insect inspection. The home inspection indicated the home was "in good shape and has been well maintained for a home of this vintage." App. p. 15. The insect inspection indicated there was visible but inactive signs of previous termite infestation.

The Beatys did not move into the home until well over one year later, in the spring of 2003. Prior to moving in they began an addition project in the fall of 2002, and

contractor Wayne McClintock pointed out some issues he felt were problematic with the home. McClintock testified that the home was generally in "bad shape." Tr. p. 55. On November 7, 2005, after the initiation of litigation, McClintock prepared a list of specific problems he found including rotted posts under the deck, a crack in the concrete porch, a sagging garage roof, bowed basement walls, falling kitchen cabinets, cracking plaster, and rotting floors in the kitchen, master bathroom, and living room.

In the summer of 2003, the Beatys hired James Booker of Ecology Services, a company specializing in pest control and excavation, to inspect the home. Booker found evidence of active post beetle damage in floor joists and evidence of previous termite infestation. He also testified to moisture problems relating to the installation of the siding. In the fall of 2005, Booker repaired floor joists, inserted floor jacks, and excavated the crawl space for $3,380.00.

The Beatys instituted an action against McElheny, Russell, and the Walters on July 3, 2003. In September of 2004, architect Richard Battershell inspected the home on behalf of McElheny and the Walters specifically looking for problems addressed in the Beatys discovery responses. He noted that some floors sagged and certain walls were not perfectly plumb, but otherwise concluded that the home "looked like a hundred year old house." Tr. p. 314. He noticed that some floor joists in one area had evidence of "bugs" but said any repair necessary would be relatively simple. Id. p. 316. He did note that the floor joists under the laundry room needed to be replaced because they were decayed.

In October of 2005, contractor Gordon Manion inspected the home on behalf of McElheny and the Walters. He did note post beetle powder on floor joists in the

basements, but concluded the wood still maintained its integrity. He observed that the uneven flooring and cracks in the plaster walls were typical for a 100-year-old house.

The Beatys moved for a default judgment against defendant Russell on February 9, 2006. The trial court granted the default judgment on March 2, 2006. A bench trial was held on December 13-14, 2006. The trial court found in favor of the Walters and McElheny. The trial court also found that even though Russell had been defaulted, the Beatys did not present sufficient evidence to support a damages award against him. This appeal followed.

**Analysis**

At the close of the bench trial, the parties stated they were not requesting findings of fact or conclusions of law, but the trial court entered limited findings and conclusions sua sponte. Sua sponte findings control only the issues they cover. Olcott Intern. & Co., Inc. v. Micro Data Base Systems, Inc., 793 N.E.2d 1063, 1071 (Ind. Ct. App. 2003) (internal citations omitted), trans. denied. We apply the following two-tier standard of review to sua sponte findings and conclusions: whether the evidence supports the findings, and whether the findings support the judgment. Id. Findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences supporting them. Id. "A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made." Id. We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will neither reweigh the evidence nor assess witness credibility. Id.

A general judgment standard of review controls as to the issues upon which there are no findings. Id. We note that aside from the few specific enumerated findings, the remainder of the judgment here is a general judgment. It will be affirmed if it can be sustained on any legal theory supported by the evidence. Id.

### *I. Damages Claim Against Russell*

The Beatys claim that Russell negligently and fraudulently performed the insect inspection. The Beatys received a default judgment against Russell and he was not represented at the bench trial. Regarding Russell, the bench trial served as a damage hearing on his default judgment. See Ind. Trial Rule 55(B) (explaining that if it is necessary to determine the amount of damages in order for the court to effectuate the default judgment that the court may conduct a damage hearing).

Russell did not file an appellee's brief. We do not need to develop an argument for him, and we apply a less stringent standard of review in this situation. Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). We may reverse the trial court if the appellant is able to establish prima facie error, which is error at first sight, on first appearance, or on the face of it. Id.

Regarding Russell, the trial court found "while liability has been established by default, the issue of damages as a result of the negligence of Russell is still to be determined. The court finds that the evidence submitted does not establish that there are any measurable damages for which the Plaintiff is entitled to recovery." App. p. 6. The trial court issued sua sponte findings of fact with this portion of the decision, which provided:

> The condition of the house at the time of sale does not disclose that there are recoverable damages. Conditions thereafter may be considered to be different, but the extent to which there is such a difference is not ascertainable without speculation, and the court finds there should be no monetary damages assessed against the Defendant Russell.

Id.

The Beatys contends that measurable damages were entered into the record by the testimony and exhibits regarding the repair of certain floor joists. Contractor James Booker testified he repaired the floor joists and submitted an invoice for $3380, which was entered into evidence. Additional testimony from defense witnesses, however, indicated that though the floor joists had post beetle evidence, they were structurally sound. Contractor Manion testified that he did see the post beetle damage on basement joists but he believed the "density on most of them was pretty good." Tr. p. 358. He found that the floors were normal for a 100-year-old home and did not find any problems with structural instability. McElheny testified that the post beetle damage he saw was "minimal" and he had "seen it on dozens of other houses." Tr. p. 381-82. Although Battershell, the architect, opined that some joists needed repair or replacement, he did not view the house at the time of sale, but three years later in the fall of 2004.

We cannot conclude that this testimony, taken together, establishes clear damages or that the trial court erred by finding plaintiffs failed to prove they were entitled to damages. Nor can we conclude that Booker's 2005 invoice of $3380 was directly related to the post beetle damage discovered after the Beatys moved into the home. It is also unclear whether or not the entire repair was necessitated by insect damage or by the

warping and decay of the joists given the age of the home. The general description on the invoice was "wood repair" but the details included $2000 for "lifts," $800 for a kitchen lift, $40 for a plumbing move, $200 for "wood fungus/PPB," $300 for excavation and $40 for a joist. App. p. 33. It is not our role to reweigh the evidence or judge the credibility of witness. The trial court was in the best position to do this. We do not find prima facie error in the trial judge's decision regarding the assignment of no damages against the defaulted Russell.

### *II. Judgment in Favor of McElheny*

The Beatys claim McElheny negligently performed the home inspection. The trial court found that "Defendants have also failed to meet their burden of proof as to the Defendant McElheny." App. p. 6. On appeal, the Beatys claim that the trial court's judgment is clearly erroneous and contrary to law.

To succeed on a negligence claim, a plaintiff must prove three elements: 1) a duty owed to the plaintiff, 2) a breach of duty by the defendant, and 3) the breach proximately caused the plaintiff's damages. Reed v. Beachy Constr. Corp., 781 N.E.2d 1145, 1148 (Ind. Ct. App. 2002), trans. denied. The Beatys contend McElheny breached his duty to skillfully inspect the home when he only did a "walk through" and did not list every potential defect but only the "serious problems." Appellant's Br. p. 21. The Beatys contend that such breach amounted to at least $1925 in damages. McElheny argues that no witness specifically stated his inspection report was unacceptable and that the Beatys presented no evidence that his report proximately caused the alleged damages. We agree. Mr. Beaty's own testimony indicated that while his realtor told him the house "passed"

he did not receive or view the inspection reports until the closing. Tr. p. 98. In addition, many of the alleged damages were not found by the witnesses until several years after the 2001 sale.

### *III. Judgment in Favor of the Walters*

The Beatys claimed fraud and breach of contract against the Walters. The trial court found that "Plaintiffs have failed to meet their burden relative to their fraud complaint against the Defendants Walters." App. p. 6. The trial court did not make a specific finding regarding the breach of contract claim and the Beatys do not argue this claim on appeal.[1]

Fraud can be actual or constructive, and the Beatys seem to contend that both types occurred here. The elements of actual fraud are: (1) a material misrepresentation of a past or existing fact that (2) was untrue, (3) was made with knowledge of or in reckless ignorance of its falsity, (4) was made with the intent to deceive, (5) was rightfully relied upon by the complaining party, and (6) which proximately caused the injury or damage complained of. Wheatcraft v. Wheatcraft, 825 N.E.2d 23, 30 (Ind. Ct. App. 2005). The elements of constructive fraud are: (1) a duty owing by the party to be charged to the complaining party due to their relationship, (2) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists, (3) reliance thereon by the complaining party, (4) injury to the

[1] Without cogent argument regarding their breach of contract claim against the Walters, we find that the issue is waived on appeal. See Ind. Appellate Rule 46(A)(8).

complaining party as a proximate result thereof, and (5) the gaining of an advantage by the party to be charged at the expense of the complaining party. Id.

The Beatys contend that the Walters were intentionally deceiving them by stating that the home was well maintained and in excellent condition. The Beatys also contend that the Walters engaged in certain repair projects merely to cover up existing damage. The Walters contend they made no misrepresentations in the sale of their home. Mr. Walters admits making statements to John Beaty that nothing was wrong with the home, but testified that he never made any misrepresentations about the condition of the home or the property. He explained the reasons for the various repairs and remodels of the home during his twenty-five year ownership. Various home repairmen and contractors performed this work through the years and Mr. Walters relied on their knowledge and recommendations. Mr. Walters admits he did not list the concrete porch crack on the sales disclosure form as he was supposed to, but he testified that the omission was accidental. In any event, the cracked concrete is not a central item to the alleged problems with the house and was "easily observable." Tr. p. 313.

We cannot conclude that the trial court's findings and conclusions are clearly erroneous or that the judgment is unsupported by any legal theory. Although the Beatys list numerous problems with the home, testimony from contractors and an architect indicated many of the issues were common to 100-year-old homes. No evidence indicates that the Walters intentionally misled the Beatys or misstated material facts to fraudulently induce them to purchase the home. The trial court did not err when it found that the Beatys did not meet their burden to prove fraud.

## Conclusion

The trial court properly did not assess any damages to the defaulted Russell. A damage award is not clearly supported by the evidence because contradicting witness testimony and unclear repair work existed. The trial court's judgment denying any relief to the Beatys for the claims against McElheny and the Walters is sound and can be supported by valid legal theories. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.