Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-195

MAY TERM, 2006

Daniel F. Coughlin, Linda S. Coughlin, Glenn A. Myer and Claudine M. Myer	}	APPEALED FROM:
v.	}	Lamoille Superior Court
T.N. Associates	}	DOCKET NO. 248-11-02 Lecv

Trial Judge: Howard E. VanBenthuysen

In the above-entitled cause, the Clerk will enter:

Plaintiffs Daniel F. Coughlin, Linda S. Coughlin, Glenn A. Myer, and Claudine M. Myer appeal from the trial court=s order granting partial summary judgment to defendant T.N. Associates on their complaint, and from the court=s order, after a jury trial, awarding defendant $49,600 plus interest on its counterclaim. Plaintiffs argue that: (1) the trial court erred in granting summary judgment to defendant because there were numerous disputed issues of material fact; and (2) the court erred in entering judgment on the jury=s verdict and awarding pre-judgment interest to defendant. We affirm.

This appeal involves a dispute over the sale of a condominium at Topnotch Townhouse Condominiums in Stowe, Vermont. In August 2002, the Coughlins signed a purchase agreement to buy a condominium unit for $469,000, and placed a deposit of $46,900.[1] The agreement allowed defendant seven days to accept the Coughlins= offer and execute the agreement. It also made the Coughlins= obligation contingent on their ability to obtain mortgage financing. Specifically, if the Coughlins were unable to obtain the necessary financing within thirty days after defendant=s acceptance of the agreement, the Coughlins could terminate the agreement, provided they gave written notice directly to defendant within thirty days. Defendant signed the agreement in August 2002, although the parties dispute whether defendant timely notified plaintiffs of its acceptance. The closing date was set for September 6, 2002. The Coughlins were unable to secure financing within thirty days, but they did not provide defendant with written notice of this fact within the time frame set by the purchase agreement. The closing did not occur as scheduled.

The parties apparently continued to negotiate the sale of the condominium. In September 2002, defendant drafted an addendum and assignment of the purchase agreement, which would have assigned the Coughlins= interest in the purchase agreement, including the deposit, to Glenn Myers. The addendum stated that all of the contingencies in the original agreement, including the financing contingency, would thereby be satisfied and waived. The addendum set a new closing date of October 11, 2002. This document was never executed. Defendant also drafted a new contract for Glenn Myer=s review. This contract stated that APurchaser represents to Seller that Purchaser has sufficient cash or liquid assets to close on the purchase of the Property as provided herein.@ Mr. Myer initialed every page of the document and signed the agreement, but the offer was never accepted by defendant. Ultimately, in October 2002, defendant formally declared the Coughlins in default of the terms of the original purchase and sale agreement, and retained the $46,900 deposit.

In November 2002, plaintiffs sued defendant, raising claims of conversion, unjust enrichment, promissory estoppel, consumer fraud, and common law fraud in their amended complaint. Plaintiffs asserted that there had

never been a valid contract between the parties because defendant failed to timely notify them that it had accepted their purchase offer. Plaintiffs claimed that, between August and November 2002, the parties continued to negotiate to purchase the condominium, and it became apparent that plaintiffs Coughlin could not obtain financing to complete the transaction. According to plaintiffs, they notified defendant that they would need more time to secure financing, and defendant assured them that the requested extensions of time would not be a problem. Plaintiffs maintained that defendant promised to provide Mr. Myers with a contract in his name only, which would enable him to secure financing. They asserted that defendant agreed with their position that the financing contingency in the original agreement was in effect during the extended negotiations. The proposed contract in the Myers= name did not contain a financing contingency but rather stated that Myer would pay cash. According to plaintiffs, the bank declined to extend financing to Myer on this basis. Defendant filed a counterclaim against plaintiffs for breach of contract.

In October 2004, defendant moved for summary judgment on plaintiffs= claims of promissory estoppel, consumer fraud, and common law fraud. In January 2005, the court granted its request. The court first addressed plaintiffs= promissory estoppel claim. According to plaintiffs, defendant orally promised to provide Glenn Myer with a purchase and sale agreement solely in Myers= name with a financial contingency provision that mirrored the one in the original purchase and sale agreement. Plaintiffs argued, generally, that there were disputed issues of fact as to what promises defendant made to plaintiffs, what plaintiffs= reasonable course of action had been, and what the resulting injustice had been. In support their assertion, plaintiffs pointed to deposition testimony from Mr. Myer that defendant had verbally assured him that the financing contingency in the original purchase and sale agreement would be extended.

The trial court concluded that defendant was entitled to summary judgment on this claim. It correctly explained that to establish promissory estoppel, plaintiffs needed to demonstrate: A(1) a promise on which the promisor reasonably expects the promisee to take action or forbearance of a substantial character; (2) the promise induced a definite and substantial action or forbearance; and (3) injustice can be avoided only through the enforcement of the promise.@ Green Mountain Inv. Group v. Flaim, 174 Vt. 495, 497 (2002) (mem.). The court concluded that, viewing the facts in the light most favorable to plaintiffs, plaintiffs could not establish

that the alleged promise induced a definite and substantial action or forbearance. The court found it undisputed that the proposed, but never consummated, contract in Mr. Myer=s name did not contain a financing contingency. Yet, the court explained, despite plaintiffs= claim that this contract was unacceptable, Mr. Myer had initialed every page and signed the agreement. Defendant never signed this agreement because plaintiffs refused to execute its proposed addendum. The court found no evidence that the Myers had any enforceable contract or promise from defendant, nor that any of the plaintiffs changed their position in reliance on any such alleged contract. The court explained that, even if plaintiffs could show that defendant promised them such a contract, they could not show that the promise induced a definite and substantial action or forbearance. It rejected plaintiffs= claims that they had incurred additional expenses in negotiating the new agreement as unsupported by the facts and insufficient. The court noted that it also appeared unlikely that plaintiffs could satisfy the third requirement of promissory estoppel, that injustice could be avoided only through enforcement of the promise.

The court found plaintiffs= consumer fraud claim similarly unsupported by the facts, concluding that plaintiffs were not Aconsumers@ under the Act because they planned to purchase the condominium primarily as a business venture. As to plaintiffs= common law fraud claim, the court found the evidence failed to establish a contract between the Myers and defendant, and defendant owed no duty to the Myers. At worst, the court found, as to the Coughlins, the evidence could tend to show a fraudulent nonperformance of the contract, inseparable from breach of the same contract and not actionable as an independent fraud. Bevins v. King, 147 Vt. 203, 204-05 (1986). The court stated that the contract between the Coughlins and defendant was clear, however, and plaintiffs had no evidence that anything was concealed from them with respect to the plain terms of the contract. Moreover, the court explained, the contract between the Coughlins and T.N. plainly could not, by its own terms, be orally modified and, in any event, it limited damages to the amount of the deposit. The court therefore granted summary judgment to defendant on these three claims.

A jury trial was held on the remaining claims, and the jury found in favor of defendant on its counterclaim.[2] The court issued a final judgment order, finding that the jury=s verdict entitled defendant to retain the $46,900 deposit. The court also granted defendant=s request for pre- and post-judgment interest of

$13,382.58, and $15.41 in interest per day until the escrowed funds were released to defendant. Plaintiffs appealed.

Plaintiffs first argue that the trial court erred in granting summary judgment to defendant on their claims for promissory estoppel, violation of the Consumer Fraud Act, and common law fraud. They assert, generally, that there were material facts in dispute, and the court failed to view the disputed facts in their favor. Plaintiffs maintain that the court=s decision rested on its finding that a binding contract existed between the parties, despite conflicting evidence on this issue. They also argue that the court erred in finding as a matter of fact that there was no detrimental reliance. We address plaintiffs= more specific arguments in connection with each claim.

On review of a summary judgment decision, we apply the same standard as the trial court. Greene v. Stevens Gas Serv., 2004 VT 67, & 9, 177 Vt. 90. ASummary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law.@ Id.; V.R.C.P. 56(c). Although the nonmoving party Ais entitled to the benefit of all reasonable doubts and inferences,@ he may not rest on mere allegations or denials of the adverse party=s pleadings when a properly supported motion for summary judgment has been filed. Greene, 2004 VT 67, & 9; V.R.C.P. 56(e). Instead, the nonmovant must set forth, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. Id. As discussed below, summary judgment was appropriately granted here.

As an initial matter, we reject plaintiffs= generalized contentions that the trial court=s decision rested on findings that a binding contract existed between defendant and the Coughlins, that plaintiffs= allegations about oral promises were Ashaky,@ or that defendant did not actually make any promises to plaintiffs. As its summary judgment decision reflects, and as discussed below, the court properly concluded that, based on the undisputed evidence, plaintiffs failed to produce sufficient evidence to support their claims.

We begin with plaintiffs= promissory estoppel claim. Plaintiffs allege that the trial court erred in finding as a matter of fact that there had been no detrimental reliance. They assert that the court overlooked its argument

that, based on defendant=s alleged promise, they did not seek to terminate the original agreement and request their deposit back in writing.

First, we note that this argument necessarily presumes the existence of a binding contract between the Coughlins and defendant, which appears at odds with plaintiffs= position below. Plaintiffs do not cite to the record as to where this specific argument was raised below. It does not appear in their amended complaint with respect to their promissory estoppel claim, nor in their response to defendant=s motion for summary judgment. The only evidence that plaintiffs offered to support their promissory estoppel claim in response to defendant=s motion for summary judgment was a single page from Glenn Myer=s deposition. The meaning of this passage is not particularly clear, but Myer appears to assert that defendant promised to extend the financing contingency deadline in the original agreement between defendant and the Coughlins. Even if plaintiffs preserved the argument that they now raise on appeal, their alleged reliance on such a promise would be unreasonable as a matter of law because the contract between the Coughlins and defendant specifically prohibited oral modifications of its terms. Viewing the supported facts in plaintiffs= favor, we agree with the trial court that plaintiffs failed to satisfy the requirements of promissory estoppel. See Flaim, 174 Vt. at 497.

Turning to the consumer fraud claim, plaintiffs allege that the court erred in concluding that they were not Aconsumers@ within the meaning of the Consumer Fraud Act. They argue that the evidence was disputed as to the Coughlins= relationship with the Myers, and what the parties= plans were for the condominium. They also maintain that the court erred as a matter of law because there was no evidence that they planned on reselling the property for a profit.

We do not reach the question of whether plaintiffs are Aconsumers@ under the Act because we conclude that summary judgment is appropriate on other grounds. As the trial court explained, to successfully pursue a claim under the Consumer Fraud Act: A(1) there must be a representation, practice, or omission likely to mislead the consumer; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be >material,= that is, likely to affect the consumer=s conduct or decision with regard to a product.@ Greene, 2004 VT 67, & 15 (citation omitted). There must also be Asome

cognizable injury caused by the alleged consumer fraud.@ Id., & 13. As discussed above, plaintiffs Coughlin could not have reasonably interpreted defendant=s alleged promise to obviate the plain requirements of the agreement that they signed. As to the Myers, there is no cognizable injury that resulted from any alleged oral promise. Defendant did not have any agreement with the Myers, and even if they had, Aa mere breach of contract cannot be sufficient to show consumer fraud.@ Id., & 15.

For similar reasons, we conclude that summary judgment was appropriately granted to defendant on the common law fraud claim as well. To establish fraud, there must be Asome affirmative act, or . . . concealment of facts by one with knowledge and a duty to disclose.@ Sugarline Assocs. v. Alpen Assocs., 155 Vt. 437, 444 (1990) (citation omitted). As the trial court explained, defendant owed no duty to the Myers. As to the Coughlins, their contract with defendant plainly provided that its terms could not be orally modified. See id. at 445 (ALiability in fraud extends only to harm caused by the [plaintiff=s] justifiable reliance upon the misrepresentation.@) (citations omitted). Alternatively, if there was not a valid contract between defendant and the Coughlins, then defendant owed the Coughlins no duty. Summary judgment was properly granted to defendant on this claim.

Finally, we do not address plaintiffs= assertion, raised for the first time on appeal, that the original contract between defendant and the Coughlins was illusory because it did not provide for mutual obligations or remedies for enforcing the contract. See Bull v. Pinkham Eng=g Assocs., 170 Vt. 450, 459 (2000) (AContentions not raised or fairly presented to the trial court are not preserved for appeal.@).

Based on our conclusions, we need not address plaintiffs= assertion that the jury verdict should be reversed because all of plaintiffs= claims should have been tried together. Summary judgment was properly granted to defendant on these claims.

Finally, plaintiffs argue that the court erred in awarding defendant pre-judgment interest on the escrowed funds. They assert that defendant continually held the deposit money and it was not deprived of any ability to use the funds or place them in an interest-bearing account. We find no error in the court=s award. As the trial

court found, the damages in this case were liquidated as of the date that the action was commenced, and defendant was plainly entitled to interest on the judgment. See V.R.C.P. 54(a) (AIn an action where monetary relief is awarded, the amount of the judgment shall include the principal amount found to be due, all interest accrued on that amount up to and including the date of entry of the judgment, and all costs allowed to the prevailing party.@); Estate of Fleming v. Nicholson, 168 Vt. 495, 501 (1998) (recognizing that award of prejudgment interest is mandated in those cases where damages are liquidated or reasonably ascertainable). Plaintiffs offer no compelling basis for reaching a contrary conclusion.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice

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[1] According to the Coughlins, the Myers paid half of this deposit.

[2] Before trial, defendant filed a motion to dismiss the Myers from the case. Based on its earlier summary judgment decision, the court concluded that the Myers were properly characterized as cross-claimants against the Coughlins for the return of their portion of the security deposit should the Coughlins prevail at trial. The court informed the Myers that they could either withdraw as plaintiffs and be witnesses in the trial, or they could stay in the case as cross-claimants against the Coughlins under V.R.C.P. 13(g). After conferring with counsel, the Myers elected to be dismissed from the case.