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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0739-21**

**ROBERT L. ROGERS and
JOYCE A. ROGERS,**

Plaintiffs-Appellants,

v.

**NORA C. CONTI and
CHRISTOPHER M. CONTI,
both individually and as
attorney-in-fact for NORA C.
CONTI,**

Defendants-Respondents,

and

**ACTIONUSA JAY ROBERT
REALTORS,**

Defendant.

Submitted January 31, 2023 – Decided May 5, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law
Division, Mercer County, Docket No. L-0442-19.

Bernstein & Manahan, LLC, attorneys for the appellants (James P. Manahan, of counsel and on the briefs).

The Spadaccini Law Firm, LLC, attorneys for respondents (Robert W. Slomicz, of counsel and on the brief).

PER CURIAM

In this appeal, plaintiffs (buyers) appeal from an order granting summary judgment to defendants (sellers) regarding an alleged concealed defective condition in the sale of a residential real estate property, namely, the presence of mold. Because we agree with the trial court that plaintiffs did not make any misrepresentations and had no prior knowledge of the alleged condition, we find no material issues of fact precluding summary judgment and affirm.

Plaintiffs entered into a real estate contract to purchase a home "as is" in an age-restricted community from defendant Nora C. Conti, an elderly woman who had moved out of the property at least a year earlier due to health issues. The transaction was handled by her son as attorney-in-fact (collectively defendants).

One year before the property was listed for sale, a leak arose in the hallway bathroom. Seller's son discovered the leak within twenty-four hours and made an insurance claim, which adjusted the loss and made a total repair of the water

intrusion, including replacing sheetrock and treating the area with an anti-microbial agent.

Seller's son listed the property a year later and did not disclose the prior leak on the seller's disclosure form. Plaintiff's professional inspection did not disclose any issues with the property. Three days after closing, buyers somehow discovered mold behind some walls and asked to rescind the sale. Seller did everything to rescind the sale, including stopping the deed from being recorded, returning all proceeds to escrow, and offering to make buyers whole – even offering to cover the broker's commission. Plaintiffs then insisted on consummating the transaction.

Plaintiffs refused to allow defendants to inspect the alleged mold condition and completely renovated the alleged condition, eliminating any evidence of the alleged mold. Plaintiffs then filed this action, alleging breach of contract, civil conspiracy, intentional common law and consumer fraud, and breach of the implied covenant of good faith and fair dealing.

Following discovery, defendants moved for summary judgment, barring plaintiffs' expert report as a net opinion, and barring plaintiffs' expert from testifying. The trial court granted summary judgment to defendants. It found

plaintiffs did not make any misrepresentations. It also found plaintiffs' expert report was a net opinion.

Plaintiffs argue there were material facts at issue precluding summary judgment, claiming the trial court erred by assuming the role of the jury in determining defendants did not make a material misrepresentation of a fact relevant to the real estate transaction. Plaintiffs claim if defendants had given proper disclosure of the water leak at the time of the contract, plaintiffs would have proceeded in a different manner by either cancelling the contract or conducting a more extensive inspection of nonvisible portions of the property. They assert the trial court based its decision on what was known by defendants at the time of sale rather than considering defendants' failure to respond to relevant questions in the Seller Property Condition Disclosure Statement (Statement). Plaintiffs further assert defendants had an independent duty to disclose the prior year's leak, without citing to any case law. Plaintiffs further argue the judge should have allowed plaintiffs' evidence of a mold-like condition to be presented to the finder of fact as lay testimony under the common knowledge doctrine with regard to a causal link between the condition reported and defendants' conduct. Therefore, an expert was not necessary.

An appellate court reviews de novo orders granting summary judgment and applies the same standard that governed the trial court's ruling. Lee v. Brown, 232 N.J. 114, 126, (2018); see also Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). Summary judgment will be granted if, viewing the competent evidential materials in the light most favorable to the non-moving party, "there is no genuine issue of material fact and 'the moving party is entitled to a judgment or order as a matter of law.'" Conley v. Guerrero, 228 N.J. 339, 346 (2017) (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)).

The court must keep in mind that "an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "The practical effect of this rule is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat, 217 N.J. at 38-39 (citing Brill, 142 N.J. at 523, 542-45).

Pertinent to our review of this appeal, "[b]are conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." U.S. Pipe & Foundry Co. v. Am. Arb. Ass'n., 67 N.J. Super. 384,

399-400 (App. Div. 1961). Our rules require a movant to file a statement of material facts that sets forth a concise statement of each material fact to which the movant contends there is no genuine issue. R. 4:46-2(a). A party offering no substantial or material facts in opposition to the motion cannot complain if the court deems as true the uncontradicted facts in the movant's papers. See Judson v. People's Bank & Tr. Co. of Westfield, 17 N.J. 67, 75 (1954); R. 4:46-5.

Critical to this appeal are two documents in the record, the sale contract, and the Statement, executed prior to entering the sale contract. The Statement instructs that "[t]he purpose of this Disclosure Statement is to disclose, to the best of Seller[s]' knowledge, the condition of the Property, as of the date set forth below." Defendants expressed they were unaware of "any leaks, backups, or other problems relating to any of the plumbing systems and fixtures" Additionally, buyers expressly affirmed their decision to buy the property "as is" in the sale contract, and not based on "any representations made by seller" As correctly noted by the trial court:

I honestly don't even see a misrepresentation here or the duty of the . . . defendant homeowners to disclose something that wasn't asked of them that goes beyond what's in the disclosure form. Question 40 is answered accurately. There's no dispute about that. I mean I know you contend that maybe they should have provided a more voluminous answer, but there's no

requirement on that. It's a yes or no. They answered it appropriately.

Additionally, the trial court found there was no causal connection between the occurrence of a prior plumbing leak and the alleged presence of mold, stating expert testimony would be needed to make that assertion and plaintiffs' expert report amounted to a net opinion. The court also noted defendants never had the opportunity to inspect the alleged condition because plaintiffs completely remodeled the area, did not preserve any evidence of mold, and refused to allow defendants to inspect the condition. Finding it was "pure speculation" to suggest defendants had any knowledge of a mold condition at the time the Statement was executed, the trial judge found no material issue of fact precluding summary judgment. We concur.

Generally, when the term "as is" is used in connection with the sale of realty, it acknowledges that the purchaser is "acquiring real property in its present state or condition." K. Woodmere Assocs., L.P. v. Menk Corp., 316 N.J. Super. 306, 316 (App. Div. 1998) (citations omitted). "The term implies real property is taken with whatever faults it may possess, and that the grantor is released of any obligation to reimburse purchaser for losses or damages resulting from the condition of the property conveyed." Id. at 317. Buyers accepted the

property with whatever faults it possessed, even after the opportunity to rescind the sale was given by the sellers.

However, the principle assumes that the seller has satisfied its duty to disclose all latent defects that are not readily observable. Plaintiff's argument that the trial court impermissibly acted as the trier of fact lacks legal support. Sellers did not represent there were never any leaks; rather at the moment of the execution of the Statement, there were no water problems to be the best of their knowledge. The record is devoid of any evidence defendants had knowledge of latent mold on the property.

The Statement asked questions about the present condition of the property, not any prior occurrences on the property. The previous leak, having been fully remediated a year prior, was not inquired about and did not require disclosure. Defendants answered the Statement accurately. Plaintiffs cannot establish any duty on the part of defendants to disclose an unknown, latent condition, particularly in light of their own professional inspection and the sale of the property in "as is" condition.

Whether a party has a duty to act is a question of law, not one of fact. Strawn v. Canuso, 271 N.J. Super. 88, 100 (App. Div. 1994) aff'd, 140 N.J. 43 (1995). The court has determined that in the sale of real estate the seller has a

duty to disclose "on-site defective conditions" if those conditions "[are] known to them and unknown and not readily observable by the buyer." Strawn, 140 N.J. at 59 (1995). The question of whether a legal duty exists is an issue ripe for summary judgment. The dispositive issue and the uncontroverted record demonstrate sellers did not violate any duty to disclose latent defects on the date of sale.

Notably, plaintiffs do not argue the trial court erred in determining plaintiffs' expert rendered a net opinion, instead arguing lay testimony is sufficient on the cause of mold. Defendants argue plaintiffs cannot prove causation without admissible expert testimony and the court agreed. We see no reason to disturb that conclusion.


Generally, "[w]hen the proofs involve a defect in a complex instrumentality, an expert is frequently required to assist the jury in understanding the mechanical intricacies and weighing competing theories of causation." Ford Motor Credit Co. LLC v. Mendola, 427 N.J. Super. 226, 236 (App. Div. 2012). "A mere possibility of . . . causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." Reynolds v. Gonzalez, 172 N.J. 266, 284 (2002) (quoting W.

Page Keeton et. al., Prosser & Keeton on the Law of Torts, § 41, at 269 (5th ed. 1984)); see also Mendola, 427 N.J. Super. at 237 (noting that where there are several causative factors involved, "allowing a jury to determine liability . . . would require impermissible speculation as to causation"); Lauder v. Teaneck Volunteer Ambulance Corps, 368 NJ. Super. 320, 330-33 (App. Div. 2004) (expert testimony required to explain why a gurney collapsed). Further, if plaintiff's case requires the support of expert testimony, the failure to adduce it will require dismissal. See Pressler and Verniero, Current N.J. Court Rules, cmt. 2.3 on R. 4:37-2 (2023); see also Smith v. Keller Ladder Co., 275 N.J. Super. 280, 284-86 (App. Div. 1994) (affirming dismissal when plaintiffs expert's opinion was sole proof of necessary element and was stricken as a net opinion).

Plaintiffs cannot establish defendants had a duty to disclose an unknown mold condition, much less breach of that duty. Additionally, in the absence of an expert report, plaintiffs cannot prove the alleged mold condition was caused by the water leak remediated a year prior to the closing, and the trial court correctly granted summary judgment to defendants. The causal nexus cannot be established.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION