No. 1-10-0645

FIFTH DIVISION
June 10, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD J. PIETRANEK, MARLENE PIETRANEK,	))	Appeal from the
	))	Circuit Court of
Plaintiffs-Appellees and Cross-Appellants,	))	Cook County
	))	
v.	)	
	)	
SUZY LEE,	)	No. 05 L 50889
	)	
Defendant,	)	
and MP TOWERS, LLC,		Honorable Elizabeth Budzinski,
Defendant-Appellant and Cross-Appellee.		Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

Held: Where condominium developer sold a parking space to unit owners with sales documents and warranty deed referencing the original condominium declaration and plat of survey, and failed to disclose the existence of an amended declaration and plat moving the location of the space, the trial court did not err in finding for plaintiff-purchasers on their breach of warranty deed and statutory consumer fraud claims. Nor did the trial court err in dismissing the developer from plaintiffs' quiet title claim where the developer no longer retained an ownership interest in the parking space. Further, the trial court correctly denied certain of plaintiffs' claimed attorney fees where plaintiffs failed to provide statutory or contractual authority for such an award, but it

improperly assessed damages relating the breach of warranty deed claim where the measure of those damages bore no relation to the loss complained of.

BACKGROUND

This matter concerns a dispute over a parking space located in the Museum Park East Condominium building at 1301 South Indiana Avenue in Chicago, Illinois. The essential underlying facts are undisputed.

On September 22, 2003, defendant Suzy Lee purchased a condominium unit and garage unit 29 (GU 29) from defendant-developer MP Tower, LLC (MPT). The legal description of GU 29 in the warranty deed incorporated the Declaration of Condominium Pursuant to the Condominium Property Act for Museum Tower Residences Condominiums (Original Declaration), recorded with the Cook County Recorder of Deeds on May 22, 2003, as document number 0314219137, and the plat of survey attached to the Original Declaration, which showed that GU 29 was located on the basement level.

On February 24, 2004, plaintiffs Richard and Marlene Pietranek entered into a sales contract with MPT for the sale of another condominium unit, as well as garage unit 204 (GU 204). Although the sales contract was executed, the parties agreed to extend the attorney approval period and negotiations on the terms of the sale proceeded through counsel over the course of the next month. During these negotiations, GU 204 became unavailable and plaintiffs selected another parking spot of comparable size, garage unit 177 (GU 177), in its place. By March 23, 2004, the terms and conditions of the purchase were finally agreed upon and the closing was set for May 20, 2004.

On March 24, 2004, a Second Amendment to the Declaration of Condominium Pursuant to Condominium Property Act for Museum Tower Residences Condominiums (Second Declaration)

was recorded with the Cook County Recorder of Deeds as document number 048918120, along with a revised plat of survey. The revised plat renumbered the garage parking spaces so that GU 29 was now located on the third floor of the garage in the space previously designated garage unit 221 (GU 221). MPT did not inform plaintiffs of the amendment.

The closing on plaintiffs' purchase was held on May 20, 2004 at the Mercury Title Company. During the closing, counsel for MPT, who attended telephonically, informed Richard that GU 177 was no longer available, but GU 221, a parking space of comparable size, was available. Richard asked to see the plat so he could consider the size and location of GU 221. The title company employee provided the plat attached to the Original Declaration, which showed GU 221 was on the third floor of the garage, not the revised plat attached to the Second Declaration, which placed the space in the basement. Richard called his wife, Marlene, who went to the third floor of the parking garage to determine if the space marked GU 221 was large enough for their needs. Marlene inspected the space and told Richard it was sufficient. Plaintiffs agreed to the substitution and the remaining closing documents were executed. Amongst those documents was a bill of sale and warranty deed issued by MPT to plaintiffs providing the legal description of the property sold as being "DELINEATED ON A SURVEY ATTACHED TO THE DECLARATION OF CONDOMINIUM RECORDED AS DOCUMENT NO. 0314219137" – the Original Declaration and plat.

Sometime after plaintiffs closed on the property, Lee asserted an ownership right to the renumbered third-floor parking space. MPT supported Lee's claim to the space, stating that the revised plat attached to the Second Declaration controlled the parties' rights.

On September 22, 2005, plaintiffs filed the instant lawsuit against Lee, seeking her ejectment and to quiet title to the third-floor parking space in their name. MPT was subsequently added as a defendant and, after several amended complaints, plaintiffs ultimately brought claims for: (1) ejectment against Lee (count I); (2) breach of warranty of title against MPT (count II); (3) common law fraud against MPT (count III); (4) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (West 2008)) against MPT (count IV); (5) quiet title against Lee and MPT (count VI); and, alternatively (6) breach of the covenant of seisin against MPT (count V). The trial court dismissed count III with prejudice, and MPT answered the remaining claims. On October 22, 2009, Lee filed for bankruptcy and the case against MPT proceeded.

Following a three-day bench trial, the trial court found for plaintiffs and against MPT on count II of the complaint, the breach of warranty claim, and count IV, the Consumer Fraud Act claim, awarding $939.28 in damages for each count. As for count VI, the quiet title action, the trial court found, *inter alia*, the legal description of the parking space attached to plaintiffs' warranty deed evidenced their superior title in and right to the third-floor space and thus quieted title to that property in their favor. The trial court also found that MPT retained no ownership interest in the third-floor parking space and dismissed the remainder of count VI against MPT. Count V, the alternative seisin claim, was dismissed as moot. On February 10, 2010, the trial court awarded plaintiffs $41,934.63 in attorney fees and $1,581.61 in costs relating to count IV. These cross appeals followed pursuant to the trial court's Rule 304(a) finding. Ill. S.Ct. R. 304(a) (eff. Jan. 1, 2006).

On appeal, MPT contends: (1) the trial court's ruling on the Consumer Fraud Act claim must

be reversed and vacated because it is inconsistent with its ruling on the quiet title claim; (2) the trial court's ruling on the Consumer Fraud Act claim must be reversed and vacated because a misrepresentation claim cannot be based on the failure to disclose information that is of public record; and (3) the trial court's ruling on the breach of warranty of title claim must be reversed and vacated because it is inconsistent with its ruling on the quiet title claim. Plaintiffs cross-appeal, contending the trial court erred in: (1) dismissing their quiet title claim against MPT; and (2) excluding their claimed attorney fees relating to their breach of warranty of title claim. For the following reasons, we affirm as modified.

ANALYSIS

I. Consumer Fraud Act

MPT raises several arguments for the reversal of the trial court's judgment on count IV of the complaint, the consumer fraud claim. First, MPT contends that the fraud claim fails as a matter of law because, in quieting title to the third-floor parking space in plaintiffs' favor, the trial court found that MPT sold that property to plaintiffs, necessarily precluding a finding that MPT made any material misrepresentation. Despite the allegations in their complaint and the trial court's finding of title in their favor, plaintiffs respond that MPT did not sell them the third-floor parking space and, in any event, the trial court's findings on the consumer fraud and quiet title claims are not irreconcilable.

The trial court found plaintiffs demonstrated superior title to the third-floor parking space through their uncontradicted testimony and documentary evidence, including their warranty deed, which referenced only the Original Declaration and plat. The court found Lee's claim to the space

was an unwarranted cloud on title and thus quieted title in plaintiffs' favor. If, as plaintiffs contend for the first time, MPT did not sell them the third-floor parking space, they would have no apparent basis for claiming title to that property.

> " 'It is a fundamental requirement in an action to quiet title or in an action to remove a cloud from a title that the plaintiff must recover on the strength of his own title, although it is not required that a perfect title be established.' [Citation.] Thus where a plaintiff has no title in himself, he cannot claim that there is a cloud upon title." *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill. App. 3d 792, 812 (1985).

Plaintiffs impliedly acknowledge this point by basing count VI on their purchase of the third-floor parking space and alleging that MPT conveyed that space to them. However, as neither party appeals that part of the trial court's judgment quieting title in plaintiffs' favor, we will not revisit the wisdom of that decision here. The question presented is whether, given the trial court's finding that MPT conveyed the third-floor parking space to plaintiffs, the consumer fraud claim can stand on its own merits.

To prove a private claim under the Consumer Fraud Act, a plaintiff must establish: "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149 (2002). A deceptive act or practice includes the use of any "misrepresentation or the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact" in the conduct

of any trade or commerce. 815 ILCS 505/2 (West 2008). The Consumer Fraud Act is to be liberally construed and broadly applied to protect consumers, allowing a plaintiff to recover for even innocent misrepresentations and omissions. *Randels v. Best Real Estate, Inc.*, 243 Ill. App. 3d 801, 805 (1993). "Whether a party has adequately proved the elements of statutory fraud is a question of fact, and a reviewing court will not disturb a trial court's finding unless it is against the manifest weight of the evidence." *Malooley v. Alice*, 251 Ill. App. 3d 51, 55 (1993).

The trial court found plaintiffs established their consumer fraud claim by, *inter alia*, presenting credible evidence that MPT misrepresented what was being sold and by omitting information related to the Second Declaration. MPT contends that the consumer fraud claim must fail "because the alleged misrepresentation turned out to be perfectly accurate: the represented Garage Unit was *** sold and conveyed to the plaintiffs." However, even if MPT made no affirmative misrepresentation, it is clear that it failed to disclose material facts to plaintiffs, who can prevail on that basis alone. See *People v. Johnson*, 208 Ill. 2d 118, 128 (2003) (reviewing courts consider "the correctness of the result reached by the lower court and not the correctness of the reasoning upon which that result was reached.").

MPT does not challenge the trial court's finding that it failed to disclose the existence of the Second Declaration and amended plat, but rather argues the existence of those documents was immaterial to plaintiffs' purchase. We are not persuaded. "A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 505 (1996). Materiality is measured under an objective

standard. *Kitzes v. Home Depot, U.S.A., Inc.*, 374 Ill. App. 3d 1053, 1061 (2007). We believe a reasonable person would consider the existence and contents of an amended condominium declaration to be a basic and essential fact in the purchase of a condominium, especially where, as here, the amendment purports to alter the agreement reached by the seller and buyer. Had plaintiffs been aware of the Second Declaration and amended plat, it is reasonable to conclude, as they allege and the trial court found, they would have acted differently, perhaps by demanding the closing documents be amended to avoid the type of confusion and conflict that has taken these last six years to resolve.

MPT next contends that, as a matter of law, a Consumer Fraud Act claim cannot be based on the omission of "mutually discoverable public information." In making this argument, MPT relies on *Randels v. Best Real Estate, Inc.*, 243 Ill. App. 3d 801, and *Notaro Homes, Inc. v. Chicago Title Insurance Company,* 309 Ill. App. 3d 246 (2000), both of which follow the general principle that "a deceptive representation or omission *of law* generally does not constitute a violation of the Consumer Fraud Act because both parties are presumed to be equally capable of knowing and interpreting the law." (Emphasis added.) *Randels*, 243 Ill. App. 3d at 805; *Notaro*, 309 Ill. App. 3d at 258. We need not discuss these cases in depth. It is sufficient for our purposes to state the omissions at issue in both cases concerned the failure to disclose an ordinance. *Randels*, 243 Ill. App. 3d at 805; *Notaro*, 309 Ill. App. 3d at 258. The omission at issue here concerns an issue of fact – the existence of the Second Declaration and amended plat – not an issue of law. MPT fails to make this distinction and cites no support for the proposition that omissions of fact cannot, as a matter of law, form the basis of a Consumer Fraud Act claim where the existence of that fact is a matter of public record. Given

that actual reliance is not an element of a consumer fraud claim, that failure is not surprising. See *Connick*, 174 Ill. 2d at 501 ("[p]laintiff's reliance is not an element of statutory consumer fraud.").

MPT further contends that the consumer fraud claim cannot stand because Illinois law does not impose a duty on the seller of real estate to affirmatively notify a buyer of a recorded plat or plat amendments. In support of this argument MPT cites a nonexistent provision of the Condominium Property Act (765 ILCS 605/1 *et seq*. (West 2008)). From the context of the argument, it is fairly clear, however, that MPT relies on section 22 of the Condominium Property Act, which requires the disclosure of certain information in relation to the initial sale or offering for sale of any condominium unit. 765 ILCS 605/22 (West 2008). Even if MPT is correct that section 22 does not require a seller to provide a buyer with a plat of survey prior to or at the time the sales contract is executed, it does expressly require a seller provide a buyer with the condominium declaration. 765 ILCS 605/22(a) (West 2008). As plaintiffs' claim is based on the failure to disclose the amended plat *and* Second Declaration, MPT's argument is ultimately unavailing. Moreover, it is well established that "it is unnecessary to plead a common-law duty to disclose in order to state a valid claim of consumer fraud based on an omission or concealment." *Rockford Memorial Hospital v. Havrilesko*, 368 Ill. App. 3d 115, 122 (2006). The trial court's judgment on count IV of the complaint is affirmed.

II. Breach of Warranty of Title

As with the consumer fraud claim, MPT contends that the trial court erred in finding for plaintiffs on the breach of warranty of title claim because it found for plaintiffs on the quiet title claim. However, MPT offers no supporting argument or legal authority for this position.

> "Bare contentions in the absence of argument or citation of authority do not merit consideration on appeal and are deemed waived. [Citation.] A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error [citation]." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993).

Accordingly, we deem this argument waived.

MPT also contends that the damages awarded by the trial court in relation to the breach of warranty of title claim are inappropriate. Reviewing courts "will not disturb the damages assessed by a trial court sitting without a jury unless its judgment is against the manifest weight of the evidence. [Citation.] A trial court's damages assessment is against the manifest weight of the evidence when it ignored the evidence or used an incorrect measure of damages." *Royal's Reconditioning Corp., Inc. v. Royal*, 293 Ill. App. 3d 1019, 1022 (1997). The trial court awarded plaintiffs $939.28 for the warranty claim. This amount was apparently calculated by totaling the differences in property taxes and assessments between the third-floor parking space, which plaintiffs always paid, and the less valuable basement parking space, which plaintiffs actually used during the course of this litigation. The amount also includes the cost of acquiring new title insurance for the third-floor parking space. MPT asserts that: (1) neither of these measures reflect the interference with plaintiffs' property rights; (2) there are no "sensible grounds" for holding MPT liable for these damages because plaintiffs were judged to have owned the third-floor parking space; and (3) there

was no showing that a new title policy was necessary. Plaintiffs respond simply that the damages are a consequence of MPT's actions. It is, however, difficult to see how the taxes and assessments paid by plaintiffs are a natural and proximate consequence of MPT's breach and plaintiffs' loss of use of the parking space. Plaintiffs owned the third-floor parking space and consequently paid taxes and assessments on it. The difference in the taxes and assessments between the parking space they owned and the parking space they used bears no relationship to their loss and is therefore an improper measure of damages. Accordingly, pursuant to Supreme Court Rule 615(b)(1) (Ill. Sup.Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), the $739.28 in damages award on count II relating to the tax and assessment differential is vacated.

With regard to the new title insurance policy, Richard testified that a new policy was necessary once title to the property had been cleared. As MPT introduced nothing to contradict that testimony, and the trial court expressly found Richard to be a credible witness, there is no reason to disturb the trial court's judgment on that point.

In their cross appeal, plaintiffs contend the trial court erred in excluding attorney fees related to the warranty claim, which they assert they are entitled to as damages. MPT responds that plaintiffs cite no authority for the proposition that attorney fees are recoverable in a breach of warranty deed claim and offer no argument as to why the trial court abused its discretion in denying those fees below.

The trial court found, *inter alia*, that plaintiffs presented no basis in law for seeking attorney fees under a breach of warranty of title claim. In doing so, the court was apparently following the rule that "[l]itigation expenses are generally not allowable to the successful party in the absence of

a statute or a contractual agreement between the parties." *Duignan v. Lincoln Towers Insurance Agency, Inc.*, 282 Ill. App. 3d 262, 268 (1997). Plaintiffs cite no statutory authority or contractual provision allowing for the recovery of attorney fees on count II. *Midwest Bank v. Abney II*, on which plaintiffs wholly rely, merely states that damages may be recovered for breach of a covenant of good title. 365 Ill. App. 3d 636, 644 (2006). In some situations "attorney fees and costs incurred as a result of a defendant's conduct may be awarded as a form of damages," however, even then, only those fees incurred in an effort to cure the damage caused by a defendant, as opposed to fees expended in the action against the defendant, are recoverable. *Duignan*, 282 Ill. App. 3d at 268-69. Plaintiffs do not argue that they incurred attorney fees in any effort to cure the damage caused by MPT outside the bounds of this lawsuit. Instead, they argue that without an award of attorney fees, the trial court's judgment on count II is a "pyrrhic victory." In any lawsuit, like any war, a party must weigh the likely cost of engaging their adversary against the likely benefit. If they do not, they hazard the same fate of King Pyrrhus of Epirus – from whose experiences the phrase "pyrrhic victory" derives – who, after several costly tactical successes against an emerging Roman Republic in the third century B.C., lamented "If we are victorious in one more battle with the Romans, we shall be utterly ruined." Plutarch, *Life of Pyrrhus*, 21:8. Plaintiffs' failure to engage in cost-benefit analysis before acting is no more availing here than it was for King Pyrrhus all those centuries ago and, although expensive, is no reason to grant them the full cost of their campaign. The trial court's denial of attorney fees on count II is affirmed.

III. Quiet Title

Finally, plaintiffs contend in their cross appeal that the trial court erred in dismissing MPT

from the quiet title claim and not assessing attorney fees related thereto. Plaintiffs base this contention on their aforementioned argument that MPT did not sell them the third-floor space, but rather sold the basement space twice, once to them and once to Lee. As we have previously addressed this issue and plaintiffs cite no authority in support of their argument, we affirm the trial court's dismissal of MPT from count VI.

CONCLUSION

Based on the foregoing, we vacate the award of $739.28 in damages relating to count II of the complaint and affirm the judgment of the circuit court of Cook County in all other respects.

Affirmed as modified.