Fred Obde et al., Respondents, v. Robert L. Schlemeyer et al., Appellants

Supreme Court of Washington, Department Two
56 Wn.2d 449 (1960)

[The sellers did not inform the buyers of an apartment house that it was infested with termites at the time of the sale. The sellers knew of the infestation and had made a less than complete attempt to eliminate the problem. The sellers claim they had no duty to inform the buyers of the termite condition. When is it efficient for a contracting party to disclose information?]

JUDGES: Finley, J. Weaver, C. J., Rosellini, and Foster, JJ., concur. Hill, J., concurs in the result.

OPINIONBY: FINLEY

Plaintiffs, Mr. and Mrs. Fred Obde, brought this action to recover damages for the alleged fraudulent concealment of termite infestation in an apartment house purchased by them from the defendants, Mr. and Mrs. Robert Schlemeyer. Plaintiffs assert that the building was infested at the time of the purchase; that defendants were well apprised of the termite condition, but fraudulently concealed it from the plaintiffs.

After a trial on the merits, the trial court entered findings of fact and conclusions of law sustaining the plaintiffs' claim, and awarded them a judgment for damages in the amount of $3,950. The defendants appealed. Their assignments of error may be compartmentalized, roughly, into two categories: (1) those going to the question of liability, and (2) those relating to the amount of damages to be awarded if liability is established.

First, as to the question of liability: The Schlemeyers concede that, shortly after they purchased the property from a Mr. Ayars on an installment contract in April 1954, they discovered substantial termite infestation in the premises. The Schlemeyers contend, however, that they immediately took steps to eradicate the termites, and that, at the time of the sale to the Obdes in November 1954, they had no reason to believe that these steps had not completely remedied the situation. We are not convinced of the merit of this contention.

The record reveals that when the Schlemeyers discovered the termite condition they engaged the services of a Mr. Senske, a specialist in pest control. He effected some measures to eradicate the termites, and made some repairs in the apartment house. Thereafter, there was no easily apparent or surface evidence of termite damage. However, portions of the findings of fact entered by the trial court read as follows:

"Senske had advised Schlemeyer that in order to obtain a complete job it would be necessary to drill the holes and pump the fluid into all parts of the basement floors as well as the basement walls. Part of the basement was used as a basement apartment. Senske informed Schlemeyer that the floors should be taken up in the apartment and the cement flooring under the wood floors should be treated in the same manner as the remainder of the basement. Schlemeyer did not care to go to the expense of tearing up the floors to do this and therefore this portion of the basement was not treated.

"Senske also told Schlemeyer even though the job were done completely, including treating the portion of the basement which was occupied by the apartment, to be sure of success, it would be necessary to make inspections regularly for a period of a year. Until these inspections were made for this period of time the success of the process could not be determined. Considering the job was not completed as mentioned, Senske would give Schlemeyer no assurance of success and advised him that he would make no guarantee under the circumstances."

… The pattern thus established is hardly compatible with the Schlemeyers' claim that they had no reason to believe that their efforts to remedy the termite condition were not completely successful.

The Schlemeyers urge that, in any event, as sellers, they had no duty to inform the Obdes of the termite condition. They emphasize that it is undisputed that the purchasers asked no questions respecting the possibility of termites. …Applying the traditional doctrine of *caveat emptor* -- namely, that, as between parties dealing at arms length (as vendor and purchaser), there is no duty to speak, in the absence of a request for information -- the Massachusetts court held that a vendor of real property has no duty to disclose to a prospective purchaser the fact of a latent termite condition in the premises.

Without doubt, the parties in the instant case were dealing at arms length. Nevertheless, and notwithstanding the reasoning of the Massachusetts court above noted, we are convinced that the defendants had a duty to inform the plaintiffs of the termite condition. In *Perkins v. Marsh* (1934), 179 Wash. 362, ..., a case involving parties dealing at arms length as landlord and tenant, we held that,

"Where there are concealed defects in demised premises, dangerous to the property, health or life of the tenant, which defects are known to the landlord when the lease is made, but unknown to the tenant, and which a careful examination on his part would not disclose, it is the landlord's duty to disclose them to the tenant before leasing, and his failure to do so amounts to a fraud."

We deem this rule to be equally applicable to the vendor-purchaser relationship. See 15 Tex. Law Review (December 1936) 1, 14-16, Keeton: *Fraud -- Concealment and Non-Disclosure*. In this article Professor Keeton also aptly summarized the modern judicial trend away from a strict application of *caveat emptor* by saying:

"It is of course apparent that the content of the maxim 'caveat emptor,' used in its broader meaning of imposing risks on both parties to a transaction, has been greatly limited since its origin. When Lord Cairns stated in *Peek v. Gurney* that there was no duty to disclose facts, however morally censurable their non-disclosure may be, he was stating the law as shaped by an individualistic philosophy based upon freedom of contract. It was not concerned with morals. In the present stage of the law, the decisions show a drawing away from this idea, and there can be seen an attempt by many courts to reach a just result in so far as possible, but yet maintaining the degree of certainty which the law must have. The statement may often be found that if either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose then his silence is fraudulent.

...

A termite infestation of a frame building, such as that involved in the instant case, is manifestly a serious and dangerous condition. One of the Schlemeyers' own witnesses, Mr. Hoefer, who at the time was a building inspector for the city of Spokane, testified that ". . . if termites are not checked in their damage, they can cause a complete collapse of a building, . . . they would simply eat up the wood." Further, at the time of the sale of the premises, the condition was clearly latent -- not readily observable upon reasonable inspection. As we have noted, all superficial or surface evidence of the condition had been removed by reason of the efforts of Senske, the pest control specialist. Under the circumstances, we are satisfied that "justice, equity, and fair dealing," to use Professor Keeton's language, demanded that the Schlemeyers speak -- that they inform prospective purchasers, such as the Obdes, of the condition, regardless of the latter's failure to ask any questions relative to the possibility of termites.

…

For the reasons hereinbefore set forth, we hold that the trial court committed no error in determining that the respondents (Obdes) were entitled to recover damages against the appellants (Schlemeyers) upon the theory of fraudulent concealment. …

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Questions

1. When should a seller be required to inform a potential buyer of potential problems? Does this enhance or reduce the efficient contracting?
2. Suppose the seller knew that a highway was likely to be built next to the home and that the construction of the highway would likely have a negative affect on the value of the property? Should the seller have a duty to inform potential buyers of this fact?
3. Suppose the buyer knew that a park was likely to be built next to the home and that the creation of the open area would likely have a positive affect on the value

of the property. Should the potential buyer have a duty to inform the seller of this fact?