

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-003558

01/03/2005

HONORABLE PETER C. REINSTEIN

CLERK OF THE COURT
M. Sahli
Deputy

FILED: 01/06/2005

CAROL BERGMAYR, et al.

KENT S BERK

v.

NORMA L BASHAM, et al.

SHAWN E NELSON

DAVID BRNILOVICH
JERRY L COCHRAN

MINUTE ENTRY

The Court having heard testimony of witnesses at trial and having reviewed the exhibits received in evidence makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On or about November 16, 1998, Defendants Schwandt purchased the property located at 8417 E. Garry Road, Scottsdale, AZ 85260 (the "subject property").
2. Defendants Schwandt used the subject property, including the insides of the main and guest homes, in addition to normal usage, to maintain a commercial dog breeding business and keep dogs.
3. Defendants Schwandts maintained a website which included information about their dog-related activities at the subject property.

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4. According to Defendants Schwandts' tax returns and breeding records, the results of their operations at the subject property from 1999 through August 2002 was as follows:

YEAR	LITTERS	DOGS BORN	DOGS KEPT	DOGS SOLD	GROSS RECEIPTS PER SCH. C	INCOME/(LOSS PER SCH. C	REVENUE PER LITTER RECORDS
1999	6	44	3	41	\$28,525	\$5,289	\$18,525
2000	11	73	1	72	\$39,975	(\$2,927)	\$35,250
2001	14	96	0	96	\$50,675	(\$24,583)	\$57,500
1/02	13	80	10	70	\$45,600	(\$27,828)	Not fully disclosed for this period
8/02 Total	38	293	14	279	\$164,775	(\$50,049)	

5. The dog-related activities at the subject property, given their duration, scope, quantity and intensity, constituted a business rather than merely a hobby.
6. On March 1, 2002, Defendants Schwandt purchased a residence and property in Goodyear, Arizona (the "Goodyear property"). The Schwandts subsequently moved to the Goodyear property.
7. On or about April 3, 2002, Defendants Schwandt listed the subject property for sale with Defendant Norma Basham. Norma Basham is a licensed real estate agent under Defendant Jancy Realty & Investment, Inc. d/b/a Century 21 Metro Alliance ("Jancy"). Defendant Charles McLean is the designated broker for Jancy. (Defendants Basham, Jancy and McLean are hereafter collectively referred to as the "Realty Defendants"). At all relevant times, McLean was the designated broker and employing broker of, was responsible for supervising and was liable for the acts of Defendant Basham while acting in the course and scope of her employment as an associate real estate broker through Jancy. As the designated broker, Defendant Mr. McLean, was responsible for supervising the actions of Ms. Basham. The listing price was \$439,900.
8. On or about May 14, 2002, the Schwandts reduced the list price for the subject property to \$421,000.
9. On or about June 5, 2002, Defendants Schwandt entered a Residential Resale Real estate Purchase Contract ("Purchase Contract") with Jim Painter, Plaintiff Bergmayr's son and Plaintiff McCullough's brother ("Painter").

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10. The information concerning the prior use of the property as a dog breeding business and to keep large numbers of dogs was material in that the information likely would have affected a reasonable buyer's decision to purchase or affect the price that a reasonable buyer would pay for the subject property.
11. The Purchase Contract provided that Painter could nominate someone to take his place under the contract. Defendants knew that Painter was the initial named purchase, but that other family members would actually be purchasing and living at the subject property.
12. Subsequently, Painter nominated Ms. Bergmayr, his mother ("Bergmayr"), to replace him as the purchaser under the Purchase Contract.
13. Nonparty Frederick "Fritz" Teetsel ("Teetsel") was the real estate agent representing the buyers in the transaction.
14. The MLS printout obtained and utilized by Teetsel included the language "Call first when owner gone, dogs are in kennels".
15. Bergmayr purchased the property to live at with her adult daughter, Jeanne McCullough ("McCullough"), and McCullough's five-year old son (Conor ("Conor")). Neither Bergmayr, McCullough, nor Conor was ever named as a party to the Purchase Contract nor named on any of the other closing documents.
16. In connection with and prior to the sale, Defendants Schwandt ("Schwands") completed, signed and provided a Residential Seller's Property Disclosure Statement ("SPDS").
17. By signing the SPDS, the Schwands affirmed that the information contained therein was true and complete to the best of their knowledge.
18. The Schwands reasonably and actually relied on Defendant Basham to advise them with respect to the sale of the house, including to advise them with respect to what disclosures needed to be made to prospective purchasers.
19. At or around the time of the listing, Defendant Basham advised/instructed the Schwands to clean up the subject property, including to move dogs away from the subject property so that the subject property would be more appealing to prospective buyers.
20. In Item 40 of the SPDS, Schwands represented that they were not aware of any violations of any zoning, building codes, sanitary or health regulations or other laws.

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21. In Item 55 of the SPDS, Schwandts represented, among other things, that they were not aware of any interior wall or floor problems at the subject property.
22. In Item 61 of the SPDS, Schwandts represented that they were not aware of any damage to any structure at the subject property.
23. In Item 153 of the SPDS, Schwandts represented that they were not aware of any other information concerning the subject property which might affect the buyer's decision-making process, the value of the property or its use.
24. In Item 202 of the SPDS, Schwandts represented that they were not aware of any other information concerning the subject property which might affect the buyer's decision-making process, the value of the property or its use.
25. The Schwandts were never advised by Basham to disclose the dog breeding business to potential buyers. The Schwandts depended on Basham to advise them as to what must be disclosed to future potential buyers.
26. Prior to the close of escrow, the buyers had a professional home inspection company, AmeriSpec, perform a home inspection. After the professional home inspection, buyers delivered a "Buyer Inspection Notice and Seller's Response" to the sellers that describe repairs that the buyers wanted made by the sellers. None of the defects complained of in this matter were described.
27. On August 13, 2002, Bergmayr's purchase of the subject property closed escrow.
28. Bergmayr paid the Schwandts \$400,000 for the subject property.
29. Defendant Basham, as the seller's real estate agent, owed the duties to "deal fairly" and honestly with all parties to the transaction and to disclose material information about the property to Plaintiffs and Jim Painter. In particular, Defendant Basham had the duty to "disclose in writing to all other parties any information which [she] possess[e]d that materially and adversely affect[ed] the consideration to be paid by any party to the transaction." Ariz. Admin. Code § R4-28-11101(B).
30. Prior to listing the subject property for sale, Defendant Basham knew that the Schwandts were in a dog breeding business with her daughter, Lisa Basham, that the business was operated from the subject property and that Defendants Schwandt and Lisa Basham had a website advertising the business. Defendant Basham was at the subject property on several occasions before and in connection

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with taking the listing and Defendant Holly Schwandt discussed the breeding business with Defendant Basham.

31. Subsequent to the purchase, McCullough heard about the dog breeding business from neighbors. Thereafter, in October 2002, she called Basham about the dog breeding business. Basham stated she did not know about the business.
32. Bergmayr would not have purchased the property had she been aware of the dog breeding business.
33. At the time of closing, the subject property actually had a value of \$340,000 given its prior use as a dog breeding business and to keep and breed large numbers of dogs. Defendants presented no evidence to contradict Bruce Greenberg's \$340,000 valuation of the subject property given its prior use.
34. The fact that a dog breeding business was once present on the property must be disclosed to future potential buyers.
35. Defendant's expert, John Foltz testified the number dogs on the property was not "routine".
36. Mr. Foltz also testified that potential buyers could perceive that this property "had more risk".
37. The property was approximately one and one-quarter acre in size with a 2,100 to 2,200 square foot main house, and a 1,100 square foot, 2 bedroom, 2 bath second house, the property had a large number of trees and bushes around the house and yard.
38. The front and back lawns of the property were Bermuda grass.
39. There were weeds in the undeveloped lot immediately to the west of the property.
40. The dog kennels on the east side of the house consisted of three dog kennels/dog runs that extended 30 to 40 feet from the back of the house to the trampoline. The dog kennels/dog runs were enclosed with six-foot tall cyclone fencing and wood slats. The bottom rail of the cyclone fencing was covered with several inches of dirt as a result of the dogs running and digging in the kennels for several years. The dog kennels/dog runs were not moved from the property until approximately August 12, 2002.
41. From April 4, 2002 until the closing, at least five doges were on the property at all times as Schwandts' family pets.

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42. The Schwandts continued to breed litters on the property at about one litter per month and outlined that schedule in her testimony.
43. When the property was shown, as indicated in the MLS, the Schwandts placed the dogs and puppies on the property in the kennels and the barn.
44. Defendants did not disclose in writing or otherwise, the prior use of the subject property as a dog breeding business or that there had been a large number of dogs at the subject property to prospective buyers, including Plaintiffs or Jim Painter.
45. Painter inspected the property with his agent, Teetsel, in mid-May 2002.
46. Both Painter and non-party at fault, Teetsel were aware of the instruction in the multiple listing to call first before an inspection so that dogs could be kenneled.
47. Painter and Teetsel inspected the property on or about June 4, 2002. Painter and Teetsel both testified that the house was very clean and there was no evidence of dog odor in the house and that the carpet was not stained and was in good condition. They also testified that the house was kept very cold.
48. Painter and Teetsel acknowledged seeing on the property a large dog and three to five puppies.
49. Subsequent to the inspection, Painter and Teetsel drafted the offer to purchase the house.
50. Painter caused Teetsel to insert in the purchase contract the following language:

“Seller agrees to remove all dog kennels and clean all related debris.”
51. Immediately after the closing, the plaintiffs removed the barn, the horse stalls, and the corrals.
52. McCullough wanted to move from Davis, California to Scottsdale because her son, Conor, was allergic to mold.
53. Conor has very large reactions to tree pollens, grass pollens, weed pollens and mold.
54. No medical testimony was given tying Conor’s Fall 2002 illness to dogs or dog allergies rather than to the seasonal allergies and asthma he had previously and continued to have. McCullough testified that Conor continued to see the doctor

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for his routine allergy shots, but had no medical visits related directly to the alleged illnesses in the Fall 2002.

55. Conor was not tested for dog allergies five months after the plaintiffs filed this action. Conor's records show a mild reaction to dogs as compared to severe allergies to grasses and tree pollens.
56. McCullough had no prior symptoms of dog allergies when she had owned a dog. Further, she moved into the home knowing that at least some dogs had been kept in the home.
57. The evaporative cooler was repaired and turned on prior to close of escrow. The evaporative cooler was operating several weeks after Plaintiffs moved onto the property.
58. Evaporative coolers draw outside air containing pollens and distribute them into the house.
59. On November 8, 2002, the Plaintiffs had the ductwork cleaned.
60. Plaintiffs claim to have been symptom-free since approximately November 2002.
61. Plaintiffs have elected to pursue damages in lieu of rescission.

CONCLUSIONS OF LAW

1. Defendants Schwandts and Basham had duties to not act unreasonably and/or carelessly in their dealings with Plaintiffs.
2. Defendants acted negligently and unreasonably toward Plaintiffs and in connection with their dealings with Plaintiffs and the purchase/sale of the subject property, thereby breached their duties, and thereby caused Plaintiffs to suffer damages.
3. As a result, Defendants are liable for negligence.
4. Defendants Schwandt and Basham had duties to not unreasonably make material false representations or to fail to disclose material information to Plaintiffs in connection with their dealings, and the purchase/sale of the subject property.

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5. Defendants Schwandt acted negligently and unreasonably toward Plaintiffs in their representations and in failing to disclose material information to Plaintiffs.
6. Defendant Basham acted negligently and unreasonably toward Plaintiffs in failing to disclose material information to Plaintiffs.
7. It was reasonably foreseeable that Plaintiffs would rely upon the statements and omissions of Defendants Schwandt and Basham.
8. Plaintiffs rightfully relied on the representations and omissions of Defendants Schwandt and Basham.
9. As a result, Defendants are liable for negligent misrepresentation.
10. As the designated broker, Defendant McLean was responsible for overseeing and supervising the actions of Defendant Basham.
11. Similarly, as the employing broker, Defendant Jancy Realty & Investments, Inc. (“Jancy”) is directly “responsible for the acts of all associate brokers, salespersons, and other employees acting within the course of their employment; and supervising the associate brokers, salespersons and employees of the employing broker within the course of their employment.” Ariz. Admin. Code § R4-28-302(I)(1).
12. Under general agency law, Defendant McLean and Jancy are also liable for the misconduct and omissions of Defendant Basham given that her conduct was in the course and scope of her employment.
13. As a direct and proximate result of the misrepresentations of Defendants Schwandt and the failures to disclose/omissions of Defendants Schwandt and Basham, Plaintiffs have suffered damages.
14. Plaintiff Bergmayr is entitled to recover \$60,000, representing the difference between the purchase price for the subject property and its actual value at the time of close of escrow, which damages are apportioned 95% to the Realty Defendants and 5% to Defendants Schwandt.
15. The Plaintiffs have failed to prove by a preponderance of the evidence that they are entitled to damages for emotional distress.
16. The Plaintiffs have failed to establish that an award of punitive damages is appropriate.

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17. No fault shall be apportioned to Plaintiffs, Third-Party Defendants or non-parties Teetsel or Ken Coker/AmeriSpec.
18. The Realty Defendants are not entitled to indemnification from Third-Party Defendants.