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Implied Warranties in the Sale of Realty - Gilbert Construction Co. v. Gross

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Implied Warranties In The Sale Of Realty

Gilbert Construction Co. v. Gross[1]

Defendant, a developer, entered into a contract of sale with Plaintiffs providing for the sale of unimproved leasehold property, and for the construction of houses on the properties by defendant in accord with plans and specifications attached to the contract prior to conveyance of title. The specifications called for the construction and installation of the exact make of pipeless furnaces actually installed. Plaintiffs sued for an alleged breach of warranty, showing that the furnaces were unsuitable for the houses,

[1] 212 Md. 402, 129 A. 2d 518 (1957).

and recovered, but the Court of Appeals reversed, reaffirming the long standing rule that there are no implied warranties in the sale of real estate. The court found that there was no express warranty of the sufficiency of the furnaces to heat the houses and continued, "[n]ot only is there no express warranty, but in sales of real estate the rule is that there is no implied warranty."[2]

On the basis of the decided cases, the statement of the court is not one with which argument may be made. However the operation of the rule may be harsh. This may be seen more clearly in a New Jersey case, *Levy v. C. Young Construction Co., Inc.*[3] There, L purchased a newly constructed home from Y Co., the developer. Subsequently serious defects in the construction of the foundation, requiring extensive repairs to sewer pipes, were discovered. L brought an action against the developer claiming that he was under a duty to construct the house in a good and workmanlike manner. The appellate court reversed a judgment for L holding that, in the absence of fraud, concealment, or express warranty in the deed, he had no remedy against the developer. The majority of the divided court said that policy reasons underlie the rule that acceptance of a deed without covenants is the cut-off point so far as the vendor's liability is concerned, and continued:

> "Were plaintiffs successful under the facts presented to us, an element of uncertainty would pervade the entire real estate field. Real estate transactions would become chaotic if vendors were subjected to liability after they had parted with ownership and control of the premises. They could never be certain as to the limits or termination of their liability."[4]

What are these policy considerations? The dissenting judge in the New Jersey case pointed out that Y was in the business of building houses and represented that it had a reasonable amount of skill necessary for the erection of a house. This representation is impliedly made to whomever purchased a house from him. "A person in the business of building houses to sell is fully aware that a purchaser relies upon such an implied representation."[5] It is sub-

[2] *Ibid.*, 408.
[3] 46 N. J. Super. 293, 134 A. 2d 717 (1957).
[4] *Ibid.*, 719. The court cited Berger v. Burkhoff, 200 Md. 561, 92 A. 2d 376 (1952).
[5] *Supra*, n. 3, dis. op. 720.

mitted that this judge properly stated what the law should be.

In support of the conclusion reached, that there are no implied warranties in the sale of realty, both courts relied on a section of Williston's treatise on contracts which states:

> "The doctrine of *caveat emptor*, so far as the title of personal property is concerned is very nearly abolished, but in the law of real estate it is still in full force. One who contracts to buy real estate may, indeed, refuse to complete the transaction if the vendor's title is bad, but one who accepts a deed generally has no remedy for defect of title, except such as the covenants in his deed may give him. * * * Still more clearly there can be no warranty of quality or condition implied in the sale of real estate . . . ."[6]

This appears to be the orthodox property view.[7]

However a distinction has been made in the situation where the home purchaser acquires the land prior to commencement or completion of the house. Under such circumstances the tender and acceptance of the conveyance cannot be considered the full performance of the contract by the vendor and any warranties that can be implied from the contract are still in effect:

> " 'When the principal object of a contract is to obtain a result, there has been no compliance with the contract until the result has been obtained.'
>
> " 'Where the contract contains a . . . warranty, express or implied, that the builder's work will be sufficient for the particular purpose, or to accomplish a certain result, . . . there is no substantial performance until the work is sufficient for such purpose or accomplishes such result.' "[8]

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[6] 4 WILLISTON, CONTRACTS (Rev. ed. 1936) 2602, 2603, §926.

[7] Most of the cases involve implied warranties in leases: Carusi v. Schulmerick, 98 F. 2d 605 (D. C. App. 1938); Clyne v. Holmes, 61 N. J. L. 358, 39 A. 767 (1898); Wood v. Carson, 257 Pa. 522, 101 A. 811 (1917); Federal Metal Bed Co. v. Alpha Sign Co., 289 Pa. 175, 137 A. 189 (1927); Powell v. John E. Hughes Orphanage, 148 Va. 331, 138 S. E. 637 (1927); Clifton v. Montague, 40 W. Va. 207, 21 S. E. 858 (1895); Hart v. Windsor, 12 M. & W. 67, 152 Eng. Rep. 1114 (1843). Involving implied warranties in sales of land; Levy v. Young Const. Co., Inc., 46 N. J. Super. 293, 134 A. 2d 717 (1957); Otto v. Bolton & Norris, [1936] 2 K. B. 46, 1 All Eng. 960 (1936); Allen v. Reichert, 73 Ariz. 91, 237 P. 2d 818 (1951).

[8] Glass v. Wiesner, 172 Kan. 133, 238 P. 2d 712, 716 (1951).

Where a person holds himself out to be specially qualified to perform work of a particular character, there is an implied warranty that the work

It has only been in recent years that the mass production of homes has become widespread. In earlier times land transactions generally involved the sale of homes that had been constructed for some time, or unimproved land which the purchaser intended subsequently to improve. In the latter case no warranties, other than of title, could be expected.[9] The land is something readily observable and about which both parties have equal ability to inquire. In the case of old homes warranties should not be implied, for it is more logical to charge the buyer with knowledge that, since the house is old, some defects undoubtedly exist.[10] In the absence of fraud or concealment, for which relief is already available, warranties, if implied, would impose undeserved liability.

Now where the owner builds his home on his own land, the implied warranties of suitability for intended purpose, and of workmanship, by the contractor will protect him. But if the home-buyer, as is the usual case today, goes to a developer and enters into a contract to purchase a selected lot with a "model home" upon it, taking title after completion of the construction, he has no protection if he accepts delivery of the deed before discovery of the defect.[11] It would appear that he relies on the developer to construct a home in a good and workmanlike manner suitable for comfortable living no less heavily than in the first situation, yet the same protection is not afforded him. Full protection under the rule now followed would require that the home-buyer hire his own architect, engineers, and specialists to examine the plans and specifications to see if the house is well planned, and a supervisor or inspector during construction to insure proper workmanship. This would defeat the purpose of mass developments: the production of homes at low cost. The problem of the develop-

which he does shall be of proper workmanship and reasonably fit for the intended purpose. Glass v. Wiesner, *ibid;* Gaybis v. Palm, 201 Md. 78, 93 A. 2d 269 (1952); 17 C. J. S. 781, Contracts, §329; Swersky v. Higgins, 194 Va. 983, 76 S. E. 2d 200 (1953); Hill v. Polar Pantries, 219 S. C. 263, 64 S. E. 2d 885 (1951); Whaley v. Milton Const. & Supply Co., 241 S. W. 2d 23 (Mo. 1951); Kuitems v. Covell, 104 Cal. App. 2d 482, 231 P. 2d 552 (1951).

[9] Sutton v. Temple, 12 M. & W. 52, 152 Eng. Rep. 1108 (1843).

[10] Combow v. Kansas City Ground Inv. Co., 358 Mo. 934, 218 S. W. 2d 539, 8 A. L. R. 2d 213 (1949), in which the court specifically pointed out the house was old.

[11] Otto v. Bolton & Norris, [1936] 2 K. B. 46, 1 All Eng. 960 (1936); Levy v. C. Young Construction Co., Inc., 46 N. J. Super. 293, 134 A. 2d 717 (1957); Allen v. Reichert, 73 Ariz. 91, 237 P. 2d 818 (1951); 8 A L. R. 2d 218; Selker, *Rights of Purchaser in Sale of Defective House*, 4 Western Res. L. Rev. 357 (1953); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 Minn. L. Rev. 108 (1953).

ment home, in short, seems distinguishable from the sale of old homes and of unimproved land to which the property rule is properly applied and more nearly fits the situation of the construction after land purchase cases where only contract principles are applied.

It would appear that the possibility for a change in the present rule would be more likely if the courts analyzed the problem presented in the development home cases before following a rule no longer suited to the times. Of all the reported cases, only in the New Jersey case[12] has any real thought been devoted to the problem. Other courts have rather mechanically framed the question and summarily dismissed it as without merit. So little attention has been paid to the unique position of the development home that it is often difficult or impossible to determine from the opinion whether a development house was involved. A parallel to the suggested change in this field may be seen in the evolution of the law of sales of chattels. There, as the mass manufacture of goods increased, and the relation between the manufacturer and the consumer became less personal, warranties were implied.[13] Ultimately these warranties were embodied in Section fifteen of the Uniform Sales Act.[14]

Three approaches to the solution of the problem have been suggested. The voluntary action of the builders themselves providing express warranties is of course the best solution. The National Association of Home Builders has suggested to its members that a written warranty be given new home purchasers stating that the building, upon delivery, was structurally sound and free from defects in material and workmanship and promising to repair any defect within a stated period of time or before resale. Ultimately a much less beneficial "Service Policy" was decided upon.[15] The second would be a statute implying certain warranties as to workmanship and fitness. The only statute relating to the subject in any way is an English one imposing warranties of habitability on lessors of low cost

[12] 46 N. J. Super. 293, 134 A. 2d 717 (1957), dis. op. 720.

[13] 1 WILLISTON, SALES (Rev. ed., 1948) 501 *et seq.*, §§195, 196; LLEWELLYN, CASES AND MATERIALS ON SALES, (1930) 204.

[14] 7 MD. CODE (1957) Art. 83, §33, and see Luria Bros. & Co. v. Klaff, 139 Md. 586, 115 A. 849 (1921), discussing §15 of the Uniform Act (then Art. 83, §36.)

[15] Dunham, *supra*, n. 11, 108-110; Brockland, *Why a Service Policy?* 6 N. A. H. B. (1952) Correlator 2. This warranty would not cover situations such as that presented in the instant case however.

housing.[16] A New York attempt to pass a more general statute was unsuccessful.[17]

The following suggested model could be used as a guide in the drafting of such a statute for Maryland:

§1. Subject to the provisions of this act, there is no warranty or condition implied by law as to quality or fitness for any particular purpose of any improvement upon realty continuing after acceptance of the deed to the realty, except as follows:

(a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the improvements are required, and it appears that the buyer relies on the seller's skill and judgment, there is an implied warranty that the improvement shall be reasonably fit for such purpose.

(b) Where the improvement is bought by description or sample, there is an implied warranty that the improvement shall be of workmanlike quality and shall correspond to the description or sample.

(c) The warranties in (a) and (b) shall continue for one year from the date of delivery of the conveyance to the buyer and shall inure to the original purchaser, his heirs, personal representatives and assigns during such one year period.

§2. As used in this act:

(a) "Buyer" means the original purchaser of improved realty, and the heirs, personal representatives, and assigns of such original purchaser.

(b) "Seller" means any person or corporation whose business it is to erect or otherwise create an improvement upon realty, or to whom a completed improvement has been conveyed for resale in the course of his (its) business.

(c) "Improvement" includes all fixtures, and structures attached to realty.

(d) "Realty" includes both freehold and redeemable leasehold estates.

[16] Housing Act of 1936, 26 Geo. 5 & 1 Ed. 8, Vol. 2, c. 51.
[17] Dunham, *supra*, n. 11, 108-9.

§3. No act or agreement of the buyer before, at the time of, or after, the making of a contract for the purchases of newly constructed improvements on realty, nor any agreement or statement by the buyer in such contract shall constitute a valid waiver of the provisions of §1.

Perhaps the most immediate remedial effort would lie in a third direction. In the instant case, as in perhaps a majority of development home cases, the purchaser had an F.H.A. mortgage loan.[18] Modifications of existing F.H.A. regulations requiring higher standards of workmanship and materials, and their enforcement by that agency might effectively encourage irresponsible builders more adequately to prepare plans and perform construction contracts. For the practicing attorney at the present time, the only method of protecting his client would seem to be to compel the builder, at the time of the conveyance, to sign a warranty agreement. Under the decided cases it would appear that such an agreement, being collateral in nature, would not be merged in the subsequent conveyance.[19]

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[18] 212 Md. 402, 407, 129 A. 2d 518 (1957). The F. H. A. form provided:
"'The construction shall equal or exceed the applicable FHA Minimum Construction Requirements and shall comply with applicable codes and regulations, zoning ordinances, restrictive covenants, and the exhibits submitted with the related application, as corrected by FHA. The highest of all the aforegoing shall govern. Each item of material or equipment shall equal or exceed that described or indicated. All parts shall be sound and all construction free of faults. All work shall be performed in a workmanlike manner and in accordance with the best practice. * * *'"

[19] Rosenthal v. Heft, 155 Md. 410, 142 A. 598 (1928); Edison Realty Co. v. Bauernschub, 191 Md. 451, 62 A. 2d 354 (1948); Laurel Realty Co. v. Himelfarb, 194 Md. 672, 72 A. 2d 23 (1950).