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

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"Since the primary object of these statutes was to free the wife from the husband's control of her property, the courts have generally agreed that they enable her to maintain an action against him for any tort against her property interests. Thus she may recover from him for conversion or detention. Likewise, since the statutes destroy the unity of the persons and place them upon an equality, it is held that the husband may recover from the wife for similar torts as to his property."

In nearly every case allowing one spouse to sue the other for a tort to property interests, marital discord has been present, and in many of the cases it has been stated as a prerequisite to bringing the action. In the principal case it was present and it seems very doubtful that the case would have ever come to trial had it not been present.

In conclusion, the Maryland position seems unnecessarily restrictive. It is based primarily on cases involving personal injury torts and upon an interpretation of the Married Women's Property Act which is very limited and narrow. The principal case was an ideal case for reaching an opposite result. The Court itself considered it appealing from the appellant's viewpoint, which was supported by the dictum in the Cochrane case, as well as the weight of authority in other jurisdictions. However, the Court saw fit to saddle itself with this narrow interpretation of the statutes and is now truly bound by stare decisis. The remedy lies with the Legislature.

J. PAUL ROGERS

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.
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 . . . ."

This appears to be the orthodox property view.

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.'"

²4 Williston, Contracts (Rev. ed. 1936) 2602, 2603, §926.


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. 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. In the absence of fraud or concealment, for which relief already is 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. 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-
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\(^2\) 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.\(^3\) Ultimately these warranties were embodied in Section fifteen of the Uniform Sales Act.\(^4\)

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.\(^5\) 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

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\(^2\) 46 N. J. Super. 293, 134 A. 2d 717 (1957), dis. op. 720.
\(^3\) 1 WILKINSON, SALES (Rev. ed., 1948) 501 et seq., §§195, 196; LLEWELLYN, CASES AND MATERIALS ON SALES, (1930) 204.
\(^4\) 7 Md. Code (1957) Art. 83, §33, and see Luria Bros. & Co. v. Klaff, 139 Md. 115 A. 849 (1921), discussing §15 of the Uniform Act (then Art. 83, §36.)
\(^5\) 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.
A New York attempt to pass a more general statute was unsuccessful.\textsuperscript{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.

\textsuperscript{16} Housing Act of 1936, 28 Geo. 5 & 1 Ed. 8, Vol. 2, c. 51.

\textsuperscript{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 wa-
ver 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. 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 ade-
quately to prepare plans and perform construction con-
tracts. 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.

NELSON R. KERR, JR.

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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 Mini-
mum Construction Requirements and shall comply with applicable codes
and regulations, zoning ordinances, restrictive covenants, and the ex-
hibits submitted with the related application, as corrected by FHA.
The highest of all the foregoing 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).