

[J-15-2018]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

LEO J. DOLAN, JR. AND CHERIE M. DOLAN, H/W	:	No. 51 MAP 2017
	:	
	:	Appeal from the Order of the Superior
	:	Court at No. 2951 EDA 2015 dated
v.	:	February 17, 2017 Vacating the
	:	Judgment of the Delaware County
	:	Court of Common Pleas, Civil
HURD MILLWORK COMPANY, INC.,	:	Division, entered August 26, 2015 at
BENTLEY HOMES, LTD., GARVIN	:	No. 2005-005801 and Remanding for
MITCHELL CORPORATION, CHADWELL	:	New Trial.
ASSOCIATES, L.P., CHADWELL	:	
REALTY, INC., HARRISON COMMUNITY	:	ARGUED: May 16, 2018
ASSOCIATION	:	
	:	
	:	
	:	
APPEAL OF: LEO J. DOLAN, JR.	:	

OPINION

JUSTICE MUNDY

DECIDED: October 17, 2018

In this appeal by permission we consider the proper role of an appellate court when reviewing a non-jury decision where it deems the trial court's opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) inadequate, but the trial judge is no longer available to provide a supplemental opinion.

In 1999, Appellant Leo Dolan, Jr. and Cherie M. Dolan¹ entered into an agreement of sale with Bentley Homes, Ltd., Garvin Mitchell Corporation, Chadwell Associates, L.P., Chadwell Realty, Inc. and Harrison Community Association (hereinafter "Bentley") for a

¹ Appellant and Cherie M. Dolan were divorced while this matter was pending in the trial court. Ms. Dolan is not a party to this appeal.

new custom house at the purchase price of \$1,941,669.00. Settlement took place on November 10, 2000. Hurd Millwork Company, Inc. (Hurd) provided many of the windows used in the construction of Appellant's home. Within a year, the house developed substantial defects, including air and water leaks around the windows.

On April 5, 2001, Hurd filed an action against Bentley for unpaid invoices related to the construction of Appellant's home and other homes in the same development. Bentley filed a counterclaim against Hurd for providing defective windows. In October 2002, Bentley and Hurd entered into a settlement containing admissions that numerous homes in the development suffered from extensive defects and leaks.

During the pendency of the litigation between Hurd and Bentley, Appellant experienced additional problems with his home including severe leaks, rotted wood and issues with a stucco wall. Bentley made some repairs to the home, but the leaks continued to worsen. Appellant hired a civil engineer to assess the home and determine what repairs were required to fix the problems with the house. The repairs and associated costs amounted to \$826,695.99.

On May 24, 2005, Appellant filed a writ of summons against Bentley and Hurd. On September 6, 2005, Appellant filed a complaint against Bentley raising the following claims: (1) negligence; (2) breach of express and implied warranty; (3) negligent misrepresentation; (4) fraud and/or intentional misrepresentation; and (5) violations of the Unfair Trade Practice and Consumer Protection Law (UTPCPL). The complaint sought punitive damages against Bentley. The complaint also raised the following claims against Hurd: (1) breach of express and implied warranty; (2) negligence; and (3) products liability. On November 4, 2005, Bentley filed preliminary objections, which the court overruled on February 2, 2006. Bentley then filed an answer, new matter and cross-claim

against Hurd on March 1, 2006. Bentley's cross-claim alleged Hurd was solely or jointly liable for Appellant's injuries.

On March 2, 2006, Hurd filed an answer to Bentley's cross-claim. Hurd then filed a separate answer and new matter to Appellant's complaint on March 13, 2006, and a cross-claim against Bentley, which alleged that Bentley was solely or jointly liable for Appellant's injuries. Bentley filed an answer to Hurd's cross-claim on March 14, 2006. Bentley filed joinder complaints against other parties involved in the construction of Appellant's home. Following settlement discussions, the joined defendants were dismissed from the case, and a settlement agreement was reached between Appellant and Hurd.

The case proceeded to a non-jury trial before Judge James F. Proud on January 6, 2015.² Prior to the commencement of testimony, Appellant and Bentley agreed to the defective nature of the Hurd windows used in the construction of Appellant's house. Appellant then presented evidence supporting his claims against Bentley. Bentley did not present any evidence to rebut Appellant's claims. At the conclusion of trial, the court took the matter under advisement. The parties filed proposed findings of fact and conclusions of law on May 20, 2015. On June 18, 2015, the court entered a general verdict in favor of Appellant and awarded him \$500,000 in damages.

On June 26, 2015, Bentley filed a motion for post-trial relief, and Appellant filed a motion for delay damages on June 30, 2015. On August, 19, 2015, the court denied

² Appellant asserts that Bentley waived its cross-claim against Hurd. In support of this contention he cites to a letter from Bentley's counsel to Judge Proud dated December 1, 2014, stating that the Bentley entities "do not intent [sic] to present claims against any third parties at trial." Appellant's Brief, at 8. Bentley did not present any evidence regarding a cross-claim against Hurd, and the trial court made no mention of a cross-claim in its verdict.

Bentley's motion for post-trial relief. On August 21, 2015, the court granted Appellant's motion for delay damages and molded the verdict to \$748,287.67.

Bentley filed a timely appeal to the Superior Court. The trial court did not order the filing of a concise statement of errors complained of on appeal, and none was filed. On October 21, 2015, Judge Proud issued a three-page opinion stating, *inter alia*, that the verdict was against Appellees "jointly and severally." Trial Ct. Op., 10/21/15, at 1. The opinion stated that "[t]he evidence in this case was overwhelmingly in favor of [Appellant]. In fact, [Bentley] presented no evidence whatsoever as either defendants or cross-party plaintiffs." *Id.* at 1-2. The court continued that "[t]he verdict made a general finding as to liability and disposed of all claims presented." *Id.* at 2. The opinion notes that Appellant's negligence claims were not barred by the gist of the action doctrine "because such claims were based on the breach of the social duty imposed by the law of torts and not a breach of a duty created by the underlying contract." *Id.* The court also concluded that the award of delay damages was appropriate.

In its brief to the Superior Court, Bentley raised the following statement of questions involved:

1. Whether a party is precluded as a matter of law from obtaining damages for negligence where that claim is barred by the gist of the action doctrine, the economic loss doctrine, and the statute of limitations.
2. Whether a plaintiff is precluded as a matter of law from obtaining damages for breach of express and implied warranties where those claims cannot be maintained against the named defendants, are barred by the statute of limitations, plaintiffs failed to present evidence of the terms of the express warranties at trial, and plaintiffs failed to give the opportunity to repair or notice of the defects for which the party now seeks an award of damages.
3. Whether a party is precluded as a matter of law from obtaining damages for negligent misrepresentation and

fraud/intentional misrepresentation where those claims are barred by the gist of the action doctrine, the economic loss doctrine, and the statute of limitations.

4. Whether a party is precluded as a matter of law from obtaining an award of punitive damages where Pennsylvania law does not recognize an independent cause of action for punitive damages and none of the claims can support a claim for punitive damages.

5. Whether a party is precluded as a matter of law from obtaining damages under the [UTPCPL] where that claim can be maintained, if at all, only against the seller and the fraudulent or deceptive conduct upon which the claim is based occurred, if at all, after the purchase of the real property at issue.

6. Whether a party is precluded as a matter of law from obtaining an award of damages where by the party's own admission, the party failed to mitigate its damages and rendered it impossible for the Court to determine the proper amount of damages to award a party.

7. Whether a party is precluded as a matter of law from obtaining an award of damages for breach of contract where the party never [pled] such a claim, did not seek leave at trial to amend to include such a claim, and any such claim is barred by the statute of limitations.

8. Whether a defendant is entitled to an award of indemnification and/or contribution against a co-defendant where the evidence is clear that the co-defendant's conduct caused the injury to the plaintiff and the basis of the defendant's liability to the plaintiff is due to the co-defendant's conduct.

9. Whether a party is precluded as a matter of law from obtaining delay damages where the underlying action is based upon the contractual relationship of the parties to the litigation and delay damages are not available in contract actions.

Bentley's Superior Court Brief, 2951 EDA 2015, at 5-7.

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