FRIMBERGER v. ANZELLOTTI

25 Conn. App. 401 (1991) | Cited 9 times | Connecticut Appellate Court | August 6, 1991

The defendant appeals from the judgment ofthe trial court awarding the plaintiff damages forbreach of the warranty against encumbrances and innocentmisrepresentation of real property that thedefendant conveyed to the plaintiff by warranty deed.

The defendant claims that the court was incorrect (1)in finding that she had misrepresented the property andthat the plaintiff had relied on that misrepresentationto his detriment, (2) in finding that she breached thewarranty deed covenant against encumbrances, and (3) inawarding damages for diminution of value to theproperty caused by a wetlands violation as well as damagesfor costs of correcting that violation. We agreewith the defendant and reverse the decision of thetrial court.

The record and memorandum of decision disclose thefollowing facts. In 1978, the defendant's brother andpredecessor in title, Paul DiLoreto, subdivided a parcelof land located in Old Saybrook for the purpose ofconstructing residences on each of the two resultingparcels. The property abuts a tidal marshland and is,therefore, subject to the provisions of GeneralStatutes 22a-28 et seq.

DiLoreto built a bulkhead and filled that portionof the subject parcel immediately adjacent to the

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wetlands area, and then proceeded with the construction ofa dwelling on the property. On February 21, 1984,DiLoreto transferred the subject property to thedefendant by quit claim deed. On December 31, 1985, thedefendant conveyed the property to the plaintiff bywarranty deed, free and clear of all encumbrances butsubject to all building, building line and zoningrestrictions as well as easements and restrictions ofrecord.

During the summer of 1986, the plaintiff decided toperform repairs on the bulkhead and the filled area ofthe property. The plaintiff engaged an engineering firmwhich wrote to the state department of environmentalprotection (DEP) requesting a survey of the tidalwetlands on the property. On March 14, 1986, workingwith the plaintiff's engineers, the DEP placed stakeson the wetlands boundary and noted that therewas a tidal wetlands violation on the property. In aletter to the plaintiff dated April 10, 1986, the DEPconfirmed its findings and indicated that in order toestablish the tidal wetlands boundary, as staked forregulatory purposes, the plaintiff must provide DEPwith an A-2 survey of the property. At some point afterApril, 1986, and before March, 1988, the plaintiffengaged a second group of engineers who met with DEPofficials and completed an A-2 survey.

On March 28, 1988, members of the DEP water resourcesunit met with the plaintiff's new engineers to stakeout the wetlands boundary again. On April 13, 1988, asconfirmation of that meeting, Denis Cunningham, theassistant director of the DEP water resources unit,wrote to the plaintiff to advise him that the filledand bulkheaded portion of the property, and possiblythe northwest corner of the house were encroaching onthe tidal wetlands boundary, thereby creating aviolation of General Statutes 22a-30. This letter suggestedthat to correct the violation, the plaintiff would

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have to submit an application to DEP demonstrating thenecessity of maintaining the bulkhead and fill withinthe tidal wetlands. Instead of filing the application,the plaintiff filed the underlying lawsuit against thedefendant, claiming damages for breach of the warrantyagainst encumbrances and innocent misrepresentation.

The trial court determined that the area had beenfilled without obtaining the necessary permits requiredunder General Statutes 22a-32.[1] The court found that

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the defendant had breached the warranty againstencumbrances and had innocently misrepresented thecondition of the property by allowing the plaintiff topurchase the property in reliance on the defendant'swarranty against encumbrances. The court awarded theplaintiff damages and costs in the amount of $47,792.60,a figure that included the costs to correct thewetlands violation as well as the diminution of valueof the property caused by the wetlands violation. Thedefendant brought the present appeal.[2]

This appeal turns on a determination of whether analleged latent violation of a land use statute orregulation, existing on the land at the time title isconveyed, constitutes an encumbrance such that theconveyance breaches the grantor's covenant againstencumbrances. An encumbrance is defined as "every rightto or interest in the land which may subsist in thirdpersons, to the diminution of the value of the land,but consistent with the passing of the fee by theconveyance." H. Tiffany, Real Property (1975) 1002;Aczas v. Stuart Heights, Inc., 154 Conn. 54, 60,221 A.2d 589 (1966). All encumbrances may be classed aseither (1) a pecuniary charge against the premises,such as mortgages, judgment liens, tax liens, orassessments, or (2) estates or interests in theproperty less than the fee, like leases, life estatesor dower rights, or (3) easements or servitudes on theland, such as rights of way, restrictive covenants andprofits. H. Tiffany, supra, 1003-1007. It is importantto note that the covenant against encumbrances operatesin praesenti and cannot be breached unless theencumbrance existed at the time of the conveyance. Id.

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The issue of whether a latent violation of a restrictiveland use statute or ordinance, that exists at thetime the fee is conveyed, constitutes a breach of thewarranty deed covenant against encumbrances has notbeen decided in Connecticut. There is, however,persuasive and authoritative weight in the legalliterature and the case law of other jurisdictions tosupport the proposition that such an exercise of policepower by the state does not affect the marketability oftitle and should not rise to the level of anencumbrance. See, e.g., Domer v. Sleeper, 533 P.2d 9(Alaska 1975) (latent building code violation not anencumbrance); McCrae v. Giteles, 253 So.2d 260, 261(Fla. App. 1971) (violation of housing code noticed andknown by vendor not an encumbrance); Monti v. Tangora,99 Ill. App.3d 575, 425 N.E.2d 597 (1981) (noticedbuilding code violations not an encumbrance);Silverblatt v. Livadas, 340 Mass. 474, 164 N.E.2d 875(1960) (contingent or inchoate lien which might resultfrom building code violation not an encumbrance);Fahmie v. Wulster, 81 N.J. 391, 408 A.2d 789 (1979)(discussed infra); Woodenbury v. Spier, 122 A.D. 396,106 N.Y.S. 817 (1907) (a lis pendens filed toenforce housing code violations after conveyance not anencumbrance); Stone v. Sexsmith, 28 Wn.2d 947,184 P.2d 567 (1947).

Of the cases cited from other jurisdictions, Fahmiev. Wulster, supra, provides the closest factualanalogue to the case before us. In Fahmie, a closelyheld corporation that originally owned certain propertyrequested permission from the New Jersey bureau ofwater to place a nine foot diameter culvert on theproperty to enclose a stream. The bureau requiredinstead that a sixteen and one-half foot diameterculvert should be installed. The corporation went aheadwith its plan and installed the nine foot culvert.

The property was later conveyed to Wulster, thetitular president of the corporation, who had no

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knowledge of the installation of the nine foot culvert.Nine years after the installation of the culvert, Wulsterconveyed the property, by warranty deed, to Fahmie.

In anticipation of the subsequent resale of the property,Fahmie made application to the New Jersey economicdevelopment commission, division of water policyand supply, to make additional improvements to thestream and its banks. It was then that the inadequatenine foot culvert was discovered, and the plaintiff wasrequired to replace it with a sixteen and one-half footdiameter pipe. Fahmie sued Wulster for the cost to correctthe violation claiming a breach of the deed warrantyagainst encumbrances.

The New Jersey supreme Court concluded that it wasgenerally the law throughout the country that a claimfor breach of a covenant against encumbrances cannot bepredicated on the necessity to repair or alter theproperty to conform with land use regulations. By sodoing, the Fahmie court refused to expand the conceptof an encumbrance to include structural conditionsexisting on the property that constitute violations ofstatute or governmental regulation. The court concludedthat such a

conceptual enlargement of the covenantagainst encumbrances would create uncertainty andconfusion in the law of conveyancing and title insurancebecause neither a title search nor a physicalexamination of the premises would disclose theviolation. The New Jersey court went on to state that"[t]he better way to deal with violations ofgovernmental regulations, their nature and scope beingas pervasive as they are, is by contract provisionswhich can give the purchaser full protection [in suchsituations]." Id., 397.

The case before us raises the same issues as thoseraised in Fahmie. Here, the court found that in 1978the wetlands area was filled without a permit and inviolation of state statute. The alleged violation was

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unknown to the defendant, was not on the land recordsand was discovered only after the plaintiff attemptedto get permission to perform additional improvements tothe wetlands area.

Although the DEP first advised the plaintiff of thealleged violation in 1986, it did not bring any actionto compel compliance with the statute. Rather, it suggestedthat the violation may be corrected by submittingan application to DEP. As of the date of trial,the plaintiff had not made such an application, therehad been no further action taken by the DEP to compelcompliance, and no administrative order was everentered from which the plaintiff could appeal. Thus,the plaintiff was never required by DEP to abate theviolation or restore the wetlands.

Our Supreme Court has stated that for a deed to befree of all encumbrances there must be marketable titlethat can be sold "at a fair price to a reasonablepurchaser or mortgaged to a person of reasonable prudenceas a security for the loan of money." Perkins v.August, 109 Conn. 452, 456, 146 A. 831 (1929). Torender a title unmarketable, the defect must present areal and substantial probability of litigation or lossat the time of the conveyance. Frank Towers Corporationv. Laviana, 140 Conn. 45, 53, 97 A.2d 567 (1953).Latent violations of state or municipal land use regulationsthat do not appear on the land records, thatare unknown to the seller of the property, as to whichthe agency charged with enforcement has taken noofficial action to compel compliance at the time thedeed was executed, and that have not ripened into aninterest that can be recorded on the land records do notconstitute an encumbrance for the purpose of the deedwarranty. Monti v. Tangora, supra, 581-82. Although,under the Statute, DEP could impose fines or restrictthe use of the property until it is brought into compliance,

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such a restriction is not an encumbrance. Silverblatt v.Livadas, supra, 479; Gaier v. Berkow, 90 N.J. Super. 377,379, 217 A.2d 642 (1966).

Because the plaintiff never actually filed the application,any damages that he may have suffered werespeculative. The court based its assessment of damageson a proposed application and the anticipated costs ofcomplying with that proposed application. The fact thatthe alleged violation was first noted by DEP only afterthe plaintiff made requests to rework the bulkhead andfilled area, leads us to the conclusion that nolitigation or loss was imminent. This position isconfirmed by the fact that, as of the date of trial, noorder was entered by DEP to compel the plaintiff torectify the violative condition and no application wasmade by the plaintiff to gain approval of existing conditions.

We adopt the reasoning of Fahmie v. Wulster, supra,and hold that the concept of encumbrances cannot beexpanded to include latent conditions on property thatare in violation of statutes or government regulations.To do so would create uncertainty in the law of conveyances,title searches and title insurance. Theparties to a conveyance of real property can adequatelyprotect themselves from such conditions by includingprotective language in the contract and by insisting onappropriate provisions in the deed. As the IllinoisAppellate Court held in Monti v. Tangora, supra, 582,"[t]he problem created by the existence of code violationsis not one to be resolved by the courts>, but isone that can be handled quite easily by the draftsmenof contracts for sale and of deeds. All that is requiredof the law on this point is that it be certain. Oncecertainty is achieved, parties and their draftsmen mayplace rights and obligations where they will. It is thestability in real estate transactions that is of paramountimportance here."

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The plaintiff in this case is an attorney and landdeveloper who had developed waterfront property andwas aware of the wetlands requirement. He could haveprotected himself from any liability for wetlandsviolation either by requiring an A-2 survey prior toclosing or by inserting provisions in the contract anddeed to indemnify himself against potential tidal wetlandsviolations or violations of other environmental statutes.

We disagree as well with the court's finding ofinnocent misrepresentation. The elements of innocentmisrepresentation are (1) a representation of materialfact (2) made for the purpose of inducing the purchase,(3) the representation is untrue, and (4) there isjustifiable reliance by the plaintiff on the representationby the defendant and (5) damages. Johnson v. Healy,176 Conn. 97, 405 A.2d 54 (1978). From the evidenceadduced at trial, no representation was made relatingto the wetlands area. The court relied exclusively onthe warranty against encumbrances as the "assertion"that the property was free and clear of all encumbrancesas the material fact misrepresented. Becausewe have held that the warranty of a covenant againstencumbrances was not violated, no misrepresentationwas made.

The judgment is reversed as to the award of damagesfor breach of the warranty against encumbrances andthe case is remanded with direction to render judgmentin favor of the defendant on that issue.

In this opinion the other judges concurred.

1. General Statutes 22a-32 provides: "REGULATEDACTIVITY PERMIT. APPLICATION. HEARING. WAIVER OFHEARING. No regulated activity shall be conducted uponany wetland without a permit. Any person proposing toconduct or cause to be conducted a regulated activityupon any wetland shall file an application for a permitwith the commission, in such form and with suchinformation as the commissioner may prescribe. Suchapplication shall include a detailed description of theproposed work and a map showing the area of wetlanddirectly affected, with the location of the proposedwork thereon, together with the names of the owners ofrecord of adjacent land and known claimants of waterrights in or adjacent to the wetland of whom theapplicant has notice. The commissioner shall cause acopy of such application to be mailed to the chiefadministrative officer in the town or towns where theproposed work, or any part thereof, is located, and thechairman of the conservation commission and shellfishcommission of the town or towns where the proposedwork, or any part thereof, is located. No sooner thanthirty days and not later than sixty days of thereceipt of such application, the commissioner or hisduly designated hearing officer shall hold a publichearing on such application, provided, whenever theCommissioner determines that the regulated activityfor which a permit is sought is not likely to have asignificant impact on the wetland, he may waive therequirement for public hearing after publishing notice,in a newspaper having general circulation in each townwherever the proposed work or any part thereof islocated, of his intent to waive said requirement,except that the commissioner shall hold a hearing onsuch application upon receipt of a petition, signed byat least twenty-five persons, requesting such ahearing. The following shall be notified of the hearingby mail not less than fifteen days prior to the dateset for the hearing: All of those persons and agencieswho are entitled to receive a copy of such applicationin accordance with the terms hereof and all owners ofrecord of adjacent land and known claimants to waterrights in or adjacent to the wetland of whom theapplicant has notice. The commissioner shall causenotice of such hearing to he published at least once notmore than thirty days and not fewer than ten days beforethe date set for the hearing in the newspaper having ageneral circulation in each town where the proposed work,or any part thereof, is located. All applications andmaps and documents relating thereto shall be open forpublic inspection at the office of the commissioner. Atsuch hearing any person or persons may appear and beheard."

2. The trial