

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1060

SUSAN M. LIRETTE AND STEVEN M. HARKER

VERSUS

TERI DUET LEDET AND
CENTURY 21 AMERICAN REALTY USA

Judgment rendered APR 17 2012

Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 150,853
Honorable Randall L. Bethancourt, Judge

STANWOOD R. DUVAL
HOUMA, LA

WOODY FALGOUST
THIBODAUX, LA

KENTLEY R. FAIRCHILD
HOUMA, LA

ATTORNEY FOR
PLAINTIFF-APPELLANT
SUSAN M. LIRETTE

ATTORNEY FOR
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TERI DUET LEDET

ATTORNEY FOR
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AMERICAN REALTY USA, L.L.C.
D/B/A CENTURY 21 AMERICAN
REALTY USA

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Q. J. B.
AS EW
PMC
6/7/12

PETTIGREW, J.

In this redhibition action, plaintiff, Susan M. Lirette, appeals the trial court's judgment, dismissing, with prejudice, her claims against defendants, Teri Duet Ledet and American Realty USA, L.L.C. d/b/a Century 21 American Realty USA (hereinafter referred to as "Century 21").¹ For the reasons that follow, we affirm the trial court's judgment and issue this memorandum opinion in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.1B.

According to the record, a business relationship was created on January 1, 2006, between Ms. Ledet and Lawrence "Panky" Christen, as broker and sole owner of Century 21. In March 2006, Ms. Ledet purchased the property at issue located at 871 School Street, Houma, Louisiana, from Steve McCoy. Her intent was for her brother, Stephen Duet, to "fix it up and [they] were going to resell it, try to start a business of flipping houses." Mr. Duet lived in the house while the work was being done, and Ms. Ledet would go on weekends to help out. Approximately six months later in August 2006, Ms. Ledet, as owner/agent, listed the property for sale with Century 21.

Pursuant to an "Act Of Cash Sale Without Warranty," dated November 3, 2006, Ms. Lirette purchased the property from Ms. Ledet for \$130,000.00. The document provided as follows:

With respect to the condition of the fixed improvements, Seller hereby conveys to Purchaser(s) all rights, title and interest of Seller in and to the Property, without any warranty or recourse whatsoever, even for the return or reduction of the purchase price, and sole peril and risk of eviction being assumed by Purchaser(s), but with full substitution and subrogation in and to all of the rights and actions of warranty which Seller has or may have against all preceding owners or vendors it being understood that Buyer takes the Property "AS IS" and "WHERE IS", Purchaser(s) hereby acknowledging reliance solely on its own title examination and inspection of the Property, and not on any warranties or representation from Seller. In addition, Purchaser(s) acknowledges that Seller has made no representations or warranties with respect thereto, or with respect to information or documents previously furnished to Purchaser(s). All implied warranties with respect to the Property, including those related to merchantability or fitness for a particular purpose, are hereby disclaimed by Seller and expressly waived [by] the Purchaser(s).

¹ American Realty USA, L.L.C. d/b/a Century 21 American Realty USA was incorrectly named as Century 21 American Realty USA in the caption in the petition for damages.

Purchaser(s) shall have no right or cause of action against Seller to assert in any controversy, claim, demand, or litigation arising from or in connection with the Property. Without limiting the generality of the foregoing, Seller does not warrant that the Property is free from redhibitory or latent defects or vices. Purchaser(s) hereby expressly waives all rights in redhibition pursuant to Louisiana Civil Code Article 2520, et seq., the warranty imposed by Louisiana Civil Code Article 2476, as well as its ability to rescind the sale or seek a reduction in the purchase price.

Purchaser(s) hereby releases Seller from any liability for redhibitory or latent defects or vices under Louisiana Civil Code Article 2520 (1870) through 2548 (1870). Purchaser(s) acknowledge that Buyer has been afforded the opportunity to, and has, conducted and completed all inspections of the Property, and any component parts thereof, as deemed necessary or advisable by Purchaser(s), and Purchaser(s) hereby accept the same in their existing "AS IS" condition and that this waiver and disclaimer of express and implied warranties and the condition of the Property is reflected in and is a function of the purchase price negotiated between Seller(s) and Purchaser(s).

BUYER HEREBY ACKNOWLEDGES THAT THE FOREGOING WAIVER AND DISCLAIMER HAS BEEN BROUGHT TO THE ATTENTION OF BUYER AND THAT AGREEMENT OF BUYER TO ALL OF THE TERMS AND CONDITIONS OF THIS WAIVER AND DISCLAIMER IS AN INTEGRAL PART OF THE TRANSACTION BETWEEN SELLER(S) AND PURCHASER(S) WITHOUT WHICH THIS TRANSACTION WOULD NOT BE AGREED TO BY SELLER.

After purchasing the home, Ms. Lirette hired Mr. Duet to perform carpentry work on the house. Ms. Lirette and her husband also participated in the remodeling. According to Ms. Lirette, about a month after the sale, they began experiencing problems with the home. Ms. Lirette claimed the paint began to peel off the walls, revealing holes in the walls and ceilings that had been patched and covered with paint by Ms. Ledet. She also alleged the finish on the wood floors started to peel off. Ms. Lirette further claimed there were leaks in the roof and a bucket in the attic that had been covered up with insulation. Finally, Ms. Lirette alleged that a short time after the sale, she learned that the central air conditioning unit was severely damaged and could not be fixed.

On March 20, 2007, Ms. Lirette and her husband, Steven M. Harker, filed suit against Ms. Ledet and Century 21, alleging that Ms. Ledet was aware of the defects in the home and failed to disclose them prior to the sale.² Ms. Lirette sought damages against

² According to the record, Mr. Harker's claim was for loss of consortium. At the start of the trial of this matter, counsel for Ms. Lirette indicated that Mr. Harker's claim for loss of consortium would be dismissed and that he would no longer be a party to the suit.

Ms. Ledet and Century 21, as Ms. Ledet's employer under the doctrine of *respondeat superior*, for return of the purchase price with interest and rescission of the sale, reduction of the purchase price, reimbursement of the reasonable expense occasioned by the sale and those incurred for the preservation of the things, and any and all other damages that may be proved at trial. On July 11, 2008, Century 21 filed a cross claim against Ms. Ledet, seeking to enforce the hold-harmless agreement contained in the January 1, 2006 "Independent Contractor Agreement Between Broker and Salesperson" executed between Century 21 and Ms. Ledet.

The matter proceeded to a three-day bench trial at which time the trial court heard testimony from numerous witnesses, and documentary evidence was introduced into the record.³ At the conclusion of the evidence, the trial court rendered judgment in favor of defendants, dismissing Ms. Lirette's claims with prejudice. While the trial court did not issue written reasons for judgment, oral reasons for judgment were provided, wherein the trial court not only gave its own brief reasons for judgment, but also adopted as its own the arguments given in defendants' trial memorandums and during closing.

This appeal by Ms. Lirette followed, wherein she assigned the following specifications of error: (1) the court was in error in dismissing her claims for failure to bear her burden of proof and in not awarding her damages; (2) the court committed error of law in not reaching the legal issue of a good faith seller; and (3) the court committed manifest error in finding that Ms. Ledet was not a bad faith seller.⁴

³ According to the record, Ms. Lirette sold the property at issue to Terrebonne General Medical Center on April 5, 2010, for the sum of \$134,000.00. In a "Joint Motion For Court Approval Of Sale Of Home," the parties agreed that no one could seek any recourse against Terrebonne General Medical Center and that rescission of the sale was no longer an option.

⁴ During opening arguments at the trial of this matter, the parties were in agreement that this was a bad faith redhibition case. As a general rule, appellate courts will not consider issues that were not raised in the pleadings, were not addressed by the trial court, or are raised for the first time on appeal. **Dan-Cin Const. Co., Inc. v. Thrasher**, 2008-1552, p. 4 (La. App. 1 Cir. 2/13/09), 9 So.3d 205, 208. See also, Uniform Rules--Courts of Appeal, Rule 1-3. ("The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.") Given that Ms. Lirette never raised the issue of good faith seller at the trial court level, the argument has been waived. Thus, we need not address Ms. Lirette's second assignment of error.

The seller warrants the buyer against redhibitory defects, or vices, in the thing sold; a defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect, or else of such diminished usefulness and value that the buyer would only have purchased the thing for a lesser price. The existence of a redhibitory defect gives the buyer the right to obtain rescission of the sale where the thing is rendered useless, or the right to have the price reduced where the thing is found to be of lesser value as a result. La. Civ. Code art. 2520. However, the seller owes no warranty for defects that were either known to the buyer at the time of the sale, or discoverable by a reasonably prudent buyer. La. Civ. Code art. 2521. A seller and buyer may agree to exclude the warranty against redhibitory defects; however, the terms of the exclusion must be clear and unambiguous and must be brought to the attention of the buyer. La. Civ. Code art. 2548.

In a suit for redhibition, the plaintiff must prove: 1) the seller sold the thing to him and it is either absolutely useless for its intended purpose or its use is so inconvenient or imperfect that, judged by the reasonable person standard, had he known of the defect, he would never have purchased it; 2) the thing contained a non-apparent defect at the time of sale; and 3) the seller was given an opportunity to repair the defect. **McNeely v. Ford Motor Co., Inc.**, 98-2139, p. 15 (La. App. 1 Cir. 12/28/99), 763 So.2d 659, 669, writ denied, 2000-0780 (La. 4/28/00), 760 So.2d 1182; **Vincent v. Hyundai Corporation**, 633 So.2d 240, 243 (La. App. 1 Cir. 1993), writ denied, 93-3118 (La. 2/11/94), 634 So.2d 832.

A defect is presumed to have existed before the sale if it manifests itself within three days immediately following the sale. La. Civ. Code art. 2530. However, later appearing defects do not enjoy this presumption as a matter of law. See **Rhodes v. All Star Ford, Inc.**, 599 So.2d 812, 814 (La. App. 1 Cir. 1992). Nonetheless, as this court has previously recognized, "in the absence of other explanations, later appearing defects may be inferred to have pre-existed the sale, when such defects do not usually result from ordinary use." **Rhodes**, 599 So.2d at 814. The existence of a redhibitory

defect is a question of fact and the trial court's conclusion should not be disturbed in the absence of manifest error. *Id.*

In the instant case, the trial court found that Ms. Lirette did not meet her burden of proving that Ms. Ledet committed acts of fraud or was in bad faith in hiding defects, if any, in the property. In dismissing Ms. Lirette's claims, the trial court made the following findings:

Looking at this case objectively, and that is what courts are called to do, taking away the passion, taking away the financial stakes, taking away the winning, losing issue, this is what I have observed in this particular case. You know, you have a house that is obviously not a new house, it's an older house in an older neighborhood and, in fact, it looks and smells like an older house, there is no question about that. So when the plaintiff is looking to buy this house a purchaser has certain obligations, you know, to reasonably inspect, take a look, see and you don't lose or leave your common sense at home, you bring that with you and -- and do what a reasonable person would do under the same circumstances.

In this particular case the law is, if I understand it correctly, in order for the plaintiff to prevail the plaintiff would have to prove essentially that Teri Ledet committed acts of fraud, or certainly bad faith, and hid defects that were known or should have been known to her.

In this case I find that many things are "telling or helpful." The fact that we have a cash sale in March of '06, and the resell is a few months later, November of '06, it was a flip, as they call it, you fix up a house and sell it, [this] is important because of the testimony of Steve McCoy. His testimony was that there was nothing wrong with the house, no defects that he knew of. He lived there ... he testified. So for the Court to believe the plaintiff I would almost have to conclude that within the few months, from March to November, defects would have had to manifest themselves to the defendant, and the defendant would have had to cover those defects up and sell it to the plaintiff when we know that we are dealing with a relatively old house anyway.

All right. Quite frankly, I am not satisfied at all that the plaintiff has met her burden of proof in proving bad faith or fraud in any respect against the defendant, Teri Duet Ledet. I have heard a lot of testimony, for goodness sakes three days worth of testimony, and it sounds like what this case really is is perhaps a case dealing with some perhaps shoddy workmanship, or improper techniques for painting, or other things, but fraudulent redhibition or bad faith redhibition case, I think the plaintiff fails in her burden of proof concerning same.

I did look at the diary. I agree with the defendant, I think the diary is telling. I think the chronology of events is telling. I think the obvious dates and the obvious and open nature of the house is obvious.

For those reasons I am going to reject the plaintiff's claim and dismiss this lawsuit. I don't think I have to get to the part of whether or not Century 21 or American Realty USA is vicariously liable. ...

And this case may be appealed, I realize that, so this is what I am going to do, I am going to adopt the defendant's trial memorandums as my own as reasons for judgment and adopt the defendant's oral arguments given this day in open court as my reasons for judgment. ...

[W]hen I look at this case as a whole, listen to the testimony, I certainly feel that there was credibility issues with the plaintiff's testimony. The defendant's credibility really was not attacked at all.

We agree with the trial court that a reasonably prudent buyer has certain obligations when purchasing a house such as the one in question. Pursuant to Article 2521, Ms. Ledet owes no warranty for any defects that were either known to Ms. Lirette at the time of the sale, or discoverable by a reasonably prudent buyer. Moreover, as set forth in the November 3, 2006 "Act Of Cash Sale Without Warranty," the parties clearly agreed to exclude the warranty against redhibitory defects and intended that the sale of the property be "AS IS" and "WHERE IS." The trial court made a credibility call and chose to believe Ms. Ledet's testimony that she had no knowledge of any defects in the house when she sold it to Ms. Lirette. The trial court found that Ms. Lirette had not met her burden of proving bad faith or fraud by Ms. Ledet in any respect. Based on our review of the evidence in this case, we find no manifest error in the trial court's factual findings in this regard. The trial court did not err in declining to award damages under these circumstances.

For the above and foregoing reasons, we affirm the judgment of the trial court and assess all costs associated with this appeal against plaintiff-appellant, Susan M. Lirette.

AFFIRMED.