Loyola Consumer Law Review

Volume 2 | Issue 3 Article 12

1990

South Carolina Home Buyers May Recover Only Against Builders Under Implied Warranty of Habitability

Stephen Kirkwood

of the towing industry. The court determined that Georgia law gives towing services a great advantage over owners of towed cars and creates great potential for unfair business practices and abuse of the public. If a car owner fails to pay a $2 parking fee the law entitles the towing service not only to remove the vehicle but to charge an involuntary fee and to deprive the owner of his or her automobile until the fee is paid.

Reviewing the ordinances, the court determined that the ordinance requiring towing services to post fees protected the public from potential overcharge. By requiring towing services to accept insured checks and major credit cards, the second ordinance protected the owner from unnecessary deprivation of his or her car while cash is not immediately available.

Finding the burden on the towing services to be insignificant, the court determined that the protective value of the regulation outweighed the inconvenience to the individual towing services. Therefore, the court held the ordinances to be clearly reasonable and valid.

Ordinances Did Not Violate United States Constitution

Article I, Section 8, Challenge. A-Tow and Porter urged two additional constitutional grounds for reversing the convictions. First, they contended that the requirement that wrecker services accept checks and credit cards violated Article I, section 8, of the United States Constitution because the ordinance strove to legislate a change in legal tender. Article I, section 8, clause 5, provides Congress with the exclusive power to coin money and regulate its value. The court rejected this argument, finding that the regulation does not require services to accept payment in anything but legal tender. In addition, the debt is discharged when the towing service receives payment in legal tender through a third party institution.

Ordinance Withstands Due Process Claim. A-Tow and Porter also argued that the ordinance requiring towing services to accept "any check which can be insured by a check approval agency . . ." violated the United States Constitution due process clause because the ordinance did not define the word "insured." To determine whether the ordinance was violative of due process, the court stated that the proper inquiry is "whether the statute forbids or requires an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application." *Porter* at 634. The court held that the term "insured" is not vague because, reasonably construed, it means that a check approval agency will indemnify the towing service if bank account funds are insufficient.

Sufficient Evidence That Checks Were Tendered and That Signs Were Not Posted

A-Tow and Porter posed two evidentiary arguments. First, they contended that there was no evidence that a check was properly tendered. While the court conceded that no fully drafted check was entered into evidence at trial, the court observed that the witnesses had testified that they had stopped writing checks when A-Tow told them that the checks would not be accepted. The court additionally noted that the ordinance does not require formal tender and that Georgia law does not necessitate formal tender where the towing company tells the consumer that the check will be refused. The court held that violation of the ordinance occurred when A-Tow indicated that a check, if written, would be refused.

Secondly, A-Tow and Porter asserted that there was insufficient evidence that the required signs were not properly posted. The court, however, found sufficient testimony to support the conviction for failure to post fees.

Sheila M. Hanley

SOUTH CAROLINA HOME BUYERS MAY RECOVER ONLY AGAINST BUILDERS UNDER IMPLIED WARRANTY OF HABITABILITY

In a recent case, the Supreme Court of South Carolina denied recovery to a new home purchaser who brought suit for breach of implied warranty of habitability against the seller, who was also the builder's lender. In ***Kennedy v. Columbia Lumber & MFG. Co.,*** 384 S.E.2d 730 (S.C. 1989), the court held that, absent knowledge of concealed defects, the seller-lender was not liable to the buyer on an implied warranty of habitability theory. However, the court also held that the builder could be liable to the buyer under an implied warranty of service theory.

Factual Background

On July 21, 1977, Columbia Lumber & Manufacturing Company ("Columbia Lumber") sold a new home to John Kennedy ("Kennedy"). Columbia Lumber had been the materials supplier to the builder of the house, Charles Crumpton ("Crumpton") of Rainbow Construction Company. Columbia Lumber had taken no part in the actual construction of the house. When Crumpton could not pay Columbia Lumber for the supplies, Columbia Lumber filed a mechanic's lien on the property. This lien put Columbia Lumber in a lender's position with regard to Crumpton. Eventually, Columbia Lumber took a deed in lieu of foreclosure on the property and paid off Crumpton's outstanding mortgages. In order to recoup its losses from Crumpton's default, Columbia Lumber sold the house to Kennedy, but received less than the amount Crumpton owed for materials.

Approximately six years after the sale, Kennedy spotted a crack in the brick veneer of the house. Almost two years later, an engineer employed by Kennedy to inspect

(continued on page 90)

South Carolina New Home Buyers (continued from page 89)

the crack informed Kennedy that he believed the crack resulted from a defective foundation. On September 27, 1985, Kennedy filed suit against Columbia Lumber based on theories of implied warranty of habitability and negligence; later, he dropped the negligence action. The Common Pleas Court of Richland County directed a verdict for Columbia Lumber, and the South Carolina Supreme Court took this appeal.

The South Carolina Supreme Court Decision

Liability of Construction Lenders. The Supreme Court of South Carolina noted that *Roundtree Villas Ass'n v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984), involved a construction lender somewhat similar to Columbia Lumber. In *Roundtree Villas,* the lender's financially troubled builder deeded housing units it had constructed to a selling corporation. These units were sold to purchasers who later noticed defects in the buildings and sued the lender on theories of negligence and implied warranty of habitability. The court held that the lender could not be held liable in tort for the builder's defective work. The lender also was not liable under a warranty of habitability theory because the lender was not the seller of the housing units.

The court noted, however, that the *Roundtree Villas* lender was in a somewhat different position from Columbia Lumber in the instant case. The lender in *Roundtree Villas* undertook to repair the defects in some of the housing units; Columbia Lumber did not take on such a responsibility. Additionally, unlike the *Roundtree Villas* lender, Columbia Lumber was also the seller. Nevertheless, the court applied *Roundtree Villas* to the instant case and held that whether or not a party to the sale of housing units, a mere lender is generally not liable to the home buyer under an implied warranty of habitability theory.

The court distinguished parties who act only as lenders from those lenders who expressly ensure habitability or conceal information regarding building defects. A lender who is also a developer or builder of the units may be liable if the lender makes express representations or conceals defects from the buyer, or if the lender plays a substantial role in constructing the units.

Builder and Seller Liability. The court next set out to define and clarify the scope of builder and seller liability in South Carolina by analyzing the appellate court decision in *Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897 (Ct.App. 1988). In *Carolina Winds,* condominium unit purchasers sued the builder when they discovered cracks in the exterior walls. The builder, who had not actually sold the units, was sued under theories of negligence and implied warranty of habitability. The court of appeals held that because the builder was not also the seller, he could not be held liable under an implied warranty of habitability theory. Neither could he be held liable in tort, according to the court of appeals, because the "economic loss" rule precludes liability in tort where the only damage suffered from a defective product is damage to the product itself.

The Supreme Court of South Carolina found that the result reached in *Carolina Winds* was contrary to South Carolina's policy of extending protection to new home purchasers. The court reviewed the legal history of builders' liability to home buyers for defective workmanship and noted the state's trend toward protecting the new home buyer. The court opined that the modern home buyer is usually in an unequal bargaining position with the seller, and asserted South Carolina's longstanding policy of caveat venditor in this context. The court of appeals had denied recovery to the home buyer in *Carolina Winds* because the builder was not also the seller and because damages were exclusively economic. The Supreme Court of South Carolina rejected this result because it failed to protect the home buyer. The court held instead that the buyer should generally be allowed to bring suit against the builder, the seller, or both the builder and the seller.

In rejecting *Carolina Winds,* the court emphasized that because a warranty of habitability stems from the sale of the house, such a warranty cannot be traced to a builder who is not also the seller. The court stated, however, that an implied warranty of workmanlike service arises when a builder contracts to build the house. The new home buyer may hold the builder liable under the theory of implied warranty of service, even where the buyer did not deal directly with the builder.

Finally, the South Carolina Supreme Court considered the appellate court's assertion that the economic loss rule precluded builder liability under the tort theory of negligence. The court concluded that the economic loss rule often results in an unfair decision. The court held that while builders who violate contractual duties are liable only in contract, builders who violate legal duties are liable both in contract and in tort. The court noted that builders have many legal duties, such as a legal duty to construct buildings in accordance with building codes and industry standards or, when there are no codes or standards to apply, a duty not to construct housing that the builder knows or should know will create risks of physical harm. A builder who violates these legal duties may be held liable in tort, and the plaintiff is not required to prove physical harm. Such a builder, said the court, may be held liable for the diminution in the value of the house, or for physical harm suffered.

Stephen Kirkwood