DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

NM RESIDENTIAL, LLC, and 949 CLEVELAND STREET, LLC,

Appellants,

v.

PROSPECT PARK DEVELOPMENT, LLC,

Appellee.

No. 2D20-3012

March 25, 2022

Appeal from the Circuit Court for Pinellas County; Thane B. Covert, Judge.

Melissa Alagna, M. Shannon McLin, and William D. Palmer of Florida Appeals, Orlando; John H. Bill of Godbold Downing, Bill & Rentz, P.A., Winter Park, for Appellants.

Darryl R. Richards of Johnson Pope Bokor Ruppel & Burns, LLP, Tampa; Rachael L. Wood of Johnson Pope Bokor Ruppel & Burns, LLP, Clearwater, for Appellee.

ATKINSON, Judge.

NM Residential, LLC, and 949 Cleveland Street, LLC

(collectively NM Residential), appeal the dismissal with prejudice of

their fraud claims against Prospect Park Development, LLC (Prospect Park), arising from a purchase and sale agreement (the Purchase Agreement) that included a provision that disclaimed the making of and reliance upon any representations or warranties regarding the property. We reverse because Florida Supreme Court precedent requires that to foreclose liability for fraud the parties must expressly stipulate that any fraud that might have been committed cannot form the basis of a claim.

During the contractual due diligence period, a construction company hired by NM Residential inspected a recently constructed development consisting of 250 residential apartments as well as commercial space (the Property). The inspection revealed several defects, which were memorialized in a punch list, including issues with gates, balconies, and windows. Prospect Park agreed to remedy the punch list items prior to closing.

After the due diligence period expired, at least one of Prospect Park's agents represented that it had "addressed every item on the original punch list." Prospect Park's attorney also represented to NM Residential that the balconies and gates were repaired, and its

property manager told NM Residential that the window leaks had been fixed.

After closing, NM Residential discovered that there were defects with the balconies and gates and that many windows were leaking. Destructive testing postclosing revealed that water was infiltrating numerous windows. As a result, NM Residential filed suit alleging that agents of Prospect Park knowingly misrepresented that the punch list items were corrected and actively concealed certain unresolved issues by, among other things, caulking windows to conceal leaks that had not been repaired. NM Residential sought damages or alternatively rescission for fraud. The trial court dismissed the amended complaint with prejudice, concluding that NM Residential had waived its fraud claims pursuant to provisions in the parties' agreement.

In order to "make [a] contract incontestable because of fraud," the parties must "stipulate that the [contract] may not be rescinded for fraud." *Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689, 691 (Fla. 1941). To do so, the contract must do more than merely agree "that no fraud had been committed"—i.e., disclaim the making of fraudulent statements upon which the other party has relied—but

must rather "recognize[] that fraud may have been committed and stipulate[] that such fraud, if found to have been committed, should not vitiate the contract." *Id.* In other words, while "an express waiver of the right to maintain a fraud claim is all that is required to avoid liability for fraud," more than a mere disclaiming of the making of fraudulent representations or a reliance thereon is required to effectuate such a waiver; rather, the parties must agree that "even if a fraud 'may have been committed,' such a claim may not be asserted." *See Billington v. Ginn-La Pine Island, Ltd.*, 192 So. 3d 77, 84 (Fla. 5th DCA 2016) (quoting *Oceanic Villas*, 4 So. 2d at 691).

So, even when the parties have "stipulate[d] that no fraud has been committed and that neither party has relied upon the representations of the other party made prior to the execution of the contract," that is not enough to foreclose liability for fraud. *See Oceanic Villas*, 4 So. 2d at 691. And that is all that the parties agreed to in this case.

Effectively, the relevant portions of the Purchase Agreement on which the trial court relied (denominated herein for convenience as the disclaimer clause) constitute four separate provisions—a

provision disclaiming the making of any representations by the seller and reliance thereon by the purchaser, an as-is clause, a release, and an integration clause. The disclaimer clause provides in pertinent part the following:

> 9. PROPERTY SOLD AS-IS. . . . (ii) Except as expressly represented by Seller in this Agreement, Seller disclaims the making of any representations or warranties, express or implied, regarding the Property or its value or matters affecting the Property, including, without limitation, the physical condition of the Property, . . . and all other information pertaining to the Property. Purchaser, moreover, acknowledges (a) that Seller did not develop or construct the Property, (b) that Purchaser has entered into this Agreement with the intention of making and relying upon its own investigation of the physical, environmental, economic and legal condition of the Property and (c) that Purchaser is not relying upon any representations and warranties, other than those specifically set forth in Paragraph 7(a) above, made by Seller or anyone acting or claiming to act on Seller's behalf concerning the Property or its value. . . . Purchaser agrees that the Property is to be sold to and accepted by Purchaser in its "AS IS" condition and WITH ALL FAULTS on the Closing Date and assumes the risk that adverse physical, environmental, economic or legal conditions may not have been revealed by its investigation.
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> (iii) Except with respect to any claims arising out of any breach of covenants, representations or warranties set forth in Paragraphs 7(a) and 8 above, Purchaser, for itself and its agents, affiliates, successors and assigns, hereby (a) releases and forever discharges and (b) holds harmless and indemnifies Seller, its agents, partners, affiliates, successors and assigns from any and all rights,

> claims and demands at law or in equity, whether past, present or future, and whether known or unknown at the time of this Agreement, arising out of the physical, environmental, economic or legal condition of the Property.
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> . . .
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> 16. Integration: . . . This Agreement contains the complete agreement between the parties and cannot be varied except by the written agreement of the parties. The parties agree that there are no oral agreements, understandings, representations or warranties that are not expressly set forth herein.

As did the trial court, Appellee Prospect Park relies on the Fifth District's *Billington* opinion to support the conclusion that NM Residential waived any cause of action based on fraudulent misrepresentation. However, the agreement at issue in *Billington* did what the Purchase Agreement in this case did not: it "clearly manifest[ed] the intent to avoid [claims of fraud]" by expressly waiving the right to base a claim on any fraudulent representations that might have been made. *See Billington*, 192 So. 3d at 84.

Instead of merely affirming that "no fraud ha[d] been committed," the agreement in *Billington* "stipulate[d] that, even if a fraud 'may have been committed,' such a claim may not be asserted." *Id.* (quoting *Oceanic Villas*, 4 So. 2d at 691). Regarding

"any statements, promises or representations in conflict with or in addition to the information contained in [the agreement]," the disclaimer provision in *Billington* expressed that the parties "specifically disclaim any responsibility for any such statements, promises or representations. By execution of this Contract, *Buyer acknowledges that Buyer has not relied upon such statements, promises or representations, if any, and waives any rights or claims arising from any such statements, promises or representations.*" *Billington*, 192 So. 3d at 79. The parties in *Billington* did not just disclaim that any fraudulent representations were made and relied upon but rather acknowledged that "such" statements might have been made and disclaimed "*responsibility for* any such" representations and "waive[d] any rights or claims arising from any such" representations. *Id.* (emphasis added).

Prospect Park understandably points to language in the disclaimer clause stipulating that "[p]urchaser is not relying upon any representations and warranties . . . made by [s]eller or anyone acting or claiming to act on [s]eller's behalf." However, unlike the agreement in *Billington*, there is no language expressly absolving the seller from any *responsibility* for such statements or expressly

releasing the seller from liability for such statements by expressly stipulating that the buyer NM Residential waives the right to bring a claim based upon such statements. Not unreasonably, Prospect Park also points to the release that follows in the next paragraph of the Purchase Agreement, but it is a general release that does not expressly and directly renounce the right to bring a cause of action for fraudulent representations that might have been made.

Perhaps even more important than a comparison to the agreement in *Billington* is that the agreement in *Oceanic Villas* had the same provisions relied upon by Prospect Park in this case—including a disclaimer of reliance on fraudulent representations and a general release—but the Florida Supreme Court pronounced that such language was not enough to eliminate the seller's fraud liability. *See Oceanic Villas*, 4 So. 2d at 691. Like the Purchase Agreement in this case, the lease in *Oceanic Villas* contained as-is and nonreliance provisions stipulating that the lessee "accepts the property . . . in its present condition, being governed by its own personal inspection of the premises" and not "by any representations of the Lessors." *Id.* at 690. And the lessors in *Oceanic Villas* were generally released from liability by virtue of the

stipulation that the lessee "shall under no circumstances assert or maintain any claims for damages against the Lessors by reason of any present or future condition of improvements or buildings, if any, situated upon the above described property." *Id.* Yet the Florida Supreme Court rejected the lessor's argument that by the language in the agreement "the lessee is estopped to allege that the lease was procured by fraud." *Id.* at 690–91.

The existence of an integration clause in the Purchase Agreement is likewise insufficient to have eliminated Prospect Park's liability for fraud. First, the *Oceanic Villas* lease also contained an integration clause, agreeing "that no verbal agreements, stipulations, reservations, exceptions or conditions whatsoever have been made or entered into in regard to the above described property, which will in any way vary, contradict or impair the validity of this lease, or of any of the terms and conditions herein contained." *Id.* at 690. That language is not merely a disclaimer; it is an acknowledgment that verbal representations that might have been made in derogation of the written contract terms would not be permitted to control over the terms of the

written agreement.[1] Additionally, the understanding that the integration clause in *Oceanic Villas* did not eliminate the lessors' liability for fraud is corroborated by the general acceptance of such a proposition in other recorded opinions. *See, e.g.*, *Rodriguez v. Tombrink Enters., Inc.*, 870 So. 2d 117, 119 (Fla. 2d DCA 2003) ("The existence of an integration clause does not bar a claim for fraudulent misrepresentation." (citing *Mejia v. Jurich*, 781 So. 2d 1175, 1178 (Fla. 3d DCA 2001))); *Billington*, 192 So. 3d at 83 ("[W]here the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud—either in the inducement or in the execution—despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made." (quoting *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 599 (N.Y. 1959))); *Mejia*, 781 So. 2d at 1178 ("The existence of a merger or integration clause, which purports to make oral agreements not incorporated into the written

[1] The Fifth District in *Billington* did not address the integration clause in the lease reviewed in *Oceanic Villas*, focusing instead on language in that document suggesting the parties merely disclaimed the making of representations that would contradict the written agreement and reliance thereon. *See Billington*, 192 So. 3d at 82–83.

contract unenforceable, does not affect oral representations which are alleged to have fraudulently induced a person to enter into the agreement.").

The language in this contract does not clear the hurdle established by *Oceanic Villas*, which requires an explicit waiver of liability for fraudulent representations that might have been made—an acknowledgment of the parties "that fraud may have been committed" and a "stipulat[ion] that such fraud, if found to have been committed, should not vitiate the contract." *Oceanic Villas*, 4 So. 2d at 690–91 ("We recognize the rule to be that fraud in the procurement of a contract is ground for rescission and cancellation of any contract unless for consideration or expediency the parties agree that the contract may not be cancelled or rescinded for such cause, and that by such special provisions of a contract it may be made incontestable on account of fraud, or for any other reason."). In the disclaimer clause in this case, like that of *Oceanic Villas*, the parties merely disclaimed *the making of* and reliance on any misrepresentations, not legal responsibility for representations that *might have been* made.

In *Billington*, our sister court affirmed and followed the holding of *Oceanic Villas*.[2] The contract language in *Billington* satisfied that standard and arguably overshot the mark. *See Billington*, 192 So. 3d at 84 ("We emphasize that the disclaimer clauses here are as clear and conspicuous as they are comprehensive. If these clauses are insufficient to render a claim for fraud 'incontestable' within the contemplation of the *Oceanic Villas* court, then no disclaimer can possibly accomplish that objective . . . .").

The same cannot be said of the disclaimer clause at issue in this case, despite a contrary conclusion that might reasonably be calculated from the sum of its parts. It may seem intuitive that a combination of provisions that includes an as-is clause, a disclaimer affirming that there were no representations of the seller

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[2] The *Billington* opinion also made a valiant but perhaps quixotic attempt to reconcile the *Oceanic Villas* opinion with an earlier opinion of the Florida Supreme Court, *Cassara v. Bowman*, 186 So. 514 (Fla. 1939). *See Billington*, 192 So. 3d at 82–85. While the *Cassara* opinion could be read to dictate a different result than the one we reach in this case, the Florida Supreme Court in *Oceanic Villas* distinguished *Cassara*, explaining that its "factual conditions differentiate[d]" it. *See Oceanic Villas*, 4 So. 2d at 691 ("The allegations of the two bills of complaint are entirely different as to the nature of the representations alleged to have been false."). Under the circumstances, we perceive no option other than to follow the holding in *Oceanic Villas*.

on which the purchaser is relying, an averment that the purchaser would rely instead on its own investigation, a general release, and an integration clause would eliminate the seller's liability for fraudulent misrepresentations on which the purchaser might later claim to have relied. *Cf. id.* at 83 ("A 'non-reliance' clause . . . is intended to 'head off the possibility of a fraud suit' by binding the parties to a promise that they have not relied upon extrinsic representations . . . [and] negates a claim for fraud because it constitutes a contractual agreement on one element of a fraud claim—reliance." (quoting *Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2002))). However, until such time as the Florida Supreme Court decides to revisit its holding in *Oceanic Villas*,[3] that binding precedent demands that something more is needed—a contractual "recogni[tion] that fraud may have been committed and [a] stipulat[ion] that such fraud, if found to

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[3] *Cf. Billington*, 192 So. 3d at 78, 85 (certifying to the Florida Supreme Court questions of great public importance, including whether a merger clause negates a claim for fraud, whether "clear and unambiguous disclaimer clauses . . . negate or 'ma[ke] incontestable' a claim for fraud as discussed in *Oceanic Villas*," and whether "a clear and unambiguous non-reliance clause negate[s] a claim for fraud, where one party alleges justifiable reliance on an extrinsic representation").

have been committed, should not vitiate the contract." *Oceanic Villas*, 4 So. 2d at 691.

Our holding does not bear upon the merits of NM Residential's fraud claims and should not be understood as a determination that the provisions discussed in this opinion are irrelevant to the ultimate success of those claims. However, reversal is required because the claims were not barred by the parties' agreement and therefore not subject to dismissal on that basis.

Reversed and remanded.

CASANUEVA and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.