FOURTH DIVISION
December 5, 2013

No. 1-12-2331

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARC BECKER and LISA BECKER,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Cook County.
	)	
v.	)	No. 05 L 011637
	)	
ALLISON SCHERER and DAVID	)	
THOMAS,	)	The Honorable
	)	Ronald F. Bartkowicz
Defendants-Appellants.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The Buyers failed to satisfy the elements of a breach of contract claim, and they contractually and impliedly waived their right to sue in connection with the housing defects identified in the complaint. Each party shall be responsible for their own attorney's fees. This court reversed the judgment of the circuit court.

¶ 2 Here, we confront an Old Town iteration of the movie, "The Money Pit," in which the Buyers claim that their so-called dream house turned into a leaky disaster of an edifice and, ultimately, a litigation nightmare. After roughly six years of bruising litigation, the trial court sided with the Buyers and awarded $193,000 in damages despite evidence at trial that revealed actual repairs totaling less than 10% of that amount. Throughout the litigation, the Sellers maintained that the Buyers had expressly waived their right to recover any damages since the Buyers' own inspection report revealed the potential problems with water penetration, a fact which they did not reveal to the Sellers until this lawsuit was filed. Thus, the Sellers have their own tragedy to tell, one characterized by needless legal battles and hundreds of thousands of dollars in inappropriate judgments and fee awards. We will leave it to the reader to decide if this tale is more redolent of drama, comedy, or farce, since it clearly has elements of each.

¶ 3 Defendants Allison Scherer (formerly Allison Thomas) and David Thomas ("Sellers") appeal from the circuit court judgment against them holding they individually and/or collectively violated the Residential Real Property Disclosure Act (765 ILCS 77/1 (West 2012)) (Disclosure Act) and committed breach of contract, as well as fraud, when they sold their home in summer 2005 to plaintiffs Marc and Lisa Becker ("Buyers"). Weeks after the closing of the sale, a torrential rain produced leaks in various parts of the home, and the Buyers sued the Sellers some months later, ultimately winning actual damages and attorneys fees for the Sellers' failure to disclose the leaky nature of the house. On appeal, and consistent with their arguments before the trial court, the Sellers contend that the Buyers waived their right to sue for roof and foundation issues identified in their own inspection report pursuant to a contractual waiver provision in the

real estate contract. They also contend the Buyers should have been barred from raising the breach of contract claim relating to window and spalling stone leaks, along with mold damage, because the Buyers did not identify these issues within the one-year period required by the Diclosure Act. The Sellers further argue the Buyers could not prove their fraud claims while they had direct knowledge of the defects, which would then preclude any justified reliance on the Sellers' disclosure report. Lastly, the Sellers raise a number of contentions related to the damages awarded to the Buyers and challenge the attorney's fees awarded.

¶ 4 For the reasons that follow, we reverse the judgment of the trial court and enter judgment in favor of the Sellers, and we further reverse the trial court's award of attorney's fees and order that both parties remain responsible for their own attorney's fees.

¶ 5 BACKGROUND

¶ 6 We discuss only those salient facts from this long and needlessly complicated case as are necessary for resolution of the issues on appeal. This case stems from an April 2005 contract for purchase of a 100-year-old four-level residence with a basement, located at 1330 N. Cleveland, in Chicago's Old Town neighborhood. The Buyers purchased what they considered to be their "dream home" with a lofty price tag of over $2 million from Seller Scherer, who was poised to move into a dream home of her own a few miles away in Lincoln Park. In the weeks before their contract was presented, Seller Scherer had a potential deal to sell the home that fell through, either as a result of problems with financing or because of issues that arose during an inspection

of the property.[1] It also bears mention that when Seller Scherer originally bought the home, she received a credit of under $5,000 to deal with a leak in one of the rooms of the aging edifice.

¶ 7 Included in the standard real estate contract was a disclosure form executed by Scherer in which she admitted to no knowledge of material defects with the roof or the foundation of the home, even though an inspection by the previous prospective buyer had found problems in both areas. This inspection, which was performed in February, noted that the foundation had some signs of water damage with an active water leak in the corner. The basement had signs of dampness with cracks in the floor and water in the trap, and there was spalling stone on the exterior. It indicated there was ponding on the roof, recommending it should be monitored for water penetration, and water stains in the rear third-floor bedroom.

¶ 8 With regard to the present case, the contract also permitted an inspection, which was done on two separate days in April by Richard F. Handschu. His inspection disclosed similar leakage issues, such as "water penetration around this property," "water…leeching in through the stone foundation," and "ponding water between the north parapet wall and the top roof structure," which could lead to surface deterioration, and "water can wick through seams via capillary action." Thus, well before the July closing and within the applicable time period for voiding any deal, the Buyers learned that their potential dream house had issues with water penetration at the top and bottom of the building.

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[1] Although Scherer's then husband, Thomas, was not the owner of 1330 N. Cleveland and thus technically not a seller, he lived there for the 19-month period along with Scherer and made representations to the Buyers during the home sale. For the sake of simplicity, we will call him a "Seller," as well.

¶ 9 After the inspection, the Buyers' attorney sent a letter to the Sellers' attorney that brought up a number of niggling issues (door handles, balky appliances, etc.), but it pointedly failed to mention any issues with the roof and foundation that came up in the inspection. This is noteworthy because Paragraph 12 of the contract *required* the Buyers to notify the Sellers in writing of any material defects, and attach relevant pages of the inspection report, or otherwise they would waive the right to complain. Paragraph 12 specifically provided:

> "In addition to the inspection provided in Paragraph F of the General Conditions of this Contract, within 8 business days after the Acceptance Date ("*Inspection Period"*), Buyer may provide at its expense *** a home, radon, environmental, lead-based paint and/or lead-based paint hazards (unless separately waived), wood infestation, and/or mold inspection(s) of the Property ("*Inspections*").*** A major component shall be deemed to be in operating condition if it performs the function for which it is intended, regardless of age, and does not constitute a health or safety threat. *** Prior to expiration of the Inspection Period, Buyer shall notify Seller or Seller's attorney in writing ("*Buyer's Inspection Notice*") of any defects disclosed by the Inspections that are unacceptable to Buyer, together with a copy of the pertinent pages of the relevant Inspections report. *** If the Parties have not reached written agreement resolving the inspection issues within the Inspection Period, then either Party may terminate this contract by written notice to the other Party. **IN THE ABSENCE OF WRITTEN NOTICE PRIOR TO EXPIRATION OF THE INSPECTION PERIOD, THIS PROVISION SHALL BE DEEMED WAIVED BY ALL PARTIES AND THIS CONTRACT SHALL BE IN**

FULL FORCE AND EFFECT." (Emphasis and capitalization in original.)

¶ 10 Despite being sophisticated buyers presented with the preceding contract language and the rather prominent roof and foundation problems revealed in the Handschu inspection, the Buyers admit that they failed to notify the Sellers in writing about the leaky roof and foundation and did not send the Sellers the inspection report. As a result, the deal proceeded to its closing on July 8, 2005.

¶ 11 As fate would have it, just two weeks later a heavy rain caused extensive leaks from the roof and the foundation. Six months later, the Buyers filed suit, claiming that the Sellers had failed to properly disclose "property defects," but these were specifically denominated as relating to *only* the leaking roof and the porous foundation wall. The Buyers claimed that as a result of these problems, they would be "forced to spend large sums of money to remedy the defects." Notably, the complaint did not mention that the Buyers had knowledge of these defects prior to closing by virtue of the inspection undertaken at their behest. Therefore, the gravamen of the Buyers' complaint is that the Sellers did not disclose problems that the Buyers had learned about very shortly after singing the real estate contract, when they still had time and a legal basis to either negotiate a satisfactory resolution or to otherwise cancel their contractual offer.

¶ 12 The gist of the complaint – although phrased alternately in different counts as breach of contract, common law fraud, fraudulent concealment, or failure to disclose – was premised on the Disclosure Act, which is meant to give aggrieved buyers one year to complain about undisclosed defects in residential property transactions. 765 ILCS 77/60 (West 2012); *Penn v. Gerig*, 334 Ill. App. 3d 345, 349-50 (2002). As such, affected buyers were provided with relief from the

common law effects of *caveat emptor*, a doctrine that would surely doom any attempt to claim these damages from an "as is" purchase of a 100-year-old home. See *Penn*, 334 Ill. App. 3d at 350. At the same time, the limitation period of one year also provided affected sellers some certainty that might not be forthcoming if the typical ten-year limitation period for contracts were to apply. *Id*.

¶ 13 It bears repeating that at the expiration of the one-year period, the *only* defects at issue in the Sellers' complaint related to the roof and foundation. Thereafter, the Buyers were allowed to amend their complaint on several occasions, only to add other alleged property defects. The Sellers successfully persuaded the court to grant summary judgment on all fraud counts with respect to the roof because of the lack of justifiable reliance by the Buyers, since they were aware of these issues when finalizing the contract at closing. The court also dismissed allegations made regarding problems with the spalling stone and leaking windows as part of the Disclosure Act under Count 2. The court found these allegations were made after the one-year limitation period had expired and further found that these allegations did not relate back to the original filing date under section 2-616 of the Code of Civil Procedure (735 ILCS 5/2-616 (West 2012)), which allows amendments to complaints. No appeal was taken from those rulings. Inexplicably, the Sellers failed to ask the trial court to enter summary judgment on all counts, based on the rather apparent waiver argument, which based on our review of the entire record and relevant case law, should have been successful. Regrettably, this litigation sputtered along for more than six years, with the case ultimately proceeding to a legally unnecessary bench trial that was conducted intermittently over a period of several months.

¶ 14 Just prior to trial, the Sellers sought leave to file an affirmative defense, which would have tied the breach of contract allegations in Count 1 to the one-year limitation period in a manner that would have been consistent with the court's earlier ruling on Count 2. The trial court denied leave to file the defense. Trial proceeded with testimony frequently devolving into narrative form, objections lingered without rulings and key terms relating to the heart of the case – the leaky roof and foundation – were left undefined or presented in a such a way as to confuse the trier of fact and this reviewing court. At trial, the court also allowed the Buyers to present evidence of estimates for repairs to the roof, windows, foundation, masonry, drywall (allegedly because of mold), and other areas, with a total projected repair cost of $480,000. Despite this figure, the record shows the cost of the actual repairs was apparently much less. As an aside, we would note that at oral argument, the Buyers contended that actual repairs amounted to a total of some $28,000, while the Sellers contended the total was less than $12,000. About six months later, on June 15, 2011, the trial court entered judgment in favor of the Buyers in the lump sum of $208,000, a figure that was never broken down to reveal what it consisted of. The trial court subsequently reduced that amount by $15,000, again without defining the basis of the reduction.

¶ 15 In relevant part, the court found the Buyers had successfully proven Seller Thomas committed fraudulent concealment (Count 4) and common law fraud (Count 5) when he made a statement to the Buyers during the final walkthrough of the house denying water infiltration in the basement wall. In spite of finding the Buyers "could not reasonably rely on Thomas' response in view of the obvious damp condition of the basement wall," the court held Seller Thomas liable for this failed disclosure because he signed the sales contract and "had a duty to speak about

known defects." With respect to Seller Scherer, the court determined the Buyers had proven breach of contract (Count 1), violation of the Disclosure Act (Count 2), common law fraud (Count 3), and fraudulent concealment (Count 4, which also included Seller Thomas). The court found Seller Scherer failed to disclose "water infiltration problems" relating to the parapet wall (apparently related to the roof leak) and foundation which resulted in damaged dry wall requiring mold remediation.

¶ 16 The trial court's attention then turned to the matter of attorneys' fees for the prevailing party, after the parties apparently declined to mediate that particular issue. This resulted in the trial court awarding the Buyers' attorney's fees of $158,110. Despite having prevailed on various aspects of the litigation during the pretrial period and at trial, the trial court denied the Sellers' request that each party bear its own fees and further declined to award any attorney's fees to the Seller's attorney. During this period of time, the Sellers attempted to reopen the proofs to establish that the Buyers had expended only $30,000 in actual repair work on the home, but the Clerk's office was said to have lost the documents and they were thus unable to provide the necessary proof to the trial court for its consideration. This timely appeal followed.

¶ 17 ANALYSIS

¶ 18 We now address only those contentions necessary to properly resolve this appeal. The Sellers principally contend the trial court erred by entering judgment in favor of the Buyers, collectively, for breach of contract, violation of the Disclosure Act, common law fraud, and fraudulent concealment, because the Sellers raised the affirmative defense of waiver defeating these various causes of action. The Buyers do not dispute that waiver is a cognizable affirmative

defense to the causes of action. Rather, the Buyers initially contend the Sellers cannot rely on waiver because the Sellers did not obtain a ruling on that affirmative defense. On this fundamental issue, we disagree.

¶ 19 This argument simply cannot obtain in a case where the trial court failed to explicitly rule on multiple issues throughout the trial. Waiver was an integral part of the Sellers' theory of the case at trial, driving defense counsel's direct and cross-examination of the Buyers. The Sellers argued the affirmative defense in closing argument and also raised it in their posttrial motion challenging the June 15 ruling. Regardless, we hold that implicit in the trial court's June 15 ruling was that the Sellers had failed to prove the affirmative defense of waiver.

¶ 20 The Buyers also argue that the Sellers, themselves, have waived their right to assert contractual waiver on appeal because they have not cited any legal authority to support their argument. While it is well established that points not supported by authority may be deemed waived, this principle is "an admonition to the parties and not a limitation upon the power of a reviewing court to address issues of law as the case may require." *Mayfield v. ACME Barrel Co.*, 258 Ill. App. 3d 32, 37 (1994); see also *Groenings v. City of St. Charles*, 215 Ill. App. 3d 295, 306 (1991). We apply this same legal principle to hold that we are not bound by the Sellers' confused concession during oral argument that the Buyers are entitled to nominal damages for the Sellers' technical violation of the Disclosure Act. See *Koulogeorge v. Campbell*, 2012 IL App (1st) 112812, ¶ 21; see also *People v. Walker*, 2012 IL App (2d) 110288, ¶ 22. We would further add that the Seller's waiver argument raises a clear question of law, and the factual record is sufficient to permit its resolution. *Catholic Charities of Archdiocese of Chicago v. Thorpe*,

318 Ill. App. 3d 304, 311 (2000) (the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversarial nature of our system). Accordingly, we deny the Buyers motion to strike the Sellers' brief on that particular point and proceed in our review.

¶ 21 This case begins and should have ended with the Disclosure Act, as it relates to the real estate contract at issue. The Disclosure Act requires a home seller, before the home contract is signed, to file a form disclosing material defects of which she has actual knowledge, *i.e.* conditions that would have a substantial adverse effect on the value of the property or significantly impair the health or safety of future occupants. 765 ILCS 77/25, 35 (West 2012). The Disclosure Act, however, specifically provides that the seller "is not obligated by this Act to make any specific investigation or inquiry in an effort to complete the disclosure statement." 765 ILCS 77/25 (West 2012). Further, while the buyer may choose to rely on the seller's disclosures in determining whether to buy the property or on what terms to buy it, the Disclosure Act expressly provides that the statements on the form are not "deemed to be warranties." 765 ILCS 77/25, 35 (West 2012). The Disclosure Act does not limit or modify any obligation to disclose created by common law, so that it permits the parties to bring alternative causes of action. 765 ILCS 77/45 (2012). Consistent with this statutory provision, the Buyers alleged it was the violation of the Disclosure Act that also formed the basis for breach of contract, fraud, and fraudulent concealment.

¶ 22 The Sellers do not now challenge the trial court's finding that they failed to comply with

Disclosure Act, in that there were undisclosed material defects of which they had actual knowledge. They essentially assert that even so, the Buyers cannot successfully prove their various causes of action because the affirmative defense of contractual waiver defeats these claims. Indeed, an affirmative defense by definition assumes that even if the allegations in the complaint are true, a new matter asserted by the defendants still can foil the plaintiffs' claim. *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222 (1984); Black's Law Dictionary (9th ed. 2009). Although the Sellers frame this issue as one of waiver, implicit in their argument is that Paragraph 12 of the contract also prevented the Buyers from successfully proving certain elements of the breach of contract claim, which we also address in turn.

¶ 23 Construing the language of this real estate contract is a question of law, which we review *de novo*. See *In re Nitz*, 317 Ill. App. 3d 119, 124 (2000). When construing a contract, it is our duty to effectuate the intent of the parties to the contract, which is determined from the plain and ordinary meaning of the language of the contract unless it is ambiguous. *Id*. Parties to a contract are free to include any terms they choose, as long as they are not against public policy and do not contravene a positive rule of law. *Id*. Such a contract is binding on both parties, and it is the duty of the court to construe it and enforce the contract as made. *Id*.

¶ 24 Here, the plain language of the contract required the Sellers to disclose material defects of which they had actual knowledge. The parties do not dispute that the disclosure provisions were executed in light of existing law and thus were deemed part of the contract. See *Fox v. Heimann*, 375 Ill. App. 3d 35, 45 (2007). However, the contract also provided the Buyers could inspect the property and if they did so, the contract imposed a duty upon the Buyers to send a copy of their

inspection report to the Sellers if it revealed any unacceptable defects and also required them to identify these defects in writing. Specifically, Paragraph 12 gave the parties time to negotiate the terms of any repair that might have to be undertaken as a result of the inspection and provided that the Buyer and the Seller could cancel the contract if the parties could not reach a satisfactory agreement to resolve the inspection issues. Here, however, the Buyers pointedly failed to notify the Sellers or submit any written notice regarding the results of the inspection.

¶ 25 This failure was in spite of the blatant, material defects highlighted in the inspection report. The inspection, for example, stated that many areas of the house "need repair," "there are numerous safety issues," and specifically informed the Buyers to "[e]xpect to have to work in all these areas once you take possession." The inspection again later stated: "There are some significant items which may need repair or replacement within the next five years. Some repairs may be *more immediate*." (Emphasis added). Under this statement, the report listed first that there had been "water penetration" around the property, and as evidence, identified the walls on the southwest corner of the house at the lower level as moist, with water "likely leeching through the stone foundation." It continued, "[t]he eaves along the east side of the top roof are water damaged" and "blistering and blubbling"; "[t]here is ponding water between the north parapet wall and the top roof structure. Even modified bitumen roofs cannot tolerate standing water for extended periods of time. If there is ponding water for over 48 hours, the surface can deteriorate and water can wick through the seams via capillary action." The report then noted that the masonry around the property needed repair and identified that "concrete blocks along the top level are spalling from water penetration," among other cracks. The report, additionally, stated

"[r]oofing on the top of the house is ridged and not well pitched" and "[w]ater has come through this roof and damaged the eaves along the east side," although the selling agent said the leaks had "all been repaired." The report went on to identify water-damaged windows.

¶ 26 Remarkably enough, the Buyers claimed their reliance on the disclosure form and the Sellers' verbal assurances served as the reason they proceeded to closing under the real estate contract and that the undisclosed defects were the reason they incurred damages. Unlike the trial court, we cannot agree with such baseless assertions. Although a trial court's findings of fact are entitled to deference, a judgment will be deemed against the manifest weight of the evidence if the opposite conclusion is apparent or if the findings appear to be arbitrary, unreasonable, and not based on the evidence submitted at trial. *Fox*, 375 Ill. App. 3d at 46. To the extent the court made any factual findings, we deem them against the manifest weight of the evidence, as the following analysis makes clear.

¶ 27 We first address the breach of contract claim against Seller Scherer (Count 1). To establish a breach of contract action, the Buyers were required to show that there was not just an offer, acceptance, consideration, a definite contract, and breach, but that the Buyers performed all of the required contractual conditions and that the damages actually resulted from the Sellers' breach of the terms. See *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1082 (1998). Here, the Buyers admitted they saw the written inspection report, had a discussion with the inspector about "potential issues with the roof and foundation," and conceded that a leaky foundation and roof were unacceptable, yet they admittedly did not comply with their contractual duty, which only arose following the inspection, to relay the property defects and inspection report to the Sellers in

writing. See, *e.g.*, *Weis v. State Farm Mutual Automobile Insurance Co.*, 333 Ill. App. 3d 402, 407-08 (2002) (plaintiff failed to state a cause of action for breach of contract, because although she disputed the cash value of her car, she failed to initiate the appraisal process required by the contract to determine the car's value). As a result, the Buyers cannot prove they complied with the contract or that the damages necessarily resulted from Seller Scherer's breach, where the Buyers knew of the material defects but said nothing and proceeded with an "as is" contract. The Buyers conduct essentially deprived *both parties* of the right to cancel the contract if negotiations proved unfruitful and left the case open to the vagaries of memory.

¶ 28 Finally, even if the Buyers had proven all the elements of their breach of contract action, they still would not succeed because the affirmative defense of waiver applies in this instance. Waiver is either an express or implied voluntary and intentional relinquishment of a known and existing right. *Wells v. Minor*, 219 Ill. App. 3d 32, 45 (1991). An implied waiver of a legal right may arise when conduct of the person against whom waiver is asserted is inconsistent with an intent to enforce that right. *Id*. The waiver doctrine is intended to prevent the waiving party from lulling another into a false belief that strict compliance with a contractual duty will not be required and then suing for noncompliance. *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 463 (1995). To determine waiver, one must focus on the conduct of the nonbreaching party. *In re Nitz*, 317 Ill. App. 3d at 131. In this case, Paragraph 12 of the contract concluded with these words: **"IN THE ABSENCE OF WRITTEN NOTICE PRIOR TO EXPIRATION OF THE INSPECTION PERIOD, THIS PROVISION SHALL BE DEEMED WAIVED BY ALL PARTIES AND THIS**

CONTRACT SHALL BE IN FULL FORCE AND EFFECT." (Emphasis and capitalization in original.) Because the Buyers did not object in writing to the material defects disclosed in the inspection report, this conduct evinced an intent to proceed under the contract without enforcing their rights. Thus, by contract and conduct, they waived the right to complain about the leaky foundation and roof. See *Bartels v. Denler*, 30 Ill. App. 3d 499, 501 (1975) (Defendants did not exercise right under contract to terminate plaintiff's employment and so, months later, they could not deny plaintiff his compensation for his earlier breach). In addition, the *only fair reading* of the contractual language is that Buyers also waived their opportunity to complain about the mold, leaky windows and spalling stone that are alleged to have later resulted from the original leaks. In their brief, the Buyers concede that these problems "more specifically describe[d] the damage to the Property that resulted from the leaks 'into the basement, foundation, roof, ceilings, walls and floors of the Property.' " Although the trial court ruled that the relation-back doctrine did not apply to the additionally identified defects in Count 2 (the Disclosure Act), so that they were dismissed from consideration below as to Count 2, on appeal Buyers now contend that the defects in the first and amended complaints were one and the same for the purposes of Count 1 (breach of contract). Specifically, they allege: "The amendment is no more than a description of additional damages arising from the same occurrence fully described in the original complaint." It follows that this "occurrence" and any resulting defects in the original complaint encompassed the very same, albeit more detailed, defects challenged in the amended complaints, and the Buyers therefore waived all the defects. As a result, the Buyers' breach of contract claim fails.

¶ 29 We next address the real property disclosure claim against Seller Scherer (Count 2). To

establish a violation of the Disclosure Act, the Buyers were required to show Seller Scherer (1) failed to disclose material defects (2) of which she had actual knowledge and (3) there were actual damages. See 765 ILCS 77/25 (West 2012); *Hogan v. Adams*, 333 Ill. App. 3d 141, 147 (2002) (a violation of the Disclosure Act must be done knowingly). A seller who knowingly makes a false statement is subject to liability under the Act; the language of the Act makes no exception because of a buyer's knowledge of the defect. *Woods v. Pence*, 303 Ill. App. 3d 573, 577 (1999); see also *Coughlin v. Gustafson*, 332 Ill. App. 3d 406, 415-16 (2002); *Hogan*, 333 Ill. App. 3d at 147-48 (both citing *Woods*).

¶ 30 Nevertheless, the real estate contract and the Buyers' conduct under the peculiar circumstances of this case *did create an exception*. Although Seller Scherer committed a technical violation of the Disclosure Act, we conclude that the Buyers contractually waived their right to seek recovery for damages under the Disclosure Act. Generally, individuals may waive statutory rights enacted for their benefit where the waiver was knowing, voluntary and intentional. *Elsener v. Brown*, 2013 IL App (2d) 120209, ¶ 83. Moreover, an individual may waive his statutory rights by entering into a contract that authorizes waiver. *Johannesen v. Eddins*, 2011 IL App (2d) 110108, ¶ 23.

¶ 31 We find no reason not to apply the contract's waiver provision since it is clear that the Buyers waived their rights under the Disclosure Act by their conduct, where the Buyers were informed of material defects at a time when they had the opportunity notify the Sellers in writing of their objections and to protect their interests but did neither. The Buyers were in possession of the very information that the Sellers are alleged to have hidden from them. This is buttressed by

the fact that the inspection report done in February for the prior potential buyer – a report which the Buyers used at trial to show the Sellers' knowledge – was materially the same as the inspection report done for the Buyers. Both reports identified leaks from above and below. Since the Buyers claim to have specifically relied on the Sellers' cursory assurances regarding the leaks, while allegedly blithely ignoring their own detailed inspection report, we cannot help but conclude their conduct was inconsistent with any intent to enforce their rights as to these issues under the Disclosure Act. See *Kane v. American National Bank & Trust Co.*, 21 Ill. App. 3d 1046, 1051 (1974); see also *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 549-50 (2006) (existence of annexation agreement precluded party from enforcing statutory right to disconnect property). We will not hold the Seller to a higher standard than the Buyers and exalt a technical violation of the Disclosure Act to the level of dispositive recovery when the Buyers in effect had the same knowledge as the Sellers. Such a finding would be elevating form over substance and ignoring the plain language of the contract here, which should be enforced, and the plain implications of the Buyers' conduct. See *Eastern Savings Bank, FSB, v. Flores*, 2012 IL App (1st) 112979, ¶¶ 13-14 (Illinois has a strong public policy favoring enforcement of contracts).

¶ 32 Both the Buyers and Sellers were sophisticated parties, represented by brokers and attorneys to enter into a multi-million dollar real estate contract; none had an undue advantage. We would further note that applying waiver in this instance does not run afoul of the Act's purpose, where there is no statutory provision barring waiver and where the legislative history suggests that the Disclosure Act was intended to protect buyers from latent, not patent, material defects. 88th Ill. Gen. Assem., Senate Proceedings, April 15, 1993, at 264 (Senator Molaro), at

265 (Senator Philip); *cf. Tortoriello v. Geral Nissan of North Aurora, Inc.*, 379 Ill. App. 3d 214, 238 (2008) (noting that section 10c of the Consumer Fraud Act provides that "Any waiver or modification of the rights, provisions, or remedies of the Act shall be void and unenforceable."). In the end, the Buyers made a calculated risk and wound up buying the very peril that was visited upon them.

¶ 33 This brings us to the remaining fraud claims against the Sellers (Counts 3, 4, and 5). Based on the foregoing, we also hold that contractual waiver applied to the Buyers' fraud claims because the Buyers' could not have justifiably relied on "misrepresentations" they already knew about, yet did not challenge under Paragraph 12 of the contract. See *Krilich v. American National Bank and Trust Company of Chicago*, 334 Ill. App. 3d 563, 571 (2002) (affirming motion to dismiss fraudulent misrepresentation claims on the basis of contractual waiver); see also *RBS Citizens, National Association v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 186 (2011) (suggesting fraud can be waived); *Boatmen's Bank of Benton v. Durham*, 203 Ill. App. 3d 921, 928 (1990) (waiver will apply if a party, after discovering the alleged fraud and with full knowledge of its material aspects, engages in conduct which is inconsistent with the intention to sue); *Bulley v. Andrews, Inc., v. Symons Corp.*, 25 Ill. App. 3d 696, 702 (1975) (holding the plaintiff waived a claim based on fraud in the formation of the contract when plaintiff remained silent for nine months after plaintiff could have reasonably discovered the fraud). Even if waiver did not apply here, we agree with the Sellers' third contention that the Buyers failed to prove all the elements of the fraud counts.

¶ 34 The remaining issue relates to the award of attorney's fees. Section 55 of the Disclosure

Act provides that a person who violates the Disclosure Act is liable for actual damages and court costs, and "the court may award reasonable attorney fees incurred by the prevailing party." 765 ILCS 77/55 (West 2012); see *Miller v. Bizzell*, 311 Ill. App. 3d 971, 976 (2000) ("prevailing party" can refer to either the plaintiff or the defendant). While an argument exists that the Sellers actually could be considered the prevailing party, their brief presents only a short paragraph without citation to the record or to the law simply asking for the reversal of the attorney's fees award. Because of this, they have waived any potential argument to gain attorney's fees. See Ill. Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) (Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing). While the Buyers' brief asks that we strike the Sellers' attorney's fees' argument and then affirm the award, we cannot do so in light of our disposition. In addition, the Buyers likewise do not point to any facts or law that would give us reason to affirm the trial court's award. Given our disposition and the parties' bare-bones arguments on this issue, we hold that there was no prevailing party under the statute, and the Buyers and Sellers are responsible for their own respective attorney's fees. See *Brown v. Kerr, Inc., v. American Stores Properties, Inc.,* 306 Ill. App. 3d 1034-35 (1999) (affirming the trial court's decision not to award attorney's fees because there was no prevailing party and the case was a "draw"). As such, we see no reason to remand the matter of attorney's fees, which is typically within the discretion of the trial court. See *Miller*, 311 Ill. App. 3d at 976.

¶ 35 CONCLUSION

¶ 36 The only fair reading of the facts and law in this appeal reveals that the Buyers were not entitled to any damages related to problems cause by the leaking roof and foundation. The

contract specifically required them to provide Sellers with notice of the material defects revealed in their inspection and also gave them time to negotiate a satisfactory resolution of any controversy raised by the inspection. The Buyers chose to proceed with the purchase and, in so doing, they willingly bought a home that was known to have water penetration issues at its top and bottom. The damages that resulted were occasioned as a result of their decision not to negotiate with the Seller, and their conduct specifically waived any claim for damages incurred. Their dream home resulted in the delineated drama because of their decision making. Therefore, we reverse the judgment of the trial court. Each party shall be responsible for their respective attorney's fees.

¶ 37 Reversed.