STATE OF MICHIGAN

COURT OF APPEALS

NORMA L. STARKS,

Plaintiff-Counter-defendant-Appellant

v

ARTHUR SOLOMON,

Defendant-Appellee,

and

GUARDIAN HOME INSPECTION, INC.,

Defendant-Counter-plaintiff-Appellee,

and

THOMAS J. DUCKWORTH and OLLIE M. DUCKWORTH,

Defendants.

UNPUBLISHED
March 30, 2001

No. 220989
Washtenaw Circuit Court
LC No. 97-008963

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition for defendants under MCR 2.116(C)(10). We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

This case arises out of plaintiff's purchase of the Duckworths' home. Plaintiff filed this lawsuit after she discovered that the foundation of the home was badly deteriorated. Before plaintiff purchased the house, she contacted defendant Guardian Home Inspection, Inc. (Guardian) to inspect it. Guardian's employee, Arthur Solomon, inspected the home on October

3, 1994. In its report prepared by Solomon, Guardian said the basement was "satisfactory," but noted some cracks in the foundation walls and basement floor.

The Duckworths also gave plaintiff a seller's disclosure statement wherein the Duckworths stated that the basement leaked water only when the eaves of the home were not maintained and that they did not know whether any structural work or alterations had been done without a licensed contractor.

Plaintiff first noticed the deterioration of the foundation when she had her brother remove the paneling on the basement walls in 1997. She then filed suit against Guardian and Solomon for negligence, breach of contract, and violation of the Michigan Consumer Protection Act (CPA), MCL 445.901 *et seq*.; MSA 19.418(1) *et seq*. Plaintiff sued the Duckworths[1] on theories of misrepresentation, negligence, breach of contract, and breach of an implied contract. Plaintiff and Guardian/Solomon, moved for summary disposition, the Duckworths joining in Guardian and Solomon's motion. The trial court granted defendants' motion and denied plaintiff's motion.

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. This Court considers "the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant[s] the benefit of any reasonable doubt to the opposing party." *Radke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A trial court properly grants a motion under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Plaintiff contends, and we agree, that the trial court abused its discretion by refusing to consider the testimony and opinions of her experts when it granted defendants' motion for summary disposition.

After plaintiff discovered the damage to her foundation walls, she contacted three experts, Patrick Lyons, Thomas Fitzpatrick, and Leon Mancour, to determine the cause and extent of the damage. In reports and by deposition the experts stated that the damage to the basement occurred over a number of years and that the damage would have been apparent in 1994, when Guardian conducted its inspection. However, in ruling on the motions for summary disposition, the trial court excluded plaintiff's experts' reports and depositions. The trial court found that because plaintiff's experts had no actual knowledge concerning plaintiff's basement as it existed in 1994, their conclusions that evidence of water damage would have been apparent in 1994 were speculative.

Of course, the trial court correctly observed that a party opposing a motion for summary disposition must present more than conjecture and speculation to support its contention that a genuine issue of material fact exists which precludes ruling as a matter of law. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

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[1] The Duckworths did not file a brief on appeal.

However, the question before this Court is whether the experts' conclusions are deducible as reasonable inferences from known facts or conditions. *Badalamenti v Wm Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999).

We find that plaintiff's experts based their opinions on known facts and conditions, and that their conclusions create genuine issues of material fact. Lyons based his opinion that evidence of water damage would have been visible in 1994 on his own observations in 1998 and his review of Solomon's 1994 report. Fitzpatrick's opinion derives from his knowledge concerning the amount of time needed for a wall, such as the basement walls in this case, to bow inward. Also, Mancour opined that, based on the floor tiles and the paneling, he would notice the water damage if the tile and paneling were visible during the 1994 inspection. He stated that the floor tiles would take "at least ten to fifteen years" to deteriorate, and that the deterioration would have been visible for "the last six to ten years."[2]

Moreover, the facts relied upon by plaintiff's experts do not conflict with established fact. Solomon and plaintiff's failure to report the bowed walls does not conflict with the experts' opinions because defendants do not claim that Solomon examined the basement walls for a bowing effect. Further, Solomon and plaintiff's alleged failure to notice bowing walls does not establish the lack of disputed fact; it creates disputed fact. See *Lorenzo v Noel*, 206 Mich App 682, 688; 522 NW2d 724 (1994). Also, although the paneling did not appear to be rotted or water-stained when Solomon and plaintiff viewed the basement, Fitzpatrick testified that new baseboard was placed over damaged areas. Finally, that the basement did not smell wet to Solomon and plaintiff does not establish that the basement did not leak. In fact, in the seller's disclosure statement, the Duckworths admitted that the basement did leak if the eaves of the house were not maintained.

Because the experts' opinions build upon established fact and because the opinions are reasonable inferences from those facts, we find that the trial court abused its discretion when it refused to consider whether the opinions established genuine issues of material fact which would preclude summary disposition. Indeed, plaintiff established a fact question for the jury's determination and, therefore, the trial court should not have granted summary disposition on plaintiff's negligence and breach of contract claims against Guardian and Solomon.

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[2] Although plaintiff raises the issue of the trial court's exclusion of the experts' opinions only as to its claims against Guardian and Solomon, we note that both Fitzpatrick and Mancour asserted that the Duckworths knew or should have known about the water damage in the basement, an issue we discuss *infra*. Mancour based this opinion on evidence he discovered during his inspection of the home in 1997, including older paint on the foundation walls, a newer brick wall built in front of an older deteriorating wall, and new baseboard attached to the paneling which hid some of the rotting paneling. Fitzpatrick stated that, based on the degree of repairs to the original wall and the fact that the furring strips attached to the wall showed a bow, the Duckworths knew or should have known that the foundation walls were damaged when they sold the home to plaintiff.

Plaintiff asserts that the trial court erred by ruling that her affidavit claiming coercion, misunderstanding and misrepresentation did not create a genuine issue of material fact about whether Guardian and Solomon violated the Michigan Consumer Protection Act (CPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq*. We disagree.

Based on the allegations in her affidavit,[3] plaintiff claims that there are genuine issues of material fact regarding violations of the following sections of MCL 445.903; MSA 19.418(3):

> (1) Unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful and are defined as follows:
>
> * * *
>
> (n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.
>
> * * *
>
> (y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.
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> * * *
>
> (aa) Causing coercion and duress as the result of the time and nature of a sales presentation.

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[3] In her May 21, 1999 affidavit, attached to her motion for summary disposition, plaintiff states:

> 1. [T]he first time that I saw or heard about the "pre-inspection agreement" which was contained in the report of Guardian Home Inspection was after I had already hired the inspector, the inspector and myself had walked through the home for over two hours and the inspection had been completed, the findings of the inspection had already been revealed to me and were to the effect that the foundation and home were "satisfactory" and had no major defects and at that time I was handed the report and I felt that I was expected to sign the document and pay the inspector.
>
> 2. [T]hat because of this, I reasonably felt that signing the document was a mere formality and that the inspector was not going to rigidly adhere to the written language that I was subject to coercion or duress to sign the document since I had already hired the inspector and felt that I had to pay him.
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> 3. If this document had truly been something handed to me "pre-inspection" with time for me to read and understand it without duress or coercion, I would not have agreed to it and would have sought another inspector.

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

Specifically, plaintiff claims that Guardian and Solomon violated subsections, (n), (y), and (bb), by creating differences between the oral representations and the written contract provisions. Plaintiff also alleges that Guardian and Solomon violated subsection (aa) by not allowing plaintiff a fair amount of time to review the contract before the inspection took place.

An "affidavit must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion." *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 321; 575 NW2d 324 (1998), mod in part on other grounds by *Harts v Farmers Ins Exchange*, 461 Mich 1, 10; 597 NW2d 47 (1999). "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact, or the lack of it, must be established by admissible evidence." *Marlo, supra*. Plaintiff's affidavit merely asserts her subjective belief about what Solomon meant when he spoke to her about the contract. She does not set forth statements or actions by Solomon that led her to believe that he expected her to sign or that signing the document was a mere formality. Moreover, the affidavit does not set forth particular facts to establish that Solomon or Guardian acted to confuse or coerce her into signing the contract.

Furthermore, neither her affidavit nor her deposition support a finding of a CPA violation under subsection (y) or (bb), because plaintiff does not set forth any express representations made by Solomon as required by the statute. See *Zine v Chrysler Corp*, 236 Mich App 261, 281; 600 NW2d 384 (1999). Plaintiff claims in her appeal brief that Solomon "made known that by signing [the contract] after the inspection that they would not rigidly adhere to its language." However, plaintiff did not support this assertion in her affidavit or her deposition. The bare assertion that defendants made it known that they would not adhere to the contract does not create a disputed fact. *Marlo, supra*, 227 Mich App 321.

Similarly, plaintiff's affidavit and deposition do not support her claim that Solomon or Guardian caused "a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction." MCL 445.903(1)(n); MSA 19.418(3)(1)(n). The affidavit does not identify which rights, obligations, or remedies about which Solomon caused confusion. Further, plaintiff's affidavit and deposition do not set forth facts regarding acts or statements by Solomon or Guardian which caused her confusion. In fact, at her deposition, plaintiff testified that she understood the terms of the contract when she signed it. Only later did plaintiff say she became confused about its terms. Therefore, viewed in a light most favorable to plaintiff, her claim under subsection (n) is not supported by admissible evidence.

Moreover, plaintiff's evidence of coercion or duress, required under subsection (aa), is insufficient to support a claim under the CPA. Plaintiff argues that because the inspection contract was not presented to her until after the inspection was over, she was coerced into signing the agreement. Black's Law Dictionary, (6th ed, 1990), p 258, defines coercion as "compulsion; constraint; compelling by force or arms or threat. Coercion may be actual, direct, or positive, as

where physical force is used to compel act against one's will, or implied, legal, or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse." (Citations omitted.) Further, this Court has stated that "to succeed with a claim of duress, [defendants] must establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes." *Farm Credit Services v Weldon*, 232 Mich App 662, 681-682; 591 NW2d 438 (1998); *Enzymes of America, Inc v Deloitte, Haskins & Sells*, 207 Mich App 28, 35; 523 NW2d 810 (1994), rev'd in part on other grounds 450 Mich 889 (1995).

The facts set forth in plaintiff's affidavit and deposition do not rise to the level of duress or coercion. Although plaintiff claims that she would not have entered the contract with Guardian if Solomon gave her the contract before he performed the inspection, her statement is a conclusionary denial and, therefore, does not constitute competent evidence of a disputed fact. See *Marlo*, *supra*, 227 Mich App 321. Plaintiff's other allegations -- that Solomon did not give her the contract until after he conducted the inspection, that Solomon made some unspecified remarks that led her to feel that defendants would not adhere to the contract, that she felt obligated to sign because she owed him the money, and that she felt that because the report labeled the home "satisfactory" it would be pointless not to sign -- do not rise to the level of overpowering her free will. Nor is there any indication that Guardian or Solomon acted illegally. Thus, the trial court properly denied plaintiff's claim of duress or coercion as a matter of law.[4]

Accordingly, we affirm the trial court's grant of summary disposition to Guardian and Solomon on plaintiff's CPA claim because plaintiff failed to establish a genuine issue of material fact for the jury.

Plaintiff also contends that the limitation of damages clause in the contract between Guardian and plaintiff is invalid. We disagree.

After he finished the inspection report, Solomon gave plaintiff a copy of the "pre-inspection agreement" for her to read and sign. In a box above the signature line, the agreement contained the following provision:

> I hereby request a visual inspection of the property at the above address in full understanding and acceptance that the total liability of the Inspector/Inspection company for mistakes, negligence, errors or omissions in this Inspection shall be limited to the amount of the fee paid for the Inspection. In the event of refund of the Inspection fee, such refund shall be accepted by the undersigned as full and final payment of all claims and causes of action against the Inspector and/or the COMPANY. Acceptance of this report constitutes acceptance of all contractual terms herein. I agree to pay the charge as specified below.

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[4] Plaintiff also cites cases from other jurisdictions which she contends support her claim that Solomon or Guardian should have delivered the inspection contract to her before the inspection. Because the cases cited by plaintiff conflict with Michigan law concerning the requirements for proving coercion or duress, they are not persuasive. Any failure to deliver the contract before the inspection does not establish coercion or duress per se.

The box in which this provision appeared also contained a separate line for the initials of the person signing the contract. After reading the contract, plaintiff signed the document and initialed the box containing the limitation of liability after reading the contract.

As a general rule, parties are free to enter into any contract at their will, provided the contract is not contrary to Michigan law and does not conflict with Michigan's public policy. *Cudnik v Wm Beaumont Hosp*, 207 Mich App 378, 383-384; 525 NW2d 891 (1994). Moreover, it is not contrary to the public policy of Michigan for a party to contract against liability for that party's own ordinary negligence. *St. Paul Ins v Guardian Alarm*, 115 Mich App 278, 283; 320 NW2d 244 (1982). Indeed, Michigan courts have upheld the validity of exculpatory agreements in various circumstances. See *Cudnik, supra* at 384. However, to be valid, a release must be fairly and knowingly made. *Paterek v 6600 Ltd*, 186 Mich App 445, 449; 465 NW2d 362 (1990). "A release is not fairly made and is invalid if (1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct." *Id*., citing *Theisen v Kroger Co*, 107 Mich App 580, 582-583; 309 NW2d 676 (1981).

Plaintiff testified at her deposition that she was aware of the release when she signed the contract and she admitted that she initialed the box containing the release provision. Furthermore, as discussed *supra*, plaintiff presented no evidence that Solomon or Guardian misrepresented the contract or engaged in fraudulent conduct or overreaching. We reject plaintiff's counterintuitive argument that handing the contract to plaintiff after the inspection establishes fraud or overreaching. Moreover, at no point has plaintiff asserted that she was under the influence of drugs or otherwise impaired in her ability to understand the contract provisions. Thus, the release was valid when plaintiff signed the contract.[5]

Plaintiff also argues that the clause is an attempt to set liquidated damages in case of a breach by Guardian. According to plaintiff, a liquidated damages clause is valid in Michigan only if three conditions are met: (1) the party seeking damages must suffer actual damages and those damages must be uncertain in amount or difficult to ascertain, (2) the contract must be silent regarding actual damages, and (3) the sum agreed to by the parties must be reasonably related to the injuries actually suffered. *Roland v Kenzie*, 11 Mich App 604, 611; 162 NW2d 97 (1968). Plaintiff asserts the clause is invalid because the damages are not uncertain in amount or difficult to ascertain and because the amount of damages is not reasonably related to the injuries suffered by plaintiff.

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[5] This Court has held certain exculpatory agreements invalid as against public policy in limited circumstances. *Stanek v Nat'l Bank of Detroit*, 171 Mich App 734; 430 NW2d 819 (1988) (provision holding bank harmless if a check was cashed within one business day impermissible under the Uniform Commercial Code); *Allen v Michigan Bell Telephone Co*, 18 Mich App 632; 171 NW2d 689 (1969) (unequal bargaining power between the parties and clause substantively unreasonable and thus unconscionable); *Cudnik, supra*, 207 Mich App at 387 (against public policy in the context of medical malpractice). These exceptions do not apply to this case because (1) the clause is not substantively unreasonable for the service provided, (2) plaintiff could have hired a different inspection company, and (3) the presentation of the contract after the inspection does not alone create an unconscionable contract.

The limitation of damages provision does not constitute a liquidated damages clause. As this Court noted in *Allen*:

> Although the trial court referred to this provision as one for "liquidated damages" and the briefs of both parties cite cases involving liquidated or stipulated damages, inasmuch as the provision does not even purport to anticipate or compute actual damages we do not regard it as a valid attempt to do so. [*Allen, supra*, 18 Mich App 637 n 4 (citation omitted).]

Here, as in *Allen*, the provision does not claim to anticipate or compute any prospective actual damages. Accordingly, because (1) it is not a liquidated damages clause, (2) the limitation of liability was fairly and knowingly made, and (3) the clause is not substantively unreasonable, the clause is enforceable. Therefore, any liability based on the home inspection is limited to a return of the $175 fee.

Plaintiff also says that the trial court erred in granting summary disposition to the Duckworths because genuine issues of material fact exist concerning whether the Duckworths knew or should have known about the damage in the basement and whether they attempted to hide or misrepresent their knowledge when they sold the home. We agree.

The Michigan Seller Disclosure Act requires a seller to disclose known defects or conditions of the property in a disclosure statement provided under MCL 565.957; MSA 26.1286(57). The statute permits the seller to employ experts to comply with the disclosure requirements. However, MCL 565.955; MSA 26.1286(55) provides, in pertinent part:

> The delivery of a report or opinion prepared by a licensed professional engineer, professional surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise, is sufficient compliance for application of the exemption provided by subsection (1) if the information is provided upon the request of the prospective transferee, unless the transferor has knowledge of a known defect or condition that contradicts the information contained in the report or opinion.

Accordingly, though a seller relies on the opinion of a professional inspector, the plaintiff must nonetheless disclose known defects or conditions if they contradict the inspector's report or opinion. Further, the statute requires that every disclosure be made in good faith which, for purposes of the statute, means honesty in fact. MCL 565.960; MSA 26.1286(60).

A claim of silent fraud requires a plaintiff to "show that some type of representation that was false or misleading was made and that there was legal or equitable duty of disclosure." *M&D, Inc v McConkey*, 231 Mich App 22, 31; 585 NW2d 33 (1998). Therefore, if the Duckworths' representation was false or misleading, plaintiff may have a claim of silent fraud. Further, the experts' opinions that the Duckworths knew of the damage creates a genuine issue of material fact and, therefore, we find that the trial court erred by granting summary disposition on this issue.

With regard to plaintiff's negligence claim, we note that, generally, the doctrine of caveat emptor prevails in land sales contracts. However, an exception applies for a "vendor's duty to disclose to the purchaser any concealed condition known to him which involves an unreasonable danger." *Christy v Prestige Builders, Inc*, 415 Mich 684, 694; 329 NW2d 748 (1982). Bowed foundation walls "could result in the collapse of the structure and therefore [are], at least arguably, an unreasonably dangerous condition." *Lorenzo*, *supra*, 206 Mich App 687 n 2. Consistent with the silent fraud count, plaintiff's experts' opinions create a disputed question of fact whether the Duckworths knew of the condition in the basement when they sold the home. Summary disposition was therefore improperly granted on plaintiff's negligence claim.

We therefore reverse the trial court's grant of summary disposition to Guardian and Solomon with respect to plaintiff's negligence and breach of contract claims, affirm the grant of summary disposition to Guardian and Solomon on plaintiff's CPA claims, reverse the grant of summary disposition to the Duckworths on plaintiff's misrepresentation and negligence claims, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Helene N. White
/s/ Joel P. Hoekstra