

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD J. PODORSEK,

Plaintiff-Appellant,

v

LAWYERS TITLE INSURANCE CORP.,
CAROL STROUPE, BARBARA J. STROUPE,
STATE REALTY, INC., d/b/a CENTURY 21
STATE REALTY, and PATRICIA E.
SPRENGER,

Defendants-Appellees.

UNPUBLISHED
December 11, 2003

No. 241450
Monroe Circuit Court
LC No. 00-11474-CH

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

In this real estate case, plaintiff Edward Podorsek appeals as of right the trial court's grant of defendants' motions for summary disposition. We affirm.

I. FACTS

This case involves plaintiff's purchase of a parcel of vacant property in Frenchtown Township, Monroe County from the previous owners of the land, defendants Carol and Barbara Stroupe. Defendants Stroupe listed their property with defendant Patricia Sprenger who worked for defendant State Realty, Inc., d/b/a Century 21 State Realty ("Century 21").

In September 1999, plaintiff, who was in the market for vacant property upon which to construct a house, made an offer to purchase the property. Defendants Stroupe and plaintiff entered into a purchase agreement. Although not legally obligated to do so, defendants Stroupe gave plaintiff a seller's vacant land disclosure statement. This statement disclosed that there were no known easements on the property. Further, the statement indicated, "this statement is a disclosure of the condition of and information concerning the property known to the seller." It went on to state that it was not a warranty of any kind, nor should it be considered a substitute for an inspection or warranties that the purchaser might wish to obtain. Lastly, the disclosure statement read, "The following are representations made by solely the seller and are not the representations of the seller's agent."

The purchase agreement was executed on September 29, 1999. Plaintiff's agent drafted this agreement and it contained several contingency provisions including an independent investigation provision, a geological inspection provision and a traditional inspection provision. Plaintiff did not have the property inspected.

On October 29, 1999 defendants Stroupe and plaintiff closed the sale; defendants Stroupe conveyed a warranty deed to plaintiff and plaintiff paid defendants Stroupe \$135,417. Defendant Lawyers Title Insurance Corporation issued a title insurance policy providing insurance coverage in the amount of \$135,000. Plaintiff took possession of the property at closing.

Shortly after the closing, plaintiff had a conversation with one of his new neighbors. The neighbor informed plaintiff that he believed that a drain easement ran across the newly purchased property. The neighbor stated that the drain was called "Gerrick Drain" and that the Monroe County drain commission held an easement for the drain and for a portion of the property on each side of the drain for maintenance purposes. Plaintiff then contacted the Monroe County drain commission, where an employee verified that a drain easement had been established on the property in 1919. A survey of the drain conducted in 1919 contained a provision that a strip of land on each side of the drain shall be taken for convenience in digging and deposit excavations. The length of this strip of land is unclear, however, because the document says either six feet or six rods, with the words "rods" and "feet" having been typed on top of one another. A rod is equal to 16 1/2 feet.

It is undisputed that defendants Stroupe never disclosed the existence of this drain easement to plaintiff, nor was the drain easement noted on the title survey. When plaintiff learned of the existence of the drain easement, he contacted defendants Stroupe, Lawyers Title Insurance Corporation, Century 21, and Sprenger, all of whom denied any knowledge of the existence of the drain or the easement. Defendant Lawyers Title Insurance Corporation denied coverage of the claim, citing paragraph three of the title insurance policy, which listed exceptions from coverage. Specifically, it stated that the policy holder was not insured against loss, costs, attorney fees and expenses resulting from easements or claims of easements not shown by the public records and existing water, mineral, oil and exploration rights.

Plaintiff brought suit against defendants Stroupe, Lawyers Title Insurance Corporation, Century 21, and Sprenger seeking damages relating to the easement. Plaintiff alleged two counts against defendants Stroupe, Century 21 and Sprenger. Count I alleged fraudulent misrepresentation based upon defendants' failure to disclose or nondisclosure. Count II alleged innocent misrepresentation based upon statements contained in the seller's vacant land disclosure statement. Plaintiff alleged the third count, for breach of contract, against defendant Lawyers Title Insurance Corporation. At the conclusion of discovery, defendants brought separate motions for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). In three separate opinions, the trial court granted each of defendants' motions for summary disposition.

With regard to defendants Century 21 and Sprenger, the trial court determined that these defendants had never made a material representation to plaintiff, which is a necessary element of fraudulent misrepresentation. Further, it found that plaintiff cannot rely on the Michigan Occupational Code to support a private cause of action. Finally, the trial court found that plaintiff had failed to plead the necessary element of privity of contract with regard to the

innocent misrepresentation claim. As a result, the trial court granted this motion for summary disposition.

With regard to defendants Stroupe, the trial court determined that the record did not reflect that defendants Stroupe intended plaintiff to rely on the seller's disclosure statement. Furthermore, the trial court noted that the statement specifically warned plaintiff that he should obtain professional advice and inspections of the property. Additionally, the trial court found that plaintiff had failed to establish the elements of innocent misrepresentation and that a reasonable juror could not conclude that plaintiff relied on the representations made in the seller's disclosure statement.

With regard to defendant Lawyers Title Insurance Corporation, the trial court opined that plaintiff failed to demonstrate an easement shown by public records. The trial court noted that the title insurance policy specifically did not cover easements not shown by public records. Further the policy defined public records as, "title records that give constructive notice of matters affecting your title – according to the state law where land is located." The trial court relied on *Peaslee v Saginaw Cty Drain Commr*, 365 Mich 338; 112 NW2d 562 (1961), which held that a filing at the county drain commissioner's office did not serve as constructive notice. The *Peaslee* Court concluded that an easement is a conveyance of an interest in land that must be recorded with the local register of deeds (which was not done in this case). The trial court concluded that defendant Lawyers Title Insurance Corporation appropriately denied coverage under the clear terms of the policy issued to plaintiff. Plaintiff now appeals all three decisions as of right.

II. STANDARD OF REVIEW

The trial court relied on both MCR 2.116(C)(8) and MCR 2.116(C)(10) when it granted defendants' motions for summary disposition. Summary disposition of all or part of a claim or defense may be granted when:

[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *American Community Mutual Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992).

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000).

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 656 NW2d 175 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence which had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8), *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997).

III. DEFENDANTS CENTURY 21 AND SPRENGER

Plaintiff argues that the trial court erred in granting defendants Century 21 and Sprenger's motion for summary disposition with regard to fraudulent misrepresentation because, in addition to being the seller of the property, defendant Barbara Stroupe was a real estate agent employed by defendants Century 21 and Sprenger's. We disagree.

A claim for fraud or fraudulent misrepresentation, as outlined in *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), requires:

- (1) the defendant made a material representation; (2) the representation was false;
- (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion;
- (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it^[1]; and (6) the plaintiff suffered damage.

In the present case, plaintiff has failed to set forth any evidence that defendants Century 21 and Sprenger made "material representations" as required to establish a *prima facie* case of fraud. In fact, when asked, "So what representations did they (Century 21 and Sprenger) make regarding this property, if any?" Plaintiff replied, "I don't know." Furthermore, plaintiff admitted that his lawsuit against defendants Century 21 and Sprenger was based upon, "an

¹ Additionally, *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689-691; 599 NW2d 546 (1999), modifies this fifth element, requiring the reliance to be reasonable.

omission of material fact.” Plaintiff asserts that because defendant Barbara Stroupe worked for defendants Century 21 and Sprenger, her signature on the seller’s disclosure statement constituted a material representation on the part of defendants Century 21 and Sprenger. This argument is without merit. The seller’s disclosure statement explicitly states “the following are representations made by solely the seller and are not the representations of the seller’s agent.” When she signed the seller’s disclosure statement, defendant Barbara Stroupe was signing as the seller of the property and not as an employee of defendants Century 21 and Sprenger. The trial court correctly determined that plaintiff had failed to satisfy the element of material representation as required to establish a *prima facie* case of fraudulent misrepresentation.

Next, plaintiff argues that the trial court erred in granting defendants Century 21 and Sprenger’s motion for summary disposition with regard to innocent misrepresentation because privity of contract is not required is not required. We disagree.

The elements of innocent misrepresentation are: False and fraudulent misrepresentations made by one party to another (1) in a transaction between them, (2) any representation which are false in fact, (3) and actually deceive the other (4) are relied on by him to his damage are actionable, irrespective of whether the person making them acted in good faith in making them, (5) where the loss of the party deceived inures to the benefit of the other. *Phillips v General Adjustment Bureau*, 12 Mich App 16, 20; 162 NW2d 301 (1968).

In addition, our Supreme Court, in *United States Fidelity and Guaranty Co v Black*, 412 Mich 99, 120; 313 NW2d 77 (1981), stated that the rule of innocent misrepresentation only applies to parties in privity of contract. Here, plaintiff did not establish that he was in privity of contract with defendants Century 21 and Sprenger. In fact, plaintiff acknowledges in his amended complaint and in his deposition that defendants Century 21 and Sprenger were not his agents. Therefore, the trial court did not err in granting defendants Century 21 and Sprenger’s motion for summary disposition on the issue of innocent misrepresentation where defendants Century 21 and Sprenger were not in privity of contract with plaintiff.

IV. DEFENDANTS STROUPE

Plaintiff argues that the trial court erred in granting defendants Stroupe’s motion for summary disposition with regard to fraudulent misrepresentation because genuine issues of material fact exist on whether defendants Stroupe knew or should have known that an easement existed and on whether plaintiff relied on the seller’s disclosure statement. We disagree.

Here, the trial court found that plaintiff had failed to establish an element of fraudulent misrepresentation; namely that defendant intended plaintiff to rely on the representation. *Jaffa, supra* at 640-641. The seller’s disclosure statement specifically stated that it was not based on expertise, was not a warranty and should not be a substitution for an inspection of the property. In fact, the statement warns, “purchaser should obtain professional advice and inspections of the property to determine the condition of the property.” This language clearly indicates that defendants Stroupe did not intend for plaintiff to rely on the seller’s disclosure statement and that they actually encouraged plaintiff to obtain an outside inspection of the property. The trial court did not err in concluding that plaintiff failed to establish that defendants Stroupe intended for plaintiff to rely on the seller’s disclosure statement.

Next, plaintiff argues that the trial court erred in granting defendants Stroupe's motion for summary disposition with regard to innocent misrepresentation because . We disagree.

A claim of innocent misrepresentation is shown if a party detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *M & D, Inc, supra*, at 27. There is no need to prove a fraudulent purpose or an intent by the defendant that the misrepresentation be acted on by the plaintiff; however, it must be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inured to the benefit of the party making the misrepresentation. *Id.* at 28.

In the present case, the seller's disclosure statement provided that it was "a disclosure of the condition and information concerning the property, known to the seller." Further, it stated, "the seller discloses the following information with the knowledge that even though this is not a warranty, the seller hereby specifically makes the following representations based upon the seller's knowledge at the signing of the document." The plain language of this statement indicates that it is a representation of the seller's knowledge of the property in question, not a representation of the actual status of the property. The statement specifically instructs the buyer to obtain an outside inspection. Thus, the trial court correctly determined that plaintiff failed to demonstrate that he relied on the representations contained in the disclosure.

V. DEFENDANT LAWYERS TITLE INSURANCE CORPORATION

Plaintiff argues that the trial court erred in granting defendant Lawyers Title Insurance Corporation's motion for summary disposition on plaintiff's breach of contract claim because the insurance policy only excludes coverage of easements not shown by public records." Plaintiff argues that a filing of the easement in the office of the county drain commissioner fits within the definition of "public records" found within the insurance policy. We disagree.

The title insurance contract clearly states that easements not shown by public records are not insured against loss. Further, the contract defines "public records" as "title records that give constructive notice of matters affecting your title—according to the state law where the land is located." A trial court may grant summary disposition against a breach of contract claim as a matter of law where the terms of the contract are plain and unambiguous, and subject to only one reasonable interpretation. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999).

Plaintiff argues that the drain easement was filed in the office of the drain commissioner and that such a filing should be considered a "public record" pursuant to the contract. Plaintiff asserts that MCL 280.6 does not require that drain easements established before 1952 be recorded at the register of deeds. Defendant Lawyers Title Insurance Corporation argues that in order to give constructive notice of the easement, the drain easement should have been filed with the register of deeds in the county where the property is located.

This Court addressed the issue of notice and the recording of a drain easement in *Allen v Bay Co Drain Comm'r*, 10 Mich App 731; 160 NW2d 346 (1968). In *Allen, supra* at 732, the defendant drain commission obtained an easement for drain purposes from the owners of property in 1917. The easement was recorded at the drain commissioner's office, but was not

recorded in the register of deeds office. *Id.* The plaintiffs subsequently purchased the property and filed an action to enjoin the defendant from constructing a new drain and to quiet title. *Id.* at 733. This Court held that an easement that is "not recorded with the register of deeds office is void against subsequent purchasers in good faith." *Id.* at 733-734. This Court determined that the trial court did not clearly err in finding that the plaintiffs did not have actual or constructive notice of the portion of the easement at issue and affirmed the trial court's determination that the easement was void against the plaintiffs. *Id.*

Thus, this Court has previously determined that a drain easement filed in a drain commissioner's office, rather than with the register of deeds, did not provide constructive or actual notice of the easement. Therefore, the trial court did not err in concluding that the drain easement filed in the drain commissioner's office did not provide constructive notice of the easement in the present case. The plain language of the title insurance policy indicates that easements not shown by public records (defined by the contract as "title records that give constructive notice of matters affecting your title") are not insured against loss.

Affirmed.

/s/ Bill Schuette
/s/ Mark J. Cavanagh

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WHITE, J. (*concurring*).

I join in the affirmance. Century 21 and Sprenger made no representations, either directly or through Stroupe as its purported agent. Although there was evidence that Barbara Stroupe may have known of the drain from an isolated comment at a zoning board of appeals meeting, plaintiff failed to show that he relied on the disclosure statement in determining whether there were any easements that might affect the value of, or his ability to build on, the property. With respect to Lawyers Title Insurance Company, the record failed to establish that there was, in fact, an easement or right-of-way on file at the office of the Monroe County Drain Commission or Register of Deeds.

/s/ Helene N. White