STATE OF MICHIGAN

COURT OF APPEALS

JUSTINE SLATER,

Plaintiff-Appellant,

v

HOMETEAM INSPECTION SERVICE, CRAIG LEE, HOMETEAM INSPECTION SERVICE, INC.,

Defendants-Appellees,

and

TOWNSHIP OF LYON, JAMES SAVAGE, and LORRAINE PHILLIPS, a/k/a LARRY PHILLIPS,

Defendants.

UNPUBLISHED
August 4, 2005

No. 260989
Oakland Circuit Court
LC No. 2001-029447-CK

JUSTINE SLATER,

Plaintiff-Appellant,

v

HOMETOWN INSPECTION SERVICE, and CRAIG LEE,

Defendants-Appellees,

and

RICHARD CORMIER, KELLY CORMIER, COUNTRYSIDE PROFESSIONALS, INC., RANDALL CLARK, SCHWEITZER REAL ESTATE, INC., and JOHN DIMORA,

Defendants.

No. 261860
Oakland Circuit Court
LC No. 2000-024108-CK

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

In these consolidated cases, plaintiff, a home buyer, appeals as of right from orders granting summary disposition to defendants-appellees, providers of home inspection services. We affirm. These cases are being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff purchased a home in 1998, relying in part on an inspection conducted by defendant Craig Lee, who was operating under the banner of Hometeam Inspection Services. Plaintiff then discovered that the house's wooden foundation was in poor condition, and asserted that the problem should have been discovered by the inspection process. She commenced two lawsuits, naming as defendants the realtors, builder, and home inspectors. The builder was dismissed pursuant to bankruptcy proceedings, and the realtors settled. The remaining controversy concerns only the two corporate home-inspection services, and the individual who conducted the inspection in question.

The home-inspection agreement signed by plaintiff and defendant Lee sets forth a fee of $240, and states that, "ANY LIABILITY OF HOMETEAM, ITS EMPLOYEES, AGENTS, OFFICERS, AND DIRECTORS, SHALL BE LIMITED TO THE AMOUNT OF THE INSPECTION FEE PAID BY CLIENT" (capitals in the original).

In 2002, defendants Lee and the Michigan-based Hometeam corporation moved for summary disposition. The trial court granted the motion on the ground that the contractual limitation on liability was facially valid and applicable, expressly concluding that it covered defendants' negligence. Subsequently, the trial court also dismissed the Ohio-based Hometeam corporation.

Plaintiff asserts that the trial court erred in enforcing the contractual limitation of liability to $240, arguing that it is unconscionable and contrary to public policy. We disagree.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Because the trial court referred to the home-inspection contract and plaintiff's affidavit, thus looking beyond the pleadings, it is apparent that the trial court granted the motion pursuant to MCR 2.116(C)(10). When reviewing a decision on a (C)(10) motion, we examine all documentary evidence in the light most favorable to the nonmoving party to determine whether there exists a genuine issue of material fact. *Ardt*, *supra*.

The trial court took persuasive guidance from this Court's decision in *Starks v Solomon*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2001 (Docket No. 220989).[1] That case concerned a dissatisfied home buyer suing a home inspector. The contract

[1] Unpublished decisions of this Court are not precedentially binding under principles of stare
(continued…)

between the parties limited potential damages to the fees paid. *Id.*, slip op at 1-2, 6-7. The *Starks* Court noted that parties are generally free to enter any contract, "provided the contract is not contrary to Michigan law and does not conflict with Michigan's public policy." *Id.*, slip op at 7, citing *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 383-384; 525 NW2d 891 (1994). The panel added, "it is not contrary to the public policy of Michigan for a party to contract against liability for that party's own ordinary negligence." *Starks, supra*, slip op at 7, citing *Cudnik, supra* at 384; *St Paul Fire & Marine Ins Co v Guardian Alarm Co of Michigan*, 115 Mich App 278, 283; 320 NW2d 244 (1982). As an initial matter, thus, we conclude that the agreement's limitation of liability clause does not facially violate public policy nor is it unconscionable.

Plaintiff argues, however, that the limitation on liability is unenforceable because "the defendants have committed intentional fraud, and intentionally violated the Consumer Protection Act[2] by false advertising." Plaintiff alleges fraud and gross negligence, which were not at issue in *Starks, supra*.

Because fraud is intentional misconduct and gross negligence its functional equivalent, if bona fide issues of fraud or gross negligence exist, then applying the contractual limitation on liability to insulate defendants from such claims would be contrary to public policy. See *Klann v Hess Cartage Co*, 50 Mich App 703, 709; 214 NW2d 63 (1973). Similarly, applying a contractual provision that violates a statute would contravene public policy. See *Cudnik, supra* at 383-384. We must therefore review the sufficiency of plaintiff's allegations to determine whether these allegations can invalidate the limitation of liability clause.

Plaintiff stresses that she alleged fraudulent misrepresentation, but her amended and restated complaint sets forth such a claim only in general terms, failing to specify what false representations were made or detrimental reliance induced. "In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." MCR 2.112(B)(1). Plaintiff cites her plethora of common allegations generally in support of this claim, but fails to distinguish those that involve the defendants involved in this appeal from the others. Plaintiff cannot leave it to this Court to "discover and rationalize the basis" for her fraud claim. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

Nevertheless, we note that plaintiff's common allegations concerning defendant all stem from her dissatisfaction with the inspection. Plaintiff complained that defendants "failed to find many defects and deficiencies in the premises and failed to adequately inform the Plaintiff of the extent and nature of the defects," and asserted that defendants "fraudulently misrepresented that a complete inspection was done" along with their "qualifications to inspect the home which had a wood foundation." However, the inclusion of these additional assertions among plaintiff's undifferentiated general allegations still fails to turn up sufficiently particular factual assertions to make out a case of fraud.

(…continued)

decisis. MCR 7.215(C)(1).

[2] MCL 445.901 *et seq.*

Moreover, the actual inspection report that plaintiff reproduced and attached to her complaint in the second of her two actions below observes that the "foundation was constructed of wood," and states that "[a] single inspection cannot determine whether movement of a foundation has ceased," while advising plaintiff to monitor cracks regularly. The report further states that there were "no major visual defects observed in the visible portion of the foundation," while stating that the "foundation was covered with drywall." The disclaimers concerning the information provided in connection with the foundation militate against any suggestion that fraud was committed.

For these reasons, we conclude that plaintiff has failed to state a claim of fraud with sufficient specificity, and that what she attempts to describe as fraud is nothing worse than ordinary negligence. The limitation of liability clause is therefore valid.

In defending her claim under the Consumer Protection Act, plaintiff cites dozens of common allegations without differentiating defendants-appellees from defendants with no issues on appeal. Her allegations specifically in connection with the Act duplicate her fraud allegations. Plaintiff further asserts that the purpose of the Act is to protect against fraud, thus confirming that she resorts to the Act as an alternate means of pursuing her fraud claim. Plaintiff's failures of presentation on appeal, and of specificity below, are fatal to her claim under the Consumer Protection Act as well.

In attempting to plead gross negligence, plaintiff alleged in one count only that defendants failed to restrict themselves to performing inspections they were qualified to perform, and that they failed to discover and provide notice of unnamed defects. Again, as pleaded only ordinary negligence might lie. In another count, plaintiff asserts "grossly negligent, material, misrepresentations" but does not specify the nature of those misrepresentations. This appears to be another insufficient attempt to plead fraud, but otherwise could be taken to present only ordinary, not gross, negligence.

For these reasons, we conclude that plaintiff has failed to sufficiently plead intentional misconduct or gross negligence for purposes of defeating a facially valid limitation on liability. The trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Brian K. Zahra
/s/ Hilda R. Gage
/s/ Christopher M. Murray