STATE OF MICHIGAN

COURT OF APPEALS

KEVIN SELLERS and CONNIE SELLERS,

Plaintiffs-Appellants,

v

JASON ADAMS, MODESTA ADAMS, STEVE S. NAVARRO, and SANJUANITA NAVARRO,

Defendants-Appellees.

UNPUBLISHED
November 19, 2020

No. 351575
Lenawee Circuit Court
LC No. 19-006232-CH

Before: BOONSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

In this action pertaining to the sale of a residence, plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendants. On appeal, plaintiffs argue that their allegations of fraud precluded the trial court from granting defendants' motion for summary disposition. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This cause of action arises from plaintiffs' purchase of a residence from defendants, Jason and Modesta Adams, who had rights in the house under a land contract from defendant, Steve S. Navarro, the legal owner of the house. Before the house was for sale, in January 2018, an upstairs waterline froze and cracked, causing water damage to the ceiling and drywall in parts of the house. An insurance claim was made resulting in a third party renovating the residence. The renovations were completed in July 2018.

In September 2018, plaintiffs offered to purchase sellers' house contingent on the sale of plaintiffs' house. Defendant Sanjuanita Navarro, a realtor of Xsell Realty, represented sellers in the transaction. The purchase agreement included the following provision:

> 22. RELEASE: Buyer and Seller acknowledge that the real estate brokers and agents have made no representations concerning the condition of the property covered by this Agreement and the marketability of title, and Buyer(s) and Seller(s) release the Listing Broker and Seller Broker, and their respective agents,

> employees, attorneys and representatives, with respect to all claims arising out of or related to this Buy and Sell Agreement, any addendums or counteroffers; all claims arising from any purported representations as to the physical and environmental condition of the property covered by this Agreement or the marketability of title; and all claims arising from any special assessments and/or utility bills which have been or may in the future be charged against the property covered by this Agreement and, in addition, agree to indemnify and hold harmless the Listing Broker and Selling Broker from any and all claims related to those matters.

Plaintiffs received a seller's disclosure statement (SDS) with the purchase agreement that indicated the water heater functioned, there was no evidence of water or structural problems in the residence, but there was "[m]ajor damage to the property from fire, wind, floods, or landslides." However, the explanatory statement following this line item was "whited out."[1]

After the purchase agreement was executed, plaintiffs and sellers amended it three times before the closing. First, plaintiffs and sellers agreed the sale of sellers' residence was "now contingent on the successful closing" of plaintiffs' house. Second, after having sellers' residence inspected, sellers agreed to add insulation to the attic and pay $1,000 toward plaintiffs' closing costs, and plaintiffs agreed "inspections are satisfied[.]" Third, sellers agreed to allow plaintiffs to move into the residence before closing in exchange for rent, and plaintiffs agreed to a provision stating: "Buyer agrees to hold harmless the seller, XSell Realty, and ReMax Main Street Realty from all liability." Shortly thereafter, plaintiffs and sellers closed on the residence. During the closing, plaintiffs agreed to remove the "contractors inspection[,]" "home inspection[,]" and "final walk through" contingencies. Plaintiffs also signed a closing affidavit, which stated in relevant part:

> ACCEPTING PROPERTY AS IT IS
>
> We state that we have satisfied ourselves as to the condition of the property, and are accepting the property in its present condition. We have been offered the opportunity to inspect the property with regards to, but not limited to, surveying, zoning, soil borings, home inspections, asbestos, radon, wetlands, insulation, pests, environmental concerns, and we are accepting the property in its present condition.
>
> * * *
>
> CONTINGENCIES AND CHANGES
>
> It is hereby agreed between the Buyers and the Sellers that ALL contingencies and/or changes to the Purchase Agreement and all Addendums, have been totally met, resolved, and, removed to their complete satisfaction.

[1] The SDS did not disclose a fire that occurred in February 2010 in a detached garage, which was later replaced by the current larger two-car garage.

* * *

HOLD HARMLESS CLAUSE

> We, the undersigned, warrant that we are closing the property of our own accord, and that we have completely satisfied ourselves as to the condition of the property and its title; and shall hold harmless Brandt, INC. [sic], dba Xsell Realty, agency relationship terminates when the closing is complete. If in the process of executing the Purchase Agreement you agreed to have dealings with each other subsequent to the closing, then carry out such agreement is between the Sellers and the Buyers, and is not a part of the agreed upon agency representation by Brandt, INC, [sic] dba Xsell Realty.

Two months after closing, plaintiffs had a second inspection performed on the residence that allegedly revealed hidden water damage, improper repairs, mold, and evidence of narcotic use or manufacture throughout the residence.

Plaintiffs sued defendants, alleging defendants committed fraud and misrepresentation in the sale of the residence.[2] In response, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing plaintiffs released defendants from liability and further, that defendants indicated prior major damage to the residence, and afforded plaintiffs every opportunity to inspect the residence. Pertinent to this appeal, plaintiffs filed a response to defendants' motion for summary disposition, arguing that questions of fact existed as to whether defendants obtained the release by fraud.

The trial court held a hearing on defendants' motion for summary disposition and granted summary disposition to defendants under MCR 2.116(C)(7), finding the signed release barred plaintiffs from bringing a claim against defendants regarding any issues related to the residence. This appeal ensued.

II. ANALYSIS

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Puetz v Spectrum Health Hosp(s)*, 324 Mich App 51, 59; 919 NW2d 439 (2018). Under MCR 2.116(C)(7), "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of release . . . of the claim before commencement of the action." MCR 2.116(C)(7). When reviewing a motion for summary disposition under MCR 2.116(C)(7):

> [T]his Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any

[2] In their brief on appeal, plaintiffs do not distinguish the actual sellers of the residence from the holders of the land contract, or from the real estate agent, rather, plaintiffs simply refer to all parties as "defendants." As a result, we treat as abandoned any potential argument that the release provisions somehow do not apply to all the named defendants. See, *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012).

> affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010).]

Questions of contract interpretation are reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). Courts will enforce contracts in accordance with their terms, and give the words of the contract their plain and ordinary meanings. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009). The unambiguous language of a contract is found to reflect the intent of the parties, as a matter of law, and will be enforced in accordance with its terms. *Id*.; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

On appeal, plaintiffs argue that the trial court erred in finding the release signed by plaintiffs operated as a bar to recovery because defendants procured the release through fraud.

It is well-settled that a cause of action may be barred, under MCR 2.116(C)(7), where a valid release of liability exists between the parties. *Xu v Gay*, 257 Mich App 263, 266; 668 NW2d 166 (2003); MCR 2.116(C)(7). "A release of liability is valid if it is fairly and knowingly made." *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996). "The validity of a release turns on the intent of the parties." *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 649 n 4; 624 NW2d 903 (2001). "If the text of the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release." *Collucci v Ekland*, 240 Mich App 654, 658; 613 NW2d 402 (2000).

However, we do concur with plaintiffs' general view of the law that under some circumstances, a release may be invalid if it was procured by fraud or a misrepresentation was made with the intent to mislead or deceive. *Id*. at 658-659. *Paterek v 6600 Ltd*, 186 Mich App 445, 449; 465 NW2d 342 (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).

As quoted above, the parties agreed to this language: "Buyer agrees to hold harmless the seller, XSell Realty, and ReMax Main Street Realty *from all liability*." (emphasis added). In *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 297-298; 553 NW2d 387 (1996), this Court held that language releasing defendants from liability for "any and all" causes of action was sufficiently broad to bar a claim for fraud. Here, plaintiffs released defendants "from all liability." Such language is sufficiently broad enough to operate as a complete bar to recovery, including claims for fraud. *Id*.

In addition, plaintiffs' arguments are unpersuasive because they fail to produce any evidence of fraud or fraudulent inducement. In their filings with the trial court and with this Court, plaintiffs provided no evidence of fraud, or fraud in the inducement of the release. In their brief

on appeal, plaintiffs make passing assertions of fraud without any specificity or citations to record evidence. For example, plaintiffs support their claim of fraud by merely stating "the lower court failed to apply the correct standard as used by the [*Hall v Small*, 267 Mich App 330; 705 NW2d 741 (2005)] court" because they "*did* allege fraud and misrepresentation in the complaint, along with specific allegations that the waiver at issue was gained through fraudulent concealment." This argument fails to point this Court to record evidence in support of their claim. It is well-settled that "[a] party cannot simply assert an error or announce a position and then leave it to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Mitchell*, 296 Mich App at 524.

Our analysis could end there; however, although not directly argued in their brief on appeal, we consider whether the facts presented to the trial court sanction a claim of fraud based on obligations arising under the Seller Disclosure Act, MCL 565.951 *et seq.*, because plaintiffs alleged defendants failed to disclose the severe flood damage, repair work, mold issues, and history of use or manufacture of narcotics in the house, and a fire on the property in 2010. In addition, plaintiffs argue Sanjuanita Navarro advised sellers not to disclose the flooding damage to plaintiffs. Again, though not directly argued on appeal, these accusations could potentially create a cause of action for fraudulent misrepresentation.

The Seller Disclosure Act imposes a legal duty on sellers to disclose to buyers the existence of certain known conditions affecting the house. MCL 565.957(1). An "as is" clause in the purchase agreement does not preclude liability on the basis of fraud. *M & D, Inc v McConkey*, 231 Mich App 22, 32; 585 NW2d 33 (1998). To establish fraudulent misrepresentation, a party must show:

> (1) a material representation was made by the defendant; (2) the representation was false; (3) the defendant knew the representation was false when made, or made the representation recklessly, without knowledge of its truth and as a positive assertion; (4) the representation was made by defendant with the intention that the plaintiff would act in reliance upon it; (5) the plaintiff did act in reliance upon it; and (6) as a result, the plaintiff suffered an injury. [*Hord v Environmental Research Institute of Mich*, 463 Mich 399, 404; 617 NW2d 543 (2000)]

Again, the record is devoid of any documentary evidence that supports any claim of fraudulent misrepresentation. While the record reveals that the sellers represented on the SDS that the basement had no "evidence of water" and there were no "[s]ettling, flooding, drainage, structural, or grading problems[,]" it also indicated there had been "[m]ajor damage to the property from fire, wind, floods, or landslides[.]" Hence, we cannot conclude there exists a misrepresentation within the SDS because sellers disclosed the house had incurred major damage from fire, wind, floods, or landslides, and because plaintiffs were allowed an unfettered opportunity to inspect the property to determine the nature and extent of the damage. "[T]here can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the

defendant." *Bev Smith, Inc v Atwell*, 301 Mich App 670, 688; 836 NW2d 872 (2013) (citation omitted).[3]

Here, it is uncontroverted that plaintiffs were given an opportunity, and did inspect the residence prior to the closing, indicating their complete satisfaction and desire to move in immediately. Further, it is uncontroverted that plaintiffs released defendants "from all liability" and did so without any evidence of fraud, duress or coercion by defendants or anyone acting on their behalf. Hence, on this record, we conclude that the trial court properly granted summary disposition to defendants.

Affirmed. Defendants having prevailed, may tax costs. MCR 7.219(F).

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

[3] We also note that following their inspection, plaintiffs signed a document indicating that they had an opportunity to inspect the property and were satisfied with the condition it was in and were "accepting the property in its present condition."