STATE OF MICHIGAN

COURT OF APPEALS

ARNOLD G. CORAN, M.D., and RONALD HIRSCHL, M.D.,	UNPUBLISHED November 18, 2010
Plaintiffs-Appellants,	
v	No. 293540 Oakland Circuit Court
CENTURY TITLE AGENCY, L.L.C.,	LC No. 2008-094784-CZ
Defendant-Appellee.	

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

In this case involving two allegedly fraudulent real estate transactions, plaintiffs appeal as of right an order granting summary disposition to defendant pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). We affirm.

This matter arises from plaintiffs' respective purchases in 2003 of vacant lots in a subdivision development called Walnut Brook Estates from an entity called Rochester Hills Real Estate Development Corporation ("RHREDC"). Defendant, a title insurance company, provided title insurance for each plaintiff's respective transaction and handled the closing documents for each transaction.

Plaintiffs first argue that the three-year limitations period should have been tolled on the claims of breach of fiduciary duty, negligent misrepresentation, and ordinary negligence under both the discovery rule and the fraudulent concealment statute, MCL 600.5855. We disagree.

A party is entitled to summary disposition under MCR 2.116(C)(7) if the opposing party's claim or claims are barred under the applicable statute of limitations. The parties may support or oppose a motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). In reviewing motions under MCR 2.116(C)(7), we will accept the plaintiff's well-pleaded factual allegations as true unless contradicted by the parties' supporting affidavits, depositions, admissions, or other documentary evidence. *Odom*, 482 Mich at 466. We will construe the parties' submission in the light most favorable to the non-moving party. See *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). However, if no material facts are in dispute and reasonable minds could not differ on the legal effect of those facts, the issue of whether the statute of limitations bars the plaintiff's claim

is a matter of law. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997), quoting *Baker v DEC Int'l*, 218 Mich App 248, 252-253; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247 (1998).

MCL 600.5805(1) states "[a] person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." Under MCL 600.5805(10), "[t]he period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." Thus, a plaintiff cannot bring an action to recover damages unless the action is commenced within three years of the date the claim first accrued.

The injury in this case occurred at the time of the closing on the purchases of plaintiffs' respective lots. Plaintiff Coran's purchase took place in February 2003, and plaintiff Hirschl's purchase took place in November 2003. Plaintiffs filed this lawsuit on September 24, 2008, more than three years from the time their claims first accrued. The trial court ruled that counts one, two, four, five, six, and seven of plaintiffs' complaint were barred by the three-year statute of limitations period under MCL 600.5805(10). Counts one and two are plaintiffs' claims for breach of fiduciary duty, count four is one of plaintiffs' two claims of fraudulent misrepresentation, counts five and six are plaintiffs' claims of negligent misrepresentation, and count seven is one of plaintiffs' two claims of ordinary negligence.

Generally, a claim for fraud must be brought within six years from the time the claim accrues. MCL 600.5813; *Blue Cross & Blue Shield of Mich v Folkema*, 174 Mich App 476, 481; 436 NW2d 670 (1988). On the basis of this case law and the parties' briefs on appeal, we conclude that the trial court mistakenly read off the wrong numbers of the counts it was dismissing under the three year statute of limitations. It is clear that the trial court intended to include count eight, which is the other claim for negligence, and the court intended to exclude count four, which is one of the counts of fraudulent misrepresentation covered under the six year limitations period. It is apparent from the parties' briefs on appeal that they agree that the claims of breach of fiduciary duty, negligent misrepresentation, and negligence are governed by the three-year limitations period of MCL 600.5805(10). Further, as discussed below, the trial court properly dismissed the fraudulent misrepresentation counts on other grounds.

Under the discovery rule, the limitations period does not begin to run until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the possible cause of action. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 159; 626 NW2d 917 (2001). However, in *Trentadue v Gorton*, 479 Mich 378, 388-390; 738 NW2d 664 (2007), our Supreme Court held that our Legislature had abrogated the Michigan common law discovery rule. Plaintiffs argue that the retroactive application of *Trentadue* deprives them of due process, and plaintiffs cite *Peter v Stryker Orthopaedics, Inc*, 581 F Supp 2d 813 (ED Mich, 2008). However, as defendant argues, our Supreme Court explicitly held that its decision in *Trentadue* was to have retroactive effect. *Trentadue*, 479 Mich at 401. Further, this Court retroactively

applied *Trentadue* in *Terlecki v Stewart*, 278 Mich App 644, 652; 754 NW2d 899 (2008). Thus, the discovery rule does not toll the limitations period for plaintiffs' claims.[1]

With regard to the fraudulent concealment statute, MCL 600.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

In *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 48; 698 NW2d 900 (2005), this Court stated:

> Generally, for fraudulent concealment to postpone the running of a limitations period, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. Mere silence is insufficient. [Quoting *Witherspoon v Guilford*, 203 Mich App 240, 248-249; 511 NW2d 720 (1994), overruled in part on other grounds in *Ostroth v Warren Regency, Inc*, 474 Mich 36; 709 NW2d 598 (2006); other internal quotations and citations omitted.]

Plaintiffs fail to allege how defendant took affirmative steps to conceal plaintiffs' cause of action. Rather, plaintiffs' depositions establish that they had no communication with defendant before or during closing. In addition, as defendant argues, the information regarding the ownership of the lots and the failure to record plaintiffs' respective deeds was a matter of public record and, generally, a person is charged with knowledge of the public record. See *In re Farris Estate*, 160 Mich App 14, 18-19; 408 NW2d 92 (1987). Absent any affirmative acts or misrepresentations by defendant that were not a part of the public record, the fraudulent concealment statute did not toll the limitations period for the relevant claims.

Next, plaintiffs argue that the trial court erred in dismissing plaintiffs' tort claims under MCR 2.116(C)(8). The trial court based its ruling on *Wormsbacher v Seaver Title Co*, 284 Mich App 1; 772 NW2d 827 (2009), which held that Michigan law does not recognize tort claims against title insurers. *Id*. at 5-8. Plaintiffs contend that because of defendant's dual role as not only title insurer, but as an escrow or closing agent, it had a duty to disclose to plaintiffs the material facts of the transaction. We disagree.

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[1] We note that our Supreme Court recently heard oral arguments in *Colaianni v Stuart Frankel Dev Corp*, 485 Mich 1070; 777 NW2d 410 (2010). When the Court granted leave to appeal in *Colaianni*, the Court instructed the parties to address whether *Trentadue* was correctly decided. *Id*.

A grant of summary disposition pursuant to MCR 2.116(C)(8) is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Where summary disposition is sought pursuant to MCR 2.116(C)(8), "the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "[A]ll well-pleaded allegations are accepted as true, and construed most favorably to the nonmoving party." *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992).

In *Wormsbacher*, this Court affirmed a trial court's grant of summary disposition to the defendants based on the decision in *Mickam v Joseph Louis Palace Trust*, 849 F Supp 516 (ED Mich, 1993). *Wormsbacher*, 284 Mich App at 4. The federal district court in *Mickam* held that under Michigan law, in order "to protect the rights and expectations of the parties, a title insurer should be liable in accordance with the terms of the title policy only and should not be liable in tort." *Mickam*, 849 F Supp 521-522. The court in *Mickam* noted, "no Michigan court has held that a title insurer or agent has a professional duty of care to those who employ them, outside of their contractual obligations." *Id*. at 521. This Court, finding the reasoning of *Mickam* persuasive, adopted its position regarding title insurers' liability in tort. *Wormsbacher*, 284 Mich App at 5-8.

Plaintiffs argue that *Wormsbacher* and *Mickam* are inapplicable to the instant case because of defendant's dual role as not only title insurer, but as an escrow or closing agent. An escrow agent may be held liable in tort for the negligent performance of its duties or breach of its fiduciary duties. *Smith v First Nat'l Bank & Trust Co*, 177 Mich App 264, 270-271; 440 NW2d 915 (1989). The duties and liabilities of an escrow agent are those set forth in the escrow agreement, and we examine the language of the escrow agreement to effectuate the intent of the parties. *Hills of Lone Pine Ass'n v Texel Land Co*, 226 Mich App 120, 124; 572 NW2d 256 (1997). An escrow agent is bound by the terms and conditions of the escrow agreement and charged with a strict execution of the duties voluntarily assumed. *Smith*, 177 Mich App at 271.

In the instant case, the parties did not execute an escrow agreement. Thus, we conclude that defendant, as the escrow or closing agent, was bound by the terms of the respective purchase agreements. However, plaintiffs fail to point out any provision of the respective purchase agreements that they allege defendant violated. Rather, they rely on case law from other jurisdictions, asserting that an escrow agent has an additional duty to disclose fraud, where he or she knows of it. See, e.g., *Berry v McLeod*, 124 Ariz 346; 604 P2d 610 (1979). However, as defendant argues, this does not reflect the state of the law in Michigan, where the duties of title insurers and escrow or closing agents are delineated by the contracts between the parties. Therefore, as plaintiffs have failed to assert any violation of the relevant contracts, the trial court did not err granting summary disposition on plaintiffs' tort claims.

Plaintiffs argue that the trial court erred in dismissing their claims of fraudulent misrepresentation and negligent misrepresentation under MCR 2.116(C)(10), because it ignored the fact that misrepresentations can occur under circumstances where there is a duty to disclose, but the entity with the duty to disclose stays silent. Thus, plaintiffs argue that defendant's silence regarding the circumstances of the transaction in which RHREDC purchased the lots that it sold to plaintiffs at a cost much less than it sold them to plaintiffs constituted fraudulent or negligent misrepresentation. We disagree.

We review de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Maiden*, 461 Mich at 118. A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id*. at 120. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Maiden*, 461 Mich at 120. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id*. at 118, 120.

As this Court has explained:

> To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008), aff'd 485 Mich 867 (2009).]

"A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006) (internal quotation marks and citation omitted). Reliance on the representation must be reasonable to sustain an action for misrepresentation. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005).

"[I]n order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure." *M&D, Inc v WB McConkey*, 231 Mich App 22, 31; 585 NW2d 33 (1998). "Suppression of facts and truths can constitute silent fraud where the circumstances are such that there exists a legal or equitable duty to disclose." *Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 500; 686 NW2d 770 (2004). Significantly, "[t]here can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

As already discussed above, defendant did not owe any duties to plaintiffs outside of their agreement in the respective title insurance policies and purchase agreements. Plaintiffs have failed to point to any provision in either of the respective insurance policies or purchase agreements that they claim defendant violated. Thus, plaintiffs have failed to establish that defendant had a duty of disclosure. Further, plaintiffs, who had no communication with defendant prior to purchasing their respective lots, had the means to determine that the representations were not true. As defendant argues, information regarding the ownership of the property is readily discoverable as a matter of public record, and thus, defendant was not required to disclose such information because it was discoverable through reasonable inquiry. See *McMullen v Joldersma*, 174 Mich App 207, 212-213; 435 NW2d 428 (1988). Therefore, the

trial court, pursuant to MCR 2.116(C)(10), properly granted summary disposition to defendant on plaintiffs' claims of fraudulent misrepresentation and negligent misrepresentation because defendant did not have a duty make the asserted disclosures and plaintiffs did not reasonably rely on defendant to make these disclosures.

Lastly, plaintiffs argue that if the trial court is reversed on any of its decisions involving the other counts of its complaint, it must be reversed on its decision to dismiss plaintiffs' claims of civil conspiracy, which the trial court based on there being no other separate, actionable tort.

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v Auto Club Ins Assoc*, 257 Mich App 365, 384; 670 NW2d 569 (2003), aff'd 472 Mich 91 (2005) (citation omitted). To establish civil conspiracy, "it is necessary to prove a separate, actionable tort." *Id*. (citation omitted). Here, the separate torts alleged are breach of fiduciary duty, fraudulent concealment, negligent misrepresentation, and negligence. However, as discussed above, plaintiffs failed to establish actionable claims for any of these torts. Therefore, plaintiffs' civil conspiracy claims fail as a matter of law.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray