

STATE OF MICHIGAN
COURT OF APPEALS

MARK C. NALEPKA and KIMBERLY P.
NALEPKA,

UNPUBLISHED
September 15, 2005

Plaintiffs/Counter-
Defendants/Appellants,

v

JAMES HNATIO and WALDA HNATIO,

No. 262000
Wayne Circuit Court
LC No. 03-340600-CK

Defendants/Counter-
Plaintiffs/Appellees.

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right a final trial court order dismissing all claims in this case regarding plaintiffs' purchase of real estate from defendants. We affirm.

I

Plaintiffs entered into an agreement to purchase real estate from defendants. Plaintiffs claim that since closing they have discovered that the electrical and sprinkler systems are not in good working order, that various types of mold are present in the house, and that the roof is older than the age represented; all of which make the house uninhabitable and have caused Kimberly Nalepka injury. Plaintiffs filed a complaint and requested rescission of the contract alleging: (1) breach of contract, (2) fraudulent misrepresentation, (3) negligent misrepresentation, and (4) intentional infliction of emotional distress.¹ Defendants filed a motion for summary disposition with regard to all of plaintiffs' claims, and the trial court granted the motion.

II

¹ Defendants brought a counterclaim against plaintiffs for defamation, but this claim was dismissed by a stipulated order.

Plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition. We disagree.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (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. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint," and "all well-plead factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich. 109, 119; 597 NW2d 817 (1999). A motion brought under this rule may be granted where the claims alleged "are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery" and only the pleadings may be considered in deciding a motion brought under this subsection. *Id.*

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A. Misrepresentation Claims

Plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition with regard to the fraudulent misrepresentation and negligent misrepresentation claims. We disagree.

On appeal, plaintiffs argue that defendants made material misrepresentations when they represented that there were no water leaks or hazardous conditions, the outdoor sprinkler system and electrical in the family room and garage would be in working order, and represented that the roof was new when it was two years old. Plaintiffs also contend that defendants took affirmative actions to conceal hazardous conditions, in particular, by laying carpet over mold in a bedroom and not allowing an inspector access to the attic.

To establish a prima facie claim of fraudulent misrepresentation, a plaintiff must prove that:

- (1) the defendant made a material misrepresentation;
- (2) the representation was false;
- (3) at the time the defendant made the representation, the defendant knew the representation 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; and
- (6) the plaintiff suffered damage. [*M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).]

Negligent misrepresentation also requires justifiable reliance to one's "detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 502; 686 NW2d 770 (2004), quoting *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 30; 436 NW2d 70 (1989).

Although not alleged in the complaint, plaintiffs also contend their claims are actionable under the doctrine of silent fraud. Under the doctrine of silent fraud, a seller of real property may be held liable to a buyer for failing to disclose material defects in the property or its title. *McMullen v Joldersma*, 174 Mich App 207, 212-213; 435 NW2d 428 (1988). Such a claim also requires that the plaintiff act in reliance and suffer injury. *Id.* Moreover, in order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure. *United States Fidelity & Guarantee Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981).

Thus, to be actionable, all of plaintiffs' misrepresentation claims require actual reliance on a false representation. See *Phinney v Perlmutter*, 222 Mich App 513, 534; 564 NW2d 532 (1997). "A misrepresentation claim requires reasonable reliance on a false representation" and "there can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Industries, Inc.*, 204 Mich App 459, 464; 517 NW2d 235 (1994) (emphasis added). "[A] person who unreasonably relies on false statements should not be entitled to damages for misrepresentation." *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999).

The offer to purchase, signed by plaintiffs on June 20, 2003, provided that: (1) the offer was contingent on a satisfactory home inspection, (2) that the real estate was to be purchased in an "AS IS CONDITION," (3) that the seller was making no warranties, and (4) that plaintiffs inspected and were satisfied with the condition of the property. The offer to purchase also provided that plaintiffs "choose to have property privately inspected . . . If the inspection discloses any defects in the property which results in the Purchasers having substantial cause to be dissatisfied with the current physical condition of the property and its systems, they shall notify the Sellers, in writing, with three calendar days following the inspection," and that failure to do this would constitute a waiver requiring plaintiffs to take the property "AS IS." An addendum to the offer to purchase provided, in part, that:

PURCHASER SHALL HAVE THE RIGHT AND BE PERMITTED, AT PURCHASER'S EXPENSE, TO HAVE THE PREMISES INSPECTED BY A STRUCTURAL ENGINEER, ARCHITECT, OR OTHER PERSONS OF PURCHASER'S CHOOSING, AND IF THESE INSPECTIONS SHOW ANY CONDITION ANY CONDITION WHICH RENDERS THE PREMISES DEFECTIVE OR OTHERWISE UNACCEPTABLE TO PURCHASER WITHOUT FURTHER LIABILITY AND, UPON THE EXERCISE OF SUCH OPTION BY PURCHASER, THE DEPOSIT MADE HEREUNDER SHALL BE RETURNED IN ITS ENTIRETY TO PURCHASER. . . . IN THE EVENT THAT PURCHASER HAS NOT NOTIFIED SELLER THAT PURCHASER IS TERMINATING THIS OFFER TO PURCHASER WITHIN TWO [] BUSINESS DAYS FROM THE DATE PURCHASER OBTAINED SUCH WRITTEN INSPECTION REPORT . . . THE CONDITIONS OF THIS

PARAGRAPH SHALL BE DEEMED REMOVED AND WAIVED BY PURCHASER.

On June 25, 2003, an independent inspector hired by plaintiffs conducted an inspection of the property and issued a report. Subsequently, the closing agreement, signed by plaintiffs on July 29, 2003, provided that the purchase was made "AS IS," without warranties and that:

Is it [sic] between Buyer(s) and Seller(s) of this property that all contingencies and addendums to the Offer to Purchase thereto, dated, have been meet [sic] or are hereby resolved or removed to the satisfaction of the parties concerned.

On review de novo, we conclude that the trial court properly granted defendants' motion for summary disposition with regard to plaintiffs' claims of fraudulent misrepresentation and negligent misrepresentation because there is no genuine issue of material raised (nor could the claim be sustained) with regard to the element of reliance. Reliance is an element for both of plaintiffs' claims. To be actionable, the reliance must be reasonable, and there can be no fraud where a person has the means to determine that a representation is not true. *Nieves, supra* at 464; *Novak, supra* at 690. Here, the inspection provision in the parties' purchase agreement establishes that plaintiffs did not rely on defendants' alleged statements or failure to make statements, but rather sought an independent assessment of the condition of the property. It is unreasonable for plaintiffs to rely on any alleged representations, not expressly included in the purchase agreement when plaintiffs did not rely on defendants, instead, requested and hired and independent inspector.

Plaintiffs contend that toxic mold was created by a roof leak, which caused water to travel through the attic, wall spaces, sub floor and up into the master bedroom. Plaintiffs argue that a claim for silent misrepresentation claim is supported because defendants attempted to actively cover up toxic mold in the bedroom by placing carpet over the mold and by not allowing the inspector access to the attic where mold was present. Plaintiffs further argue that that if their expert had been allowed into the attic he would have seen the mold and extensive testing would have been conducted in the home, resulting in the other mold being discovered. However, there is no showing that defendants in any way prevented plaintiffs from going in the attic. The report produced by plaintiffs' inspector indicated that with regard to the attic "Viewing was limited to observing from hatch areas only. Access is restricted by low headroom or stored goods. No walk boards provided[.]" Similarly, in an affidavit, plaintiffs expert stated that he was denied other than visual inspection of the attic because of storage, insulation near the access point, loose hanging wires, and the absence of boards. This does not support that the inspector was denied access by defendants.

The problem with plaintiffs' claim is that even if defendants knew there was mold there is still no showing of reliance. Plaintiffs did not rely on defendants, but, instead, they decided to have the property inspected. And, plaintiffs' expert, who they relied on, conducted a visual inspection in the attic, and did not find any mold. No documentation was provided supporting that plaintiffs were denied any type of requested access to the attic or anywhere in the home, instead, the documentation supports that plaintiff were permitted to conduct further inspections. The report provided by plaintiffs' inspector revealed how the attic was only visually inspected, and plaintiffs chose to rely on this inspection rather conducting an additional inspection.

Plaintiffs did not rely on defendants, instead, relied on the visual inspection of the inspector they hired.

Plaintiffs argue that a silent fraud claim also exists because defendant failed to disclose mold under the carpet in the bedroom. But plaintiffs also argued (acknowledged) that if the mold had been discovered in the attic more extensive tests would have been conducted in the home resulting in discovery of the mold in other parts of the home. Thus, if the attic was further inspected the mold in the rest of the home (including the bedroom) could have been discovered, and this failure to discover was also attributable to reliance on the inspection, not defendants. As such, there can be no reasonable reliance by plaintiffs on defendants' statements or failure to make statements with regard to the toxic mold.

Further, even if at closing, James Hnatio represented that the electrical and sprinkler system were repaired (as provided in Mark Nalepka's affidavit), reliance on this statement would be unreasonable after plaintiffs' own inspector recommended plaintiffs hire a licensed electrician to review the wiring and circuits and that a certified technician review the irrigation system. See *Novak, supra* at 690. Plaintiffs could have had the electrical and sprinkler systems inspected as recommended by their inspector, but did not. Moreover, although, the offer to purchase did include the condition for the electrical and sprinkler, the only condition was that it be in working order. Kimberly Nalepka, in her deposition, acknowledged that in July 2003 these were in working order except for a fan that was accounted for in the closing statement. This supports that there was no material misrepresentation at closing with regard to the electrical and sprinkler system as these were repaired except for the fan, which was accounted for.

Plaintiffs have not established any reasonable reliance on any statements or failure to make statements by defendants. Accordingly, the trial court properly granted defendants' motion for summary disposition.

B. Breach of Contract Claims

Plaintiffs also argue on appeal that summary disposition was improperly granted on the breach of contract claims because there was substantial evidence that the sprinkler system and the electrical were not in working order and that defendants misrepresented the age of the roof. We disagree.

With regard to the sprinkler system and the electrical, plaintiffs alleged that defendants represented that the sprinkler system and the and electrical in the family room would be in good working order and that these systems were not in good working order as represented. The offer to purchase, signed by plaintiffs on June 20, 2003, provided, as a condition, that the sellers provide evidence of the sprinkler system and electrical in the family room to be in working order. On June 25, 2003, an inspector hired by plaintiffs noted as a concern the wiring and circuits and the lawn irrigation system, and suggested that plaintiffs seek further professional inspection. On July 29, 2003, the closing agreement was signed. The closing agreement provided that plaintiffs were accepting the property "AS IS." As noted above, the closing agreement further provided that "all contingencies and addendums to the Offer to Purchase" were "resolved or removed to the satisfaction of the parties concerned." In addition, the seller's closing statement provides that a \$100 adjustment was made for a ceiling fan in the living room.

Further, Kimberly Nalepka, in her deposition indicated that in July 2003, the sprinkler system and electrical in the family room were working except for a fan.

A condition to the offer to purchase was for defendants to provide evidence that the electrical in the family room and the sprinkler system to be in working order. Subsequently, the closing agreement signed by both parties provided that all contingencies had been met or resolved. Thus, plaintiffs agreed that this condition had been met (which is further supported by Kimberly Nalepka's deposition), and summary disposition was properly granted with regard to the breach of contract claim in this regard.

Plaintiffs also claim on appeal that a breach of contract existed because the roof was represented as new in 2002, when it was actually replaced in 2000. However, plaintiffs did not raise this issue in their complaint, thus, it is not properly before this Court. Nonetheless, plaintiffs' claim is without merit as plaintiffs purchased the house "AS IS," and did not specifically contract for a house that had a new roof in 2002.²

C. Intentional Infliction of Emotion Distress

Plaintiffs also argue that summary disposition was improperly granted with regard to the intentional infliction of emotional distress claim. We disagree.

In *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004), this Court set forth the following standards relevant to claims of intentional infliction of emotional distress³:

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." It is for the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so

² We also reject plaintiff's argument that the trial court erred in finding rescission was an inappropriate remedy. Rescission is an appropriate remedy for a non-breaching party when another party materially breaches a contract, *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997); *PAL Investment Group, Inc v Staff-Builders, Inc*, 118 F Supp 2d 781, 786 (ED Mich, 2000), or where the contract would not have been made if default in that particular had been expected or contemplated. *Rosenthal v Triangle Development Co*, 261 Mich 462, 463; 246 NW 182 (1933). As discussed above, there was no breach of contract (much less a material breach of the contract) and no remedy is required.

³ Although this Court has repeatedly recognized the existence of the tort of intentional infliction of emotional distress, our Supreme Court has not yet done so. *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004).

extreme and outrageous as to permit recovery. But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery. [Citations omitted.]

The threshold for showing extreme and outrageous conduct is high, and no cause of action will necessarily lie even where a defendant acts with tortious or even criminal intent." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985). The test is whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to claim, 'Outrageous!'" *Id.* at 603.

In the present case, plaintiffs accused defendants of fraudulent misrepresentation and breach of contract. Under the circumstances, even if plaintiff's allegations were true, it did not constitute the sort of extreme and outrageous behavior that would permit recovery for intentional infliction of emotional distress.

Affirmed.

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder

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WHITE, P.J., (*concurring in part, dissenting in part*).

I agree with the majority that the breach of contract and intentional infliction of emotional distress claims were properly dismissed. I also agree that the circuit court properly rejected rescission as a remedy.

Regarding plaintiffs' fraud and misrepresentation claims, I agree they were properly dismissed as to the electrical and sprinkler systems. However, I respectfully dissent because I conclude that plaintiffs presented documentary evidence sufficient to raise a genuine issue of fact regarding fraud and misrepresentation as to water leaks and toxic mold.

Plaintiffs presented sufficient evidence to raise a genuine issue of fact whether the Hnatio knew of the severe water intrusion, which led to the presence of toxic mold, and concealed that knowledge from plaintiffs. Plaintiffs submitted below the affidavit of the home inspector they hired to inspect the home before closing on it, Michael Mahurin, who stated that he was denied full access to certain parts of the home, most notably, the attic, by virtue of defendants' belongings blocking access and the attic having no pathways. Mahurin stated in his affidavit, "I was denied anything other than limited visual inspection of the attic due to a number of factors including, but not limited to, the storage of homeowner's personal belongings at the access point, piling of insulation material near the access point, loose hanging wires in the attic, and the absence of floor boards as a pathway." Mark Nalepka's affidavit stated that, in his presence "the home inspector sought to open the access door into the attic but stated that he could not gain access to the attic because insulation was piled high near the access point." Mahurin's affidavit also stated that "According to standards for certified home inspectors, entry is not to be made into an attic wherein [sic] the opinion of the inspector, the same cannot be performed safely and without risk of property damage." Defendants do not dispute that there were boxes throughout the attic and that there were no floor boards.

Notwithstanding that the circuit court was obliged to view the facts in a light most favorable to plaintiffs, and that plaintiffs presented the evidence cited above, the majority concludes that plaintiffs' evidence "does not support that the inspector was denied access by defendants," and that plaintiffs "did not rely on defendants, but, instead, they decided to have the property inspected." This reasoning ignores that plaintiffs and their inspector, Mahurin, relied on defendants' (false) disclosures on the sellers' disclosure form that there **were no roof leaks**. Plaintiff Mark Nalepka and Mahurin stated in their sworn affidavits that they relied on defendants' representation in the sellers' disclosure form that there were no roof leaks. Mahurin attested that his inspections are guided by what sellers represent in their disclosure form. He attested that he read and relied on defendants' disclosure statement representing a leak-free habitable home with a new roof:

4. The Sellers' Disclosure Statement did not reveal any roof leaks or any past water intrusion or water damage into the home.

5. The scope of my inspection and my recommendations to prospective purchasers depends in part on the disclosures made by the Seller.

6. Had the Seller advised that there was significant past water intrusion and that in the past, water had come up through the sub floor into the master bedroom, I would have recommended more extensive testing including, but not limited to, penetrating the wall for purposes of visual inspection and/or mold sampling.

* * *

9. I did not view a more thorough inspection of the attic to be called for based upon what was represented to be the new roof which appeared to be in good condition and the absence of disclosures regarding prior roof leaks.

10. Had I been made aware of prior roof leaks, I would have recommended a second inspection where access to the attic would be provided by the Seller.

11. In my opinion, it is often impossible based on a visual home inspection to discover conditions which are covered up by a Seller and/or which exist underneath carpeting, paint or in the interior of walls.

12. To perform an adequate home inspection and to make proper recommendations to a prospective Purchaser, a home inspector relies in part on the good faith of the Seller in making material disclosures.

I conclude that this evidence raised a genuine issue of fact whether plaintiffs' inspector was prevented from safely and adequately inspecting the home, and whether plaintiffs and plaintiffs' inspector relied on the sellers disclosure form's attestations that there had been no roof leaks. I disagree with the majority's conclusion that plaintiffs did not present evidence sufficient to raise an issue of fact whether they relied on defendants' (false) disclosures, as opposed to relying on their inspector alone.

Plaintiffs presented an affidavit of Dr. Mark Banner, a micro-biologist and scientist,¹ who also visited the home, in which he opined that evidence of years of water damage and mold would have been obvious to the Hnatio when they removed the carpeting in 2001. Dr. Banner's affidavit stated "It is my opinion that no homeowner who suffered a significant amount of water intrusion such that water leaking from the roof seeped up through flooring material in the master bedroom could reasonably have concluded that they had alleviated the problem by simply stopping the roof leak." Dr. Banner's affidavit also stated that in his opinion a reasonable homeowner would know that he had to assess and address damage from the water that had intruded into the home, particularly where the same would have been evident by the blackened flooring in the master bedroom.

Plaintiffs also presented affidavits below of next door neighbors of defendants, which stated that while defendants owned the home, defendant James Hnatio advised them that he woke up one morning to discover that the carpeting in his bedroom was soaked with water; that they observed shingles missing from the Hnatio roof, mentioned such to James Hnatio, and that months went by before the roof was addressed; that they observed bare wood showing on the Hnatio roof; and that they observed rotting stucco on one side of the Hnatio home, that James Hnatio borrowed their ladder and painted over the rotting stucco without doing anything to prepare the surface. The next door neighbors also attested that they observed a contractor placing siding on the Hnatio home in early 2003, the winter before it was placed on the market.

This documentary evidence raised an issue of fact whether defendants actively concealed or knowingly failed to disclose the roof leak and concomitant water damage.

Given the documentary evidence plaintiffs presented and that the circuit court was obligated to view the facts in a light most favorable to plaintiffs, I conclude that plaintiffs' silent fraud and misrepresentations claims were improperly dismissed.

The "as is" clause does not vitiate plaintiffs' claims of silent fraud and misrepresentation. In *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994), this Court noted:

"As is" clauses allocate the risk of loss arising from conditions unknown to the parties. . . . "As is" clauses also transfer the risk of loss where the defect should have reasonably been discovered upon inspection, but was not. **They do not, however, transfer the risk of loss where "a seller makes fraudulent representations before a purchaser signs a binding agreement."** [Emphasis added.]

I would reverse the dismissal of plaintiffs' claims of silent fraud and misrepresentation pertaining to the roof leak, water damage and toxic mold.

/s/ Helene N. White

¹ Dr. Banner's curriculum vitae was before the circuit court.