DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GARTH ULLOM AND JANE R. ULLOM, Husband and Wife, Plaintiffs/Appellants, v. CINDY NEWTON, as an independent contractor; COLDWELL BANKER FIRST AFFILIATE, an Arizona company, Defendants/Appellees.	No. 1 CA-CV 09-0070 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. V-1300-CV 0820040313

The Honorable David L. Mackey, Judge

AFFIRMED

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B R O W N, Judge

¶1 Garth and Jane Ullom appeal the trial court's grant of summary judgment in favor of Cindy Newton and Coldwell Banker

First Affiliate ("Defendants"). For the following reasons, we affirm.

BACKGROUND

¶2 In August 2004, the Ulloms entered into a purchase contract with Merrylast, LLC ("Merrylast") for the purchase of a house located in Sedona, Arizona. Newton, an independent contractor for Coldwell Banker First Affiliate, served as Merrylast's real estate agent in the transaction. The Ulloms retained Barbara Bradbury ("Bradbury") to serve as their own real estate agent.

¶3 Newton assembled the information to be included in the Multiple Listing Service ("MLS"). The house was constructed in 1997, with a major remodel in 2001. The MLS listed the house as being 5,200 square feet; however, the listing also noted that according to "tax roll records," the square footage of the house was 4,059. According to Newton, she had been informed by Merrylast's prior realtor of the increased square footage based on remodeling of the house.

¶4 Prior to close of escrow, the Ulloms obtained a home inspection. The inspection report revealed, in reference to structural components of the home, "[w]ater staining as evidence of leakage . . . on the framing and subfloor of the deck undersides in the area of the grill and sink counter." The report recommended "[f]urther evaluation and correction of this

water intrusion . . . to avoid water damage to the structure." The original low slope roof "had apparently experienced problems-leaks" and the majority of the roof had been covered with a foam roof covering. There was also evidence of "minor water ponding" on the foam roof. Further, the report noted "water staining as evidence of prior leakage" in the ceilings above the guest bedroom and "minor leak evidence" above the deck of the master suite. The report also noted evidence of prior stucco repair and patterned stucco cracking. The Ulloms subsequently had two stucco contractors survey the cracks in the stucco and were told the cost of the stucco repairs would be between $10,000 and $17,000. A roofing contractor was also called to survey the roof, but the contractor was unfamiliar with foam roofing and was unable to observe any damage.

¶5 The parties agreed to accelerate the close of escrow from October 1, 2004 to August 23, 2004, to allow the Ulloms to move into the home earlier than previously planned. The purchase price was $1,187,500, but the Ulloms received a $5,000 credit to "assist them in correcting certain cosmetic imperfections." Repairs on the roof of the home were to be completed the day after closing of escrow by Energy Roofers, Inc.

¶6 After taking possession of the home, the Ulloms discovered that the home's true square footage was 4,057. The

Ulloms also discovered that certain repairs were not properly completed, the roof leaked consistently, and there was extensive mold infestation.

¶7 In December 2004, the Ulloms sued Newton, Merrylast, LLC, and Energy Roofers, Inc. for breach of contract, negligent misrepresentation, and fraud. In 2007, the Ulloms amended their complaint, adding Coldwell Banker First Affiliate, Merry Development Company, Inc., and Ernest Cheonis ("Cheonis"), principal of Merry Development Company, Inc., as defendants.

¶8 Relating to this appeal, Defendants filed three motions seeking summary judgment on the Ulloms' (1) fraud claim, (2) their claim related to the alleged misrepresentation of the square footage of the home, and (3) their claim related to the alleged misrepresentation of the status of repairs and existence of mold. The Ulloms cross-moved for partial summary judgment on Defendants' liability for negligent misrepresentation and fraud. Following extensive briefing and oral argument, the trial court granted all the Defendants' motions for summary judgment. As to the motion regarding the fraud claim, the court found that the "slight evidence that may be in dispute regarding an intent to deceive by [Defendants] is so – has so little probative value and is so insubstantial that a reasonable jury could not conclude from that evidence that there was an intent to

deceive."[1] The court also found that constructive fraud was not pled by the Ulloms and even if it had been, summary judgment was appropriate as a matter of law because no confidential or fiduciary relationship existed.

¶9 For the other motions, the court acknowledged that material issues of fact precluded summary judgment in favor of other parties in the lawsuit, but determined that judgment as a matter of law was proper in favor of Defendants. As to the condition and repairs of the roof and stucco, and the existence of mold, the court found that the Ulloms were "unable to produce evidence warranting a trial that [Defendants] 'knew or should have known' that the representations they passed on from the seller regarding the condition of the home were not accurate." Regarding inaccurate square footage, the court found that Defendants had disclosed all of the information they "knew or should have known" and complied with their duty to deal fairly with the Ulloms. The court also determined that because the Ulloms were aware of the discrepancy and had the opportunity to

[1] Neither party has provided us with a *certified* transcript of the oral arguments conducted in the trial court on the summary judgment motions at issue here. *See* ARCAP 11(b). We do note, however, that Defendants included a copy of a transcript for the July 17, 2008, hearing as an appendix to their answering brief. The Ulloms have not objected to inclusion of the transcript and thus we consider it to the extent any portions are relevant to this appeal.

investigate but failed to do so, they were not justified in relying upon the "5,200" square footage.

¶10 The Ulloms timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).[2]

DISCUSSION

¶11 Summary judgment is proper in cases where there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). Summary judgment should be granted, "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review a trial court's granting of summary judgment de novo. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). Additionally, we view the facts in a light most favorable to the non-moving party and draw any inferences reasonably derived from the facts in favor of that party. *Angus*

[2] In January 2009, Merrylast, LLC, Merry Development Company, Inc., and Cheonis entered into a settlement agreement with the Ulloms. The only defendants included in this appeal are Newton and Coldwell Banker First Affiliate.

Med. Co. v. Digital Equip. Corp., 173 Ariz. 159, 162, 840 P.2d 1024, 1027 (App. 1992).

¶12 The Ulloms argue that the trial court erred by: (1) granting summary judgment in favor of Defendants despite "numerous" material issues of disputed facts; (2) applying the sham affidavit rule to strike a declaration that was not submitted by a party; (3) refusing to allow the inference of the Defendants' intent to deceive; (4) finding that "constructive fraud" must be plead separately from "fraud"; and (5) finding that no confidential relationship existed between Defendants and the Ulloms.[3] Based on our review, we find that the record supports the rulings of the trial court.

I. Negligent Misrepresentation

¶13 The Ulloms assert that Defendants are liable for negligent misrepresentation because they failed to disclose known defects and represented the home as having more square

[3] The Ulloms also contend that the court's finding of the existence of material issues of fact as to Ulloms' claims against other parties is inconsistent with its summary judgment rulings in favor of Defendants. We disagree. In reference to a motion for summary judgment filed by Merry Development Company, Inc. and Cheonis, the trial court found nine disputed issues of material fact. Those parties are no longer involved in this litigation and the court's ruling is therefore moot. Regardless, the motion relating to Merry Development Company, Inc. and Cheonis had relevance only to Ulloms' breach of contract and fraud claims, not the negligent misrepresentation claim.

footage than truly existed. Their claim is governed by the Restatement of Torts § 552, which states:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552 (1977); *see also McAlister v. Citibank,* 171 Ariz. 207, 215, 829 P.2d 1253, 1261 (App. 1992) ("Arizona recognizes a cause of action for negligent misrepresentation as set forth in the Restatement (Second) of Torts § 552 (1977).").

¶14 This duty is narrowed, however, in the context of real estate transactions. Agents for the sellers of a home do not owe the buyers a duty of "full and frank disclosure," but rather owe the buyers a duty to "deal fairly with all other parties to a transaction." *Aranki v. RKP Inv., Inc.*, 194 Ariz. 206, 208, ¶ 8, 979 P.2d 534, 536 (1999) (citations omitted); *see also* Ariz. Admin. Code R4-28-1101(A) ("A [real estate] licensee owes a fiduciary duty to the client and shall protect and promote the client's interests. The licensee shall also deal fairly with all other parties to a transaction."). "The duty of fair dealing does not include investigations to discover defects in

the seller's property." *Aranki*, 194 Ariz. at 208, ¶ 9, 979 P.2d at 536. Additionally, Defendants are not liable to the Ulloms for "passing along" information about defects "without proof that they did so under circumstances suggesting that they knew or should have known that the information provided . . . might by false." *Id*. at 209. Furthermore, Defendants are not liable unless the Ulloms can establish they justifiably relied on Defendants' representations. *Id*. at ¶ 10 (noting that plaintiffs' decision to hire a professional inspection service, resulting in a report that identified at least some of the problems relating to plaintiffs' damages claim, called plaintiffs' reliance into question); *see also Kuehn v. Stanley*, 208 Ariz. 124, 128, ¶ 12, 91 P.3d 346, 350 (App. 2004) (recognizing that "plaintiff must show justifiable reliance to prevail on a claim for negligent misrepresentation" (internal quotations and citation omitted)).

¶15 The Ulloms contend that Newton had a duty to verify the square footage of the house and that they were damaged as a result of her failure to do so. It is undisputed, however, that the Ulloms were aware of the square footage issue before they signed the purchase contract. The MLS listing noted the discrepancy. Bradbury, the Ulloms' realtor, testified that she used the lesser square footage total, 4,059, when calculating a comparative market analysis of the home for the Ulloms.

Bradbury also testified that it was her "impression that the Ulloms understood that it was their obligation to conduct due diligence about the . . . square footage[.]" Furthermore, Mr. Ullom had the opportunity to ask the appraiser about the square footage but failed to do so. Specifically, Mr. Ullom testified that the appraiser came to the home while Mr. Ullom was present, and the appraiser "[took] one of those wheels and roll[ed] it around the outside perimeter of the house." Mr. Ullom acknowledged that the appraiser "was probably measuring the house," but admitted that he never asked the appraiser about the square footage of the home.

¶16 Moreover, the Purchase Contract expressly provided that: "BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE . . . IS APPROXIMATE. IF SQUARE FOOTAGE IS A MATERIAL MATTER TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION PERIOD." The Ulloms signed the contract acknowledging that it was their responsibility to verify the square footage if it was a material matter to them. They had ample opportunities to resolve the discrepancy in square footage but they chose not to. Thus, we find no material issue of fact to prove the Ulloms justifiably relied on any statements made by the Defendants about the square footage. *See Godfrey v. Navratil*, 3 Ariz. App. 47, 51, 411 P.2d 470, 474 (1966), *overruled on other grounds by Horne v. Timbanard*, 6 Ariz. App. 518, 434 P.2d 520 (1967) ("Assuming a

false representation, there is still a point at which a buyer may be forced to abandon the protection of the false or misleading representation and open his eyes to that which is signaling danger, or thereafter proceed at his own peril and be forced to accept less than originally promised.").

¶17 As to the Ulloms' argument that Defendants failed to disclose known defects and the existence of mold, we turn first to the specific evidence offered in support of the Ulloms' claim. In their opening brief, the Ulloms rely solely on the affidavit of Jason Bowers ("Bowers"), who painted the house before closing, in support of their argument that genuine issues of fact precluded summary judgment on this issue.[4] Four days prior to oral argument, the Ulloms filed a motion to supplement their response to the motion for summary judgment regarding defects and mold. They requested permission to file the affidavit, which asserted that he had discussed various stucco problems with Newton, including voicing his concerns about the condition of the underlying wall surface and that "some sort of problem" had caused the previous paint system to fail. The trial court refused to consider the affidavit because its filing was untimely and the court believed the affidavit contradicted Bowers' deposition testimony. The timeliness of the motion has

[4] At oral argument before this court, counsel for the Ulloms' acknowledged that the Ulloms cannot prove that Newton had knowledge of the defects without Bowers' affidavit.

not been contested on appeal. Therefore, the trial court did not abuse its discretion in refusing to consider the affidavit and the Ulloms have not shown there is a genuine issue of material fact as to whether Defendants failed to disclose material defects or the existence of mold.

¶18 Even if we consider the Bowers' affidavit, Defendants were properly granted summary judgment because the Ulloms have not presented sufficient proof of justifiable reliance. The home inspection revealed evidence of "water staining" and prior water leaks that may have been "old leaks from prior to the newer foam roof covering installation." The report recommended a "qualified licensed stucco contractor . . . be consulted for further evaluation[.]" After the home inspection, the Ulloms hired two stucco contractors and one roofing contractor to inspect the home. Upon receipt of the information from the home inspection report, together with the findings (or lack thereof) of the stucco and roof contractors, the Ulloms were not justified in relying upon the alleged statements made by Newton. *See Aranki*, 194 Ariz. at 208, ¶ 9, 979 P.2d at 536; *Godfrey*, 3 Ariz. App. at 51, 411 P.2d at 474. Thus, the trial court properly granted summary judgment on the negligent misrepresentation claim.

II. Fraud

¶19 The Ulloms also argue that the trial court erred in granting summary judgment on their fraud claim as they were not required to prove intent to defraud and, even if they were, such intent should have been inferred from the circumstances. Fraud requires proof of the following nine elements: "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted upon by the recipient in a manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the right to rely on it; (9) his consequent and proximate injury." *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 77, ¶ 18, 985 P.2d 556, 562 (App. 1998) (citing *Nielson v. Flashberg*, 101 Ariz. 335, 338-39, 419 P.2d 514, 517-18 (1966)).

¶20 The Ulloms also argue that the trial court erred by holding that "constructive fraud" must be pled separately from "fraud." Alternatively, the Ulloms contend that the court should have permitted them to amend their complaint to clarify that they were alleging constructive fraud.

¶21 In contrast to fraud, constructive fraud is "a breach of legal or equitable duty which, without regard to moral guilt or intent of the person charged, the law declares fraudulent because the breach tends to deceive others, violates public or

private confidences, or injures public interests." *Dawson v. Withycombe*, 216 Ariz. 84, 107, ¶ 72, 163 P.3d 1034, 1057 (App. 2007) (quoting *Lasley v. Helms*, 179 Ariz. 589, 591, 880 P.2d 1135, 1137 (App. 1994)). Though constructive fraud does not require a showing of intent to deceive, it does require a fiduciary or confidential relationship, and the breach of duty must induce justifiable reliance to the other party's detriment. *Id*. Both fraud and constructive fraud require a showing of justifiable reliance on the alleged fraudulent statements. *See id*. at 107-08; *see also Linder v. Brown & Herrick*, 189 Ariz. 398, 405, 943 P.2d 758, 765 (App. 1997) ("Justifiable reliance is one of [the] essential elements" of a fraud claim.).

¶22 As mentioned previously, we find no material issues of fact in support of a claim that the Ulloms justifiably relied on any statements made to them by the Defendants. Thus, their claims of fraud and constructive fraud were properly disposed of by summary judgment.

¶23 Moreover, there is no evidence here of a confidential or fiduciary relationship. The Ulloms rely only on *Aranki*, suggesting that a duty to deal fairly creates the type of confidential relationship sufficient to trigger liability for constructive fraud. We do not view *Aranki*, however, as creating any such obligation. Constructive fraud was not an issue in that case—we simply clarified that the seller's agent does not

have the same duty to buyer as buyer's agent. *See Aranki*, 194 Ariz. at 208, 979 P.2d at 536. Further, this court has previously defined a confidential relationship as:

> [a] relationship which arises by reason of kinship between the parties, or professional, business, or social relations that would reasonably lead an ordinarily prudent person in the management of his business affairs to repose that degree of confidence in another which largely results in the substitution of that other's will for his in the material matters involved in the transaction[.]

Herz & Lewis, Inc. v. Union Bank, 22 Ariz. App. 437, 439, 528 P.2d 188, 190 (1974) (quoting *In re Guardianship of Chandos*, 18 Ariz. App. 583, 585, 504 P.2d 524, 526 (1972)). We do not find that the Defendants served as a "substitution" for the Ulloms' will in the material matters related to the purchase of the Ulloms' home, especially since the Ulloms had retained their own real estate agent.

¶24 Because we conclude that trial court properly awarded summary judgment on the Ulloms' fraud claims, we need not decide whether fraud must be pled separately from constructive fraud, or whether the Ulloms should have been permitted to amend their pleadings. Even if the court permitted an amendment of the pleadings, it would have been a futile gesture and made no difference in the outcome of the proceedings because no material facts existed as to the Ulloms' fraud claims. *See Walls v.*

Ariz. Dep't. of Public Safety, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991) (finding that even though leave to amend a pleading is usually freely given, if a motion for summary judgment could defeat the amended pleading, the court's grant of leave to amend would be futile).

CONCLUSION

¶25 For the foregoing reasons, we affirm the trial court's decision to grant summary judgment in favor of Defendants.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge