STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL W. MINER and SANDRA L. MINER,

Plaintiffs-Appellants,

v

ANDREW TEASEL, CATHY P. TEASEL, CONNIE HACKER, and G.L. & ASSOCIATES, INC. d/b/a THE PRUDENTIAL GREAT LAKES REALTY,

Defendants-Appellees.

UNPUBLISHED
April 10, 1998

Nos. 197225; 199165; 199892
Oakland Circuit Court
LC No. 95-490646-CZ

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

In Docket No. 197225, plaintiffs appeal as of right the trial court's orders granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), in this action for fraudulent misrepresentation and concealment and breach of fiduciary duties in connection with a sale of residential real estate. In Docket Nos. 199165 and 199892, plaintiffs appeal by leave granted the trial court's order awarding frivolous claim sanctions to defendants. We affirm.

Plaintiffs alleged that in November 1993, they executed a written agreement with Connie Hacker and Prudential Realty, naming these defendants as their agents for the purpose of purchasing a house. Plaintiffs contended Hacker directed them to the Teasels' house, which had been built in 1987 and was for sale. Plaintiffs also claimed Hacker told them they would not need to conduct an inspection on the property, because its structure, improvements, and appliances were, at most, six years old. Plaintiffs further alleged that in October 1993, the Teasels completed a written disclosure statement pursuant to MCL 565.951-.966; MSA 26.1286(51)-.1286(66), which they gave to plaintiffs "just prior to" their February 1994 closing date.[1] Plaintiffs claimed the Teasels made several representations regarding the property in their disclosure statement.

On October 28, 1993, plaintiffs and the Teasels entered into a written purchase agreement that specified the Teasels were selling their residence "as is," subject to plaintiffs' right of first inspection. An

addendum to the purchase agreement contained an inspection contingency, which included Prudential's recommendation that plaintiffs have the premises inspected and which provided that if plaintiffs indicated they would conduct an inspection, the sale would become contingent upon plaintiffs' satisfaction with the results of the inspection.[2] Plaintiffs indicated they intended to have the property inspected.

On November 1, 1993, plaintiffs and the Teasels executed an amendment to the purchase agreement addendum, which provided plaintiffs had the property inspected, were satisfied with the results of the inspection, and waived their contingency for a satisfactory inspection with the exception of certain listed repairs. The Teasels subsequently delivered a warranty deed to plaintiffs. Plaintiffs alleged that, after taking possession, they discovered the property suffered from many defects, problems, and code violations that would cost more than $74,000 to cure.

Plaintiffs brought claims for fraudulent misrepresentation against all defendants, alleging that the Teasels made various misrepresentations as to the condition of their property to induce plaintiffs to purchase it. Plaintiffs claimed that Hacker furthered the Teasels' fraud by inducing plaintiffs to forego an inspection of the property. Plaintiffs also brought a claim against the Teasels for fraudulent concealment and nondisclosure for their alleged failure to fully apprise plaintiffs of the flawed condition of the property. Plaintiffs also filed claims against Hacker and Prudential for breach of fiduciary duty, alleging Hacker and Prudential acted as "buyers' agents" in assisting plaintiffs in their real estate purchase.[3]

The Teasels moved for summary disposition pursuant to MCR 2.116(C)(8), arguing plaintiffs bore the risk of loss under the parties' "as is" purchase agreement because plaintiffs could not show the Teasels concealed known defects that an inspection could not have discovered. In support of their motion, the Teasels submitted the portion of the purchase agreement that stated plaintiffs had conducted a full inspection of the property and further "waived their contingency for a satisfactory inspection." The Teasels also submitted documentary evidence establishing that Keith A. Leonard, Sandra Miner's son, had performed an inspection of the property. Lastly, the Teasels submitted to the trial court the results of a Rochester Hills safety inspection plaintiffs had conducted in March 1994, and the affidavit of Daniel J. Wood, a real estate inspector. Hacker and Prudential also moved for summary disposition pursuant to MCR 2.116(C)(8). Plaintiffs countered defendants' motions for summary disposition in one brief, to which they attached various exhibits.

At the hearing on defendants' motions for summary disposition, the trial court observed that defendants had submitted evidence in support of their motions, and that the motions should have brought pursuant to MCR 2.116(C)(10), rather than MCR 2.116(C)(8). Thus, the trial court analyzed defendants' motions under the MCR 2.116(C)(10) standard for granting summary disposition and granted summary disposition in defendants' favor pursuant to MCR 2.116(C)(8) and (C)(10). The Court also found plaintiffs' actions frivolous and granted defendants' request for sanctions pursuant to MCR 2.114(F) and MCR 2.625(A)(2).

I

In Docket No. 197225, plaintiffs first argue the trial court erred in applying the MCR 2.116(C)(10) standard for granting summary disposition in analyzing defendants' motions for summary disposition, because they were filed solely pursuant to MCR 2.116(C)(8). We disagree.

Exact technical adherence with MCR 2.116(C) is not required. *Mollett v Taylor*, 197 Mich App 328, 332; 494 NW2d 832 (1992). Where a motion for summary disposition has been mislabeled, a trial court is free to analyze the motion under the correct MCR 2.116(C) subrule, as long as it does not appear as if either party was misled by the mislabeling of the motion. *Id.* Clearly, defendants' motions for summary disposition were mislabeled. The Teasels argued the success of plaintiffs' claims hinged on their ability to show that the alleged defects of their property could not reasonably be discovered upon inspection. To support their contention that no genuine issue of material fact existed as to this issue, the Teasels submitted documentary evidence to show plaintiffs had actually conducted an inspection of the property, which reasonably should have revealed the alleged defects. Their argument was not confined to the pleadings alone and explicitly considered the factual support for plaintiffs' claims. Additionally, in their mislabeled MCR 2.116(C)(8) motion for summary disposition, Hacker and Prudential made explicit references to the documentary evidence Teasels had submitted in support of their motion, arguing that the failure of plaintiffs' inspector to reasonably discover the alleged defects barred their present claims. Obviously, defendants' motions for summary disposition were more appropriately analyzed under the MCR 2.116(C)(10) standard, which examines the documentary evidence produced in support of and in opposition to a claim. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

Moreover, plaintiffs do not appear to have been prejudiced by the trial court's viewing of defendants' motions as MCR 2.116(C)(10) motions for summary disposition. In their brief in opposition to defendants' motions for summary disposition, plaintiffs specifically addressed the issue of whether material issues of fact existed for a jury's determination. Additionally, plaintiffs submitted documentary evidence apart from the pleadings in support of their arguments. In light of these considerations, we conclude the trial court did not err in applying the MCR 2.116(C)(10) standard of analysis to defendants' motions for summary disposition.

Next, plaintiffs argue the trial court erred in granting the Teasels' motion for summary disposition pursuant to MCR 2.116(C)(10) because they succeeded in establishing genuine issues of material fact regarding whether the Teasels were liable to them for fraudulent concealment and misrepresentation. We do not agree. MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). When deciding a motion for summary disposition, a court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence available to it. *Patterson, supra* at 432. We review the trial court's

decision to grant summary disposition pursuant to MCR 2.116(C)(10) de novo. *Jackhill*, *supra* at 117.

Plaintiffs claimed the Teasels were liable to them for fraudulently concealing the defective condition of the property they sold plaintiffs pursuant to an "as is" purchase agreement. Generally, buyers bear the risk of loss under an "as is" contract unless the sellers fail to disclose concealed defects known to them. *Conahan v Fisher*, 186 Mich App 48, 49; 463 NW2d 118 (1990). Caveat emptor prevails in land sales, and the vendors, with two exceptions, are not liable for any harm due to defects existing at the time of sale. *Id.* The exception relevant to plaintiffs' action for fraudulent concealment is that the vendors have a duty to disclose to the purchasers any concealed conditions known to them that involve an unreasonable danger. *Id.* at 49-50; see also *Clemens v Lesnek*, 200 Mich App 456, 459-460; 505 NW2d 283 (1993). However, where evidence demonstrates a competent inspector should reasonably have been expected to have discovered the defective conditions, the conditions are not concealed, and there can be no recovery for fraudulent concealment in connection with the sale of real estate. See *Conahan*, *supra* at 50.

Here, evidence established that plaintiffs inspected the property the Teasels sold them and found the results of the inspection to be satisfactory, notwithstanding the minor repairs they requested the Teasels make. The Teasels submitted further evidence to establish that "a competent inspection on [plaintiffs'] behalf prior to the purchase of the property would be reasonably likely to have uncovered all of the alleged defects complained of." Although plaintiffs argue Leonard did not actually inspect the property, but rather conducted a casual walk-through, this does not matter. Plaintiffs were apprised of the necessity of inspecting the property and given ample opportunity to do so. They stated they had satisfactorily completed such an inspection. The Teasels adequately established that the defects were not concealed, in that they *could* have been discovered had plaintiffs conducted an adequate inspection. *Id.* Thus, whether plaintiffs actually did conduct an adequate inspection of the property is not relevant. Therefore, the trial court did not err in granting the Teasels' motion for summary disposition as to plaintiffs' claim for fraudulent concealment.

The trial court did not err in similarly disposing of plaintiffs' claim for fraudulent misrepresentation. While "as is" clauses in real estate sales contracts allocate the risk of loss arising from conditions unknown to the parties, they do not transfer the risk of loss to the buyers where the sellers make fraudulent misrepresentations before the purchasers sign a binding agreement. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). However, to be actionable, a misrepresentation claim requires actual reliance on a false representation. *Phinney v Perlmutter*, 222 Mich App 513, 534-536; 564 NW2d 532 (1997).

Here, the Teasels may have made certain misrepresentations to plaintiffs concerning the condition of their property before they signed the "as is" purchase agreement. However, plaintiffs expressly reserved the right to rescind their agreement to purchase the property if they were dissatisfied with the results of an inspection of the property. Moreover, the Teasels presented evidence to show that none of the alleged defects were concealed. Plaintiffs' assertion of their right to inspect the Teasels' property and rescind the contract if dissatisfied with the results proves there is no genuine issue of

material fact regarding whether plaintiffs relied on the Teasels' misrepresentations. The evidence clearly establishes that plaintiffs did not rely on the Teasels' statements, but rather sought an independent assessment of the condition of the property before deciding to waive their further right of inspection. Therefore, the trial court did not err in granting the Teasels' motion for summary disposition as to plaintiffs' claim for fraudulent misrepresentation.

Next, plaintiffs argue the trial court erred in granting Hacker and Prudential's motion for summary disposition as to plaintiffs' claim for breach of fiduciary duties. Again, we disagree.

A cause of action may lie where a real estate broker breaches a fiduciary duty owed to her principals. See *Andrie v Chrystal-Anderson & Assoc's Realtors, Inc*, 187 Mich App 333, 335; 466 NW2d 393 (1991). Accepting as true plaintiffs' assertion that Hacker and Prudential acted as their fiduciaries in the real estate transaction, plaintiffs have generally based their claims on their allegation that Hacker caused plaintiffs to forego inspecting the Teasels' property. However, by the terms of the purchase agreement, Prudential encouraged plaintiffs to have the property inspected before buying it. Indeed, plaintiffs stated their intention to have the property inspected. Further evidence established that plaintiffs conducted a satisfactory inspection of the property before purchasing it. Thus, even assuming that Hacker instructed plaintiffs that they should forego inspecting the Teasels' property before purchasing it, it is clear that plaintiffs' alleged damages did not arise from their reliance on her advice or on any other of her actions. Rather, their damages arose from the apparent ineffectiveness of their own real estate inspector. Therefore, we conclude the trial court did not err in granting Hacker and Prudential's motion for summary disposition as to plaintiffs' claim for breach of fiduciary duties.

II

In Docket Nos. 199165 and 199892, plaintiffs argue the trial court clearly erred in granting sanctions against them because their claims against defendants were not frivolous. We disagree.

This Court will not disturb a trial court's finding that a claim or defense was frivolous unless the finding is clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id*. Sanctions may be imposed on a party who brings a frivolous claim under MCL 600.2591; MSA 27A.2591. There is no indication that plaintiffs' purpose in initiating an action against defendants was to harass, embarrass or injure them. See MCL 600.2591(2)(i); MSA 27A.2591(2)(i). However, we find plaintiffs had no reasonable basis to believe that the facts underlying their legal position were true. MCL 600.2591(3)(ii); MSA 27A.2591(3)(ii). In addition, we find plaintiffs' legal position was devoid of arguable legal merit. MCL 600.2591(3)(iii); MSA 27A.2591(3)(iii).

First, plaintiffs' claim against the Teasels was premised on their allegation that the Teasels fraudulently concealed the defective conditions of 1111 Enfield. However, in order for plaintiffs to recover against the Teasels, plaintiffs were required to demonstrate that a competent inspector

could not have reasonably been expected to discover the defective conditions. See *Conohan, supra* at 50. The evidence established that plaintiffs conducted an inspection, through Keith Leonard, and requested the Teasels to make repairs discovered during that inspection. Plaintiffs were apprised of the necessity of conducting an inspection, and signed the Addendum to Purchase Agreement, which stated that they had satisfactorily completed an inspection. Moreover, the Teasels presented evidence that, had plaintiffs performed an adequate inspection, they could have discovered the defects complained of. Plaintiffs could have discovered the defects complained of with a competent inspection, and they stated that they conducted such an inspection and were satisfied with the results. Accordingly, they had no reasonable basis to believe that they could establish the facts necessary to recover against the Teasels, and their claim was devoid of arguable legal merit.

Moreover, plaintiffs based their claim against Hacker and Prudential on the allegation that Hacker caused plaintiffs to forego inspection of the Teasels' property. However, the purchase agreement clearly provided that plaintiffs should inspect the property and plaintiffs stated their intention to have the property inspected. Additionally, the evidence established that plaintiffs conducted a satisfactory inspection of the property before purchasing it. Therefore, plaintiffs' damages arose from their failure to competently inspect the property, and they could not reasonably assert that their damages arose from their reliance on Hacker's alleged advice to forego inspection of the property. Consequently, plaintiffs' claim against Hacker and Prudential was not reasonably based on legitimate facts and it was devoid of arguable legal merit. Accordingly, the trial court did not clearly err in granting frivolous claim sanctions in favor of defendants.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh

[1] However, the disclosure statement reflects that plaintiffs received this document on November 6, 1993, approximately three months before the February 1994 closing.

[2] The written disclosure statement also explicitly provided, in capital letters, that plaintiffs should "OBTAIN PROFESSIONAL ADVICE AND INSPECTIONS OF THE PROPERTY TO MORE FULLY DETERMINE THE CONDITION OF THE PROPERTY."

[3] Plaintiffs' complaint included other claims that are not relevant to this appeal.