STATE OF MICHIGAN

COURT OF APPEALS

STEVEN RICHARDSON and MARY J. RICHARDSON,

Plaintiffs-Appellees,

v

DAVID DEBRUYN,

Defendant-Appellant,

and

SALVATORE F. ARRIGO and PATRICIA REID ARRIGO,

Defendants.

UNPUBLISHED
November 19, 1999

No. 209876
Kent Circuit Court
LC No. 94002675

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant David DeBruyn appeals as of right from an order denying his motion for judgment notwithstanding the verdict. We reverse.

In 1994, plaintiffs Steven and Mary Richardson filed suit against Salvatore and Patricia Arrigo and David DeBruyn for breach of contract, professional negligence and violation of the Michigan Consumer Protection Act. The dispute arose as a result of the purchase of a home by plaintiffs from defendants Arrigo with defendant DeBruyn acting as the real estate agent for the Arrigos. After purchasing the home, plaintiffs discovered that the roof was defective, resulting in significant leakage into the home. DeBruyn maintained that before the sale plaintiffs were aware of the potential problems with the roof because it was one of the potential problems listed on an inspection report that was reviewed by plaintiffs before closing on the sale of the home. Plaintiffs denied ever receiving a copy of or reviewing the inspection report.

In May 1995, the matter was mediated and an evaluation was entered in the amount of $7,500 against DeBruyn. Both parties rejected the mediation. On April 16, 1997, the jury rendered a verdict in favor of plaintiffs and against DeBruyn for $6,000. The jury held that defendants Arrigo were not culpable in the transaction.

Plaintiffs filed a motion for costs and attorney fees pursuant to the Michigan Consumer Protection Act [MCPA], MCL 445.911(2); MSA 19.418(11)(2). The trial court awarded plaintiffs $8,500 in attorney fees, $454.90 in costs and $3,558.94 in accrued interest. Plaintiffs then filed a motion for attorney fees pursuant to MCR 2.403, arguing that the final judgment included the costs and fees awarded under the MCPA and thus exceeded the mediation evaluation. The trial court awarded $4,196.65 in mediation sanctions. DeBruyn filed a motion for judgment notwithstanding the verdict, which was denied by the trial court.

In reviewing a decision on a motion for JNOV, we view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence failed to establish a claim as a matter of law was JNOV appropriate; the question of law is subject to de novo review on appeal. *Forge, supra.*

Defendant first argues that plaintiffs failed to put forth clear and convincing evidence in support of their fraudulent misrepresentation claim. Defendant contends that, as a matter of law, plaintiffs did not create an issue for the jury.

The elements that a plaintiff must prove in order to successfully allege a common-law fraud claim are the following:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it 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 McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336, 247 NW2d 813 (1976).]

Additionally, the burden of proof rests with the plaintiff and fraud must be proven by clear and convincing evidence. *Hi-Way Motor Co, supra* at 336.

Defendant DeBruyn argues and we agree that plaintiffs failed to prove the first element of common-law fraud. Defendant contends that plaintiffs failed to put forth any credible evidence that he ever made any affirmative material misrepresentations to them concerning the subject property. Plaintiffs, on the other hand, argue that they directly asked defendant whether there were any roof problems and that he responded that there were none. After a thorough review of the trial transcripts we conclude that the record is devoid of any evidence of representations made by defendant with

respect to the roof. The only evidence regarding representations made to plaintiffs regarding the roof indicates that any such representations were made by the Arrigos and that DeBruyn was not even present at that time. Absent such a representation by defendant DeBruyn we hold that plaintiffs failed to put forth a prima facie case of common-law fraud.

Defendant next argues that plaintiffs failed to put forth clear and convincing evidence in support of their silent fraud claim. In *M&D, supra* at 25, we held:

> in order to establish a claim of silent fraud, there must be evidence that the seller made some sort of representation that was false. It is not enough, as this Court in *Shimmons*[*v Mortgage Corp of America*, 206 Mich App 27; 520 NW2d 670 (1994),] held, that the seller had knowledge of the defect and failed to disclose it; rather, the seller must make some type of misrepresentation. A misrepresentation need not necessarily be words alone, but can be shown where the party, if duty-bound to disclose, intentionally suppresses material facts to create a false impression to the other party.

In the instant case, as mentioned above, there is no evidence that defendant DeBruyn made any representations to plaintiffs concerning the roof. Moreover, there is no evidence of a legal or equitable duty on behalf of defendant to disclose to plaintiffs the results of the inspection report. Defendant was acting as the agent for the seller and not plaintiffs. The holding in *McConkey* is clear that defendant must have made a representation or responded to a particularized concern of plaintiffs before he may be liable for silent fraud. We hold that plaintiffs failed to prove with clear and convincing evidence that defendant made any representations with respect to the roof of the subject property. Accordingly, the trial court erred in not granting defendant DeBruyn's motion for judgment notwithstanding the verdict.

Defendant also argues that the trial court's award of attorney fees under both the Michigan Consumer Protection Act, MCL 445.911(2); MSA 19.418(11)(2), and the mediation rule MCR 2.403(O) was erroneous. In light of our resolution of the above issues we vacate the trial court's award of attorney fees.

Reversed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski