

STATE OF MICHIGAN
COURT OF APPEALS

CARL PEPLINSKI and DELPHINE PEPLINSKI,

Plaintiffs-Appellants,

v

COLDWELL BANKER WALTERS REAL
ESTATE, INC., OLGA OREE GIRODAT, and
JACQUELINE S. DIBLEY,

Defendants,

and

MARVIN S. APIGO and LINDA M. APIGO,

Defendants-Appellees.

UNPUBLISHED

August 22, 2000

No. 217419

Macomb Circuit Court

LC No. 98-000342-CH

Before: Markey, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition of plaintiffs' fraud, unintentional misrepresentation, civil conspiracy, and breach of contract claims. We affirm.

This case arises from plaintiffs' purchase of a vacant 14.62 acre lot located on Thirty-three Mile Road in Richmond Township. In November 1995, the owners of the property, defendants Marvin Apigo and Linda Apigo, listed the lot for sale with defendant Coldwell Banker Walters Real Estate, Inc (Coldwell Banker). Defendants Girodat and Dibley were the realtors involved in selling the property. On more than one occasion in late 1995 and early 1996, plaintiffs, accompanied by defendants Girodat and Dibley and/or defendant Marvin Apigo, went to look at the property. The parties dispute what was said during those visits regarding the existence and extent of a Consumers Power gas main easement on the property. According to plaintiff Carl Peplinski, he had numerous discussions with defendants Girodat and Dibley regarding his intent to build on the property. He claims defendants Girodat, Dibley, and Marvin Apigo expressly stated that there was nothing to prohibit him from making his intended

improvements. Defendants Marvin Apigo and Linda Apigo claim they showed plaintiff Carl Peplinski the location of a gas line pole and sign and explained that the gas company's easement cut through the property. They also claim they told plaintiff Carl Peplinski he would not be able to construct a pole barn where he intended "because of the 75 foot gas company easement." It is undisputed that, prior to plaintiffs' purchase of the property, defendants Marvin Apigo and Linda Apigo provided a disclosure statement indicating there were no easements on the property. On or about January 29, 1996, the parties closed on the property. The sale price was \$70,000. According to plaintiffs, there was no discussion of the easement at the closing. Plaintiffs claim to have first learned the easement existed at some point subsequent to closing.¹ The easement owned by Consumers Power dissects the property, stretching 1,050 to 1,250 feet long and seventy-five feet wide.

On January 26, 1998, plaintiffs filed the present suit, claiming the property is worth substantially less than the sale price as a result of the easement and that the easement precludes them from making their planned improvements. They alleged common law fraud, misrepresentation, concealment, civil conspiracy, and negligence against all defendants. They also claimed defendants Coldwell Banker, Girodat, and Dibley were liable for violations of the Michigan Consumer Protection Act and defendants Marvin Apigo and Linda Apigo breached their contract to provide marketable title to the property. The trial court granted summary disposition for defendants. On appeal, plaintiffs only challenge the dismissal of their fraud, misrepresentation, civil conspiracy, and breach of contract claims against defendants Marvin Apigo and Linda Apigo.

Plaintiffs first argue that the trial court erred in granting summary disposition because there are issues of fact regarding whether defendants are liable for fraud, unintentional misrepresentation, and civil conspiracy based on their failure to disclose the existence, size, and location of the Consumers Power easement. We disagree. We review a trial court's grant or denial of a motion for summary disposition under MCR 2.116(C)(10) de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).² A motion for summary disposition under that subsection tests whether there is factual support for a claim. *Spiek, supra* at 337; *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A court may rely on affidavits, pleadings, depositions, or any other documentary evidence in deciding whether a genuine issue of material fact exists. *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). On appeal, this Court reviews de novo a trial court's decision regarding a summary disposition motion. *Roberson v Occupational Health Centers of America, Inc.*, 220 Mich App 322, 324; 559 NW2d 86 (1996). A motion pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. In reviewing such a motion, the test is set forth in *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996):

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. 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. MCR 2.116(C)(10), (G)(4).

See also *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999).

In order to prove fraudulent misrepresentation, the plaintiff must prove: (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew or should have known it was false at the time it was made; (4) the defendant made the representation, intending the plaintiff to act upon it; and (5) the plaintiff acted in reliance on it and suffered damages as a result. *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999); *HJ Tucker & Associates, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 572; 595 NW2d 176 (1999). Here, plaintiffs claim that defendants' statement within the vacant land disclosure that there were no easements on the property and defendants' failure to inform plaintiffs of the existence and extent of the easement during their visits to the property constituted actionable misrepresentations. Even assuming those representations were false and that defendants made them knowingly and with the intent that plaintiffs would act on them, plaintiffs' fraud claim fails as a matter of law because plaintiffs had notice of the easement prior to purchasing the property. A plaintiff's reliance must be reasonable to support a fraud claim. *Novak, supra* at 690-691; *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994); *Webb v First of Michigan Corp*, 195 Mich App 470, 474-475; 491 NW2d 851 (1992); *State-William Partnership v Gale*, 169 Mich App 170, 179; 425 NW2d 756 (1988); *Cormack v American Underwriters Corp*, 94 Mich App 379, 385; 288 NW2d 634 (1979). Here, the warranty deed conveying the property stated the conveyance was "subject to easements and restrictions on record." It is undisputed the Consumers Power easement was validly recorded with the Macomb County Register of Deeds in 1971. That recording served as notice of the encumbrance. MCL 565.25(4); MSA 26.543(1); see *McMutry v Smith*, 320 Mich 304, 306-307; 30 NW2d 880 (1948). Plaintiffs admit they did not examine the records of the Macomb County Register of Deeds. Had they done so, they would have discovered the exact size and location of the easement as it is plainly stated on the recorded document. Given the notice provided by the recorded easement, plaintiffs cannot be said to have reasonably relied on defendants' alleged misrepresentations. Thus, plaintiffs cannot prove the elements of fraud and their claim fails as a matter of law.

Plaintiffs' unintentional misrepresentation and civil conspiracy claims fail for the same reason. "A claim of innocent misrepresentation is shown if a party to a contract detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *Novak, supra* at 688. Here, plaintiffs had notice of the easement and, thus, cannot be said to have reasonably relied on any alleged unintentional misrepresentation. *Id.* at 690. "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." *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351(1992). Given that plaintiffs' fraud and unintentional misrepresentation claims fail, their claim that defendants conspired to commit such acts are also meritless. *Id.*

Plaintiffs argue next that defendants breached the contract for the sale of the property by failing to disclose material facts regarding the size and location of the easement. We disagree. Contrary to

plaintiffs' argument on appeal, defendants did not admit liability for breach of contract by concurring with defendants Coldwell Banker, Girodat, and Dibley's motion for summary disposition. Moreover, the fact that an easement is present on the property does not render its title unmarketable. *Madhavan v Sucher*, 105 Mich App 284, 288; 306 NW2d 481 (1981). Plaintiffs agreed to purchase the property as is, having had sufficient notice of the existence, size and location of the easement, and there is nothing to suggest defendants' conveyance of the property that included the easement constituted a breach of contract.

Affirmed.

/s/ Roman S. Gribbs

/s/ Richard Allen Griffin

I concur in the result only.

/s/ Jane E. Markey

¹ The point at which plaintiffs claim to have first become aware of the easement is not clear given plaintiff Carl Peplinski's statements during deposition that he first learned of the easement on review of the title insurance policy subsequent to closing and a neighbor first informed him of the easement.

² Although the order appealed from states that summary disposition was granted pursuant to MCR 2.116(C)(8) and (C)(10), defendants and the trial court relied on documentary evidence beyond the pleadings to support the motion for summary disposition. Thus, we construe defendants' motion as having been granted pursuant to MCR 2.116(C)(10). See *Krass v Tri-County Security, Inc.*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).