

STATE OF MICHIGAN
COURT OF APPEALS

ELLEN PAULE,

Plaintiff-Appellant,

v

MICHAEL IWANIW and JOAN IWANIW,

Defendants-Appellees.

UNPUBLISHED

October 5, 2001

No. 225590

Muskegon Circuit Court

LC No. 99-039473-CH

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) in this action regarding alleged misrepresentations made by defendants to plaintiff in a real estate disclosure statement. We affirm the trial court's dismissal of plaintiff's innocent misrepresentation claim, reverse the trial court's dismissal of plaintiff's fraudulent misrepresentation claim, and remand for proceedings consistent with this opinion.

On May 23, 1996, plaintiff entered into a purchase agreement with defendants for the purchase of defendants' house. Defendants provided plaintiff with a disclosure statement regarding the condition of the house at the time of sale. The disclosure statement provided that there had been evidence of water in the southeast corner of the basement after heavy rains in the spring and fall; however, the statement also provided that there were no "[s]ettling, flooding, drainage, structural or grading problems."

The purchase agreement provided that plaintiff was aware that home inspection services were available, plaintiff had the right to have the house inspected by an expert, and plaintiff had elected to arrange and pay for an inspection concerning the plumbing, heating, ventilating, air conditioning, and electrical systems, along with a termite inspection, and an inspection concerning the home's structural integrity, including the roof. The purchase agreement also contained an "as is" clause. The parties executed an addendum to the purchase agreement on May 23, 1996, which provided that plaintiff waived all inspections except for the termite inspection. Plaintiff alleged that she relied on defendants' representations contained in the disclosure statement in purchasing the premises, and a closing took place on June 19, 1996.

In the winter and spring of 1998, extensive flooding allegedly occurred in the basement of the house. In the fall of 1998, plaintiff allegedly installed an interior tile drain to correct the

continual basement flooding and to relieve hydrostatic pressure on the basement walls. Plaintiff asserts that during the installation of the interior tile drain, structural damage to the premises was discovered.¹

Plaintiff filed a complaint alleging causes of action based on fraudulent misrepresentation, innocent misrepresentation, breach of contract, and physical and emotional distress arising out of misrepresentations contained in the disclosure statement concerning defendants' claims that there were no settling, flooding, drainage, structural, or grading problems.

The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10).² Plaintiff argues the trial court erred in determining that the part of the disclosure statement asserting there were no structural or flooding problems with the house was not a factual statement on which plaintiff could rely. Plaintiff further argues the trial court erred in concluding that the "as is" clause shielded defendants from liability unless plaintiff could show the structural damage to the house was concealed. Plaintiff finally argues the trial court erred in determining that there were no genuine issues of material fact concerning plaintiff's causes of action.

This Court reviews rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999).

¹ We note Roger T. Gierzak, plaintiff's grandson and real estate agent at the time of the sale, has lived in the house since August 1996; plaintiff only lived in the house for a few weeks during August/September 1996.

² MCR 2.116(C)(8) provides for summary disposition of a claim on the grounds that the opposing party has failed to state a claim on which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone, and the motion may not be supported with documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and the motion is construed in a light most favorable to the nonmoving party. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

MCR 2.116(C)(10) provides for summary disposition where 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. Our Supreme Court has ruled 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." *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed "in the light most favorable to the party opposing the motion." *Id.*

Fraudulent misrepresentation consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) at the time 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 actually acted in reliance upon it; and (6) the plaintiff suffered damages. *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

A claim of innocent misrepresentation is shown if a party 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. *Id.* There is no need to prove a fraudulent purpose or an intent by the defendant that the misrepresentation be acted on by the plaintiff; however, it must be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inured to the benefit of the party making the misrepresentation. *Id.* at 28.³

An action for fraudulent misrepresentation must be predicated on a statement relating to an existing or past fact. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). Mere puffing is not actionable because such statements are expressions of opinion, not fact. *George v Spencer*, 56 Mich App 249, 254; 223 NW2d 736 (1974). In the present case, the trial court ruled that defendants' statement, contained in the disclosure statement, that there were no settling, flooding, drainage, structural, or grading problems, had "elements of subjectivity and opinion" and thus was not one of fact on which plaintiff could rely. We disagree. Defendants through this statement were affirmatively representing there were no structural or flooding problems, thereby necessarily implying there were no cracks in the basement walls, no bowing of the basement walls, no cracks in two cement block columns in the basement, and no history of flooding. A disclosure statement is required under the seller disclosure act, MCL 565.951 *et seq.*, and the particular language contained in disclosure statements, including the language at issue in the present case concerning structural and flooding problems, is dictated by MCL 565.957. MCL 565.955(1) provides:

The transferor or his or her agent is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor, or was based entirely on information provided by public agencies or provided by other persons specified in subsection (3), and ordinary care was exercised in transmitting the information. It is not a violation of this act if the transferor fails to disclose

³ Plaintiff's breach of contract claim is premised on allegations of misrepresentations; therefore, the claim is merely a reformulation of the misrepresentation claims, and the claim will be treated as part of the misrepresentation claim. Count IV of plaintiff's complaint, which is untitled, merely provided that "[d]efendants' representations were made intentionally and maliciously and have caused Plaintiff to suffer physical and emotional distress." Once again, this is merely an intentional misrepresentation claim requesting damages for physical and emotional distress. In light of the above, we shall only analyze this appeal in the context of a claim based on misrepresentation.

information that could be obtained only through inspection or observation of inaccessible portions of real estate or could be discovered only by a person with expertise in a science or trade beyond the knowledge of the transferor.

This language clearly indicates that statements contained in a disclosure statement can give rise to liability in certain circumstances if the information is a misrepresentation. The trial court erred in determining that the statements at issue did not concern a factual matter.

Moreover, although the parties and the trial court did not address the issue, we hold that MCL 565.955(1) eliminated any claim based on innocent misrepresentation in the context of a claim premised on a misrepresentation contained in a disclosure statement, because personal knowledge or ordinary care is required by the statute. The language indicates a legislative intent to hold vendors liable only for intentional or negligent misrepresentation. Thus, in the instant case, the innocent misrepresentation claim should have been dismissed pursuant to MCR 2.116(C)(8) for failure to state a valid claim. Although the trial court dismissed the claim for other reasons, this Court will not reverse a trial court's order if it reached the right result for the wrong reason. *Detroit v Presti*, 240 Mich App 208, 214; 610 NW2d 261 (2000). Plaintiff makes no claim based on negligent misrepresentation.

The trial court also ruled no claim or factual issue was presented indicating that any problems with defendants' basement were concealed. We conclude that the trial court's analysis was in error. Plaintiff's claim was based on an alleged intentional misrepresentation, and in *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994), this Court, addressing an argument based on an "as is" clause, stated:

"As is" clauses allocate the risk of loss arising from conditions unknown to the parties. . . . Thus, plaintiff's mutual mistake claim is therefore barred. "As is" clauses also transfer the risk of loss where the defect should have 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."* [Citations omitted; emphasis added.]

Therefore, in the present case, because plaintiff's claim is based on an alleged fraudulent representation, the "as is" clause does not relieve defendants of liability regardless whether the structural or flooding problems with the basement were concealed.

The trial court ruled that plaintiff did not meet the burden of presenting sufficient documentary evidence to establish a factual issue on the fraudulent misrepresentation claim. We disagree. We do agree with the trial court that the affidavit of Richard A. Fassett could not be considered in determining whether there was an issue of fact regarding structural defects because the affidavit did not refer to specific facts and was merely conclusory. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). However, the trial court erred in not considering plaintiff's response to defendants' first set of interrogatories in determining whether an issue of fact existed. Interrogatories are relevant when the ground stated for summary disposition is that there is no genuine issue of material fact. *Madison National Bank v Lipin*, 57 Mich App 706, 709; 226 NW2d 834 (1975). The following interrogatory was asked and answered:

Q. Identify each and every fact or piece of information known to you to support your claim that the “defendants intentionally made false representations of material facts to Plaintiff regarding the structural condition of the premises.”

A. The Seller’s Disclosure Statement.

The Defendants resided in the home for many years.

Two cement block columns supporting the east wall of the basement.

Cracks in the basement walls.

Paint on the top of cement blocks of the basement wall indicating the cracks were present prior to Plaintiff’s purchase of home.

Bowing of the basement walls.

Opinion of Plaintiff’s expert that the structural damage to the house occurred prior to Plaintiff’s purchase and this would have been obvious to its occupants.

Witness accounts of the flooding in the basement.

Defendants argue that the answer to the interrogatory does not indicate any firsthand knowledge of any damage and only indicates what plaintiff believes her expert will be able to establish. Defendants further argue that there are no factual statements establishing how or why the conditions of the property amount to structural damage. Finally, defendants argue that the answer to the interrogatory contains hearsay because plaintiff is stating what her expert is going to state; therefore, the information cannot be considered because only substantively admissible evidence actually proffered can be evaluated in a motion brought pursuant to MCR 2.116(C)(10).

The interrogatory answers indicate plaintiff relied on the disclosure statement, estimates from Everdry of West Michigan and Hydroflo System, photographs of the basement, and letters from defendants and Hydroflo System, in answering the interrogatories. Plaintiff also relied on Fassett.

In *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999), our Supreme Court, clarifying the correct legal standard under MCR 2.116(C)(10), stated that “[t]he reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion.” Testimony regarding the cracks in, and bowing of, the basement walls and flooding would be “substantively” admissible evidence, and defendants’ hearsay argument is without merit because the evidence could be introduced in such a manner as not to create a hearsay issue. We note that plaintiff specified the witnesses expected to be called at trial, including Fassett, Jeff Malcolm from Everdry, and Kerry Sommerson from Hydroflo.

The following interrogatory was also asked and answered:

Q. Identify and itemize the losses you allege in your Complaint. Please also identify any bids and invoices for repairs.

A. Install subsurface drain in the basement to correct the extensive flooding in the basement. \$6,350.00

Estimate to correct bowing of the basement walls by Hydroflo. \$15,000.00

This response further indicated that there were structural and flooding problems with the house. Although defendants denied that any flooding occurred during their ownership, defendants' affidavits indicated that the problem was extensive enough that defendants placed wood block on the basement floor in an attempt to divert water toward the sump pump. Defendants' affidavits and plaintiff's responses to defendants' first set of interrogatories constituted sufficient documentary evidence to create an issue of fact regarding whether defendants' representations were false regarding flooding and structural problems.

We also conclude that there is a material issue of fact regarding whether defendants had the requisite knowledge and intent to be liable for fraudulent misrepresentation. Defendants argue that plaintiff admitted she had no personal knowledge of the defendants having knowledge of any structural and flooding problems at the time of the sale, and defendants note that they submitted affidavits indicating they did not have the requisite knowledge. Defendants' argument lacks merit.

In *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457-458; 559 NW2d 379 (1996), this Court stated that fraudulent misrepresentation may be established by circumstantial evidence. As noted above, the responses to the interrogatories and defendants' affidavits established issues concerning structural problems, such as cracks in, and the bowing of, the basement walls, and flooding and drainage problems. That same documentary evidence, although circumstantial, creates an issue of fact regarding whether defendants were aware of structural and flooding problems. The structural and flooding problems claimed by plaintiff are, by their visibility and very nature, problems that defendants may well have been aware of at the time of the sale, if they in fact existed.

We affirm the trial court's dismissal of plaintiff's innocent misrepresentation claim, reverse the trial court's dismissal of plaintiff's fraudulent misrepresentation claim, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage