STATE OF MICHIGAN

COURT OF APPEALS

DEBRA ROEHL and SANDEEP KHURANA, M.D.,

Plaintiffs-Appellants,

v

HIGBIE MAXON, INC., and MARILYN STANITZKE, a/k/a MARILYN SUNINSKI,

Defendants-Appellees.

UNPUBLISHED
February 15, 2002

No. 221957
Wayne Circuit Court
LC No. 97-737684-CK

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right the orders granting summary disposition in favor of defendants. We affirm.

This appeal arises out of alleged defects in a home in Grosse Pointe Woods bought by plaintiffs, who allege negligence against defendant realtor Marilyn Stanitzke and her employer, defendant Higbie Maxon, Incorporated. Stanitzke represented the sellers of the home, Robert Kuhr and Betty Kuhr. In November 1995, plaintiff Debra Roehl viewed the Kuhrs' house and then hired a home inspection company, who issued an inspection report, which plaintiffs received prior to closing. The report noted several items were in "worse than average" condition.[1] The Seller's Disclosure Statement provided by the Kuhrs, however, reflected no defects. Plaintiffs bought the home and now contend that the realtor defendants should be liable where the Seller's Disclosure Statement did not reflect certain defects.

We first address a jurisdictional argument raised by defendants. Defendants contend that this Court is without jurisdiction to hear plaintiffs' arguments as to the interlocutory orders of summary disposition entered by the circuit court because plaintiffs did not appeal from those orders. Contrary to defendants' assertion, however, a party on appeal from a final order in a civil case is "free to raise on appeal issues related to other orders in the case." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992) (citing *Dean v Tucker*, 182 Mich App

[1] These included the roofing, attic venting, garage's roof, basement smoke alarms and insulation. The inspector noted regarding the garage's structural condition that the 2 x 4's supporting the garage ceiling were "barely strong enough to support the ceiling itself."

27, 31; 451 NW2d 571 (1990)). Further, the cases cited by defendants are distinguishable because the appellants had failed to appeal from the initial final order. Those cases are not dispositive here, where plaintiffs have appealed from the first order that resolved all the claims of all the parties in the action. This Court, therefore, has jurisdiction pursuant to *Bonner, supra*, to review plaintiffs' claims of error.

Plaintiffs contend that the circuit court erred when it ruled that defendants' conduct did not constitute a representation of fact sufficient to constitute common law fraud, silent fraud, or a violation of the Michigan Consumer Protection Act (MCPA), MCL 445.903. We disagree.

Common law fraud requires a showing that: (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. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). As indicated, a representation is a requisite element of common law fraud. Without a representation, a plaintiff may not maintain an action for common law fraud because proof of some false representation made with an intent to deceive is a necessary element of a prima facie case. See *M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

In this case, the parties do not dispute that plaintiffs never directly spoke with Stanitzke before the closing; therefore, Stanitzke made no direct representations to plaintiffs regarding the condition of the house. Plaintiffs thus rely on the "representations" allegedly made by Stanitzke in the Seller's Disclosure Statement. That statement, however, plainly indicates: "The following are representations made solely by the Seller and are not the representations of the Seller's Agent(s), if any." Accordingly, under the statement's own terms, it does not contain representations made by defendants.

Plaintiffs, however, contend that a question of fact may exist as to whether Stanitzke was the scrivener of the Seller's Disclosure Statement, or whether one of the Kuhrs was the scrivener. But that point is not dispositive where, even if Stanitzke was the scrivener, she was provided the information on the Seller's Disclosure Statement by the Kuhrs. This is supported by myriad record facts, including the testimony of Robert Kuhr and Betty Kuhr, who testified that they, not Stanitzke, answered the questions on the Seller's Disclosure Statement.

Further, even if Stanitzke's notations on the Seller's Disclosure Statement could be viewed as a representation, plaintiffs have not shown that Stanitzke knew that the representation was false, or made it recklessly, without knowledge of its truth as a positive assertion, which is a requisite element for common law fraud under *Novak, supra,* and under *Hammond v Matthes*, 109 Mich App 352, 359; 311 NW2d 357 (1981), relied on by plaintiffs. Further, unlike the realtor in *Hammond*, who made direct representations to the plaintiffs, Stanitzke made no such representations to plaintiffs. Thus, the requisite elements for common law fraud are not present.

Additionally, to prove a claim of silent fraud, a plaintiff must show that the defendant made some type of false or misleading representation and that the defendant had a legal or equitable duty of disclosure. *M&D, supra* at 31. Mere nondisclosure is insufficient;

circumstances must exist that establish a legal duty to make a disclosure. *Hord v Environmental Research Inst of MI*, 463 Mich 399, 412; 617 NW2d 543 (2000).

This Court previously has determined, however, that generally no such legal duty exists with regard to real estate agents for sellers. In *M&D, supra*, this Court adopted and reinstated part IV of the Court's prior opinion in the case, which provided:

> We next conclude that the trial court properly dismissed the fraud and misrepresentation claims . . . brought against defendant[s] . . . in their capacity as real estate brokers and licensees.
>
> This Court has recognized that sellers' real estate agents, by virtue of their agency relationship as agents for the sellers, do not have a general duty to disclose to purchasers material defects involving the property. *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988). Real estate agents do, however, remain liable for common-law fraud or misrepresentation based upon false material misrepresentations (necessarily including incomplete or misleading statements creating a false impression) that are made with fraudulent intent. See *Price v Long Realty, Inc*, 199 Mich App 461, 470; 502 NW2d 337 (1993). While *Shimmons* [*v Mortgage Corp of America*, 206 Mich App 27; 520 NW2d 670 (1994), overruled by *M&D, supra*, 231 Mich App 22, 31, 32] holds that a vendor's liability for fraud can be based upon the mere failure to reveal undisclosed defects, we decline to extend the *Shimmons* rule of liability to defendant Relenco's real estate agents. [*M&D, supra* at 813.]

Therefore, real estate agents representing sellers do not have a general duty to disclose to purchasers material defects involving the property. It follows that defendants here had no duty to disclose to plaintiffs defects involving the property. Because no duty exists here, plaintiffs' claim for silent fraud fails as a matter of law.

As to the alleged MCPA violation, plaintiffs did not separately argue this issue and thus have abandoned it on appeal for failure to sufficiently brief the issue. See *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). Even a consideration of the argument on its merits, however, does not offer plaintiffs relief. In a footnote in their brief, plaintiffs assert that their arguments on appeal regarding fraud are identical to their arguments regarding the MCPA. As indicated above, the circuit court correctly granted summary disposition to defendants on the issue of fraud. Where Stanitzke made no representations and had no legal duty, liability likewise cannot attach under the MCPA. Accordingly, the circuit court properly granted summary disposition on this issue.

Plaintiffs next contend that the circuit court erred in ruling in favor of defendants on the negligence claim, arguing that defendants need not have had actual knowledge of the defects to be liable. We note initially that the circuit court denied plaintiffs' motion to amend their complaint (for the third time) to add a claim under the Seller's Disclosure Act, MCL 565.955, and that plaintiffs do not challenge that ruling on appeal. Further, plaintiffs do not argue that

defendant Stanitzke did not exercise ordinary care, which is required under that statute.[2] Plaintiffs contend that Stanitzke had the duty of "reasonable inquiry," but provide no authority to support that argument. Under these circumstances, this Court will not search for authority to support a party's position. See *Great Lakes Div of Nat Steel Co v Ecorse*, 227 Mich App 379, 425; 576 NW2d 667 (1998). Plaintiffs' claims against defendants under the Seller's Disclosure Act thus are not sustainable on appeal.

Regarding plaintiffs' common law negligence claims, a prima facie case of negligence requires a showing that:

> (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. [*Koester v VCA Animal Hosp*, 244 Mich App 173, 175; 624 NW2d 209 (2000).]

Duty has been defined as "an obligation that the defendant has to the plaintiff to avoid negligent conduct." *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997). Whether a duty exists is a question of law. *Meek v Dep't of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000). If a court determines as a matter of law that a defendant owed no duty, summary disposition is appropriate. *Terry, supra* at 424.

The question of duty turns on the relationship between the actor and the injured person. *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 668; 593 NW2d 578 (1999). The relationship between the parties here is based on the sale of land where plaintiffs were the purchasers and defendants represented the sellers. Our Supreme Court has examined the duty relationship surrounding the sale of land in *Christy v Prestige Builders, Inc*, 415 Mich 684; 329 NW2d 748 (1982), a case cited by both parties. The Court ruled that generally, the seller has no duty regarding defects at the time of sale:

> Under the common law, a land vendor who surrenders title, possession, and control of property *shifts all responsibility for the land's condition to the purchaser*. Caveat emptor prevails in land sales, and the vendor, with two exceptions, is not liable for any harm due to defects existing at the time of sale. [*Id*. at 694 (emphasis supplied).]

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[2] MCL 565.955(1), provides in pertinent part:

> 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 this information.** [Emphasis added.]

> The first exception is the vendor's duty to disclose to the purchaser any concealed condition known to him which involves an unreasonable danger. Failure to make such a disclosure or efforts to actively conceal a dangerous condition render the vendor liable for resulting injuries. The second exception is that a vendor is liable to those outside the land for a dangerous condition on the land after the sale until the purchaser discovers or should have discovered it. Once the purchaser discovers the defect and has had a reasonable opportunity to take precautions, third parties such as subvendees have no further recourse against the vendor. Under both exceptions, then, knowledge of the defect on the part of the purchaser relieves the vendor of any duty or liability. [*Id.* at 694-695.]

Thus, the vendor must have known of the concealed condition that involves an unreasonable danger. In this case, assuming that this statement would apply to defendants as agents, rather than a vendor, plaintiffs have not shown that defendant Stanitzke knew of any of the conditions. The record does not contain facts reflecting that the home had any outward evidence of a carpenter ant infestation of which Stanitzke was aware. Betty Kuhr testified that she had not told defendant Stanitzke about the alleged defects; Robert Kuhr testified in the same vein. The record does not reveal that Stanitzke knew of the asbestos floor tiles or the leaky pipes. Because the record contains no evidence reflecting that defendants knew of the conditions, no genuine issue of material fact precludes summary disposition here. Although plaintiffs assert that defendants should have known or had a duty to inquire, those bare assertions do not overcome the rule set forth in *Christy, supra*.

This issue, therefore, does not provide a basis for relief for plaintiffs. The circuit court correctly ruled that no genuine issue of material fact existed that defendants had no actual knowledge of the defects; pursuant to *Christy*, *supra*, defendants, therefore, are not liable in negligence.

Affirmed.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White