STATE OF MICHIGAN

COURT OF APPEALS

THOMAS MCGRATH and SERENE MCGRATH,

Plaintiffs-Appellants,

v

COREY WEBBER,

Defendant-Appellee.

UNPUBLISHED
July 20, 2004

No. 244300
Oakland Circuit Court
LC No. 00-028002-CH

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

After plaintiffs purchased a home from defendant, they brought suit alleging fraud, innocent misrepresentation and silent fraud, claiming that defendant failed to disclose defects and misrepresented various aspects of the home. Following a jury trial, the trial court directed a verdict in plaintiffs' favor on their fraud claim relating to the home's outdoor deck. Plaintiffs appeal as of right the jury's verdict of no cause of action on their claims regarding defects in the home's foundation and plumbing. We affirm.

Plaintiffs first claim that the trial court erred in denying their motion for summary disposition on their claims of fraud concerning the plumbing. We disagree. A necessary element of fraud is that the defendant made a material representation that was false. *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). A claim of innocent misrepresentation also requires a misrepresentation, but the party alleging it need not prove that the party making the representation knew it was false. *Id.* at 28. Plaintiffs claim that defendant misrepresented the condition of the home by saying there were "no problems" with the home, even though defendant had received notice of a class action lawsuit concerning acetyl fittings for polybutylene plumbing systems. However, both parties agreed that the plumbing never actually failed and that acetyl fittings were not used for the plumbing. Thus, a question of fact existed whether defendant's statement that there were "no problems" with the home was false.

Plaintiffs also claim that defendant misrepresented the condition of the home's plumbing by writing "copper and PVC" on the seller's disclosure form. However, plaintiffs had the home inspected before purchase, and the plumbing was visible. This Court has held that an action for fraud will not lie where the means of discovering the truthfulness of a representation are available. *Nieves v Bell Industries Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Thus,

plaintiffs cannot maintain an action for fraud based on defendant's failure to disclose the composition of the plumbing because such was readily discoverable.

Plaintiffs also claim that defendant committed silent fraud because he knew he had a dangerous and defective polybutylene plumbing system and failed to disclose it. We disagree. An action for silent fraud can only lie where there is a duty to disclose information. *McConkey*, *supra* at 29. Such a duty can arise, when a buyer makes a *particularized inquiry* about the matter in question. *Id*. at 31. In the instant case, plaintiffs inquired about "problems or concerns with the home" in general, but not about the plumbing system in particular. Thus, plaintiffs' general inquiry did not impose an equitable duty on defendant to disclose information about the plumbing system.

Plaintiffs rely on the seller disclosure act (SDA), MCL 565.951 *et seq*., as imposing a legal duty on defendant to disclose known conditions affecting the property. The SDA requires "disclosure of the condition and information concerning the property, *known by the seller*." MCL 565.957 (emphasis added). In the instant case, there was a question of fact whether defendant had knowledge that the plumbing was defective. Despite having received notice of a lawsuit concerning the failure of acetyl fittings, the home did not have these fittings and defendant claimed he never had problems with his plumbing and that it was in perfect working order. Although plaintiffs' expert witness, a licensed builder, testified that a polybutylene plumbing system detracts from a home's value and should be disclosed to a purchaser, it was a question for the jury whether defendant could be charged with this knowledge.

Similarly, plaintiffs' claim of silent fraud concerning the plumbing of the ground-floor bathroom was not ripe for summary disposition. Because plaintiffs never specifically inquired about the plumbing, defendant had no equitable duty of disclosure. Under the SDA, defendant was only legally required to disclose *known* conditions affecting the property, MCL 565.957. Defendant testified that he had no expertise in plumbing and did not know that a permit was required for the work. Nor was defendant aware whether his stepfather, who did the plumbing, was licensed.

Next, plaintiffs claim that the trial court erred in denying their motion for a directed verdict on the claims pertaining to the polybutylene plumbing. We disagree. Directed verdicts are only proper when there is no factual question about which reasonable minds could differ. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). Here, plaintiffs presented expert testimony from a licensed builder, a realtor, and a master plumber concerning the polybutylene plumbing system and its effect on the home's value. However, plaintiffs' evidence did not settle the factual questions. Plaintiffs' proofs did not irrefutably establish that defendant made a false statement when he said there were "no problems" with the home. A master plumber testified that even home inspectors are not generally knowledgeable about the problems associated with polybutylene plumbing. It was a question of fact for the jury whether defendant should have been charged with knowledge of the defective nature of polybutylene plumbing systems based on the notice of the lawsuit.

As for plaintiffs' silent fraud claim regarding the bathroom, the SDA does not require disclosure of information not within the personal knowledge of the seller. MCL 565.955(1). Plaintiffs' proofs at trial were of plumbing work having been done by an unlicensed person, the bathroom plumbing was substandard and would not pass a code inspection, plus evidence of

costs plaintiffs alleged they incurred. However, none of this evidence resolved the factual question whether defendant had knowledge at the time of the sale that the work was done by an unlicensed individual without the necessary permit. Thus, there was a question of fact for the jury that precluded a directed verdict.

Next, defendant claims the trial court erred in failing to grant judgment notwithstanding the verdict (JNOV) regarding the plumbing, and a new trial. We disagree. Only if the evidence fails to establish a claim as a matter of law should a motion for JNOV be granted. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). As already discussed, defendant raised legitimate questions of fact regarding plaintiffs' claims concerning the plumbing, which the jury decided in defendant's favor. JNOV was not warranted.

As for plaintiffs' claims concerning the cracks in the crawl space, there was evidence from which a jury could find that defendant did not know about the cracks and leaks in the crawl space. First, plaintiffs testified that the leaking was discovered after a "torrential" rainfall accompanied by news reports of flash flooding. From this evidence, a jury might reasonably infer that the foundation only leaked during especially heavy storms. Second, the evidence showed that defendant used the crawl space extensively for storage of personal belongings, including a velour couch, photographs, clothing, and wedding gifts. Defendant testified that he would not have risked damage to these belongings if he had known of the cracks and leaks. In fact, the crawl space was so full of defendant's belongings that the house inspector plaintiffs hired could not inspect it. A reasonable jury could infer from this that defendant did not go into the crawl space on a regular basis. Third, the cracks were covered by insulation, which prevented easy visual inspection of the walls. Finally, the home was owned by someone else for six years before defendant bought it, so cracks, leaks, and previous repairs to the foundation could have occurred before defendant owned the home. In fact, the builder testified that he built fifty houses in the same subdivision and hired a subcontractor to repair foundation cracks in some of them. Therefore, we conclude that defendant's claims were not unsupportable as a matter of law, and the trial court did not err in denying plaintiffs' motion for JNOV and a new trial.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White