STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY L. ANTEAU and DIANE J. ANTEAU, Plaintiff-Appellees, v OAKLAND PEST CONTROL, LLC, Defendant-Appellant.	UNPUBLISHED August 17, 2004 No. 246513 Macomb Circuit Court LC No. 2001-002929-NO

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant appeals by leave granted from the opinion and order that denied its motion for summary disposition with regard to plaintiffs' implied contract claims, reinstated plaintiffs' negligence claim, and denied defendant's motion in limine. We reverse.

Plaintiffs purchased a home located in Chesterfield. Because the home was being financed through a Veterans Administration mortgage, plaintiffs understood that a pest inspection was required by the mortgage company, Lincoln Title. On October 13, 2000, before the closing, Darrell Seelinger, defendant's owner, inspected the home and issued a report that stated that "no visible evidence of wood destroying insect infestation was observed." Plaintiffs alleged that based on this report, they proceeded to close on the home. However, after moving into the home, plaintiffs found that the home was infested with powder post beetles. Plaintiffs alleged that defendant was negligent in failing to inspect the home and breached a contract by falsifying the inspection report.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). The trial court, at this time Judge Mark S. Switalski, granted defendant's motion with regard to the negligence claim, pursuant to MCR 2.116(C)(8). The trial court reasoned that it was well settled that an action in contract cannot also support an action in tort where no duty arose that was separate and distinct from the contractual obligation. The trial court denied defendant's motion with regard to the contract claim. The trial court stated that although defendant argued that the contract had been between itself and the title company, plaintiffs maintained that they were entitled to recover under an implied contract or third-party beneficiary theory. The trial court concluded that the "interest of justice" would be furthered by granting plaintiffs an opportunity to amend their pleading pursuant to MCR 2.118(A)(2).

Plaintiffs filed an amended complaint, pursuant to the trial court's above ruling, in which they alleged breach of an implied contract in fact, breach of an implied contract in law, and a third-party beneficiary claim. Defendant again moved for summary disposition. The trial court, now Judge Diane M. Druzinski, found that the "Wood Destroying Insect Infestation Report," the only document on which the parties relied, did not constitute a contract. The trial court stated that the report merely set forth the inspector's findings and served as a disclosure form. The trial court also found that there were outstanding factual issues regarding whether the parties had entered into an implied contract in fact or law and whether defendant had breached such a contract by failing to perform the pest inspection in an adequate manner. Therefore, the trial court denied defendant's motion with regard to the implied contract claims, but granted defendant's motion with regard to the third-party beneficiary claim. The court reinstated plaintiffs' negligence claim.

Defendant contends that the trial court erred by denying its motion for summary disposition concerning plaintiffs' implied contract claims. Plaintiffs expressly state in their appellate brief that they do not contest defendant's argument and that they abandon any claims of implied contract. Therefore, we address this issue no further.

Defendant next contends that Judge Druzinski, the successor judge, committed error mandating reversal by reversing Judge Switalski's previous ruling on the negligence claim. We disagree.

"[I]nterpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo." *CAM Constr v Lake Edgewood Condominium Ass'n,* 465 Mich 549, 553; 640 NW2d 256 (2002). Our Supreme Court has articulated the following mode of interpreting a court rule:

> When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. *McAuley v General Motors Corp,* 457 Mich 513, 518; 578 NW2d 282 (1998)[, overruled on other grounds in *Rafferty v Markovitz,* 461 Mich 265 (1999)]. Accordingly, we begin with the plain language of the court rule. When that is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. See *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135; 545 NW2d 642, (1996). Similarly, common words must be understood to have their everyday, plain meaning. See MCL 8.3a . . . ; see also *Perez v Keeler Brass Co,* 461 Mich 602, 609; 608 NW2d 45 (2000). [*CAM Constr, supra,* 554.]

MCR 2.604 provides the following:

> (A) Except as provided in subrule (B), an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. Such an order or other form of decision is not appealable as of right before entry of final judgment. A party may file an application for leave to appeal from such an order.

The plain language of this court rule provides that an order that adjudicates fewer than all the claims in the case may be subject to revision before entry of final judgment. See *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997), where this Court stated that "a prior denial of summary disposition is not dispositive of this issue because an order entered by a trial court may be modified before entry of the final judgment, and a successor judge, as in this case, is empowered to make a revision to reflect a more correct adjudication of the rights and liabilities of the litigants."

With respect to the issue at hand, final judgment had not been entered. Thus, pursuant to the plain language of MCR 2.604 and this Court's ruling in *Meagher, supra*, Judge Druzinski, the successor judge, could revise Judge Switalski's previous order.

Defendant further contends that apart from the procedural irregularity discussed above, the trial court erred in reinstating plaintiffs' negligence claim. In determining whether a plaintiff can maintain a tort action, the threshold inquiry is whether the plaintiff alleges a violation of a legal duty separate and distinct from a contractual obligation. *Rinaldo's Constr Co v Michigan Bell Telephone Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). In *Rinaldo*, the Court found that the plaintiff did not set forth a cognizable cause of action in tort. *Id.*, 85. Our Court stated:

> In this case, as in *Hart* [*v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956)], the defendant agreed to provide the plaintiff with services under a contract. Like the defendant in *Hart*, Michigan Bell allegedly failed to fully perform according to the terms of its promise. While plaintiff's allegations arguably make out a claim for "negligent performance" of the contract, there is no allegation that this conduct by the defendant constitutes tortious activity in that it caused physical harm to persons or tangible property; and plaintiff does not allege violation of an independent legal duty distinct from the duties arising out of the contractual relationship. Like the plaintiff in *Valentine* [*v Michigan Bell Telephone Co*, 388 Mich 19, 22; 199 NW2d 182 (1972), abrogated on other grounds by *Travelers Ins Co v Detroit Edison Co*, 465 Mich. 185 (2001)], "regardless of the variety of names [plaintiff gives the] claim, [plaintiff is] basically complaining of inadequate service and equipment . . . ." Thus, under the principles outlined above, there is no cognizable cause of action in tort. [*Rinaldo's, supra*, 85.]

This Court has recently reiterated that the above case law expressly provides that an action in tort may not be maintained where a contractual agreement exists, unless a duty, separate and distinct from the contractual obligation, is established. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 52; 649 NW2d 783 (2002).

Defendant argues that plaintiffs did not allege a duty separate and distinct from the alleged contractual obligation. The trial court, on the other hand, found that because the inspection report did not constitute a contract, the interest of justice would be served by reinstating the negligence claim. Therefore, the first issue that we need to address is whether an express contract existed in the case at hand.

"In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

The essence of consideration is "legal detriment that has been bargained for and exchanged for the promise." *Higgins v Monroe Evening News,* 404 Mich 1, 20; 272 NW2d 537 (1978).

In the case at hand, we conclude that the trial court did not err in finding that the inspection report did not constitute a contract. This report does not set forth the above elements necessary for a valid contract. Because there was no contractual duty between plaintiffs and defendant to perform this inspection, the next question is whether the trial court correctly ruled that the negligence claim should be reinstated. Defendant cites *Palmer v Orkin Exterminating Co, Inc,* 871 F Supp 912 (SD Miss, 1994), and *Orkin Exterminating Co, Inc v Steven,* 130 Ga App 363; 203 SE2d 587 (1973), to support its contention that the negligence claim should not have been reinstated.

In *Palmer, supra,* 912-913, the plaintiff contracted with Orkin for its exterminating services. Orkin treated the home pursuant to the contract and then issued the plaintiff a "Re-treatment Guarantee" that provided that Orkin would re-treat the plaintiff's home in the event of further termite activity, but expressly limited Orkin's liability to re-treatment. *Id.*, 913. A few years later, after several re-treatments by Orkin, termites were still apparent in areas of the plaintiff's home, and this prompted her to request the assistance of the State Department of Agriculture. *Id.* The plaintiff filed suit, alleging breach of contract and negligent breach of contract. *Id.* The district court found that the negligence that plaintiff attributed to Orkin stemmed directly from the duties imposed by the contract, not from any duty owed to the plaintiff independent of the contract. *Id.*, 914.

In *Stevens, supra,* 589, Stevens contracted with Orkin for control of subterranean termites in his home. Stevens brought a negligence suit against Orkin to recover for new termite damage to portions of the house not involved in the initial termite infestation. *Id.* The Georgia Court of Appeals found that the plaintiff's tort claim failed because there was no cause of action. *Id.*, 591. That court stated that the only duty Orkin was claimed to have failed to perform "was its contract duty to treat the premises in such a way as to control renewed termite infestation." *Id.* Therefore, the court stated that "this may be regarded as a case of nonperformance of a contract obligation, and as such falls within the ambit of the above stated rule that mere failure to perform a contract obligation -- or inaction -- gives rise to no claim in tort." *Id.*

These cases can be distinguished in that the plaintiffs in these two cases contracted directly for the exterminating services for their homes they already owned; thus, the courts found that the duties attributed to Orkin stemmed directly from the contracts. In the case at hand, plaintiffs did not hire defendant or enter into a contract for the inspection of the home plaintiffs were intending to purchase.

Defendant states that "[a]bsent a contractual obligation, Michigan law does not recognize a duty of pest inspection and disclosure." We have found no case law recognizing or rejecting such a duty. We acknowledge that there is case law from other jurisdictions recognizing that a pest control operator owes the purchaser of a home a duty of reasonable care, competence, or skill in ascertaining facts in a termite inspection report, even though the purchasers are not a party to the contract and have no direct or indirect contact with the inspector. See *Osborne v Ladner,* 691 So 2d 1245, 1255 (La App, 1997); see also, generally, *Fessler v Quinn,* 143 Ore App 397, 401-403; 923 P2d 1294 (1996).

Even if we were to find that a pest control operator owes the purchaser of a home a duty of reasonable care, competence, or skill in ascertaining facts in a pest inspection report, we conclude that plaintiffs failed to produce evidence to create a genuine issue of material fact regarding whether defendant's inspection of the home was negligent. Seelinger stated the following in his affidavit:

> 4. On or about October 13, 2000, I conducted a pest inspection at 48061 Sugarbush in Chesterfield Township, Michigan. During my inspection, I inspected all accessible areas, and found no evidence of pest infestation.
>
> 5. I did not inspect the crawlspace beneath the house that day. However, at the time of the inspection, I was unaware that the house contained a crawl space.
>
> 6. At no time prior to or during its engagement was OPC or any of its employees requested to inspect the crawlspace beneath the home. At no time was OPC or any of its employees advised there was a crawlspace beneath the home.

Plaintiffs' deposition testimony acknowledges that the crawl space was covered by a steel cover. Plaintiff Diane Anteau testified that somebody would have to point out the entry to the crawl space in order to know that one existed.

In addition, plaintiffs failed to produce evidence that there was an active infestation of termites on the date of inspection that should have been detected by a visual inspection. The inspection report states that "[t]his report is indicative of the condition of the subject structure(s) *on the date of the inspection only*. . ." Plaintiff Jeffrey Anteau stated that in June 2000, he inspected the home, including the crawl space for moisture. Plaintiff was asked if he noticed any damaged wood in the crawl space at this time, and he stated "No." Plaintiff was further asked:

> *Q.* Yes. Now, you claim you didn't see the damage to the house prior to closing, correct?
>
> *A.* Correct.
>
> *Q.* So it's fair to say that you cannot testify as to what damage existed and the extent of that damage when Oakland Pest control went out to the house to do their inspection, correct?
>
> *A.* I cannot say what the damage was when he showed up to do the initial inspection.
>
> *Q.* That's what my question --
>
> *A.* That's what you're asking?
>
> *Q.* Yes.
>
> *A.* No, I can't say that.

We acknowledge that Paul McGregor, a residential builder, was asked, "When let's say when you first get powder post beetles at your house, how long it might take to get some damage, how quickly they work, in other words," and McGregor responded, "Oh years. Years." While McGregor's testimony indicates that the home had powder post beetles for years, it does not demonstrate that damage from the beetles was evident in the crawl space in October 2000, when the inspection occurred. Therefore, we conclude that Judge Druzinski erred in reinstating the negligence claim.

Finally, defendant contends that the trial court erred by failing to enforce the limitation of liability provision in the inspection report. Because all of plaintiffs' claims have been dismissed, this issue is moot. *Jackson v Thompson-McCully Co*, 239 Mich App 482, 493; 608 NW2d 531 (2000).

Reversed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter