Court of Appeals, State of Michigan

ORDER

Gerald Kobetic v Marc Corbat

Docket No. 279065

LC No. 06-003349-CH

Henry William Saad
Presiding Judge

Karen M. Fort Hood

Stephen L. Borrello
Judges

On its own motion, the Court orders that the Opinion issued July 17, 2008, is hereby VACATED. A new Opinion will issue.

Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 29 2008
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

GERALD KOBETIC and FRANCES KOBETIC, Plaintiffs-Appellants,	UNPUBLISHED July 17, 2008
v	No. 279065 Bay Circuit Court
MARC CORBAT and DENISE CORBAT, Defendants-Appellees.	LC No. 06-003349-CH

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This matter originates from defendants' November 2003 sale of a house to plaintiffs. Defendants constructed the home in 1993 and resided in it until August 2003. In the spring of 2004, during the first heavy rain after plaintiffs acquired the home, the roof noticeably leaked from three different locations. In May 2006, plaintiffs filed a complaint alleging fraudulent, innocent, and negligent misrepresentation and breach of contract arising out of defendants' purported failure to disclose the roof leaks that caused them to incur damages. The trial court granted defendants' subsequent motion for summary disposition pursuant to MCR 2.116 (C)(10), stating that "there is no material factual dispute that creates an issue that is triable to the jury" and that

> it just hasn't been developed by the pleadings or in the discovery or in any of the documentation that's been submitted to the Court that there is any kind of misrepresentation whether it be fraudulent, negligent, innocent or anything. And that there is no fact of record to support the claim that the Seller's Disclosure Statement was filled out in any manner other than a full disclosure of the facts as the defendants knew them at the time the form was filled out.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337, 572 NW2d 201 (1998). Summary disposition pursuant to MCR 2.116(C)(10) assesses the factual support for a claim. MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Plaintiffs' claims arise out of statements and purported omissions in the seller's disclosure statement provided to them by defendants. Pursuant to the Seller Disclosure Act (SDA), MCL 565.951 *et seq*., sellers have a legal duty to disclose, in "good faith," certain conditions of their home to prospective buyers. See MCL 565 .957 and MCL 565.960. In the event that the disclosures are fraudulently made, a buyer may maintain an action for fraud against the sellers. *Bergen v Baker*, 264 Mich App 376, 385; 691 NW2d 770 (2004).

A claim for fraudulent misrepresentation or actionable fraud generally 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." [*M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (*M & D II*), quoting *M & D, Inc v McConkey*, 226 Mich App 801, 806; 573 NW2d 281 (1997).]

Under the silent fraud doctrine, a cause of action "is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure." *M & D II*, *supra* at 35-36.

Under the SDA, defendants were expressly required to disclose whether the roof leaked. MCL 565.957(1). The SDA places no time limitation on disclosures of leaks. The seller's disclosure statement provided by defendants indicated that water entered the roof "several years ago" when a soffit was blown off. This statement, in and of itself, cannot be deemed a misrepresentation in relation to plaintiffs' claims. The problem arises from the accompanying explanatory language: "1x incident-repaired."

A reasonable interpretation of the seller's disclosure statement is that there had been a single leak in the past but that it had been wholly rectified. A reasonable mind could also conclude that any leak in the roof was restricted to where a soffit had previously become detached. The record, however, suggests otherwise.

First, multiple obvious leaks in the roof were discovered by plaintiffs upon the first significant rainfall after they purchased the home from defendants. When viewed in a light most favorable to plaintiffs, the immediacy and extent of the leaking is sufficient to cause a reasonable

fact finder to infer that the leaks were in existence and known about by defendants but that they impermissibly failed to disclose them on the seller's disclosure statement.

Furthermore, there is no reference in the seller's disclosure statement to leaks in the valley of the roof. Instead, defendants represented that they were not aware of any leaks aside from the leak remedied by the repair to the soffit. However, a letter addressed to defendants from their insurance company in connection with an insurance claim filed by them at the time the soffit was damaged in 1998 suggested the existence of a separate leak originating from the valley of the roof. Notably, two distinct repairs were listed in that correspondence: one for "soffit metal" and one for "roofing repair." Also, a log from the insurance company shows that in June of 1998, an agent, while accompanied by defendants, inspected the roof of the home and noted damage to the soffit in addition to a "small leak" on the ceiling of the sitting room originating from the "leak from [the] valley of [the] roof."

Additionally, plaintiffs submitted an affidavit wherein a home inspector noted evidence of "prior roof leaks that were not properly repaired." Because defendants constructed the home and were the sole owners prior to plaintiffs, it is likely that any previous roof leaks or attempted repairs were known about or made by them. Defendants, however, did not make mention in the seller's disclosure statement of these leaks or to any problems with the roof other than the damage related to the soffit. This too is sufficient to establish a genuine issue of material fact that defendants made a material representation concerning the condition of the roof, that the representation was false, and that, when defendants made the representation, they knew that it was false.

Finally, defendants suggest that they are not liable to plaintiffs for the condition of the roof because the home was sold "as is." This argument is without merit if it is found that misrepresentations were made by defendants in the seller disclosure statement. "[I]f a seller makes fraudulent representations before a purchaser signs a binding agreement, then an 'as is' clause may be ineffective." *M & D II*, *supra* at 32; see also *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993). The "as is" clause in the purchase agreement does not insulate defendants from liability where they have made fraudulent representations in connection with the sale of the property. *Bergen*, *supra* at 390 n 5; see also *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994).

Plaintiffs demonstrated a genuine issue of material fact as to whether defendants made actionable misrepresentations in the seller's disclosure statement they provided to plaintiffs. Whether actionable misrepresentations were indeed made and whether plaintiffs reasonably relied on those misrepresentations and sustained damages as a result are matters for the trier of fact to resolve. Accordingly, defendants were not entitled to judgment as a matter of law.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello