

STATE OF MICHIGAN
COURT OF APPEALS

DR. CHARLES GABE and MEI LAI GABE,

Plaintiffs-Appellants,

v

JAMES VLK and WENDY WARK,

Defendants-Appellees.

UNPUBLISHED

February 3, 2009

No. 282843

Oakland Circuit Court

LC No. 2007-085751-CK

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7), in this fraud, negligence and breach of contract action. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

We review the trial court's grant of summary disposition de novo on appeal. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008); *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). In reviewing a grant of summary disposition under MCR 2.116(C)(7), we must accept the non-moving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to decide whether any factual development could provide a basis for recovery. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

Plaintiffs argue the trial court erred in finding that their claims were barred by an Addendum to the Purchase Agreement (a release) they signed prior to closing on the sale of the house in question. Specifically, plaintiffs claim the report prepared by Sanit Air supports their position that defendants fraudulently misrepresented the facts regarding the water intrusions and fraudulently concealed the hidden defects. Plaintiffs further assert that they would not have executed the contract if full facts had been disclosed and that defendants breached the contract by failing to disclose the material defects. Finally, plaintiffs claim the report creates a material issue of fact as to the validity of the release. We disagree.

Summary disposition is properly granted if there has been a release. MCR 2.116(C)(7). "A release is valid if it is fairly and knowingly made." *Brooks v Holmes*, 163 Mich App 143, 145; 413 NW2d 688 (1987), citing *Denton v Utley*, 350 Mich 332, 342; 86 NW2d 537 (1957); *Trongo v Trongo*, 124 Mich App 432, 435; 335 NW2d 60 (1983). Accelerated judgment is

improper when there is a material issue of fact as to the validity of the release. *Trongo, supra*, 435. A release will be found to be invalid if the releaser was acting under duress, there was a misrepresentation regarding the nature of the release agreement, or there was overreaching or fraudulent conduct to secure the release. *Brooks, supra*.

Fraudulent misrepresentation or actionable 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 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).]

A cause of action for silent fraud 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. To establish silent fraud, that has to be some form of misrepresentation, either by words or action. *Id.* at 36. Courts will not hesitate to allow recoveries where the truth is suppressed with the intent to defraud. A plaintiff must show some type of representation that was false or misleading that was intended to deceive. *Lorenzo v Noel*, 206 Mich App 682, 683-684; 522 NW2d 724 (1994).

Plaintiffs were provided with two separate seller disclosure statements that disclosed water issues in the basement. Plaintiffs’ home inspector also noted evidence of water intrusion in the north basement window. Unlike the purchasers in *Brooks, supra*, where this Court upheld the trial court order granting summary disposition because the purchaser never alleged fraud of mistake in signing the release, plaintiffs did plead such facts herein. However, contrary to plaintiffs’ assertion, Sanit Air’s report of mold, etc., and prior water intrusions in the basement merely supported defendants’ two disclosure statements. It did not put in question the veracity of the disclosures. To the extent that Sanit Air discovered mold and water damage behind walls, defendants were under no duty to disclose issues 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.” MCL 565.955(1).

Accordingly, the trial court properly determined that plaintiffs’ claim was barred by the release they signed prior to closing on the purchase of the house pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra