

STATE OF MICHIGAN
COURT OF APPEALS

JANELLA SIUDA and ERVIN SIUDA,

Plaintiffs-Appellants,

v

RICHARD J. TOBIN, d/b/a DREAMLAND
HOMES,

Defendant-Appellee,

and

NEW ERA MODULAR HOMES,

Defendant.

UNPUBLISHED
September 29, 2009

No. 285618
Cass Circuit Court
LC No. 07-000063-CZ

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiffs Janella Siuda and Ervin Siuda appeal as of right from a circuit court order that granted summary disposition to defendant Richard Tobin, d/b/a Dreamland Homes, pursuant to MCR 2.116(C)(7) on the basis of a one-year limitation period in the parties' contract. We affirm. We decide this appeal without oral argument.¹

I. Basic Facts And Procedural History

The parties entered a purchase agreement on November 28, 2003, for the sale of a four-piece modular home. The purchase agreement states, "Any action brought by the Purchaser against the Retailer of the home and any action brought by the Purchaser against any employee, owner, officer or agent of the Retailer of the home, whether based in tort, based in contract or based on any other legal or equitable theory, must be brought and filed no later than one year from the date of the sale of the home."

The Siudas filed their complaint in this action on February 7, 2007. They alleged that the materials for the home's construction arrived at the site in March or April 2004. But before it

¹ MCR 7.214(E).

was assembled, the interior was exposed to the weather and water damage. The Siudas claimed that the home was poorly constructed in numerous respects. They asserted that Tobin breached the contract to build the home in a professional manner and that Tobin fraudulently concealed defects. (The Siudas' claim against New Era for negligently recommending Tobin was dismissed by the trial court and is not at issue in this appeal.)

Tobin moved for summary disposition on the basis of the one-year limitations period provided in the purchase agreement. In response, the Siudas filed a "Motion in Opposition" that, in a conclusory manner, stated that Tobin waived enforcement and was estopped by fraudulent concealment or "Continuing Wrong," that the provision was against public policy and would be unconscionable to enforce, and that Tobin entered into a new contract to repair by promising that he or his insurance company would take care of the problems. The Siudas attached Janella Siuda's deposition in its entirety but did not reference any specific testimony or cite to any pages of it. The trial court granted Tobin's motion for summary disposition and explained its reasons for rejecting the Siudas' arguments in avoidance of the provision as follows:

I know the plaintiff raises a whole slew of other arguments here. The only one that really has any relevance I guess is the fact that there hasn't been any waiver, I mean, there's no agreement by the parties to change this limitation, and I don't find any waiver by their conduct. The continuing wrongs theory that the plaintiff presents is not even applicable to this type of action. So his primary thrust is this is fraudulent concealment, and I don't accept that. I don't think the record supports it, but even if it did the statute requires that an action pursuant to fraudulent concealment be brought within two years of discovery or when the parties should have discovered it. Well, you know, when you move in December '04 and you have a lot of problems and complaints about it and you recognize or discover that there are issues and you don't file suit for over two years from then, that is, until February '07, you haven't satisfied the Statute of Limitations set forth in the Fraudulent Concealment Statute, that's Section 5855, MCL 600.5855.

The bottom line is the parties agreed in their contract to a one-year Statute of Limitations, which has not been followed, so the Court grants summary disposition on the defendant's motion pursuant to 2.116(C)(7).

II. Summary Disposition

A. Standard Of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition.²

B. The Time-Limitation Provision Of The Purchase Agreement

The trial court correctly rejected the Siudas' attempts to avoid the effect of the unambiguous and comprehensive provision in the parties' purchase agreement. The Siudas have

² *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005).

not shown a public policy clearly rooted in the law that prohibits this type of limitation.³ The Siudas rely on the various statutes of limitations that would otherwise have been applicable. However, if the existence of longer limitations periods that would have been applicable were adequate to show a public policy against an agreement for a shorter period, then all agreements to shorten limitations periods are against public policy. This result would be contrary to the holding in *Rory*.

The Siudas contend that Tobin waived the provision by promising to take care of everything. The assurance is not clear and convincing evidence of Tobin agreeing to forego the benefit of the restriction on bringing suit.⁴

C. Estoppel

The Siudas contend that, because of Tobin's conduct, he should be estopped from asserting the limitations period as a defense. For equitable estoppel to apply, the Siudas must establish that (1) Tobin's acts or representations induced them to believe that the limitations period clause would not be enforced, (2) they justifiably relied on this belief, and (3) they were prejudiced as a result of their reliance on their belief that the clause would not be enforced.⁵ In this case, there is no evidence that the Siudas had a belief that the limitations clause would not be enforced. The Siudas' belief as to the enforceability of the provision or even its existence was not mentioned in the evidence that was presented. Moreover, Tobin's actions and representations with respect to the repairs provided no basis from which the Siudas could have formed a belief about whether Tobin would enforce the time limitation.

D. Unconscionability

Finally, under the heading, "UNCONSCIONABILITY," the Siudas state that enforcing the provision would "lead to a result that should shock the court's conscience" because of the severity of the economic loss suffered by the Siudas. Both procedural and substantive unconscionability must be present for a provision to be considered unconscionable.⁶ The Siudas' argument premised on the extent of their loss is misguided. They have not argued, much less established, that they had no realistic alternative to purchasing the modular home from defendant.⁷ Moreover, the analysis of substantive unconscionability depends on the inequity of

³ See *Rory v Continental Ins Co*, 473 Mich 457, 470-471; 703 NW2d 23 (2005).

⁴ See *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 365; 666 NW2d 251 (2003).

⁵ *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008).

⁶ *Clark*, *supra* at 143.

⁷ Cf., *Liparoto Constr Co, Inc v Gen Shale Brick, Inc*, ___ Mich App ___, ___ NW2d ___ issued May 21, 2009 (Docket No. 282920) (concluding the plaintiff failed to present evidence of procedural unconscionability, for instance that it was unable to purchase bricks from another supplier or that the defendant was unwilling to provide brick under different terms).

the contractual term sought to be avoided,⁸ which in this case is the time limitation. The extent of the loss allegedly sustained by the Siudas is immaterial to the inequity of that term.

Because the Siudas failed to show that the time limitation should not be enforced, we conclude that the trial court correctly granted summary disposition to Tobin.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

⁸ *Clark, supra* at 144.