Court of Appeals, State of Michigan

ORDER

LORINDA HAINES V MAPLE ISLAND ESTATES INC

Docket No. 285849

LC No. 07-057672-CK

Patrick M. Meter
Presiding Judge

William B. Murphy
Chief Judge

Brian K. Zahra
Judge

The Court orders that the December 3, 2009 opinion is hereby AMENDED. The opinion contained a clerical error on page 2 of the opinion and footnote reference "2" is accordingly deleted.

In all other respects, the December 3, 2009 opinion remains unchanged.

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

DEC 14 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

LORINDA HAINES, MITCHELL TAYLOR and LORINE TAYLOR,

Plaintiffs-Appellants,

v

MAPLE ISLAND ESTATES, INC., and PAUL AND MARLENE, INC.,

Defendants-Appellees,

and

SCHULT HOMES,

Defendants.

UNPUBLISHED
December 3, 2009

No. 285849
Ottawa Circuit Court
LC No. 07-057672-CK

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Following a bench trial, plaintiffs appeal as of right the trial court's order of no cause of action. We affirm.

I. Basic Facts and Proceedings

In January 2006, plaintiffs entered into contract with defendants[1] for the purchase and installation of a modular home. Plaintiffs maintained that a sales representative for defendants had told them before the sale that the kitchen cabinet doors and the interior trim throughout the house would be "solid" or "real" wood. After the home was installed, plaintiffs sent defendant a list of problems with home, including that the kitchen cabinet doors and the interior trim were

[1] Schult Homes manufactured the home and was dismissed from the case by stipulation and order. Because there is no dispute that ownership of the appellees is interwined, they will collectively hereafter be referred to as "defendants."

manufactured wood. The list also indicated that the northeast corner of the basement leaked. Defendants agreed to fix some of problems on the list, but plaintiffs were not satisfied with defendants' repairs or defendants' refusal to repair. Plaintiffs filed a complaint that was later amended to include claims for breach of contract, fraudulent misrepresentation, innocent misrepresentation, breach of implied warranty of merchantability, and breach of Michigan uniform mobile home warranty act. Following a bench trial, the trial court issued a written opinion finding there no "deceit, misleading or misrepresentation by any of defendant[s'] salespeople." In regard to the basement, the trial court found no evidence of water in the basement after defendants had the basement waterproofed and cracks in the basement could not be attributed to defendants. The trial court entered judgment in favor of defendants. The instant appeal ensued.

II. Fraudulent Representation

A. Standard of Review

We review a trial court's findings of fact for clear error. *Triple E Produce Corp v Mastronardi Produce*, 209 Mich App 165, 171; 530 NW2d 772 (1995). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

B. Analysis

Plaintiff first argues that the trial court clearly erred in finding that defendants' representatives did not deceive, mislead or misrepresent the type of wood that plaintiffs would have in their home. Specifically, plaintiffs argue that the trial court's failed to consider evidence presented that defendants'[2] representative informed them that solid oak would be used throughout the home.

In *Hord v Environmental Research Inst*, 463 Mich 399, 404; 617 NW2d 543 (2000), the Michigan Supreme Court recognized the "six elements that must be proven to sustain a claim of fraudulent misrepresentation:"

> 1. The defendant made a material representation.
>
> 2. The representation was false.
>
> 3. When the defendant made the representation, it knew that it was false, or the defendant made the representation recklessly, without any knowledge of its truth, and as a positive assertion.
>
> 4. The defendant made the representation with the intention that it should be acted on by the plaintiff.

5. The plaintiff acted in reliance on the representation.

6. The plaintiff suffered injury due to his reliance on the representation.

"A plaintiff's subjective misunderstanding of information that is not objectively false or misleading cannot mean that a defendant has committed the tort of fraudulent misrepresentation." *Id*. at 411. Fraud must be proven by clear and convincing evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996).

Innocent misrepresentation exists when a "party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). It is not necessary to prove that the person making the misrepresentations knew that the statements were false. *Id*. at 212. Further, the false representation must be made in connection with the making of a contract, and the plaintiff and the defendant must be in privity of contract. *Id.*

Plaintiff Lorine Taylor testified that she inquired whether her home would contain "real wood" and Valerie House, defendants' sales consultant, indicated that their home would contain "real wood." Plaintiff Mitchell Taylor also testified that they were clearly told that their home would contain solid oak. House testified that she explained that just the front of the cabinets were generally solid wood and that she never told plaintiffs that they would receive solid wood doors or cabinets. Further, there was testimony indicating House appeared to believe that when she said that the cabinet door was an oak door, she was not misrepresenting the nature of the door, because the door was, in fact, "[r]eal oak finish" or "an actual, oak finished door." Credibility determinations are left to the fact-finder. *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999).

Here, a reasonable fact-finder could conclude that either House did not make a materially false representation, or that when House made the representation, she did not know or believe that it was false. *Hord*, *supra*. In either event, there is no evidence that House made a false representation with the intention that it should be acted upon. *Id*. Thus, a reasonable fact-finder could find that plaintiffs did not prove deceit, misleading statements, or misrepresentation by clear and convincing evidence. *Foodland Distributors*, *supra*. Accordingly, the trial court's conclusion that there was no deceit, misleading, or misrepresentation and that the elements of fraudulent misrepresentation and innocent misrepresentation were not met was not clearly erroneous. *Triple E Produce*, *supra*.

Plaintiffs also argue the trial court clearly erred in finding no evidence of cracks and leaks in the basement.

The amended complaint lists the only problem involving leaks in the basement as "[t]he Northeast corner of the basement leaks." Both Mitchell and Lorine testified that the photographs, which depicted the cracks and leaking in the basement corner, were taken in 2006. Lorine testified that Georgetown Waterproofing filled a lot of the cracks in the basement with caulk sometime during the summer of 2006. Lorine was specifically asked how often water appeared in the basement corner. She replied that that corner of the basement has remained dry since the summer of 2006, which she characterized as an unusually wet summer. Lorine also testified that after the gutters and downspouts were installed at the end of summer 2006, they still

had some water entering through other cracks, but the amount of water entering was "very little." Given the subsequent lack of water in the basement and plaintiffs' failure to present any evidence of damages presented by excessive cracking that had been caulked, we cannot conclude that the trial court's conclusion was clearly erroneous. *Triple E Produce*, *supra*.

Plaintiffs' next argue that the inability to prove the exact costs of repair should not have been detrimental to their recovery of damages. In *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995), we stated:

> A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. [Citations omitted.]

The trial court indicated in its opinion that plaintiffs did not submit evidence of the cost to repair or replace several of the items that plaintiffs thought were defective and needed to be repaired or replaced. However, in each of these instances, the trial court also provided findings essentially evidencing why it found that plaintiffs' claims lacked merit. Thus, the trial court clearly made substantive findings that plaintiffs failed to establish liability. Accordingly, plaintiff has failed to show that the trial court placed too stringent a threshold upon plaintiffs' inability to prove the exact costs of repair.

Affirmed.

/s/ Patrick M. Meter
/s/ William B. Murphy
/s/ Brian K. Zahra