STATE OF MICHIGAN

COURT OF APPEALS

SIGMA REALTY, LLC,

Plaintiff/Counterdefendant-Appellee,

v

MAPLE GARDEN ASSOCIATES, a/k/a MAPLE GARDEN LLC, and DAVID JANKOWSKI,

Defendants,

and

STEPHAN CUBBA,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
March 11, 2010

No. 289148
Oakland Circuit Court
LC No. 2008-090371-CH

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendant-appellant appeals as of right from the circuit court's order granting summary disposition to plaintiff. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This action arises from the sale of an apartment building in Birmingham. Plaintiff sold the building to defendant Maple Garden in March 2006. Maple Garden was owned by defendant Jankowski and defendant. The latter two executed a promissory note and guaranty, which provided that they personally guaranteed the payment of all principal, interest, and costs due under the note. Plaintiff filed the instant collection action to collect on the note. Maple Garden and Jankowski defaulted, but defendant answered and counterclaimed, alleging fraudulent misrepresentation. Specifically, defendant alleged that plaintiff had fraudulently misrepresented the number of inhabitable units in the complex.

Plaintiff moved for summary disposition. In granting the motion, the court held:

> The Court finds that summary disposition is appropriate because there is no genuine issue of material fact that Defendant Cubba executed the personal

> Guaranty and has failed to raise a valid defense or a prima facie case of fraudulent misrepresentation. Defendant Cubba cannot establish the elements of fraudulent misrepresentation because the Purchase Agreement provided him the opportunity to inspect the property and raise any claims regarding the representations and warranties associated with the sale within 18 months of closing. Defendant Cubba failed to raise the issues within the 18 months, thereby waiving them under the terms of the Agreement.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Contract interpretation likewise presents a question of law, calling for review de novo. See *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

When reviewing an order of summary disposition under MCR 2.116(C)(10), we examine all documentary evidence in the light most favorable to the nonmoving party to determine whether there exists a genuine issue of material fact. *Ardt*, 233 Mich App at 688. "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). In reviewing a (C)(8) motion, we accept as true all factual allegations in the claim "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.*

The purchase agreement describes "an 18-unit apartment complex," and gives its location. The agreement provides for a pre-closing inspection period during which "Buyer may physically inspect the Property," including records relating to "information concerning the condition of the Property," and further provides that the agreement "shall automatically terminate unless, prior to the end of the Inspection Period, Buyer delivers to Seller written notice stating that Buyer intends to proceed." Not in dispute is that defendant conducted such an inspection and provided such notice.

Among the seller's warranties, representations, and covenants is that, until closing, the property would be maintained "in the manner in which it is currently being maintained," and that the seller "has not received written notice indicating that the Property is not in compliance with all applicable laws, regulations and ordinances."

Of key importance in this case is the following provision:

> The indemnities, representations and warranties of each of Seller and Buyer, and their respective obligations intended to be performed after the Closing, if any, shall survive the Closing for a period of eighteen (18) months and thereupon shall lapse, terminate and become void. After eighteen (18) months following the Closing, neither party shall have the right to commence any suit against the other based upon any claim of breach of any warranty or representation under this Agreement nor upon any right to indemnification under this Agreement.

The agreement also includes an integration provision, stating that the agreement "supercedes all prior agreements between the parties as to the interests and/or Property, if any,

and constitutes the entire agreement between the parties with respect to the subject matter hereof," and that any modification or amendments must be executed by the parties in writing.

At deposition, defendant confirmed that he had signed the promissory note and guaranty, and testified that he knew of no payments made upon it to date. Defendant testified that there were wiring violations and other code violations, but added that he did not know if plaintiff's owner intentionally hid those defects from him. Asked specifically what information he had to indicate that plaintiff intentionally withheld information concerning problems with the allegedly uninhabitable unit, defendant replied, "I have no idea." Defendant additionally testified that there was a problem with the building's heat exchanger, but, again, that he did not know of plaintiff was aware of it.

Fraud occurs where a person knowingly or recklessly makes a false material assertion intending to induce, and actually inducing, reliance by another, to that other's detriment. See *Brownell v Garber*, 199 Mich App 519, 533; 503 NW2d 81 (1993). In this case, defendant fails to point to evidence of any knowingly or recklessly false material assertion, including by way of concealment, and also fails to specify what form any such misrepresentations took and the corresponding realities were.

"In allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." MCR 2.112(B)(1). Defendant, however, testified on deposition that he had "no idea" if plaintiff intentionally misrepresented anything. On appeal, defendant reminds this Court that intent may be proved by circumstantial evidence, but even so points to no circumstantial evidence of any fraudulent misrepresentation beyond the bare existence of unspecified problems with the heat exchanger, wiring, or code compliance.

As noted, the purchase agreement included the warranty that the seller had received no "written notice indicating that the Property is not in compliance with all applicable laws, regulations and ordinances," thus disclaiming any knowledge that the applicable municipal authority had deemed a unit uninhabitable for code violations. Defendant points to nothing to indicate otherwise, and nowhere argues that he should have been allowed further discovery in order to produce such evidence.

Further, the purchase agreement included no express warranty concerning the number of inhabitable units, but did include an integration provision disclaiming any agreements or understandings beyond the four corners of the agreement. We thus question whether defendant was entitled to ascertain the condition of the property by other than the terms spelled out in the agreement—its description of the property, warranties, and inspection opportunities.

Finally, "there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). In this case, in addition to the pre-closing inspection opportunity, of which defendant took advantage, the purchase agreement allowed 18 months after closing to bring claims over breach of any warranty or representation. As the trial court noted, defendant had the "opportunity to inspect the property and raise any claims regarding the representations and warranties associated with the sale within 18 months of closing," yet failed to raise any such issues within that time. Defendant points to nothing plaintiff did, or did not do, that prevented

him, or the agents of his choice, from discovering any defect in the subject property during either the 30-day pre-closing inspection period, or the 18 months after defendant and related concerns took possession.

For these reasons, we conclude that the trial court properly rejected defendant's defense and counterclaim, and granted summary disposition to plaintiff.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood