STATE OF MICHIGAN

COURT OF APPEALS

LANE P. WESTRICK and MARNIE J. WESTRICK, Plaintiffs-Appellants, v MICHAEL F. JEGLIC and DAWN M. JEGLIC, Defendants-Appellees, and TRI-CITY HOME INSPECTIONS LLC, Defendant.	UNPUBLISHED July 15, 2010 No. 291470 Bay Circuit Court LC No. 06-003635-CH

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Plaintiffs Lane P. Westrick and Marnie J. Westrick, husband and wife, appeal as of right the trial court's March 30, 2009, order entering a judgment of no cause of action in favor of defendants Michael F. Jeglic and Dawn M. Jeglic, also husband and wife. We affirm.

I

This case involves the sale of a house on the Kawkawlin River in Bay City, Michigan. After defendants sold the house to plaintiffs, plaintiffs initiated this action, alleging intentional fraud (count I), innocent misrepresentation (count II), nondisclosure (count III), and breach of contract (count IV) based on defendants' failure to disclose certain structural problems with the house.[1]

[1] Plaintiffs also filed suit against defendant Tri-City Home Inspections LLC ("Tri-City"). Tri-City filed bankruptcy, and the file was closed as to that defendant due to a bankruptcy stay. Tri-City was subsequently dismissed from the case by order.

Michael initially purchased the house on March 1, 2000. Prior to the purchase, he had the house inspected by Great Lakes Building Inspection Services, Inc. ("Great Lakes"). Michael accompanied the inspector into the crawlspace beneath the house and the inspector showed him what needed to be fixed. Under the section of the inspection report entitled, "Interior-Foundation," the inspector stated:

> The rim joist along the west wall, north wall east corner of the laundry room and corner of the west wall is deteriorated. The sill plate is also deteriorated in those areas along with the ends of some of the floor joists. The floor joists along the north wall of the kitchen hall are bad, there are several floor joists that are deteriorated in the ends. A beam is in place in this area. Is installed but has not been properly finished.

After the inspection, but before Michael purchased the house, he obtained a $4500 bid from Mark DeSanto Builders for work to be performed on the house. The bid stated in part:

> Replace rotten mud plates, band joists, and floor joists on west and south walls of family room and laundry room. Replace four feet of mud sill and band joist on east wall of laundry room. Install new joists along side rotten joists under hall and TV room, and install new beam with 4"x4" support posts down to footing under the ends of these joists.

When Michael purchased the house in March 2000, he received a $3,000 rebate for necessary repairs, specifically for repairing the sill plate and one corner of the crawlspace. None of the problems identified in the inspection report were ever corrected. Michael explained at trial that although he had obtained some estimates for the repairs, he hoped to make other modifications to the house and to make any necessary repairs in conjunction with those modifications.

Michael and Dawn married in May 2001. In December 2002, they relocated to North Carolina. Michael testified that he and Dawn liked the house very much, they never had any safety concerns, and they only relocated because of a job transfer. In fact, it was a very difficult decision for them to move because it meant leaving behind Michael's children from a previous relationship. At that point, Dawn's brother Gary Krueger moved into the house and resided there until it was sold to plaintiffs. According to Michael, Krueger never made any complaints about the condition of the house and Krueger testified that he never noticed any structural defects.

On September 21, 2004, the parties entered into a sales contract for the house. The contract provided, in part:

> Buyer acknowledges receipt of a copy of the Seller's Disclosure Statement.
>
> * * *
>
> An inspection of the premises will be obtained by the Buyer, at Buyer's expense. If inspection is acceptable to Buyer, Buyer agrees to accept property in its present "AS IS" condition with no warranties, expressed or implied, from the Seller and/or agent. Buyer will remove contingency, in writing, within 7 days of

> acceptance on line 33 of the Sales Contract. If inspection is not acceptable to the Buyer, Buyer may terminate this Sales Contract. Seller may terminate this Sales Contract if Buyer fails to respond within the time periods set forth above. Any terminations must be in writing.

A seller's disclosure statement was provided to plaintiffs. The statement was signed by Michael on May 17, 2003, approximately 16 months before the parties entered into the sales contract. Michael testified that the information on the statement was accurate to the best of his knowledge and that he was aware his real estate agent would be giving a copy of the statement to any prospective buyers. The statement included the following relevant information:

> This statement is not a warranty of any kind by the Seller or by any Agent representing the Seller in this transaction, and is not a substitute for any inspections or warranties the Buyer may wish to obtain.
>
> * * *
>
> This information is a disclosure only and is not intended to be a part of any contract between Buyer and Seller.
>
> * * *
>
> Sellers have not lived in home in the [last] 2 years.[2]
>
> * * *
>
> Other Items: Are you aware of any of the following:
>
> * * *
>
> 5. Settling, flooding, drainage, structural or grading problems? . . . No X

When asked why he answered "no" to the question on the statement regarding structural problems, Michael testified that when he completed the statement, he only remembered his inspector referencing a problem with a sill plate, and he did not equate that with a structural problem. He never connected what he remembered from the inspection with anything on the seller's disclosure statement. According the Michael, the inspector indicated that the sill plate needed to be repaired or replaced "at some point," but Michael was never under the impression that it was "a big deal." Michael further testified that he had noticed some of the floors in the house were uneven, but he believed the unevenness was normal for an older home.

After receiving the seller's disclosure statement, plaintiffs arranged for their own inspection of the house. The inspection was conducted on October 2, 2004 by Tri-City. In the

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[2] Michael testified that his real estate agent added two sentences indicating that defendants had not lived in the house in two years after he had filled out and signed the statement.

section of Tri-City's form entitled, "Foundation," the inspector stated: "Limited access to crawl—clearance less than 16" . . . north wall has had rotted tails on Joist but repairs have been made." Plaintiffs did not accompany the inspector into the crawlspace. Thereafter, plaintiffs signed an inspection contingency addendum to the sales contract, acknowledging that the inspection of the house was satisfactory, that the contingency was removed, and that they agreed to purchase the house "in 'AS IS' condition." The closing occurred on October 28, 2004, and defendants conveyed the house to plaintiffs.

Plaintiffs testified that they moved into the house on October 31, 2004. After moving in and setting up their furniture, they noticed that the floors were not level and that there were places where the floors had separated from the baseboards. Shortly thereafter, plaintiffs hired Jerry Bergman, a licensed architect and general contractor who thoroughly inspected the house in February 2005. Bergman testified that in his opinion, the house was not salvageable and should be demolished. He stated that making the necessary repairs would require raising or lifting the house and extending the foundation, which could not be done without jeopardizing the structural integrity of the house's shell considering, among other things, that the floor joists were rotting, some of the floor joists ran into foundation blocks, and the roof structure was sagging.

John Snyder, a licensed civil engineer, testified on behalf of defendants. He inspected the house after plaintiffs initiated this action and opined that the house was structurally sound, the real problem was that the house was built too close to grade, and the house could be made safe with minimum structural repairs. Snyder agreed that making the necessary repairs would require lifting the house, but believed that the house could be lifted without causing additional structural problems. Snyder further testified that neither the inspection report done by Great Lakes nor the one done by Tri-City revealed all of the house's current problems.

Plaintiffs testified that in 2006, a neighbor informed them that Michael had the house inspected before he purchased it and that, at closing, he received a $3,000 rebate for repairs. Based on that information, plaintiffs believed that defendants were aware of the house's structural defects and failed to disclose them. Plaintiffs further testified that they had relied on the seller's disclosure statement, which indicated that there were no structural problems, and that had they known about the problems they would not have purchased the house.

Plaintiffs initiated this action in August 2006, and the case proceeded to a bench trial in November 2008.[3] After trial, the trial court issued a written opinion and order entering a judgment of no cause of action in favor of defendants on all counts. Plaintiffs now appeal as of right.

II

[3] During opening statements, plaintiffs' counsel stated that plaintiffs were not proceeding under count II of their complaint (innocent misrepresentation) and would only proceed under counts I, III, and IV (intentional fraud, nondisclosure, and breach of contract).

Plaintiffs argue that the trial court erred in granting judgment in favor of defendants. We disagree.

"This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C) and *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). In the application of the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding of fact is clearly erroneous if this Court "is left with a definite and firm conviction that a mistake has been made." *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005).

Plaintiffs first argue that the trial court erred in granting Michael judgment on their claims of intentional fraud and nondisclosure. Plaintiffs labeled their first claim "intentional fraud," but such a claim is typically labeled "fraudulent misrepresentation" or "traditional common law fraud." Fraudulent misrepresentation requires 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), adopting as its own then Judge Young's discussion from the previously vacated opinion in *M & D, Inc v McConkey*, 226 Mich App 801, 806; 573 NW2d 281 (1997).]

Thus, a fraudulent misrepresentation claim requires an affirmative representation. *Id*. More specifically, to establish a prima facie case of fraudulent misrepresentation, a plaintiff must present evidence of a "false representation made with an intent to deceive[.]" *Id*. (emphasis omitted). Further, a plaintiff "must show that any reliance on [the] defendant's representations was reasonable." *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005).

Plaintiffs labeled their next claim "nondisclosure," which is also commonly referred to as "silent fraud" or "fraudulent concealment." "[E]stablishing silent fraud requires more than proving that the seller was aware of and failed to disclose a hidden defect. Instead, to prove a claim of silent fraud, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008) (citations omitted). As stated in *M & D, Inc*, 231 Mich App at 25, "[a] misrepresentation need not necessarily be words alone, but can be shown where the party, if duty-bound to disclose, intentionally suppresses material facts to create a false impression to the other party." A claim of silent fraud, like a claim for fraudulent misrepresentation, requires proof of reliance on the inadequate or unforthcoming representation. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 171; 721 NW2d 233 (2006). Such reliance must be reasonable. *Lumber Village, Inc v Siegler*, 135 Mich App 685, 700; 355 NW2d 654 (1984).

Additionally, in order for the suppression of information to constitute silent fraud, there must be a legal or equitable duty of disclosure. *Roberts*, 280 Mich App at 404. Plaintiffs assert

that Michael had a duty of disclosure under the Seller Disclosure Act (SDA), MCL 565.951 *et seq*. In *Bergen v Baker*, 264 Mich App 376, 382-385; 691 NW2d 770 (2004), this Court thoroughly examined the SDA in relation to claims of fraud arising from a real estate transaction in which the plaintiffs purchased a home from the defendants, after which the plaintiffs discovered a significant water leak in the roof of a sunroom. This Court construed the various sections of the SDA and reached the following conclusion:

> Reviewing collectively the language of the relevant statutes that comprise the SDA, it is evident that the Legislature intended to allow for seller liability in a civil action alleging fraud or violation of the act brought by a purchaser on the basis of misrepresentations or omissions in a disclosure statement, but with some limitations. . . . The SDA clearly creates a legal duty of disclosure relative to the transaction in this case. [*Id*. at 385.]

All disclosures made under the SDA must be made in good faith, which "means honesty in fact in the conduct of the transaction." MCL 565.960. MCL 565.957 is the actual disclosure form mandated by the SDA, and this Court in *Bergen*, 264 Mich App at 383, discussed the language therein:

> The statutory form requires and provides, in part, that the seller answer all questions and report known conditions affecting the property. The form reads, "This statement is a disclosure of the condition and information concerning the property, known by the seller." MCL 565.957(1). The statutory form also provides that the disclosure "is not a warranty of any kind by the seller or by any agent representing the seller in [the] transaction, and is not a substitute for any inspections or warranties the buyer may wish to obtain." *Id*.

With respect to "as is" clauses in real estate documents, this Court has stated that, generally speaking, such clauses "allocate the risk of loss arising from conditions unknown to the parties" and transfer the risk of loss to the purchaser of real property, where a defect should have reasonably been discovered on inspection, but was not found. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). However, "as is" clauses do not transfer the risk of loss to a purchaser when a seller engages in fraud before the purchaser executes an agreement. *Id*. See also *Bergen*, 264 Mich App at 390 n 5. In general, however, "[t]here can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

In this case, plaintiffs argue that Michael was aware of structural problems with the house at the time of the sale and that he committed fraudulent misrepresentation and silent fraud by representing on the seller's disclosure statement that there were no structural problems. In regard to plaintiffs' fraudulent misrepresentation claim, the trial court specifically held that Michael "did not make a material misrepresentation when he answered the question [regarding the existence of structural problems], 'no,' on the disclosure form. Rather, the Court finds he signed that form in good faith . . . ." Michael admitted at trial that before he purchased the house, Great Lakes inspected the house and he received its inspection report, he obtained the bid from Mark DeSanto Builders for work to be performed on the house, and he received the $3,000 rebate for necessary repairs, specifically for repairing the sill plate and one corner of the crawlspace. None of the repairs were made. Thus, there were deteriorating rim and floor joists,

a deteriorating sill plate, and an improperly finished beam in the crawlspace before Michael purchased the house, and as the trial court acknowledged, he must have been aware, at least at the time, of those defects. We cannot conclude that such defects were anything other than structural problems. Thus, it is arguable that Michael made a material misrepresentation on the disclosure statement. "To be material, the representation need not relate to the sole or major reason for the transaction, but . . . it [must] relate to a material or important fact." *Zine v Chrysler Corp*, 236 Mich App 261, 283; 600 NW2d 384 (1999) (quotation marks and citation omitted). Structural integrity is an important factor in deciding whether to purchase a house. See *id*., citing *Rzepka v Farm Estates, Inc*, 83 Mich App 702, 710; 269 NW2d 270 (1978) (holding that the defendant seller's omission of fact was material because it related to a fact crucial to the plaintiff's decision to buy).

That said, even if the trial court erred in finding that Michael made no material misrepresentation on the disclosure statement, we agree with the trial court's ultimate conclusion that Michael acted in good faith. Great Lakes inspected the house in January 2000. When Michael completed the disclosure statement in May 2003, more than three years had passed since the inspection, and he had not resided in the house in approximately five months. When plaintiffs actually received the statement in September 2004, Michael had not lived in the house in almost two years. Michael testified that at the time he completed the disclosure statement, he did not have Great Lakes' inspection report and he only remembered his inspector referencing a problem with a sill plate. The inspector verbally indicated during the inspection that the sill plate needed to be repaired or replaced "at some point," but Michael was never under the impression that it was "a big deal." He never equated what he remembered from the inspection with a structural problem or anything on the disclosure statement. Michael testified that he filled the statement out truthfully. He and Dawn never had any problems with the house or any safety concerns, they liked living in the house very much, and they only relocated to North Carolina because of a job transfer. Furthermore, according to both Bergman and Snyder's testimonies, the structural defects they discovered after plaintiffs had purchased the house were much more severe than anything reported by Great Lakes several years earlier. Based on this evidence, the trial court concluded that Michael completed the disclosure statement in good faith, and we must give regard to the special opportunity of the trial court to judge the credibility of the witnesses before it. MCR 2.613(C).

Because Michael acted in good faith in completing the disclosure statement, plaintiffs' claims of fraudulent misrepresentation and silent fraud must fail. To support their claim of fraudulent misrepresentation, plaintiffs were required to establish that Michael made a material misrepresentation recklessly or knowing that it was false, and with the intent to deceive. See *M & D, Inc*, 231 Mich App at 27. Likewise, to support their claim of silent fraud, plaintiffs were required to establish that Michael made a representation that was intended to deceive or that he intentionally suppressed material facts to create a false impression. See *Roberts*, 280 Mich App at 404; *M & D, Inc*, 231 Mich App at 25. Plaintiffs have not established that Michael intended to deceive them with the disclosure statement. Contrary to plaintiffs' argument on appeal, the trial court correctly concluded that because Michael did not engage in fraud, the "as is" clause in the parties' sales contract transferred the risk of loss for defects that should reasonably have been

discovered on inspection to plaintiffs as the purchasers. See *Lorenzo*, 206 Mich App at 687. The trial court did not err in awarding defendants judgment on plaintiffs' claims of fraudulent misrepresentation and silent fraud.[4]

Plaintiffs further argue that the trial court erred in granting defendants judgment on plaintiffs' breach of contract claim. Plaintiffs do not assert that defendants breached any actual terms in the parties' sales contract. Rather, plaintiffs assert that the sales contract imposed an implicit duty of good faith and fair dealing on defendants, and that defendants breached that duty by failing to disclose the structural problems with the house to plaintiffs. "[T]he covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152; 483 NW2d 652 (1992) (quotation marks and citation omitted). But plaintiffs' attempt to base their breach of contract claim on the covenant of good faith and fair dealing must fail because "Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Fodale v Waste Mgt of Mich, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006). Furthermore, as indicated above, plaintiffs have not established that defendants acted in bad faith. The trial court did not err in granting defendants judgment on plaintiffs' breach of contract claim.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering

[4] The trial court clearly erred to the extent it concluded, in regard to plaintiffs' silent fraud claim, that plaintiffs should have known about the structural problems with the house based on Tri-City's inspection and because they noticed the separation of the floors from the walls the day they moved into the house. Tri-City's inspection report only indicated that the "north wall had rotted tails on Joist *but repairs have been made*" (emphasis added), and plaintiffs testified that the Tri-City inspector verbally informed them that the foundation and structure of the house was sound. Plaintiffs further testified that they did not notice gaps between the floors and walls until approximately two weeks after they moved into the house. We note, however, that the trial court's findings in this regard were not necessary to its ultimate conclusion.