DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, Judge

CA06-59

October 11, 2006

WINFRED GARRISON and CYNTHIA GARRISON APPELLANTS	AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT [No. CV-2004-13789]
v.	
DAVID PICKERING and MARY PICKERING APPELLEES	HONORABLE JAMES M. MOODY, CIRCUIT JUDGE REVERSED and REMANDED

This case follows the entry of summary judgment to the sellers of a house in an action brought by the purchasers for fraudulent inducement. On May 26, 2004, appellees David and Mary Pickering sold their house in west Little Rock for $890,000 to appellants Winfred and Cynthia Garrison. Mr. Pickering's construction company built the house in 1991-92. Pursuant to the contract, appellees provided appellants with a written disclosure about the property's condition. On behalf of appellants, Al Williams, a home inspector, performed an inspection of the property on May 17, 2004, while Mrs. Garrison, Mr. Pickering, and appellants' real estate agent, Betty Coney, were present. According to appellants, Mr. Williams asked Mr. Pickering about the foundation vents located in the brick on the back side of the house in the area of the master bedroom, and Mr. Pickering replied that the foundation was a concrete

slab, failing to mention that there were also two crawl spaces. Appellants also claim that, during the inspection, Mr. Pickering told Mrs. Garrison that the security system had recently been functional and was monitored by ADT. Mr. Williams's report listed no serious problems with the house. Appellants obtained a letter from AAA Roofing Co., Inc., on May 25, 2004, stating that the roof appeared to be in good condition, with no visible leaks. Mr. Pickering also provided appellants with a letter from Sam Elmore, with Specialty Services, stating that, when his company installed the copper bay roof on the house, there was no roof damage and that, when he checked the shingles on May 19, 2004, they were still in the same condition. The termite inspection found no problems.

The contract contained a merger clause, and in paragraph 15(B), it provided for the buyer's inspection. It stated: "The buyer understands and agrees that pursuant to the terms of Paragraph 15(B), they will be accepting this property 'AS IS' at closing." It also set forth the following buyers' disclaimer:

> **26. BUYER'S DISCLAIMER OF RELIANCE: BUYER CERTIFIES BUYER HAS PERSONALLY INSPECTED OR WILL PERSONALLY INSPECT, OR HAS HAD OR WILL HAVE A REPRESENTATIVE INSPECT, THE PROPERTY AS FULLY AS BUYER DESIRES AND IS NOT RELYING AND SHALL NOT HEREAFTER RELY UPON ANY WARRANTIES REPRESENTATIONS OR STATEMENTS OF THE SELLER, LISTING AGENT FIRM, THE SELLING AGENT FIRMS, OR ANY AGENT, INDEPENDENT CONTRACTOR OR EMPLOYEE ASSOCIATED WITH THOSE ENTITIES, REGARDING THE AGE, SIZE (INCLUDING WITHOUT LIMITATION THE NUMBER OF SQUARE FEET IN IMPROVEMENTS LOCATED ON THE PROPERTY), QUALITY, VALUE OR CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION ALL IMPROVEMENTS, ELECTRICAL OR MECHANICAL SYSTEMS, PLUMBING OR APPLIANCES OTHER THAN THOSE SPECIFIED HEREIN (INCLUDING ANY WRITTEN DISCLOSURERS [SIC] PROVIDED BY SELLER AND DESCRIBED IN PARAGRAPH 16 OF THIS REAL ESTATE CONTRACT), IF ANY, WHETHER OR NOT ANY EXISTING DEFECTS IN ANY SUCH REAL OR PERSONAL PROPERTY MAY BE REASONABLY DISCOVERABLE BY BUYER OR A REPRESENTATIVE HIRED BY BUYER. NEITHER LISTING AGENT FIRM NOR SELLING AGENT FIRM CAN GIVE LEGAL**

ADVICE TO BUYER OR SELLER. LISTING AGENT FIRM AND SELLING AGENT FIRM STRONGLY URGE STATUS OF TITLE TO THE PROPERTY, PROPERTY CONDITION, SQUARE FOOTAGE OF IMPROVEMENTS ON THE PROPERTY, QUESTIONS OF SURVEY AND ALL REQUIREMENTS OF SELLER AND BUYER HEREUNDER SHOULD EACH BE INDEPENDENTLY VERIFIED AND INVESTIGATED. BUYER IS HEREBY NOTIFIED THAT BUYER WILL BE REQUIRED TO UTILIZE THE INSPECTION REPAIR & SURVEY ADDENDUM PURSUANT TO PARAGRAPH 10 AND PARAGRAPH 15B, AND WILL BE REQUIRED TO DO A FINAL SIGN OFF ON PAGE 3, UPON COMPLETING ALL INSPECTIONS ON SAID ADDENDUM PRIOR TO, OR AT CLOSING.

The "Inspection, Repair and Survey Addendum" form, signed by appellants before closing, stated:

5. BUYERS AGREEMENT TO PROPERTY CONDITIONS: THE BUYER ACKNOWLEDGES THE AGENT(S) INVOLVED IN THIS TRANSACTION HAVE MADE THE BUYER AWARE THAT HOME INSPECTORS WHO PROVIDE THAT SERVICE REGULARLY ARE AVAILABLE AND THE BUYER COULD CHOOSE FROM THOSE HOME INSPECTORS LISTED IN THE YELLOW PAGES, OR THOSE THE AGENTS(S) KNOW ABOUT, OR THE BUYER COULD CONTACT A PROFESSIONAL SOCIETY OR ORGANIZATION OF HOME INSPECTORS TO FIND A SUITABLE HOME INSPECTOR. BUYER IS NOT RELYING ON THE AGENT(S) ADVICE OR RECOMMENDATION IN REGARDS TO CHOOSING A HOME INSPECTOR. ALSO, BUYER UNDERSTANDS THAT THE RECEIPT OF A HOME INSPECTION AND A SELLER PROPERTY DISCLOSURE DOES NOT RELIEVE BUYER FROM THE RESPONSIBILITY OF PERSONALLY INSPECTING THE PROPERTY UNTIL THE BUYER IS FULLY SATISFIED. BUYER WARRANTS, REPRESENTS AND ACKNOWLEDGES THAT BUYER AND ALL PERSONS OR ENTITIES DESIRED BY BUYER HAVE INSPECTED THE PROPERTY TO THE FULLEST EXTENT DESIRED BY BUYER AND FIND THE CONDITION OF THE PROPERTY ACCEPTABLE IN ALL RESPECTS. BUYER REAFFIRMS ALL DISCLAIMERS SET FORTH WITHIN THE REAL ESTATE CONTRACT BETWEEN BUYER AND SELLER.

BUYER HAS HAD AN OPPORTUNITY TO INSPECT, REVIEW AND VISIT THE PROPERTY AND TO OBTAIN A BOUNDARY SURVEY OF THE PROPERTY TO DETERMINE THAT THE PROPERTY ACTUALLY CONVEYED IS THE PROPERTY THE BUYER UNDERSTANDS IS BEING CONVEYED, AND BUYER IS NOT RELYING ON ANY STATEMENT (WRITTEN OR ORAL) OF LISTING AGENT FIRM, SELLING AGENT FIRM, OR SELLER CONCERNING THE SIZE, DIMENSIONS, ACREAGE, AREA OR LOCATION OF THE PROPERTY. THE FACT THAT THE BUYER COMPLETES THE PURCHASE OF THIS PROPERTY WARRANTS THAT THE BUYER IS COMPLETELY SATISFIED WITH THE CONDITION OF THE PROPERTY.

After appellants moved in, a representative of ADT came to the property to activate the security system and informed Mrs. Garrison that ADT had never had a security contract on the property and that a heat sensor on the ceiling of the bedroom next to the family room was not wired to the existing system. According to appellants, the heat sensor was non-functional and had been placed so as to cover up the location of a water leak. In the disclosure form, however, appellees represented that there had never been any past or present water intrusion, problems with the roof, or leaks. After appellants moved into the house, they also discovered that portions of the house were not built on a slab foundation, as had been represented by David Pickering; in fact, two areas were built on crawl spaces, for which no exterior access existed. According to appellants, these crawl spaces did not comply with applicable construction codes and were not shown on the original building plans; a final building inspection was not performed, and a certificate of occupancy was never issued; and appellees failed to obtain the necessary permits and inspections for the construction of an addition to the family room at the back of the house. However, in the disclosure form, appellees represented that all additions were done following the issuance of a permit and that they complied with building codes. In August, appellants discovered termite damage in the bedroom next to the family room and in the exercise room adjacent to the garage. In the disclosure form, appellees represented that there was no infestation by termites, that there was no "known damage" from a previous infestation, and that they were not aware of any potential termite problems.

Appellants asked appellees to repurchase the house, and they refused to do so. Appellants filed this lawsuit in December 2004, alleging fraud in the inducement and requesting rescission, actual damages, and punitive damages. They alleged that, in attempting to repair the termite damage in the office area, it was discovered that a major water leak had occurred in the water heater closet.

In their answer, appellees stated that Mr. Pickering's statement to the inspector about the foundation was a mistake and that he told Mr. Garrison that the security system, when last used, was operational, although appellees did not use it.

Appellees moved for summary judgment on July 12, 2005, arguing that appellants had failed to produce evidence that appellees made false statements of material fact with regard to the condition of the property; that appellees knew at the time that any of their statements were false; or that appellants justifiably relied on any representations made by appellees. Appellees argued that appellants' allegations were contrary to the express language of the contract wherein appellants disclaimed reliance upon any representations of appellees and agreed to accept the property "as is." Appellees supported their motion with several documents, including excerpts from the parties' depositions; the contract; the disclosure form; the termite inspection report; the inspector's report; and the Inspection, Repair, and Survey Addendum.

Appellants filed a first amended complaint on August 1, 2005, adding a claim for constructive fraud. On the same date, they filed their response to the motion for summary judgment. Their attachments included the following exhibits: the affidavits of Al Williams,

Betty Coney, George Levart, the security system installer, and appellants; photographs of a foundation vent, the flooring, a hot water heater closet, and the baseboards in the exercise room; excerpts from the depositions of the parties; the disclosure form; the 1988 mineral deed affecting Chenal Valley; and the termite-inspection report. In his affidavit, Mr. Levart stated that, when he inspected the house's security system, he inspected a heat sensor in the ceiling of the "gold bedroom" and discovered the following:

> 5. When I began trying to inspect the heat sensor, sheetrock began crumbling and coming down from the ceiling area adjacent to the heat sensor due to previous damage to the sheetrock.
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> 6. Upon closer inspection, I discovered that the heat sensor was not wired into the existing security system. From looking at the screws on the back of the heat sensor, I could tell that the heat sensor had never been connected to the security system because the screws were not scarred and were in the same position as when shipped from the manufacturer.
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> 7. Upon discovering that the heat sensor had never been connected, I went into the attic of the house at 14 Chenal Circle to try to locate the wires for the heat sensor.
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> 8. Once I was up in the attic, I moved insulation that had been placed over the location of the heat sensor and discovered that no wires existed for the heat sensor and that the heat sensor had been placed directly where a roof leak had caused damage to the sheetrock in the ceiling.

Appellants argued that they had produced evidence that appellees had misrepresented the condition of the house's foundation when Mr. Pickering told appellants' inspector that the house was built on a slab, when in fact, there were two areas that were built over crawl spaces, for which no access existed; that appellees had inaccurately stated in the disclosure form that there had not been any roof leaks when there was evidence that such leaks had occurred and that the damage had been covered up; that appellees had misled appellants in

stating in the disclosure form that no one else claimed ownership of the mineral rights to the property; that appellees had failed to disclose other water leaks and water damage affecting the windowsills, under the master bathroom's vanity sink, and the hot water heater closet; that appellees had concealed termite damage in the exercise room and termite mud on the floor of the hot water heater closet; and that appellees had misrepresented the status of the building permits for the family room addition. Appellants argued that their reliance on appellees' representations was reasonable in light of Mr. Pickering's statements that he had special knowledge of the house because he had lived there for twelve years and because his company had served as the builder; that the contract's "as-is" clause did not bar an action by the vendee against the vendor on claims of fraud or misrepresentation; and that the contract's merger clause would not prevent appellants from showing that they were fraudulently induced to enter into the contract.

A hearing was held on the motion for summary judgment on September 6, 2005. On September 13, 2005, appellees filed a supplemental motion for summary judgment on the constructive-fraud claim.

The circuit court granted summary judgment to appellees on their fraud and constructive-fraud claims, finding that appellants did not, as a matter of law, justifiably rely on any representations made by appellees. This appeal followed.

Summary judgment should be granted only when it is clear that there are no disputed issues of material fact. *Holliman v. Liles*, 72 Ark. App. 169, 35 S.W.3d 369 (2000) (treating a dismissal as a summary judgment). All evidence must be viewed in the light most favorable to the party resisting the motion; he is also entitled to have all doubts and inferences resolved in his favor. *Id*. Summary

judgment is inappropriate when facts remain in dispute or when undisputed facts may lead to differing conclusions as to whether the moving party is entitled to judgment as a matter of law. *Id*. When the evidence leaves room for a reasonable difference of opinion, summary judgment is not appropriate. *Id*. The object of summary judgment proceedings is not to try the issues but to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied. *Id*.

Appellants contend that they presented evidence sufficient to raise questions of fact as to whether appellees committed fraud and constructive fraud and, therefore, the circuit court erred in granting summary judgment to appellees. The elements of fraud are: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; (5) damage suffered as a result of the reliance. *Joplin v. Joplin*, 88 Ark. App. 190, 196 S.W.3d 496 (2004).

To rescind a contract based on fraud, it is not necessary that actual fraud exist; a person may commit fraud even in the absence of an intention to deceive. This is constructive fraud, in which liability is premised on representations that are made by one who, not knowing whether they are true or not, asserts them to be true. *Beatty v. Haggard*, 87 Ark. App. 75, 184 S.W.3d 479 (2004). Constructive fraud has been defined as a breach of a legal or equitable duty, which, irrespective of the moral guilt of the fraud feasor, the law declares to be fraudulent because of its tendency to deceive others. *Id*. In fact, it has been said that constructive fraud generally involves a mere mistake of fact. *Id*. Thus, neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud, and a party's lack of knowledge of the material representations asserted by him to be true or his

good faith in making the representations is no defense to liability. *Id*. In *Lane v. Rachel*, 239 Ark. 400, 389 S.W.2d 621 (1965), our supreme court held that constructive fraud could occur where a seller made a misrepresentation, even though the seller did not know that he was making a misrepresentation, and even though he made the representation in good faith; the key was that the buyer relied to his detriment on statements that proved to be untrue. *See also Knox v. Chambers*, 8 Ark. App. 336, 654 S.W.2d 582 (1983).

Appellants contend that they demonstrated evidence that appellees misrepresented the condition of the house's foundation. We agree. They provided evidence that Mr. Pickering represented to Mrs. Garrison, Mr. Williams, and Ms. Coney that the house was built entirely on a slab, when it is undisputed that this representation was incorrect — in fact, there were two areas built over crawl spaces for which no access existed.

Appellants also presented evidence that appellees misrepresented the condition of the roof in the disclosure form, where, in question 21, appellees responded that there had never been a problem, such as leaks, with the roof. Appellants also provided evidence that Mr. Pickering verbally represented to appellants that the roof did not leak. However, in his affidavit, Mr. Levart described the heat sensor in the "gold bedroom" as not operational but merely covering up damage to the sheetrock in the ceiling caused by a water leak. Also, Mrs. Garrison testified that the ceiling had been caulked and painted to conceal the damage, and Mr. Garrison testified in his deposition that appellants had discovered other roof leaks after moving into the house.

Further, appellants presented evidence that appellees misrepresented whether the house had suffered any termite damage when, in fact, it is undisputed that the exercise room in the house was infested with termites at the time of the sale. Appellees' lack of knowledge of such termite damage is a question of material fact in light of the photographs of the baseboards in the exercise room that show that they had been caulked and repainted and Mrs. Pickering's admission in her deposition that touch-up painting had been performed in the house. Additionally, Mrs. Garrison testified in her deposition that appellees had placed a four-drawer file cabinet in such a way that it obstructed the view of the hot-water heater closet when the inspection was done; although one could determine that the heater was working during the inspection, appellants discovered termite mud on the floor of the closet after they moved in. From this evidence, a reasonable juror could conclude that appellees were aware of the termite problems and took steps to prevent appellants from viewing the closet before closing.

Appellants also submitted sufficient evidence from which a reasonable juror could conclude that appellees intended that appellants rely on their representations about the house; the representations concerning the slab foundation were made in response to a specific inquiry from the inspector. Also, in this case, there is no reasonable doubt that the sellers intended that the buyers rely on the statements in the disclosure form.

We also believe that appellants' reliance on appellees' representations was justifiable, because Mr. Pickering had peculiar knowledge of the house's condition as a result of living there for twelve years and because his company built the house. The fact that appellants hired

an inspector and a roofer to inspect the property before closing does not automatically mean that, as a matter of law, they did not justifiably rely on appellees' representations. *See Fausett & Co. v. Bullard*, 217 Ark. 176, 229 S.W.2d 490 (1950). Whether justifiable reliance occurred is generally a question of fact. *See Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W.3d 568 (2002); *Hart v. Bridges*, 30 Ark. App. 262, 786 S.W.2d 589 (1990); *Godwin v. Hampton*, 11 Ark. App. 205, 669 S.W.2d 12 (1984).

Appellants additionally argue that the "as-is" clause did not prevent them from justifiably relying on appellees' misrepresentations, and we agree. An "as-is" clause does not bar a claim for fraud. *Beatty v. Haggard, supra*. Further, the merger clause could not prevent appellants from showing that they were fraudulently induced to enter into the contract. *Farmers Coop. Ass'n v. Garrison*, 248 Ark. 948, 454 S.W.2d 644 (1970). Additionally, we disagree with appellees' contention that constructive fraud will not apply in the absence of a special or fiduciary relationship. Although a fiduciary relationship may form the basis for the practice of a constructive fraud, such a relationship is not vital to a finding of constructive fraud. *Evans Indus. Coatings, Inc. v. Chancery Court of Union County*, 315 Ark. 728, 870 S.W.2d 701 (1994). Even in the absence of such a relationship, appellees had a legal duty to disclose what they knew about the house. *Beatty v. Haggard*, *supra*.

In conclusion, the "as-is" clause, the Buyer's Disclaimer of Reliance, and the Inspection, Repair, and Survey Addendum do not, as a matter of law, bar an action for fraudulent inducement where the buyer offers evidence of all of the elements of fraud or constructive fraud. Although such documents are relevant facts to be considered by the jury,

they do not, in and of themselves, form the basis for the award of summary judgment to the sellers. Because appellants raised genuine issues of material fact on all of the elements of their cause of action, including justifiable reliance, the entry of summary judgment for appellees was not proper.

Reversed and remanded.

GLADWIN and ROBBINS, JJ., agree.