RENDERED: AUGUST 17, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001594-MR

KIRK WALDENMAIER AND
CYNTHIA WALDENMAIER — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CI-02992

FISCHER SINGLE FAMILY
HOMES, II, LLC AND
ELAINE KERNS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Kirk and Cynthia Waldenmaier appeal from the August 2, 2011, order of the Kenton Circuit Court which granted summary judgment in favor

of Fischer Single Family Homes, II, LLC ("Fischer") and Elaine Kerns. For the following reasons, we affirm.

In the spring of 2008, the Waldenmaiers were looking to buy a lot and construct a home. Fischer developed the Trails of Doe Run ("Doe Run") subdivision in Kenton County, Kentucky. In discussions with Kerns, a Fischer sales representative, to purchase a lot and build a home in Doe Run, the Waldenmaiers requested a home with a three-car, side-entry garage. Kerns informed them that further approval as to the type of home that could be built was required from a district manager at Fischer. The Waldenmaiers also inquired into whether a home could be built on an adjacent lot with a side-entry garage facing their garage, and claim that Kerns told them it would not happen. They signed an agreement to purchase the lot and have a home constructed. The agreement provided that a division manager's approval was required to build a home with a side-entry garage, and also included a merger clause stating the following:

> No representations or warranties of any type are made or agreed to by any party hereto, except those specifically provided herein. All prior negotiations, statements, representations, warranties or agreements, if any, pertaining to any aspect of this transaction are hereby superseded and terminated by this Agreement which constitutes the entire Agreement of the Builder and Purchaser.

In June 2009, the Waldenmaiers learned that Fischer planned to build a home on an adjacent lot with a side-entry garage that would face their garage. Thereafter, they brought the underlying action claiming fraud that resulted in loss

of value to their home in the amount of $100,000. Specifically, the Waldenmaiers alleged that Kerns fraudulently induced them to enter into a contract to purchase and construct their home by telling them that a home would not be built on an adjacent property with a garage facing their home. Fischer and Kerns moved for summary judgment, which the trial court granted. This appeal followed.

Summary judgment is appropriate when the evidence presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR[1] 56.03. The court grants summary judgment when it appears impossible that the non-moving party will produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991).

The standard of review on appeal of a trial court's grant of summary judgment is "'whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001) (citations omitted). This court reviews matters of law *de novo*. *Id*.

In Kentucky, to make a claim for fraudulent misrepresentation a party must establish by clear and convincing evidence that: a) a material representation, b) which is false, c) known to be false or made recklessly, d) was made with inducement to be acted upon, e) was acted in reliance thereon, and f) caused injury. *Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544, 549 (Ky. 2009) (citing *United*

[1] Kentucky Rules of Civil Procedure.

Parcel Serv. Co. v. Rickert, 996 S.W.2d 464 (Ky. 1999)). Reliance on the representation must be reasonable, and the representation must relate to a past or present material fact. *Flegles*, 289 S.W.3d at 549 (citations omitted). "'A mere statement of opinion or predication may not be the basis of an action.'" *Id.* (quoting *McHargue v. Fayette Coal & Feed Co.*, 283 S.W.2d 170 (Ky. 1955)).

The Waldenmaiers contend that Kerns' statement led them to believe that a home with a side-entry garage facing their garage would not be built adjacent to their home. However, we find that Kerns' statement, if made, was a prediction or opinion of future circumstances, and not a factual representation. *Id.* ("absent misrepresentation of objective data, 'forward-looking recommendations and opinions are not actionable . . . merely because they are misguided, imprudent or overly optimistic[]'") (quoting *In re Salomon Analyst AT&T Litigation,* 350 F.Supp.2d 455, 467 (S.D.N.Y.2004)). The Waldenmaiers knew that Kerns did not have binding authority to assure them that a home with a side-entry garage would not be built adjacent to their home; Kerns told them that such construction required further approval and the agreement checklist signed by the Waldenmaiers provided that a division manager's review was required to build a side-entry garage. Evidence was also presented that Kerns informed the Waldenmaiers that she could not specifically say what type of house would be constructed on the adjacent lot.

Next, the Waldenmaiers argue that Kerns had apparent authority to make a factual representation regarding home construction on adjacent lots. We disagree.

Apparent authority exists when the principal creates an appearance that the agent has certain authority he in fact does not have, which third parties then rely on. *Mt. Holly Nursing Ctr. v. Crowdus*, 281 S.W.3d 809, 813 (Ky.App. 2008). Here, the Waldenmaiers were aware that the construction of any home with a side-entry garage required further approval. Mrs. Waldenmaier testified that before signing the contract, her husband again inquired as to whether a home with a garage facing their lot could be built on the adjacent lot. She recalled Kerns saying that a possibility existed that a home could be built with a front-entry, left-side garage which would face their side-entry garage, but she did not know specifically what type of house would be built on the adjacent property. Considering the Waldenmaiers' awareness of Kerns' lack of authority, reliance on any factual misrepresentations she might have made regarding the restrictions on the type of home to be built on the adjacent lot was not reasonable.

The Waldenmaiers further testified that the contract did not contain any restrictions on the type of home that could be constructed on the adjacent lot, and that they understood they were free to incorporate terms and conditions into the contract as they saw fit. The agreement's merger clause clearly terminates and supersedes any prior negotiations or statements made between the parties regarding the sale. With respect to claims of fraud, "a party may not rely on oral representations that conflict with written disclaimers to the contrary[.]" *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 640 (Ky.App. 2003). *See also* Restatement (Second) of Contracts § 210(1) (1981) ("A completely

integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement"). In light of this evidence, the Waldenmaiers' reliance on Kerns' alleged statement was not reasonable and they have failed to satisfy this element of their fraud claim.[2]

Finally, on appeal the Waldenmaiers present for the first time a claim of fraud by omission, alleging that their neighbors' driveway is a material defect of their home and that Kerns' failure to predict the future condition of the neighboring driveway constitutes an omission. Such a claim is distinguishable from a claim of fraud by misrepresentation. *Rivermont Inn,* 113 S.W.3d at 641 ("Fraud by omission is not the same, at law, as fraud by misrepresentation, and has substantially different elements."). Since the Waldenmaiers did not plead fraud by omission before the trial court, we will not consider this claim on appeal. *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011) ("'[a] new theory of error cannot be raised for the first time on appeal[]'") (citation omitted).

The Kenton Circuit Court's order is affirmed.

DIXON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I respectfully dissent. The Waldenmaiers' testimony as to representations by Kerns did indeed create a material issue of fact that they were entitled to present as evidence and to develop

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[2] Since we hold that the Waldenmaiers failed to establish a *prima facie* case of fraudulent inducement, we need not reach the issue of whether the doctrine of merger, and any exceptions thereto, apply.

at trial rather than having their claim summarily dismissed without the benefit of a trial. The waffling and innuendoes perpetrated by Kerns were proper matters for a jury to consider along with the issue of her agency status. I cannot agree that Kerns's statement was merely "a prediction or opinion of future circumstances" as noted by the majority opinion. The making of that statement most assuredly constituted both sharp practice and a material issue of fact. Jury scrutiny was clearly warranted.

Consequently, I would hold that summary judgment was improvidently entered.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEES:
Eric C. Deters Independence, Kentucky	David A. Futscher Covington, Kentucky