STATE OF MICHIGAN

COURT OF APPEALS

BURWOOD INVESTMENTS,

Plaintiff/Counterdefendant-Appellee,

v

THE MICHIGAN GROUP-LIVINGSTON and VERNON L. PAPPAS,

Defendants/Cross-Defendants-Appellees,

and

WILLIS STOICK, VERNA STOICK and JOSEPH KOSIK,

Defendants/Cross-Plaintiffs/Third-Party Plaintiffs-Appellants,

and

ELAINE KOSICK, BRENDA JOHNSON and TAURUS PROPERTIES,

Third-Party Defendants/Cross-Plaintiffs/Third-Party Plaintiffs-Appellants,

and

WARD M. BAILEY RESIDUARY TRUST, DAVID & JOYCE BAILEY FAMILY TRUST, JOEL W. & MADELYN BAILEY FAMILY TRUST, JOEL W. BAILEY, BRIAN BAILEY and CHARLES M. RICE,

UNPUBLISHED
August 18, 1998

No. 203678
Oakland Circuit Court
LC No. 93-452773 CZ

Third-Party Defendants-Appellees.

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Appellants Willis Stoick, Verna Stoick, Joseph Kosik, Elaine Kosik, Brenda Johnson, and Taurus Properties ("appellants") appeal as of right from an order granting summary disposition in favor of Vernon L. Pappas and The Michigan Group-Livingston. We affirm.

I. Fraud and Misrepresentation

Appellants argue that the trial court erroneously dismissed their claim for fraud and misrepresentation. We disagree. The trial court's decision to grant a motion for summary disposition is reviewed de novo. *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 48; 530 NW2d 99 (1995).

As a threshold matter, we are satisfied that the trial court did reach the issues of fraud and misrepresentation. Generally, an issue not addressed by the trial court is not preserved for appellate review. *Federated Publications, Inc v Bd of Trustees of Michigan State Univ*, 221 Mich App 103, 119; 561 NW2d 433 (1997). Here, however, the December 3, 1996, "Motion for Reconsideration and to Compel Binding Arbitration" raised the issues of fraud and misrepresentation. The trial court's denial of that motion was sufficient to bring these matters before this Court.

To constitute actionable fraud it must appear: (1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992).

Silent fraud occurs when there is a "suppression of facts and of the truth, as well as by open false assertions" where there is a "legal or equitable duty of disclosure." *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981), quoting *Fred Macey Co v Macey*, 143 Mich 138, 153; 106 NW 722 (1906); see also *M&D, Inc v W B McConkey*, __ Mich App __; __ NW2d __ (Docket No. 175201, issued July 31, 1998), slip op, p 4-7. A claim of silent fraud requires a plaintiff to allege that the defendant intended to induce him to rely on the nondisclosure and that defendant had an affirmative duty to disclose. *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995).

Appellants offer no authority for the proposition that Pappas had a legal duty to disclose his association with the Baileys. Moreover, there is no justification for imposing an equitable duty of disclosure because the agreement plainly allowed for the transfer of the purchaser's interest in the

property. By agreeing to this provision in the purchase agreement, the sellers took the risk that the property or some interest in it might be transferred to someone else.

In addition, some of the alleged misrepresentations in the counterclaim were not material to the sale. Both Mr. Stoick and Mr. Kosik indicated that their purpose in selling the property was "to dispose of a large tract of land for cash," not to develop a golf course. Thus, any alleged representations regarding Pappas' experience with golf courses were not material.

Furthermore, the actual state of affairs was readily determinable by the sellers or their agent.[1] 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 85 (1992). Appellants could have asked to review the financing commitments Pappas allegedly claimed to have had, they could have examined his proposed plans for the development, and they could have asked him for the source of his earnest money deposit. If nothing else, the deposit check itself revealed that Pappas was not advancing funds in his own name.

We reject appellants' argument that this matter should be remanded for the trial court to further articulate its reasoning on the fraud and misrepresentation counts. Where a trial court reaches the correct result for the wrong reason, its decision need not be reversed on appeal. *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993). This same principle would apply where the trial court reaches the correct result, without fully stating its reasons.

We also find that the trial court did not err in failing to send the fraud and misrepresentation claims to arbitration. The parties' stipulated order of November 1, 1995, plainly left for arbitration only those claims not disposed of by summary disposition. Because the fraud and misrepresentation claims were properly dismissed by the trial court, the stipulation does not apply.

II. Contract Claims

Appellants claim that they are entitled to the earnest money deposit pursuant to § 13 of the purchase agreement governing defaults. The construction of a contract with clear language is a question of law that we review de novo. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 418-419; 546 NW2d 648 (1996). In interpreting contracts capable of two different constructions, a reasonable and fair construction is preferred over a less just and less reasonable construction. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 188; 565 NW2d 887 (1997). We agree with the trial court that the default provision is inapplicable to the facts of the case.

The trial court concluded, and we agree, that the duties outlined in § 4 of the purchase agreement are conditions precedent to performance of the contract. A condition precedent is a fact or event that the parties intend must take place before there is a right to performance. *Reed v Citizens Ins Co*, 198 Mich App 443, 447; 499 NW2d 22 (1993). As a general rule, a promisor may not obstruct

the materialization of a condition precedent. *Ihlenfeldt v Guastella*, 42 Mich App 384, 389-390; 202 NW2d 327 (1972).

The conditions in § 4 of the purchase agreement are precedent to the *sellers'* performance, not Pappas'. Their purpose is to require the sellers to complete their part of the bargain, i.e., to transfer title to the land, if Pappas carried out the tasks identified in § 4. The trial court recognized this distinction, finding that the sellers impeded Pappas from obtaining financing for the project by their delay in delivering the deeds to the escrow agent, in violation of the escrow agreement. We find nothing in the record to warrant reversal of that determination. Pappas testified that the Stoicks' deed was not made available until August 30, 1992, a month after the Stoicks had promised to deliver it "[u]pon the execution of this . . . Agreement." Pappas further testified, and his mortgage broker averred, that the absence of the deed made it impossible for him to obtain a final commitment for a loan. The default provision in § 14 applied only if the sale failed to close "due to a refusal or default on the part of the Purchaser." Where the lapse did not occur because of Pappas' "refusal or default," the liquidated damages provision does not apply.

Appellants' other contract-based arguments are without merit. Section 16 of the purchase agreement, the merger clause, states flatly that "This Agreement constitutes the entire agreement *between the parties* with respect to the transaction contemplated herein" (emphasis supplied). By its own terms, it has no application to any agreement between one of the parties and someone else. Section 10 is likewise inapplicable. It does not warrant that the purchaser had no dealings with a broker; it only obligates the purchaser to bear the expenses of a lawsuit if the broker's commission is not paid. Appellants' claim that the default provision is "severable" misconstrues the meaning of "severable." An invalid or unenforceable portion of a document may be "severed," so that the rest of it can be applied, but a party cannot pluck one clause out of an entire contract and seek to enforce it in isolation.

Appellants' final argument, that the trial court should not have required them to elect between tort- and contract-based claims, is misplaced because that is not what the trial court ordered. The court's July 13, 1994, order distinguished between "damages for breach of the contract" and "liquidated damages under the contract," not tort damages and contract damages. In any case, appellants' damages would be the same under either theory.[2] The only "fraud" alleged is the purported deception that led the sellers to enter into the contract, and there is no claim for any damages other than those resulting from the loss of the deposit or failure to go through with the sale.

III. Attorney Fees

Appellants contend that they are entitled to attorney fees "at both the lower court and appellate court levels." We disagree.

Appellants' argument is predicated on §10.00 of the purchase agreement. However, that section applies only to litigation involving the claim of a broker or agent for a commission or other

compensation with respect to the purchase and sale of the property. We note that this issue is not properly preserved for review, because appellants never moved for attorney fees in the trial court. Plainly, however, the present litigation does not involve a claim by a broker or agent for a commission or other compensation.

Affirmed.

/s/ William B. Murphy
/s/ Roman S. Gribbs
/s/ Hilda R. Gage

[1] Appellees' contention that Johnson, the sellers' agent, had notice that the Baileys were involved in the transaction, was denied by Johnson. Because this matter can be decided without reference to that allegation, there is no need to resolve this factual dispute.

[2] We also reject appellants' vague claim for exemplary damages for the alleged "fraud." Appellants' fraud claims are not sustainable and Michigan has specifically held that "exemplary damages are not available in an action for breach of a commercial contract." *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 351; 480 NW2d 623 (1991).