STATE OF MICHIGAN

COURT OF APPEALS

DAVID K. AUSTIN,

Plaintiff-Appellee,

v

JAMES J. MCGUIRK,

Defendant/Third Party Plaintiff/Cross Plaintiff-Appellant,

and

ISABELLA COUNTY ABSTRACT COMPANY, INC., RUDDELL ENGINEERING, INC., and R.J. GOLDEN, INC., d/b/a REMAX OF MT. PLEASANT, INC.,

Defendants/Third Party Defendants-Appellees,

and

WILLIAM B. RUDDELL,

Defendant-Appellee,

and

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant/Cross Plaintiff/Cross Defendant-Appellee.

UNPUBLISHED
February 23, 1999

No. 204437
Isabella Circuit Court
LC No. 92-006787CH

Before: Talbot, P.J., and McDonald and Neff, JJ.

PER CURIAM.

Defendant and third party plaintiff James J. McGuirk appeals by leave granted from trial court orders granting third party defendant Isabella County Abstract Company's [Isabella Abstract's] and First American Title Company's [First American's] motions for summary disposition, from an order denying defendant's motion for disqualification of the trial judge, from the judgment of recission and award of consequential damages, and from a judgment and order finding no cause of action against third party defendants Re/Max of Mount Pleasant [Re/Max] and Ruddell Engineering and awarding those parties mediation sanctions. We affirm.

McGuirk first argues the trial court erred in granting recission of the purchase agreement between plaintiff and McGuirk. This Court reviews equitable actions de novo. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997). However, the decision whether to grant recission of a contract is within the court's discretion. *Bechard v Bolton*, 316 Mich 1, 5; 24 NW2d 422 (1946); *Wronski v Sun Oil Co*, 89 Mich App 11, 29; 279 NW2d 564 (1979); see also *United States Fidelity & Guaranty v Black*, 412 Mich 99, 134; 313 NW2d 77 (1981).

Defendant claims the trial court "automatically" granted recission and that the court's decision was not truly an exercise of discretion. Defendant's argument is without merit. At the hearing on plaintiff's motion for recission, the trial court expressly considered the balance of the equities in determining whether recission was an appropriate remedy, including whether money damages would be adequate. Moreover, the trial court did not actually grant recission until after the trial and explained to McGuirk's counsel that the hearing was only preliminary.

We find the trial court did not abuse its decision by granting recission in this case. The trial court's decision was amply supported by case law and other authority. See e.g., *Kroninger v Anast*, 367 Mich 478, 481-482; 116 NW2d 863 (1962) (affirming order rescinding sale of property where material misrepresentation innocently made); *Dillon v Yankee*, 346 Mich 491; 78 NW2d 131 (1956); *Vormelker v Oleksinski*, 32 Mich App 498; 189 NW2d 135 (1971) (affirming recission of land purchase contract where sellers made material misrepresentation); *Mock v Duke*, 20 Mich App 453; 174 NW2d 161 (1969); 37 Am Jur 2d, Fraud and Deceit, § 221 (1968). Defendant cites only one case, *Browne v Briggs Commercial & Development Co*, 271 Mich 191; 259 NW 886 (1935), in which recission was held to be an inappropriate remedy. However, *Browne* is distinguishable from this case on its facts. There, the problem with the legal description was a shortage in area, while here the problem was that the seller conveyed an easement right that he did not have. The value of that easement right was not subject to quantification with the same ease with which the value of a part might be determined by reference to the value of the whole. Moreover, the discrepancy in this case was discovered only one year after the sale, rather than five years as in *Browne*.

Defendant also suggests that the defect was not material because plaintiff was not seriously injured by the misrepresentation. This argument is not properly before this Court because the question of materiality of the defect was determined in connection with the trial court's grant of summary disposition to plaintiff regarding misrepresentation, which McGuirk has not appealed. However, even if we were to consider McGuirk's argument, we would find the trial court properly determined that the

existence of the easement was a material term of the contract and that recission was warranted because it is undisputed that plaintiff did not receive the

benefit he expected to receive, i.e. a sixty-six foot easement. *Omnicom v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997); *Holtzlander v Brownell*, 182 Mich App 716, 721-722; 453 NW2d 295 (1990).

Next, McGuirk argues the trial court erred when it concluded plaintiff was entitled to recover as consequential damages the reasonable value of improvements made to the interior of the house after he took possession of the property. We disagree.

This Court reviews the trial court's finding of fact made in connection with the judgment in an equitable action for clear error. *LaFond, supra* at 450. We find that the trial court did not clearly err in concluding that it might reasonably have been anticipated that plaintiff would make some improvements to the property after he bought it, especially in light of the fact that most of the improvements were started but left uncompleted by McGuirk. *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997); *Fagerberg v LeBlanc*, 164 Mich App 349, 356-357; 416 NW2d 438 (1987). Accordingly, the trial court properly awarded plaintiff the reasonable value of the improvements as consequential damages.

Defendant's argument that the value of the improvements to the interior of the house are not recoverable as consequential damages because they were not the direct result of the misrepresentation regarding the width of the easement is misplaced.[1] Plaintiff relied on the misrepresentation when he purchased the house, and if he had not done so he would not have incurred the costs of the improvements. The Michigan Supreme Court has held that the proper measure of damages in cases in which improvements have been made to real property subsequent to a sale at which the value of the property was misrepresented is the difference in the value of the property as is and the value if it had been as represented. *Troff v Boeve*, 354 Mich 593, 598-599; 93 NW2d 311 (1958); *Wolbrink v Sorr*, 341 Mich 512, 520-521; 67 NW2d 688 (1954). Although both *Wolbrink* and *Troff* involved actions for money damages rather than recission, the difference lies only in the fact that rather than being taken into consideration in the calculation of actual damages (difference in value), the value of the improvements becomes an element of consequential damages. It would render the principle of election of remedies meaningless if the victim of a misrepresentation made during the sale of property was penalized for electing recission by not being able to recover for the value of improvements that were reasonably anticipated by the parties, and preclude an adequate remedy altogether where, as in the instant equity case, difference in value can not be determined with any degree of certainty. As plaintiff points out, to disallow recovery for the improvements would unjustly enrich McGuirk and allow him to profit from his wrongful conduct because he would be receiving a more valuable house than that which he sold to Austin. Moreover, the object of recission is to place the parties in a position equal to that which they would have occupied had the sale not occurred. See 37 Am Jur 2d, Fraud and Deceit, § 221. In this case, because McGuirk started the improvements but left them unfinished, and because the reasonableness of the cost was never challenged, McGuirk will occupy the same position he would have held had he stayed in the house and finished the improvements himself.

McGuirk also argues the trial court erred in granting summary disposition to third party defendants First American and Isabella Abstract. We review the trial court's decision to grant summary

disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

The trial court properly granted summary disposition to First American and Isabella Abstract on the basis that neither owed a duty to McGuirk. McGuirk cites *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974) and *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 467; 487 NW2d 807 (1992) in support of his position that a duty was owed. However, *Williams, supra* does not apply here because it is undisputed that no abstract of title was ever requested or prepared. Moreover, McGuirk cannot claim that he reasonably relied on the legal description since he admitted that he has always known that the easement is only thirty-three feet wide and that he did not read the description. No duty could have been owed absent this reliance. *Bonner, supra* at 468.

Next, McGuirk argues the trial court erred by granting defendants Ruddell Engineering and Re/Max's motions for a directed verdict on his third-party complaint. We disagree.

Although McGuirk attempts to argue on appeal that Re/Max and Ruddell's liability arises out of their status as agents, no claim sounding in agency or fiduciary duty was pleaded in the complaint. Instead, the only claim was for indemnification. Moreover, at the beginning of trial McGuirk's counsel agreed that the only issue for trial was indemnification. McGuirk later moved to amend the pleadings, but the trial court ruled that McGuirk could not argue there was a fiduciary duty arising from agency. McGuirk has not appealed the trial court's ruling. Accordingly, McGuirk's agency arguments are irrelevant.

The trial court correctly granted a directed verdict for Ruddell Engineering and Re/Max under the law of indemnification. Because there is no express contract of indemnification, the only applicable theories are implied contractual indemnification and common law indemnification. See *Paul v Bogle*, 193 Mich App 479, 490; 484 NW2d 728 (1992). Both common-law indemnity and implied contractual indemnity require that the person seeking indemnification be free from active negligence. *Paul*, *supra* at 491. In this case, McGuirk admittedly did not read the legal description or review the mortgage survey before signing the deed. McGuirk has not challenged the trial court's ruling that McGuirk negligently misrepresented the property. Moreover, the Supreme Court has held that signing a deed without reading it is an act of negligence. *Richeson v Wagar*, 287 Mich 79, 86-87; 282 NW 909 (1938); *Sponseller v Kimball*, 246 Mich 255; 224 NW 359 (1929). Thus, the trial court correctly determined that a directed verdict was appropriate because McGuirk's own active negligence precludes recovery under the theories of common law or implied contractual indemnification as a matter of law.

McGuirk next argues his motion for disqualification of the trial judge should have been granted. We disagree. After reviewing McGuirk's allegations[2] and the record, we find McGuirk has not met his heavy burden of overcoming the presumption of impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996); *In re Hamlet (After Remand)*, 225 Mich App 505, 524; 571 NW2d 750 (1997).

Finally, McGuirk argues the trial court erred when it awarded as mediation sanctions to Re/Max and Ruddell Engineering all of their attorney fees, rather than only awarding attorney fees for the time

spent on McGuirk's third party complaint. We disagree. This Court will uphold the trial court's award of mediation sanctions unless it finds an abuse of discretion. *Put v FKI Industries, Inc*, 222 Mich App 565, 572; 564 NW2d 184 (1997). In this case, the proceedings involving the primary litigation were integrally related with proceedings involving McGuirk's third party claims. McGuirk's third party claim was based on indemnification; therefore, the third party defendants liability was completely derivative of McGuirk's liability to Austin. Accordingly, the trial court did not abuse its discretion in awarding mediation sanctions for all attorney fees incurred after the mediation evaluation was rejected. *Michigan Basic Property Ass'n v Hackert Furniture Distributing Co*, 194 Mich App 230, 233, 235; 486 NW2d 68 (1992); *Severn v Sperry Corp*, 212 Mich App 406, 416-417; 538 NW2d 50 (1995).

Affirmed.

/s/ Michael J. Talbot
/s/ Gary R. McDonald
/s/ Janet T. Neff

[1] The case defendant cites in support of his argument, *D'Alessandro v VanderHooning*, 365 Mich 66; 112 NW2d 114 (1961), is not applicable here. In *D'Alessandro*, the Supreme Court specifically distinguished a property case as "not analogous" to the facts before it. *Id.* at 77.

[2] We have not reviewed incidents McGuirk cites on appeal but did not cite as grounds for disqualification below.