STATE OF MICHIGAN

COURT OF APPEALS

JOCK FRITZ,

Plaintiff-Appellee,

v

GEORGE TAPKE and ANN TAPKE,

Defendants-Appellants.

UNPUBLISHED
August 3, 2001

No. 221954
Cheboygan Circuit Court
LC No. 98-006421-CK

Before: Neff, P.J., and O'Connell and R.J. Danhof*, JJ.

PER CURIAM.

Defendants appeal as of right a judgment in favor of plaintiff following a bench trial. Plaintiff, who purchased a home from defendants, claimed that defendants made false representations on a seller's disclosure statement regarding the condition of the roof and the septic system. We affirm.

Defendants argue first that the trial court incorrectly found that plaintiff was unaware of the problem with the septic system. We disagree. This Court reviews the findings of fact by a trial court sitting without a jury under the clearly erroneous standard. MCR 2.613(C); *Gumma v D & T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999); *Phardel v Michigan*, 120 Mich App 806, 811-812; 328 NW2d 108 (1982). To recover for misrepresentation, a plaintiff must have reasonably relied on false statements. *M&D, Inc v McConkey*, 231 Mich App 22, 26-28; 585 NW2d 33 (1998); *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689-690; 599 NW2d 546 (1999). A plaintiff cannot have reasonably relied on a representation he knew was false. *Phinney v Perlmutter*, 222 Mich App 513, 535; 564 NW2d 532 (1997). The trial court here explicitly found defendants had misrepresented the condition of the system; this implied that plaintiff proved to the court he had reasonably relied on the false representation.

In the present case, plaintiff received an inspector's report regarding the septic system on the day of the closing. The report said only that water was running into the system; the inspector did not identify the source of the water or the implications of his observation. Defendants never informed plaintiff that an intermittent spring periodically filled the tank, nor that a new drain field and pumping system might be required due to the numerous springs on the property and the proximity of the lake. Plaintiff was reassured by defendants' representation that although the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

tank had been pumped, it was now "okay," and was assured that the repairs could be made for less than $1,500. Although plaintiff knew (just before closing) that the septic system was not perfect, he had no way of knowing that the system had a serious problem that simple pumping would not solve. Defendants' assertion that the system was "okay" was false; the last time defendants actually used the system, they needed to pump it twice and decided to pump it continuously so it would function. Plaintiff's reliance that the disclosure statement had been completed in good faith was reasonable. The trial court's finding that plaintiff lacked knowledge of the problem was not clearly erroneous because plaintiff lacked knowledge that the problem's true nature extended beyond the septic tank to the spring-riddled property itself. *Gumma*, *supra* at 221.

Defendants further claim that an accord and satisfaction occurred when plaintiff agreed to accept $1,500 in escrow to pay for septic repairs. Defendants failed to preserve this issue for review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Furthermore, defendants' argument has no merit because plaintiff was unaware of the misrepresentation and did not intend to give up his right to sue. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 718-719; 583 NW2d 232 (1998).

Defendants also argue that the trial court incorrectly found that defendants falsely represented the condition of the roof. We disagree. Plaintiff must prove fraud by clear and convincing evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996). The trial court's factual conclusions are reviewed for clear error. *Gumma*, *supra*.

For a plaintiff to recover for common-law fraud, the representation must have been false. *M&D, Inc*, *supra* at 26-27. In the present case, defendants affirmatively represented to plaintiff that the roof did not leak. Defendants argue that this statement was true because the leaks came from the wood around the windows, not from the roof, framing the issue as whether the wood around the windows should be considered part of the roof structure. The trial court found that the windows were part of the "roof structure," based on expert testimony and visual evidence presented at trial, and found misleading defendants' statement that there were no roof leaks. We cannot say that this conclusion is clearly erroneous. *Gumma*, *supra* at 221. Furthermore, defendants had a legal duty to report "known conditions affecting the property," even if not prompted by a specific question on the disclosure form. MCL 565.957. The statutory form reads: "Instructions to the Seller: (1) Answer ALL questions. (2) Report known conditions affecting the property." If a seller is only required to report conditions listed in the questions, the second instruction would be mere surplusage. Therefore, the instructions require more from the seller than simply answering the questions. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999). The "good faith" required by the statute extends not just to answering specific questions asked by the form but in honestly reporting the condition of the property. MCL 565.960. Defendants knew that the house leaked, and their silence became an affirmative act of misrepresentation when they signed the disclosure form that was purported to be a report of "known conditions affecting property."

Next, defendants argue that the "as is" clause in the contract shifted the burden to plaintiff to discover defects that a reasonable inspection would reveal. Defendants cite *Conahan v Fisher*, 186 Mich App 48, 50; 463 NW2d 118 (1990); however, that case states only that silent fraud

cannot exist when a reasonable inspection would have revealed the defect. Plaintiff does not claim silent fraud. An "as is" clause in a real estate purchase agreement does not transfer the risk of loss to the buyer when the seller made fraudulent statements before the parties signed the contract. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). In addition, the statutes impose a duty on the seller when the seller has knowledge of a defect or condition that contradicts information provided by an inspector. MCL 565.955(2). As noted above, defendants' disclosure statement misrepresented the condition of the property; therefore *Conahan* does not support defendants' argument. Also, *Conahan* was decided before the disclosure statute became effective in 1994; the duties created by statute cannot be circumscribed by the earlier case. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). Thus, plaintiff's decision to hire an inspector did not bar him from asserting that he reasonably relied on defendants' statements. *Novak*, supra. The inspection mentioned nothing about roof or window leaks, and the evidence indicated only that the water stains inside the house could be seen from a ladder. The disclosure statement did not reveal any problems with leaks. Plaintiff had no reason to doubt defendants' representation, especially because defendants were obliged to disclose the condition and to correct known errors in the inspector's report.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert J. Danhof