STATE OF MICHIGAN

COURT OF APPEALS

CHARLES LOVE AND ANGELA LOVE,

Plaintiffs-Appellants,

v

DINO CICCARELLI, LYNDA CICCARELLI, THEODORE KOLASA and NEW REALTY, INC., d/b/a CENTURY 21-EAST, INC.,

Defendants-Appellees.

UNPUBLISHED
January 4, 2002

No. 221993
Macomb Circuit Court
LC No. 97-004363-CH

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting a directed verdict, pursuant to MCR 2.515, in favor of defendants. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Plaintiffs purchased a Shelby Township home, formerly owned by defendants Dino Ciccarelli and Lynda Ciccarelli ("sellers"). After discovering several problems with the home, plaintiffs filed a three-count complaint alleging fraud and misrepresentation, violations of the Seller Disclosure Act, MCL 565.951 *et seq.*, and violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. Plaintiffs also named the seller's broker, Ted Kolasa and New Realty, Inc., d/b/a Century 21-East, Inc. ("broker") as defendants in this lawsuit.

Plaintiffs allege that the home contains several defects, specifically, water accumulation in the basement and the existence of a heating coil on the exterior of the home. Plaintiffs further state that despite defendants' assurances to the contrary, the home was subject to a homeowner's association. As a result of the association's bylaws, plaintiffs have been prevented from building the fence that they initially contemplated and discussed with defendants. Lastly, plaintiffs assert that the lot size differed materially from what defendants represented. Plaintiffs ultimately testified that they never would have purchased the home if these issues had been disclosed.

Defendants moved for a directed verdict at the close of plaintiffs' proofs. The trial court granted this motion on the grounds that plaintiffs failed to present any evidence of actual damages and did not demand rescission of the contract. Plaintiffs argue on appeal that the trial court erred in granting the directed verdict.

A trial court's grant or denial of a directed verdict is reviewed de novo. *Tobin v Providence Hosp*, 244 Mich App 626, 642; 624 NW2d 548 (2001). "When reviewing a motion for a directed verdict, the evidence and all reasonable inferences from that evidence are reviewed in a light most favorable to the nonmoving party." *Chambers v Trettco, Inc*, 244 Mich App 614, 621; 624 NW2d 543 (2001). A directed verdict is only appropriate if no material question of fact remains that could lead reasonable minds to disagree. *Moll v Abbott Laboratories*, 444 Mich 1, 26, n 36; 506 NW2d 816 (1993).

I

We find that plaintiffs' action in fraud was not foreclosed by a failure to specifically demand relief in the form of rescission. In fact, plaintiffs did "elect to rescind" in the fraud count of their complaint. Plaintiffs also made a general demand for "other equitable and proper relief." Further, trial court has broad discretion to grant relief, supported by the evidence, even if such relief was not demanded in the pleadings. MCR 2.601(A). Therefore, the trial court erred in granting a directed verdict on the basis that plaintiffs did not specifically demand rescission.

Additionally, plaintiffs' action in fraud was not foreclosed by their lack of proof of actual damages. Generally where a plaintiff, as here, asserts a remedy based in damages, recovery is not allowed unless actual damage is proven. *Dehring v Northern Michigan Exploration Co*, 104 Mich App 300, 309; 304 NW2d 560 (1981). However, where a plaintiff seeks rescission due to fraud, evidence of monetary damage is not necessarily required. *Id*. at 313. Rather, it is enough for plaintiffs to establish some legal injury by alleging that they have been wrongfully deprived of certain property due to defendants' misrepresentations without setting forth in detail the extent of the damage. *Id*. at 311. Like *Dehring*, plaintiffs established injury sufficient for rescission, through testimony that they would not have purchased the home had they known of the alleged defective conditions or property restrictions.

Although we find that the trial court erred in granting a directed verdict for plaintiffs' failure to specifically demand rescission or prove monetary damages, there is no need to reverse the decision if the trial court reached the correct result for the wrong reason. *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231, 240; 581 NW2d 746 (1998). Therefore, we must determine whether plaintiffs established a prima facie case of fraud to overcome the directed verdict. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

To establish a claim of fraudulent misrepresentation, plaintiffs must prove:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).]

Plaintiffs first argue that defendants fraudulently represented the size of the lot. Apparently, the discrepancy in the lot size was discovered when plaintiffs had a stake survey completed after they had moved into the home. However, plaintiffs presented no evidence showing that defendants knew of this discrepancy. In fact, all evidence points to the contrary. Defendants reasonably relied on the publicly recorded lot size when they informed plaintiffs of the size of the property. Moreover, the survey completed for plaintiffs' mortgage company also confirmed the lot size as represented by defendants. Plaintiffs themselves admitted that they had no reason to believe that the recorded land description was incorrect. Thus, plaintiffs have failed to establish that defendants knew the lot information was inaccurate or that they acted with the intent to defraud plaintiffs.

Plaintiffs also claim that defendants fraudulently indicated that there had been no evidence of water in the basement. However, the evidence of the water damage consisted of photographs taken in early 1999, and plaintiffs admitted that they first noticed the problem in the spring of 1996. We do not see how a reasonable person could infer that these pictures accurately portrayed the condition of the basement when plaintiffs purchased the home in December of 1995. Further, plaintiffs testified that when they initially viewed the home they failed to notice any signs of water damage in the basement, such as stains on the walls. Plaintiffs also acknowledged that the water problem grew progressively worse over the years. As such, plaintiffs have not shown that a reasonable juror would infer that the sellers knew about the water problem, or that the problem even existed when the sellers lived in the home.[1] Absent proof of defendants' knowledge, plaintiffs have failed to establish a prima facie case of fraud.

Plaintiffs next suggest that defendants fraudulently represented that plaintiffs would have no impediment to erecting a fence. Plaintiffs testified that the broker stated that erecting a fence "shouldn't be a problem." However, the bylaws of the home-owners association prohibited the erection of fences. Nonetheless, there was no evidence admitted at trial showing that when the broker made the statement he knew it was false or that it was made recklessly with disregard for its truth. Although the broker may have been negligent, his conduct did not rise to the level of intentional fraud or recklessness. Moreover, plaintiffs never suggested that the sellers fraudulently concealed the restrictions on fences, and thus, there is no actionable fraud against them.

Plaintiffs next contend that defendants made several fraudulent representations regarding the non-existence of a homeowner's association. While we find that it is clearly arguable that defendants knew about the association, plaintiffs have failed to show that they reasonably relied on defendants' statements. *Novak v Nationwide Ins Co*, 235 Mich App 675, 689-691; 599 NW2d 546 (1999). There can be no fraud where plaintiffs had the means to determine that a representation was untrue and defendants never prohibited plaintiffs' ability to use that knowledge. *Webb v First of Michigan Corp,* 195 Mich App 470, 474; 491 NW2d 851 (1992). Here, plaintiffs were provided with a title insurance commitment that specifically disclosed the existence of a homeowner's association. Defendants did not prevent plaintiffs from reading the documentation, and even a cursory review of the title insurance commitment would have

[1] Compare *Clemens v Lesnek*, 200 Mich App 456; 505 NW2d 283 (1993) (purchasers immediately detected problems with the home).

disclosed that the property was subject to a homeowner's association. Plaintiffs also acknowledged that they read and understood the title insurance commitment, therefore establishing their reliance on it. Accordingly, plaintiffs cannot claim to have been defrauded when they chose to ignore the available information. *Id*. at 475.

Plaintiffs finally contend that defendants fraudulently concealed the existence of a coil heater. Under the doctrine of silent fraud, the intentional suppression of material facts, to give a false impression to the other party, constitutes actionable fraud where there is a duty to disclose. *M&D, supra* at 29. A seller's duty to disclose material facts arises when the parties to the transaction "have generally discussed the condition at issue--when the purchaser has expressed some particularized concern or made a direct inquiry--and the seller fails to fully disclose the material facts within the seller's knowledge related to the condition and the buyer detrimentally relies upon the resulting misdirection." *Id*.

While plaintiffs alleged that the sellers knew about the heating coil and failed to disclose it, plaintiffs have not presented any evidence that the sellers had a duty to disclose that fact. Indeed, the record in this case is devoid of any proof that plaintiffs inquired directly or indirectly about the existence of a heating coil or heating problems. Consequently, plaintiffs do not have an action under the doctrine of silent fraud. Moreover, we note that plaintiffs purchased the property "as is" and specifically declined to have a home inspection which may have revealed the coil's existence. See *id*. at 31-33.

Since plaintiffs failed to establish a factual question with respect to the above items, they have failed to sustain a prima facie case of fraud and defendants were entitled to judgment as a matter of law.

II

In the second count of their complaint, plaintiffs argued that defendants' misrepresentations violated the Seller Disclosure Act, MCL 565.951 *et seq*. However, the Act clearly states that "[a] transferee's right to terminate the purchase agreement expires upon the transfer of the subject property by deed or installment sales contract." MCL 565.954(4). Because plaintiffs failed to terminate their purchase agreement prior to the transfer of the deed, they forfeited any cause of action under the Act. Moreover, a transfer of property subject to this Act will not be invalidated solely because a person failed to comply with one of its provisions. MCL 565.964.

III

Plaintiffs' complaint also contends that defendants violated the MCPA. An individual who suffers harm from any of the acts enumerated in MCL 445.903 can bring suit under the MCPA. MCL 445.911(1)(a). After carefully reviewing the record, we find that plaintiffs have successfully alleged at least one violation of the MCPA.

The MCPA states that it is unlawful to make "a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is." MCL 445.903(bb). In this case, the broker told plaintiffs that the home was not subject to a homeowner's association. The plaintiffs also testified that Mrs. Ciccarelli informed them, orally and in her representations in the Seller's Disclosure Statement, that there was no homeowner's association. This was material to the transaction because, according to plaintiffs' testimony, they would not have purchased the home if they had known of the homeowner's association. *Zine v Chrysler Corp,* 236 Mich App 261, 283; 600 NW2d 384 (1999). Moreover, the MCPA does not require that actual damages be proven to allow recovery.[2] MCL 445.911(2). Because a reasonable juror could find that plaintiffs rationally believed the representations made by defendants, a directed verdict on plaintiff's MCPA claims was improper.

IV

Accordingly, we affirm the portion of the trial court's order that granted defendants' motion for directed verdict with respect to fraud and violations of the Seller's Disclosure Act. We reverse the trial court's directed verdict as to plaintiffs' MCPA claims and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper

[2] Absent a showing of actual damages, the MCPA provides for nominal damages. These nominal damages include $250 and reasonable attorney's fees. MCL 445.911(2).