STATE OF MICHIGAN

COURT OF APPEALS

ERNEST A. KNOBELSPIESSE and MARY H. KNOBELSPIESSE,

Plaintiffs-Appellants,

V

WRIGHT VENTURES INC., d/b/a/ PALACE BUILDERS OF MICHIGAN; DAVID W. WRIGHT; DEAN KOSSARAS; AMSTAR CORP.; DEAN KOSSARAS CUSTOM HOMES; GEORGE J. CIMERMAN; C. J. CIMERMAN CO.; CIMERMAN & KOSSARAS,

Defendants-Appellees.

UNPUBLISHED
June 14, 2002

No. 223340
Genesee Circuit Court
LC No. 97-62063-CP

Before: Neff, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's grant of summary disposition on their claims of fraud/misrepresentation and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*. We affirm.

I. Facts and Procedural History

In 1996, plaintiffs signed a purchase agreement with defendant, Palace Builders, to buy a home at 5476 Woodfield Parkway, in Grand Blanc.[1] The purchase price of the house was $425,000 and the record reflects plaintiffs bought the house "as is," subject to certain conditions, including that Palace Builders would perform various specified repairs. On April 1, 1996, at the closing on the house, plaintiffs signed a document entitled "Final Inspection by Homeowners," which indicated that the builder would perform several additional repairs to the house. This

[1] Palace Builders is a joint venture between defendant Wright Ventures, Inc., a corporation controlled by defendant David Wright, and defendant G. J. Cimerman Company, now a dissolved corporation, controlled by defendant George Cimerman. Plaintiffs' claims against defendant Dean Kossaras were subsequently dismissed because of bankruptcy proceedings initiated by Kossaras. As part of plaintiffs' dismissal, plaintiffs waived appeal regarding all claims against Kossaras and Amstar Corporation.

document also states that plaintiffs acknowledged that a final certificate of occupancy had not been issued for the house, and that the builder would, within 60 days, comply with final inspection requirements of the township building department.

A permanent occupancy permit was never issued for the house and, on December 30, 1997, plaintiffs filed a two-count complaint alleging fraud/misrepresentation and that defendants violated the MCPA by engaging in an unlawful or deceptive act in contravention of the statute. The trial court initially ordered that the parties arbitrate plaintiffs' claims as required under the "Building Warranty Program," executed by the parties for allegations relating to "defects or damage" to the home. Plaintiffs refused to submit to arbitration and asserted that the arbitration clause does not apply because plaintiffs are not seeking remedies for breach of contract or breach of warranty. On reconsideration, the trial court rescinded its order requiring arbitration.

Thereafter, plaintiffs and defendants filed motions for summary disposition under MCR 2.116(C)(8) and (C)(10). After several hearings, the trial court ultimately granted summary disposition to defendants on plaintiffs' fraud/misrepresentation claims and all fraud-based claims arising under the MCPA, except for those claims asserted against defendant George Cimerman. Trial was scheduled to begin on September 30, 1999; however, on that date, the trial court only entertained motions.

The trial court granted defendants' motion to strike plaintiffs' jury demand because plaintiffs acknowledged that the remedy they sought was equitable, rescission of the purchase agreement. Further, the trial court denied as untimely plaintiffs' motion to amend their complaint or for reconsideration of their claims under the MCPA. The trial court then granted defendants' motion for summary disposition under both MCR 2.116(C)(8) and (C)(10) as against George Cimerman. However, the trial court did not specifically rule on plaintiffs' remaining claims under MCL 445.903(1)(y) of the MCPA, "failure of the other party to the transaction to provide the promised benefits." Rather, the parties stipulated to the dismissal of plaintiffs' remaining statutory claims against Palace Builders, G.J. Cimerman Company, and Wright Ventures, without prejudice and without costs. On the basis of this stipulation, any statute of limitations applicable to these claims against these parties was tolled to allow plaintiffs to file this appeal.

II. Analysis

A. Claims Against George Cimerman

Plaintiffs argue that the trial court erred in granting summary disposition to Cimerman on their claims under the MCPA.

The trial court granted summary disposition to Cimerman under MCR 2.116(C)(8) and (C)(10).[2] Plaintiffs argue that summary disposition was improper because the Occupational

[2] As our Supreme Court articulated in *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed

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Code imposes an implicit duty on Cimerman as a licensed builder. In support of this claim, plaintiffs cite *Mikos v Chrysler*, 158 Mich App 781; 404 NW2d 783 (1987), in which this Court held that a warranty implied by law is as much a promise as an express representation by the seller. *Id.* at 782-783. Plaintiffs maintain that the portion of the Occupational Code that relates to residential builders, MCL 339.2401-339.2412, requires that a builder construct dwellings that will not harm the health, safety and welfare of the community. Plaintiffs argue that the Code also implies a warranty regarding workmanship and that Cimerman violated the Code in building the house in a non-workmanlike manner. However, plaintiffs' reliance on the Occupational Code is in error because, as the trial court recognized, the record shows that Palace Builders is the license holder, and that George Cimerman is the merely the qualifying officer. Therefore, even assuming that the occupational code implies such a warranty, plaintiffs fail to show that the code implies a warranty on Cimerman personally.

Plaintiffs further contend that Cimerman should be held liable under the MCPA because he personally signed documents relating to the sale of the house. Plaintiffs cite the "Final Inspection to Homeowners" document which Cimerman signed on the line designated for the "Builder." However, as is clear from the first sentence of the document, and as the trial court correctly observed, the "Builder" is specifically defined as "Palace Builders, a joint venture hereinafter referred to as, Builder . . . ." Plaintiffs present no other evidence that Cimerman personally made any representations or assurances to them or that he acted outside his capacity as a representative of Palace Builders. Accordingly, plaintiffs have failed to support their claim that Cimerman's signature imposes liability under the MCPA.

Plaintiffs also claim that, because an administrative law judge ruled that Cimerman, a licensed builder, failed to build the home in a workmanlike manner, the trial court erred in granting summary disposition to Cimerman on plaintiffs' MCPA claim.[3] As both parties

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> in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992) [mod by *Patterson v Kleiman*, 447 Mich 429 (1994).] A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).
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> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

[3] On plaintiffs' behalf, the Department of Consumer & Industry Services (DCIS) filed a complaint against George Cimerman for failing to construct the house in a workmanlike manner,

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acknowledge, Cimerman was assessed a fine in that proceeding; however, plaintiffs have failed to articulate how this constitutes a *per se* violation of the MCPA and failed to assert an argument or offer supporting case law regarding whether and to what extent the trial court was bound to rely on the findings of fact or conclusions of the administrative law judge. Accordingly, we deem this argument waived.

Finally, we note that, at various points in the record, plaintiffs asserted that Cimerman violated various sections of the MCPA, including MCL 445.903(1)(m), (n), (p), and (q), (v), (y), (bb) and (cc). However, conspicuously absent from the record are specific facts and legal support to sustain those claims. At the final hearing on the summary disposition motion, plaintiffs admitted that Cimerman did not speak to plaintiffs about the occupancy permit and it is undisputed that, aside from certain "misrepresentations" alleged by plaintiffs, that plaintiffs purchased the house "as is." Below and on appeal, plaintiffs failed to adequately brief their claims and failed to present facts or arguments to survive a motion for summary disposition on any of the cited MCPA sections they claim should apply to Cimerman.[4] Accordingly, the trial court was clearly correct in granting summary disposition on plaintiffs' claims against Cimerman.

B. Innocent Misrepresentation and Silent Fraud

Plaintiffs say that the trial court erred in granting of summary disposition on their claims against David Wright for innocent misrepresentation and silent fraud. We disagree.

In *M & D, Inc v McConkey*, 231 Mich App 22, 27-28, 585 NW2d 33 (1998), a special conflict panel of this Court quoted from an earlier opinion and explained the following distinction between innocent misrepresentation and common-law fraud:

> A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. The innocent misrepresentation rule represents a species of fraudulent misrepresentation that has, as its distinguished characteristics, the elimination of the need to prove a fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the

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pursuant to MCL 339.2411(2)(m) for failing to comply with township building codes, and for failing to correct any problems within a reasonable time, as required by the building codes.

[4] It is well-settled in this state that, on appeal:

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

> necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. [Citations omitted.]

Furthermore, it is well-settled in Michigan that an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. *Hi-Way Motor Co v International Harvester Co,* 398 Mich 330; 247 NW2d 813 (1976). Future promises are contractual and do not constitute fraud. *Id.* A mere broken promise does not constitute fraud, nor is it evidence of fraud. *Higgins v Kenneth R Lawrence, DPM, PC,* 107 Mich App 178, 184-185; 309 NW2d 194 (1981). Moreover, our Supreme Court has held that a claim of innocent misrepresentation must also relate to a past or existing fact, rather than a promise of future conduct. *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998).

Here, plaintiffs' sole support for their assertion that Wright defrauded them is the addendum to the purchase agreement which constitutes a promise to complete several tasks, and to obtain an occupancy permit. These future promises do not constitute fraud or innocent misrepresentation because they relate to future acts. Accordingly, the trial court properly granted summary disposition on plaintiffs' misrepresentation claim.

We further hold that the trial court properly granted summary disposition on plaintiffs' claim of silent fraud. To establish a claim of silent fraud, a plaintiff must "show that some type of representation that was false or misleading was made and that there was legal or equitable duty of disclosure." *M & D, supra* at 31. In other words, "the suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation and will support an action in fraud." *Id*. at 29, quoting *Williams v Benson*, 3 Mich App 9, 19; 141 NW2d 650, rev'd 378 Mich 721 (1966), quoting *Tompkins v Hollister*, 60 Mich 470, 483; 27 NW 651 (1886). However, as with other forms of fraud, to establish silent fraud, plaintiff must also show reliance. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 504; 579 NW2d 411 (1998).

Plaintiffs assert that Wright committed silent fraud at the signing of the purchase agreement by failing to disclose that the house did not have an occupancy permit. However, plaintiffs have failed to establish the required element of reliance. Indeed, when plaintiffs learned about the missing occupancy permit at the time of closing, they did not change their legal position. Instead, plaintiffs made the purchase and acknowledged in writing that the house did not have an occupancy permit. Because plaintiffs did not rely on Wright's silence, their claim of silent fraud is meritless.

C. Remaining MCPA Claim and Jury Demand

After ruling that plaintiffs failed to set forth a claim for fraud, the trial court ruled that summary disposition was proper for any claim under the MCPA that had its basis in common-law fraud. At the hearing, plaintiffs argued that they believed defendants had only committed two unlawful acts, MCL 445.903(1)(u) and (y). The trial court granted summary disposition only on plaintiffs' claim under subsection (u), which imposes liability for:

> Failing, in a consumer transaction that is rescinded, canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law, to promptly restore to the person or persons entitled to it a deposit, down payment, or other payment, or in the case of property traded in but not available, the greater of the agreed value or the fair market value of the property, or to cancel within a specified time or an otherwise reasonable time an acquired security interest.

At the hearing, plaintiffs' counsel stated that plaintiffs had rescinded the contract. However, in their complaint, plaintiffs assert they are seeking rescission *as a remedy*. Indeed, in resolving the issue of the whether a jury would hear their statutory claims, plaintiffs again argued that the remedy sought was for rescission of the purchase agreement. Therefore, because plaintiffs had not, at the time of filing their complaint, rescinded their contract, the trial court properly dismissed plaintiffs' claim under subsection (u), which requires that rescission has already occurred.[5]

For similar reasons, we also reject plaintiffs' claim that the trial court improperly struck their jury demand. In their complaint, plaintiffs requested an equitable rescission of the purchase agreement and injunctive relief. While plaintiffs also asserted a claim for damages in the complaint, the record reflects that plaintiffs repeatedly stated on the record that their claim for relief was to rescind the contract. Indeed, at the hearing on defendants' motion to strike the jury demand, plaintiffs admitted that their requested relief was for rescission and merely requested that the trial court should, in its discretion, appoint an *advisory* jury under MCR 2.509(d)(1). Absent the consent of the parties, equitable remedies are decided by the trial court without a jury. *Zurcher v Herveat*, 238 Mich App 267, 297; 605 NW2d 329 (1999). Thus, the trial court properly exercised its discretion in declining to seat a special, advisory jury and in striking plaintiffs' jury demand.[6]

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Henry William Saad

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[5] The trial court did not rule on plaintiffs' claim under MCL 445.903(1)(y). Rather, plaintiffs stipulated to dismiss all remaining claims against Wright Ventures, Inc., G.J. Cimerman Company and Palace Builders.

[6] Because we find no merit in plaintiffs' claims on appeal and because the trial court did not rule that defendants violated the MCPA, we decline to address plaintiffs' claims for attorney fees.