STATE OF MICHIGAN

COURT OF APPEALS

HUSSEIN SHAMMOUT and JAAFAR SLIM, Plaintiffs/Counterdefendants-Appellants,	UNPUBLISHED February 7, 2003
v	No. 234362 Wayne Circuit Court
ALI D. ALI and WESSAM'S FILL-UP, INC., Defendants/Counterplaintiffs-Appellees.	LC No. 98-821507-CK

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment in favor of defendants in this action arising from a lease agreement for a gasoline service station and mini-mart. We affirm.

On appeal, plaintiffs contend that the trial court erred in granting defendants' motion for directed verdict on plaintiffs' fraud by nondisclosure claim. We disagree. This Court reviews de novo the grant or denial of a directed verdict. *Cacevic v Simplimatic Eng'g Co*, 248 Mich App 670, 679; 645 NW2d 287 (2001). In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Id*. This Court is cognizant of the factfinder's responsibility to determine the credibility and weight of the testimony. *Zeeland Farm Servs v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

Plaintiffs allege the trial court erred in granting defendants' motion for directed verdict because a reasonable jury could have determined defendants had knowledge of the construction before the lease was entered into because defendant Ali offered to compensate plaintiffs for their loss of profits. We disagree.

To show fraud or misrepresentation, plaintiffs must prove: (1) defendants made a material misrepresentation; (2) it was false; (3) when defendants made it, defendant knew that it was false or made recklessly without knowledge of its truth or falsity; (4) defendants made it with the intent that plaintiff would act upon it; (5) plaintiffs acted in reliance upon it; and (6)

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

plaintiffs suffered damage. *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994). A claim of silent fraud requires plaintiffs to set forth a more complex set of proofs. *M&D, Inc v McConkey*, 231 Mich App 22, 28-29; 585 NW2d 33 (1998). "A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." *Id*. Michigan courts have recognized that silence cannot constitute actionable fraud unless it occurred under circumstances where there was a legal duty of disclosure. *Id*. A misrepresentation need not necessarily be words alone, but can be shown where the party, if duty-bound to disclose, intentionally suppresses material facts to create a false impression to the other party. *Id.* at 25. However, there must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud. *Id.* at 36.

Upon review of the record, we find no evidence to show defendants had knowledge regarding the construction, that defendants were suppressing information from plaintiffs, or that defendants made any misrepresentations. Thus, plaintiffs did not prove the elements of silent fraud. Plaintiffs both testified that defendant Ali disclaimed any prior knowledge of the construction, and together with Shammout sought information from the on-site supervisor. While plaintiffs asserted that as the property owner, Ali must have had notice of the impending construction, they produced no evidence that letters were sent to property owners, or that hearings were held, and cited no statutes or ordinances requiring that property owners be notified. The trial court did not err in requiring that plaintiffs produce evidence to support their assertions. Plaintiffs further assert that their testimony that Ali offered to make up the difference in the profits after the loss was determined supports that he knew about the construction before hand. On this record, we disagree. The evidence showed that Ali believed that business would improve, and indeed, be better than ever, when the road was widened to four lanes. Further, plaintiffs had the right under the lease to cancel the lease within the first year. Under these circumstances, a promise by Ali to compensate plaintiffs for the net loss, offset by the anticipated increase in profits after the completion of the project, does not support an inference of prior knowledge.

We also conclude that plaintiffs failed to establish that a misrepresentation was made. There was no evidence that plaintiffs asked defendants about any construction prior to signing the lease, or made any inquiries regarding whether Ali had any knowledge of any facts that might adversely affect business during the term of the lease. Therefore, the trial court did not err in granting defendants' motion for directed verdict on plaintiffs' fraud by nondisclosure claim.

Plaintiffs also assert that the trial court abused its discretion in denying their request to reopen proofs. We disagree. The reopening of a case after the evidence is completed is within the sound discretion of the trial court. *Clapham v Yanga*, 102 Mich App 47, 56; 300 NW2d 727 (1980); *Graham v Inskeep*, 5 Mich App 514, 522; 147 NW2d 436 (1967). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

On issues of reopening proofs, this Court's attitude has generally been one of noninterference. *Knoper v Burton*, 12 Mich App 644, 649; 163 NW2d 453 (1968), rev'd on other grounds 383 Mich 62; 173 NW2d 202 (1970). A critical inquiry is whether the petitioning

party was unfairly deprived of its opportunity to present its case. *Klee v Light*, 360 Mich 419, 424; 104 NW2d 207 (1960).

Plaintiffs' proofs consisted of both plaintiffs testifying, after which they rested. Defendants then moved for a directed verdict, at which time plaintiffs requested to reopen their proofs to call defendant Ali. The court observed that plaintiffs presented no evidence that defendant had notice of the construction, and that plaintiffs had already testified that Ali denied any knowledge when asked. Plaintiffs did not make an offer of proof regarding any other testimony anticipated from Ali. The court did not abuse its discretion in refusing to reopen the proofs under these circumstances. Further, as noted above, plaintiffs failed to show a misrepresentation in the face of a duty to disclose, and the motion to reopen the proofs was addressed only to the notice issue.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie