STATE OF MICHIGAN

COURT OF APPEALS

SHAWN SPEARS and ELIZABETH SPEARS,

Plaintiffs-Appellees,

v

ROBERT CERIOTTI, KIMBERLY ANN CERIOTTI and ROBERT WATSON,

Defendants-Appellants,

and

HOME TECH SERVICES and BILL GREENHALGH,

Defendants.

UNPUBLISHED
November 17, 2005

No. 255167
Wayne Circuit Court
LC No. 02-206485-CH

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Defendants[1] appeal as of right an order granting plaintiffs' motion for summary disposition and a judgment for plaintiffs in this action for breach of a residential real estate contract. We affirm in part and reverse in part.

Defendants first argue that the trial court abused its discretion when it denied their motion to withdraw admissions. This Court reviews the trial court's decision concerning the amendment or withdrawal of an admission for an abuse of discretion. *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991).

Under MCR 2.312(B)(1), a party has twenty-eight days after service of a request for admissions to provide written answers or objections to the party requesting the admissions. If the party to whom the request is directed fails to timely answer the request for admissions,

[1] Defendants Home Tech Services and Bill Greenhalgh were dismissed from this case by stipulation and are not parties to this appeal.

"[e]ach matter as to which a request is made is deemed admitted . . . ." MCR 2.312(B)(1). "A matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission." MCR 2.312(D)(1). Here, it is undisputed that defendants did not respond to plaintiffs' request for admissions within the twenty-eight days specified by MCR 2.312(B)(1).

The trial court may permit withdrawal or amendment for good cause or on terms that are just. MCR 2.312(D)(1). The trial court should consider three factors in considering whether to grant a request for late admissions: (1) whether refusing to allow that party to answer late or amend the admissions will eliminate the trial on its merits; (2) whether the other party would be prejudiced if the court allowed a late answer; and (3) the reason for the delay, i.e., whether it was inadvertent. *Janczyk v Davis*, 125 Mich App 683, 692-693; 337 NW2d 272 (1983).

Defendants prevail on the first factor because the admissions were dispositive on the issue of liability, eliminating a trial on that issue. Plaintiffs prevail on the second factor because they relied on the admissions for one and a half years while preparing their case and would be prejudiced by the withdrawal of the admissions after so much time. The third factor also favors plaintiffs because defendants did not give any reason at all for the delay. Rather, they argued that their prior counsel failed to properly inform replacement counsel about the admissions. Thus, the trial court did not abuse its discretion when it declined to find good or just cause to withdraw or amend the admissions supporting its grant of summary disposition. MCR 2.312(D)(1); MCR 2.116(G).

Next, defendants contend that the trial court erred when it rescinded the contract for the sale of the property. We disagree. This Court reviews the factual findings of the trial court for clear error and its conclusions of law de novo. *Omnicom v Giannetti Investment*, 221 Mich App 341, 348; 561 NW2d 138 (1997).

To warrant rescission of a contract, there must have been a material breach affecting a substantial or essential part of the contract. *Id.* In determining whether a breach is material, a court should consider whether the plaintiff obtained the benefit that he or she reasonably expected to receive. *Id.* Also relevant are the willfulness of the defendant's conduct, and the extent to which the plaintiff can be adequately compensated for damages for lack of complete performance. *Id.*

Here, the court found that defendants' misrepresentations about the floor joists was "severely damaging to the plaintiffs . . . ." Plaintiffs' experts testified that the entire substructure was compromised and that repairing the house was not worth the effort or the danger. Thus, plaintiffs did not obtain the benefit they reasonably expected to obtain from the house because the house must be completely rebuilt or extensively repaired. In addition, defendants' admissions irrefutably established that they knew about the damage to the floor before the sale and concealed the damage from plaintiffs. The trial court found that defendants knew about the problems with the floor and should have informed plaintiffs before the sale. The admissions established that defendants willfully concealed the rotten floor from plaintiffs. This evidence supports the legal conclusion that the rotten floor constituted a material breach of the contract.

The extent to which plaintiffs could be compensated for defendants' breach also favors a finding of material breach. The house requires extensive repairs or a complete tear down. While

defendants could arguably pay plaintiffs the amount required to rebuild and to live elsewhere during that time, the house was so severely damaged that the purpose of the contract was frustrated. Had plaintiffs known about the extent of the damage before the sale, it is unlikely that they would have purchased the house.

Defendants next assert that the court abused its discretion when it allowed Michael Marth and Larry Pacheko to testify as experts when plaintiffs failed to list them as experts on their witness list. We disagree. A trial court's decision regarding the admissibility of expert witness testimony is reviewed for an abuse of discretion. *In re Wentworth*, 251 Mich App 560, 563; 651 NW2d 773 (2002).

Admissibility of expert testimony is governed by MRE 702:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Defendants do not challenge the reliability of the experts' testimony.

While MCR 2.401(I)(1)(b) provides that the witness list must include whether the witness is an expert, MCR 2.401(I)(2) provides that the court "*may* order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." (Emphasis added.) In *Postrick v General Tel Co*, 162 Mich App 243, 245; 412 NW2d 279 (1987), this Court held:

> [W]e believe that justice is best served where an unlisted witness can be permitted to testify while the interests of the opposing party are adequately protected. If reasonable conditions can allow the testimony of the undisclosed witness to be admitted without prejudice to the opposing parties, then we see nothing wrong with permitting the witness to testify subject to those conditions.

Here, it is undisputed that Marth and Pacheko were listed as witnesses, but not as *expert* witnesses. In addition, defendants received the reports prepared by Marth and Pacheko, had the opportunity to depose the witnesses, and subpoenaed Marth. Thus, defendants' ability to present their case with respect to Marth's and Pacheko's testimony was not impaired. The trial court did not abuse its discretion when it allowed Marth and Pacheko to offer expert testimony.

Finally, defendants argue that the trial court erred when it granted plaintiffs' motion for summary disposition and denied defendants' motion for summary disposition. We disagree. This Court reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). MCR 2.116(C)(10) permits summary disposition when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to

judgment or partial judgment as a matter of law." *City of Taylor v Detroit Edison Co*, 263 Mich App 551, 563; 689 NW2d 482 (2004).

> 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. [*Williams, supra* at 507, quoting *Maiden, supra* at 120.]

Defendants argue that because the purchase agreement had an "as is" clause, they are not liable for defects in the house. The "as-is" clause at issue here reads:

> Buyer understands that Buyer is purchasing a used structure in "AS-IS" condition.
>
> (A) Buyer has examined the premises and is satisfied with its condition.
>
> (B) Broker and Broker's agents are not contractors and do not, and cannot, make any representations regarding the physical condition of the premises.
>
> (C) Buyer has not relied on any representation of the Broker or Broker's Agents.

Generally, buyers bear the risk of loss under an "as is" contract unless the sellers fail to disclose concealed defects known to them. *Christy v Prestige Builders, Inc*, 415 Mich 684, 694; 329 NW2d 748 (1982); *Conahan v Fisher*, 186 Mich App 48, 49-50; 463 NW2d 118 (1990). Caveat emptor prevails in land sales, and the vendors, with two exceptions, are not liable for any harm due to defects existing at the time of sale. *Id.* The exception relevant in this case is that the sellers have a duty to disclose to the buyers any concealed conditions known to them that involve an unreasonable danger.[2] *Id.* However, where evidence indicates that a competent inspector should reasonably have been expected to discover the defective conditions, the conditions are not concealed, and there can be no recovery for fraudulent concealment in connection with the sale of real estate. *Conahan, supra* at 50.

Here, defendants did not submit evidence that a competent inspector would have been reasonably likely to discover the problems. Indeed, the "Basement or Crawl Space Dampness" section of the building inspection report that plaintiffs' inspector provided reads, "Often . . . the visible signs on the interior of a basement which would indicate a past or present water problem are concealed. For example, an area may be painted over, or basement storage may be piled against a wall where a problem has occurred."

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[2] The second exception is that a seller is liable to those outside the land for a dangerous condition on the land after the sale until the buyer discovers or should have discovered the danger. *Christy, supra* at 694.

Plaintiffs presented sufficient evidence to show that there was no issue of material fact with respect to defendants' fraudulent misrepresentation. In order to prove fraud or fraudulent misrepresentation, the plaintiff must prove: (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew or should have known it was false at the time it was made; (4) the defendant made the representation, intending the plaintiff to act upon it; and (5) the plaintiff acted in reliance on it and (6) suffered damages as a result. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). The failure to divulge a material fact, which a party in good faith is duty-bound to disclose, may serve as the false representation necessary to support an action for fraudulent concealment. *Lorenzo v Noel*, 206 Mich App 682, 684; 522 NW2d 724 (1994). Watson and Kimberly told plaintiffs that the house was in good condition because they wanted plaintiffs to buy the house. Defendants' admissions irrefutably established that defendants knew about the damage in the crawlspace, attempted to conceal the damage and refused to allow plaintiffs to inspect the crawlspace and that they knew that the floors were uneven and sagging and also tried to conceal those problems. Plaintiffs relied on that representation and suffered damages because the house must be torn down or extensively repaired.

Defendants also argue that the trial court should have granted summary disposition with respect to defendants Robert Watson and Robert Ceriotti because they were not parties to the real estate contract. However, Robert Ceriotti co-signed the loan for the purchase of the house and signed the Contract to Purchase as a seller, and defendants offered no evidence to show that he was precluded from being a party to the contract. In contrast, it is undisputed that Watson had no ownership interest in the property and did not contract to sell it.

Plaintiffs argue that Watson is liable for the judgment because he acted as the agent of his wife, Kimberly Ceriotti, when he made representations to them about the condition of the house. While apparent authority may arise when acts and appearances traceable to the principal lead a third person reasonably to believe that an agency relationship exists, apparent authority cannot be established by the acts and conduct of the agent alone. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). Kimberly and Watson's marital relationship does not alter the agency analysis.

Here, plaintiffs argue that they thought Watson was the owner of the house and neither Kimberly nor Robert ever indicated that Watson lacked authority. However, although Watson did participate in showing plaintiffs around the house and told them that the house was in good condition, nothing in the record indicates that Kimberly did anything to indicate that she had an implicit or explicit agency relationship with Watson. Plaintiffs' assumptions are not sufficient to create an agency relationship between Kimberly and Watson.

In any case, even if Watson acted as Kimberly's agent when he made the representations, his actions did not make him personally liable with respect to the sales contract. An agent may work on behalf of a principal within the scope of the agency agreement as if the agent had stepped into the shoes of the principal without incurring any personal liability. *Uniproprop, Inc, v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004). Because there was no contract between Watson and Kimberly or between Watson and plaintiffs, plaintiffs had no relationship with Watson. Thus, Watson is not personally liable for the breach of contract. See *Id.* at 448.

Affirmed in part, reversed in part, and remanded for entry of an order dismissing defendant Robert Watson. Jurisdiction is not retained.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper