STATE OF MICHIGAN

COURT OF APPEALS

LORI SEIT-OLSEN,

Plaintiff-Appellant,

v

RELIANCE APPRAISALS, LLC, RALPH MANUEL ASSOCIATES-WEST, INC., JOHN ADAMS MORTGAGE CO., KATHLEEN REGAN a/k/a MARY KATHLEEN REGAN, HALLMARK WEST REALTY, INC. a/k/a CENTURY 21 HALLMARK-WEST, GM APPRAISALS, INC., and DONALD L. EIZEN,

Defendants-Appellees.

UNPUBLISHED
April 27, 2006

No. 264470
Oakland Circuit Court
LC No. 2004-060309-CH

Before: Neff, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of the trial court, granting summary disposition for defendants and dismissing plaintiff's various claims against defendant real estate agent and brokerage firms, seller, mortgage company, and appraisers involved in the sale of plaintiff's condominium and her purchase of a lakefront home. We affirm.

I

On September 10, 2001, plaintiff entered into a listing agreement with defendant Donald Eizen of Ralph Manuel Associates-West, Inc. (Manuel), a real estate brokerage firm, to sell her condominium at 2038A Hidden Meadows Drive in Commerce. Anticipating the sale of the condominium, plaintiff also entered into an "Exclusive Buyer Agency Agreement" with Eizen, under which she made an offer to purchase a lakefront home at 5960 Long Pointe Drive in Davisburg from the seller, defendant Kathleen Regan, who had listed the home for sale with defendant Hallmark West Realty, Inc. (Hallmark). Plaintiff's offer on the Long Pointe home was for the full listing price, and Regan accepted the offer. However, because the condominium had not yet sold, plaintiff required a "bridge loan."

Eizen, who was also a loan officer with defendant John Adams Mortgage Company (Adams), undertook efforts to secure the bridge loan for plaintiff. As part of the loan process, Adams secured appraisals of plaintiff's condominium and the Long Pointe property.

Adams retained defendant GM Appraisals, Inc. (GM) to provide an appraisal of plaintiff's condominium. On September 13, 2001, GM appraised the condominium at $164,000, which was the exact amount necessary to secure plaintiff's bridge loan of $131,200, at an 80 percent loan value.[1] Adams likewise secured an appraisal of the Long Pointe property for plaintiff, required by her purchase agreement, from defendant Reliance Appraisals, LLC. (Reliance).

According to plaintiff, after closing on the Long Pointe home, plaintiff learned that she was unable to construct a two-car garage as planned because of setback requirements and the placement of the existing water well and septic system. Plaintiff further discovered that other representations allegedly made concerning the home were inaccurate. In particular, the home was not 1,720 square feet, but instead could only accurately be represented as 938 square feet of habitable space, with a basement of 768 square feet. Accordingly, living space in the basement could not be considered an "in law suite" as represented.

Further, plaintiff also subsequently learned that representations made by GM concerning the appraised value of her condominium were inaccurate. When she eventually sold her condominium in February 2003, after making substantial improvements, it sold for only $153,500, approximately $15,000 less than the appraised value.

Plaintiff filed a three-count complaint against defendants, alleging negligence and breach of fiduciary duty against Manual and Eizen (Count I); negligence and misrepresentation against Regan and Hallmark (Count II); and failure to provide accurate appraisals against Adams, Reliance, and GM (Count III). The trial court granted summary disposition for all defendants, on separate grounds.

II

This Court reviews de novo a trial court's denial of summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.* The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its position with documentary evidence. *Id*. at 455; *Maiden, supra* at 120. The responding party

[1] When plaintiff's condominium still had not sold several months later, she sought refinancing of her bridge loan with Adams. In the course of the refinancing, Adams obtained a second appraisal of plaintiff's condominium from GM, which valued the condominium at $168,000.

must then present legally admissible evidence to demonstrate that a genuine issue of material fact remains for trial. *Id.*; *Smith, supra* at 455 n 2.

A trial court may properly grant summary disposition on the basis of a valid release pursuant to MCR 2.116(C)(7). *Hall v Small*, 267 Mich App 330, 333, 336; 705 NW2d 741 (2005).

III. Claims against Seller and Broker of Long Pointe Home

Plaintiff first argues that the court erred in granting summary disposition in favor of defendants Regan and Hallmark. We find no error.

Plaintiff's complaint alleged misrepresentation and negligence against Regan and Hallmark on the basis of four inaccuracies in their presale representations: the home's square footage, the existence of an "in-law suite," the potential for a two-stall garage, and water drainage in the basement. The trial court granted summary disposition on the ground that Regan and Hallmark made no misrepresentations on which plaintiff reasonably relied in purchasing the home.

A

With regard to Regan, plaintiff argues on appeal that the trial court erred in concluding that an "as is" clause in the closing documents defeated plaintiff's claims of negligence and fraud. Plaintiff contends that she would not have purchased the property had she not been able to build the two-car garage and count the home's lower level as habitable space.

Plaintiff fails to set forth any particular theory with regard to her claims of fraud, e.g. traditional common-law fraud, innocent misrepresentation, or silent fraud.[2] *M & D, Inc v McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998). Nonetheless, proof of a false representation is a necessary element of both common-law fraud and innocent misrepresentation. *Id.* at 27. Additionally, a plaintiff must show reliance on the false representation to his or her detriment. *Id.*

"A misrepresentation claim requires reasonable reliance on a false representation." *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). "[A] person who *unreasonably* relies on false statements should not be entitled to damages for misrepresentation."

[2] Plaintiff also alleged a "negligence" claim, but has failed to specify the basis or nature of her claim to permit consideration on appeal. An appellant may not merely give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). The tort of negligent misrepresentation arises when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed a duty to exercise reasonable care. *Williams v Polgar*, 391 Mich 6, 20-21; 215 NW2d 149 (1974); *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 502; 686 NW2d 770 (2004), but see *M & D, supra* at 34-35 (discussing the proper basis of a negligence claim in the context of a real estate sale involving an unreasonably dangerous condition).

Novak v Nationwide Mut Ins Co, 235 Mich App 675, 690; 599 NW2d 546 (1999). "[A] plaintiff cannot claim to have been defrauded where he had information available to him that he chose to ignore." *Nieves, supra* at 465.

Further, "in order to prove 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 a legal or equitable duty of disclosure." *M & D, supra* at 31. A claim of silent fraud may not be established by merely showing that a seller knew there was a hidden defect and that the purchaser has no knowledge of it. *Id*. at 31-32. Rather, it must generally be shown that the nondisclosure related to a specific inquiry by the purchaser such that the statements by the seller were in some way incomplete or misleading. *Id*. at 31.

The trial court found no basis for plaintiff's reliance on the alleged misrepresentations. The court noted that the representations at issue were not made by Regan or Hallmark; any information relied on came from the listing advertisement, which expressly stated that it was not guaranteed and should be independently verified; and the purchase agreement contained provisions foreclosing any reliance on representations by the seller or broker and holding the broker harmless.

We agree that the alleged misrepresentations do not support a claim of fraud against Regan. There is no evidence that Regan made false representation on which plaintiff reasonably relied or that Regan committed silent fraud through nondisclosure.

According to plaintiff's deposition testimony, she had only one conversation with Regan, which focused on the water well and did not discuss anything in depth. Plaintiff acknowledged that the alleged square footage misrepresentation was not made by Regan, but was merely the square footage stated on the internet listing, which also showed the square footage of the finished basement as 760 square feet. Plaintiff made several visits to the home, had an independent home inspection performed, and received an appraisal before closing on the home. That the lower level was included in the 1,720 square footage would have been evident to plaintiff upon her walks through the home before making her offer of purchase, and was expressly shown in the appraisal. There is no evidence that plaintiff reasonably relied on any false representation of the square footage by Regan. Moreover, the listing and the purchase agreement expressly disclaimed any guarantee concerning the listing information and stated, in particular, that "if square footage is a material matter to the buyer, it must be verified during the inspection period." The same reasoning applies to defeat plaintiff's claim that the basement was misrepresented as an "in-law suite" because it is "legally nonexistent" i.e., it lacked windows, a proper means of ingress and egress, and Regan obtained no permits to allow it to be sold as a separate unit.[3]

Moreover, there is no evidence that plaintiff inquired specifically about the square footage or the in-law suite such that any nondisclosure was actionable as silent fraud. *Id*. at 31.

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[3] Plaintiff's expert appraiser opined that only the above-grade measurements of value could be considered given these conditions, which plaintiff asserts makes her home essentially a one-bedroom home.

To the contrary, in her deposition plaintiff testified that she did not notice the "in-law suite" in the listing and that she first saw the phrase when she met with one of her attorneys after the closing on the home. Further, she did not rely on the representation that the home included an "in-law suite," in particular, but relied on the representations of the seller and her agent generally for their information and expertise. Absent any reliance on the alleged misrepresentation, plaintiff's fraud claims concerning the in-law suite fail.

Regarding the alleged misrepresentation that a two-car garage could be constructed, plaintiff likewise has not shown that she relied on any representations by Regan. *Id.* at 27, 31. Plaintiff testified that she did not recall whether Regan made any representations about the garage, but that Regan's husband "commented that there was plenty of room for a two car garage, and he pointed out the area and that they had applied for a permit." Plaintiff also cites a statement on the listing. Even disregarding that the representations at issue were not made by Regan, we find no basis for a claim of fraud on these facts. The representations, as phrased, are more an expression of opinion than an expression of fact. Plaintiff's later discovery that the location of the well and septic system would need to be moved to construct the garage, and her appraiser's opinion that a permit would not be issued because of set-back requirements, does not support a conclusion that Regan engaged in a misrepresentation.

With regard to the basement, although plaintiff cited misrepresentation concerning basement drainage in her complaint, plaintiff has not included this particular misrepresentation in her argument on appeal with respect to Regan. We therefore decline to address this claim. An appellant may not merely announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Plaintiff additionally argues that the trial court erred in deciding that the "as is" clause defeats her claims. As discussed above, and as noted by the trial court, plaintiff's claims fail on several other grounds. Nonetheless, the existence of the "as is" clause further undermines plaintiff's claims, particularly any claim of silent fraud. *M & D, supra* at 32-33.

Plaintiff acknowledges that her purchase agreement contained an "as is" clause and that the property listing, as noted above, contained other statements that specifically disclaimed any representations and warranties about the property. The purchase agreement also contained a provision stating, "Buyers and Sellers acknowledge that they are not relying on any other written or verbal representations by each other or by Listing or Selling Brokers that are not explicitly set forth in this agreement or attached hereto."

Contrary to plaintiff's argument, we disagree that the "as is" clause in the purchase agreement is without effect concerning the alleged misrepresentations. This is not a case in which the buyer expressed some particularized concern or made a direct inquiry, and the seller concealed material facts or made fraudulent representations to the buyer, on which the buyer relied, such that the "as is" clause is ineffective. *Id*. at 33; *Clemens v Lesnek*, 200 Mich App 456, 460-463; 505 NW2d 283 (1993).

> "As is" clauses allocate the risk of loss arising from conditions unknown to the parties. . . . "As is" clauses also transfer the risk of loss where the defect should have reasonably been discovered upon inspection, but was not. They do not, however, transfer the risk of loss where "a seller makes fraudulent representations before a purchaser signs a binding agreement." [*Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994) (citations omitted.)]

Nor is this a case in which "highly misleading actions" can support a claim of silent fraud, absent a buyer's specific inquiry. *M & D, supra* at 33. We find no error in the grant of Regan's motion for summary disposition.

B

For the same general reasoning discussed above with respect to Regan, we find no error in the grant of summary disposition in favor of Hallmark. Plaintiff testified that she had no specific conversations with the Hallmark agent. She did not talk with the agent about any of the matters allegedly misrepresented. Plaintiff's claim against Hallmark is based solely on the listing advertisement. There is no evidence that Hallmark made false representations on which plaintiff reasonably relied or that Hallmark committed silent fraud through nondisclosure.

Although Hallmark's listing represented that the home had 1,720 square footage, plaintiff easily should have recognized upon her visits to the home that the basement area was included in the square footage. Further, plaintiff admitted that she received an appraisal before closing that reflected the upper and lower level square footage, which together totaled 1,742 square feet. That plaintiff did not review the appraisal does not relieve her of knowledge of the facts within. See *Rowady v K Mart Corp*, 170 Mich App 54, 60; 428 NW2d 22 (1988) (A person cannot avoid a contract on the ground he did not read it or did not attend to its terms.) In either situation, plaintiff cannot be said to have reasonably relied on the listing with regard to the home's square footage or claim to have been defrauded on the basis of the listing. *Novak, supra* at 690; *Nieves, supra* at 465. Likewise, with regard to the listing's statement that there was "plenty of room for 2 car garage," plaintiff could not reasonably have relied on this general statement.[4]

Similarly, any claim of negligent misrepresentation is not viable on the facts of this case given that plaintiff did not justifiably rely on the listing with regard to the alleged misrepresentations. Further, we find no basis for disregarding the general rule that a seller's real estate broker or agent owes no duty to a potential buyer. *Andrie v Chrystal-Anderson & Assoc Realtors, Inc*, 187 Mich App 333, 337; 466 NW2d 393 (1991). Absent a duty, no claim of negligence may be pursued. *Id.* We find no error in the grant of summary disposition in favor of Hallmark.

[4] It is noteworthy that plaintiff holds a master's degree in architecture.

IV. Claims against Plaintiff's Real Estate Agent and Broker

Plaintiff argues that Eizen and Manuel remain liable for damages despite a release clause executed by plaintiff because they failed to disclose material facts in a real estate transaction. Further, the court erred in ruling as a matter of law that they did not breach their fiduciary duties to plaintiff under the Exclusive Buyer's Agency Agreement. We disagree.

Plaintiff contends that Manuel and Eizen breached their duties as the buyer's broker and agent by misrepresenting their marketing efforts for her condominium; failing to obtain material information about the Long Pointe home, such as information to correct the alleged misrepresentations; failing to provide her closing documents in advance; and failing to disclose that Eizen was a loan officer with Adams. Further, because of the circumstances under which the release clause in her agreement was signed, e.g., in haste, without explanation of the contents, and absent any consideration, the release clause is invalid.

The trial court rejected plaintiff's arguments, concluding that the release was valid and barred plaintiff's claims against Eizen and Manuel. The court found no fraudulent or overreaching conduct by Eizen and Manuel in securing the release, and no misrepresentation or duress such that the release should be held invalid, *Brooks v Holmes*, 163 Mich App 143; 413 NW2d 688 (1987) The court also found no breach of fiduciary duties as set forth in the Purchase Agreement and the Exclusive Buyer's Agency Agreement, noting, in particular, that Eizen and Manuel met their obligations under their agreement with plaintiff to market her condominium.

We concur in the court's reasoning and conclusions. A release is valid if it is fairly and knowingly made; however, a release is invalid if the releasor acted under duress, the release agreement was misrepresented with regard to its nature, or there was fraudulent or overreaching conduct in securing the release. *Brooks, supra* at 145. In this case, as in *Hall, supra* at 335, and *Brooks, supra*, plaintiff never alleged fraud or mistake, and the scope of the release was not at issue, and thus the trial court did not err in failing to consider the circumstances surrounding the signing of the release. *Hall, supra* at 335. Nor does the release fail for lack of separate consideration given that the release did not stand alone, but was part of the sales transactions and closing documents. *Id*. at 334; *Rowady, supra* at 59. To the extent that plaintiff failed to read the release or attend to its terms, liability rests with plaintiff and she cannot thereby avoid its effect. *Id*. at 60; *Hall, supra* at 333.

We also find no error in the court's ruling regarding a breach of fiduciary duty. The court's ruling is fully supported by the facts.

V. Claims against Appraisers

Plaintiff argues that the court erred in holding that Reliance and GM owed plaintiff no duty to provide accurate appraisals of the properties when plaintiff paid for the appraisals and acted in reliance on the appraisals. We disagree.

Plaintiff alleged negligence claims against Reliance and GM based on their failure to provide accurate and competent appraisals, to disclose all factual differences between the appraised properties and the comparables, and to independently support their appraisals with proper and relevant market information.

With regard to GM, the trial court found no duty owed to plaintiff. The court noted that Adams contacted GM to obtain the appraisal and that its cover letter specifically stated that the appraisal was for the mortgage company (Adams), and that the borrower (plaintiff) was not the client and could not use the report for any purpose. Further, the court found that contrary to plaintiff's assertion, GM made no representations to plaintiff and there was no evidence that she relied on the appraisal to establish the listing price for her condominium.

With regard to Reliance, the court concluded likewise that the appraisal was done for the sole benefit of Adams, the mortgagee, and thus Reliance owed plaintiff no duty. The court quoted a provision in the appraisal stating "[t]hat the market value is to estimate the market value for federally related mortgage purposes," and also noted that the president of Adams averred in his affidavit that Adams ordered the appraisal to comply with Fannie Mae and Freddie Mac requirements, and it was done for their benefit.

Concerning any third-party beneficiary claim, which the court noted plaintiff did not plead, the court nevertheless concluded that any such claim would fail. The court reasoned that there was no express promise by Reliance that it would act on behalf of plaintiff.

Plaintiff has failed to show any error in the trial court's reasoning or conclusions. Plaintiff cites no authority in support of her arguments, other than citation to MCL 339.2609, which generally addresses appraisal requirements under the occupational code, and MCL 600.1405, which generally addresses the rights of third party beneficiaries. As noted previously, an appellant may not merely announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee*, *supra* at 406. Because plaintiff has failed to adequately argue the merits of this allegation of error, this issue is abandoned. *Id*.

In any event, we find no evidence that plaintiff relied on the appraisals in setting the listing price of her condominium[5] or in deciding to purchase her Long Pointe home. It is undisputed that plaintiff listed the condominium for sale at a price of $174,500 on September 10, 2001, before an appraisal was even requested from GM. Likewise, plaintiff entered into a purchase agreement for the Long Pointe home two weeks before Reliance prepared its appraisal of the home.

[5] Although plaintiff cites her deposition testimony in support of this assertion, the cited testimony does not appear to be included in the exhibit referenced or otherwise provided on appeal.

It appears that plaintiff is arguing that the appraisals were inaccurate and overinflated the market value of the property, and had the appraisals reflected lower values, she would not have secured the loans and entered into the real estate transactions, and thus would not have incurred increased bridge loan costs and payoff amounts. We find plaintiff's arguments overgeneralized and unpersuasive. We find no error in the grant of summary disposition in favor of GM and Reliance.

VI. Claims against the Mortgage Company

Plaintiff similarly argues that the court erred in holding that Adams owed no duty to plaintiff to procure accurate appraisals and loan documents. We disagree.

Plaintiff's claim against Adams is apparently premised, in part, on a theory of agency. The trial court granted summary disposition for Adams on the ground that plaintiff's claims against Adams were totally unsupported in fact or in law. Given the argument and facts before us, we find no error in the court's determination.

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Donald S. Owens