STATE OF MICHIGAN

COURT OF APPEALS

RONALD FRUITMAN, ILENE FRUITMAN, BURTON EISENBERG, and SHEILA EISENBERG, Individually and as Trustee of the SHEILA EISENBERG TRUST,

Plaintiffs/Counter-Defendants-Appellants,

v

DAVID RUBINSTEIN and RUBINSTEIN & SCHWARTZ, P.C.,

Defendants-Appellees,

and

BIG SKY DEVELOPMENT ANN ARBOR, L.L.C, and BIG SKY DEVELOPMENT CLINTON TOWNSHIP, L.L.C.,

Defendants/Counter-Plaintiffs,

and

IAN SCHONSHECK, HY STOLLMAN, DICK HARTIGAN, STEVE DACKIW, and RONALD HAGEN,

Defendants.

UNPUBLISHED
January 14, 2010

No. 286916
Oakland Circuit Court
LC No. 2007-084916-CZ

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the circuit court's orders granting summary disposition for defendants David Rubinstein and Rubinstein & Schwartz, P.C. (collectively "the Rubinstein defendants") under MCR 2.116(C)(10). We affirm.

Plaintiffs first argue that the trial court erroneously granted summary disposition in favor of the Rubinstein defendants on the Eisenberg plaintiffs' breach of fiduciary duty claim. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31. Further, whether to recognize a cause of action for breach of fiduciary duty is a question of law that this Court reviews de novo. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 574; 603 NW2d 816 (1999).

"A fiduciary relationship arises from the reposing of faith, confidence, and trust, and the reliance of one upon the judgment and advice of another." *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991). A fiduciary is obligated "to act for the benefit of the other [person] regarding matters within the scope of the relationship." *Teadt, supra* at 581. Relief is granted when a fiduciary has "acquired and abused" his position of influence "or when confidence has been reposed and betrayed." *Id.* Our Supreme Court has recognized that a fiduciary relationship usually arises in one of four situations:

> (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer. [*In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003).]

Other common examples of fiduciary relationships include a trustee to a beneficiary, a guardian to a ward, and a doctor to a patient. *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981).

Here, the evidence fails to establish a fiduciary relationship between the Eisenbergs and Rubenstein. Although plaintiffs rely on Burton Eisenberg's testimony that he trusted and relied on Rubinstein's knowledge in making the Big Sky investments, this testimony does not establish a question of fact regarding the existence of a fiduciary relationship. The evidence showed that Rubinstein and Burton were social friends and that Rubinstein was the Eisenbergs' accountant and had performed tax services for them for many years. Burton had asked Rubinstein to let him know if any good investment opportunities arose. Burton belonged to an investment club and employed at least two stockbrokers. Over time, Rubinstein informed Burton of three investment opportunities, including the Big Sky entities, and the Eisenbergs invested in the entities after conducting some preliminary research. Although Burton testified that he relied on Rubinstein's knowledge regarding the entities, Rubinstein denied giving the Eisenbergs investment advice or guidance regarding their investments.

No evidence indicates that Rubinstein had gained superiority or influence over the Eisenbergs as a result of their trust in him or that Rubinstein assumed control or responsibility over the Eisenbergs. Similarly, no evidence shows that Rubinstein had a duty to act or provide advice to the Eisenbergs regarding their investments. Further, although a stockbroker-client relationship may give rise to a fiduciary duty, Rubinstein did not act as the Eisenbergs' stockbroker. Black's Law Dictionary (7th ed) defines "stockbroker" as "[o]ne who buys or sells stock as agent for another." It is undisputed that Rubinstein did not purchase stock as the Eisenbergs' agent. Burton testified that although he gave his investment money directly to Rubinstein with respect to the Big Sky investments, he never gave Rubinstein money to invest on his behalf. Accordingly, the evidence fails to establish a question of fact regarding the existence of a fiduciary duty between the Rubinstein defendants and the Eisenbergs.

Plaintiffs next argue that the trial court improperly granted summary disposition for the Rubinstein defendants on their common-law fraud claim. We again disagree.

Both in the trial court and in this court, plaintiffs conflate common-law fraud with silent fraud. "There are essentially three theories to establish fraud: (1) traditional common-law fraud, (2) innocent misrepresentation, and (3) silent fraud." *M & D, Inc v McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998). Traditional common-law fraud requires that

> (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. [*Id.* at 27, adopting as its own then Judge Young's discussion from previously vacated opinion in *M & D, Inc v McConkey*, 226 Mich App 801, 806; 573 NW2d 281 (1997).]

Thus, a common-law fraud claim requires an affirmative representation. *M & D, Inc*, *supra*, 231 Mich App at 27. More specifically, to establish a prima facie case of common-law fraud, a plaintiff must present evidence of a "*false representation* made with an intent to deceive[.]" *Id.* (emphasis in original.)

Here, plaintiffs argue that the Rubinstein defendants committed common-law fraud by failing to disclose material facts. Plaintiffs made the same argument in the trial court.[1] Because

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[1] For example, in response to the Rubinstein defendants' motion for summary disposition, the Eisenbergs stated:

> The claims against Rubinstein is not [sic] that he affirmatively made false representations but rather that he made false representations by failing to make material representation[s] thereby signaling to the Eisenbergs that indeed there was nothing material to disclose.

plaintiffs' claims are based on alleged nondisclosures and they do not argue that the Rubinstein defendants made material representations that were false, their claims do not sound in common-law fraud.

Plaintiffs' claims of nondisclosure of material facts are more appropriately based in silent fraud. In *M & D, Inc, supra*, 231 Mich App at 28-29, this Court discussed silent fraud as follows:

> "Silent fraud," also known as fraud by nondisclosure or fraudulent concealment, is a commonly asserted, but frequently misunderstood, doctrine. This is primarily because most fraud claims are based upon alleged affirmatively stated false representations of material fact. A claim of "silent fraud" requires a plaintiff to set forth a more complex set of proofs. In *Lorenzo v Noel*, 206 Mich App 682, 684-685; 522 NW2d 724 (1994), this Court gave the following explanation of the so-called "silent fraud" doctrine:
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> > " ' "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." ' *Williams v Benson*, 3 Mich App 9, 18-19; 141 NW2d 650 (1966), [rev'd 378 Mich 721 (1966),] quoting *Tompkins v Hollister*, 60 Mich 470, 483; 27 NW 651 (1886). Thus, '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.' *Williams* at 19."

"But for the suppression of information to constitute silent fraud there must exist a legal or equitable duty of disclosure." *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009); see also *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981). Moreover, establishing silent fraud requires more than mere silence. Rather, "a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Roberts, supra* at 404. As stated in *M & D, Inc, supra*, 231 Mich App at 25, "[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."

Here, plaintiffs contend that Rubinstein intentionally suppressed material facts to give them the false impression that there existed nothing to disclose. Therefore, plaintiffs' claim sounds in silent fraud. However, plaintiffs have failed to establish that Rubinstein had a legal or equitable duty to disclose the alleged material facts. As discussed previously, there existed no fiduciary relationship between Rubinstein and the Eisenbergs that would have given rise to a fiduciary duty on behalf of Rubinstein to disclose the alleged undisclosed material facts. Moreover, plaintiffs conceded in the trial court that there existed no fiduciary relationship between Rubinstein and the Fruitman plaintiffs. Plaintiffs fail to offer any other reasoning that would give rise to a legal or equitable duty on behalf of Rubinstein. Without a legal or equitable duty of disclosure, plaintiffs cannot establish a prima facie claim of silent fraud. *Roberts, supra* at 404. Because plaintiffs have failed to establish the existence of a genuine issue of material fact under either a common-law or silent fraud theory, the trial court properly granted summary disposition for the Rubinstein defendants.

Plaintiffs next contend that the trial court erred to the extent that it considered plaintiffs' degree of sophistication and lack of due diligence in investigating the Big Sky entities before investing. We again disagree. Under either a common-law or a silent fraud theory, these factors were relevant.

A common-law fraud claim requires a plaintiff to prove reliance on a false material representation. *M & D, Inc, supra*, 231 Mich App at 27. Similarly, a plaintiff is required to establish reliance as an element of a silent fraud claim. *Lumber Village, Inc v Siegler*, 135 Mich App 685, 700; 355 NW2d 654 (1984). Such reliance, however, must be reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005); *Lumber Village, Inc*, *supra* at 700.

Plaintiffs' status as sophisticated investors and their lack of due diligence in investigating the Big Sky investment opportunities were relevant to determining the reasonableness of their purported reliance on Rubinstein's alleged misrepresentation that there existed no material facts to disclose. "There can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Therefore, to the extent that the trial court considered these factors in rendering its decision, such consideration was not erroneous.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot