STATE OF MICHIGAN

COURT OF APPEALS

DANIEL MEYER and JENNIFER MEYER, Plaintiffs-Appellants,	UNPUBLISHED May 19, 2011
v	No. 292351 Wayne Circuit Court
THURMAN UNDERWOOD and DENISE UNDERWOOD, Defendants-Appellees.	LC No. 07-733093-CK

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

In this action concerning the purchase of a house, plaintiffs appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) to defendants. We affirm in part and reverse in part.

I. BASIC FACTS

Defendants were the original owners of a house in Northville. They purchased the house in 2001 and resided in it until 2006. On November 16, 2006, defendant Denise Underwood executed a seller's disclosure statement, in which she indicated that there had been no evidence of water in the basement/crawl space or of leaks in the roof. She also indicated that defendants were not aware of any settling, flooding, drainage, structural, or grading problems. Plaintiffs received a copy of the seller's disclosure statement in May 2007, when they made an offer on the house.

Plaintiffs and defendants entered into a purchase agreement later in May 2007. The agreement contained the following provisions:

> 9. AS IS CONDITION: By the execution of this Agreement, the Purchasers acknowledge THAT THEY HAVE EXAMINED THE ABOVE described property and are satisfied with the physical condition of structures thereon and purchase said property in an "AS IS CONDITION," subject only to the right of a property inspection. . . .
>
> 10. SELLER'S DISCLOSURE: Purchaser has received and acknowledged the Seller's Disclosure Statement required by Michigan law. Purchaser has reviewed

and accepts the condition of the property per the Seller's Disclosure Statement, subject to any additional inspections or contingencies set forth in this Agreement.

* * *

23. REPRESENTATIONS OF SELLER: Seller represents that the foundation, foundation walls and basement are watertight and free of any leakage, or seepage, as of the date of this Agreement or as disclosed. Seller further represents that the property is not in violation of any building and/or zoning restrictions and/or requirements, or in violation of any law or ordinance or as disclosed.

Plaintiffs had an independent inspection completed on the house in June 2007. The inspection report contained the following findings with regard to the house's siding:

- Rusted lintels should be refinished and sealed against the weather. When lintels rust, they can cause brick and mortar damage.

- In some places, the mortar joints have been caulked for unknown reasons; [t]ypically this is done as the result of water intrusion, but caulk is a temporary repair. We suggest obtaining the maintenance history.

- Flat sills noted; these tend to be prone to water intrusion. Steps should be taken to full seal against the weather, including all existing gaps.

- Some gaps at stone should be repaired as needed.

- There are no weep holes visible. Weep holes are a means of allowing water to escape walls to help reduce chances of hidden deterioration. . . . It will be important to keep surfaces in good condition and sealed against the weather and to monitor for signs of water intrusion.

- Composite wood siding can readily deteriorate when not properly maintained. Advise keeping all surfaces and edges well finished and sealed against the weather to reduce opportunities for hidden water infiltration and deterioration. . . .

The inspection report also noted the presence of "[s]pot deterioration/decay" in a "couple areas" of the exterior wood trim, and advised that "[a]ll gaps [in the trim] should be sealed against the weather." The report further noted that the windows had "[p]eeling finish and weathered wood . . . and some areas of split wood as well as loose weatherstripping." It suggested "flashing, caulking/weatherstripping as needed." In addition, the report noted that water stains were found near the chimney in the attic. The inspection report contained the following addendum on water intrusion:

> In our report we tell you about conditions we see that can lead to water intrusion. We discuss the importance of proper grade, of monitoring and maintaining the roof, siding/trim & windows and of keeping the building envelope in good condition. If you keep your siding intact, if you maintain your roof and respond

> immediately to exterior roof, attic, basement and crawl space maintenance issues, and if you keep water away from the foundation, you go a long way towards reducing the chances of water infiltration and the insidious problems water can cause. . . .

After receiving the inspection report, plaintiffs contacted their real estate agent by email. They indicated that they intended to accept the inspection and move on to closing. Plaintiffs did, however, have some questions for defendants concerning the inspection report, including "why was exterior caulked in certain places at mortar joints…any water intrusion?" Plaintiffs also requested the maintenance records for the caulking repairs. Defendants responded that there had not been any water intrusion during the time they owned the house.

Before the parties closed on the sale of the house, plaintiffs learned that defendants had filed a home insurance claim in December 2006 for water damage. Upon inquiry, defendants explained that "[d]uring a hard rain" water had leaked in around the copper hood of the front bay window. They further explained that their contractor had told them this was a normal occurrence in Michigan because temperature changes cause caulking to pull away from brick. Defendants stated that the copper hood had been recaulked and there had not been a problem since. Plaintiffs informed their real estate agent that they wanted to proceed with closing on the house.[1] In an email, they acknowledged that there were a number of things that needed to be done on the house, but they wanted to have control over the repair process to make sure the repairs were done correctly.

Plaintiffs closed on the house on June 28, 2007, and they moved into the house on August 17. During a rainstorm three days later water leaked into the house through two bay windows and seeped into the basement storeroom. Two more rainstorms during the next several days caused more leakages at various doors and windows throughout the house. A subsequent inspection of the house revealed extensive water intrusion problems.

Plaintiffs filed a five-count complaint, alleging silent fraud, fraud and/or fraudulent misrepresentation, negligent misrepresentation, negligence, and breach of contract. Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10). They argued that plaintiffs did not allege facts and did not develop a record showing actual reliance, that negligence is not a proper claim where there is only economic loss, and that the breach of contract claim was "simply a restatement of their claims for fraud, fraudulent misrepresentation, silent, [and] negligent misrepresentation" and that the contract conveyed the house in an "as is" condition, rather than in the condition specified by the seller's disclosure statement. The trial court granted the motion under MCR 2.116(C)(10). It concluded that plaintiffs failed to create a genuine issue of material fact that they relied on any statements by defendant, that the "as is"

---

[1] After plaintiffs received defendants' explanation for the water damage and insurance claim, they had the inspector return to the house to look at the bay window.

clause in the purchase agreement barred the breach of contract claim, and that defendants owed no duty to plaintiffs. This appeal ensues.[2]

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." We must view the evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Where the burden of proof . . . on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The Court is liberal in finding genuine issues of material fact. *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). We also review de novo the interpretation of a contract. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009).

III. SILENT FRAUD, FRAUD, AND INNOCENT MISREPRESENTATION

Plaintiffs argue that the trial court erred by granting summary disposition to defendants on their fraud claims. Specifically, they contend that the trial court erroneously concluded that they did not reasonably rely on the seller's disclosure statement and defendants' false statements. We agree.

There are three theories to establish fraud: (1) traditional common-law, or actionable, fraud, (2) innocent misrepresentation, and (3) silent fraud. *M&D, Inc v McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998). Each theory contains the element of reliance. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 171; 721 NW2d 233 (2006); *M&D, Inc*, 231 Mich App at 27-29. Reliance must be reasonable. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005). "There can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Further, "someone who knows that a representation is false cannot rely on that representation[; s]uch knowledge prevents not only reasonable reliance; it prevents any reliance at all." *Phinney v Perlmutter*, 222 Mich App 513, 535; 564 NW2d 532 (1997).

Plaintiff Daniel Meyer averred that he and his wife relied on the seller's disclosure statement in making an offer to purchase the house. He further averred that he and his wife, in deciding to continue with the purchase of the house, relied on defendants' denial of any water

[2] Plaintiffs do not contest the trial court's grant of summary disposition on the negligence claim.

intrusion problems, given after the request for maintenance records of caulking of the mortar joints, and on defendants' explanation, given after the discovery of the insurance claim, that the leak by the front bay window had been rectified through recaulking. According to Daniel Meyer, he and his wife would not have spent over $1 million on a house that had significant water intrusion problems. These averments by Daniel Meyer, if in conflict with the actual conduct of plaintiffs, cannot avoid a grant of summary disposition to defendants. See *Aetna Cas & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993).

In determining whether Daniel Meyer's affidavit is sufficient to create a genuine issue of material fact regarding reliance, we find this Court's decision in *Bergen v Baker*, 264 Mich App 376; 691 NW2d 770 (2004), instructive. In *Bergen*, the plaintiffs purchased a house from the defendants in 2001 and then discovered a significant leak in the glass-paned roof of the sunroom. The seller's disclosure statement executed by the defendants indicated a leaking roof, but stated that the roof had been replaced in 1998. The disclosure statement also reflected evidence of water in the house's basement or crawl space, but stated that the problem was rectified with the new roof in 1998. A home inspection performed at the request of the plaintiffs revealed that the glass roof of the sunroom was heavily caulked and had experienced past leakage. The plaintiffs sued the defendants for fraud and negligent misrepresentation, and submitted an affidavit and interrogatories, in which they claimed that they relied on the seller's disclosure statement, to establish a factual issue concerning the reliance element. This Court held that the affidavit and interrogatories created a factual dispute, stating that the plaintiffs "could have actually relied on the disclosure statement for the proposition that the sunroom roof did not leak, and could have done so reasonably, even in the face of the inspection report and language in the disclosure statement itself." *Id.* at 389. It reasoned that the language in the disclosure statement, because it indicated that the roof had been replaced, could be read to suggest that there were no active roof leakages. *Id.* at 386, 389. Similarly, the Court reasoned that because the inspection report spoke in terms of past leakages, the report could be interpreted to speak of past leakages which had been successfully repaired. *Id.* at 389. Because neither the disclosure statement nor the inspection report identified any active leakage problems, the Court concluded that the plaintiffs submitted sufficient documentary evidence to create a genuine issue of material fact whether they actually and reasonably relied on the seller's disclosure statement. *Id.* at 389-390.

In this case, we conclude that Daniel Meyer's affidavit is sufficient to create a genuine issue of material fact whether plaintiffs reasonably relied on the seller's disclosure statement, the purchase agreement, and defendants' statements about water intrusion obtained upon inquiry. Specifically, a trier of fact could find that Daniel Meyer's averments do not conflict with plaintiffs' conduct. The seller's disclosure statement provided no indication of any present or past water intrusion problems. The inspection report noted conditions that could lead to possible water intrusion, such as flat sills, the absence of weep holes, and improperly maintained composite wood siding, and it even noted the presence of water stains near the chimney. But it contained no indications that the house, past or present, suffered from any significant water intrusion or leakage problems. Specifically, we note that while the inspection report stated that mortar joints had been caulked, and that that is often done as the result of water intrusion, the report stated that the joints had been caulked for an unknown reason. It suggested that plaintiffs obtain the maintenance history. Plaintiffs, after receiving the inspection report, inquired of defendants about the caulking of the mortar joints and requested the maintenance history. Defendants responded that there had not been any water intrusion during the time they owned the

house. Plaintiffs then learned that defendants had made an insurance claim for water damage. When asked about the claim, defendants explained that water had leaked in around the copper hood of the front bay window, but the hood had been recaulked and there had not been a problem since. It is true that in proceeding to close on the house, plaintiffs acknowledged that several repairs needed to be performed. However, nothing in the seller's disclosure statement, inspection report, or the statements of defendants suggested that the repairs were necessary to stop or to prevent water intrusion to any extent close to that suffered by the house in the days after plaintiffs moved in. Because the seller's disclosure statement, the inspection report, the purchase agreement, and defendants' statements did not identify any significant and current water intrusion or leakage problems, we conclude that Daniel Meyer's affidavit is sufficient to create a genuine issue of material fact whether plaintiffs reasonably relied on the written documents and defendants' statements. We therefore reverse the trial court's grant of summary disposition to defendants on plaintiffs' claims for fraud.

IV. BREACH OF CONTRACT

Plaintiffs argue that defendants breached paragraphs 10 and 23 of the purchase agreement. They contend that because an "as is" clause does not insulate a seller from liability where the seller makes fraudulent misrepresentations, the trial court erred in relying on the "as is" clause of the purchase agreement to grant summary disposition to defendants. Even assuming that the "as is" clause does not bar plaintiffs' breach of contract claim,[3] we conclude that plaintiffs have failed to establish a genuine issue of material fact with regard to a breach of either paragraph 10 or 23.

Plaintiffs assert that paragraph 10 of the purchase agreement incorporates the seller's disclosure statement, which indicated that the house was free of water intrusion. However, the plain language of paragraph 10 does not incorporate the disclosure statement as a term of the agreement. Rather, it merely indicates that plaintiffs had reviewed and accepted "the condition of the property per the Seller's Disclosure Statement, subject to any *additional inspections* . . . ." (emphasis added). In other words, defendants did not promise to deliver the property to plaintiffs in the exact condition recorded in the disclosure statement. Accordingly, there was no breach of paragraph 10 of the purchase agreement.

Paragraph 23 of the purchase agreement provides that "[s]eller represents that the foundation, foundation walls and basement are watertight and free of any leakage, or seepage, as

---

[3] An "as is" clause allocates the risk of loss as to unknown risks to the purchaser. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). Thus, to the extent that the problems with the house were unknown to defendants, a contract claim for damages would be barred. Further, plaintiffs cite *Lorenzo* for the contention that an "as is" clause does not bar their breach of contract claim because defendants made misrepresentations. However, *Lorenzo* merely ruled that an "as is" clause will not function to bar a claim for fraud where a defendant has made misrepresentations. Here, plaintiffs allege a breach of contract. Thus, the case does not support plaintiffs' position.

of the date of this Agreement or as disclosed." Daniel Meyer testified that during the second rainstorm after plaintiffs had moved into the house water leaked into the basement from its windows, doors, and ceilings. However, plaintiffs also presented the deposition testimony of their expert, John Zarzecki, who testified as to causes and entry points of the water intrusion into the house. Plaintiffs fail to cite to any testimony by Zarzecki that the entry point of the water that leaked into the basement was the basement's doors and windows. To the contrary, Zarzecki's testimony showed that the doors, windows, or other structures on the house's upper floors were the points where water entered the house and from those entry points the water migrated down to the basement. We, therefore, conclude that plaintiffs' evidence failed to create a factual dispute whether paragraph 23 of the purchase agreement was breached. We affirm the trial court's grant of summary disposition to defendants on plaintiffs' breach of contract claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCL 7.219, neither party having prevailed in full.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Donald S. Owens