STATE OF MICHIGAN

COURT OF APPEALS

DONNAHUE GEORGE, Plaintiff-Appellant,	UNPUBLISHED February 20, 2020
v	No. 347636 Wayne Circuit Court
TEIA MCGEE and HARRY NANES, Defendants-Appellees.	LC No. 18-010253-CZ

Before: GLEICHER, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

Donnahue George filed suit against Teia McGee and real estate broker Harry Nanes for fraudulently asserting that the plumbing was in good working order in connection with the sale of a multifamily home in Detroit. The circuit court summarily dismissed his complaint without prejudice for failure to state a claim. We affirm in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

When George purchased the subject property on land contract, McGee provided a seller's disclosure statement indicating that there were no "known problems" with the building's plumbing system. The listing indicated that it was a "turn key deal" and an "[e]asy turnkey deal,"[1] and that McGee "ha[d] satisfied all City of Detroit requirements for rental license." After closing the sale, George turned on the water supply to the property and discovered that the "pipes were leaking or

[1] "A turnkey property is a fully renovated home or apartment building that an investor can purchase or immediately rent out." Investopedia, available at <https://www.investopedia.com/terms/t/turnkey-property.asp> (accessed February 6, 2020). "Turn-key properties are homes that are move-in ready . . . and there are no obvious structural or electrical issues." Redfin, *What Does Turnkey Mean?*, available at <https://www.redfin.com/guides/turn-key> (accessed February 6, 2020).

blocked and corroded" throughout. George had to pay to replace the plumbing and repair water damage.

George, acting in pro per, filed a handwritten one-page complaint against McGee and the "seller's agent," Nanes. He alleged that defendants committed fraud by selling the subject property "without disclosing that the plumbing was no good." George further alleged that defendants "concealed a material fact"—that the plumbing was in poor condition—upon which George relied. In a second count, George accused Nanes of "[u]nfair and deceptive trade practices along with negligence and gross negligence," averring that Nanes "owed [George] a duty of care" and breached it by providing a "final contract" that "had no sellers [sic] disclosure or [d]ual [a]gency agreement as required by law." Additionally, George alleged that Nanes "[n]ever explained" or mentioned "[d]ual [a]gency" to him.

McGee generally denied George's allegations, but Nanes never filed a responsive pleading. George responded to McGee's answer with a "reply" that was actually a motion for summary disposition. The court never acknowledged that motion. Approximately one week later, McGee filed her own motion for summary disposition under MCR 2.116(C)(8), arguing that George's tort claims should be dismissed under the economic loss doctrine. Before the motion could be heard, George filed a new motion for summary disposition under MCR 2.116(C)(9) and (10). The court did not consider that motion either. And in response to McGee's summary disposition motion, George advised the court that Nanes had yet to reply and therefore requested that the court enter a default judgment against him. That request too was left unanswered by the court.

The circuit court ultimately dismissed George's complaint without prejudice. In doing so, the court described that George asserted tort claims in a contract action. The tort claims were therefore barred by the economic loss doctrine, the court ruled. George aptly advised the court that the economic loss doctrine "only applies to consumer goods," not "real estate transactions," but the court rejected his plea. The alleged violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., the court found, were not applicable to individuals.[2]

II. ANALYSIS

On appeal, George contends that the circuit court erred when it dismissed his fraud claim, again asserting that the economic loss doctrine only applies to the commercial purchase of goods. He also challenges the circuit court's failure to rule on his motion for summary disposition and to enter a default judgment against Nanes.

We review de novo a circuit court's decision on a motion for summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). Summary disposition is appropriate under MCR 2.116(C)(8) "if '[t]he opposing party has failed to state a claim on which relief can be granted.' " "A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Dalley v Dykema Gossett*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "When considering such a motion, a trial court must accept all factual

[2] George has not appealed the court's ruling regarding the MCPA. We therefore affirm its dismissal.

allegations as true, deciding the motion on the pleadings alone." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id.*

As noted, George accused both defendants of fraud and accused Nanes of unfair and deceptive trade practices under the MCPA and negligence. On appeal, he contends that the economic loss doctrine does not apply to his fraud claims (with no mention of the MCPA and negligence counts).

"Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of 'fraud'—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation." *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). As described by this Court in *Alfieri v Bertorelli*, 295 Mich App 189, 193-194; 813 NW2d 772 (2012) (citations omitted):

> Common-law fraud or fraudulent misrepresentation entails a defendant making a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damage as a result. Silent fraud is essentially the same except that it is based on a defendant suppressing a material fact that he or she was legally obligated to disclose, rather than making an affirmative misrepresentation. Such a duty may arise by law or by equity; an example of the latter is a buyer making a direct inquiry or expressing a particularized concern. A misleadingly incomplete response to an inquiry can constitute silent fraud.

More specifically related to this case, this Court has held that a plaintiff may maintain a fraud action for certain violations of the Seller Disclosure Act (SDA), MCL 565.951 *et seq.*: "it is evident that the Legislature intended to allow for seller liability in a civil action alleging fraud or violation of the act brought by a purchaser on the basis of misrepresentations or omissions in a disclosure statement, but with some limitations." *Bergen v Baker*, 264 Mich App 376, 385; 691 NW2d 770 (2004). Accordingly, this Court has held that when the SDA applies to a transaction,[3] it "clearly creates a legal duty of disclosure" that is "relative" to the subject transaction. *Id.*

"The economic-loss doctrine is a judicially created doctrine that bars all tort remedies where the suit is between an aggrieved buyer and a nonperformance seller, the injury consists of damage to the goods themselves, and the only losses alleged are economic." *Sullivan Indus, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 339; 480 NW2d 623 (1992). The doctrine "bars tort recovery and limits remedies to those available under the Uniform Commercial Code [UCC]

[3] Under MCL 565.952, the SDA applies "to the transfer of any interest in real estate consisting of not less than 1 or more than 4 residential dwelling units, whether by sale, exchange, installment land contract, lease with an option to purchase, any other option to purchase, or ground lease coupled with proposed improvements by the purchaser or tenant, or a transfer of stock or an interest in a residential cooperative."

where a claim for damages arises out of the commercial sale of goods and losses incurred are purely economic." *Neibarger v Universal Coops, Inc*, 439 Mich 512, 515; 486 NW2d 612 (1992). When the Michigan Supreme Court adopted the economic loss doctrine, it emphasized that the doctrine distinguished "between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." *Id*. at 520-521. However, the *Neibarger* Court applied the doctrine where cows were injured by a milking system; although the injury was not to the goods themselves (the milking machine) but to the cows, the Court determined that the doctrine applied where the commercial damages to property (the cows) were economic and caused by the failure of the product. *Id*. at 531.

McGee argues that the economic loss doctrine is not restricted to goods, and has been extended to services, citing *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65; 559 NW2d 647 (1997). *Rinaldo* is inapposite. The question in *Rinaldo* was "whether an action in tort may arise out of a contractual promise." *Id*. at 83. To raise a tort claim, the Court held, the plaintiff must allege a "violation of a legal duty separate and distinct from the contractual obligation." *Id*. at 84. When entering a contract, a party takes on a duty to perform the object of the contract "in a careful and skillful manner without risk of harm to others. *Id*. (quotation marks and citation omitted). "This duty, however, does not extend to 'intangible economic losses' "—i.e., tort damages. *Id*. The Court then commented that this "distinction" had "more recently been applied to sales contracts under the UCC under the rubric of the 'economic loss doctrine.' " *Id*. at 84-85, citing *Neibarger*, 439 Mich at 527. In making the comparison, however, the Court did not in any way suggest that the economic loss doctrine applied to the provision of services.

The current case does not involve the commercial sale of goods. MCL 440.2102 provides that the UCC "applies to transactions in goods . . . ." MCL 440.2105(1) defines "goods" for purposes of the UCC in relevant part as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . ." The subject property in this case is a multifamily home; it is neither manufactured nor movable. Therefore, neither the UCC nor the economic loss doctrine apply and the circuit court erred in dismissing George's fraud claim on this ground.

Although the economic loss doctrine does not apply, *Rinaldo*'s principles about raising tort claims for contractual breaches may. After all, the root of this action is the contract for the sale of real estate. However, neither party briefed, either in this Court or below, whether the duty to make truthful disclosures is separate and distinct from the duty to perform the sales contract in a careful and skillful manner. As more recently noted in *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004) (quotation marks and citations omitted), "a tort action stemming from misfeasance of a contractual obligation" may be maintained when there is "the violation of a legal duty separate and distinct from the contractual obligation." This concept applies independent of the economic loss doctrine.

It appears that George did cite a legal duty apart from the purchase contract, although inartfully: the duty under the SDA to make truthful disclosures in the seller's disclosure statement. See *Bergen*, 264 Mich App at 385. This duty would be apart from the purchase agreement. Indeed, *Bergen* indicates that "a civil action alleging fraud or violation of the act brought by a purchaser

on the basis of misrepresentations or omissions in a disclosure statement" may be maintained. *Id*. Whether the listing for the property can be considered to be distinct from the contract, such that a misrepresentation may have given rise to a distinct duty, is a question that requires further development of the record. The circuit court must decide this issue in the first instance.[4]

McGee contends that this Court should affirm the summary dismissal of George's claims on an alternate ground—because George's claims are barred by the "as is" clause in the purchase agreement. " 'As is' clauses allocate the risk of loss arising from conditions unknown to the parties." *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). They "also transfer the risk of loss where the defect should have reasonably been discovered upon inspection, but was not." *Id*. Such clauses do not, however, "transfer the risk of loss where a seller makes fraudulent representations before a purchaser signs a binding agreement." *Id*. (quotation marks and citation omitted).

The purchase agreement for the subject property provides, "By closing this transaction, Buyer shall be deemed to have accepted the property in 'AS IS' condition and shall be deemed by closing this transaction that buyer is satisfied with the condition of the property." George has raised a claim of fraud, and thus, the purchase agreement's "as is" clause alone does not defeat his claim. " '[A]s is' clauses do not insulate a seller from liability where the seller makes fraudulent representations." *Bergen*, 264 Mich App at 390 n 5, citing *Lorenzo*, 206 Mich App at 687. Therefore, the "as is" clause in the purchase agreement would become dispositive only if George's fraud claim failed on some other ground.

George also challenges the circuit court's failure to consider his motion for summary disposition under MCR 2.116(C)(9). As the lower court dismissed George's claims in defendants' favor, there was no need to consider George's separate motion at that time. On remand, George will be able to raise his motion anew and request the court's consideration.

And George challenges the circuit court's failure to enter a default judgment against Nanes based on his failure to respond to the complaint. However, George did not follow proper procedure in requesting the default. Under MCR 2.603(A)(1), George was required to make his case for a default to the *clerk of the court*. After entry of a default, the clerk can enter a default judgment if the complaint is for a sum certain. Otherwise, the judge must enter the judgment. MCR 2.603(B)(2), (3). Here, George sought $30,000, plus $1,000,000 in punitive damages. The punitive damages sought are not a "sum certain"; "[p]unitive damages are available in Michigan only when expressly authorized by the Legislature." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 765; 685 NW2d 391 (2004). Yet, George has not cited the legislative grounds for his punitive damages request. Accordingly, if the court clerk issues a default, George will be required to then file a motion asking the judge to enter a default judgment. MCR 2.603(B)(3).

[4] Although not raised on appeal, we note that the circuit court also erroneously dismissed George's negligence claim against Nanes based on the economic loss doctrine. George alleged that Nanes owed him a duty as a buyer's agent to explain the seller's disclosure statement and to explain his dual agency relationship. The agent's disclosure duties are outlined in MCL 339.2517. The circuit court should address this issue in the first instance, as well, however.

We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael F. Gadola
/s/ Anica Letica