STATE OF MICHIGAN

COURT OF APPEALS

SUN YU and JULIE YU,

Plaintiffs-Appellants,

v

FRANK MIGLIAZZO and GAIL MIGLIAZZO,

Defendants-Appellees.

UNPUBLISHED
October 22, 2020

No. 350940
Oakland Circuit Court
LC No. 2015-148909-CK

Before: METER, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Plaintiffs, Sun Yu ("Sun") and Julie Yu ("Julie"), appeal as of right a September 20, 2019 stipulated order dismissing their innocent misrepresentation claim, which was their last remaining claim against defendants, Frank Migliazzo ("Frank") and Gail Migliazzo ("Gail"), in this action arising from the sale of defendants' home to plaintiffs. On appeal, plaintiffs present arguments challenging the trial court's July 16, 2019 order granting summary disposition to defendants under MCR 2.116(C)(10) on plaintiff's fraud, silent fraud, negligent misrepresentation, and breach of contract claims. We reverse the July 16, 2019 order and remand for further proceedings.

I. FACTS & PROCEDURAL HISTORY

This case was the subject of an earlier appeal in which we affirmed in part and reversed in part the trial court's June 8, 2017 order granting defendants' first motion for summary disposition. See *Yu v Migliazzo*, unpublished per curiam opinion of the Court of Appeals, issued July 3, 2018 (Docket No. 338847), pp 1, 6. In that earlier appeal, we summarized the nature and background of this case as follows:

> This case arises from defendants' sale of a house to plaintiffs. Defendants owned the house from the time of its construction in 1994 until the sale to plaintiffs in December 2010. Plaintiffs filed suit in September 2015, alleging breach of contract, negligent repair, and fraud-related claims. Plaintiffs asserted that defendants knew about certain structural problems in the house, including leaks in the kitchen ceiling and related structural issues, but failed to adequately disclose

> those matters to plaintiffs. Plaintiffs further claimed that the leaks caused damage to the home and that it had been rendered unmarketable or its value had been diminished. Following discovery, defendants moved for summary disposition under MCR 2.116(C)(7) (claim barred by applicable limitations period), (C)(8) (failure to state a claim for which relief may be granted), and (C)(10) (no genuine issue of material fact). The trial court granted the motion under MCR 2.116(C)(7), holding that plaintiffs' claims were barred by the applicable statutes of limitation. This appeal followed. [*Yu*, unpub op at 1.]

We concluded that, except for the negligent repair claim, the trial court had erred by granting summary disposition to defendants on the basis of the applicable statutes of limitations. *Id*. at 2-5. The breach of contract and fraud-related claims were subject to six-year statutes of limitations and were thus timely. *Id*. at 2-4. The negligent repair claim was subject to a three-year statute of limitations and was thus untimely. *Id*. at 4. We rejected plaintiffs' argument that, for the negligent repair claim, they were entitled to tolling of the statute of limitations on the basis of the fraudulent concealment exception to the statute of limitations. *Id*. at 4-5. We therefore reversed the trial court's grant of summary disposition to defendants with respect to all of plaintiffs' claims except for the negligent repair claim. *Id*. at 5. Regarding the claims other than the negligent repair claim, we declined defendants' invitation to affirm the grant of summary disposition to defendants on the alternative grounds that plaintiffs had failed to state a claim for which relief may be granted, MCR 2.116(C)(8), and that plaintiffs had failed to demonstrate a genuine issue of material fact in support of their claims, MCR 2.116(C)(10). *Yu*, unpub op at 5. We explained that:

> in a case such as this, in which the trial court granted summary disposition on what might be deemed "procedural" grounds, without reaching the substantive merits of plaintiffs' claims, and where resolution of many, if not all, of those claims may prove to be fact-intensive, we conclude that the wiser and more proper course of action is to remand to the trial court for further proceedings, rather than to consider the merits of plaintiffs' claim in the first instance in this Court under the guise of considering whether to affirm on alternate grounds. [*Id*.]

We affirmed in part, reversed in part, and remanded for further proceedings. *Id*. at 6.

On remand, defendants filed their second motion for summary disposition. On July 16, 2019, the trial court entered an order dispensing with oral argument and granting summary disposition to defendants under MCR 2.116(C)(10) on the breach of contract, fraud, and silent fraud claims due to plaintiffs' failure to submit evidence that defendants knew of the leaks or the internal gutter system installed above the kitchen ceiling to address the leaks. Summary disposition under MCR 2.116(C)(10) was granted to defendants on the negligent misrepresentation claim because defendants provided information in the seller's disclosure statement ("SDS") that

they believed to be accurate and there was no evidence that defendants failed to exercise reasonable care in executing the SDS.[1] This appeal followed.

II. ANALYSIS

Plaintiffs argue that the trial court committed error requiring reversal when it granted summary disposition to defendants on the fraud, silent fraud, negligent misrepresentation, and breach of contract claims.

We review de novo a trial court's decision regarding a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion under MCR 2.116(C)(10) tests whether a claim is factually sufficient. *Id*. at 160. "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* "A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact." *Id.* "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id.* However, the trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). Questions concerning the state of one's mind, including intent, motivation, or knowledge can be proven by circumstantial evidence. *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004).

The elements of common-law fraud or fraudulent misrepresentation are:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009).]

Regarding a silent fraud claim, we have explained:

> 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. But for the suppression of information to constitute silent fraud there must exist a legal or equitable duty of disclosure. Further, establishing silent fraud requires more than

[1] The trial court denied defendants' motion for summary disposition with respect to the innocent misrepresentation claim because knowledge of the falsity of a representation was not an element of such a claim and defendants' argument on that claim was therefore unavailing. On September 20, 2019, the trial court entered a stipulated order dismissing the innocent misrepresentation claim with prejudice.

> proving that the seller was aware of and failed to disclose a hidden defect. Instead, to prove a claim of silent fraud, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive. [*Id*. at 403-404 (quotation marks and citations omitted).]

A negligent misrepresentation claim requires the plaintiff to "prove that a party justifiably relied to his detriment on information provided without reasonable care by one who owed the relying party a duty of care." *Id*. at 406 n 2 (quotation marks and citation omitted).

The Seller Disclosure Act (SDA), MCL 565.951 *et seq*., requires sellers to disclose in an SDS certain information actually within their personal knowledge. MCL 565.955(1); MCL 565.956; MCL 565.957. However, "[t]he specification of items for disclosure in [the SDA] does not limit or abridge any obligation for disclosure created by any other provision of law regarding fraud, misrepresentation, or deceit in transfer transactions." MCL 565.961. Thus, where an item is specified for disclosure on the SDS, a transferor may be liable for fraud or silent fraud if the elements of those causes of action are proved, including that the transferor possessed personal knowledge about the item but failed to exercise "good faith" by disclosing that knowledge. MCL 565.960; *Bergen*, *supra*.

Plaintiffs argue that the trial court erred in granting summary disposition to defendants on the fraud and silent fraud claims. Plaintiffs contend that genuine issues of material fact exist regarding defendants' knowledge of misrepresentations or omissions in the SDS. We agree.[2]

In the SDS provided to plaintiffs and signed by defendants on September 22, 2010, defendants wrote, "New Roof Sept 2010—had previous leak."[3] This language could reasonably be viewed as suggesting that there was only a single previous leak or leaking incident and that the leak was resolved or remedied by the installation of a new roof in September 2010. But there was evidence that defendants knew that such a representation was false. In particular, there was evidence of numerous leaks over many years, including multiple leaking incidents that, according to Gail, occurred from 1994 or 1995 until 2005 or 2006 (although Frank estimated that the last

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[2] The only element of either fraud or silent fraud that was addressed by the trial court, or that was the focus of defendants' summary disposition motion, was defendants' knowledge of the fraudulent representations or omissions. No other element of fraud or silent fraud was the focus of the parties' arguments below or on appeal, or of the trial court's decision (although the falsity of representations is intertwined with the element of knowledge). We therefore do not address any other elements of those claims. Further, it is unnecessary to address fraud and silent fraud separately given that knowledge is a common element for both claims, and the evidence of defendants' knowledge regarding both fraudulent representations and omissions is interrelated.

[3] The reference to a "previous leak" is a handwritten notation; the handwriting is not entirely clear regarding whether the word "leak" or "leaks" was used. If the plural form of the word was arguably used, then the "s" is barely legible. At the very least, a trier of fact could reasonably view the handwriting as indicating a reference to only a single leak. "It is for the trier of fact to resolve the issue of how to interpret the disclosure statement." *Bergen*, 264 Mich App at 387.

leaking event was in 2006 or 2008).[4] There was also evidence, as explained below, that defendants knew that the leaking was at least possibly related to a problem with the master bedroom balcony rather than the roof. And there was evidence that defendants possessed at least some knowledge about the installation of a hidden internal gutter system above the kitchen ceiling that was apparently intended to address the recurrent leaking issue. Yet the SDS is bereft of any reference to the multiple leaks over many years, the possible relationship of those leaks to the balcony, and the hidden internal gutter system that was installed and repaired over the years in an effort to address the ongoing leaks.

In particular, Gail admitted in her deposition that the roof replacement in September 2010 had nothing to do with the water intrusion into the home. This reflects the arguably misleading implication of the SDS that the roof replacement was meant to address the "previous leak." Although Gail testified that the leaking issue was related to the roof rather than the balcony, Frank testified that the workers who were addressing the leaks for defendants had at one point believed that the leaking came from the roof but then at another point believed that the leaking possibly came from the balcony. Moreover, in a written discovery response in this case, defendants admitted that they knew of leaks from the master bedroom balcony into the kitchen. A trier of fact could reasonably infer from the evidence that defendants knew that the leaking issue was at least possibly related to the balcony rather than the roof, and thus, that it was misleading to suggest in the SDS that the September 2010 roof replacement was meant to address a previous single leak.

Further, the record reflects at least some knowledge on the part of defendants in regard to the presence of the hidden internal gutter system above the kitchen ceiling and the failure to disclose this could reasonably be viewed as an effort to conceal the severity or frequency of the ongoing leaks. Plaintiffs' architecture expert, Eric Murrell, testified that he found an internal gutter system in the kitchen ceiling. This internal gutter system was apparently an attempt to catch leaking water before it got to the kitchen ceiling and to direct it outside. Although defendants disclaimed any knowledge or expertise concerning construction, architectural, or engineering matters in general and regarding the internal gutter system in particular, their testimony reflected at least some knowledge on their part regarding the components of the internal gutter system inside the kitchen ceiling, including a contractor's enlargement or replacement of scuppers and the use of heat tape on the scuppers. Indeed, Gail's testimony reflected at least some degree of knowledge

[4] The veracity of Gail's contention that no leaking incidents occurred in the kitchen after 2006 could reasonably be questioned. With respect to a separate leak into the basement, Gail initially testified that the leak occurred before 2006. But later in her deposition, when presented with paperwork for mold remediation services that were provided for the basement, Gail admitted that the paperwork showed that the mold remediation was conducted in 2010. A trier of fact could reasonably conclude that Gail was not the most reliable indicator of when events occurred. A defendant's inconsistent statements may create genuine issues of material fact. *White v Taylor Distrib Co, Inc*, 482 Mich 136, 142; 753 NW2d 591 (2008). Any issues regarding Gail's credibility are for the trier of fact to resolve. *Id*. at 142-143. It is also notable that, according to Sun's testimony, plaintiffs began seeing water drops form bubbles in the kitchen ceiling as early as the spring of 2011, soon after they moved into the home.

regarding the functioning of the scuppers. When asked if a scupper was something used to redirect water, Gail responded that her "understanding is a scupper was like a hole, like a tube so the water can go out. So redirect would be a way of saying it." Gail believed that the contractor at one point in time "made the scuppers larger, that the scuppers were icing up and it wasn't sufficient enough to get the water out. So they made the scuppers larger." Gail testified that, at a later time, the contractor repaired or enlarged the scuppers again and applied heat tape. According to Gail, the last leak occurred in 2005 or 2006; when asked what measures the contractor took, Gail again referred to the scupper replacement or enlargement and the use of heat tape, but emphasized that she did not recall chronologically which measures were taken for each leak event.[5]

Further, given the significant nature of the work undertaken in connection with the installation and repeated repairs of the internal gutter system, including the removal of the kitchen ceiling drywall, the enlargement or replacement of the scuppers, and the use of heat tape, a trier of fact could reasonably infer that defendants, who lived in the home at the time, possessed at least some degree of understanding of the nature and extent of the work being performed. There was also evidence that defendants knew that the balcony rather than the roof was at least possibly a cause of the ongoing leaks. Therefore, defendants could be found to have known that the SDS contained a misrepresentation because it falsely indicated that there was a single previous leak that was addressed by the installation of a new roof in September 2010.

In addition, another question on the SDS form asked, "Structural modifications, alterations or repairs made without necessary permits or licensed contractors?" Defendants checked a line marked, "no." And another question on the SDS form asked, "Settling, flooding, drainage, structural or grading problems?" Defendants again checked a line marked, "no." As discussed, there was evidence of flooding, drainage, or structural problems extending over many years involving leaks into the kitchen, that the leaks may have been coming from the balcony, and that an internal gutter system was installed to address the leaks. Also, Gail testified regarding her understanding that snow or ice dams on the roof caused water to drip down a brick wall abutting the balcony and seep into the kitchen. A trier of fact could infer that defendants possessed knowledge of flooding, drainage, or structural problems and yet answered "no" on the portion of the SDS form asking if such problems existed. Further, a trier of fact could reasonably view the internal gutter system as a structural modification, alteration, or repair made without necessary permits. Murrell testified that a permit was required for the internal gutter system because it constituted an alteration that went beyond simple repair, but no permit was issued. Although defendants suggest that they lacked knowledge regarding whether a permit was required or issued, defendants' argument fails to take into consideration the fact that the SDS form allowed defendants to check "yes," "no," or "unknown" in response to questions. Overall, reasonable minds could differ regarding whether defendants knew their responses to these questions on the SDS form were false. At the very least, a trier of fact could reasonably infer that defendants made the representations recklessly, without knowledge of their truth.

[5] Gail also testified, however, that she has never seen a scupper and that she did not know if there had already been scuppers in the house from the time of its construction.

Accordingly, the trial court erred in granting summary disposition to defendants with respect to plaintiffs' fraud and silent fraud claims. Contrary to the trial court's reasoning, genuine issues of material fact existed about the extent of defendants' knowledge of the misrepresentations.

Plaintiffs next argue that the trial court erred in granting summary disposition to defendants on the silent fraud, negligent misrepresentation, and breach of contract claims because defendants did not move for summary disposition on those claims. Plaintiffs' argument regarding the silent fraud claim is moot in light of our conclusion that the trial court erred in granting summary disposition on that claim. Regarding plaintiffs' arguments with respect to the negligent misrepresentation and breach of contract claims, we agree.

Defendants' motion for summary for summary disposition was poorly written and it was unclear which claims were the subject of the motion. It presented no discernible or coherent argument for the dismissal of the negligent misrepresentation and breach of contract claims. Defendants inaccurately asserted below that only the fraud claim had been remanded to the trial court by our prior opinion, and this supports the conclusion that defendants were not seeking summary disposition on the negligent misrepresentation and breach of contract claims. Because defendants' motion did not seek summary disposition on the negligent misrepresentation and breach of contract claims, plaintiffs were not afforded an opportunity to present evidence or arguments in response to any request for summary disposition on those claims. The trial court thus erred in granting summary disposition to defendants on the negligent misrepresentation and breach of contract claims.

Moreover, the trial court's rationale for granting summary disposition to defendants on the breach of contract claim was flawed. The trial court stated that a breach of contract claim was impermissible because defendants lacked knowledge of the leaks or the internal gutter system. The trial court failed to explain how defendants' purported lack of knowledge was relevant to any of the elements of a breach of contract claim.[6] Moreover, as explained earlier in connection with the fraud and silent fraud claims, there was evidence from which a trier of fact could reasonably find that defendants possessed knowledge of the leaks and the internal gutter system. Accordingly, the trial court committed error requiring reversal.

III. CONCLUSION

Because there was evidence from which a trier of fact could conclude that defendants possessed knowledge of the leaks and the internal gutter system, there existed a genuine issue of material fact regarding plaintiffs' claims of fraud and silent fraud. Additionally, the trial court improperly granted summary disposition on plaintiffs' claims of negligent misrepresentation and breach of contract. Accordingly, the July 16, 2019 order of the trial court is reversed, and the case

[6] The elements of a breach of contract claim are "(1) that there was a contract, (2) that the other party breached the contract, and (3) that the party asserting breach of contract suffered damages as a result of the breach." *Doe v Henry Ford Health Sys*, 308 Mich App 592, 601; 865 NW2d 915 (2014).

is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan