STATE OF MICHIGAN

COURT OF APPEALS

CAROL J. BELL,

Plaintiff-Appellant/Cross-Appellee,

v

BRIAN R. KELLER and JANELLE KELLER,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
May 20, 2021

No. 352421
Livingston Circuit Court
LC No. 18-029980-CH

Before: SAWYER, P.J., and STEPHENS and RICK, JJ.

PER CURIAM.

The trial court entered a judgment in favor of plaintiff, following a bench trial in this action for rescission of a purchase of a residential home and recovery of money damages associated with undisclosed flooding problems in the home. The judgment permitted plaintiff to rescind her purchase of the home because of defendants' fraud and violation of the Seller's Disclosure Act, MCL 565.951 *et seq*., ordered defendants to return plaintiff's purchase price, and awarded plaintiff other requested damages, but denied plaintiff's requests for additional damages. The trial court rejected plaintiff's claim that the defendants' defense was frivolous and denied plaintiff's motion for costs and attorney fees under MCL 600.2591. Plaintiff appeals as of right, arguing that the trial court erroneously denied some of her requested damages, and erred by denying her motion for attorney fees. Defendants filed a cross-appeal. They argue that the trial court erred by finding that defendant Janelle Keller was liable for fraud, and that the trial court also erred in finding that plaintiff reasonably relied only representations made by the defendants. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Plaintiff entered into a purchase agreement with defendants to purchase a home in Pinkney, Michigan in June 2016. Defendants completed a Seller's Disclosure Statement (SDS) prior to the purchase agreement, which included the question: "Basement/Crawlspace: Has there been evidence of water?" The question provided options for checking "yes" or "no" and, if the answer

was yes, to provide an explanation.[1] Defendants answered, "no." The same SDS required the sellers to disclose whether there had been any "settling, flooding, drainage, structural, or grading problems." The options in answering that question were "yes," "no," or "unknown"; defendants also answered, "no." The SDS also stated that "the Seller specifically makes the following representations based on the Seller's knowledge at the signing of this document."

Plaintiff filed this action seeking rescission of the purchase contract and recovery of money damages for reimbursement of her time and expenses in addressing and mitigating recurrent flooding problems. The trial court found that defendants made material misrepresentations in the SDS, that plaintiff relied on them to her detriment, and that rescission was an appropriate remedy. The trial court also awarded plaintiff damages for amounts she had spent on contractors for their repair efforts. However, the trial court refused to award damages for plaintiff's own repair efforts and cost of materials purchased by plaintiff. The court also denied plaintiff's post-judgment motion for attorney fees.

II. PLAINTIFF'S APPEAL

Plaintiff claims the trial court erred in failing to award certain damages and, also, in declining to award frivolous action sanctions. We agree in part with her damages argument but find no error in the trial court's ruling to deny sanctions.

A. DAMAGES

Plaintiff argues that the trial court erred when it denied her requests for damages for her personal time cleaning and repairing the basement, and for reimbursement of the cost of materials purchased to make the repairs. "The circuit court's findings of fact, if any, following a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo." *Ladd v Motor City Plastics Co*, 303 Mich App 83, 93; 842 NW2d 388 (2013). Rescission is an equitable remedy. *Bazzi v Sentinel Ins Co*, 502 Mich 390, 411; 919 NW2d 20 (2018). This Court reviews de novo a trial court's decision whether to grant equitable relief. *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995). However, the decision to grant rescission "lies largely within the court's discretion." *Bechard v Bolton*, 316 Mich 1, 5; 24 NW2d 422 (1946).

The purpose of the equitable remedy of rescission is to restore the status quo. *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995). That is, a contract that is rescinded is considered never to have existed, and rescission restores the status quo, returning the parties to the positions they occupied before entering into the contract. *Id.* In *Lash*, this Court explained:

> To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves

[1] This question did not have a box to check for "unknown," unlike the majority of the questions on the SDS.

> a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the status quo. [*Lash*, 210 Mich App at 102, quoting *Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 479; 350 NW2d 283 (1984).]

Michigan law has long held that, "[w]here a rescission for fraud has been had, repairs and improvements made by the innocent party are recoverable as damages." *Patten v Downer*, 227 Mich 95, 100; 198 NW 722 (1924), citing *Davis v Strobridge*, 44 Mich 157, 159; 6 NW 205 (1880).

In this case, the trial court found that reimbursement for plaintiff's time and materials used to repair the basement damage was not reasonable, both because plaintiff had not demonstrated that $30 an hour was a reasonable rate for her time, and because the repairs did not fix the flooding problem. However, neither the trial court nor defendants have cited any legal support for the proposition that remediation efforts must be successful to qualify for recovery. Because the purpose of rescission is to return a plaintiff to the plaintiff's position before the contract, which in this case involved plaintiff's purchase of the house, it follows that expenses for repairs and improvements that plaintiff would not have incurred but for the purchase are recoverable.

In addition, plaintiff testified that the only continuing damage after her initial repairs and the repair efforts by other contractors were some "popping up" of floor tiles. Plaintiff did not describe other continuing water damage, such as wet drywall or insulation. Plaintiff testified that she eventually determined that the "cure" for the problem was to pump out the water from the ditch where it flowed after Todd's Services regraded the property and put in new pipes. Although this fix was temporary and must be repeated regularly, it is reasonable to conclude that, with this fix, future water will not cause the home to flood. So, while the initial efforts failed, it does not appear that any of the other items that plaintiff repaired, such as drywall, will again be damaged. Thus, plaintiff's personal efforts to repair the damage caused by the initial flooding created value to the home, or at least restored some of its value after the initial flooding.

Moreover, we agree with plaintiff that the trial court's decision to allow recovery of plaintiff's payments to contractors for both labor and materials, while denying the same to plaintiff for her own efforts, is inconsistent. This is particularly true considering that all of the "professional" contractors' efforts also "failed" at preventing further flooding, at least absent the periodic removal of water by the septic service. For these reasons, we hold that the trial court erred when it refused to award plaintiff damages for the materials she used in her renovations.

On the other hand, the trial court did not err when it denied plaintiff's request for damages for reimbursement of her alleged time spent performing remediation work. Although we agree that reimbursement of plaintiff's time spent remediating the basement can qualify as an element of damages, plaintiff presented no evidence that $30 an hour was a reasonable rate for her services. When asked to defend this hourly rate, plaintiff responded only that she was worth it and that was what she made an hour at her regular job. We agree with the trial court that this testimony was insufficient to justify the requested hourly rate. Plaintiff presented no evidence that this was a reasonable rate not only for work installing drywall and tile, which we would regard as skilled labor, but also for unskilled work, such as removing the damaged materials and installing

insulation. In addition, plaintiff did not present anything other than her "guess" about how much time she spent. At trial, plaintiff did not present testimony that she spent 440 hours remediating, as she claims on appeal. Even if her higher estimates for each task are credited, her testimony at trial indicated that she spent a total of, at most, only 170 hours. Although she also testified that she probably spent "a lot more [time] than that," that is insufficient to support an award of a particular number of additional hours. Plaintiff acknowledged at trial that she had estimated far more hours when she filed her complaint, but she did not attempt to reconcile or even explain the differing amounts at trial. We do not hold that a person in plaintiff's position is not entitled to be compensated for personal remediation efforts. In this case, however, the testimony did not support what plaintiff requested.

In sum, we hold that the trial court erred when it refused to award plaintiff damages for the cost of materials purchased to repair the basement. Accordingly, we remand for a determination of an appropriate award of damages in this regard. However, given plaintiff's lack of support for her claim that she should be awarded damages for her repair efforts at $30 an hour for 440 hours, the trial court did not err by declining to award these requested damages.

B. SANCTIONS

Plaintiff next argues that the trial court erred by denying her motion for an award of attorney fees on the ground that defendants' defense of this action was frivolous. We disagree.

"A trial court's findings with regard to whether a claim or defense was frivolous, and whether sanctions may be imposed, will not be disturbed unless it is clearly erroneous." *1300 LaFayette E Coop, Inc v Savoy*, 284 Mich App 522, 533; 773 NW2d 57 (2009). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 534 (quotations and citation omitted).

In Michigan, recovery of attorney fees is governed by the American rule. *Burnside v State Farm Fire & Gas Co*, 208 Mich App 422, 426; 528 NW2d 749 (1995), citing *Matras v Amoco Oil Co*, 424 Mich 675, 695; 385 NW2d 586 (1986). "Under the American rule, attorney fees are generally not allowed, as either costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception." *Burnside*, 208 Mich App at 426-427; see also *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012).

Under MCR 2.625(A)(2) and MCL 600.2591, if a trial court finds that a civil action or defense is frivolous, the trial court may award costs and attorney fees to the prevailing party. MCL 600.2591(3)(a) and (b); *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 245; 635 NW2d 379 (2001). A claim or defense is frivolous when: "(1) the party's primary purpose was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe the underlying facts were true; or (3) the party's position was devoid of arguable legal merit." *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35-36; 666 NW2d 310 (2003); MCL 600.2951(3)(a). To be considered a prevailing party, a party is required "to show at the very least that its position was improved by the litigation." *Citizens Ins Co*, 247 Mich App at 245.

In this case, plaintiff qualifies as a prevailing party because she obtained both equitable and monetary relief. Although the trial court did not award all of her requested damages, she still improved her position from before trial. However, plaintiff has not shown that the trial court clearly erred by finding that defendants' defense of this action was not frivolous.

Plaintiff does not argue that defendants' defenses were without underlying legal merit, except as applied. First, rescission is an equitable remedy, not a legal one. *Bazzi*, 502 Mich at 411. As our Supreme Court explained in *Browne v Briggs Commercial & Dev Co*, 271 Mich 191, 194; 259 NW 886 (1935), "the equitable remedy of rescission is one of grace." In *Browne*, despite noting testimony establishing the falsity of statements, the Court concluded that compensation in the nature of abatement of part of the purchase price was a more appropriate remedy. *Id*. The Court stated that "[l]apse of time and change of conditions, such as the value of real estate, [can] militate against the remedy [of rescission] if another appears more just" and that "[o]rdinarily, shortage in area may be adequately compensated by abatement of part of the purchase price." *Id*. Thus, defendants' legal position—that even if the trial court were to find that defendants misrepresented that the home had no history of flooding problems, other remedies short of recession would be more appropriate—was not "devoid of arguable legal merit."

Further, whether defendants had knowledge of a history of flooding problems at the home was a disputed issue at trial. Plaintiff relies principally on the fact that the trial court resolved this dispute in her favor to argue that the court also erred by finding that defendants' defense was not frivolous. However, as this Court has observed, "merely because a plaintiff might not ultimately prevail does not mean that the plaintiff's complaint was frivolous." *1300 LaFayette E Coop*, 284 Mich App at 535, quoting *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). Ultimately, the trial court did not find the testimony of defendants and their witnesses credible, or at least not as credible as the testimony of a former tenant. However, the trial court correctly noted that defendants provided factual support for their claim. In addition to Brian's testimony, defendants presented other witnesses who testified that they lived in or performed work in the home and saw no evidence of water damage. Defendants also presented evidence challenging the credibility of the former tenant's testimony. In addition, although the trial court did not err by finding that Janelle Keller committed silent fraud, Janelle testified that she received information from Brian, which led her to believe that her SDS answers were correct.

In addition, a necessary element of fraud is that a plaintiff's reliance on any misrepresentation be reasonable. *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Defendants argued below that because plaintiff obtained an independent inspection of the home before she completed the purchase, it was not reasonable for plaintiff to rely on any misrepresentations they may have made about the condition of the property. Although the trial court rejected this argument, defendants' position that any misstatements, standing alone, would not justify a finding of fraud was not devoid of arguable legal merit.

For these reasons, the trial court did not clearly err by finding that defendants' defense of this action was not frivolous.

II. DEFENDANTS' CROSS APPEAL

In their cross-appeal, defendants argue that the trial court erred when it found that plaintiff reasonably relied on their statements in the SDS. Defendants also argue that plaintiff failed to plead or prove fraud with sufficient specificity. We disagree.

In *Titan Ins Co v Hyten*, 491 Mich 547, 571-572; 817 NW2d 562 (2012), our Supreme Court explained the elements of fraudulent misrepresentation as follows:

> (1) [the defendant] made a material representation; (2) it was false; (3) [the defendant] knew it was false [when made], or else made it recklessly, without knowledge of its truth, and as a positive assertion; (4) [the defendant] made it with the intention that it should be acted on by [the plaintiff]; (5) [the plaintiff] acted in reliance on it; and (6) [the plaintiff] thereby suffered injury.

See also *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677-678; 473 NW2d 720 (1991).

With respect to silent fraud, the Court in *Titan*, 491 Mich at 557, stated:

> Silent fraud has also long been recognized in Michigan. This doctrine holds that when there is a legal or equitable duty of disclosure, "[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." [Citation omitted.]

Defendants argue that plaintiff could not have reasonably relied on the misstatements in the SDS because she had the advantage of a home inspection, which should have made her aware that the home could have been subject to flooding or water damage. Defendants rely on authority, such as the holding in *Nieves*, 204 Mich App at 464, that "[a] misrepresentation claim requires reasonable reliance on a false representation. There can be no fraud where a person has the means to determine that a representation is not true." (Citations omitted.) Defendants also quote *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999) ("[A] person who unreasonably relies on false statements should not be entitled to damages for misrepresentation.").

We note that these cases were decided before the decision in *Titan*, in which the Court held that a plaintiff may recover for fraud even if the asserted misrepresentation could have been discovered with reasonable diligence. In *Titan*, the Court held that an intentional fraud claim may be pursued even if the fraud is "easily ascertainable." *Titan*, 491 Mich 547. The Court explained:

> As is evident, although the doctrines of actionable fraud, innocent misrepresentation, and silent fraud each contain separate elements, none of these doctrines requires that the party asserting fraud prove that the fraud could not have been discovered through the exercise of reasonable diligence. Stated differently, these doctrines do not require the party asserting fraud to have performed an investigation of all assertions and representations made by its contracting partner as a prerequisite to establishing fraud. [*Id*. at 557.]

This discussion is principally directed at whether a party who asserts fraud has an affirmative duty to investigate another party's representations as a prerequisite to establishing fraud. Although *Titan* makes clear that a party asserting fraud does not have a duty to exercise due diligence to

determine the veracity of any representations, it does not otherwise undermine the requirement that a party's reliance on a misrepresentation must still be reasonable, and it does not preclude a finding that a party's reliance will not be reasonable if the party is armed with actual knowledge of facts making any reliance unreasonable. In this case, however, unlike in *Nieves* and *Webb v First of Mich Corp*, 195 Mich App 470, 474-475; 491 NW2d 851 (1992),[2] defendants never provided the "actual facts" to plaintiff, but expected that plaintiff would rely on their misstatements. Moreover, plaintiff presented evidence refuting that the home inspection revealed "conclusive" information that the basement was prone to severe or periodic flooding.

Even if "reasonable" diligence is still required to set forth a valid fraud claim, defendants have not demonstrated that plaintiff could not establish a claim of fraud. Defendants rely on a number of entries in the inspection report that they claim should have put plaintiff on notice of possible flooding. However, none of the items to which defendants refer would have put a reasonable person on notice that the basement would repeatedly leak water from cracks under the carpet. For example, plaintiff was asked about conditions such as exposed roofing nails or improperly installed gutter flashing. Plaintiff acknowledged that these issues could raise some concern, but these items had nothing to do with the basement flooding problems. Another condition the inspector found was the presence of possible mold in the attic, but defendants rectified this problem, which again was unrelated to the flooding in the basement. Plaintiff also acknowledged that the inspection found a hairline crack in the right garage foundational wall. However, plaintiff testified that this too was not relevant because there was no evidence of water damage there. Plaintiff also testified that the garage was on a slab and that there was no water there. The wall crack in the garage was approximately 24 to 26 feet from the basement. Additionally, the garage was at the lower side of the house and plaintiff had to go down two or three steps to get into the garage from the driveway. Plaintiff acknowledged that the inspection pointed out a low spot against the back right-side of the foundation that should be properly graded to help reduce moisture in the home and protect the foundation. But plaintiff fixed the low spot after she moved in. She also testified that this spot was behind the far left corner of the garage, and that the basement did not run under the garage. None of these other possible "defects" were relevant to the actual flooding problems in the basement, and thus would not have put plaintiff on notice of the potential for significant repeated flooding, especially flooding emanating from cracks in the basement floor, underneath the newly installed carpeting.

Plaintiff acknowledged that the initial report from a 1-800-Water Damage employee stated that the home had sustained water damage from a leaking foundation wall. However, without objection, the plaintiff testified that the same worker also saw water coming through the cracks in

[2] In *Webb*, the defendant alleged fraud by a broker who allegedly advised him that the proposed investment was "risk free," but the plaintiff had received and signed for a prospectus that on its front page referenced that the investment carried risk and referred to several pages in the document describing those risks. In *Nieves*, 204 Mich App at 463, the plaintiff claimed that an agent of his employer had told him that his employment was not at-will. However, the plaintiff agreed that he had received and read the employment contract he signed that specifically described the job as at-will and he conceded that the employer's agent did not have the authority to override the contract's terms. *Id*. at 464-465.

the floor after the carpet was removed. The trial court, which was in a superior position to review the credibility of the parties' testimonies, did not clearly err when it found that plaintiff could not have discovered the actual source of the flooding from these other items. In addition, defendants' suggestion that plaintiff should have removed carpeting or walls after receiving the home inspection report before purchasing it has no merit, especially considering that none of the cited information in the inspection report revealed a possible problem with flooding emanating from these sources.

Defendants "as is" argument also fails. An "as is" clause does not 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).

Defendants also argue that plaintiff did not prove her fraud claim because she did not prove that water intruded from cracks in the basement "floor," which is what she pleaded in her complaint. Defendants rely on the fact that plaintiff did not present expert testimony about the source of water intrusion, and they claim that testimony from the former tenants was inconsistent about the source of the flooding. These arguments are without merit.

Defendants are correct that one must plead fraud with specificity. MCR 2.112(B)(1) provides that when alleging fraud, "the circumstances constituting fraud . . . must be stated with particularity." However, defendants read "with particularity" too rigidly. Defendants essentially would require plaintiff to have presented the exact spot on the floor or walls where the basement leaked water, as well as its source. This is not what is required under the court rule. "Fraud claims must be pleaded with particularity, addressing each element of the tort." *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 230; 859 NW2d 723 (2014), citing *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008). However, the requirement that one must plead "each element" is not the equivalent of what defendants would require. In *DiLeo v Ernst & Young*, 901 F2d 624, 627 (CA 7, 1990), for example, the court stated the following regarding a claim of fraud under FRCP 9(b), the federal counterpart to MCR 2.112(B)(1):

> [FRCP] 9(b) requires the plaintiff to state 'with particularity' any 'circumstances constituting fraud.' Although states of mind may be pleaded generally, the 'circumstances' must be pleaded in detail. This means the who, what when, where, and how: the first paragraph of any newspaper story.

See also *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 69; 852 NW2d 103 (2014) (CAVANAUGH, J., concurring) (noting that when reviewing claims under the federal False Claims Act, 31 USC 3729 *et seq*., federal courts have developed the guideline that plaintiffs must allege "with particularity the who, what, when, where, and how of the alleged fraud," and that the particularity requirement "is not a straightjacket") (quotation marks and citation omitted). In this case, plaintiff's identification of floor cracks in the "basement" satisfied the requirement of particularity to put defendants on notice of what plaintiff intended to prove, i.e., that defendants lied about having no knowledge of basement flooding problems, and that plaintiff relied on these misrepresentations to her detriment.

Defendants also argue in their cross-appeal that the trial court erred when it found that Janelle Keller had committed silent fraud, because she had relied on what Brian Keller had told

her about the home. However, defendants do not argue that they did not have a duty to respond honestly when completing the SDS. They argue instead that Janelle could not have committed fraud because she relied on Brian to provide information about the condition of the home. However, defendants fail to discuss that the trial court found that Janelle's testimony was not credible. In addition, as plaintiff argues, the SDS provided an option for Janelle to enter "unknown" instead of "no," at least with respect to the question whether there has been any "settling, flooding, drainage, structural, or grading problems." She did not choose that option, but instead affirmatively answered "no," thereby leading plaintiff to believe that she had actual knowledge that none of those conditions existed. The trial court did not clearly err when it found that Janelle committed silent fraud.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Cynthia Diane Stephens
/s/ Michelle M. Rick