

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**31500 13 MILE, LLC, a Michigan  
Corporation,**

**Plaintiff,**

**Case No. 24-206422-CB**

**Hon. Victoria A. Valentine**

**v**

**FH BASHA, LLC, a Michigan limited  
liability company, and NAI FARBMAN,  
a Michigan corporation.**

**Defendants.**

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**OPINION AND ORDER REGARDING DEFENDANT FH BASHA’S RENEWED  
MOTON FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)**

At a session of said Court, held in the  
County of Oakland, State of Michigan  
August 14, 2024

This matter is before the Court on Defendant FH Basha, LLC’s Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(8). This Court has reviewed the pleadings, the motion, the response, and the reply and has heard oral argument.

**I.**

**Overview**

Plaintiff 31500 13 Mile, LLC (“13 Mile LLC”) is a limited liability company which manages and operates rental properties. In July 2023 Plaintiff was assigned rights to a Commercial

Purchase Agreement for the purchase of certain commercial property located at 31500 13 Mile Rd (the “Property”) from Defendant FH Basha, LLC (“Basha”) for the purchase price of \$2,000,00. Basha and Defendant NAI Farbman (“Farbman”) were parties to a listing agreement which allegedly gave Farbman the exclusive right to sell the Property. Plaintiff alleges that the purchase price was reached after the parties agreed on a 5.5% capitalization rate based upon the net operating income for the Property and that it relied on certain representations of Defendants regarding the total utility costs of the Property when agreeing to the Commercial Purchase Agreement. Plaintiff further alleges that after the purchase of the Property it learned that the utility costs were significantly higher than was disclosed by Defendants. Plaintiff alleges that considering the actual utility costs, the value of the property would have been \$1,428,370.73, much lower than the agreed upon purchase price.

Plaintiff brought the instant action against Basha and Farbman alleging: Breach of Contract-Basha only (Count I); Fraud (Count II); Innocent Misrepresentation (Count III); Negligent Misrepresentation (Count IV); and Civil Conspiracy (Count V). Basha now moves for summary disposition under MCR 2.116(C)(8).

## **II.**

### **Standard of Review**

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019); *Pawlak v Redox Corp*, 182 Mich App 758, 763; 453 NW2d 304 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v*

*Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991).

“All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

### **III.**

#### **A.**

#### **Breach of Contract (Count I)**

It is alleged that “Basha breached the Purchase Agreement by providing false disclosures to Plaintiff” and as a result Plaintiff significantly overpaid for the Property.<sup>1</sup> Although the First Amended Complaint does not specify which provision of the Purchase Agreement applies to the breach of contract claim, in its response 13 Mile, LLC references Paragraph 5. This provision states, in pertinent part:

Within 5 business days after execution of this Agreement, Seller will provide Purchaser with copies of all title policies, surveys, leases, environmental reports, studies, site plans, certificates of occupancy and other documentation in the possession or control of Seller, which is material to Purchaser’s decision whether to purchase the Property.<sup>2</sup>

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<sup>1</sup> First Amended Complaint, ¶¶ 32-33.

<sup>2</sup> First Amended Complaint, Exh D, Commercial Purchase Agreement at ¶ 5.

Plaintiff asserts that this provision was breached because Plaintiff specifically requested documentation of the actual utility expenses and Basha responded by making false disclosures.

Basha asserts that summary disposition is proper as a matter of law because of the “As is” provision of the Commercial Purchase Agreement, which states:

12. **AS IS.** Neither Seller nor any broker, nor any of their officers, directors, managers, employees or agents have made any representation, warranty or disclosure with respect to the Property, upon which Purchaser may rely, except as may be set forth in writing in this Agreement. By Closing, Purchaser agrees to accept the Property in “as is” condition to the fullest extent permitted by law.<sup>3</sup>

The Court agrees with Plaintiff that the “As is” clause does not, as a matter of law, preclude a claim for breach of contract based upon a failure to comply with Paragraph 5. “‘As is’ clauses allocate the risk of loss arising from conditions *unknown* to the parties” but does not transfer the risk where a seller makes fraudulent representations. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994) (emphasis added). *See also Coosard v Tarrant*, 342 Mich App 620, 636; 995 NW2d 877 (2022). Here it is alleged that Basha had knowledge of the cost of the utilities but failed to provide the documentation allegedly required by the Commercial Purchase Agreement.

Based on the foregoing, summary disposition under MCR 2.116(C)(8) is denied as to Count I (Breach of Contract).

## **B.**

### **The Fraud Claims: Fraud (Count II); Innocent Misrepresentation (Count III); Negligent Misrepresentation (Count IV)**

To establish traditional common-law fraud, the following elements must be proven:

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<sup>3</sup> First Amended Complaint, Exh D, ¶ 12.

(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. [*Coosard*, 342 Mich App at 633 (quotation marks and citation omitted).]

Furthermore, the plaintiff's reliance must be reasonable. *Id.*

A claim of innocent misrepresentation “omits the requirement of intent to deceive, and it adds a requirement that the party who made the misrepresentation benefited from the ensuing harm to the plaintiff.” *Coosard*, 342 Mich App at 633.

A claim of negligent misrepresentation requires a plaintiff “to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.” *Alfieri v Bertorelli*, 295 Mich App 189, 194; 813 NW2d 772 (2012) (quotation marks and citation omitted).

When pleading a cause of action involving fraud, the circumstances alleged to constitute fraud must be stated with particularity. MCR 2.112(B)(1). See also *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 229–30 (2014) (“Fraud claims must be pleaded with particularity, addressing each element of the tort”).

In the First Amended Complaint it is alleged generally that:

10. Basha, through its agent Farbman, made various verbal representations regarding the expense of the Property including, but not limited to, the total utility cost.

11. Based upon such representations, Plaintiff agreed to a purchase price of \$2,000,000.00.

12. Relying upon such representations, on or about July 3, 2023, Basha entered into a “Commercial Purchase Agreement” with General Realty Corp for the sale of the Property for the purchase price of two million dollars (\$2,000,000.00) . . .

13. Subsequent to executing the Purchase Agreement, during the due diligence period, Defendant shared various documents with Plaintiff, Exhibit B; *Disclosures Email*.

14. Defendants' disclosures included annual expenses of \$207,399.19. Exhibit C; *Expenses*.

\* \* \*

16. Due to the written disclosures being consistent with the oral disclosures, Plaintiff continued to closing rather than terminating the Purchase Agreement or renegotiating the price.

With regard to the Fraud claim (Count II), it is alleged:

36. Defendants made false representations regarding the annual utilities cost of the Property.

37. Defendants had actual records of the utilities cost, and knew the representations were false when making such representations.

38. Defendants made the false representations with the intent that Plaintiff would rely upon the representations.

39. The representations were false when made.

40. Plaintiff did rely upon such representations and agreed to a purchase price of \$2,000,000.00 for the Property.

With regard to the Innocent Misrepresentation claim (Count III) it is alleged that "Defendants have directly benefited from such representation by increasing the monies they have and/or will receive as a result of the inflated purchase price."<sup>4</sup> With regard to the Negligent Misrepresentation claim it is alleged that"

52. Defendants negligently misrepresented the annual expenses of operating the Property to Plaintiff.

53. Defendants owed Plaintiff a duty of care when disclosing information regarding the Property.

54. Plaintiff justifiably relied upon such misrepresentation because it cannot itself access the previous year utility charges for the Property to verify the information.<sup>5</sup>

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<sup>4</sup> First Amended Complaint, ¶ 50.

<sup>5</sup> *Id.* at ¶¶ 52-54.

First, contrary to Basha's assertion, the Court determines that the circumstances surrounding the fraud are pleaded with sufficient particularity. MCR 2.112(B)(1).

Next, Basha argues the existence of merger/integration clauses in the Commercial Purchase Agreement prevents Plaintiff from establishing fraud.<sup>6</sup> In support of this argument Basha cites *UAW-GM Human Resources Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998). In *UAW-GM* the Court of Appeals noted that "[p]arole evidence is generally admissible to demonstrate fraud" but that "in the context of an integration clause, which releases all antecedent claims, only certain types of fraud would vitiate the contract." *Id.* at 503. The court further stated:

In other words, while parole evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause. 3 Corbin, Contracts, § 578. [*UAW-GM*, 228 Mich App at 503.]

The court noted that the fraud claims alleged require reliance on a misrepresentation and that the existence of the merger clause made it unreasonable for the plaintiff to rely on any representation not included in the contract. *Id.* at 504.

This Court finds that the holding in *UAW-GM* does not mandate the conclusion that the fraud claims in this case fail as a matter of law. First, the merger/integration clauses in the

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<sup>6</sup> Pursuant to ¶ 19 of the Commercial Purchase Agreement: "**ENTIRE AGREEMENT.** This Agreement contains the entire agreement of the parties with respect to the sale of the Property. All contemporaneous or prior oral or written negotiations and agreements have been merged into this Agreement."

Pursuant to ¶ 32: **ENTIRE AGREEMENT.** This Agreement constitutes the entire Agreement between the parties and shall become a binding and enforceable Agreement among the parties upon full and complete execution and delivery of this Agreement. No prior verbal or written Agreement shall survive the execution of this Agreement.

Commercial Purchase Agreement at issue here refer to “all contemporaneous or prior oral or written negotiations and agreements” and “prior verbal or written Agreement[s]” and Plaintiff alleges fraudulent representations not only before the Purchase Agreement was executed, but also during the contractual due diligence period.<sup>7</sup> Additionally, this Court finds that the situation presented in this case is more similar to that presented in *Coosard v Tarrant*, 342 Mich App 620; 995 NW2d 877 (2022). In *Coosard*, a case involving the sale of real estate, the Court, noting the general rule stated in *UAW-GM*, explained:

The gravamen of plaintiffs’ argument is that defendant committed fraud that induced plaintiffs to enter into the purchase agreement and that he also committed fraud in the seller’s disclosure statement. In other words, plaintiffs do allege that defendant committed fraud that might be sufficient to invalidate the entire purchase agreement. Therefore, the integration clause does not necessarily preclude plaintiffs from showing that defendant committed fraud . . . We conclude that plaintiffs are not precluded, as a matter of law, from bringing fraud or innocent misrepresentation claims. . . .” [*Coosard*, 342 Mich App at 635-636.]

In this case, Plaintiff has also alleged that fraud on the part of Basha induced Plaintiff to enter into the Commercial Purchase Agreement.<sup>8</sup> This Court concludes that the merger/integration clause does not preclude the fraud claims as a matter of law.

However, the Court does find that the innocent misrepresentation claim fails as a matter of law for another reason.

[I]nnocent misrepresentation is premised upon the seller having no knowledge of the falsity of a representation, and “as is” clauses are fundamentally intended to allocate the risk of unknown losses. If a claim of innocent misrepresentation could avoid application of an “as is” clause, then “as is” clauses would essentially become universally invalid. Therefore, we conclude that an “as is” clause *does* preclude a

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<sup>7</sup> See First Amended Complaint ¶¶ 9-13. As was discussed previously, ¶ 5 provides, in part: “Within 5 business days after execution of this Agreement, Seller will provide Purchaser with copies of all title policies, surveys, leases, environmental reports, studies, site plans, certificates of occupancy and other documentation in the possession or control of Seller, which is material to Purchaser’s decision whether to purchase the Property.”

<sup>8</sup> See e.g. First Amended Complaint, ¶¶ 10-16.

claim of innocent misrepresentation. [*Coosard*, 342 Mich App at 637 (emphasis added).]

*See also Faraj v Giles*, unpublished per curiam opinion of the Court of Appeals, issued June 13, 2024 (Docket No. 366854) p 10 (Claim of innocent misrepresentation is barred by the “as is” clause in the parties’ purchase agreement.)

Based on the foregoing analysis, the Court grants summary disposition as to the innocent misrepresentation claim (Count III) and denies summary disposition as to the fraudulent misrepresentation claim (Count II) and the negligent misrepresentation claim (Count IV).<sup>9</sup>

### **C.**

#### **Civil Conspiracy**

“A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.” *Swain v Morse*, 332 Mich App 510, 531; 957 NW2d 396 (2020). “[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.” *Advocacy Organization for Patients & Providers v Auto Club Ins Ass’n*, 257 Mich App 365, 384; 670 NW2d 569 (2003).

Basha argues that the civil conspiracy claim fails as a matter of law because it is not supported by an underlying tort, however, as was explained above the fraud and negligent misrepresentation claims survive. Basha also argues that the Complaint fails to properly allege the elements of a civil conspiracy claim. This Court disagrees. Plaintiff alleges a concerted action

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<sup>9</sup> The parties have not cited, and the Court is not aware of any authority extending the holding in *Coosard* that an innocent misrepresentation claim is precluded by an “As is” clause to a claim of negligent misrepresentation.

working together to make certain disclosures to Plaintiff) to accomplish the sale through fraudulent misrepresentation.<sup>10</sup>

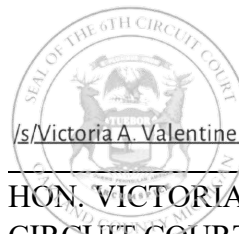
Lastly, Basha argues that the Civil Conspiracy claim fails as a matter of law because the “As is” clause in the Commercial Purchase Agreement does not permit Plaintiff/Purchaser to rely on representations, outside of the CPA, with regard to the Property. It is not clear from Basha’s brief why this is necessarily so and as has been previously discussed, “As is” clauses do not protect fraudulent misrepresentations. *See Lorenzo*, 206 Mich App at 687.

### **ORDER**

Based on the foregoing Opinion, it is hereby ordered that Defendant FH Basha, LLC’s Renewed Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is **GRANTED** as to Count III (Innocent Misrepresentation) and is otherwise **DENIED**.

**IT IS SO ORDERED.**

**This Order DOES NOT resolve the past pending matter and DOES NOT close the case.**

The seal of the 6th Circuit Court of Michigan is circular. It features a central shield with a scale of justice and a book. The shield is flanked by two figures. The words "SEAL OF THE 6TH CIRCUIT COURT" are written around the top inner edge, and "MICHIGAN" is at the bottom.

/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE  
CIRCUIT COURT JUDGE

Dated: 8/14/24

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<sup>10</sup> First Amended Complaint, ¶¶ 59-65.