

STATE OF MICHIGAN
COURT OF APPEALS

HAMILTON LYNCH HUNT CLUB LLC,

Plaintiff-Appellant,

v

LORRAINE M. BROWN and BIG MOOSE
INSPECTIONS, INC.,

Defendants-Appellees.

UNPUBLISHED
October 10, 2013

No. 312612
Alcona Circuit Court
LC No. 10-001662-CZ

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right an order finding that it had no cause of action with regard to defendant Lorraine Brown, for fraudulent misrepresentation under the Seller Disclosure Act (SDA), MCL 565.951 *et seq.*¹ We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Brown inherited property in Mikado, Michigan from her mother in 2003. In 2006, Brown began to experience issues with water from the well on the property after she installed a washer and dryer. Lovelace Well Drilling installed a new cistern tank for \$2,300 and another individual replaced the well pump. Brown listed the property for sale in October of 2007 and completed a seller's disclosure statement (SDS) on October 5, 2007. In the SDS, defendant Brown represented that the property included a "new well." Brown admitted at trial that the property did not have a new well, but explained that she made the false disclosure because she paid \$2,300 to Lovelace Well Drilling to install a new cistern tank.

In May of 2010, plaintiff offered to purchase the property, contingent upon a home inspection of plaintiff's choice. Brown accepted plaintiff's offer and the parties also agreed to an

¹ The trial court also ordered that defendant, Big Moose Inspections, Inc. ("defendant Big Moose"), pay \$395 to plaintiff as liquidated damages for its negligence claim. Plaintiff does not challenge this award on appeal.

“as is” clause in the sales contract. Big Moose inspected the property and delivered an inspection report to plaintiff that stated, in relevant part:

The well system is a flowing well with a cistern tank. When the cistern tank is full, the water flows at seven plus gallons per minute. When the cistern tank is empty, the water does not flow until the cistern tank fills up. Under normal usage the cistern tank should not run dry. It will continual [sic] refill, but at a slower rate than the jet pump is pumping. The jet pump and pressure tank were in working condition at the time of inspection. The pressure gauge and pressure switch were in working condition at the time of the inspection.

Plaintiff claimed that it did not have any indication that the well was defective and signed a release of contingency after it received the home inspection report, which provided, in relevant part:

Ralph Hamilton, Timothy Hamilton & Patrick Lynch, as Purchaser, made an offer contingent upon Item #13 [sic] Contingent upon a satisfactory home inspection to included [sic] septic, well and water test. Item #20 Contingent upon a satisfactory estimate on the pond from an Excavating Company of buyer choice. The purchaser's [sic] are hereby satisfied with the results of the inspections and are removing the above contingencies. Furthermore, the purchasers are ready, willing and able to pursue with closing.

Three weeks after closing, plaintiff began to experience problems with the inflow of the well after principals attempted to power wash the home. Plaintiff subsequently hired two companies to drill a new well, but each was unsuccessful in their attempts to find potable water on the property.

Plaintiff sued Brown for fraudulent misrepresentation and fraudulent concealment of a known defect. Plaintiff also alleged that defendant Big Moose was liable for negligence relating to the home inspection.

Brown argued that she was not liable because plaintiff purchased the property “as is” and released all contingencies. In addition, Brown argued that she made the disclosure in good faith and based on the best available information known to her.

Following a bench trial, the trial court found no action with regard to Brown for fraudulent misrepresentation under the SDA:

And basically what we have is the well, in my mind's not inoperable, it's just not a very quick recovery. Apparently it's worked for years. And I think the use changed, and that's what brought the lawsuit. It doesn't sound like the history of the use was very often. It was sporadic, and with only a few people at a time at the most. And I haven't heard any testimony that there were any problems other than from Ms. Brown when she got it fixed in 2006 and had to replace the pump and the other -- it escapes me. The pump and the tank I guess, from two different people. Mr. Lovelace replaced one; Mr. Cocks the other. But as far as I haven't heard anything about the water flow being any more or less than what it had been.

I think, as I indicated, it sounds to me like there's more use now than what traditionally there was, and that's what caused the problem. I don't -- obviously the plaintiff has the burden.

There was a misrepresentation on the disclosure statement that was executed by Ms. Brown back in 2007. Well, there were [sic] more than one misrepresentation. It said there was a city sewer. Obviously that was wrong; there was a septic system. As well as other things. It said there was a new well. There wasn't a new well. Now I don't think from my viewing her testifying and listening to her on the witness stand, I don't think that was intentional. I think it was unintentional. I think she unintentionally put there was a city sewer there too. I don't think she was trying to deceive anybody about that. I don't think there was any act of fraud on her part. If anything, I find that -- there to be innocent misrepresentation. I don't think she was trying to put that to sell the place.

I do find that the purchase agreement, while the counter offer [sic] had an as is clause -- and I think the purchasers were innocent. I think both parties are kind of innocent here. And I think because of the as is clause, I think that shifted to the purchasers to take it as it is. I think they were innocent too. They were -- they didn't think that there was a problem with it. There were no indications. So with regards to defendant Lorraine Brown, I find no cause of action as to her, as I don't find any act of fraud or intentional fraud. I think it was simply a misrepresentation by her. And so I find no cause of action as to Ms. Brown.

The trial court issued a written judgment to reflect its oral opinion and plaintiff now appeals as of right.

II. ANALYSIS

Plaintiff argues that the trial court erred in determining that it had no cause of action against Brown for fraudulent misrepresentation under the SDA, given that the trial court concluded that defendant Brown's misrepresentation in the SDS was "innocent." We disagree.

This Court reviews findings of fact for clear error and questions of law de novo. *Pine Bluffs Ass'n v DeWitt Landing Ass'n*, 287 Mich App 690, 711; 792 NW2d 18 (2010). "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

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" MCL 565.952. MCL 565.954(1) provides that "[t]he transferor of any real property in [MCL 565.952] shall deliver to the transferor's agent or to the prospective transferee or the transferee's agent the written statement required by this act." *Bergen v Baker*, 264 Mich App 376, 383; 691 NW2d 770 (2004). The SDA requires a transferor to honestly disclose information known to the transferor at the time the SDS is completed. MCL 565.956; MCL 565.957; *Roberts v Saffell*, 280 Mich App 397, 413; 760 NW2d 715 (2008). A

transferor “is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor” and ordinary care was used in transmitting the information. MCL 565.955; *Roberts*, 280 Mich App at 413. However, 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 565.951.

Michigan recognizes several theories of fraud as exceptions to the common-law rule of *caveat emptor*² in real estate transactions: (1) fraudulent misrepresentation, or common-law fraud; (2) silent fraud; and (3) innocent misrepresentation. *Roberts*, 280 Mich App at 403. To establish a claim for fraudulent misrepresentation, a plaintiff must prove:

- (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. [*Id.*]

In other words, “the plaintiff must establish that the defendant knowingly or recklessly misrepresented a material fact with the intent that the other party rely on it.” *Id.* at 404-405.

On the other hand, “[a] claim of innocent misrepresentation is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation.” *Id.* at 404 (internal quotation marks omitted). A plaintiff need not prove that the party making the representation had knowledge it was false. *Id.* at 405. “[C]ontrary to fraudulent misrepresentation, a plaintiff asserting an innocent misrepresentation claim need not prove that the defendant intended to deceive the plaintiff into relying on the false or misleading representation.” *Id.*

In *Bergen*, the plaintiffs purchased a home from the defendants in 2001 and subsequently discovered a significant leak in the glass-paned roof of the sunroom. *Bergen*, 264 Mich App at 377. The defendants’ SDS indicated that there were problems with a leaking roof, but that it had been completely repaired in 1998. *Id.* at 377-378. An independent contractor’s inspection of the home revealed no active leak, but there was evidence of a past leak. *Id.* at 378-379. The plaintiffs sued under claims of “fraud, negligent misrepresentation, and breach of contract arising out of defendants’ alleged failure to disclose the leaking roof.” *Id.* at 377. The trial court granted summary disposition in favor of the defendants, finding that no genuine issue of material fact existed regarding actual reliance on the information contained in the SDS. *Id.* at 379-380. The *Bergen* Court reversed and held that the trial court erred in concluding that a genuine issue of material fact did not exist. *Id.* at 389. The *Bergen* Court determined that “a reasonable fact-finder could [] infer that defendants knew about the leak yet proceeded in bad faith by

² Latin for “let the buyer beware.” Black’s Law Dictionary (9th ed). “A doctrine holding that purchasers buy at their own risk.” *Id.*

impermissibly failing to disclose the condition.” *Id.* at 388. In addition, the *Bergen* Court held that the affidavit and interrogatories submitted by the plaintiffs created a factual dispute, in 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 the language in the disclosure statement itself.” *Id.* at 389.

In *Roberts*, the plaintiffs claimed that the defendants failed to disclose a termite infestation in the home. *Roberts*, 280 Mich App at 399. The plaintiffs based their claim on the defendants’ affirmative answer of “no” to history of infestation in their SDS. *Id.* The plaintiffs originally alleged breach of contract and three fraud claims: fraudulent misrepresentation, silent fraud, and innocent misrepresentation. *Id.* However, the plaintiffs voluntarily dismissed all claims except innocent misrepresentation. *Id.* at 400. The trial court denied the defendant’s motion for summary disposition, and a jury subsequently awarded plaintiffs \$86,813 in damages and costs. *Id.* at 399, 415. In reversing, the *Roberts* Court held that innocent misrepresentation is incompatible with the exemption from liability afforded by the SDA. *Id.* at 414. The *Roberts* Court reasoned:

Because liability for an innocent misrepresentation may be imposed without regard to whether the party making the representation knew it was false or was acting in good faith and because MCL 565.955(1) precludes imposition of liability on a transferor who lack personal knowledge with respect to errors, inaccuracies, or omissions in an SDS, there is no liability for a disclosure made on an SDS under a theory of innocent misrepresentation. [*Id.*]

However, the *Roberts* Court noted that, “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.” *Id.* at 414.

Brown testified that she inherited the property from her mother in 2003 and stayed at the property at various points during the summers between 2003 and 2007. Defendant Brown began experiencing water issues in 2006 after she installed a washer and dryer. Lovelace Well Drilling installed a new cistern tank for \$2,300 and another individual replaced the well pump shortly thereafter. Defendant Brown listed the property for sale in October of 2007 and indicated “new well” in the SDS. Although Brown admitted at trial that she misrepresented the condition of the well in the SDS, the trial court concluded, and we agree, that she did not make the false disclosure with the intent that plaintiff act upon the misrepresentation. In other words, Brown’s misrepresentation was “innocent,” in that she placed “new well” in the SDS because she paid \$2,300 to Lovelace Well Drilling to install a new cistern tank. “This Court affords great deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” *Augustine v Allstate Ins Co*, 292 Mich App 408, 424-425; 807 NW2d 77 (2011) (citation omitted). Thus, the trial court did not err in concluding that plaintiff failed to prove that Brown made the false disclosure with the intent for plaintiff to act upon it.

Moreover, plaintiff’s offer was contingent upon a home inspection of its choice. The home inspection was to include a satisfactory septic and drain field inspection, a water test and inspection of the well, and a satisfactory estimate on the pond from an excavating company of its

choice. Brown believed the inspection was to include a test of the well, plaintiff insisted did not request a well inspection. In addition, the SDS provided, "This statement is not a warranty of any kind by the seller or by the agent representing the seller in this transaction, and is not a substitute for any inspections or warranties the buyer may wish to obtain." Big Moose performed a home inspection of the property and issued an inspection report. There was no indication in the report that the well was defective, except that the cistern should not run dry under "normal usage." The parties subsequently agreed to a release of contingency. The parties also agreed to an "as is" clause in the sales contract. Therefore, even if there was fraudulent misrepresentation, plaintiff released all contingencies and took the property in "as is" condition after receipt of the home inspection report.

Affirmed.

/s/ Michael J. Riordan

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly