STATE OF MICHIGAN

COURT OF APPEALS

JAMES TIMMONS, CAROLYN TIMMONS, and TALIA CHAMPLIN,

Plaintiffs-Appellants,

v

ELIZABETH FRANKLIN DEVOLL, a/k/a ELIZABETH GAYLE FRANKLIN,

Defendant-Appellee,

and

GREGORY DEVOLL,

Defendant.

UNPUBLISHED
February 24, 2004

No. 241507
Calhoun Circuit Court
LC No. 01-001092-CK

JAMES TIMMONS, CAROLYN TIMMONS, and TALIA CHAMPLIN,

Plaintiffs-Appellants,

v

JOHN STETLER, GARY CURTIS, and STETLER, INC., d/b/a STETLER, VANDERVEER & ASSOCIATES,

Defendants-Appellees.

No. 249015
Calhoun Circuit Court
LC No. 02-003635-CK

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiffs James Timmons, Carolyn Timmons, and Talia Champlin appeal by right from two orders, one granting defendant Elizabeth Franklin DeVoll, also known as Elizabeth Gayle Franklin's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) (Docket No.

241507), and one granting defendants John Stetler, Gary Curtis, and Stetler, Inc., doing business as Stetler, Vanderveer & Associates' motion for summary disposition also pursuant to MCR 2.116(C)(8) and (10) (Docket No. 249015). We affirm.

This appeal arises out of a real estate transaction in which defendants Gregory DeVoll and Elizabeth Franklin listed their home for sale with their real estate agent, defendant Gary Curtis, and the office for which he was employed, defendant Stetler, Vanderveer & Associates. Plaintiffs James and Carolyn Timmons purchased the home with the assistance of their real estate agent, plaintiff Talia Champlin. After moving in, plaintiffs allegedly found "numerous defects" on the property regarding the electrical system, pool heater, wall liner and equipment, plumbing system, central air conditioning, central heating system, and furnace; evidence of water in the basement; and an addition that was constructed without the necessary construction permits. Plaintiffs filed a complaint against Franklin and DeVoll primarily based upon alleged misrepresentations in the seller's disclosure statement (hereinafter the SDS); they alleged a violation of the seller's disclosure act (hereinafter the SDA), MCL 565.951 *et seq*., breach of contract, misrepresentation, innocent misrepresentation, silent fraud, and a violation of the Michigan Consumer Protection Act (hereinafter the MCPA), MCL 445.901 *et seq*. DeVoll subsequently defaulted; plaintiffs and Franklin moved for summary disposition; and after a hearing on both motions, the trial court granted summary disposition in favor of Franklin and against plaintiffs. Plaintiffs then filed substantively the same complaint against real estate agent Curtis, Stetler, and Stetler, Vanderveer & Associates; both parties moved for summary disposition, and after a hearing on both motions, the trial court granted it in favor of Curtis, Stetler, and Stetler, Vanderveer & Associates. This Court consolidated these cases for appeal.

We review the trial court's decision on a motion for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint," and "[a]ll well-plead factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion brought under this rule may be granted where the claims alleged "are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery" and only the pleadings may be considered in deciding a motion brought under this subsection. *Id.* "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id.*, 119. In evaluating a motion brought under this subsection, the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.*, 119-120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*., 120.

The Seller's Disclosure Act, MCL 565.951, et seq.

Plaintiffs begin by conceding the fact that under MCL 565.954(4), there is no independent cause of action under the SDA after closing on the property and transferring the deed, but maintain that the trial court erred in dismissing this claim because the facts establishing defendants' violation of the SDA, by submitting an SDS with false and misleading statements, can serve as the factual basis for plaintiffs' claims of misrepresentation. We disagree.

MCL 565.954 provides the following in pertinent part:

(1) The transferor of any real property described in section 2 shall deliver to the transferor's agent or to the prospective transferee or the transferee's agent the written statement required by this act. . . . The written statement shall be delivered to the prospective transferee within the following limits:

(a) In the case of a sale, before the transferor executes a binding purchase agreement with the prospective transferee.

* * *

(3) Except as provided in subsection (4), if any disclosure or amendment of any disclosure required to be made by this act is delivered after the transferor executes a binding purchase agreement, the prospective transferee may terminate the purchase agreement by delivering written notice of termination to the transferor or the transferor's agent within the following time limits[.]

* * *

(4) A transferee's right to terminate the purchase agreement expires upon the transfer of the subject property by deed or installment sales contract.

Pursuant to MCL 565.964:

A transfer subject to this act shall not be invalidated solely because of the failure of any person to comply with a provision of this act.

Under the plain language of the SDA, plaintiffs' only relief for a violation of the act would have been termination of the purchase agreement, but after the transfer of the deed, plaintiffs' ability to terminate the purchase agreement had expired, and thus no independent cause of action existed for a violation of the SDA after the deed to the property was transferred. Also, under MCL 565.964 a transfer of property subject to this act will not be invalidated solely because someone failed to comply with one of its provisions.

Finally, as stated in *Maiden, supra,* 461 Mich 119 "[a] motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint," and in the present case, taking all of plaintiffs' well-plead factual allegations as true, and viewing them in a light most favorable to plaintiffs, there cannot be a claim for a violation of the SDA because plaintiffs concede that under the SDA there cannot be an independent cause of action for a violation of the SDA here because the deed had already been transferred; and thus plaintiffs essentially admit that they failed to state a claim upon which relief could be granted. Therefore, the trial court properly dismissed this claim under MCR 2.116(C)(8) both with respect to defendant Franklin, and with respect to defendants Curtis, Stetler, and Stetler, Vanderveer and Associates.

Misrepresentation, Innocent Misrepresentation, & Silent Fraud

Plaintiffs argue that the trial court erred by denying their motion for summary disposition and granting defendants' motion for summary disposition when there is no genuine issue of

material fact that defendants met all of the requisite elements of fraudulent misrepresentation, innocent misrepresentation, and silent fraud. We disagree.

Fraudulent misrepresentation consists of the following elements:

> (1) the defendant made a material misrepresentation; (2) the representation was false; (3) at the time the defendant made the representation, the defendant knew the representation 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. [*M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).]

"A claim of innocent misrepresentation is shown if a party detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *Id.*, 27.

Under the doctrine of silent fraud, a seller of real property may be held liable to a buyer for failing to disclose material defects in the property or its title. *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988). The elements include: 1) a material representation which is false; 2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; 3) that defendant intended plaintiff to rely upon the representation; 4) that, in fact, plaintiff acted in reliance upon it; and 5) plaintiff thereby suffered injury. *Id.*, 213. In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure. *US Fidelity & Guarantee Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981). Each of the above misrepresentation claims requires a showing of the plaintiff's "reliance" in order to be actionable.

With respect to plaintiffs' claim for innocent misrepresentation, although the trial court did not address this claim individually, such a claim cannot exist under the SDA, because the act itself eliminates any claims based on innocent misrepresentation in reference to alleged misrepresentations within the SDS.

MCL 565.955(1) provides the following in relevant part:

> The transferor or his or her agent 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, or was based entirely on information provided by public agencies or provided by other persons specified in subsection (3), and ordinary care was exercised in transmitting the information.

Thus, this claim could be properly dismissed under MCR 2.116(C)(8), for a failure to state a claim upon which relief could be granted. In any event, there is no genuine issue of material fact that a claim for innocent misrepresentation, as well as a claim for fraudulent misrepresentation and silent fraud, could not be sustained in the present case because there is no evidence that plaintiffs reasonably relied on any statements in the SDS, and reasonable reliance is an essential element to all of the above claims. To be actionable, a misrepresentation claim

requires actual reliance on a false representation. *Phinney v Perlmutter*, 222 Mich App 513, 534; 564 NW2d 532 (1997). Also, "[a] misrepresentation claim requires *reasonable* reliance on a false representation" and "[t]here can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994) (emphasis added). "[A] person who unreasonably relies on false statements should not be entitled to damages for misrepresentation." *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999).

In the present case, plaintiffs opted to have the closing be contingent upon a satisfactory independent inspection of the home, the home was inspected, and plaintiffs subsequently released the inspection contingency, but only after the issues pointed out by the inspector were corrected as indicated in the addendums to the purchase agreement. While plaintiffs testified at their deposition that "we relied on [the statements in the SDS]," plaintiffs' actions demonstrated that they relied on the independent inspection, specifically, the action they took by requesting that defendants make those repairs and corrections prior to closing. While plaintiffs' actions demonstrated that they relied on the inspector's findings prior to closing on the property, they recognized afterwards that the inspector probably "missed some stuff," but they decided to formally release him from any liability.

Also, the evidence indicates that the alleged misrepresentations were not concealed and would have been discovered by a competent home inspector. For example, plaintiffs' own expert witness Jeff Stiemsma, inspected the property and testified that he observed that the basement wall "was patched, somebody had done—tried to do something there before, the wall is patched with a hardening cement sealant, you know." He also noted that he saw "water stains on the wall . . . [l]ike discoloration of water, a path where water has taken." According to Stiemsma, although "it wouldn't have been caught by a normal person looking at the house or anything like that," somebody who was "inspecting the home" would have "noticed it" and "it wasn't in anyway concealed" or "covered up by anything," nothing was "sitting in front of it" and it had not been "painted over."

Robert H. Burr, a licensed builder and an employee of the BrickKicker Home Inspection Company, inspected the property and identified numerous areas of the "Pergo floating floor" that were "loose and sliding" and "numerous past moisture stains on the concrete foundation walls." Burr identified adequate grading and drainage away from the foundation in all areas "except the West side of the home," and indicated that he "would have identified these issues to the home buyer at the time of his inspection." Additionally, the law is clear that notice to an agent, constitutes notice to the principal. *US Fidelity & Guaranty Bank, supra*, 412 Mich 126. Thus, plaintiffs' real estate agent's knowledge was imputed onto plaintiffs, and they were on constructive notice that, contrary to the assertion in the SDS, certain necessary permits had not been pulled for the construction of the addition, indicating that the addition may not have been built according to code specifications.

Therefore, plaintiffs could not have reasonably relied on the alleged misrepresentations within the SDS because before closing on the property they opted to have the closing contingent upon an adequate inspection of the home "in order to determine if there were faults" in the home; and pursuant to their inspection, they requested certain repairs and corrections be made before proceeding to closing; they had constructive knowledge that certain building permits were not pulled for the "[s]tructural modifications, alterations or repairs made" on the home; and all of the

evidence demonstrates that the alleged misrepresentations could have easily been identified by a competent home inspector. Therefore, as stated above in *Nieves, supra*, 204 Mich App 464, here plaintiffs also had "the means" to determine whether the SDS contained true statements, and "[t]here can be no fraud where a person has the means to determine that a representation is not true." Without actual reliance on a false representation, there cannot be an action for misrepresentation. *Phinney, supra*, 222 Mich App 534-536. Therefore, the trial properly found that there is no genuine issue of fact that plaintiffs could not meet the requisite element of reliance for their claims of fraudulent misrepresentation, innocent misrepresentation, and silent fraud.

The Michigan Consumer Protection Act, MCL, 445.901 et seq.

With respect to defendant Franklin, plaintiffs argue that the trial court erred in dismissing their MCPA claim, improperly focusing on the parties' business instead of on the transaction in question. Moreover, with respect to defendants Curtis, Stetler and Stetler, Vanderveer & Associates, plaintiffs argue that the trial court erred in dismissing this claim as defendants were realtors engaged in "trade or commerce." We disagree.

MCL 445.901 prohibits "certain methods, acts, and practices, in trade or commerce." MCL 445.903(1) states that "[u]nfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful . . . ." MCL 445.902(d) provides the following definition:

> "Trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.

The trial court properly dismissed the MCPA claim against Franklin because there is no genuine issue of material fact that Franklin does not fit the definition of one engaged in the "trade or commerce" of building and/or selling homes; there is no evidence that she was ever involved in DeVoll's business; she was only married to DeVoll, who was a licensed builder and built the home that they lived in and then subsequently sold to plaintiffs; and the sale of the home to plaintiffs was not due to the conduct nor was it in the course of DeVoll's business, as his business had no interest in the property at all. Plaintiff James Timmons only testified that in his mind Franklin's signature "amounted to a builders [sic] guarantee," but no support is offered by plaintiffs to demonstrate why he would have this belief, as no information was given to plaintiffs indicating that the sale was due to the conduct of a business. Thus, the trial court properly noted that both DeVoll and Franklin acted "as private home owners offering their residence for sale" and thus the MCPA is inapplicable and the trial court properly dismissed this claim.

The trial court also correctly dismissed the MCPA claim against Curtis, Stetler, and Stetler, Vanderveer & Associates. Real estate brokers and salespersons are regulated by the Department of Consumer & Industry Services pursuant to Article 25 of Michigan's Occupational Code, MCL 339.2501, *et seq*. Pursuant to the code, a "real estate sales person" is defined as:

> A person who for compensation or valuable consideration is employed

> either directly or indirectly by a licensed real estate broker to sell or offer to sell, to buy or to offer to buy, to provide or offer to provide market analysis, to list or offer to attempt to list or to negotiate the purchase or sale or exchange of mortgage or real estate . . . . [MCL 339.2501(e).]

The MCPA provides an exemption for "a transaction or conduct specifically authorized under the laws administered by a regulatory board or officer acting under statutory authority of this State or the United States" MCL 445.904(1)(a).

In the present case Curtis' role as DeVoll and Franklin's real estate agent, was simply to list the home for DeVoll and Franklin, the same home that he had listed for them on previous occasions, and thus the "transaction" and his "conduct" are exempt from the act under the above-noted exemption. In any event, even if his "conduct" is not exempt from the act, as previously discussed, there is no evidence to support plaintiffs' substantive claims of misrepresentation, innocent misrepresentation or silent fraud, and thus there is no cause of action under the MCPA, and the trial court properly dismissed this claim.

Breach of Contract

Plaintiffs argue that the trial court erred in dismissing their breach of contract claim because although it is premised upon the misrepresentation claims, it stems from the failure of consideration as a result of the defects on the property. We disagree.

Plaintiffs failed to set forth a separate cause of action with their breach of contract claim because the breach of contract they allege rests *only* on the claims of misrepresentation in the SDS, and if there were no claims of misrepresentation in the SDS, plaintiffs would not have a breach of contract claim. Therefore, the breach of contract *is* essentially the alleged misrepresentation in the SDS. Accordingly, the trial court properly dismissed plaintiffs' breach of contract claim under MCR 2.116(C)(8), as it did not set forth a separate cause of action.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra