STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. DART,

Plaintiff/Counter-Defendant-Appellee/ Cross-Appellant,

v

DAVID J. DYKHOUSE and LUCIE M. DYKHOUSE,

Defendants/Counter-Plaintiffs-Appellants/ Cross-Appellees.

UNPUBLISHED
July 26, 1996

No. 176064
LC No. 93-074756

Before: Michael J. Kelly, P.J., and Bandstra and S.B. Miller,* JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order granting summary disposition in favor of plaintiff. Plaintiff cross-appeals the trial court's order denying plaintiff attorney fees. We affirm the denial of attorney fees and the dismissal of defendants' negligence and breach of contract claims, but reverse the dismissal of defendants' fraud claim.

The trial court entered summary disposition against defendants under MCR 2.116(C)(10), determining there was no genuine issue as to a material fact. We review the record de novo to determine whether plaintiff was entitled to judgment as a matter of law. *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 48; 530 NW2d 99 (1995). We interpret the evidence "in favor of the nonmoving party to see whether an issue of fact exists upon which reasonable minds could differ." *Radtke v Miller, Canfield, Paddock & Stone*, 209 Mich App 606, 612; 532 NW2d 547 (1995). With respect to a negligence action at "'common law, a land vendor who surrenders title, possession, and control of property shifts all responsibility for the land's condition to the purchaser.'" *Lorenzo v Noel*, 206 Mich App 682, 685; 522 NW2d 724 (1994), quoting *Christy v Prestige Builders, Inc*,

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* Circuit judge, sitting on the Court of Appeals by assignment.

415 Mich 684, 694; 329 NW2d 748 (1982) (Levin, J.). The only duty imposed on a vendor, which is relevant to this case, is the "duty to disclose to the purchaser any concealed condition known to him which involves an unreasonable danger." *Christy, supra*.

The trial court determined that reasonable minds could not conclude that the leaking fuel tank presented an unreasonably dangerous condition. Defendant's evidence on this issue consisted of reports received from EMES. However, EMES gave no indication that the tanks or the contaminated soil were dangerous. Defendant David Dykhouse admitted at his deposition that defendants had not been advised to leave the house, where they continued to live. Had anyone from EMES believed that the oil leakage was, or might have been, dangerous, defendants could have obtained an affidavit to that effect. Their failure to do so weakens their argument that they could have found sufficient evidence to support this claim in the seven remaining days of discovery. Indeed, defendants do not even allude to this possibility on appeal. Instead, they assert unconvincingly that the evidence presented to the trial court was sufficient. The trial court did not err in granting summary disposition against defendants on the negligence claim.

Defendants argue that the court incorrectly applied the same reasoning to the fraud and breach of contract counts, but that this analysis was incorrect because a party alleging fraud or breach of contract, rather than negligence, need not show an unreasonable danger. We agree. *Lorenzo, supra* at 686-687. However, plaintiff argues that another basis for summary disposition existed with respect to the fraud and breach of contract claims. Because we will affirm a right result entered for the wrong reason, *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993), we turn to plaintiff's arguments.

With respect to the fraud count, plaintiff argues that defendants cannot prove they relied on plaintiff's alleged material misrepresentation regarding the fuel tank in deciding to purchase plaintiff's home. See, e.g., *Arim v General Motors Corp*, 206 Mich App 178, 195-196; 520 NW2d 695 (1994). Specifically, plaintiff points to the fact that defendant David Dykhouse signed all the documents that composed the agreement on or before July 16, 1991, while the Seller's Disclosure Statement is dated July 18, 1991. However, as defendants point out, the building analysis report that they obtained, dated July 17, makes reference to the Disclosure Statement. If this report was dated accurately, the Disclosure Statement must have been dated inaccurately. Thus, a question of fact exists with respect to the date on which plaintiff conveyed the Disclosure Statement to defendants. Further, even if the Disclosure Statement was provided to defendants after the purchase agreements were signed, defendants point to contingencies in the purchase agreements under which they could have canceled the sale had plaintiff not made the allegedly fraudulent misrepresentation regarding the fuel tanks. If the factfinder concludes that the purchase agreement should be interpreted as defendants argue, the reliance element of fraud may be proved.

Plaintiff further argues that the "as is" clause in the closing agreement precludes an action for fraud because defendants should have discovered the fuel storage tanks upon reasonable inspection. Plaintiff’s legal premise is correct; where a defect "should have reasonably been discovered upon

inspection, but was not," an "as is" clause transfers the risk of loss to the buyer. *Lorenzo, supra* at 687. Whether defendants should have discovered the tanks, however, is a question of fact that the lower court did not address. Generally, this Court will not consider an issue that the trial court did not decide. *Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991). Moreover, an "as is" clause does not provide relief to a seller whose fraudulent misrepresentation is made "before a purchaser signs a binding agreement." *Lorenzo, supra*. As noted above, the timing of the alleged fraudulent representation is a contested factual issue. Accordingly, we reverse the circuit court's grant of summary disposition with respect to defendants' allegation of fraud.

Defendants have provided this Court with no authority or argument regarding the viability of their breach of contract claim. They have, therefore, failed to preserve this argument for our consideration on appeal. *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995).

Plaintiff argues that the trial court erred in failing to grant attorney fees against defendants for bringing a meritless counterclaim. We review for clear error a determination that a claim was not frivolous. *Tanielian v Brooks*, 202 Mich App 304, 309; 508 NW2d 189 (1993). As noted above, the fraud claim was not frivolous. Depending on when the alleged fraudulent misrepresentation was made, the contract's "as is" clause may have been rendered ineffective, *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993), and it was not clear error for the trial court to conclude that the breach of contract claim was not frivolous. We do not consider the facts regarding the existence of an unreasonably dangerous condition to be so conclusive against defendants that they had no legitimate basis to believe that they could maintain a negligence action. Defendants argued that the Consumer Protection Act applied to this case because of statutory language regarding the "sale . . . of a service or property." MCL 445.902(d); MSA 19.418(2)(d). See also MCL 445.903(1); MSA 19.418(3)(1). We do not conclude that this argument was so devoid of legal merit as to warrant an award of attorney fees to plaintiff. MCL 600.2591(3)(iii); MSA 27A.2591(3)(iii).

Finally, as decided above, defendants' appeal raised a meritorious issue regarding their fraud claim. We will not award sanctions against defendants for bringing this appeal. MCR 7.216(C)(1)(a).

The order of the trial court granting summary disposition with respect to the count of defendants' counterclaim alleging fraud is reversed. In other respects, the decision of the trial court is affirmed. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Richard A. Bandstra
/s/ Stephen B. Miller