STATE OF MICHIGAN

COURT OF APPEALS

DAVID J. PAPAZIAN and ALLISON T. PAPAZIAN,

Plaintiffs-Appellants,

v

LAWRENCE A. LICHTMAN, HOLLY A. LICHTMAN, ALAN VAN ACKER and R.F.C. & ASSOCIATES, INC. a/k/a REMAX FOREMOST, INC.,

Defendants-Appellees.

UNPUBLISHED
September 6, 1996

No. 180755
LC No. 93-460146

Before: Hood, P.J., and Griffin and J.F. Foley*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting summary disposition, pursuant to MCR 2.116 (C)(8) and (C)(10), in favor of defendants. Plaintiffs also appeal as of right the circuit court's order denying their motion for leave to amend their complaint. We affirm in part, reverse in part, and remand.

Plaintiffs, the purchasers of the home owned by Lawrence and Holly Lichtman in the city of Farmington Hills, filed a five-count complaint alleging negligence, innocent misrepresentation, fraud and misrepresentation, breach of implied warranty, and violations of the Michigan consumer protection act, MCL 445.901, *et seq.*; MSA 19.418(1), *et seq.* ("MCPA"), against the Lichtmans and Alan Van Acker and the Lichtmans' broker, R.F.C. & Associates, Inc. a/k/a Re-Max Foremost, Inc. ("R.F.C."). Plaintiffs instituted suit after noticing that water accumulated in the crawl space and heating ducts under the living room after heavy rains. Plaintiffs' claims were based on: the alleged non-disclosure of the "water problem"; the Lichtmans' alleged removal of fixtures from the house; the Lichtmans' alleged misrepresentations regarding a warranty on the exterior siding of the house; the Lichtmans' failure to

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

provide a garage door opener; and the Lichtmans' non-disclosure of a defect in the sprinkling system and a hole in the bathroom wall.

Defendants ultimately moved for, and the trial court granted, summary disposition pursuant to MCR 2.116(C)(8) in favor of defendants on plaintiffs' negligence, breach of implied warranty, and MCPA claims, finding that plaintiffs had failed to sufficiently state these claims. The trial court granted summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) in defendants' favor on plaintiffs' fraud, misrepresentation, and innocent misrepresentation claims, finding that there was no genuine issue of material fact that plaintiffs had knowledge of the water problem, and that plaintiffs failed to allege in their complaint that the water problem involved an unreasonably dangerous condition, a necessary requirement since the purchase agreement contained an "as is" clause. The trial court subsequently denied plaintiffs' motion to amend their complaint to add a breach of express warranty claim, finding that the amendment would be futile.

Plaintiffs first argue that the trial court erred in refusing to permit them to amend their complaint to add a breach of express warranty claim. We disagree. Leave to amend a complaint should be freely given when justice so requires, and denied only for particularized reasons, such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiency by amendments previously allowed, undue prejudice to the opposing party, or futility. MCR 2.118(A)(2); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). Absent an abuse of discretion, this Court will not reverse a trial court's decision on a motion to amend a complaint. *Froede v Holland Ladder Co*, 207 Mich App 127, 136; 523 NW2d 849 (1994).

Here, the trial court correctly denied plaintiffs' motion to amend their complaint because adding a breach of express warranty claim would have been futile. An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamp*, 184 Mich App 101, 103; 457 NW2d 68 (1990). An express warranty is created when a seller sets forth a promise or affirmation, description, or sample with the intent that the goods will conform with that representation. *Latimer v William Mueller & Son, Inc*, 149 Mich App 620, 630; 386 NW2d 618 (1986). In plaintiffs' claim for breach of express warranty, none of the representations forming the basis of the alleged express warranty were included in the purchase agreement and the purchase agreement stated that it represented the entire agreement between the parties. Therefore, the proposed amendment was legally insufficient on its face. Furthermore, the purchase agreement stated that the house was sold "as is." "As is" clauses not only allocate the risk of loss arising from conditions known to the parties, but it also transfers to the purchaser risks unknown to the parties and risks that should have been discoverable by the purchaser upon inspection. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). In the absence of fraud or misrepresentation, recovery in such instances is foreclosed. Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint.

Plaintiffs next argue that the trial court erred in holding that plaintiffs failed to state claims for fraud, misrepresentation, and innocent misrepresentation, and in holding that no genuine issue of material fact existed as to those claims. We agree.

To show fraud or misrepresentation, a plaintiff must establish the following elements: (1) the defendant made a material misrepresentation; (2) it was false; (3) when it was made, the defendant either knew it was false or made it recklessly without knowledge of its truth or falsity; (4) the defendant made it with the intent that the plaintiff would act upon it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered damage. *Internat'l Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995). General allegations will not suffice to state a fraud claim. *LaMonthe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). Nor are mere speculations sufficient to overcome a motion for summary disposition pursuant to MCR 2.116(C)(10) on claims of fraud or misrepresentation. *Id.*

Michigan also recognizes a cause of action for innocent misrepresentation. See *Hammond v Matthes*, 109 Mich App 352, 359; 311 NW2d 357 (1981). Under this claim, scienter, or knowledge of the falsity of a statement, does not have to be shown as long as the plaintiff relied on the untrue statement to his detriment. *Id.* However, an agent (i.e., broker) cannot be found liable for innocent misrepresentation. *Id.* Where a broker is charged with fraud, the plaintiff must show that the broker made the false representation knowing it to be false or made it recklessly without knowledge of its truth. *Id.* The suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation and will support an action for fraud. *Lorenzo, supra* at 684-685. Fraudulent concealment is also actionable fraud and is established by showing that the hidden defect was known to the seller and that the purchaser had no knowledge of it. *Shimmons v Mortgage Corp*, 206 Mich App 27, 29; 520 NW2d 670 (1994). When the fraud involves a defect in the sale of a home, the defect does not have to be "unreasonably dangerous" to support a fraud claim. *Id.*; *Clemens v Lesnek*, 200 Mich App 456; 505 NW2d 283 (1993).

The trial court granted defendants' motion for summary disposition on plaintiffs' fraud, misrepresentation, and innocent misrepresentation claims pursuant to MCR 2.116(C)(8) on the basis that the purchase agreement contained an "as is" clause and plaintiffs failed to allege that the defect was "unreasonably dangerous," as allegedly required by *Christy v Prestige Builders*, 415 Mich 684; 329 NW2d 748 (1982). We find that the trial court erred in dismissing these claims based on the "as is" clause because this Court has specifically held that an "as is" clause in a purchase agreement does not bar a fraud claim. *Lorenzo, supra* at 687; *Shimmons, supra*; *Clemens, supra* at 460. However, because a broker cannot be found liable of innocent misrepresentation, the trial court correctly dismissed plaintiffs' innocent misrepresentation claim as to Van Acker and R.F.C. *Hammond, supra* at 359.

In addition, the trial court erred in dismissing plaintiffs' fraud, misrepresentation, and innocent misrepresentation claims based on *Christy* because, contrary to the trial court's holding, a plaintiff does not have to allege that the defect was "unreasonably dangerous" when the theory of liability is premised on fraud rather than on negligence. See *Shimmons, supra*. The trial court also justified its dismissal of plaintiffs' fraud, misrepresentation, and innocent misrepresentation claims pursuant to MCR 2.116(C)(8) because of plaintiffs' admission that they had notice of dampness in the den of the house. We find that the trial court erred in dismissing these claims based on this admission since plaintiffs also alleged in their complaint that they did not discover the "water problem" in the family room and crawl

space prior to the closing. We, therefore, conclude that plaintiffs' fraud, misrepresentation, and innocent misrepresentation claims were not so clearly unenforceable that no amount of factual development could have justified a right to recovery. See *Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 378; 521 NW2d 847 (1994).

The trial court also granted summary disposition on plaintiffs' fraud, misrepresentation, and innocent misrepresentation claims pursuant to MCR 2.116(C)(10) on the basis that there was no genuine issue of material fact that plaintiffs knew or should have known of the water problem in the family room before the closing on the house. We, however, find that because defendants failed to present proper documentary evidence establishing the nonexistence of a factual dispute, the trial court's holding was in error. *McNulty, supra* at 443. Defendants stated in their brief in support of their summary disposition motion that after plaintiffs inspected the property, Van Acker telephoned the Lichtmans and informed them that plaintiffs were concerned about the presence of water in the crawl space and heating ducts under the living room. Defendants also stated in their summary disposition brief that at the closing, but prior to consummation of the deal, plaintiffs' attorney inquired of Lawrence Lichtman regarding the water problem in the living room. The only documentary evidence defendants submitted in support of these allegations was an affidavit submitted by Lawrence Lichtman stating that he swore that the facts stated in his summary disposition brief were true. This affidavit was insufficient to support defendants' summary disposition motion since evidence merely supporting the factual allegations in a movants' summary disposition motion is insufficient to satisfy the movants' burden of providing documentary evidence establishing a disputed fact. *Id*. The affidavit was also insufficient because it consisted of conclusionary language unsupported by specific facts. *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 207; 413 NW2d 705 (1987). Because defendants failed to submit proper documentary evidence in support of their summary disposition motion, plaintiffs were not obligated to come forward with evidence showing that a disputed fact existed. *SSC v Detroit Retirement Sys*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991). Defendants also argued that no genuine issue of material fact existed as to whether they had knowledge of the water problem in the living room. The only documentary evidence defendants presented in support of this argument was the affidavit discussed above. Therefore, defendants' argument relating to their knowledge of the water problem is similarly baseless.

In summary, we conclude that because the trial court erred in holding that plaintiffs failed to state claims for fraud, misrepresentation, and innocent misrepresentation, and erred in holding that no genuine issue of material fact existed regarding these claims, the trial court's order relating to these claims should be reversed. However, since a broker cannot be found liable of innocent misrepresentation, the trial court correctly dismissed plaintiffs' innocent misrepresentation claim as to Van Acker and R.F.C.

Plaintiffs also argue that the trial court erred in dismissing plaintiffs' breach of implied warranty claim. We disagree. The trial court dismissed plaintiffs' breach of implied warranty claim pursuant to MCR 2.116(C)(8), finding that plaintiffs could not establish that claim since they were not the original purchasers of the house. An implied warranty of fitness and habitability runs only to the first purchaser of a house. *McCann v Brody-Built Const Co*, 197 Mich App 512, 516; 496 NW2d 349 (1992). Because plaintiffs were not the first purchasers of the house, no implied warranty existed. Furthermore,

even if plaintiffs had been the first purchasers, they would still have been unable to state a claim for breach of implied warranty since an "as is" clause waives implied warranties *Lenawee Bd of Health v Messerly*, 417 Mich 17, 32 n 15; 331 NW2d 203 (1982). We, therefore, conclude that the trial court properly dismissed plaintiffs' breach of implied warranty claim.

Plaintiffs next argue that the trial court erred in dismissing their MCPA claim since they based that claim on a valid fraud claim. We agree. The purpose of the MCPA is to prohibit certain practices in trade or commerce and to provide for certain remedies. *Price v Long Realty, Inc*, 199 Mich App 461, 470; 502 NW2d 337 (1993). Trade or commerce includes the sale of real property under the act. *Id.* MCL 445.903(1); MSA 19.418(3)(1) provides that deceptive methods or practices in the conduct of trade or commerce are unlawful. *Id.* at 470-471. Because the MCPA is a remedial statute designed to prohibit unfair practices in trade and commerce, it must be literally construed to achieve its intended goal. *Id.* Both this Court and the Michigan Supreme Court have permitted plaintiffs to base their MCPA claims on fraudulent misrepresentations and omissions. *Dix v American Bankers Life Assurance Co*, 429 Mich 410, 412; 415 NW2d 206 (1987); *Price, supra*. Furthermore, the language of MCL 445.903(1)(s) and (bb); MSA 19.418(3)(1)(s) and (bb), which sets forth what constitutes a deceptive practice, is practically identical to the claims of fraud and fraudulent nondisclosure. See *McNulty, supra* at 447; *Lorenzo, supra* at 684-685.

Plaintiffs asserted in their complaint that defendants' failure to "provide benefits" under the express and/or implied warranties constituted unfair and deceptive practices under the MCPA. The trial court dismissed plaintiffs' MCPA claim pursuant to MCR 2.116(C)(8) on the ground that they failed to state a claim for breach of either an express or implied warranty. We find that the trial court correctly dismissed plaintiffs' MCPA claim on this basis since, as previously discussed, plaintiffs could not establish a claim for breach of either an express or implied warranty. Plaintiffs, however, also argued below that their MCPA claim was supported by their fraud claim. Because a MCPA claim can be supported by a fraud claim, and because we concluded that plaintiffs have stated a valid claim for fraud, we conclude that the trial court should permit plaintiffs to amend their complaint to allege fraud as the basis of their MCPA claim.

Plaintiffs finally argue that the trial court erred in dismissing their negligence claim on the ground that the Lichtmans did not owe plaintiffs a duty. We disagree. In order to assert negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff. *Hammack v Lutheran Soc Servs*, 211 Mich App 1, 4; 535 NW2d 215 (1995). The existence of a duty is a question of law for the court's resolution. *Id.* In Michigan, caveat emptor applies to land sales. *Conahan v Fisher*, 186 Mich App 48, 49; 463 NW2d 118 (1990). A landowner has a duty to disclose to the purchaser only concealed conditions known to him which involve an unreasonable danger that is not known to the seller. *Id.* at 49-50. Plaintiffs failed to allege in their complaint that the water problem in the living room involved an unreasonable danger. Because they failed to establish that defendants' owed them a duty, the trial court properly dismissed plaintiffs' negligence claim. *Eason v Coggins Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).

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

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ John F. Foley