S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DONALD F. URBAN, UNPUBLISHED
October 8, 1996

Plaintiff-Appellant,

v No. 180978
LC No. 93-024404

ROBERT THIBAULT and PATRICIA THIBAULT,

Defendants-Appellees.

Before: Holbrook, Jr., P.J., and Saad and W.J. Giovan,* JJ.

PER CURIAM.

Plaintiff purchased a parcel of real property "as is" from defendant Thibaults and thereafter brought this lawsuit alleging fraudulent misrepresentation by the Thibaults and also alleging a violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.;* MSA 19.418(1) *et seq.*, against certain defendant real estate agents who have since been dismissed from the lawsuit. Plaintiff now appeals as of right from the circuit court order that granted summary disposition in favor of defendant Thibaults pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff first argues that defendant Thibaults were improperly granted summary disposition on the fraudulent misrepresentation claim because they misrepresented that the house had a new roof and sheathing. We disagree.

> Generally, the buyer bears the risk of loss under an "as is" contract unless the seller fails to disclose concealed defects known to him. Caveat emptor prevails in land sales, and the vendor, with two exceptions, is not liable for any harm due to defects existing at the time of sale. The first exception, which is arguably applicable, is that the vendor has a duty to disclose to the purchaser any concealed condition known to him which involves an unreasonable danger. [*Conahan v Fisher,* 186 Mich App 48, 49-50; 463 NW2d 118 (1990).]

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

In this case, the parties' purchase agreement contained an "as is" clause. In allocating the risk of loss arising from conditions unknown to the parties, "as is" clauses transfer the risk of loss where the defect should have reasonably been discovered upon inspection but was not. *Lorenzo v Noel,* 206 Mich App 682, 686; 522 NW2d 724 (1994). However, an "as is" clause does not transfer the risk of loss where a seller makes a fraudulent representation before a purchaser signs a binding agreement. *Id.; Clemens v Lesnek,* 200 Mich App 456, 460; 505 NW2d 283 (1993).

Here, defendants' seller disclosure statement disclosed that the house had a "new" roof and sheathing, and there was evidence that recent work had in fact been done on the roof. Defendants' disclosure statement did not represent that the roof repairs were done properly or that the roof was warranted against future leaks. Plaintiff has not presented evidence that defendants fraudulently concealed a latent defect in the roof sufficient to supplant the doctrine of caveat emptor, and the "as is" clause in the parties' purchase agreement. Thus, the risk of loss was transferred to plaintiff because any defect in the repaired roof was reasonably discoverable upon inspection. Notably, plaintiff did not take the opportunity to have the home professionally inspected before purchase. Viewing the pleadings and documentary evidence in a light most favorable to plaintiff, we conclude that plaintiff has failed to assert the existence of a genuine issue of material fact whether defendants failed to disclose concealed defects known to them.[1] Plaintiff's bare assertion that defendants made a fraudulent misrepresentation was insufficient to withstand a motion for summary disposition pursuant to MCR 2.116(C)(10). See *Conahan, supra.* For similar reasons, summary disposition was properly granted to defendant Thibaults on plaintiff's fraudulent misrepresentation claim regarding the other claimed defects in the home.

Finally, plaintiff argues on appeal that the trial court erred in granting defendants summary disposition on his Michigan Consumer Protection Act claim. We find this argument to be wholly without merit. Plaintiff's complaint did not allege a violation of the act against defendant Thibaults, and plaintiff has never sought leave to amend his complaint to allege such a violation. Accordingly, summary disposition was appropriate because plaintiff has failed to state a claim upon which relief may be granted. MCR 2.116(C)(8). Moreover, any such proposed amendment of the complaint would have been futile given that these defendants were not engaged in "trade or commerce" as is contemplated under the MCPA. See MCL 445.902(d); MSA 19.418(2)(d) ["Trade or commerce" is defined as the conduct of a *business* providing goods, property, etc.]

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Henry W. Saad
/s/ William J. Giovan

[1] On appeal, plaintiff relies on the deposition testimony of the roofer. However, plaintiff's reliance on the roofer's deposition is improper because it was not presented to the trial court. Only discovery

material that was filed or made a record are part of the record on appeal. MCR 2.302(H)(3); 7.210(A)(1).