

STATE OF MICHIGAN
COURT OF APPEALS

CARRI L. JOHNSON

Plaintiff-Appellant,

v

MARK A. GOODRICH, VICTORIA E.
GOODRICH and COUNTRY HOMES, LIMITED,

Defendants-Appellees,

and

AMERICAN INSPECTION, INC.,

Defendant.

UNPUBLISHED

March 18, 1997

No. 183824

Oakland Circuit Court

LC No. 94-472610-CH

Before: Cavanagh, P.J., and Reilly, and C.D. Corwin,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of Mark A. Goodrich and Victoria E. Goodrich (hereinafter “defendants”). Plaintiff also challenges on appeal an order granting summary disposition in favor of defendant Country Homes, Limited (hereinafter “Country Homes”). We affirm in part and reverse in part.

Plaintiff bought property and a house from defendants. Country Homes was defendants’ agent. After plaintiff bought the house, she discovered numerous defects in the house, including lack of access to crawl spaces under certain portions of the house and rotted floor joists.

Plaintiff first argues that the trial court erred in granting defendants’ motion for summary disposition on plaintiff’s fraudulent misrepresentation claim. The court did not clearly explain its reason

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

for granting the motion, but seems to have relied on the fact that the parties' contract contained an "as-is" clause. Plaintiff contends this was error because a fraud claim may not be defeated by an "as is" clause. We agree in part. Although an "as is" clause can transfer the risk of loss from unknown conditions and conditions that the buyer should have discovered, it cannot transfer the risk where "a seller makes fraudulent representations before a purchaser signs a binding agreement." *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994), quoting *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993). A seller has a duty to disclose to the purchaser any concealed conditions known to the seller. *Conohan v Fisher*, 186 Mich App 48, 49-50; 463 NW2d 118 (1990). However, if a competent inspector should reasonably have been expected to discover evidence of the defects, the condition is not concealed. *Id.* at 50. The trial court did not distinguish between those conditions that were concealed and those that should have reasonably been discovered upon inspection and between those that were known to the defendants and those that were unknown. The parties' briefs to the trial court also did not draw these distinctions. On the record before us, defendants did not demonstrate that they were entitled to judgment as a matter of law on the basis of the "as-is" clause. Accordingly, the order granting defendants' motion for summary disposition is reversed.

Defendants suggest that we could affirm the court's order on the basis that plaintiff did not rely on defendants' statements or omissions because she repeatedly stated in her deposition that she relied on her inspection. We disagree. In her deposition, she also referred to her reliance on defendants' lack of statements about problems with the house. Therefore, plaintiff raised a genuine issue of material fact as to defendants' fraudulent misrepresentation. *Kassab v Michigan Property Ins*, 441 Mich 433, 442; 491 NW2d 545 (1992).

Plaintiff next argues that summary disposition should not have been granted to Country Homes on her fraudulent misrepresentation claim because the releases of liability she signed were not fairly and knowingly entered into due to Country Homes' overreaching conduct. We disagree. Although plaintiff presented an affidavit to the trial court stating that she had not understood the language in the releases, it is clear from her deposition testimony that she understood that by signing the releases she could not hold Country Homes liable for defects in the house. Because a plaintiff cannot raise factual issues by asserting facts contrary to damaging deposition testimony, the trial court properly held that the releases barred plaintiff's fraudulent misrepresentation claim against Country Homes. *Barlow v Crane-Houdaille, Inc*, 191 Mich App 244, 250; 477 NW2d 133 (1991).

Finally, plaintiff argues that the trial court erred in granting summary disposition in favor of Country Homes because there was a genuine issue of material fact as to whether Country Homes violated the Michigan Consumer Protection Act (CPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.* The trial court did not separately address plaintiff's CPA claim. However, because plaintiff did not support the allegations contained in sub-paragraphs (c), (d), (f), (g) and (h) of paragraph 20 of her first amended complaint, plaintiff failed to state a cause of action for those claims. MCR 2.111; *Kramer v Dearborn Heights* 197 Mich App 723, 725; 496 NW2d 301 (1993). As to plaintiff's other allegations of violations of the CPA, each of those violations are based on a misrepresentation

made by Country Homes' agent as to the condition of plaintiff's floors. However, plaintiff's own understanding of the situation was that the agent's statements were equivocal. Therefore, there were no misrepresentations made about any material fact or condition of the floors. Thus, the trial court did not err in dismissing plaintiff's CPA claim.

Affirmed in part and reversed in part.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin