

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD D. FULLER and ARLENE FULLER,

UNPUBLISHED

Plaintiffs-Appellants,

v

No. 194380
Monroe Circuit Court
LC No. 94-002571

DAVID G. HUGHEY and JOYCE R. HUGHEY,

Defendants-Appellees,

and

STEPHANIE M. KITTLE-METZGER,
TERRY H. KITTLE, WILLIE BLOHM, INC., d/b/a/
DOWNRIVER REALTY and
CALVIN LAGINESS,

Defendants.

Before: Hood, P.J., and Saad and T.S. Eveland*, JJ.

HOOD, J. (concurring in part and dissenting in part).

I must respectfully dissent from that portion of the majority opinion which concludes that no questions of fact exist as to plaintiffs' claims for innocent representation and fraudulent representation.

This case arises from plaintiffs' August 14, 1991, purchase of defendants' house located at 1330 Goff Road in the Township of Dundee. On October 11, 1991, plaintiffs and defendants closed on the purchase of the home and plaintiffs took possession. Defendants had purchased the house one year earlier.

Before purchasing the house, plaintiffs visited the property on two occasions. On both occasions, plaintiffs spoke with Joyce Hughey outside of the house while David Hughey was present

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

inside the house. Richard Fuller testified that, during plaintiffs' first visit, he asked Joyce about the septic field and whether there were any plumbing problems. Joyce responded that the house was in excellent condition. Defendants denied any recollection of any conversations with plaintiffs. Shortly after moving into the house, plaintiffs discovered several problems related to a termite infestation. Defendants denied any awareness of termite problems in the home.

Plaintiffs sued defendants, alleging fraudulent misrepresentation, fraudulent concealment, and innocent misrepresentation. On September 18, 1995, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiffs had failed to produce any evidence that defendants knew of the termite infestation or benefited in any way from plaintiffs' termite problems.

The trial court granted defendants' motion, finding that plaintiffs presented no evidence that defendants had any knowledge of a termite problem. In making its ruling, the court noted that plaintiffs did not rebut the assertion that defendants made no repairs, that plaintiffs did not discover the termite problem until some months after moving in, and that defendants had only been in the house for a short time before selling it to plaintiffs.

Plaintiffs argue that the trial court erred in granting defendant summary disposition because genuine issues of material fact exist. This Court reviews a trial court's grant of summary disposition de novo. *Pinckney Schools v Continental Casualty Co*, 213 Mich App 521 525; 540 NW2d 748 (1995). A motion for summary disposition under MCR 2.116(C)(10) may be granted when, giving the benefit of reasonable doubt to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The general rule, under the doctrine of caveat emptor, is that a land vendor who surrenders title, possession, and control of property is not liable for harm due to defects existing at the time of the sale. *Christy v Prestige Builders Inc*, 415 Mich 684, 694; 329 NW2d 748 (1982); *Lorenzo v Noel*, 206 Mich App 682, 685-686; 522 NW2d 724 (1994). However, when the vendor engages in fraud or misrepresentation before the vendee signs a binding agreement, an "as is" clause or the doctrine of caveat emptor does not operate to shift the risk of loss to the vendee. See *Lenawee Co Board of Health v Messerly*, 417 Mich 17, 32, n 16; 331 NW2d 203 (1982); *Christy, supra* at 658 n 7, citing Prosser, Torts (4th ed), § 64; *Lorenzo, supra* at 687; *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993).

I agree with plaintiffs' argument that the trial court erred in summarily disposing of their claim of innocent misrepresentation against defendants. To prevail on a claim of innocent misrepresentation, a plaintiff must establish (1) privity of contract, (2) a false representation, (3) actual deception, (4) detrimental reliance, and (5) that the injury to the deceived party inures to the benefit of the other party. See *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 116-118; 313 NW2d 77 (1981). The person making the misrepresentation need not know that it was false. *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996).

In this case, plaintiffs testified that, on two occasions prior to purchasing the house, Joyce Hughey assured them that the house was in “good” or “excellent” condition. Plaintiffs’ termite expert, however, opined that, in 1993, there was extensive termite damage and that the house had been infested for ten to fifteen years. Giving the benefit of reasonable doubt to plaintiffs, genuine issues of material fact exist as to whether the alleged assurances regarding the condition of the house were made and, if so, whether they were false. Therefore, the trial court improperly granted summary disposition in favor of defendants on plaintiffs’ claim of innocent misrepresentation.

I also believe that plaintiffs are correct in contending that the trial court erred in summarily disposing of their claim of fraudulent misrepresentation. Fraudulent misrepresentation, unlike innocent misrepresentation, does not require privity of contract or a showing that the injury suffered by the plaintiff inured to the benefit of the defendant. *United States Fidelity & Guaranty Co, supra* at 118-119. Fraudulent misrepresentation, however, requires proof of both scienter and an intention that the misrepresentation be acted upon by the plaintiff. *Id.* at 118; *Temborius v Slatkin*, 157 Mich App 587, 596-597; 403 NW2d 821 (1986).

In this case, plaintiffs’ termite expert indicated that there were several layers of flooring in the kitchen, each still covered with linoleum and each showing evidence of termites. Plaintiffs’ termite expert further explained that the removal of an apparently recently placed piece of particle board flooring underneath the living room carpet revealed signs of termite infestation. There was also evidence that paint on a replaced floor board matched the color of the paint that defendants had admittedly applied in the living room. These facts, if established at trial, would suggest that some prior owner had knowledge of the termite problem. Defendants’ argument that plaintiffs’ claim must fail because plaintiffs have failed to present evidence that defendants were aware of the termite infestation is incorrect. Rather, defendants’ denial of such knowledge simply creates a question of fact. A denial of summary disposition does not mean that plaintiffs have a validly enforceable claim, but only that, viewed in the light most favorable to them, fact questions are presented. See *Lorenzo, supra* at 688. I therefore conclude that the trial court improperly granted summary disposition in favor of defendants on plaintiffs’ claim of fraudulent misrepresentation.

I agree with the majority’s conclusion that the trial court properly granted summary disposition on plaintiffs’ claim of fraudulent concealment.

/s/ Harold Hood