STATE OF MICHIGAN

COURT OF APPEALS

JUDITH D. DORAN,

Plaintiff–Appellant,

v

ESTATE OF SADIE BELLE BUTLER, ELLIOT H. PHILLIPS, Personal Representative of the Estate of Sadie Belle Butler, NATIONAL BANK OF DETROIT, TECHNIHOUSE INSPECTIONS, INC., and STAN DUCHER,

Defendants–Appellees,

and

SNYDER, KINNEY & BENNETT and MICHAEL COTTER,

Defendants.

UNPUBLISHED
May 16, 1997

No. 182930
Oakland Circuit Court
LC No. 93-457836 CZ

Before: Taylor, P.J., and Markey and N. O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals as of right from orders that granted summary disposition, pursuant to MCR 2.116(C)(10), to defendants[1] in this real estate sale/breach of contract claim. We affirm.

I

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

Sadie Belle Butler died on March 14, 1990, leaving behind an estate that included certain real property and a residence in Bloomfield Township. The property and home were located at the top of a ravine created by the Franklin River. On May 6, 1990, plaintiff made an offer to purchase the property from the estate. Defendant Phillips, the personal representative, accepted the offer. The contract plaintiff signed to purchase the property contained a clause stating that she had examined the premises and was satisfied with the physical condition of the structures thereon and that the property was in an "as is condition." The contract also contained an inspection addendum stating that the agreement was contingent on the property being inspected by an inspector of plaintiff's choice. The addendum further stated that the agreement was null and void if plaintiff was not satisfied with the result of the inspection. Plaintiff had the property inspected and, apparently being satisfied with the report she received, she completed her purchase of the property and home. Plaintiff thereafter learned that the property had slope instability and soil erosion problems and filed the instant lawsuit.

Plaintiff first contends that the trial court erred in determining that Phillips did not know of any hidden defects in the property and thus did not fail to inform her of the defects. We disagree. Summary disposition was proper because plaintiff failed to present evidence that Butler or Phillips knew of the alleged defects. The mere assertion in plaintiff's complaint is, of course, insufficient to withstand a motion for summary disposition brought pursuant to MCR 2.116(C)(10). While the dissent asserts, without specifics, that there were other documents that plaintiff tendered to counter defendants' motion, we know of no such document. Indeed, the only thing that could perhaps qualify is plaintiff's citation of a report prepared by GeoDynamics Consultants. This report, however, was irrelevant because it did not come into existence until five months after Butler's death. Thus, it could not have been known by Butler, and no assertion is made that Phillips knew of it. Indeed, the sale of the property was consummated more than a month before the GeoDynamics report was issued. Plaintiff also claimed that remedial work evidenced an effort to conceal the defect. However, even if someone tried to alleviate the erosion and instability problems, such actions, standing alone, did not create a genuine issue of material fact that Butler or Phillips tried to hide a defect. See *Christy v Prestige Builders, Inc*, 415 Mich 684, 694; 329 NW2d 748 (1982) (buyer bears risk of loss under an "as is" clause unless seller fails to disclose known defects).

Next, plaintiff argues that Phillips and the estate fraudulently misrepresented the condition of the property to her. We disagree. The dissent finds that defendants fraudulently misrepresented the property, citing Robert Butler's comment that the property was "sound." First, Robert Butler (Sadie Butler's son) was not a party to the contract plaintiff entered into with Phillips. Second, plaintiff cannot assert that she relied on any oral statements because the sales contract contained the "as is" clause and also an integration clause stating "It is further understood that no promises have been made other than those that are in writing and signed by all parties involved." The dissent effectively treats these contractual problems for plaintiff's case as unworthy of analysis, but they are consequential. Contracts should be enforced unless there is some reason not to do so recognized in the law. Moreover, plaintiff's purchase of the property was subject to her approval of an inspection. Plaintiff's expert opined that the defect should have been discovered by the inspector. When the purchaser of property has the property professionally inspected and the inspection should have discovered the alleged defect but did not, the defect is not considered to have been concealed and an "as is" clause will be enforced. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994) ("[an] as is" clause transfers risk of loss where the defect should have reasonably been discovered upon inspection but was not). See also *Conahan v Fisher*, 186 Mich App 48, 49-50; 463 NW2d 118 (1990).

Plaintiff is also not entitled to rescission. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 32; 331 NW2d 203 (1982).

We do not consider plaintiff's claim that further discovery should have been allowed because this issue is not included within the statement of questions presented. MCR 7.212(C)(5); *Preston v Dep't of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991).

II

Plaintiff also argues that the trial court erred in granting summary disposition to defendants Technihouse Inspections and its employee Stan Ducher. We disagree. The contract plaintiff signed with Technihouse Inspections provided for the inspection of the "interior and exterior where visible" of the home she was contemplating purchasing. The contract specifically stated that Technihouse was not liable "for failure to note latent or hidden defects" and that the inspection was not a guarantee or warranty with regard to any existing condition of the property.

The trial court granted summary disposition on the basis that the soil erosion and instability problems were outside the scope of the inspection contract because they were hidden or latent defects. We agree with the trial court's assessment and find summary disposition was properly granted. If plaintiff wanted the entire property inspected, including the ravine, she should have negotiated for a more expansive inspection.

Finally, even if we were persuaded that the erosion and instability problems were within the scope of the inspection, we would find that summary disposition would have been proper on the basis that the liquidated damages clause was enforceable. See *St Paul Fire & Marine Ins Co v Guardian Alarm Co of Michigan*, 115 Mich App 278, 282-285; 320 NW2d 244 (1982); *USAA Group v Universal Alarms, Inc*, 158 Mich App 633, 635-636; 405 NW2d 146 (1987). Further, because plaintiff's damages would have been limited to $275, the circuit court would have lacked jurisdiction over the dispute. *USAA*, *supra*.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Clifford W. Taylor
/s/ Nick O. Holowka

[1] Plaintiff does not appeal the dismissal of NBD.