

STATE OF MICHIGAN
COURT OF APPEALS

JUDITH D. DORAN,

UNPUBLISHED

Plaintiff-Appellant

v

No. 182930

Oakland Circuit Court

LC No. 93-457836-CZ

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,

and

SNYDER, KINNEY & BENNETT and MICHAEL COTTER,

Defendants,

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

MARKEY, J. (Concurring in part/Dissenting in part).

I respectfully dissent.

Plaintiff first contends that the lower court erred in determining that defendant Phillips did not know of any hidden defects in the property and, thus, defendants Estate and Phillips did not improperly fail to inform plaintiff of the defects¹. I agree.

Plaintiff presented enough evidence to withstand defendants Estate and Phillips' motion for summary disposition. Plaintiff's complaint contained allegations, and the response to the motion was supported by documentary evidence, that decedent, or someone in privity with her, knew of the erosion and instability problems of the property at issue, took attempts to alleviate them, and in the process

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

concealed the problems. Further, plaintiff was not told of the problems and was unaware of them when she purchased the property. *Christy v Prestige Builders, Inc*, 415 Mich 684-696, 694; 329 NW2d 748 (1982); *Lorenzo v Noel*, 206 Mich App 682, 686-687; 522 NW2d 724 (1994); *Clemens v Lesnek*, 200 Mich App 456, 459-461; 505 NW2d 283 (1993). Whether defendant Phillips as personal representative of the estate had knowledge of the defect was irrelevant. (“[P]ersonal representatives traditionally have been held to stand in the place of the decedent with respect to the decedent’s property or claims.”) See *Michigan National Bank v Morren*, 194 Mich App 407, 411; 487 NW2d 784 (1992); *Evans v Johnson*, 131 Mich App 776, 781; 347 NW2d 198 (1984). Nonetheless, plaintiff presented sufficient evidence to create a genuine issue of fact as to whether defendants Estate and Phillips knew of the concealed defect. *Radtke v Evertett*, 442 Mich 368, 374; 501 NW2d 155 (1993); *Farm Bureau Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991).

Next, plaintiff argues that defendants Estate and Phillips fraudulently misrepresented the condition of the property to her. Again, I agree.

Plaintiff has presented a case of fraudulent misrepresentation. Along with Robert Butler’s representations to her that the property was “sound,” plaintiff has presented evidence that decedent, and thus defendants Estate and Phillips, were aware of the defects on the property and failed to inform her of them. As a result of both Butler’s representations and their failure to inform her of the deficiencies associated with the property, plaintiff purchased the property. *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994); *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988).

Plaintiff also argues that the lower court erred in granting summary disposition to defendants Technihouse Inspections and Stan Ducher on the ground that the soil erosion and instability problems were hidden or latent defects and thus outside the scope of the inspection contract. I agree.

Defendants Technihouse Inspections and Stan Ducher, who held themselves out to be licensed home builders and building inspectors, should have noted the problems and informed plaintiff of them. The defects were not concealed to them and defendants Technihouse Inspections and Stan Ducher should have informed plaintiff of the problems. The purpose of the contract between plaintiff and defendants Technihouse Inspections and Stan Ducher was for these defendants to help plaintiff make an intelligent and informed decision regarding the purchase of the home. From the evidence presented, it appears that defendant Technihouse Inspections and Stan Ducher failed to note serious overriding problems associated with this piece of property - the soil erosion and instability of the house itself. As such, defendants Technihouse Inspections and Stan Ducher are liable to plaintiff for any damages which resulted from their failure to note the defect. See *Klann v Hess Cartage Co*, 50 Mich App 703, 706; 214 NW2d 63 (1973); See also *Shelby Mutual Ins Co v Grand Rapids*, 6 Mich App 95, 98; 148 NW2d 260 (1967).

Finally plaintiff argues that the limited damages clause in the inspection contract was void as it was unreasonable in light of the substantial foreseeable damages. I disagree.

The contract between plaintiff and defendants Technihouse Inspections and Stan Ducher limited any damages due to defendants Technihouse Inspections and Stan Ducher's negligence in performing the inspection to \$275. The contract stated that it was not a "guarantee or warranty with regard to any existing condition of the property." Therefore, failing to note the soil erosion and instability problems, while most likely negligent, was not gross negligence. *Shelby Mutual Ins Co, supra* at 98. At the time the contract was entered into, it was not possible to calculate damages with any reasonable certainty and therefore setting the damages at \$275, the contract price, was proper. As such, I agree with the majority that the limitation on damages clause was valid and enforceable. *Cudnick v William Beaumont Hosp*, 207 Mich App 378, 384; 525 NW2d 891 (1994); *Moore v St. Clair County*, 120 Mich App 335, 340; 328 NW2d 47 (1982); *St. Paul Fire & Marine Ins Co v Guardian Alarm Co of Michigan*, 115 Mich App 278, 282-285; 320 NW2d 244 (1982).

/s/ Jane E. Markey

¹ As a practical and procedural matter, the only proper defendant in respect to the estate is Elliot Phillips as its personal representative.