STATE OF MICHIGAN

COURT OF APPEALS

EDWARD STAWICKI and IRENE STAWICKI,

Plaintiffs-Appellees/
Cross-Appellants,

v

BYRON LANE LIMITED PARTNERSHIP and DANIEL CARTER,

Defendants-Appellants,
and

BIO-SERV CORPORATION, d/b/a ROSE EXTERMINATOR COMPANY,

Defendant-Appellee/
Cross-Appellee.

UNPUBLISHED
August 1, 1997

No. 176159
Kent Circuit Court
LC No. 91-073635-CK

EDWARD STAWICKI and IRENE STAWICKI,

Plaintiffs-Appellees,

v

BYRON LANE LIMITED PARTNERSHIP and DANIEL CARTER,

Defendants-Appellants,
and

BIO-SERV CORPORATION, d/b/a ROSE EXTERMINATOR COMPANY,

Defendant.

No. 178316
Kent Circuit Court
LC No. 91-073635-CK

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

In these consolidated cases, appellants Byron Lane Limited Partnership (BLLP) and Daniel Carter, its general partner, appeal as of right from judgments entered after a two-part bench trial which (1) found that appellants had made a material misrepresentation in the sale of Byron Lane Apartments to plaintiffs, (2) ordered rescission of the land contract between plaintiffs and BLLP, (3) ruled that appellants cannot recover on their claim against Bio-Serv Corporation d/b/a Rose Exterminator Company ("Rose"), and (4) awarded a maintenance fee to plaintiffs covering the time they owned and operated the apartments. Plaintiffs cross-appeal from the trial court's ruling that they are not third-party beneficiaries of the contract between appellants and Rose for pre-sale termite inspection of the apartments. We affirm in part, reverse in part, and remand to the trial court for further proceedings.

These appeals involve plaintiffs' successful suit to rescind their purchase of the Byron Lane Apartments, a three-building apartment complex in Wyoming, Michigan, from BLLP. Plaintiffs' core claim was that, during purchase negotiations, Carter falsely represented that none of the apartments had wood-eating insect infestations, although plaintiffs subsequently discovered that at least one of the apartment buildings had termites. Rose was named as a defendant because its pre-sale inspection of the property reported no visible evidence of infestation from wood-destroying insects. Plaintiffs alleged that this was contrary to fact and negligent, and that they suffered damages as a result of the negligence.

The trial court ruled, following the bench trial, that plaintiffs were entitled to rescission of their land contract with BLLP for purchase of the apartments. The court found that BLLP, through Carter, had misrepresented the absence of termites on the property, that BLLP knew that its agent's representations about the alleged lack of termite problems were untrue, that BLLP intended that plaintiffs rely on its misrepresentation and that its misrepresentation had a material influence on plaintiffs. The court further found that BLLP was not entitled to recover on its cross-claim against Rose because, although Rose was guilty of breach of contract regarding its inspection of the apartments, it had corrected its initial inspection report by issuing a revised version a few days after closing; thus, this matter would have been resolved previously had BLLP promptly informed plaintiffs of the amended report. The court also concluded that plaintiffs could not recover on their claim against Rose because plaintiffs were not third-party beneficiaries of the inspection contract between Rose and BLLP.

The court also determined that plaintiffs could resume their proofs at a later date if they elected to seek consequential damages in addition to rescission. As a result, a second bench trial was held on the issue of money damages. The trial court ruled for plaintiffs and awarded them "maintenance fees" incurred during their possession of the premises, minus an offset in appellants' favor for positive cash flow during that period.

Appellants first argue that the trial court clearly erred by finding that Carter materially misrepresented the premises to plaintiffs before the sale. We disagree. Findings of fact by the trial court may not be set aside unless clearly erroneous. MCR 2.613(C); *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976).

To show misrepresentation, plaintiffs must prove that (1) appellants made a material representation; (2) the representation was false; (3) when appellants made the representation they knew it was false, or made it recklessly without knowledge of its truth or falsity; (4) appellants made the representation with the intent that plaintiffs would act on it; (5) plaintiffs acted in reliance on it; and (6) plaintiffs suffered injury. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208-209; 544 NW2d 727 (1996), citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Furthermore, any representation made by one party to another in a transaction between them which is false in fact and actually deceives the other party, and upon which the latter relies to that party's damage, is actionable where the deceived party's loss inures to the benefit of the deceiver. It is unnecessary for the deceived to prove a fraudulent purpose or intent on the part of the deceiver. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 116-120; 313 NW2d 77 (1981).

Here, the evidence supports the trial court's conclusions that appellants misrepresented to plaintiffs that no problem with termite infestation existed at the apartments, and that plaintiffs would not have consummated the transaction had they known the truth. Edward Stawicki testified that Carter denied that the property had any termite problems. In fact, according to Stawicki, Carter never mentioned anything about termites, termite treatment or termite damages. After he purchased the property, Stawicki learned about the termite problem from a tenant who reported seeing a swarm of termites in his apartment. Stawicki then spoke with a representative from Rose, who indicated that the apartments had been infested with termites since they were built. Stawicki stated that he would not have purchased the property had he known about the termite infestation. Carter, on the other hand, presented a totally different rendition of facts to the court. In reviewing the conflicting testimony, we do so with regard for the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *Id.* We find no clear error from our review of the record.

Appellants next raise several challenges to the trial court ordering rescission of the land contract for sale of the apartments. Appellants first contend that the court's finding that plaintiffs did not unreasonably delay their request for rescission was erroneous. We disagree with appellants' contention. Plaintiffs' complaint, filed on September 10, 1991, did not request rescission. Their first amended complaint, filed on April 30, 1992, sought rescission. Appellants did not challenge the amendment of the initial complaint and did not object to rescission until at least October 1992. The trial court found that plaintiffs did not learn of the significant prior termite infestation and extensive damage until April 1992. The court further found that plaintiffs' delay in seeking rescission did not prejudice BLLP because it would not have taken back the premises or done anything differently if plaintiffs had initially demanded rescission. There was no error in the trial court's ruling. MCR 2.613(C).

We likewise reject appellants' argument that plaintiffs should not have been allowed to proceed on their theory of rescission after failing to present that theory in their original complaint. As the trial court noted, appellants are estopped from raising this argument because they did not timely object to

plaintiffs' amendment of their complaint. Furthermore, amendment of the complaint to add the rescission claim is consistent with MCR 2.118(A)(2), which provides that leave to amend "shall be freely given when justice so requires." Moreover, a plaintiff may simultaneously pursue all remedies against the sellers and other defendants regardless of legal consistency, so long as plaintiff is not awarded double recovery. See MCR 2.118(A)(2)(b) and *Walraven v Martin*, 123 Mich App 342, 349-350; 333 NW2d 569 (1983).

Appellants next argue that rescission was improper because plaintiffs failed to return appellants to the position they were in before the transaction occurred. Specifically, appellants contend that the trial court erred by failing to require that plaintiffs pay appellants the amount due for unpaid property taxes that accrued during plaintiffs' tenure. We agree that this obligation is consistent with plaintiffs' duty to restore appellants to the status quo in seeking rescission. We therefore remand the matter and direct the trial court to determine and award appellants the amount of such taxes.

We, however, reject appellants' argument that the trial court erred by granting rescission "in a case where damages were subject to a precise monetary determination." A defrauded purchaser under a land contract has the option of rescinding the contract and recovering what he has paid, as well as damages for losses sustained as the direct result of the misrepresentation. *Mock v Duke*, 20 Mich App 453, 455; 174 NW2d 161 (1969).

Appellants also claim that the trial court erred by dismissing their cross-claim against Rose, which contracted with BLLP to perform the pre-sale termite inspection of the apartments. We agree.

It is undisputed that Rose's initial inspection report failed to indicate termite damage, and although Rose sent appellants an amended report a few days after the sale, appellants did not furnish a copy to plaintiffs. Stawicki testified that he would not have purchased the apartments if he had known of the existing termite damage. As such, if Rose had properly performed its pre-sale inspection it would have discovered and reported the termite problem, and plaintiffs would not have purchased the property. Thus, but for Rose's negligence, neither plaintiffs nor appellants would have sustained damages.

Our conclusion, however, does not mean that BLLP and Rose are joint tortfeasors with equal degrees of fault. Rather, on remand for trial of appellants' cross-claim against Rose, the trial court must determine whether the amended report, if BLLP had relayed it to plaintiffs, would have put plaintiffs on notice of the termite problems. If so, Rose significantly limited its potential liability by issuing the amended report, and if the court finds in favor of plaintiffs in their suit against Rose the court should apportion plaintiffs' damages between appellants and Rose accordingly.

Appellants next contend that the trial court improperly awarded maintenance fees to plaintiffs. We agree. Expenses of general maintenance and upkeep required to maintain the premises in a condition equivalent to that existing at the time plaintiffs purchased the premises fall within their duty to restore appellants to the status quo and cannot be recovered as damages. *In re Hummel*, 23 Bankr 8, 13 (WD Mo, 1982). However, expenditures that actually *enhance* the value of the property should be

awarded to plaintiffs. *Id*. On remand, the trial court should review the evidence and its award to ensure that it complies with these principles.

In their cross-appeal, plaintiffs maintain that the trial court erred by ruling that they are not third-party beneficiaries of the pre-sale inspection contract between BLLP and Rose. We agree.

For an individual to sue on a contract to which she or he is not a party, it must be determined that the plaintiff was an intended third-party beneficiary of the contract. *Rhodes v United Jewish Charities*, 184 Mich App 740, 744; 459 NW2d 44 (1990). Third-party beneficiary law in Michigan is controlled by statute. MCL 600.1405; MSA 27A.1405 provides in pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

The court must objectively determine from the form and meaning of the contract itself whether one is a third-party beneficiary as defined by statute. *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 189; 504 NW2d 635 (1993). The subjective intent of the parties to the contract is irrelevant to this determination. *Alcona Community Schools v Michigan*, 216 Mich App 202, 205; 549 NW2d 356 (1996). "Third-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of the contract. . . . Thus, a person who incidentally benefits from the performance of some duty required under a contract has no rights under the contract." *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995).

Here, viewing the contract objectively, there is adequate evidence that plaintiffs were the third-party beneficiaries of the contract between Rose and BLLP. Plaintiffs specifically demanded that a termite inspection be performed before closing. Having demanded such an inspection, it cannot be said that plaintiffs "incidentally" benefited from the performance of the contract. Rather, it appears that the termite inspection was performed largely for plaintiffs' benefit. The trial court therefore incorrectly concluded that plaintiffs are not third-party beneficiaries of the contract. [1] Accordingly, plaintiffs are entitled to proceed on their claim against Rose.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Maureen P. Reilly
/s/ Harold Hood
/s/ William B. Murphy

[1] See *Greenlees v Owen Ames Kimball Co*, 340 Mich 670, 677; 66 NW2d 227 (1954) (shopkeeper-tenant held a third-party beneficiary of a remodeling contract providing for minimum disturbance to daytime operations in the building); see also *Koenig v South Haven*, 221 Mich App 711; 562 NW2d 509 (1997) (person swept from a Lake Michigan pier held a third-party beneficiary of a contract between the City of South Haven and the Corps of Engineers regarding safety procedures on the pier); *Rhodes v United Jewish Charities*, 184 Mich App 740; 459 NW2d 44 (1990).(employee held arguably a third-party beneficiary of a lease agreement between the building owner and a tenant, providing that the tenant was obligated to furnish security for the parking lot in which the employee was assaulted); *Talucci v Archambault*, 20 Mich App 153, 158-160; 173 NW2d 740 (1969) (employee held entitled to assert third-party beneficiary status regarding snow-removal contracts between his employer and the defendants).