

STATE OF MICHIGAN
COURT OF APPEALS

LAURA CORBIN and FAITH CORBIN,

Plaintiffs-Appellants,

v

NORM SMITH, WAYNE SHEPHARD, ROBERT
STEWART and JOHN METHNER,

Defendants-Appellees.

UNPUBLISHED

April 3, 1998

No. 200414

Kalamazoo Circuit Court

LC No. 95-002458

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal from an order granting defendants' motions for summary disposition regarding plaintiffs' claims for gross negligence, fraud and third-party beneficiary contract rights. We affirm.

In late 1992, plaintiffs purchased a home from Thomas Escamilla. Defendants are inspectors for the City of Portage. Escamilla asked defendants to perform plumbing, electrical, mechanical and structural inspections on the home. The agreement between Escamilla and defendants was oral. In a letter dated October 15, 1992 and signed by all of the defendants, defendants stated that the house had been visually inspected and that the plumbing, mechanical and electrical systems met code requirements of the City of Portage. Defendants also stated that the structure of the house was in good condition. After moving into the house, plaintiffs discovered termite damage to the windows; that all drains, except for the toilet, drained onto the dirt floor in the crawl space; foundation damage; that the furnace cold air vent did not function properly; and water damage to the kitchen floor. Plaintiffs filed a complaint alleging fraud and gross negligence against Escamilla, Smith, Methner, Shephard and Stewart based on the inspections performed by defendants. Plaintiffs also alleged breach of contract against Escamilla, Smith, Methner, Shephard, Stewart and Fremont Insurance Company (Fremont denied a claim made by plaintiffs under a homeowner's insurance policy issued by Fremont). The trial court granted defendants Smith, Methner, Stewart and Shephard's motions for summary disposition. This matter was dismissed as to Fremont Insurance Company upon stipulation by the parties. A judgment of \$18,500 was entered against Escamilla.

I.

Plaintiffs first claim that the trial court erred in granting defendants' motions for summary disposition regarding plaintiffs' gross negligence claim where plaintiffs presented evidence of a special relationship between defendants and Escamilla. The trial court granted defendants' motions pursuant to MCR 2.116(C)(7) and (8). Defendants' motion should be denied unless no factual development can provide a basis for recovery. *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 449; 487 NW2d 799 (1992).

An essential element of a negligence claim is the existence of a duty owed by the defendant to the plaintiff. *Smith v Kowalski*, 223 Mich App 610, 613; 567 NW2d 463 (1997). Whether a duty exists is a question of law for the court. *Id.* Our Supreme Court recently addressed the public duty doctrine in *White v Beasley*, 453 Mich 308; 552 NW2d 1 (1996). The public-duty doctrine provides:

[t]hat if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. [*Id.* at 316.]

The public-duty doctrine applies to building inspectors, *Jones v Wilcox*, 190 Mich App 564, 569; 476 NW2d 473 (1991), and also to claims of gross negligence, *Markis v Grosse Pointe Park*, 180 Mich App 545, 558-559; 448 NW2d 352 (1989).

The special-relationship exception to the public-duty doctrine exposes a government employee to liability for the employee's actions whenever a court finds that the government employee has a special-relationship with the plaintiff. *Smith, supra* at 614. At a minimum, the existence of a special relationship requires some contact between the government agency or official involved and the victim, and reliance by the victim upon the promises or actions of the government agency or official. *Gazette v Pontiac*, 212 Mich App 162, 170-171; 536 NW2d 854 (1995), *Gazette v Pontiac (On Remand)*, 221 Mich App 579; 561 NW2d 879 (1997). In *Jones, supra* at 569, we held that the inspection of buildings for code violations is a duty owed to the public at large and not to individuals. Therefore, unless plaintiffs had a relationship with defendants which was different in kind from defendants' relationship with all home buyers, a special relationship does not exist imposing on defendants a duty to plaintiffs. *Gazette, supra* at 170.

Plaintiffs contend that a special relationship exists between plaintiffs and defendants because defendants performed the inspections as a special favor to Escamilla and plaintiffs outside of their normal code inspection duties in order to facilitate a loan from NBD to plaintiffs. Plaintiffs also argue that because they were "foreseeable plaintiffs," defendants are liable for their grossly negligent acts. However, the record is devoid of any support for such allegations.

In a letter dated October 15, 1992, defendants certified to Escamilla that the house had been visually inspected and met "City of Portage code requirements." The parties do not dispute that defendants are employed as inspectors for the City of Portage or that defendants inspected the house at Escamilla's request. Plaintiffs have provided no evidence that defendants' inspection of Escamilla's house was done as a "special favor." Neither have plaintiffs presented any evidence that the relationship between plaintiffs and defendants was different in kind from defendants' relationship with any other home buyer. Also, the public-duty doctrine does apply to claims of gross negligence, and no exception to the doctrine is made for "foreseeable plaintiffs."

Because plaintiffs have failed to establish the existence of a special relationship between defendants and plaintiffs, defendants owe no duty to plaintiffs pursuant to the public-duty doctrine and no factual development can provide a basis for recovery. *Harrison, supra*, 194 Mich App 449. Therefore, the trial court properly granted defendants' motions for summary disposition based on MCR 2.116(7) and (8).

II.

Next, plaintiffs contend that the trial court erred in granting defendants' motions for summary disposition regarding plaintiffs' fraud claim where plaintiffs had established each of the required elements of fraud. Plaintiffs allege that defendants misrepresented in their letters to Escamilla on September 15, 1992 and October 15, 1992 that the structure of the house was in good condition, and that plaintiffs relied on such misrepresentations when deciding to purchase Escamilla's home. The trial court granted defendants' motions pursuant to MCR 2.116(C)(8).

To show fraud or misrepresentation, a plaintiff must establish the following elements:

(1) the defendant made a material misrepresentation; (2) it was false; (3) when it was made, the defendant either knew it was false or made it recklessly without knowledge of its truth or falsity; (4) the defendant made it with the intent that the plaintiff would act upon it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered damage. [*Int'l Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 447; 543 NW2d 25 (1995).]

Plaintiffs have failed to establish the required elements to support their claim of fraud. "An allegation of fraud based on misrepresentations made to a third party does not constitute a valid fraud claim." *Id.* In their complaint, plaintiffs allege that defendants specifically told plaintiffs "that the only termite damage was to the garage and that the house did not have plumbing, electrical, mechanical or structural problems" and that such statements were material misrepresentations upon which defendants intended plaintiffs to rely in obtaining a loan. However, plaintiffs have provided no evidence that such statements were made directly to plaintiffs, and, in fact, on appeal state that it is the October 15, 1992 and September 15, 1992 letters from defendants to Escamilla concerning the soundness of the house which were relied on by plaintiffs. Therefore, because plaintiffs' fraud claim is based on alleged misrepresentations made to a third party (Escamilla), plaintiffs have failed to state a valid fraud claim and summary disposition was properly granted.

III.

Finally, plaintiffs argue that the trial court erred in granting defendants' motions for summary disposition regarding plaintiffs' claim that they are third-party beneficiaries to the agreement between Escamilla and defendants, where the inspections were performed for the benefit of plaintiffs.

MCL 600.1405; MSA 27A.1405 provides in relevant part as follows:

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 had undertaken to give or to do or refrain from doing something directly to or for said person.

When determining whether the parties to a contract intended to make a third person a third-party beneficiary, a court should examine the contract using an objective standard. *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 427; 543 NW2d 31 (1995). "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." *Id.* at 428 (citations omitted). As noted above, no written contract between defendants and Escamilla exists. Plaintiffs have presented no evidence that Escamilla asked defendants to inspect his home for the benefit of plaintiffs or any other third party. Although plaintiffs argue that Escamilla had no use for the inspection himself, but rather requested the inspection to facilitate the sale of the home, plaintiffs have failed to establish an "express promise" by defendants to act for the benefit of the purchasers of Escamilla's home. Therefore, plaintiffs cannot claim an action for breach of the contract between Escamilla and defendants. *Id.* The trial court properly granted defendants' motion for summary disposition regarding plaintiffs' third-party-beneficiary claim.

Affirmed.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Michael R. Smolenski