STATE OF MICHIGAN

COURT OF APPEALS

ELAINE POOLE,

Plaintiff-Appellant,

v

MIDVEST L.L.C., JARVIS PAINTING, INC., d/b/a JARVIS CONSTRUCTION, and JARVIS CARPET CLEANING,

Defendants,

and

The MARTIN W. STAGNER and LINDA L. STAGNER REVOCABLE LIVING TRUST, LINDA L. STAGNER, and MARTIN W. STAGNER,

Defendants-Appellees.

UNPUBLISHED
September 19, 2006

No. 269129
Macomb Circuit Court
LC No. 04-000035-NI

Before: Murray, P.J., and Smolenski and Servitto, JJ.

MURRAY, P.J. (*concurring in part/dissenting in part*).

I concur in the majority's decision to affirm the trial court's order dismissing plaintiff's claims based on negligence, the Michigan Consumer Protection Act (MCPA) and the Jarvis contract as to each defendant, as well as plaintiff's remaining claims as applied to individual defendants Martin W. Stagner and Linda L. Stagner. However, I disagree with the conclusion that the trial court erred when it granted summary disposition in favor of defendant Stagner Revocable Living Trust (Stagner Trust) with regard to plaintiff's fraudulent misrepresentation, innocent misrepresentation and silent fraud claims. Accordingly, I would affirm *in toto* the trial court's disposition of this case.

As the majority notes, a promise of future conduct, along with actions in furtherance of that promise, can constitute a representation that is capable of supporting a plaintiff's fraud claims. See *McDonald v Smith*, 139 Mich 211, 223; 102 NW 668 (1905). The majority then concludes that, by promising that the house would be restored to its prior condition and subsequently hiring Jarvis Painting, Inc, doing business as Jarvis Construction, Jarvis Carpet Cleaning (Jarvis) to perform repairs, William T. Monaghan, as the agent for the Stagner Trust,

implied that the work performed did actually restore the home to its prior condition. It further concludes that, because it appears from the invoices that only temporary repairs were authorized and performed, a reasonable jury could find that Monaghan deliberately caused plaintiff to believe that the plumbing had been repaired although knowing that it had not been correctly repaired.

The following timeline based on the record is relevant to determining whether a genuine issue of material fact exists to support plaintiff's fraud claims.[1]

(1) On December 2, 2000, the purchase agreement for the home was executed.

(2) Sometime in December 2000, after the agreement was signed, plaintiff's agent, Cindy Barach, found water damage in the home.

(3) On December 26, 2000, Monaghan learned of the water damage.

(4) On December 27, 2000, Monaghan hired Jarvis to make the necessary repairs.

(5) On December 27, 2000, Jarvis performed repairs, during which plaintiff viewed the progress of the repair work.

(6) On January 4, 2001, Barach walked through the home and noticed some other defects, which Monaghan agreed to repair in an addendum signed at closing.

(7) On January 4, 2001, the closing occurred.

(8) On January 17, 2001, and thereafter, plaintiff noticed additional problems allegedly relating to the plumbing.

A review of the record reveals that plaintiff offered no evidence that the statement that the home would be restored to its prior condition was false or that it was known to be false at the time it was made. See *M & D, Inc v McConkey (M & D II)*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (citation omitted) (holding that actionable fraud must include proof that "when the defendant made the representation, the defendant knew that it was false, or made it recklessly,

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[1]This Court cannot rely on plaintiff's complaint or her affidavit for facts relating to the alleged assurance that forms the basis of plaintiff's fraud claims. In particular, plaintiff's complaint fails to allege fraud with the specificity required by MCR 2.112(B)(1), as the complaint does not contain a single statement attributable to defendants to support the fraud claims. Furthermore, plaintiff improperly cites to her affidavit as support for the assertion that Monaghan misrepresented the condition of the home. Plaintiff's averment that *her agent* was assured that the home would be restored to its prior condition is inadmissible hearsay, and therefore, cannot be used as evidence in opposing defendant's motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999) (holding that the reviewing court evaluating a motion for summary disposition under MCR 2.116(C)(10) should only consider the substantively admissible evidence offered in opposition to the motion).

without knowledge of its truth as a positive assertion."). Moreover, defendants submitted deposition testimony and documentary evidence showing that Monaghan, upon learning of the water damage in the home, contracted with Jarvis to "dry out the house and *make necessary repairs*," as well as to provide "painting and plaster work, and insulation of pipes." (Emphasis added.) Although the language of the contract authorizes Jarvis to perform "temporary repairs," it also states that Jarvis will restore the damage "to a condition equivalent to that which existed prior to the date of loss." Thus, the only admissible evidence submitted to the trial court showed that Monaghan's actions conformed to the representation made. Therefore, there is no evidence that Monaghan had knowledge that the plumbing had not been properly repaired.

Furthermore, as the majority notes, plaintiff was actually aware of the water damage and problem with the pipes before the closing, and plaintiff was aware of the repairs being done to the water damaged area. Specifically, the record indicates that plaintiff "came to view the progress of the repair work and any request by [her] was honored." In addition, her agent asserted that she subsequently walked through the home shortly after the work was completed, and did not find any damage that was not specifically addressed in the addendum. Thus, plaintiff could not have reasonably relied on the earlier disclosure made pursuant to the Seller Disclosure Act to support her fraud claims, and plaintiff is precluded from relying on the later representation by Monaghan's agent to support her fraud claims. See *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992) ("there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.").

Accordingly, because the contract contained an "as is" clause,[2] the risk of loss shifted to the buyer unless there were fraudulent representations. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). Because plaintiff failed to demonstrate that defendants induced her to purchase the home through fraudulent representation, defendants cannot be held liable for the condition of the home. Accordingly, I would affirm the trial court's order granting summary disposition in favor of the Stagner Trust with regard to plaintiff's fraud claims.

/s/ Christopher M. Murray

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[2] The purchase agreement not only contains an "as is" provision but it also has a specific disclaimer of any representations that "the foundation, foundation walls and basement are watertight and free of any leakage or seepage . . . ."