

STATE OF MICHIGAN
COURT OF APPEALS

GORDON TABENSKE and WENDY
TABENSKE,

Plaintiffs/Counter Defendants-
Appellants,

v

KENDILLON CONSTRUCTION COMPANY,

Defendant/Counter Plaintiff/Third
Party Plaintiff/Cross Defendant,

and

RICHARD A. PETERSEN, JEFFREY R. JAMES,
JERRY P. HAITAIAN, ROB N WOOD HOME
CARE, INC., and SIGNATURE INTERIOR &
DESIGN CONTRACTORS,

Defendants,

and

J.R. JAMES DEVELOPMENT CORPORATION,

Defendant/Cross Plaintiff-Appellee,

and

J.S. TRUDEAU CONCRETE FORMING, INC.,
and NICK KRUSZEWSKI,

Third Party Defendants.

UNPUBLISHED
October 7, 2008

No. 276442
Oakland Circuit Court
LC No. 2003-049750-CK

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right the summary dismissal of their second amended complaint filed against J.R. James Development Corporation and its president Jeffrey R. James. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

This lawsuit arises from the fact that the luxury home that plaintiffs had built by Kendillon Construction Company was built on unsuitable bearing soils which caused it to sink, resulting in significant structural damage necessitating extensive repairs. Plaintiffs had purchased the land that the home was situated on from James Development. After plaintiffs' requests to repair the structural defects were ignored by Kendillon Construction and James Development, this lawsuit was filed.

Plaintiffs' first complaint only alleged claims against Kendillon Construction and its sole shareholder, Richard Petersen. Plaintiffs' first amended complaint added claims against James Development and Jeffrey James. On January 29, 2004, plaintiffs' second amended complaint was filed and included the following counts against Jeffrey James and James Development:¹ (1) Count I, Failure to Disclose Material, Latent Conditions (referencing the unsuitable soil conditions); (2) Count II, Fraudulent Misrepresentation/Silent Fraud (referencing the failure to disclose the unsuitable soil conditions); (3) Count III, Civil Conspiracy to Commit Fraud (alleging that Kendillon, Petersen, James Development and Jeffrey James conspired to withhold the known material adverse soil conditions); (4) Count XIV, Negligence—James Development (alleging the failure to properly develop and prepare the build site), and (5) Count XV, Negligence—Jeffrey James (alleging the failure to properly develop and prepare the build site). Plaintiffs' subsequent attempt to file a third amended complaint was denied.

On June 21, 2004, James Development and Jeffrey James (defendants) filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants primarily argued that no representations were made about the condition of the vacant land sold to plaintiffs. In fact, any warranties or representations about the condition of the property were specifically and expressly denied in the sales contract through an "as is" clause. Further, plaintiffs had the right to inspect and perform tests on the property—tests that would have revealed the defective condition. Therefore, defendants argued, plaintiffs' fraud claims must fail. Without the fraud claims, the civil conspiracy to commit fraud claim must fail as well. And, because neither defendant owed plaintiffs a duty that was separate and distinct from the contractual agreement, the negligence claims must also be dismissed.

On July 21, 2004, plaintiffs responded to defendants' motion for summary disposition. Plaintiffs first denied that they pleaded breach of warranty or fraud in the inducement claims, as defendants seemed to imply. Then plaintiffs argued that defendants had soil boring test results in their possession—namely reports authored by CTI Geotechnical, Environmental & Construction Engineers on March 19, 1998, and February 14, 2000—which indicated that the soil conditions on Lot 7 were not suitable for construction. Defendants failed to provide those test results to

¹ Although the second amended complaint included claims against other defendants, this appeal only pertains to Jeffrey James and James Development; thus, only those claims are considered here.

plaintiffs, although they were requested. Defendants also knew the soils were unsuitable for building because remediation of unsuitable soils was required with regard to Lot 5 before construction could begin on that property. Yet, defendants failed to disclose the unsuitable soil conditions. Plaintiffs argued that, because the “as is” provision only allocated the risk of loss from conditions unknown to the parties, defendants had an affirmative duty to disclose this information and the failure to do so constituted silent fraud.

Further, plaintiffs argued, because of the joint venture relationship that existed between James Development and Kendillon Construction, the misrepresentation Petersen made to plaintiffs about the lot conditions should be attributed to defendants. Specifically, before plaintiffs purchased the lot they asked Petersen about the results of the soil boring tests and Petersen responded that “they didn’t show anything significant.” Thus, plaintiffs argued, defendants were liable for common-law fraud because of this misrepresentation made by defendants’ partner in the joint venture. Accordingly, plaintiffs argued, they established that a genuine issue of material fact existed as to plaintiffs’ fraud claims and defendants’ motion to dismiss their fraud and civil conspiracy claims should be denied.

With respect to their negligence counts against these defendants, plaintiffs argued that, as the developers of this residential property, defendants were liable for failing “to exercise the degree of skill and care ordinarily exercised by other Michigan developers when developing residential lots adjacent to open and notorious registered wetlands.” Plaintiffs, who were not experienced in these matters, reasonably relied on defendants’ skill and expertise in the development of this subdivision, as well as their lot. Accordingly, plaintiffs argued that defendants’ motion for summary disposition should be denied in total.

On May 6, 2005, the trial court issued its opinion and order granting summary dismissal with respect to all claims against James Development and Jeffrey James, without oral argument. First, the court noted that (1) the purchase and sale agreement between plaintiffs and James Development contained an “as is” provision, (2) the property’s defective condition was capable of being discovered by plaintiffs upon inspection, and (3) the sale agreement indicated that it did not “represent or warrant in any way, express or implied, the soil or subsurface conditions for the” property. Therefore, the court dismissed plaintiffs’ silent fraud claim—no misrepresentation was made. And because there was no tort claim, there could be no civil conspiracy.

The court then turned to the negligence claims and noted that for such claims to be viable, there must be a relationship outside the existence of the contract. Here, the court held, “there is nothing presented to indicate Defendants had a duty other than that contained in the contract between the parties.” The court also addressed defendants’ argument that the doctrine of caveat emptor bars any liability against defendant. Because plaintiffs failed to address the argument, the court held that summary disposition was appropriate. Further, though, the court concluded that summary disposition was proper based on the merits. Citing *Christy v Glass*, 415 Mich 684; 329 NW2d 748 (1982), the court held that the seller of real estate shifts all responsibility for the land’s condition to the purchaser. In a footnote the court addressed plaintiffs’ “partnership/joint venture” argument, holding that “there is nothing produced to persuade the Court that such a joint venture actually existed.” Thereafter, plaintiffs’ motion for reconsideration was denied, as were their motions for leave to file a fourth amended complaint

and for relief from the order dismissing their claims against James Development and Jeffrey James.² This appeal followed.

On appeal, plaintiffs first appear to argue that their second amended complaint included a breach of contract claim against James Development and Jeffrey James that should not have been dismissed.³ Plaintiffs did not argue that any such claim was asserted in their brief in opposition to defendants' motion for summary disposition. The trial court did not consider and decide the issue whether plaintiffs asserted a breach of contract claim. Therefore, this issue is not preserved for our review. See *Polkton Charter Twp v Pellegrum*, 265 Mich App 88, 95; 693 NW2d 170 (2005); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, because this is an issue of law for which all of the necessary facts have been presented, we will consider this issue. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

Plaintiffs argue that Count I sets forth a breach of contract claim. Count I is titled "Failure to Disclose Material, Latent Conditions." Because a party's label is not dispositive of the cause of action, we turn to the complaint to determine the true gravamen of the claim. See *Klein v Kik*, 264 Mich App 682, 686; 692 NW2d 854 (2005). In pertinent part, Count I of plaintiffs' second amended complaint contains the following allegations:

18. The relevant "Contract Documents", as between Kendillon and Development Company, create a joint venture between Kendillon and Development Company to sell lots and construct homes in Oak Hills Estate, Farmington Hills, MI.
19. Petersen is the primary agent of Kendillon.
20. James is the primary agent of Development Company.
21. During the signing [sic] both the Purchase and Sale Agreement, dated November 29, 2000, and the Building Contract, dated August 28, 2000, Kendillon, Petersen, Development Company and James had an affirmative duty to disclose to Plaintiffs, at those contract execution conferences, known conditions which might materially affect Plaintiffs' [sic] intended use and enjoyment of the Residence.
22. Petersen & James are personally charged with the actual knowledge that certain soil conditions could materially affect the structural integrity of any residential structure which might be built in the Subdivision within which the Residence was constructed.

² Although in their claim of appeal plaintiffs appear to state that they are appealing the trial court's denial of their motions to file third and fourth amended complaints, no such issues were identified or presented. See MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Because plaintiffs' motions to file third and fourth amended complaints were, in fact, denied, plaintiffs' repeated references to the claims made in those documents serve no useful purpose and have not been considered.

³ In their argument, plaintiffs refer us to their original complaint and first amended complaint but those complaints were superseded by the second amended complaint. See MCR 2.118(A)(4).

23. Specifically, prior to the signing both the Purchase and Sale Agreement dated November 29, 2000, and the Building Contract, dated August 28, 2000, Kendillon, Development Company, Petersen & James had direct personal knowledge of certain soil conditions existing within the Subdivision and within the lot upon which the Residence was to be constructed, which could and would materially affect the structural integrity of the proposed residential structure to be built on Lot 7 Oak Hills Estates, Farmington Hills, MI (the Residence), viz: [the geotechnical reports authored by CTI are referenced and the findings are detailed.]

* * *

24. Specifically, during the signing of both the Purchase and Sale Agreement, dated November 29, 2000, and the Building Contract, dated August 28, 2000, Kendillon, Petersen, Development Company and James failed to disclose to Plaintiffs, at those contract execution conferences, the above-mentioned known conditions which, in fact, materially affected Plaintiffs' [sic] intended use and enjoyment of the Residence.

25. As a direct and proximate result of Kendillon, Petersen, Development Company and James' failure to disclose to Plaintiffs, at those contract execution conferences, the above-mentioned known material conditions, Plaintiffs have suffered, and continue to suffer, substantial structural damage to the Residence.

26. Said substantial structural damage to the Residence, is a direct result of constructing the Residence upon soil substrates totally unsuitable to sustain and support the weight of the Residence.

These allegations do not set forth the elements of a breach of contract cause of action, which include that a contract existed between the parties and that a breach of one or more of the contractual terms occurred. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). Instead plaintiffs averred that defendants had a duty to disclose the allegedly defective land conditions *during* the signing of the contracts at "those contract execution conferences" and failed to do so. Plaintiffs failed to aver as to how that purported duty to disclose arose, but simply stated that a duty existed. From the terminology used, however, it appears as though plaintiffs were attempting to plead a cause of action sounding in fraud. In their motion for summary disposition, defendants seemed to interpret the allegations as an attempt to plead breach of warranty or fraud in the inducement claims. But, in their responsive brief, plaintiffs specifically denied having pleaded those claims.⁴ In any case, whatever cause of action plaintiffs were attempting to plead in Count I, a breach of contract cause of action was not pleaded. Accordingly, this issue is without merit and the trial court properly dismissed this claim.

⁴ On appeal it appears that plaintiffs are attempting to argue that they alleged and proved a breach of warranty claim. In their brief in opposition to defendants' motion for summary disposition, plaintiffs specifically stated: "Plaintiffs have not pleaded any allegations against James for Breach of Warranty." Therefore, we reject this argument on appeal.

Next, plaintiffs argue that their fraud claims against defendants should not have been summarily dismissed.⁵ After review de novo of the trial court's decision on this motion for summary disposition, we agree. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if, after considering all of the evidence, affidavits, pleadings, and admissions in a light most favorable to the nonmoving party, it is determined that no factual dispute exists. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002).

We first consider plaintiffs' silent fraud claim. This claim was premised on the purported fact that defendants failed to provide the complete soil boring test information, as referenced in the purchase and sale agreement pertaining to the property, after plaintiffs had requested such information. In fact, defendants failed to provide the soil boring test information that revealed that the soil conditions were unsuitable for building. Plaintiffs claimed that without the withheld information, they were left with the false impression that the property soils were suitable, thereby perpetrating a fraud on them. Plaintiffs argued that the "as is" provision in the agreement did not foreclose liability because that provision only allocated the risk of loss from conditions unknown to the parties, not where the seller fails to disclose known defects. The trial court disagreed and dismissed plaintiffs' silent fraud claim. Plaintiffs' motion for reconsideration was denied.

"Silent fraud" is also known as fraud by nondisclosure or fraudulent concealment. *M & D, Inc v McConkey*, 231 Mich App 22, 28; 585 NW2d 33 (1998). An often quoted explanation of silent fraud is as follows:

A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud. Thus, the suppression of a material fact, which a party is duty-bound to disclose, is equivalent to a false representation and will support an action in fraud. [*Lorenzo v Noel*, 206 Mich App 682, 684-685; 522 NW2d 724 (1994) (citations omitted).]

As this Court explained in *McConkey, supra*, "the touchstone of liability for misdirection or 'silent fraud' is that *some* form of representation has been made and that it was or proved to be false." *Id.* at 30. *McConkey* continued that "[o]ur review of Michigan Supreme Court precedent regarding this issue reveals that, in every case, the fraud by nondisclosure was based upon statements by the vendor that were made in response to a specific inquiry by the purchaser, which statements were in some way incomplete or misleading." *Id.* at 31 (citations omitted).

Here, plaintiffs' request for the soil boring test information before the sale was consummated could reasonably be construed as a specific inquiry as to the suitability of the soil conditions for building. The primary purpose of soil boring tests is to determine the capability of the soil to support proposed improvements. Defendants allegedly responded with only some of the soil boring test information and, unbeknownst to plaintiffs, withheld the test information that

⁵ Plaintiffs also appear to argue that their "negligent misrepresentation" and "bad faith promise" claims should not have been dismissed. Again, review of plaintiffs' second amended complaint reveals that no such claims were ever asserted. They were also not raised, considered, or decided in the trial court. We decline to address any such arguments here.

revealed that the soil was unsuitable for building. The act of providing the partial soil boring test information in response to plaintiffs' inquiry could be construed as an incomplete or misleading "statement by the vendor" as to the suitability of the soil. By failing to provide the entire report, defendants suppressed material facts about the soil conditions and failed to give the true facts while ostensibly doing so. See *Groening v Opsata*, 323 Mich 73, 83-84; 34 NW2d 560 (1948). Although the purchase and sale agreement contained a provision that James Development was not warranting the soil test results, this fraud claim is not premised on the accuracy of the soil test results. And, as they have argued, as a consequence of the incomplete and misleading soil boring test information provided, plaintiffs were left with the distinct impression that the property contained suitable soils for building. See *McConkey*, *supra* at 31-32.

Contrary to the trial court's holding, the "as is" clause in the purchase and sale agreement does not preclude a successful fraud claim. As this Court explained in *Lorenzo*, *supra*:

"As is" clauses allocate the risk of loss arising from conditions unknown to the parties. Thus, plaintiff's mutual mistake claim is therefore barred. "As is" clauses also transfer the risk of loss where the defect should have reasonably been discovered upon inspection, but was not. They do not, however, transfer the risk of loss where "a seller makes fraudulent representations before a purchaser signs a binding agreement." [*Id.* at 687 (citations omitted).]

In this case plaintiffs have consistently claimed that defendants knew about the unsuitable soil conditions. The evidence of record supports that claim, and includes that the subdivision was platted in the immediate vicinity of registered wet lands, the concealed soil boring test information revealed that at least some of the subdivision soils were not suitable for building, and other lots in their natural state in that subdivision were not suitable to build on either. In other words, there was no mutual mistake—defendants knew about the unsuitable soil conditions. And, plaintiffs have consistently claimed that the failure to provide the critical soil boring tests in response to their request constituted fraud. Because of the fraudulent actions of James Development and Jeffrey James, plaintiffs were led to believe that the soil conditions were suitable and, thus, no additional testing of the site was necessary. Again, we conclude that a genuine issue of material fact exists as to whether silent fraud was committed in this case; thus, summary disposition on the ground that an "as is" clause was in the contract was improper.

We next consider plaintiffs' common-law fraud claim. Plaintiffs have argued that James Development and Kendillon Construction marketed and sold the lots in the subdivision pursuant to a joint venture agreement. Plaintiffs claimed that, prior to their purchasing the lot, Petersen, the Kendillon representative, specifically stated that the soil boring tests conducted on lots in the subdivision showed nothing of significance. Plaintiffs argued that James Development was bound by that statement which, by virtue of the joint venture agreement, should be attributed to it.

The elements to establish a common-law fraud claim generally include: (1) the defendant made a material misrepresentation, (2) that was false, (3) defendant knew it was false or made it recklessly, without knowledge of its truth, (4) the defendant made the representation intending that plaintiff act on it, (5) the plaintiff did act in reliance on it, and (6) the plaintiff suffered damages. *McConkey*, *supra* at 27. Here, plaintiffs contend that the false representation in support of their claim was made by Petersen. In particular, plaintiff Gordon Tabenske testified

that when he asked Petersen about the results of the soil boring tests that were referred to in the purchase and sale agreement for the property, Petersen responded that “they didn’t show anything significant” Plaintiffs have consistently pleaded and argued that a joint venture agreement existed between Kendillon Construction and James Development. A copy of the agreement was appended to many submissions to the trial court and was repeatedly referenced throughout the lower court proceeding.⁶ Plaintiffs have also argued that there was other indicia of a joint venture relationship. However, the trial court did not thoughtfully consider and decide the issue whether a joint venture relationship existed between Kendillon Construction and James Development. The determination of whether a joint venture relationship existed impacts the viability of plaintiffs’ common-law fraud claim against James Development. Therefore, we remand this matter to the trial court for consideration. We express no opinion as to its merit. Further, in light of our conclusions regarding plaintiffs’ fraud claims, we reverse the dismissal of plaintiffs’ civil conspiracy claim.

Next, plaintiffs argue that their negligence claims against Jeffrey James and James Development should not have been summarily dismissed because, as real estate developers, they owed plaintiffs duties that were separate and distinct from those arising from the purchase and sale agreement. Because this issue was not addressed below, we reverse the dismissal of this claim.

In their second amended complaint, plaintiffs averred that they relied on each defendants’ “developmental expertise as a licensed developer to construct and deliver to plaintiffs the Property free of workmanship defects with workmanship typical of developmental industry standards that are expected by contracting parties in a residence of this size and value.” Plaintiffs have consistently argued that defendants breached their duties as real estate developers, particularly by failing to properly prepare or plat the build site consistent with defendants’ subdivision requirements and the fact that the property was situated in the immediate vicinity of registered wetlands.

In their motion for summary disposition, defendants argued that the negligence claim must be dismissed because they did not owe plaintiffs a duty that was separate and distinct from their purchase and sale agreement pertaining to the sale of the lot. Defendants did not address plaintiffs’ claim that, as real estate developers—not just purveyors of land—defendants were negligent. In dismissing the negligence claims, the trial court held “there is nothing presented to indicate Defendants had a duty other than that contained in the contract between the parties.” But the record evidence indicates that defendants were the developers of the subdivision at issue. Plaintiffs have claimed that they were “licensed.” While we agree with the trial court that the duty arising from the sale of the property is governed by the caveat emptor doctrine, plaintiffs have argued that their relationship with defendants as real estate developers gave rise to a separate and distinct duty. See *Christy, supra* at 693-694. This claim has not been considered; therefore, we reverse the dismissal of the negligence claims against defendants but express no opinion as to their merit.

⁶ The agreement is titled “amended agreement between J.R. James Development Corporation and Kendillon Construction Co. regarding Oak Hills Estates Subdivision” and it is dated February 25, 2000.

Finally, plaintiffs argue that their equitable claims premised on promissory estoppel and restitution theories were improperly dismissed. However, we have reviewed plaintiffs' second amended complaint and conclude that no such claims were asserted. The trial court, in fact, did not consider and decide these issues because they were not raised. Accordingly, we decline to consider these issues.

In summary, we reverse the trial court's summary dismissal of plaintiffs' fraud, civil conspiracy to commit fraud, and negligence claims against Jeffrey James and James Development. We affirm the dismissal of Count I of plaintiffs' second amended complaint titled "Failure to Disclose Material, Latent Conditions."

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

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly