

STATE OF MICHIGAN
COURT OF APPEALS

LOUIS GEORGE and SHARON GEORGE,

Plaintiffs-Appellants,

v

ROBERT HUMPERT,

Defendant-Appellee.

UNPUBLISHED

August 4, 2005

No. 253344

Arenac Circuit Court

LC No. 02-008217-CH

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs Louis and Sharon George appeal as of right the trial court's order granting defendant Robert Humpert's motion for summary disposition. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

The Georges bought a home from Humpert. A disclosure statement Humpert completed indicated that there was no evidence of water damage in the crawlspace beneath the home. After the Georges occupied the home, they discovered water damage in the crawlspace and dampness throughout the home. Eventually, the Georges were required to vacate the home due to the presence of black mold. The Georges lost possession of the home via a mortgage foreclosure.

The Georges filed suit alleging fraudulent/intentional misrepresentation, negligent misrepresentation, fraudulent concealment/failure to disclose, and rescission. Humpert moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), asserting that the Georges could not make out a prima facie case of misrepresentation because they admitted they did not speak with him or review the disclosure statement before purchasing the home, and because the sales contract contained an "as is" clause. In response, the Georges argued that a question of fact existed as to whether Humpert and/or his agent knew that the home had water problems. Sharon George submitted an affidavit in which she stated that she asked Humpert's agent, Gary Bisons, if the home had water problems, and that he replied, "not to my knowledge." Sharon George

also stated that neighbors informed her that Bisons had told them that the home had water problems. The trial court granted Humpert's motion for summary disposition.¹

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's decision on a motion for summary disposition.²

B. Legal Standards

A claim for fraudulent/intentional misrepresentation requires a showing that: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damages.³

A claim of negligent misrepresentation requires proof that a party justifiably relied to his detriment on information subject to independent verification prepared without reasonable care by one who owed the relying party a duty of care.⁴

To establish a claim of silent fraud, there must be circumstances which establish a legal duty to make a disclosure. A mere nondisclosure is insufficient. A legal duty to disclose arises from circumstances in which the plaintiff inquires regarding something, to which the defendant replies incompletely with answers that are truthful but omit material information.⁵

A real estate agent, as an agent for the seller, does not have a general duty to disclose to purchasers material defects involving the property.⁶ A real estate agent remains liable for

¹ During the hearing on Humpert's motion, the Georges' counsel acknowledged that the Georges had not seen Humpert's disclosure statement prior to signing the contract, and that therefore, the representation allegedly made by Bisons was the only representation on which the Georges could rely. In addition, the Georges' counsel conceded that the claim for rescission was no longer viable.

² *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

³ *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004).

⁴ *Cleary Trust v Muzyl Trust*, 262 Mich App 485, 502; 686 NW2d 770 (2004).

⁵ *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000).

⁶ *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988).

common law fraud or misrepresentation based upon a material misrepresentation that is made with fraudulent intent.⁷

C. Applying The Standards

The Georges alleged that in response to their inquiry as to whether the home had water problems, Humpert's real estate agent, Bisons, replied "not to my knowledge." Bisons' statement to the Georges was not a positive assertion of past or existing fact, and thus was not an actionable misrepresentation.⁸

A party opposing a motion for summary disposition must establish the existence of a disputed fact with admissible evidence.⁹ Sharon George submitted an affidavit in which she stated that neighbors informed her and Louis George that Bisons told them that the home had water problems. However, the neighbors' statement to the Georges is hearsay,¹⁰ and would not constitute admissible evidence required to create a question of fact.¹¹ Moreover, the affidavit did not affirmatively show that Sharon George, if sworn as a witness, could testify competently to the facts stated in the affidavit.¹² Therefore, the trial court correctly granted Humpert's motion for summary disposition.¹³

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

⁷ *Price v Long Realty, Inc*, 199 Mich App 461, 470; 502 NW2d 337 (1993).

⁸ *Michaels v Amway Corp*, 206 Mich App 644, 652; 522 NW2d 703 (1994); *Bergen, supra*; *Cleary Trust, supra*; *Hord, supra*.

⁹ MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002).

¹⁰ MRE 801(c).

¹¹ MCR 2.116(G)(6); *Veenstra, supra*.

¹² MCR 2.119(B)(1)(c); *Regents of the Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 728; 650 NW2d 129 (2002).

¹³ If we conclude that the trial court reached the correct result, we will affirm that decision even if we do so under alternative reasoning. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).