

STATE OF MICHIGAN
COURT OF APPEALS

MARK C. NALEPKA and KIMBERLY P.
NALEPKA,

UNPUBLISHED
September 15, 2005

Plaintiffs/Counter-Defendants/
Appellants,

v

JAMES HNATIO and WALDA HNATIO,

No. 262000
Wayne Circuit Court
LC No. 03-340600-CK

Defendants/Counter-Plaintiffs/
Appellees.

WHITE, P.J., (*concurring in part, dissenting in part*).

I agree with the majority that the breach of contract and intentional infliction of emotional distress claims were properly dismissed. I also agree that the circuit court properly rejected rescission as a remedy.

Regarding plaintiffs' fraud and misrepresentation claims, I agree they were properly dismissed as to the electrical and sprinkler systems. However, I respectfully dissent because I conclude that plaintiffs presented documentary evidence sufficient to raise a genuine issue of fact regarding fraud and misrepresentation as to water leaks and toxic mold.

Plaintiffs presented sufficient evidence to raise a genuine issue of fact whether the Hnatio knew of the severe water intrusion, which led to the presence of toxic mold, and concealed that knowledge from plaintiffs. Plaintiffs submitted below the affidavit of the home inspector they hired to inspect the home before closing on it, Michael Mahurin, who stated that he was denied full access to certain parts of the home, most notably, the attic, by virtue of defendants' belongings blocking access and the attic having no pathways. Mahurin stated in his affidavit, "I was denied anything other than limited visual inspection of the attic due to a number of factors including, but not limited to, the storage of homeowner's personal belongings at the access point, piling of insulation material near the access point, loose hanging wires in the attic, and the absence of floor boards as a pathway." Mark Nalepka's affidavit stated that, in his presence "the home inspector sought to open the access door into the attic but stated that he could not gain access to the attic because insulation was piled high near the access point." Mahurin's affidavit also stated that "According to standards for certified home inspectors, entry is not to be made into an attic wherein [sic] the opinion of the inspector, the same cannot be performed safely and without risk of property damage." Defendants do not dispute that there were boxes throughout the attic and that there were no floor boards.

Notwithstanding that the circuit court was obliged to view the facts in a light most favorable to plaintiffs, and that plaintiffs presented the evidence cited above, the majority concludes that plaintiffs' evidence "does not support that the inspector was denied access by defendants," and that plaintiffs "did not rely on defendants, but, instead, they decided to have the property inspected." This reasoning ignores that plaintiffs and their inspector, Mahurin, relied on defendants' (false) disclosures on the sellers' disclosure form that there **were no roof leaks**. Plaintiff Mark Nalepka and Mahurin stated in their sworn affidavits that they relied on defendants' representation in the sellers' disclosure form that there were no roof leaks. Mahurin attested that his inspections are guided by what sellers represent in their disclosure form. He attested that he read and relied on defendants' disclosure statement representing a leak-free habitable home with a new roof:

4. The Sellers' Disclosure Statement did not reveal any roof leaks or any past water intrusion or water damage into the home.

5. The scope of my inspection and my recommendations to prospective purchasers depends in part on the disclosures made by the Seller.

6. Had the Seller advised that there was significant past water intrusion and that in the past, water had come up through the sub floor into the master bedroom, I would have recommended more extensive testing including, but not limited to, penetrating the wall for purposes of visual inspection and/or mold sampling.

* * *

9. I did not view a more thorough inspection of the attic to be called for based upon what was represented to be the new roof which appeared to be in good condition and the absence of disclosures regarding prior roof leaks.

10. Had I been made aware of prior roof leaks, I would have recommended a second inspection where access to the attic would be provided by the Seller.

11. In my opinion, it is often impossible based on a visual home inspection to discover conditions which are covered up by a Seller and/or which exist underneath carpeting, paint or in the interior of walls.

12. To perform an adequate home inspection and to make proper recommendations to a prospective Purchaser, a home inspector relies in part on the good faith of the Seller in making material disclosures.

I conclude that this evidence raised a genuine issue of fact whether plaintiffs' inspector was prevented from safely and adequately inspecting the home, and whether plaintiffs and plaintiffs' inspector relied on the sellers disclosure form's attestations that there had been no roof leaks. I disagree with the majority's conclusion that plaintiffs did not present evidence sufficient to raise an issue of fact whether they relied on defendants' (false) disclosures, as opposed to relying on their inspector alone.

Plaintiffs presented an affidavit of Dr. Mark Banner, a micro-biologist and scientist,¹ who also visited the home, in which he opined that evidence of years of water damage and mold would have been obvious to the Hnatos when they removed the carpeting in 2001. Dr. Banner's affidavit stated "It is my opinion that no homeowner who suffered a significant amount of water intrusion such that water leaking from the roof seeped up through flooring material in the master bedroom could reasonably have concluded that they had alleviated the problem by simply stopping the roof leak." Dr. Banner's affidavit also stated that in his opinion a reasonable homeowner would know that he had to assess and address damage from the water that had intruded into the home, particularly where the same would have been evident by the blackened flooring in the master bedroom.

Plaintiffs also presented affidavits below of next door neighbors of defendants, which stated that while defendants owned the home, defendant James Hnatio advised them that he woke up one morning to discover that the carpeting in his bedroom was soaked with water; that they observed shingles missing from the Hnatio roof, mentioned such to James Hnatio, and that months went by before the roof was addressed; that they observed bare wood showing on the Hnatio roof; and that they observed rotting stucco on one side of the Hnatio home, that James Hnatio borrowed their ladder and painted over the rotting stucco without doing anything to prepare the surface. The next door neighbors also attested that they observed a contractor placing siding on the Hnatio home in early 2003, the winter before it was placed on the market.

This documentary evidence raised an issue of fact whether defendants actively concealed or knowingly failed to disclose the roof leak and concomitant water damage.

Given the documentary evidence plaintiffs presented and that the circuit court was obligated to view the facts in a light most favorable to plaintiffs, I conclude that plaintiffs' silent fraud and misrepresentations claims were improperly dismissed.

The "as is" clause does not vitiate plaintiffs' claims of silent fraud and misrepresentation. In *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994), this Court noted:

"As is" clauses allocate the risk of loss arising from conditions unknown to the parties. . . . "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."** [Emphasis added.]

I would reverse the dismissal of plaintiffs' claims of silent fraud and misrepresentation pertaining to the roof leak, water damage and toxic mold.

/s/ Helene N. White

¹ Dr. Banner's curriculum vitae was before the circuit court.