

STATE OF MICHIGAN
COURT OF APPEALS

SAL-MAR BUILDING COMPANY,

Plaintiff-Appellant,

v

FORMSPEC, INC.,¹ SINGH OF QUAILCREST,
LLC, FENN & ASSOCIATES SURVEYING,
INC., MOCERI EXCAVATING COMPANY, and
R & R ENTRENCHING CORPORATION,

Defendants-Appellees.

UNPUBLISHED

June 14, 2007

No. 268003

Oakland Circuit Court

LC No. 2003-050878-CH

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

In this action involving claims for fraud and breach of contract, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant Singh of Quailcrest, LLC (defendant), pursuant to MCR 2.116(C)(10). We affirm.

This case involves lot 34 in the Quailcrest Subdivision in Rochester Hills, Michigan. Plaintiff, a home builder, acquired the property from defendant Singh, the developer of the subdivision, pursuant to an April 1998 option agreement. Plaintiff built a house on the property and sold it in May 2001. The house later developed cracks in the footings, foundation, and brick veneer, which were allegedly caused by the settlement of fill dirt. Plaintiff eventually repurchased the house and advised defendant Singh in January 2002 that there was an adverse soil condition on lot 34. Defendant Singh disclaimed any responsibility for the condition. Plaintiff thereafter brought this action alleging, inter alia, claims against defendant for breach of the option agreement and fraud for failure to disclose that a significant amount of fill dirt had been used on lot 34. The trial court granted defendant Singh's motion for summary disposition and dismissed both claims.

¹ After the claim of appeal was filed, Formspec, Inc. was dismissed as an appellee by stipulation of the parties.

We review the trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. The trial court must consider any pleadings, affidavits, depositions, admissions or other documentary evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. MCR 2.116(G)(2); *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

Plaintiff first argues that the trial court erred in finding that it was not entitled to avail itself of the remedies available under the option agreement once footings and a foundation were installed on the property. Plaintiff asserts that the agreement does not contain a deadline for invoking the remedies available under the agreement, or is at least ambiguous in this respect, thus creating a question of fact to be resolved by a jury.

The interpretation of contractual language is an issue of law that is reviewed de novo on appeal. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). Where a contract can be construed by its terms alone, it is the duty of the court to interpret it, but where its meaning is ambiguous or depends upon extrinsic information, the question of interpretation should be submitted to the jury. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). Contracts must be construed so as to give effect to every word or phrase as far as practicable. *Id.* at 467.

The option agreement specifically addressed responsibility for adverse soil conditions. Paragraph 6 of the agreement expressly provided that defendant Singh was making "no representations, covenants or warranties regarding suitability of the ground conditions, soil conditions, sub-soil conditions, and any other matters and conditions relating to the suitability of the lots for [plaintiff's] purposes, and [plaintiff's] exercise of any lot constitutes acceptance of the Lot 'as is.'" The agreement also provided, however:

Notwithstanding the foregoing, if [plaintiff] discovers an adverse soil condition on a Lot, not related to the topography of the Lot, preventing installation of normal footings and foundations, [plaintiff] may give Singh written notice within seven (7) days of discovery of such adverse soil condition, together with a description of the adverse soil condition. . . . If Singh agrees that an adverse condition exists without the need for soils engineers report, or if a report shows an adverse condition, and if the cost of correcting the condition exceeds Five Thousand and 00/100 (\$5,000.00) Dollars, [plaintiff] may cancel the exercise of the option on such Lot and Singh will remove it from this Option Agreement and give credit to Optionee for any option fees paid on such Lot. In such event, [plaintiff] shall restore the Lot to its pre-excavated condition. . . .

Thus, the unambiguous language of the agreement provided plaintiff with a limited remedy only if plaintiff "discover[ed] an adverse soil condition on a Lot, . . . preventing installation of normal footings and foundations." However, there was no evidence of a soil condition that prevented installation of normal footings and a foundation. On the contrary, it was undisputed that footings and a foundation were installed, and that the house was completed more

than six months before a problem with the soil was discovered. Under the clear language of the contract, the limited contract remedy for an adverse soil condition was not applicable and the trial court did not err in dismissing plaintiff's breach of contract claim.

Plaintiff next argues that the trial court improperly granted summary disposition for defendant on plaintiff's claim for fraud. Plaintiff does not allege that defendant Singh made any misrepresentation regarding the soil condition on lot 34. Rather, plaintiff alleges that defendant failed to disclose that a significant amount of fill dirt had been used on lot 34.

As the trial court observed, "mere nondisclosure is insufficient" to support an allegation of silent fraud. Instead, "[t]here must be circumstances that establish a legal duty to make a disclosure." *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412, 617 NW2d 543 (2000). "[A] legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Id.* Here, plaintiff did not present any evidence that defendant Singh made any representations regarding the soil conditions or that defendant failed to respond to inquiries or requests for information that would have given rise to a legal duty of disclosure.

Plaintiff also asserts that dismissal of this claim was premature because discovery was ongoing and might have revealed that defendant Singh made representations to, or failed to respond to inquiries by, plaintiff's predecessor Bravo Homes. Although summary disposition may be premature if discovery is incomplete, summary disposition is properly granted if further discovery does not stand a fair chance of uncovering additional factual support for a party's position. *Crider v Borg*, 109 Mich App 771, 772-773; 312 NW2d 156 (1981).

A claim for silent fraud requires proof that the defendant intended to induce the plaintiff to rely on its nondisclosure. *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995). Here, any evidence of defendant's statements or nondisclosures to Bravo Homes would not have been sufficient to establish reliance by plaintiff. Even if there were such evidence in this case, any reliance by plaintiff would not have been reasonable considering the language of the option agreement providing that defendant Singh "makes no representations, covenants or warranties regarding suitability of the ground conditions, soil conditions, sub-soil conditions, and any other matters and conditions relating to the suitability of the lots for Optionee's purposes, and Optionee's exercise of any lot constitutes acceptance of the Lot 'as is.'" To support a claim of fraud, the plaintiff's reliance must have been reasonable. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999). However, a plaintiff's reliance is unreasonable as a matter of law when the terms of the parties' contract specifically contradict the representations on which the plaintiff claims to have relied. *Id.*

There is no basis for concluding that further discovery would have uncovered additional factual support for plaintiff's fraud claim. Therefore, the trial court properly dismissed this claim.

Affirmed.

/s/ Deborah A. Servitto

/s/ Kathleen Jansen

/s/ Bill Schuette