STATE OF MICHIGAN

COURT OF APPEALS

SAMANTHA CELANO and RYAN ADAMS, Plaintiffs-Appellants, v JOANN HOFSTRA, MICHAEL NEITRING, and LISA NEITRING, Defendants-Appellees.	UNPUBLISHED September 19, 2017 No. 334279 Ottawa Circuit Court LC No. 15-004400-CZ

Before: TALBOT, C.J., and O'CONNELL and CAMERON, JJ.

PER CURIAM.

Plaintiffs, Samantha Celano and Ryan Adams, appeal as of right the trial court's opinion and order granting defendants, Joann Hofstra, Michael Neitring, and Lisa Neitring's, motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. FACTUAL BACKGROUND

This case arises out of the sale of residential property located in Spring Lake, Michigan (hereinafter referred to as the "property" or "house"). Around 2009 or 2010, Hofstra purchased the property for her granddaughter, Lisa, and Lisa's husband, Michael. Defendants toured the property once before the purchase. According to Hofstra, it was the only time she had ever visited the property. When Hofstra toured the house, she did not notice anything consistent with water damage.

Lisa and Michael lived in the house for approximately four to five years while making monthly payments to Hofstra. During that time, they made a number of renovations, but they testified that they did not see anything that resembled mold.

In late 2014, they decided to sell the property. Before the house was placed on the market, Michael painted the garage door, painted trim, raised the floor in the living room, and installed linoleum floors in the kitchen, entrance way, and laundry room. He also removed the wood paneling in the living room and replaced it with drywall. Michael and Lisa denied that any of the renovations revealed any signs of mold or water damage.

Lisa and Michael found realtor LuAnn Takens to assist Hofstra with the sale. On January 5, 2015, Hofstra completed a seller's disclosure statement, but did not provide any information

about the condition of the property. Instead, a line was drawn through the first two pages of the disclosure statement with the words "Seller has never lived at property" written across each page. Hofstra testified that her real estate agent, Takens, wrote it. Takens explained it was standard practice to use this language when an owner "never lived in the property" and has "no idea [about] anything."

In January of 2014, Samantha and Ryan, through their realtor, Leigh Louzon, scheduled a walk-through of the property with Takens. According to Samantha, they visited the property in the evening, there was plastic hung throughout the house due to the renovations, and it was dark. On January 21, 2014, after plaintiffs' walk-through, they emailed Hofstra's realtor a list of questions about the property. In pertinent part, plaintiffs asked, "Can Seller fill out the Disclosure to the best of his/her ability? They must know *some* information on age of roof, etc." In a response email, Lisa responded, "We are unsure of age of the roof, we made some repairs last year to it. It will probably need a new one shortly."

On January 24, 2014, Hofstra entered into a purchase agreement with plaintiffs. Samantha and Ryan reserved the right to obtain an independent inspection before closing, and on February 10, 2014, Ryan's father, Douglas Adams, performed an inspection on the house. Douglas's inspection invoice made no mention of potential water issues except that the attic was dry with no signs of leaking present, and he could not determine the grade outside because there was "snow everywhere." On February 28, 2014, plaintiffs signed the closing agreement, "accept[ing] the premises 'as is' and 'with all faults.' "

Within a few months, plaintiffs experienced severe flooding of the house and surrounding property. At one point, there was nearly one foot of standing water in the living room. Ryan was forced to regrade the entire property. He also removed all of the flooring and drywall in the house and discovered an extensive amount of mold. At one point, he talked with his neighbors, Dave Heckaman and Georgia Heckaman. They informed Ryan that the property was known to flood, and Michael and Lisa had troubles with the flooding. Plaintiffs also contacted the former owner of the property, Tim Dobson, who repeatedly said he continually had problems with the property flooding. Dave and Dobson both executed affidavits as to what they knew about the property.

On November 25, 2015, plaintiffs filed their complaint and alleged fraudulent misrepresentation, negligent misrepresentation, silent fraud, and breach of contract. After discovery, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court issued a written opinion and order granting defendants' motion for summary disposition on July 19, 2016. This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's rulings on a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *Alfieri v Bertorelli*, 295 Mich App 189, 192; 813 NW2d 772 (2012) (citation omitted). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court must "consider the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving

party to determine whether there exists any genuine issue of material fact." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Statutory interpretation is a question of law that is reviewed de novo. *Ayar v Foodland Distributors*, 472 Mich 713; 698 NW2d 875 (2005). This Court also reviews issues involving contract interpretation de novo. *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 488; 892 NW2d 467 (2016).

III. ANALYSIS

A. FRAUDULENT MISREPRESENTATION

Plaintiffs argue that the trial court erred when it granted summary disposition on their fraudulent misrepresentation claim. We disagree.

To establish a claim for fraudulent misrepresentation, a plaintiff must prove the following elements:

> (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 upon it; and (6) the plaintiff suffered damage. [*Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004), quoting *M&D, Inc*, *v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (quotation marks omitted).]

A fraudulent misrepresentation claim requires an "affirmative representation" that is false and "made with an intent to deceive." *M&D, Inc*, 231 Mich App at 27.

Plaintiffs argue that (1) the disclosures in Hofstra's disclosure statement, (2) the disclosures in Lisa's email response, and (3) the renovations to the property were false material representations that plaintiffs relied on to purchase the property from defendants. These arguments are unavailing.

To establish fraud, plaintiffs must have shown that defendants made an affirmative false representation. Defendants, however, made no such representation. Hofstra's seller's disclosure statement stated, "Seller has never lived at property," disavowing any knowledge of the condition of the property. Similarly, Lisa's email response to plaintiffs' generalized inquiry in connection with the "age of the roof, etc." did not make any representation whether she experienced issues involving flooding, water damage, or mold. Finally, while defendants made numerous renovations to the living room, kitchen, and entryway, the act of renovating the property was in no way an "affirmative representation" regarding flooding, water damage, or mold in the house. Silence under these circumstances is not an affirmative statement. Therefore, the trial court did not err when it granted summary disposition on plaintiffs' fraudulent misrepresentation claim.

B. NEGLIGENT MISREPRESENTATION

Defendants next argue that the trial court erred when it granted summary disposition as to their negligent misrepresentation claim. We disagree.

"A claim for negligent misrepresentation requires [the] plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Alfieri*, 295 Mich App at 194, quoting *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 621; 769 NW2d 911 (2009). "[A] duty to disclose may arise solely because 'the buyers express a particularized concern or directly inquire of the seller' " *Alfieri*, 295 Mich App at 194, quoting *M&D, Inc*, 231 Mich App at 33. Like fraudulent misrepresentation, negligent misrepresentation also requires an affirmative representation regarding the condition of the property. *Alfieri*, 295 Mich App at 194.

Plaintiffs argue that defendants are liable for negligent misrepresentation because they had a duty to disclose all conditions on the property, and they breached that duty when they failed to provide full disclosures regarding prior flooding, water damage, and mold. This argument fails. Defendants made no representations related to flooding, water damage, or mold. Instead, Hofstra stated in the seller's disclosure statement that she never lived on the property and, thus, was unable to make any representation as to the conditions on the property. This is not an affirmative statement as to the condition of water or mold on the property, and the trial court, when considering in a light most favorable to plaintiffs, did not err when it granted summary disposition as to this claim.

C. SILENT FRAUD

Plaintiffs argue that the trial court erred when it granted summary disposition on their silent fraud claim. We disagree.

"To prove silent fraud, also known as fraudulent concealment, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure." *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013), citing *Roberts v Saffell*, 280 Mich App 397, 403-404; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009). As stated previously, "a duty to disclose may arise solely because 'the buyers express a particularized concern or directly inquire of the seller.' " *Alfieri*, 295 Mich App at 194, quoting *M&D, Inc*, 231 Mich App at 33. Furthermore, "[a] plaintiff cannot merely prove that the defendant failed to disclose something; instead, 'a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive.' " *Lucas*, 299 Mich App at 364, quoting *Roberts*, 280 Mich App at 404.

For instance, "[a] misleadingly incomplete response to an inquiry can constitute silent fraud." *Alfieri*, 295 Mich App at 193-194. Our Supreme Court has explained that "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." *Hord v Environmental Research Institute of Mich*, 463 Mich 399, 412; 617 NW2d 543 (2000). Finally, like a claim for fraudulent misrepresentation, a silent fraud claim requires proof of reliance on the inadequate representation. *Hamade v Sunoco, Inc (R &*

M), 271 Mich App 145, 171; 721 NW2d 233 (2006). Plaintiffs argue that defendants are liable for silent fraud because (1) they had a legal and equitable duty to disclose information about flooding, water damage, and mold, and (2) they suppressed that information with the intent to defraud plaintiffs.

1. HOFSTRA

a. DUTY

Plaintiffs first assert that Hofstra had a legal duty of disclosure arising from the Seller's Disclosure Act (SDA) under MCL 565.954, which requires a transferor of property to deliver a disclosure statement to the transferee when there is a "transfer of any interest in real estate consisting of not less than 1 or more than 4 residential dwelling units." MCL 565.952. Here, the SDA applied to the transfer of the property because it involved the sale of a single residential dwelling unit. When the SDA applies to the transfer of property, it "clearly creates a legal duty of disclosure relative to the transaction." *Bergen*, 264 Mich App at 385. Accordingly, Hofstra had a legal duty of disclosure as established in *Bergen*.

Defendants, however, rely on *M&D, Inc* to claim Hofstra did not have a legal duty to disclose conditions on the property. In that case, the seller did not have a legal duty to disclose conditions involving flooding at his commercial property, even though the seller knew that the property flooded, because the disclosure statement indicated that the seller did not live on the property, no representations were being made as to its condition, and the purchase agreement included an "as is" clause. *M&D, Inc*, 231 Mich App at 33. This Court found the seller did not have a legal or equitable duty because the contract expressly disclaimed any seller representations on warranties about the condition of the property, and the buyer never directly inquired as to flooding. *Id*. However, the transaction in *M&D, Inc* involved commercial real estate where, unlike this case, the SDA did not impose a legal duty upon the seller to disclose conditions of the property. *Id*. Therefore, Hofstra had a statutory duty under the SDA, as opposed to a contractual duty, to make certain disclosures.

b. FAILURE TO DISCLOSE WITH THE INTENT TO DEFRAUD

Because Hofstra did, in fact, owe a legal duty of disclosure to plaintiffs, the question turns on whether Hofstra "suppressed the truth with the intent to defraud." *Lucas*, 299 Mich App at 363-364, citing *Roberts*, 280 Mich App at 403-404. In other words, was there sufficient evidence on the record to support that Hofstra's failure to disclose the flooding, water damage, and mold issues was done with the intent to defraud plaintiffs? Written across the first two pages of Hofstra's signed disclosure statement were the words, "Seller has never lived at property." In effect, by stating that she had never lived on the property, Hofstra was indicating that she did not have knowledge as to the property's condition. While the disclosure statement constituted a representation by words, plaintiffs failed to provide any evidence to dispute its authenticity. Hofstra visited the property once before she purchased it. She never lived on the property, and she never came to visit Lisa and Michael thereafter. Plaintiffs provided no evidence that disputes these facts. Furthermore, while plaintiffs rely on affidavits from a neighbor and former owner to argue that Lisa and Michael struggled with flooding, those witnesses do not claim that Hofstra

knew about the flooding. Thus, plaintiffs provide no evidence that Hofstra—rather than Lisa and Michael—knew about the property's conditions.

Even if Hofstra knew about the flooding, there is also no evidence that she made a false or misleading representation with the intent to defraud plaintiffs. On the contrary, the disclosure statement plainly stated, "Seller never lived at property," which reflected her lack of knowledge as to the condition of the property. Further, she notified plaintiffs the property was being sold "as is" without making any warranties or representations. According to Hofstra, she listened to Takens because she truly knew nothing about the property and considered it a "fixer-upper" that was being sold "as is." To prove that a defendant suppressed the truth, "a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Lucas*, 299 Mich App at 364, quoting *Roberts*, 280 Mich App at 404 (quotation marks omitted). Plaintiffs provided no evidence that Hofstra acted with any intent to deceive plaintiffs into purchasing the property.

Furthermore, as with any claim of fraud, reliance is a critical component. *Hamade*, 271 Mich App at 171; see also *1031 Lapeer LLC v Rice*, 290 Mich App 225; 810 NW2d 293 (2010). Defendants claim that it was unreasonable to rely on the seller's disclosure statement because (1) plaintiffs obtained an independent inspection that uncovered no issues, and (2) the seller's disclosure statement informed plaintiffs that Hofstra did not live on the property and knew nothing about its condition. Given the circumstances of the transaction, reliance on Hofstra's statements would have been unreasonable. After reviewing the disclosure statement, plaintiffs sought additional information through email. Information about the roof was provided, but no representations as to flooding, water damage, or mold were made. Thus, after receiving the seller's disclosure statement and an email response, plaintiffs had no information upon which to rely concerning the condition of the property. Indeed, the paucity of information caused plaintiffs to retain Ryan's father, Douglas, to conduct an official inspection of the property. Plaintiffs' decision to purchase the property was based on their personal observations and a generally favorable inspection, not based on any reasonable reliance on Hofstra's non-disclosures.

This case is distinct from *Bergen*, 264 Mich App at 378, where the seller provided in the disclosure statement that "there had once been a problem with a leaking roof, but it was rectified with a new roof in 1998." An independent inspection of the home did not uncover an active leak—though there was evidence of a past leak. *Id*. at 378-379. This Court held that a question of fact existed as to "whether [the buyers] actually and reasonably relied on the seller's disclosure statement, when both the disclosure statement and the inspection report failed to identify any active leakage problem affecting the property." *Id*. at 389-390. Thus, in *Bergen*, the sellers made an actual representation as to the condition of the property, which was information that the buyers could rely on and would create a question of fact as to whether the buyers reasonably relied on the disclosure statement and the inspection. Here, Hofstra made no such representation. Accordingly, the trial court did not err when it granted summary disposition as to plaintiffs' silent fraud claim against defendants.

2. LISA AND MICHAEL

Plaintiffs also claim that Lisa and Michael, as Hofstra's agents, owed a legal duty to disclose conditions on the property under the SDA. Furthermore, plaintiffs claim that Lisa and Michael also had an equitable duty to disclose conditions of the property when plaintiffs emailed them questions concerning the property. These arguments also fail.

a. LEGAL DUTY

An agency relationship is a "fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." *Breighner v Mich High Sch Athletic Ass'n, Inc*, 255 Mich App 567, 582-583; 662 NW2d 413 (2003), aff'd 471 Mich 217 (2004). "[W]hether an agency has in fact been created is to be determined by the relations of the parties as they exist under the agreement or acts, with the question being ultimately one of intention." *Van Pelt v Paull*, 6 Mich App 618, 623-624; 150 NW2d 185 (1967). "An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account," and "[t]he test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697-698; 491 NW2d 278 (1992); see also *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 80; 780 NW2d 753 (2010) ("Fundamental to the existence of an agency relationship is the right of the principal to control the conduct of the agent.").

Plaintiffs have provided no evidence to show an express or implied contractual relationship between Hofstra and her grandchildren so that anything said by Lisa and Michael would bind Hofstra. While Lisa and Michael lived on the property, made the renovations, and interacted with plaintiffs and the realtors, they had no ownership interest in the property, and the final decisions regarding the sale of the property were with Hofstra. She alone approved and signed the seller's disclosure statement, the purchase agreement—along with its addendums, and the closing agreement. Plaintiffs have provided no evidence that Hofstra had control over Lisa's and Michael's actions.

The question then becomes whether there may have been an implied agency relationship. "An implied agency must be an agency in fact; found to be so by reasonable deductions, drawn from disclosed facts or circumstances." *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 507; 844 NW2d 470 (2014) (quotation marks and citation omitted). An agency by implication does not arise if the "alleged principal expressly denies its existence, but it may arise from acts and circumstances within [the alleged principal's] control and permitted over a course of time by acquiescence or in recognition thereof." *Id*. (quotation marks and citation omitted) (alteration in original). "[T]he facts and circumstances giving rise to an implied agency must be (1) known to the alleged principal, (2) within the control of the alleged principal, and (3) either explicitly acknowledged or at least acquiesced in by the alleged principal." *Id*.

Just as with an agency relationship arising from contract, plaintiff failed to provide any evidence that Lisa and Michael had any authority to bind Hofstra. Instead, the record shows that Hofstra approved all transactions between the parties, and she signed multiple addendums in the purchase agreement that memorialized those transactions. For instance, every renovation to be

completed before closing was included in an addendum and authorized by Hofstra. Furthermore, Hofstra approved the apportionment of the cost for the new septic system. Lisa and Michael acted as the liaisons, not Hofstra's agents, and this Court cannot attribute their conduct to Hofstra. Therefore, Lisa and Michael did not have a legal duty to disclose conditions on the property.

b. EQUITABLE DUTY

Plaintiffs also claim that Lisa and Michael had an equitable duty to disclose conditions of the property by way of plaintiffs' direct inquiry. "[A] duty to disclose may arise solely because 'the buyers express a particularized concern or directly inquire of the seller' " *Alfieri*, 295 Mich App at 194, quoting *M&D, Inc*, 231 Mich App at 33. Before the parties entered into the purchase agreement, plaintiffs sent an email to Takens asking, in pertinent part, "Can Seller fill out the Disclosures to the best of his/her ability? They must know *some* information on age of roof, etc." Lisa responded to that question, "We are unsure of age of the roof, we made some repairs last year to it. It will probably need a new one shortly." As the trial court correctly held, plaintiffs' inquiry was broad and vague. The only "particularized concern" that plaintiffs addressed was the roof, and Lisa provided a responsive answer. Therefore, Lisa and Michael did not owe an equitable duty of disclosure to plaintiffs where no particularized concern was expressed. Without a legal or equitable duty, Lisa and Michael cannot be liable for silent fraud.

D. BREACH OF CONTRACT

Plaintiffs argue that the trial court erred when it granted summary disposition on their breach of contract claim. We disagree.

To establish a claim for breach of contract, the plaintiff "must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). Plaintiffs argue that Hofstra breached the purchase agreement by failing to disclose the flooding, water damage, and mold problems in the seller's disclosure statement as required under Paragraphs 2 and 29 of the purchase agreement. Additionally, plaintiffs argue that Lisa and Michael acted as either co-sellers or agents to Hofstra and are, thereby, equally liable under the contract. These arguments are without merit.

First, the purchase agreement only required Hofstra, as seller, to provide a certified seller's disclosure statement. Paragraph 2 states, "Buyer has received Seller's Disclosure Statement dated January 5, 2015, subject to Seller's certification in Paragraph 29." Towards the bottom of the purchase agreement, Paragraph 29 states, "Seller certifies to Buyer that the property is currently in the same condition as Seller previously disclosed in Seller's Disclosure Statement dated: January 5, 2015. Seller agrees to inform the Buyer in writing of any changes in the content of the disclosure statement prior to closing." While plaintiffs claim that Hofstra breached these provisions, the record proves otherwise. Plaintiffs received Hofstra's signed disclosure statement as required under Paragraph 2, and there is nothing to indicate a change in the condition from when Hofstra signed the disclosure statement. Without a change in the condition of the property since the disclosure statement was signed, Hofstra was not required under Paragraph 29 to provide additional disclosures, and she could not have breached the

purchase agreement. Furthermore, as to any undisclosed conditions relating to flooding, water damage, and mold, plaintiffs accepted the property "as is" and "with all faults," and therefore, any failure to disclose such conditions would not constitute a breach of the purchase agreement. As a final point, Lisa and Michael were not parties to the contract, and they could not have been in breach of the purchase agreement between plaintiffs and Hofstra. Even if Lisa and Michael were considered agents to Hofstra, "a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract." *Riddle v Lacey & Jones*, 135 Mich App 241, 246; 351 NW2d 916 (1984), quoting 2 Restatement Agency, 2d, § 320, p 67 (quotation marks omitted). The plaintiffs clearly were aware, or should have been aware, that Hofstra was the owner of the property, considering she signed the seller's disclosure statement, the purchase agreement—including the multiple addendums—and the closing agreement. Therefore, the trial court did not err when it granted summary disposition on this claim.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Thomas C. Cameron