

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JUDY BETH AEBIG,

Plaintiff/Counter-Defendant,

v

File No. 02-22039-CK
HON. PHILIP E. RODGERS, JR.

GRETCHEN COX and TERRY COX,
jointly and severally,

Defendants/Counter-Plaintiffs,

and

COLDWELL BANKER SCHMIDT
REALTORS, a corporation,

Defendant.

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DECISION AND ORDER
DENYING DEFENDANTS/COUNTER-PLAINTIFFS
TERRY AND GRETCHEN COX' MOTION FOR SUMMARY DISPOSITION

This action involves a real estate transaction. Defendants Terry Cox and Gretchen Cox are husband and wife. Defendant Terry Cox is a licensed builder. Defendant Gretchen Cox is a real estate agent with Defendant Coldwell Banker Schmidt Realtors ("Coldwell Banker"). Defendants Terry and Gretchen Cox will be collectively referred to as "Cox."

In 1994, Cox purchased a cabin on Silver Lake. Over the course of the next few years, Cox rebuilt the cabin, adding a second story and a garage. They lived in the house from 1997 to 2000. On March 15, 2000, Cox listed the house for sale with Defendant Coldwell Banker. Defendant Gretchen Cox was the real estate agent responsible for advertising and promoting the house. In the literature distributed to potential purchasers, she represented the house as "quality built" and "re-built from the foundation up." Along with the listing agreement, Cox completed a Seller's Disclosure Statement which indicated that there were no known problems with the house and that all structural modifications, alterations or repairs were made with necessary permits or licensed contractors.

On May 21, 2000, the Plaintiff Judy Beth Aebig ("Aebig") made an offer to purchase the house for \$350,000. Cox accepted Aebig's offer by signing the Purchase and Sales Agreement ("Agreement") that same day. Pursuant to paragraph 11 of the Agreement, Cox warranted that there were no functional defects in the property other than those disclosed in the Disclosure Statement. Paragraph 11 also gave Aebig 72 hours from the receipt of the Disclosure Statement to determine the existence of any material defects and three days to negotiate a satisfactory resolution or terminate the Agreement.

Paragraph 14 of the Agreement gave Aebig the right, within 10 calendar days, to inspect and investigate the property. If the inspection(s) "disclose a potential material defect that has a SUBSTANTIAL IMPACT upon the value of the Property," the parties agreed to negotiate in good faith to resolve the matter and, if no resolution could be reached within seven days, either party could terminate the Agreement. Paragraph 14 also contained the following provision:

THIS CONDITION PROVIDES THE PURCHASER WITH AN OPPORTUNITY TO OBTAIN INDEPENDENT AND UNBIASED INFORMATION REGARDING THE CONDITION OF THE PROPERTY WITHIN THE TIME FRAME SPECIFIED ABOVE. IF THE PURCHASER FAILS TO HAVE THESE INSPECTIONS, STUDIES OR TESTS PERFORMED, OR FAILS TO RAISE MATTERS PURSUANT TO THIS PROVISION, THE PURCHASER SHALL BE DEEMED TO HAVE ACCEPTED THE PROPERTY SUBJECT TO ANY MATERIAL OR ADVERSE CONDITION THAT SUCH INSPECTION, STUDY OR TEST WOULD HAVE DISCLOSED. PURCHASER FURTHER ACKNOWLEDGES THAT IN ENTERING INTO THIS AGREEMENT, PURCHASER IS NOT RELYING UPON ANY REPRESENTATIONS MADE BY ANY REALTOR.

When Aebig executed the Agreement, she initialed paragraph 14. Paragraph 26 of the Agreement contained an integration clause.

Aebig hired AmeriSpec to conduct a general inspection of the house. The inspector noted several defects in the electrical system and recommended review by a qualified licensed electrician. He noted several defects in the floor joists, support posts and beams and recommended further review by a licensed building contractor or structural engineer. He noted a defect in the ventilation and recommended further review by a qualified licensed contractor.

According to Aebig, Defendant Terry Cox was present during the inspection and he agreed to fix the defects. He subsequently represented to Aebig that all repairs had been properly made. The transaction closed on June 29, 2000. Aebig took possession on July 1, 2000.

According to Aebig's deposition testimony, the leaks in the ceiling, bubbles in the carpet, heave in the kitchen floor and buckling of the living room floor began to occur within six months. In July of 2001, when Aebig contracted with Phillips Energy who subcontracted with Panoramic Electric, to install an air conditioning connection in the house, electrical and wiring problems were discovered. Aebig hired a structural engineer and building code consultant to inspect the house. They discovered that the foundation was inadequate to support the floor load. Aebig also discovered that there were several building code and permit violations and that no Certificate of Occupancy had ever been issued.

On February 25, 2002, Aebig filed this action alleging breach of contract, fraudulent misrepresentation, silent fraud, negligent misrepresentation, innocent misrepresentation, negligence and violations of the Michigan Consumer Protection Act against the Defendants Terry and Gretchen Cox. She also alleged vicarious liability against Defendant Coldwell Banker. Aebig seeks money damages or rescission or "other relief as is equitable."

On December 18, 2002, Defendant Cox filed their Motion for Summary Disposition on the fraud, silent fraud, and misrepresentation in the sale of real estate claims, pursuant to MCR 2.116(C)(10). The Cox claim that there is no genuine issue of material fact and they are entitled to judgment as a matter of law. In a nutshell, Cox contend that Aebig's reliance on any false representations made by Cox was unreasonable because she had the right, but failed, to conduct an effective inspection. She had the means to determine that any alleged false representations were not true. Therefore, she caused her own damages.

Aebig filed a response to the motion and a supplemental brief in opposition.¹ She contends that she reasonably relied upon Cox' representation that the house had no known defects because Defendant Terry Cox was a licensed builder and Defendant Gretchen Cox was a realtor and they rebuilt the house themselves. She further responds that she did not follow up on the recommendations of her general inspector because Defendant Terry Cox assured her that he would fix the discovered defects. Any other defects were hidden and could not have been discovered without a destructive inspection.

On January 21, 2003, the Court heard the arguments of counsel and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, denies the Defendant Cox' motion.

I.

STANDARD OF REVIEW

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant

¹Pursuant to the Court's Civil Scheduling Conference Order, the Defendants' motion was untimely because it could not be heard prior to the January 17, 2003 final settlement conference. While this is true, given the Court's disposition of the motion, it will not address this issue.

a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

II.

APPLICABLE LAW

There are six essential elements of a fraud claim: (1) that the defendant made a material representation; (2) that it was false; (3) that when the defendant made it the defendant knew that it was false, or that the defendant made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that the defendant made it with the intention that it should be acted on by the plaintiff; (5) that the plaintiff acted in reliance on it; and (6) that the plaintiff thereby suffered injury. *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919), overruled in part on other grounds in *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 120-121; 313 NW2d 77 (1981); *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 507; 538 NW2d 20 (1995). "Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." *Candler, supra* at 121.

Without a representation, a plaintiff can not maintain an action for common-law fraud because proof of some false representation made with an intent to deceive is a necessary element of their prima facie case. *M&D, Inc v McConkley*, 231 Mich App 22, 27; 585 NW2d 33 (1998). In addition, the plaintiff's reliance on the misrepresentation must be reasonable. *Novak v Nationwide Ins Co*, 235 Mich App 675; 599 NW2d 546 (1999); *Nieves v Bell Industries*, 204 Mich App 459;

517 NW2d 235 (1994). And, there can be no claim of fraud where the plaintiff has the means to determine that a representation is not true. *Nieves, supra*; *Webb v First of Mich Corp*, 195 Mich App 470. In the real estate context, a claim of silent fraud cannot exist or be actionable when a reasonable inspection would have revealed the defect. *Conahan v Fisher*, 186 Mich App 48; 463 NW2d 118 (1990); *Clemens v Lesnek*, 200 Mich App 456, 459-460; 505 NW2d 283 (1993).

In general, actionable fraud must be predicated on a statement relating to a past or an existing fact, see, e.g., *Scott v Harper Recreation, Inc*, 444 Mich 441, 446, fn 3; 506 NW2d 857 (1993). Michigan also recognizes fraud in the inducement. Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon. *Kefuss v Whitley*, 220 Mich 67, 82-83; 189 NW 76 (1922); see also *Adams v Gillig*, 199 NY 314; 92 NE 670 (1910), cited with approval in *Kefuss, supra* at 86; 189 NW 76; *Judd v Judd (On Rehearing)*, 192 Mich 198, 207; 160 NW 548 (1916).

Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party. *Whitcraft v Wolfe*, 148 Mich App 40, 52; 384 NW2d 400 (1985).

III.

DISCUSSION

Gretchen Cox as a Realtor
(and Vicariously Coldwell Banker)

In *M&D, Inc, supra*, a special conflict panel of the Court of Appeals, held that neither the defendant real estate company nor its individual brokers owed a general duty to the plaintiff purchaser to disclose material defects involving property. Therefore, the Court affirmed the trial court dismissal of the fraud and misrepresentation claims against the real estate brokers and licensees stating:

This Court has recognized that sellers' real estate agents, by virtue of their agency relationship as agents for the sellers, do not have a general duty to disclose to purchasers material defects involving the property. *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988). Real estate agents do, however, remain liable for common-law fraud or misrepresentation based upon false material misrepresentations (necessarily including incomplete or misleading statements creating a false impression) that are made with fraudulent intent. See, *Price v Long Realty, Inc*, 199 Mich App 461, 470; 502 NW2d 337 (1993).

Thus, it is for the jury to decide whether Defendant Gretchen Cox as a seller had material information regarding this home which caused her as a realtor to make false material misrepresentations with fraudulent intent. The jury must also decide whether Defendant Gretchen Cox as a seller suppressed material facts which she was bound to disclose. Certainly as the seller and the realtor, her actual knowledge of her home will be charged to her in her capacity as a realtor. These facts remain in dispute.

Terry Cox as Seller and
Gretchen Cox as Both Realtor and Seller

Viewed most favorably from the Plaintiff's perspective, this was a real estate transaction rife with fraud as a result of which she was overtly cheated. Plaintiff offered to purchase a home that was represented as being "quality construction" and "re-modeled from the foundation up." She signed a Purchase and Sale Agreement and received a copy of the Seller's Disclosure Statement. The disclosure statement did not reveal any known defects. The Agreement gave her the right to conduct an inspection. Not knowing anything about construction, she hired AmeriSpec to do a general inspection. The inspection revealed several defects and recommended further review by qualified electrical and structural contractors.

Aebig did not follow up with additional inspections. Instead she relied upon Defendant Terry Cox to make all necessary repairs and his assurance that he had done so. The transaction closed. Aebig subsequently discovered that she bought a house with significant structural and electrical problems.

Defendant Cox claim they are not responsible because it was unreasonable for Aebig to rely on anything they said before the AmeriSpec inspection because that inspection revealed all of the defects of which Aebig now complains. They fault Aebig for not following up with qualified electrical contractors and structural engineers. And yet, according to Aebig, Defendant Terry Cox represented that he would and did make all the necessary repairs to take care of the defects identified by the AmeriSpec inspector.

Aebig has presented sufficient evidence from which a jury could find that both Gretchen and Terry Cox knew about the defects in the house, concealed them, misrepresented the condition of the house and intended to defraud Aebig. Whether Aebig reasonably relied upon the alleged

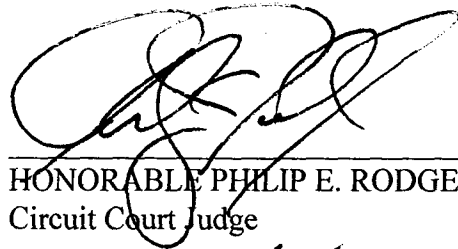
representations is also for the jury to decide. It is possible for a jury to believe that Aebig's reliance was reasonable throughout. It is also possible for a jury to believe that Aebig's reliance became unreasonable in light of the AmeriSpec inspection. However, when Defendant Terry Cox agreed to make the necessary repairs, a jury could conclude that he was continuing the fraud that he and his wife had already set in motion. Further, the jury could find that Gretchen Cox knew the repairs had not been made and failed to disclose this fact as a seller and as a realtor.²

Of course, in cases involving both equitable and legal issues, the jury may decide factual issues relating to a claim for money damages, while the Court retains the authority to determine the facts as they relate to equitable remedies such as specific performance or injunction or, in this case, rescission. See, *Zurcher v Herveat*, 238 Mich App 267, 297-298; 605 NW2d 329 (2000); *Smith v University of Detroit*, 145 Mich App 468, 479; 378 NW2d 511 (1985); *Dutka v Sanai Hosp of Detroit*, 143 Mich App 170, 174; 371 NW2d 901 (1985).

The existence of material fact issues precludes summary judgment. *Lorenzo v Noel*, 206 Mich App 682; 522 NW2d 724 (1994). The Defendants' Motion for Summary Disposition is denied.

IT IS SO ORDERED.

This Decision and Order does not resolve the last pending claim nor close the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

1/31/03

²The potential for a jury to find fraud or misrepresentation by Gretchen Cox after the "repairs" were completed, precludes the dismissal of the Defendant Coldwell Banker at this time.

State of Michigan



Thirteenth Judicial Circuit

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Subject: *Judy Beth Aebig v Gretchen Cox and Terry Cox, et al*
Grand Traverse County Circuit Court Case No. 02-22039-CK

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Decision and Order Denying Defendants/Counter-Plaintiffs Terry and Gretchen
Cox' Motion for Summary Disposition