

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

ALFRED F. STEPHENS and JANET L. STEPHENS,

Plaintiffs,

v

File No. 97-7426-NO
HON. PHILIP E. RODGERS, JR.

MITCHELL AND ASSOCIATES, a Michigan
Professional Corporation, BRIDGET RUSSELL,
d/b/a RAINBOW REALTY, for herself and as agent
for Rainbow Realty; CATHY BURRY, individually
and as an agent for Rainbow Realty;

Defendants.

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Attorney for Plaintiffs

William J. Liedel (P24826)
Attorneys for Defendants Russell, Burry & Rainbow Realty

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Attorney for Defendant Mitchell & Assoc.

DECISION AND ORDER GRANTING DEFENDANTS
BRIDGET RUSSELL d/b/a RAINBOW REALTY
AND CATHY BURRY'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

This case involves a real estate transaction. In 1995, the Plaintiffs purchased a home from the Defendants Patrick and Linda Burdo (the "Burdos"). Subsequently, the Plaintiffs discovered that the home encroached on an alley and the septic system was located under an adjacent lot. The Plaintiffs sued the Burdos along with the real estate agents who were involved in the transaction: Real Estate One ("REO"), REO's agent Mark Rodriguez ("Rodriquez"), Bridget Russell ("Russell") d/b/a Rainbow Realty ("Rainbow"), and Rainbow's agent Cathy Burry ("Burry"). Mitchell &

Associates, a professional surveying firm, was also a named Defendant.¹ The Plaintiffs allege that the Defendants are liable under Count I for Fraud and Misrepresentation, Count II for Violation of the Consumer Protection Act, Count III for Innocent Misrepresentation, Count IV for Professional Malpractice, Count V for Breach of Contract and Count VI for Intentional Infliction of Emotional Distress.

The Defendants Russell, Rainbow and Burry filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10). These Defendants contend that the Plaintiffs' Complaint fails to state a claim against them upon which relief can be granted and that there is no genuine issue of material fact and they are entitled to judgment as a matter of law.

The Plaintiffs filed a timely response to the motion. The Plaintiffs concede that these Defendants are entitled to summary disposition as to Count III for Innocent Misrepresentation and Count V for Breach of Contract. The Plaintiffs claim, however, that the Defendants are not entitled to summary disposition on the other counts as, "under the narrow facts of this case, Defendants owed Plaintiffs a duty to disclose the location of the septic system serving the property."

On December 20, 1999, the Court entertained the arguments of counsel. The Court, having considered the motion, the response, the arguments of counsel, and otherwise being fully advised in the premises, grants the Defendants' motion for the reasons stated herein.

STANDARD OF REVIEW

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any

¹In the companion case styled *Alfred F Stephens, et ux v Antrim Co Rd Comm, et al*, Antrim County Circuit Court File No. 99-7586-NO, the Plaintiffs brought an action against the Antrim County Road Commission, Milton Township, and the Schultzes who sold them the property. They sought, among other things, to have the alley to the north of their property vacated and deeded to them. The case against the Schultzes was voluntarily dismissed. In April of 1999, the Road Commission and Township consented to entry of judgment. The Court is waiting for the Consent Judgment which will be signed and entered. On January 4, 2000, default judgment was entered against the Schultzes.

inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988).

MCR 2.116(C)(10)

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was most recently 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 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).

I.

Fraud and Intentional Misrepresentation

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.

The Defendants contend that it is undisputed that they did not make any statements to the Plaintiffs that are alleged to have been relied upon regarding the lot lines or septic system. This contention is supported by the affidavits of Defendants Russell and Burry which are attached to the Defendants' brief in support of their motion. Without a representation, the Plaintiffs cannot 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).

The Plaintiffs respond that these Defendants "knew" that the septic system was on the neighbor's property and had a duty to disclose this information to them and that these Defendants engaged in active concealment or nondisclosure which is tantamount to a misrepresentation. The Plaintiffs rely exclusively upon the deposition testimony of the neighbor who noticed the driver of a septic tank truck digging "in her yard." She asked the driver why he was digging in her yard and he replied that he did not think he was in her yard. She then called Rainbow Realty, spoke with Defendant Russell, and told her about the truck and the digging. Defendant Russell responded that she believed the truck was in the alleyway (also referred to as the "access," "easement," and "right of way.") At page 16, line 10 - page 17, line 7, the neighbor testified that she "questioned" whether

the digging had been done on her property or the easement and that, after she spoke with Defendant Russell, she “accepted” that the digging had been done on the easement.

Assuming, without deciding, that this conversation provided these Defendants with the requisite knowledge about the location of the septic system, the issue becomes whether that knowledge creates a duty for these Defendants to disclose such information to the Plaintiffs.

In *M&D, Inc, supra*, a special conflict panel of the Court of Appeals, Jansen, P.J., 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). While *Shimmons* holds that a vendor’s liability for fraud can be based upon the mere failure to reveal undisclosed defects, we decline to extend the *Shimmons* rule of liability to defendant Relenco's real estate agents.²

Furthermore, the Plaintiffs knew from surveys of the property that there were encroachments. They were offered the opportunity to conduct a boundary survey. They chose not to do so. The purchase agreement documents contained various disclaimers denying real estate agent representations and warranties about the property and imposing upon the purchaser the obligation

²The special conflict panel of the Court of Appeals held that *Shimmons* did not correctly set forth the elements of a claim of silent fraud, or fraudulent concealment, and overruled it, stating: “Supreme Court precedent shows that a claim of silent fraud is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure. We emphasize that there must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud. In this case, plaintiffs have not established a claim of silent fraud against Relenco. The trial court did not err in granting summary disposition in favor of Relenco and McConkey with respect to the fraud claims.”

to conduct an inspection or survey of the property. If the Plaintiffs had chosen to do so, they could have and would have discovered the boundary problems. *M&D, Inc, supra*.

Thus, the Court grants the Defendants' motion for summary disposition as to Count I - Fraud and Misrepresentation.

II.

Violation of Consumer Protection Act

The Defendants contend that there is no evidence that they intended to mislead or deceive the Plaintiffs. In fact, they claim there is no evidence that they made any representations regarding the boundary line and septic system.

The Court, having agreed that these Defendants did not make material misrepresentations to the Plaintiffs and did not have a duty to disclose the whereabouts of the septic system, grants the Defendants' motion for summary disposition as to Count II - Violation of the Consumer Protection Act.

III.

Innocent Misrepresentation

In *M&D, Inc, supra*, a special panel of the Court of Appeals distinguished fraudulent misrepresentation from innocent misrepresentation as follows:

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. *Id* at 118; 313 NW2d 77.

Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. *Id* at 117; 313 NW2d 77. Finally, in order to prevail

on an innocent misrepresentation claim, a plaintiff must also show that the plaintiff and defendant were in privity of contract. *Id.* at 118-119; 313 NW2d 77.

The Plaintiffs concede that they were not in privity of contract with these Defendants and, therefore, the Plaintiffs' claim against them for innocent misrepresentation should be dismissed. Therefore, the Court grants the Defendants' motion for summary disposition as to Count III - Innocent Misrepresentation.

IV.

Professional Malpractice

Count IV alleges professional malpractice against Defendant Mitchell & Associates only. Therefore, this Count is not covered by this motion.

V.

Breach of Contract

As pointed out above, the Plaintiffs concede that they were not in privity of contract with these Defendants and Count V - Breach of Contract should be dismissed. Therefore, the Court grants the Defendants' motion for summary disposition as to Count V - Breach of Contract.

VI.

Intentional Infliction of Emotional Distress

In *Robers v Auto-Owners Ins Co*, 422 Mich 594, 602-604; 374 NW2d 905 (1985) our Supreme Court recognized intentional infliction of emotional distress as a separate theory of recovery and adopted the Restatement definition of the tort:

Sec. 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement Torts, 2d, Sec. 46, p. 71.

The Court went on to analyze the tort as follows:

Four elements are identified in this definition: (1) “extreme and outrageous” conduct; (2) intent or recklessness; (3) causation; and (4) “severe emotional distress.” See, e.g., *Ross v Burns*, 612 F2d 271, 273 (CA6, 1980).

A. Extreme and Outrageous Conduct

An oft-quoted Restatement comment summarizes the prevailing view of what constitutes “extreme and outrageous” conduct:

The cases thus far decided have found liability only where the defendant’s conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice’, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one’s feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. Restatement Torts, 2d, Sec. 46, comment d, pp. 72-73.

Another Restatement comment further qualifies the conduct proscribed by this tort:

The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such

insistence is certain to cause emotional distress. Restatement Torts, 2d, Sec. 46, comment g, p. 76.

Further, in a contractual setting, a tort action must rest on a breach of duty distinct from contract. Thus, in *Hart v Ludwig*, 347 Mich 559; 79 N.W.2d 895 (1956), we recognized that mere nonfeasance of a contractual obligation cannot give rise to a negligence cause of action in tort:

The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. Otherwise, the failure to meet a note, or any other promise to pay money, would sustain an action in tort for negligence, and thus the promisor be made liable for all the consequential damages arising from such failure.

As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract. In the case at bar, the utmost shown against the defendant is that there was unreasonable delay on its part in performing an executory contract. 347 Mich 563; 79 N.W.2d 895 (quoting from *Tuttle v Gilbert Mfg Co*, 145 Mass 169, 174-175; 13 N.E. 465 [1887]) (emphasis added).

There is no evidence before the Court to show that these Defendants engaged in any extreme and outrageous conduct. In addition, there is no evidence before the Court to show that the Plaintiffs suffered severe emotional distress.

The Restatement commentary explains the emotional distress requirement as follows:

The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable [422 MICH 609] man could be expected to endure it. Restatement Torts, 2d, Sec. 46, comment j, p. 77 (emphasis added).

Further, although bodily injury need not result, the Restatement commentary suggests that "more in the way of outrage" may be required where a claim is based on emotional injury alone. *Id.*, comment k, p. 78.

Roberts, supra at 608-609.

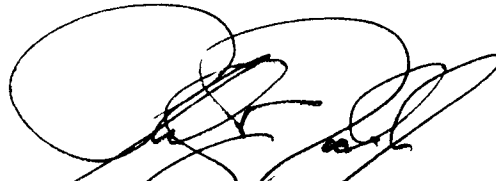
For these reasons, the Court grants the Defendants motion for summary disposition as to Count VI - Intentional Infliction of Emotional Distress.

CONCLUSION

The Plaintiffs have failed to state a cause of action against Defendants Russell, Rainbow, and Burry. MCR 2.116(C)(8). Further, they have failed to raise any genuine issue of material fact for trial. MCR 2.116(C)(10). Therefore, the Defendants' motion for summary disposition should be and hereby is granted and the Plaintiffs' Complaint against these Defendants should be and hereby is dismissed.

IT IS SO ORDERED.

This Decision and Order does not resolve the last pending claim or close the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____