

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JOHN THOMAS DUFFY and PATRICIA A.
DUFFY, a/k/a TRISH DUFFY,

Plaintiffs,

vs.

Case No. 2014-2212-CZ

GREGORY L. DUNFIELD, TARA R. DUNFIELD,
STEVEN KULICK and KELLER WILLIAMS
MACOMB ST. CLAIR MARKET CENTER, d/b/a
PREMIER AGENTS REAL ESTATE COMPANY,
LLC,

Defendants.

OPINION AND ORDER

Defendants Keller Williams Macomb St. Clair Market Center and Steven Kulick (collectively, “Movants”) have filed a motion for reconsideration of the Court’s March 12, 2015 Opinion and Order denying their motion for summary disposition.

In the interests of judicial economy the factual and procedural statements set forth in the Court’s March 12, 2015 Opinion and Order are herein incorporated.

Standard of Review

Motions for reconsideration must be filed within 21 days of the challenged decision. MCR 2.119(F)(1). The moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject

to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

Arguments and Analysis

In their motion, Movants first assert that the portion of Plaintiffs' claims related to the deck fail because neither Defendant Kulick, nor K & K construction, performed any work in connection with the deck.

The Court has previously held that the Plaintiffs agreed to purchase the Subject Property "as is." However, while "as is" language puts the buyer on notice that he or she is assuming all risks regarding the property, the Michigan Court of Appeals has identified two exceptions: when "a seller makes fraudulent representations before a purchaser signs a binding agreement" and when the seller fails to disclose concealed defects known to him. *Conahan v Fisher*, 186 Mich App 48, 49-50; 463 NW2d 118 (1990). However, a defect is not concealed if it should have been reasonably discovered upon inspection, but was not. *Id.*

Upon reviewing the pleadings, the Court is convinced that Plaintiff's claims related to the deck must be dismissed. After having the Subject Property inspected, Plaintiffs received an inspection report. The inspection report noted that the deck contained decayed wood which required replacement. (*See* Defendants' Exhibit F.) Accordingly, Plaintiffs knew about the condition of the deck prior to closing their purchase of the Subject Property. "[F]raud cannot be perpetrated upon one who has full knowledge to the contrary of the representation." *Beverly v Richards*, 225 Mich 508, 514; 238 NW 270 (1931). Due to the fact that Plaintiff knew about the

condition of the deck prior to closing, the claims must be dismissed to the extent based on the deck.

Next, Movants contend that Plaintiffs' fraud claims fail to the extent based on the condition of the main floor tile. Plaintiffs' fraud claims with respect to the kitchen floor are based on Defendant Kulick's representation that the tile was "top dollar" and "beautiful," and that the work was completed with the highest workmanship. (*See* Movants' Exhibit D, at 233; Plaintiffs' Exhibits B and C.) However, Plaintiff Thomas Duffy conceded that the tile was expensive. (*See* Movants' Exhibit D, at 168.) Moreover, stating that the tile was beautiful is a subjective opinion. Consequently, neither of those two statements may form the basis for Plaintiffs' fraud claims.

With respect to Defendant Kulick's statement that the workmanship was of the highest quality, the Court is convinced that such a statement may form the basis for Plaintiffs' claims. It is undisputed that Defendant Kulick advised Plaintiffs that he completed various projects in connection with the Subject Property including the tile work and the basement bathroom. Accordingly, by stating that the work was done with the highest quality of workmanship and that the work was sound, a reasonable trier of fact could find that the statements were made in the form of stating facts that Defendant Kulick knew rather than simply expressing his opinion as to the quality of the work. Consequently, the Court remains convinced that Plaintiffs may proceed on their claims with respect to Defendant Kulick's statement that the tile was installed with the highest quality of workmanship.

Additionally, Movants contend that Plaintiffs' fraud claims fail with respect to the work performed in the basement. In their response to the original motion, Plaintiffs provided the inspection report prepared by Shelby Township's Plumbing and Mechanical Inspector in which

he states that the basement bathroom was constructed without the necessary permits, that the bathroom was not properly plumbed, that the shower was built without a trap, that the pipes used in the bathroom were not to code, and that the tile was improperly installed. (*See* Plaintiffs' Exhibits F & G.) Plaintiff also provided a report prepared by Shelby Township's Electrical Inspector in which he stated that lights were not properly installed, that there were exposed wires resting on metal, that plugs were not grounded, and that improper loads were placed on circuits. (*Id.*) While Movants contend that Defendant Kulick did not know that the statements were false, statements made recklessly are the legal equivalent of false statements made intentionally. *Hammond v Matthes*, 109 Mich App 352, 360; 311 NW2d 357 (1981); *Callihan v Talkowski*, 272 Mich 1, 4; 124 NW2d 788 (1963). Therefore, even if Defendant Kulick did not know that the work his company did was not done to code, done with the proper permits, and completed in an otherwise deficient/defective manner, an issue remains as to whether his statements were recklessly false.

In their instant motion, Movants contend that they cannot be liable in connection with Plaintiffs' claims related to the basement because the issues were visible and/or discoverable. The Michigan Court of Appeals has held that an action for fraud will not lie where the means of discovering the truthfulness of a representation are available. *Nieves v Bell Industries Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

With respect to the p-trap, Plaintiffs, as well as their inspector, have testified that the issue could have been discovered simply by shining a light down the drain. (*See* Defendants' Exhibit D, at 134-136; Exhibit G, at 35-36; and Exhibit J, at 26-27.) Indeed, the fact that the absence of a p-trap should have been found is further evidenced by the fact that Plaintiffs' inspector refunded them \$350.00 due to the fact that he did not discover and/or disclose that the

p-trap was missing. For these reasons, the Court is satisfied that Plaintiff's had the ability to discover that the p-trap was missing. Consequently, the absence of the p-trap may not form the basis for Plaintiffs' claims.

With respect to the other asserted basement-related issues, Movants have not addressed those portions of Plaintiffs' claims. Consequently, the portions of Plaintiffs' claims related to those issues may proceed.

Movants also contend that they cannot be held liable on an agent/broker relationship because Plaintiffs knew that they were not acting as an agent/broker in connection with the sale at issue. However, this issue has already been addressed and decided. A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The Court remains convinced that Movants can potentially be found liable under an agent/broker theory and that Movants assertion is without merit.

Conclusion

For the reasons set forth above, Defendants Keller Williams Macomb St. Clair Market Center and Steven Kulick's joint motion for reconsideration of the Court's March 12, 2015 Opinion and Order is GRANTED, IN PART, and DENIED, IN PART. Defendants' motion for summary disposition of the portions of Plaintiffs' claims related to the deck, the absence of p-trap in the basement bathroom, and the first floor tile, to the extent based on Defendant Kulick's statement that the tile was high quality and beautiful, is GRANTED. The remainder of Defendants' motion is DENIED. This Opinion and Order neither resolves the last pending claim nor closes the case. *See* MCR 2.602(A)(3),

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: April 13, 2015

JCF/sr

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