

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.

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OPINION AND ORDER

Defendants Keller Williams Macomb St. Clair Market Center and Steven Kulick (collectively, “Movants”) have filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiffs have filed a response and request that the motion be denied.

*Factual and Procedural Background*

Defendant Steven Kulick (“Defendant Kulick”) is a licensed real estate sales person associated with Premier Agents Real Estate Company, LLC, which does business as Defendant Keller Williams Macomb-St. Clair Market Center (“Keller”). Defendant Kulick also operates K&K Construction and Landscaping, LLC (“K&K”), a home renovation business that is not associated with Keller.

In 2003 and 2005 K&K performed various construction tasks at the Subject Property including installing a toilet, sink and shower unit in the basement bathroom and installing a tile floor in the main floor kitchen.

In 2012, Plaintiffs became interested in purchasing a home in the neighborhood in which the Subject Property is located. In an effort to find a home, Plaintiffs sent out a flyer asking the home owners if anyone was interested in selling their home. While the parties dispute who initiated the discussions, Plaintiffs and Defendants Gregory and Tara Dunfield (“Dunfield Defendants”) began negotiating a potential sale of the Subject Property to the Plaintiffs. However, the negotiations were put on hold until the Plaintiffs sold their current home.

After the initial negotiations cooled, the Dunfield Defendants listed the Subject Property for sale with Keller through Defendant Kulik. The Subject Property was listed on March 27, 2013. However, Movants contend that any transaction with Plaintiffs was exempt from the Dunfield Defendants listing with Keller.

On or about April 1, 2013, the Plaintiffs and the Dunfield Defendants (the “Parties”) executed a “Buy & Sell Agreement” (the “Purchase Agreement”). On April 19, 2013, Plaintiff had the Subject Property inspected. The inspection revealed some problems including rotting wood on the exterior deck. (*See* Defendants’ Exhibit E.) The inspector found the bathrooms and kitchen to be in acceptable condition. (*Id.*)

On May 14, 2013, the Parties closed the transaction despite finding some defects during the inspection.

After purchasing the Subject Property, Plaintiffs allegedly began smelling bad odors in the basement. Plaintiffs contacted a plumber who allegedly identified defects in the basement bathroom which were causing the smell. Plaintiffs then allegedly contacted Shelby Township, who advised them that no permits were pulled for the work in question. When the city inspectors came to inspect the basement bathroom and upstairs kitchen, laundry room and dining room they allegedly found numerous problems.

On September 30, 2013, Plaintiffs filed their complaint in this matter with the 41-A District Court. In their complaint, Plaintiffs state claims for: Count I- Fraud and Count II- Agency. On January 1, 2014, Plaintiffs filed an amended complaint adding a claim for: Count III- Negligent Misrepresentation.

On May 9, 2014, this matter was removed to this Court. On June 24, 2014, Movants filed their first motion for summary disposition. On July 9, 2014, the Dunfield Defendants filed a concurrence. On July 24, 2014, Plaintiffs filed their response.

On August 29, 2014, the Court entered its Opinion and Order granting, in part, and denying without prejudice, in part, Movants' motion for summary disposition. Specifically, the motion was granted to the extent it sought summary disposition of the portion of Plaintiffs' claims against them based on the seller's disclosure executed by Defendants Patricia and John Duffy. The remainder of the motion was denied without prejudice.

On January 8, 2015, Movants filed their instant motion for summary disposition. Plaintiffs have filed a response and request that the motion be denied. On February 17, 2015, the Court held a hearing in connection with the motion and took the matter under advisement.

#### *Standards of Review*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine

issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

#### *Arguments and Analysis*

In their motion, Movants contend that Keller cannot be vicariously liable when it was not a broker, and Defendant Kulick was not an agent, in the sale at issue. In support of their contention, Movants rely on Plaintiff John Duffy's deposition testimony in which he testified that it was his understanding that the sale in question was a for sale by owner transaction. (*See* Movant's Exhibit D.) Further, Movants rely on the "For Sale By Owner Acknowledgement" executed by the parties at closing (the "Acknowledgement"). The Acknowledgement provides:

Buyer and Seller understand that there are no commissions being paid to any Real Estate Agent.

Buyer and Seller acknowledgment that neither party has hired a Real Estate Agent and that there are no real estate commissions due to any third parties.

In the event that Buyer or Seller have hired a Real Estate Agent both Buyers and Sellers agree and understand that it is their responsibility to inform Abstract Title Agency so that the appropriate commissions can be paid.

All parties agree to indemnify and hold Abstract Title Agent harmless against any loss in reference to the above information. (*See* Movants' Exhibit H.)

While the Acknowledgement provides that neither party would be paying real estate commissions and that neither party had hired a real estate agent, the Acknowledgment goes on to say what must be done if either party had hired a real estate agent. Moreover, it is undisputed that Defendant Kulick was listed as the seller's broker on behalf of Keller Williams on the Purchase Agreement (*See* Movants' Exhibit E), and that Defendant Kulick was involved during

all stages of the sale including the initial showing and the inspection (*See* Plaintiffs' Exhibit C.). Additionally, the listing of the Subject Property was allegedly placed on service which can only be modified by brokers, and the listing provided that there were no exemptions from Keller Williams' exclusive right to sell the Subject Property. (*See* Plaintiffs' Exhibit A.) Based on these facts, the Court is convinced that a genuine issue of material fact exists as to whether Defendant Kulick was acting as the Dunfield Defendants' sales agent on behalf of Keller.

Movants also contend that Plaintiffs do not have facts to support their fraud allegations. In their complaint, Plaintiffs' fraud claims against Defendant Kulick are based on two categories of alleged misrepresentations. The first portion of Plaintiffs' claim is based on the statements made in the seller's disclosures that there were no structural modifications, alterations or repairs done to the Subject Property that were made without necessary permits. However, MCL 565.955 provides, in part:

- (1) The transferor or his or her agent is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge **of the transferor**, or was based entirely on information provided by public agencies or provided by other person specified in subsection (3), and ordinary care was exercised in transmitting the information.

Further, pursuant to the form required by MCL 565.957, any representations made in the disclosures are made "solely by the seller and are not the representations of the seller's agent(s), if any." Accordingly, while the statements made in the seller's disclosure may have contained inaccuracies, such statements were not made by Defendant Kulick. Moreover, Plaintiffs have failed to provide any evidence that the Dunfield Defendants knew that any of the information in the disclosures was false, and have failed to provide any authority by which Movants would be liable for the Dunfield Defendants' false statements in the disclosure. Consequently, the Court is

convinced that Plaintiff's fraud claims against Movants fail to the extent they are based on the seller's disclosure.

The remainder of Plaintiffs' fraud claims are based on their allegations that Defendant Kulick (1) represented that the deck, basement bathroom and upstairs tile were in sound condition, and that work was perfect, done to code and done with the highest quality of workmanship, (2) that the representations were false, (3) that Defendant Kulick knew that the representations were false as his company completed the work at issue and knew that the work on the plumbing system was not done to code and that the work was faulty, (4) that the representations were made in order to induce Plaintiffs into buying the Subject Property, (5) that they did rely on the representations, and (6) that they have suffered damages as a result of their reliance. (*See* Complaint at pgs. 6-8.)

As a preliminary matter, 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.*

In this case, Plaintiffs allege that Defendant Kulick actively lied about the condition of the basement bathroom, deck and upstairs tile. In their motion, Movants contend that Defendant Kulick's representations were either true or that Defendant Kulick did not know that they were false. While the scope of work is disputed, it is undisputed that Defendant Kulick's company performed work on the deck, the main floor tile and the basement bathroom. In their response,

Plaintiffs provide 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, or done with the proper permits, an issue remains as to whether his statements were recklessly false.

Movants also contend that Defendant Kulick's statements were opinions and may not form the basis for Plaintiffs' claims. It is undisputed that Defendant Kulick advised Plaintiffs that he had done the work in question. Accordingly, by stating that the work was done to code, 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 warranting the work and of stating facts that Defendant Kulick knew, rather than that he was simply expressing his opinion, as to the quality of the work.

Finally, Movants contend that the alleged misrepresentations may not overcome the "as is" language because the statements were made after a binding agreement was in place. However, it is undisputed that by executing the Purchase Agreement the Plaintiff agreed to

purchase the Subject Property, contingent upon their right to have the Subject Property inspected. Further, the statements were made during the inspection. Consequently, the Plaintiffs were not bound to purchase the Subject Property at the time the statements were made. Accordingly, the Court is convinced that Movants' position is without merit.

For the reasons discussed above, the Court is convinced that genuine issue of material fact exists as to, *inter alia*, whether Defendant Kulick was the Dunfield Defendant's broker in connection with the sale, the scope of the work performed by Defendant Kulick's company, whether Defendant Kulick recklessly or intentionally made false statement regarding the condition of the Subject Property, whether Plaintiffs reasonably relied on the statements, and whether the statements were opinions. Consequently, the Court is convinced that genuine issue of material fact exist which preclude summary disposition.

#### *Conclusion*

For the reasons set forth above, Defendants Keller Williams Macomb St. Clair Market Center and Steven Kulick's joint motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) 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: March 2, 2015

JCF/sr

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