Michigan Realtors®
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SILENT FRAUD AND THE DUTY TO DISCLOSE

I. INTRODUCTION

A REALTOR®'s duty to disclose defects in property has not been the subject of a legal update for several years. This is probably due to the fact that in Michigan, it has generally been found that when representing sellers, REALTORS® have no duty to disclose defects to buyers. In analyzing this question, Michigan courts have recognized that there is a "commercially antagonistic relationship" between the buyer and the REALTOR® representing the seller. Further, the number of questions in the seller's disclosure form has greatly reduced the opportunity for a seller to remain silent as to a potential defect. However, as demonstrated by several recent Court of Appeals decisions discussed below, there are still circumstances in which a seller and his agent can be found liable for saying nothing, *i.e.*, "silent fraud."

II. DISCUSSION

Plaintiffs-buyers, who have discovered defects in the house they have purchased, typically claim one or more of the following:

(1) that the seller and/or his agent made false statements that they knew were false;

(2) that the seller and/or his agent made false statements that they did not know were false, but for which they nonetheless should be held responsible; and/or

(3) that the seller and/or his agent intentionally withheld information that they had an obligation to disclose.

The recent cases that we will discuss focus on the third type of claim – *i.e.,* a claim of silent fraud. However, in order to better understand these "silent fraud" cases, we will first provide a brief refresher on the other two types of claims.

A. FRAUD – INTENTIONAL MISREPRESENTATION

All persons – sellers, buyers and REALTORS® alike – are liable if they commit fraud, *i.e.,* for false statements which they know to be false at the time they make them. As REALTORS® may recall, it has always been the rule that in order to prove fraud, a plaintiff must prove all of the following six (6) elements by clear, satisfactory and convincing evidence:

(1) that defendant made a material misrepresentation;

(2) the representation was false;

(3) when made, the defendant knew the representation was false or made it recklessly, without any knowledge of its truth and as a positive assertion;

(4) the defendant made the representation with the intention that it should be acted upon by plaintiff;

(5) the plaintiff acted in justifiable and reasonable reliance upon the representation; and

(6) the plaintiff suffered injury in reliance upon the representation.

Unfortunately, over the years the courts' analyses of these different elements, and the weight afforded to each, has not been consistent. Many decisions have focused on the "justifiable and reasonable reliance" element. In many of these cases, the court never needed to decide whether someone actually made the false statement or whether he knew the statement was false when he said it. Rather, the court decided that even assuming the false

statement was made, the buyer did not rely, or should not have relied, upon that statement. In essence, the court imposed responsibility on the buyer to take note of facts that were readily apparent.

In *Miner v Teasel*,[1] for example, the buyers alleged that after they took possession of the house, they discovered that the property suffered from many defects, problems and code violations that would cost more than $74,000 to fix. The buyers sued the sellers and the sellers' real estate agent on a number of theories, including fraudulent misrepresentation. The defendants responded that the buyers had purchased the house "as is" and that the buyers had the home inspected prior to closing. The trial court dismissed the buyers' fraud claim against all defendants and on appeal, the Court of Appeals affirmed the trial court's decision.

The Court in *Miner* first noted that an "as is" clause does not protect sellers if they make fraudulent misrepresentations to the buyers before the purchase agreement is signed. The Court went on to state, however, that in order for the buyers to recover, they must show that they actually relied on the sellers' misrepresentations. The Court concluded that here, the buyers' fraud claim against the sellers was correctly dismissed because the buyers had sought an "independent assessment" of the property before they waived their right to rescind the purchase agreement pursuant to the inspection contingency. The Court concluded that

[1] 1998 WL 1991706, Mich App, April 10, 1998 (Docket Nos. 197225 and 199165).

the buyers had relied on this "independent assessment" rather than the sellers' alleged misrepresentations in deciding whether to purchase the property.

B. NEGLIGENT/INNOCENT MISREPRESENTATION

Often, a plaintiff-buyer can establish that the seller and/or the agent made a false statement, but cannot prove that the person knew that the statement was false at the time it was made. These plaintiffs must proceed under a claim of negligent or innocent misrepresentation. An innocent misrepresentation claim is like a fraud claim except:

(1) The plaintiff does not need to prove that the other party intended to deceive the plaintiff or even that he knew that the statement was false; and

(2) The plaintiff does have to prove that the parties were in privity of contract and that the injury suffered by the plaintiff inured to the benefit of the party making the representation. [2]

Michigan courts have consistently held that a seller's broker may not be liable to a buyer for negligent or innocent misrepresentation because one of the elements for such a cause of action – privity of contract – is lacking.[3] A seller, on the other hand, does have privity of contract with the buyer and can be liable for even an innocent misrepresentation if the misrepresentation was material and the buyer was justified in relying on that

[2] *M & D, Inc v McConkey*, 231 Mich App 22 (1999).

[3] *Beck v Hillock*, unpublished opinion per curiam of the Michigan Court of Appeals, decided July 20, 1989 (Docket No. 103579); *Hastings v Kniat*, unpublished opinion per curiam of the Michigan Court of Appeals, decided January 20, 1989 (Docket No. 103396); *McMullen v Joldersma*, 174 Mich App 207; 435 NW2d 428 (1988); *Minchella v Fredericks*, 138 Mich App 462; 360 NW2d 896 (1984).

representation. However, because of specific language in the Seller Disclosure Act ("SDA"), it has been held that a seller cannot be liable for an innocent misrepresentation contained in a seller's disclosure statement.[4]

C. NON-DISCLOSURE – SILENT FRAUD

1. Background

The failure to divulge a material fact, which a party in good faith is duty-bound to disclose, may give rise to a claim for "fraudulent concealment." This theory of liability is generally referred to as "silent fraud." The Court of Appeals has often stated, however, that mere silence alone is not sufficient to constitute silent fraud. Rather, a person must have a duty to disclose the information, such as in response to a specific concern expressed by the buyer.

The Michigan Court of Appeals has held that a seller's broker is not liable to a buyer for non-disclosure alone.[5] Michigan courts have simply not imposed a general duty on the seller's agent to disclose known defects to a buyer. The courts have simply recognized that the listing broker represents the seller and, therefore, owes no fiduciary duties to a buyer. The only time a seller's agent may owe a duty to volunteer information to a buyer is to correct a

[4] *Roberts v Saffell,* 2008 WL 3876309 (Mich App); *Bergen v Baker,* 264 Mich App 376 (2004).

[5] *McMullen v Joldersma*, 174 Mich App 207; 435 NW2d 428 (1988).

misimpression or misinterpretation that he caused previously or in response to a specific concern expressed by a buyer.

As to sellers, Michigan courts have held that in order for a buyer to have a claim against a seller for silent fraud, the buyer must show that the seller actually made some type of misrepresentation. In the *McConkey* case, the Court of Appeals made clear that this representation does not necessarily mean that the seller made a false statement. "A misrepresentation need not necessarily be words alone, but can be shown where the party, if duty-bound to disclose, intentionally suppresses material facts to create a false impression to the other party."

2. Recent Case Law

In one recent case, *Elliot v Therrien,*[6] the Therriens had their Michigan home listed for sale. The Michigan home was vacant as the Therriens were living in Florida. An offer was made and accepted on the property. A home inspection was made under the terms of the offer and it revealed extensive mold in the home's attic. This sale was terminated.

Mr. Therrien asked his brother, Jim Therrien, who lived in Michigan, to investigate the mold problem. Jim Therrien hired a mold consultant who inspected the property and tested it for mold. The mold consultant then prepared a "Mold Free Report" ("MFR"), which was sent to the Therriens and their listing agent. The mold consultant had checked and tested for mold in the home's attic and master bedroom.

[6] 2010 WL 293071, Mich App, January 26, 2010 (Docket No. 288235).

The MFR disclosed the presence of mold in the attic and master bedroom. The MFR provided that air tests in the master bedroom indicated a "high level of contamination." The spore counts in the attic and master bedroom were listed as "high," including spores from the penicillium-aspergillus group. The MFR stated that aspergillus and penicillium "can produce potent mycotoxins" which "are fungal metabolites that have been identified as toxic agents" and that "even low levels of these species should be remediated." The MFR went on to note the existence of other forms of mold in the attic and described the various health effects that occur when a person is exposed to mold or inhales spores. These adverse health effects can include: "allergic reactions, infections, toxic effects, runny nose, eye irritation, cough, congestion, asthma aggravation, headache, and fatigue."

The MFR contained extensive recommendations regarding remediation of the mold situation in the home, including clearance testing after the work was performed to make certain occupancy was safe. The consultant gave an estimate of almost $9,000 to take care of remediation work. The Court of Appeals found that the MFR's remediation recommendations made it quite clear that there was a need for professional services and qualified personnel to do the work.

The Therriens chose not to use professionals for the remediation work. Instead, the Therriens hired a contractor to remove the attic's insulation and the roof. Then, brother Jim, who had no training or experience in construction, mold testing or remediation, scrubbed the trusses using bleach or Lysol and then added new attic insulation. The contractor then

returned and put on a new roof. No clearance testing was performed as recommended in the MFR.

The first seller's disclosure statement prepared by the Therriens had not mentioned mold. A second seller's disclosure statement was then prepared, which spoke only of the discovery of mold "on" the home's roof. There was nothing expressly stated in the disclosure statement regarding mold in the attic or in the master bedroom. The statement did disclose that the roof and insulation had been replaced.

When the home was put back on the market, the Elliotts made an offer that was accepted. The Elliotts were never given the MFR. The inspection conducted by the Elliotts' inspector did not reveal any mold problems.

Prior to closing, the Elliotts apparently had continuing concerns about the condition of the property, including electrical and plumbing issues. The Elliotts were also concerned about mold. A day before the closing, a "powwow" was held at the house between the Therriens, the Elliotts and their respective agents. There was evidence submitted at trial that, at this meeting, the Therriens had been asked about the mold referred to in the second seller's disclosure statement and that the Therriens had responded that the mold had been "on" the roof of the house, that it had been non-toxic and that the entire roof had been replaced. There was also testimony that at the "powwow," the Elliotts, especially Mrs. Elliott, repeatedly demanded that the Therriens disclose any and all problems related to the condition of the house.

The day after the "powwow," a lengthy closing took place. The Therriens now had an attorney representing them. At the closing, the Therriens signed a third seller's disclosure statement. This disclosure statement again indicated that mold had been discovered "on" the roof and that the roof, shingles and insulation had been replaced and that the joists had been scrubbed.

Not long after the Elliotts moved into the house, they and their son became ill. The Court of Appeals decision indicates that the Elliotts were experiencing such symptoms as runny nose, coughing, sneezing, puffy eyes, rashes, breathing and respiratory difficulties, bowel problems, asthma, fatigue, migraines, memory loss, seizures and an overall malaise. According to the Elliotts, testing by doctors, including blood tests, revealed the presence of penicillium and aspergillus. The Elliotts were told by their family doctor to vacate the house and not to return until after it was tested for mold and declared safe.

Testing was performed on the home and, as expected, it revealed the same high levels of mold as indicated in the prior MFR. The second mold tester concluded that the mold contamination was so extensive in the house that there was cross-contamination throughout the interior of the house. The second mold tester was greatly concerned with anyone living in the house with the contamination levels found in the home. She advised Bill Elliott that this "was one of the sickest houses she had ever encountered." Pursuant to the second expert's direction, the Elliotts discarded a large amount of personal property and moved out of the house. Ultimately, the Elliotts were facing the situation where the house was essentially

gutted, remediation costs were exceeding $100,000 and they were living in a trailer park. The Elliotts stopped making mortgage payments, gave up on the house and the house was foreclosed.

The Elliotts sued the Therriens and the listing agent. The listing agent settled for $20,000. Ultimately, a jury awarded the Elliotts damages in the amount of $441,700 based on their claim that the Therriens had committed silent fraud. The Therriens appealed the jury verdict.

In determining whether the jury verdict was appropriate, the Court of Appeals first reviewed what a plaintiff like the Elliotts has to prove in order to establish a claim for silent fraud. To establish such a claim, the Court held, a plaintiff must by clear and convincing evidence establish the following:

1. The defendant failed to disclose a material fact about the subject matter at issue;

2. Defendant had actual knowledge, *i.e.*, knew of the facts;

3. The failure to disclose the fact gave the plaintiff a false impression;

4. When the defendant failed to disclose the fact, he or she knew that the failure to disclosure would create a false impression;

5. When the defendant failed to disclose the fact, he or she intended that the plaintiff rely on the resulting false impression;

6. The plaintiff indeed relied on the false impression; and

7. The plaintiff suffered damages resulting from his or her reliance.

It should be noted that one of the defenses asserted by the Therriens was that they had disclosed the existence of mold on the disclosure form and thus were shielded from liability under the SDA for a number of reasons. The Court of Appeals rejected these arguments, referring specifically to the provision in the SDA which states that the act "does not limit or abridge any obligation for disclosure created by any other provision of law regarding fraud, misrepresentation or deceit in transfer transactions."

Assuming the facts set forth in the Court of Appeals opinion are true, it is not difficult to see why the jury found in favor of the Elliotts and why the Court of Appeals affirmed that decision. The Court of Appeals noted that there had been testimony that when asked at the "powwow," the Therriens had denied that there had been mold anywhere in the house, including the attic. Further, had the Therriens provided the MFR to the Elliotts, the Elliotts would have become aware of the mold in the attic and the master bedroom and of the need for extensive professional remediation in the home.

In this case, the Therriens provided multiple seller's disclosure statements and allegedly made oral statements which indicated that the mold had been limited to the roof and, essentially, that it had been fixed. When questioned by the Elliotts, the Therriens knowingly failed to disclose the situation as described in the MFR and, presumably, of which they were aware as a result of living in the home. This resulted in the finding of silent fraud against them. Had the case proceeded against the Therriens' agent, presumably the same claims would have been made against her, *i.e.*, she knew the contents of the MFR, had been present

at the "powwow" and had said nothing to correct the incomplete information in the second and third seller's disclosure statements.

In another recent case,[7] the buyers sued the sellers for both actual fraud and silent fraud after the buyers discovered serious structural problems with the home they purchased. At trial, it was established that the sellers had the home inspected prior to their purchase of the home four years earlier and had been told in an inspection report:

> The rim joist along the west wall, north wall east corner of the laundry room and corner of the west wall is deteriorated. The sill plate is also deteriorated in those areas along with the ends of some of the floor joists. The floor joists along the north wall of the kitchen hall are bad, there are several floor joists that are deteriorated in the ends. A beam is in place in this area. Is installed but has not been properly finished.

In fact, when the sellers had bought the home years earlier, they had received a credit of $3,000 for necessary repairs to address these problems. No repairs were done during the four years the sellers owned the home. Nonetheless, when sellers completed the seller's disclosure statement when they went to sell the home, they had responded "no" to the question about known structural problems.

Nonetheless, the sellers prevailed both at the trial court level and on appeal to the Michigan Court of Appeals. In order to prevail on a claim for silent fraud, the Court noted that buyers must be able to establish that the sellers had intended to deceive. Here, the sellers testified that they had only a vague memory of the inspection report they had obtained

[7] *Westrick v Jeglic*, unpublished opinion per curiam of the Michigan Court of Appeals, issued July 15, 2010 (Docket No. 291470).

four years earlier and that they had never viewed the items in the report as "a big deal." The sellers testified that they had never had any problems with the house and that they liked living in the house "very much." The Court concluded that because the sellers acted in "good faith," they were not responsible under either a claim for actual fraud or silent fraud.

In the final case involving a claim of silent fraud,[8] the plaintiff-tenant leased a gas station from defendant-landlord in 2006 for a period of ten years. About a year into the lease, the tenant discovered that the gas station had been found to be a site of environmental contamination in 1996 – a fact known to the landlord, but not disclosed to the tenant. The tenant sued on a number of theories, including silent fraud, seeking both recission of the lease and reimbursement for the $200,000 that the tenant had invested in the property. The tenant relied in significant part on a Michigan environmental statute that requires disclosure in the event of a transfer of an interest in contaminated property.

The landlord argued that language in the lease itself put the tenant on notice of the contamination. The landlord pointed to several clauses in the lease that provided that the tenant would not be liable for any pre-existing contamination on the property and, moreover, that the landlord would indemnify the tenant and hold the tenant harmless from any liability as a result of any pre-existing contamination. This language was sufficient to put the tenant on notice, the landlord argued. Why would the landlord agree to assume liability for any pre-existing contamination if in fact the site was not contaminated?

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[8] *1031 Lapeer, LLC v Rice*, unpublished opinion per curiam of the Michigan Court of Appeals, issued August 5, 2010 (Docket No. 290995).

The jury found for the tenant and the landlord appealed, arguing that the trial judge should have thrown out the case on the basis that there was no reasonable reliance by the tenant. The Court of Appeals determined that the question of whether the lease reasonably placed the tenant on notice was a question for the jury and that the jury had found that it did not.

III. CONCLUSION

While neither a seller nor a listing agent has a general duty to volunteer information to a buyer, such a duty can arise in specific instances. A duty can arise, for example, if a buyer makes a specific inquiry. Partial responses to questions presented which appear to have been designed to deceive may result in liability for silent fraud. Likewise, statutes such as the SDA and certain environmental statutes may create a duty to volunteer information. On the other hand, Michigan courts will not permit buyers to ignore clear indicators of potential problems and then later claim that they have been deceived.