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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0391**

Alan J. Roers, et al.,
Appellants,

vs.

Michael B. Pierce,
Respondent,

Robert P. Hare, et al.,
Respondents,

The Real Estate Nexus, Ltd.,
Respondent.

**Filed January 13, 2009
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge**

Hennepin County District Court
File No. 27-CV-07-8792

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Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this dispute over the purchase of real property, the buyers, appellants Alan J. Roers and Cynthia J. Roers, challenge the district court's grant of summary judgment to respondent seller Michael B. Pierce and respondent real estate agent Robert P. Hare.¹ Appellants argue that the district court (1) erred in dismissing appellants' misrepresentation, breach of fiduciary duty, and consumer fraud act claims on the ground that appellants' reliance on the alleged misrepresentations was unreasonable as a matter of law; (2) erred in granting summary judgment on appellants' breach-of-contract claim against Pierce; and (3) erred in granting summary judgment on appellants' claim that Pierce breached the seller disclosure requirements of Minn. Stat. § 513.55 (2008). We affirm in part, reverse in part, and remand.

DECISION

This dispute arises from appellants' purchase from Pierce of real property known as the "20-20 Ranch." Pierce owned two parcels of property: the 20-20 Ranch and an

¹ When Hare listed the property for Pierce in July 2006, Hare was employed by respondent The Real Estate Nexus, Ltd. In October 2006, after appellants and Pierce entered into the purchase agreement but before closing, Hare left The Real Estate Nexus and formed his own brokerage company, respondent White Oak Real Estate Advisors. This opinion uses "Hare" to collectively refer to respondent Robert P. Hare, respondent The Real Estate Nexus, and respondent Robert P. Hare V, LLC d/b/a White Oak Real Estate Advisors.

abutting parcel referred to as the “Front 20.” Pierce hired Hare, a licensed real estate agent, to market the 20-20 Ranch and to represent him during its sale.

The record indicates that Hare marketed the property extensively. Among other things, the marketing materials for the 20-20 Ranch represented that the property being sold included nine sheds. It is undisputed that only six sheds were located on the 20-20 Ranch and that an additional three sheds were located on the Front 20, and that these three sheds receive water and electrical services from the main residence located on the 20-20 Ranch. It is also undisputed that there was a sign located on the Front 20 advertising the sale of the 20-20 Ranch.

The record indicates that Hare gave appellants a tour of the property and shortly thereafter, appellants entered into a purchase agreement for the 20-20 Ranch. At the time that appellants signed the purchase agreement appellants agreed to a dual agency arrangement whereby Hare would represent both Pierce and appellants. The transaction closed several months later and appellants took possession of the 20-20 Ranch. Some months later, appellants learned that Pierce was selling the Front 20. Appellants claim that they believed that the Front 20 was included in their purchase of the 20-20 Ranch because both respondents took actions or made representations to that effect. Respondents state the Front 20 was never a part of the sale of the 20-20 Ranch.

The district court determined, and the parties do not dispute, that (1) an examination of relevant public records would have revealed that the Front 20 was not within the land described in the purchase agreement for the 20-20 Ranch; and (2) the Front 20 was not within the land described in the deed delivered to appellants.

On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). There is no genuine issue of material fact when the nonmoving party presents evidence that is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I.

Appellants challenge the district court's grant of summary judgment on their misrepresentation, breach of fiduciary duty, and consumer fraud claims. Appellants argue that because there are disputed issues of material fact, the district court erred in dismissing these claims based on the holding in *Corazalla v. Quie*, 478 N.W.2d 197 (Minn. 1991). Citing *Corazalla*, the district court concluded that appellants' reliance on respondents' alleged representations was unreasonable as a matter of law and therefore, the court granted summary judgment to respondents on appellants' claims of fraudulent and negligent misrepresentation, breach of fiduciary duty, and their claim under the Minnesota Consumer Fraud Act. We conclude that because the present case is distinguishable from the unique facts in *Corazalla*, the district court erred in relying on *Corazalla* as a basis for entering summary judgment.

In *Corazalla*, a purchaser brought suit against a seller and his real estate agent for fraud and negligent disclosure predicated on representations that the property being sold was a wildlife sanctuary with a private seven-acre lake. *Corazalla*, 478 N.W.2d at 198.

After entering into a purchase agreement, the purchaser made two visual inspections of the property. *Id.* But according to the purchaser's complaint, it was not until after the closing that he discovered that the lake was not exclusively within the boundaries of the property because the lake was partially located on neighboring land and, therefore, subject to use by the neighboring landowner. *Id.*

The *Corazalla* court reversed this court and reinstated the district court's order for summary judgment in favor of the seller. *Id.* at 198-99. The court noted that the buyer conducted several visual inspections of the property and that the fence line separating the subject parcel from the neighboring land was readily apparent. *Id.* at 198. And the court concluded that "no genuine issues of material fact existed for trial based on respondent's evidence of public record, readily available for inspection by a purchaser of real property, which clearly discloses the fact that two parcels of land abut the lake." *Id.* at 198-99.

Unlike *Corazalla*, appellants here claim to have relied on misrepresentations made by both the seller (Pierce) and their own real estate agent (Hare), who was acting in a dual agency role. And it is undisputed that respondents provided to appellants marketing materials that incorrectly stated that the 20-20 Ranch included nine day sheds. The record indicates that three of the day sheds are located on the Front 20. Appellants also claim that tours of the 20-20 Ranch conducted by respondents included the Front 20.

Whether a party's reliance is reasonable is ordinarily a fact question for the jury unless the record reflects a complete failure of proof. Accordingly, to survive a motion for summary judgment, the nonmoving party must come forward with some facts supporting a conclusion of reasonable reliance. We have held that a party can reasonably rely on a representation unless the falsity of the representation is

known or obvious to the listener. The listener is not under an obligation to conduct an investigation and thus may rely on the representation so long as it is not known by the listener to be false and is not obviously false.

Hoyt Props., Inc. v. Prod. Res. Group, L.L.C., 736 N.W.2d 313, 321 (Minn. 2007) (citations omitted).

The purchaser in *Corazalla* did not claim that he relied on representations made by his own agent. And here it is disputed whether appellants' visual inspections of the 20-20 Ranch should have revealed that the Front 20 was not included in the sale of the 20-20 Ranch. "Reasonableness becomes an issue of law when the record is devoid of any facts that would support a conclusion that an action or belief is reasonable." *Frerichs Constr. Co., Inc. v. Minnesota Counties Ins. Trust*, 666 N.W.2d 398, 402 (Minn. App. 2003). We conclude that under these facts, reasonable reliance is a question for the jury. Therefore, the district court erred in ruling that appellants' reliance on respondents' representations was unreasonable as a matter of law.

We will, however, affirm the judgment of the district court if it can be sustained on any grounds. *Myers Through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990), *review denied* (Minn. Feb. 4, 1991). Thus, we examine appellants' claims to determine whether there are other grounds on which to affirm the district court's judgment. We conduct this examination viewing the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Fraudulent Misrepresentation

We reject respondents' arguments that there are alternative grounds on which to affirm summary judgment on appellants' fraudulent misrepresentation claim. A review of the record demonstrates that there are genuine issues of fact as to whether representations were made, whether the representations were false, whether respondents possessed the requisite intent for fraudulent misrepresentation, whether reliance on any misrepresentations was reasonable, and whether appellants suffered pecuniary damage as a result of the alleged misrepresentations. Furthermore, there are factual issues that preclude a determination on summary judgment whether Pierce may be held liable for the alleged misrepresentations of his agent, respondent Hare. Therefore we reverse the district court's grant of summary judgment to respondents on this claim and remand for further proceedings.

Negligent Misrepresentation

We also reject respondents' arguments that there are alternative grounds on which to affirm summary judgment on appellants' negligent misrepresentation claims.

"A misrepresentation is made negligently when the misrepresenter has not discovered or communicated certain information that the ordinary person in his or her position would have discovered or communicated." *Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986). "An essential element of negligent misrepresentation is that the alleged misrepresenter owes a duty of care to the person to whom they are providing information." *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 424 (Minn. App. 2000) (citation omitted). "A duty to disclose facts may exist under certain circumstances, such

as when a confidential or fiduciary relationship exists between the parties or when disclosure would be necessary to clarify information already disclosed, which would otherwise be misleading.” *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989). One also owes a duty of care when supplying information in the course of one’s business, profession or employment. *Florenzano*, 387 N.W.2d at 174.

The marketing materials provided by Hare erroneously listed nine sheds as part of the 20-20 Ranch. It is disputed whether or not Pierce and Hare included the Front 20 in tours of the 20-20 Ranch. And it is also disputed whether Hare and Pierce represented that the Front 20 was included in the sale of the 20-20 Ranch. Because of Hare’s fiduciary duty to appellants and because he was supplying information to appellants in the course of his profession, we conclude that Hare owes a duty to appellants for purposes of appellants’ negligent misrepresentation claim. And we conclude that the scope of Pierce’s duty, including whether or not Pierce may be liable for Hare’s alleged negligent misrepresentations, depends on disputed issues of material fact. Consequently, the district court erred in granting summary judgment on appellants’ negligent misrepresentation claims.

Breach of Fiduciary Duty

Appellants challenge the district court’s grant of summary judgment on their claim that Hare breached his fiduciary duties under the common law and Minn. Stat. § 82.22 (2008). Hare does not dispute that he was acting as a dual agent by representing both Pierce and appellants. The district court concluded that because appellants’ reliance on Hare’s statements was unreasonable as a matter of law, appellants could not establish that

any breach of duty by Hare caused appellants damage. As discussed above, we reverse the district court's conclusion that appellants' reliance on respondents' statements was unreasonable as a matter of law. Because there are genuine issues of fact concerning appellants' breach-of-fiduciary-duty claim against Hare, we reverse the district court's grant of summary judgment on this claim and remand for further proceedings.

Consumer Fraud Act

Appellants challenge the district court's grant of summary judgment on their claim that respondents violated Minnesota's Consumer Fraud Act (CFA). The district court determined that this claim failed because appellants' reliance on respondents' representations was unreasonable as a matter of law. We reverse this conclusion by the district court but will address whether there are other grounds upon which the judgment may be affirmed. *See Myers Through Myers*, 463 N.W.2d at 775. We conclude that the district court should be affirmed on the ground that appellants' claim does not benefit the public.

The private attorney general statute, Minn. Stat. § 8.31, subd. 3a (2008), in conjunction with the CFA, allows consumers to bring claims against persons employing fraud, misrepresentation, and deceptive practices in connection with the sale of merchandise. *See* Minn. Stat. § 325F.69, subd. 1 (2008). The definition of "merchandise" includes real estate. Minn. Stat. § 325F.68 (2008). But a claimant who brings an action under the private attorney general statute must demonstrate that their cause of action benefits the public. *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000).

Typically, where the alleged misconduct occurs in a one-on-one transaction, a claim arising from the one-on-one transaction does not fulfill the public benefit requirement. *See Davis v. U.S. Bancorp*, 383 F.3d 761, 768 (8th Cir. 2004) (“Litigation over an alleged misrepresentation that was made only to one person ‘does not advance state interests and enforcement has no public benefit.’”) (quoting *Ly*, 615 N.W.2d at 314); *Kivel v. Wealthspring Mortgage Corp.*, 398 F. Supp. 2d 1049, 1056 (D. Minn. 2005) (concluding no public benefit where plaintiffs did not demonstrate that defendant’s conduct affected the general public and plaintiffs’ damages were personal and individualized); *Ly*, 615 N.W.2d at 314 (concluding that there is no public benefit to successful prosecution of a fraud claim arising from a one-on-one transaction); *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578 (Minn. App. 2004) (relying on *Ly* to conclude no public benefit from a claim arising from a single one-on-one incident that terminated plaintiff’s membership and only affected the plaintiff).

Here, the record indicates that respondents allegedly published marketing materials to the public that allegedly contain misrepresentations. But because appellants’ claim arises from an individualized transaction with respondents and because the damages appellants seek are personal in nature, we conclude that appellants’ fraud claim is not a cause of action benefiting the public as required by *Ly*. *See Ly*, 615 N.W.2d at 313-14 (holding that actions brought under private attorney general statute must benefit the public). Therefore, we affirm the district court’s grant of summary judgment to respondents on appellants’ claim under the Consumer Fraud Act on the ground that appellants’ claim does not benefit the public.

II.

Appellants challenge the district court's grant of summary judgment on their breach-of-contract claim against Pierce. Appellants claim that Pierce breached the purchase agreement by failing to transfer the Front 20. The district court concluded that this claim was precluded by the statute of frauds. Appellants argue that the doctrines of part performance and equitable estoppel preclude the application of the statute of frauds. We conclude that because there are questions of fact as to whether the doctrine of equitable estoppel applies to preclude the application of the statute of frauds, summary judgment was inappropriate.

The statute of frauds provides that every contract for the sale of land shall be void unless the contract "is in writing and subscribed by the party by whom the lease or sale is to be made." Minn. Stat. § 513.05 (2008). Here, appellants argue that their contract with Pierce included the sale of the Front 20. But the record indicates that the property described in the purchase agreement does not include the Front 20. And appellants do not claim that there is another writing purporting to transfer the Front 20. Because there is no writing memorializing the sale of the Front 20, the statute of frauds operates to void any alleged contract unless an exception applies.

Appellants contend that the doctrine of part performance operates to preclude application of the statute of frauds. But a reviewing court must generally consider only those issues that the record shows were presented and considered by the district court in deciding the matter before it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). And

because appellants did not argue the applicability of the doctrine of part performance to the district court, we conclude that this issue is waived.

But appellants also argue that the doctrine of equitable estoppel applies to preclude application of the statute of frauds. The doctrine of equitable estoppel may limit the application of the statute of frauds. *Lunning v. Land O'Lakes*, 303 N.W.2d 452, 457 (Minn. 1980). As the *Lunning* court explained, the legislature enacted the statute of frauds to promote honesty and fair dealings. *Id.* “When an application of the [statute of frauds] will protect, rather than prevent, a fraud, equity requires that the doctrine of equitable estoppel be applied.” *Id.* The Minnesota Supreme Court has held that where a seller points out the location of a boundary line of real estate which he is selling, and the buyer, relying upon such representations, is induced to make the purchase, the seller is thereafter estopped from claiming that the boundary was elsewhere. *Poksyla v. Sundholm*, 259 Minn. 125, 128, 106 N.W.2d 202, 204 (1960). *See also Gresser v. Hotzler*, 604 N.W.2d 379, 385 (Minn. App. 2000) (concluding equitable estoppel inapplicable to deny validity of a purchase agreement where realtor’s statements not attributable to vendor under agency principles); *Nelson v. Smith*, 349 N.W.2d 849, 852-53 (Minn. App. 1984) (upholding the application of equitable estoppel to preclude application of the statute of frauds in an action by a lessee against a lessor for breach of an oral lease of farmland), *review denied* (Minn. July 26, 1984).

A misrepresentation is the first element necessary to establish estoppel. *Gresser*, 604 N.W.2d at 385. We conclude that appellants submitted sufficient evidence in opposition to respondents’ summary judgment motion to raise an issue of fact regarding

whether Pierce made false representations. Additionally, there are fact questions concerning whether Hare's representations may be attributed to Pierce under agency principles. *See id.* (concluding appellant presented evidence that real estate agent's representations could be attributed to his principal for purposes of equitable estoppel). We conclude that summary judgment on appellants' breach-of-contract claim is inappropriate because there are fact issues that may preclude the application of the statute of frauds. Thus, we reverse the district court's grant of summary judgment in favor of respondents on this claim and remand for further proceedings.

III.

Appellants challenge the district court's grant of summary judgment to Pierce on their claim that Pierce violated the seller's disclosure requirement set forth in Minn. Stat. § 513.55 (2008) by failing to disclose the actual boundaries of the property to be included in the sale. We reject this argument because the record indicates that Pierce disclosed the boundaries and because the alleged missing disclosure is not the type of disclosure contemplated by the statute.

Minnesota imposes a duty on sellers to make certain disclosures. The seller's disclosure statute states in relevant part:

- (a) Before signing an agreement to sell or transfer residential real property, the seller shall make a written disclosure to the prospective buyer. The disclosure must include all material facts of which the seller is aware that could adversely and significantly affect:
 - (1) an ordinary buyer's use and enjoyment of the property; or
 - (2) any intended use of the property of which the seller is aware.

Minn. Stat. § 513.55, subd. 1 (2008). “The disclosure must be made in good faith and based upon the best of the seller’s knowledge at the time of the disclosure.” *Id.* “A seller who fails to make a disclosure as required by [section 513.55] and was aware of material facts pertaining to the real property is liable to the prospective buyer.” Minn. Stat. § 513.57 (2008). But a seller is not liable for “any error, inaccuracy, or omission of any information” required by section 513.55 “if the error, inaccuracy, or omission was not within the personal knowledge of the seller.” *Id.*

Here, the record indicates that Pierce utilized a disclosure form prepared by the Minnesota Association of Realtors that primarily addresses the condition of the property and its structural and mechanical systems. But in several places on the form, the location of the property is properly listed as “20 Co Rd No 20 S.” Additionally, the purchase agreement lists the street address of the property as “20 Co Rd No 20 S” and legally describes the property as “Unplatted 06 117 24 (see Hennepin county for complete metes and bounds).”

Moreover, the seller’s disclosure statute is designed to impose an obligation on the seller of property to reveal physical defects and other problems with a property that could adversely and significantly affect a potential buyer’s use and enjoyment of the property or a buyer’s intended use of a property of which the seller is aware. *See* Minn. Stat. § 513.55, subd. 1. It is not intended to require a seller to disclose what land is *not* included in the sale of property. *See id.*

We conclude that to the extent that the boundaries of the 20-20 Ranch were a material fact under section 513.55, Pierce adequately disclosed the boundaries of the property being sold for purposes of the statute. Therefore, we affirm the district court's grant of summary judgment to Pierce on appellants' claim under section 513.55.

IV.

In summary, we reverse and remand the district court's grant of summary judgment on appellants' claims of fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, and breach of contract. We affirm the district court's grant of summary judgment on appellants' claims under the Minnesota Consumer Fraud Act and the seller's disclosure statute.

Affirmed in part, reversed in part, and remanded.