
No. WD68188

**IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STEVEN C. LARABEE and FRANCES C. LARABEE

Appellants,

v.

BUDDY EICHLER and DOROTHY EICHLER

Respondents.

RESPONDENT'S OPENING BRIEF

**Appeal from the Circuit Court of Benton County
Warsaw, Missouri
Honorable John W. (Bill) Sims
Case No. 04CV692924**

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ARGUMENT

1. Appellant's claim at to Count I is barred by the Statute of Limitations, as the alleged fraud was discoverable in excess of five years before the cause of action was instituted.

As stated in Graf v. Michaels, 900 S.W.2d 659, 661 (Mo.App.S.D. 1995), the statute of limitation for an action in fraud is RSMo §516.120(5), which states:

Within five years:

...

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

As explained in Graf this subsection sets forth a period of ten years in which the fraud may be discovered or discoverable. Once the alleged fraud is discovered or discoverable, suit must be filed within five years. Here, Appellants were in the position to discover any alleged misrepresentations regarding the restrictions placed upon Lot 403 by reviewing the real estate records contained in the Office of the Recorder of Deeds for Benton County, Missouri, and a review of the deeds received at closing. In addition, notice with respect to any restrictions on any bordering pieces of real property was

available to Appellants in the office of the Recorder of Deeds for Benton County, Missouri.

“It is generally held that where the facts constituting the fraud appear on the face of a record deed, the record of the deed furnishes constructive notice of the fraud so as to set the statute of limitations in motion. It is held, however, that this rule is not controlling where a fiduciary relation exists between the person committing the fraud and the person defrauded.” Briece et al v. Bosso et al., 158 S.W.2d 463 (Mo.App. 1942). Appellants do not allege that a fiduciary relationship exists between Appellants and Respondents, therefore the general rule must apply.

“Our courts have placed a duty on plaintiffs to make inquiry to discover the facts surrounding the fraud and plaintiff is deemed to know of the fraud where plaintiff possesses the means of discovery,” Gilmore v Chicago Title Ins. Co., 926 S.W.2d 695, 698 (Mo.App.E.D. 1996). The means of discovering any alleged fraud was available to Appellants, to wit, a review of the real estate records of Benton County, Missouri.

As this is the case, the statute of limitations began to run, as to Count I, at the closing of the real estate transaction. Said transaction closed on or about April 10, 1998. More than five years had elapsed when the petition

was filed in this cause. Appellants' claim in Count I was properly dismissed as a matter of law by the Trial Court.

Appellants lengthy description of alleged wrongful acts of Respondent after the closing date does not have an affect upon the ability of Appellant to **discover** the alleged fraud. As Appellant properly points out at page 13 of Appellants' Brief, "the reliance by the Plaintiffs in this case is upon a recorded document." All documents which relate to the restrictions, or lack thereof, on the real estate in question are available for public viewing in the office of the Recorder of Deeds for Benton County, Missouri. The standard practice of a title search would have revealed the status of Lot 403 and of the surrounding properties. Appellants' claim as to Count I is barred as a result of the applicable Statute of Limitations.

2. Appellants failure to produce evidence of damage with respect to alleged misrepresentations regarding Lot 402 requires summary judgment to be granted.

“In order to establish a claim for nondisclosure or fraudulent misrepresentation, the plaintiff must prove: (1) a representation, (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or his ignorance of the truth; (5) the speaker's intent that the representation should be acted upon by the hearer in a manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the truth of the representation; (8) the hearer's right to rely thereon; and (9) injury to the hearer proximately caused by that reliance. Dechant v. Saaman Corp., 63 S.W.3d 293, 295 (Mo.App.E.D. 2001). For the limited purpose of their motion for summary judgment, Respondents conceded that Appellants could prove the first 8 elements of their claim. However, in order for Appellants to be successful on their claim, Appellants must plead and prove pecuniary damages because damages are an intrinsic element of such a cause of action, Tindall v. Holder, 892 S.W.2d 314, 322 (Mo.App.S.D. 1994).

The measure of damages in a fraudulent misrepresentation case is the difference between the actual value of the property on the date it was sold to

Appellants and what its value would have been on that date had the property been as represented by Respondents. Missouri Approved Instruction 4.03. Here, Appellants have stated under oath that they “have no idea” as to value of Lot 402, in actuality or if alleged representations were in fact true. L.F. 97. It is undisputed that the property immediately adjacent to Lot 402 is subject to restrictive covenants. L.F. 77-78, & 149. Appellants’ expert has testified that there would not be a decrease in value to Lot 402 if the lots immediately adjacent (Lots 401 and 403) were in fact restricted. L.F. 98-99

In addition, the standard of review for a summary judgment is essentially de novo, ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. 1993). This Court should review the Motion for Summary Judgment and the responses thereto in reaching its determination. Within the Appellants’ Response to the Motion for Summary Judgment, Appellant was unable to establish a genuine issue of material fact to survive summary judgment.

As set forth in Missouri Rule of Civil Procedure 74.04(c)(2), an adverse party “shall admit or deny each of movant’s factual statements” and “a denial may not rest upon the mere allegations or denials of the party’s pleadings. Rather, the response shall support each denial with specific references to the discovery, exhibits, or affidavits that demonstrate specific

facts showing that there is a genuine issue for trial.” Here, Appellants have admitted as true the Statements of Material Facts in paragraphs 1-7, and 11. (L.F. 149-150). Appellants have attempted to deny the undisputed material facts described in paragraphs 8-10 of Respondents’ Motion for Summary Judgment. (L.F. 150) Said denials and the evidence purporting to support the denial fail to address the material facts actually set forth.

Count II of Appellants’ Petition only involves alleged misrepresentations with respect to Lot 402 Sterett Creek Village, a subdivision in Benton County, Missouri (L.F. 11-12). Within Defendants’ Statement of Material Facts, Paragraph 9 & 10, the specific statements set forth are that:

9. Plaintiffs “have no idea” as to the actual value of Lot 402, Sterett Creek Village, a subdivision in Benton County, Missouri, as of February 1, 2000, or the value of said parcel if all alleged representations of Defendants contained in Plaintiffs’ Petition were in fact true.

10. Plaintiffs’ retained property appraiser, Jamie Lux, has testified under oath in his deposition taken April 19, 2006, that Lot 402, Sterett Creek Village, a subdivision in Benton County, Missouri,

would not have a decreased value if Lots 401 and 403 are subject to restriction. (L.F. 78)

In response to these statements of material fact, Appellants have stated that they have “hired Missouri Property Appraisal, Inc., to perform an appraisal as to the decrease in value associated with the property due to the surrounding properties not being subjected to restrictions as represented by Defendants. See Exhibit A, indicating a decrease in value of \$17,000.” (L.F. 150).

A review of Exhibit A that was attached to Appellants response indicates:

1. The purpose of the appraisal “is to estimate the monetary damages, which are eminent as a result of the subject property being unrestricted.” (L.F. 122)
2. The subject property of the appraisal consists of both Lots 402 & 403, Sterett Creek Village, a subdivision in Benton County, Missouri. (L.F. 110).
3. The appraisal does not address the decrease in value of Lot 402, Sterett Creek Village, a subdivision in Benton County, Missouri, if said Lot is surrounded by Corps of Engineer property and restricted Lots.

Appellants have conceded that Lots 401, 402, & 403, Sterett Creek Village, a subdivision in Benton County, Missouri are subject to restrictions (see admission #7 on Plaintiffs Response to Defendants Motion for Summary judgment) (L.F. 149).

Appellants have failed to provide by affidavit, or any other evidence, that there has been a decrease in the value of Lot 402, Sterret Creek Village, a subdivision in Benton County Missouri.

Appellants now claim that their damages include items other than a decrease in value of the real property. It should be noted that Appellants petition does not set forth any of the damage claims set forth in Plaintiffs Suggestions in Support of Response to Defendants Motion for Summary Judgment. (L.F. 154-155) In addition, Appellants have failed to cite to any applicable case law or statute which would entitle Appellants to the new items of damage set forth therein. The proper measure of damages for a misrepresentation case is set forth in Missouri Approved Instruction 4.03, to wit: the difference between the actual value of Lot 402 on the date it was sold to Appellants and what its value would have been on that date Lot 402 been as represented by Respondents. Appellants have failed to provide any credible evidence to support a finding of such damage. The Trial Court correctly determined that Respondents should be granted summary judgment

with respect to Count II because of Appellants failure to produce such credible evidence.

CONCLUSION

This Court should sustain the trial court's decision and order. The granting of Summary Judgment in this cause is proper in that Count I is barred by the Statute of Limitations and Count must fail because of the absence of evidence of damages.

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CERTIFICATE REQUIRED BY SUP. CT. RULE 84.06(c)

I certify that Respondent's Brief complies with the requirements of Sup. Ct. Rule 84.06(c) in that it includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), uses characters throughout the brief, including footnotes, that are not smaller than 13 point font, Times New Roman and contains 1756 words, excluding the cover, certificate of service, the contents of this certificate, and the signature block. For the work count, I am relying on the word-processing system used to prepare the brief, MSWord 2002.

JAMES KJAR, #48179

CERTIFICATE REQUIRED BY SUP. CT. RULE 84.06(g)

I certify that the computer disk provided to the Court, and opposing counsel, containing a copy of Respondent's Brief has been scanned for viruses and is virus free. The label affixed to the disk includes the caption of the case, the name of the party filing the disk, the disk number, and the-processing format.

JAMES KJAR, #48179