

**This Order Is Not Precedential
And Is Not To Be Cited**

No. 2--00--1218

FILED

AUG 31 2001

LOREN J. STROTZ, CLERK
APPELLATE COURT 2ND DISTRICT

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DANA L. SCHULTZ,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 99--AR--96
)	
KEPHART-OTT REALTORS, INC.,)	
ROSELLA NIXON, ROBERT DREIS,)	
and DIANE DREIS,)	Honorable
)	Emilio B. Santi,
Defendants-Appellees.)	Judge, Presiding.

RULE 23 ORDER

The plaintiff, Dana Schultz, appeals from the September 14, 2000, order of the circuit court of Lake County granting the defendants' motion for summary judgment on her complaint for negligent misrepresentation and consumer fraud. We affirm.

The instant case arises out of the plaintiff's purchase of residential real estate from Robert and Diane Dreis. Kephart-Ott Realtors, Inc. (Kephart) was the brokerage firm which listed the real estate for sale, and Rosella Nixon was Kephart's agent involved in the sale. On January 21, 1999, the plaintiff filed suit against the Dreises, Kephart, and Nixon alleging violations of the Consumer Fraud and Deceptive Business Practices Act (the Consumer Fraud Act) (815 ILCS 505/1, et seq. (West 1998)) and negligent representation. Specifically, the complaint alleged that

the defendants had falsely represented in the multiple listing service (MLS) that the residence for sale was located within the Fremont School District in Mundelein. The plaintiff alleged that the primary reason she purchased the residence was because she believed that it was in that school district. After moving into the residence, however, the plaintiff learned that the residence was actually in the Mechanics Grove School District. The plaintiff was therefore unable to enroll her daughter in the Fremont School District. The plaintiff sought damages of approximately \$30,000 for expenses she incurred in having to sell the residence and move to a location within the Fremont School District.

On May 4, 2000, the defendants filed a motion for summary judgment. The defendants argued that its statement that the property was located within the Fremont School District was a representation of law and therefore not actionable. The Dreises also argued that, as the sellers of residential real estate, they could not be held liable under the Consumer Fraud Act.

In support of their motion for summary judgment, the defendants attached the transcripts from the plaintiff's deposition as well as an affidavit the plaintiff had previously submitted in the proceedings. The plaintiff testified that, on Saturday, April 25, 1998, she was driving through Mundelein and looking to purchase a home. She wanted to buy a home that was in the Fremont School District. After observing that the Dreises' residence was for sale, she informed her broker that she wanted to see the interior of the house. Her broker informed her that another offer was being

negotiated on the residence, and she should therefore see it immediately. The plaintiff then reviewed the MLS form, which indicated that the residence was located within the Fremont School District. The plaintiff acknowledged that the MLS form included a notation indicating "information not guaranteed." However, she believed this notation only referred to flood insurance and the exact size of the rooms. She never asked the Dreises or Nixon whether the house was located within the Fremont School District.

On the evening of April 25, 1998, the plaintiff and the Dreises entered into a real estate contract for the sale of the residence. The contract included a contingency for attorney approval. The plaintiff acknowledged that, during this contingency period, she could have confirmed the information appearing on the MLS form. She also acknowledged that she could have contacted the tax assessor's office or the school office to verify that the residence was in fact located in the Fremont School District. However, she did not do so because she believed "there was no reason to."

Two weeks after moving into the residence, the plaintiff attempted to enroll her daughter, Christen, at Fremont school. The school officials informed her that she lived in the Mechanics Grove School District. The plaintiff then enrolled Christen at Lincoln school in the Mechanics Grove School District. The plaintiff was not happy with the school because it did not offer any accelerated classes and left Christen "bored." The plaintiff

subsequently sold the residence and moved to a location within the Fremont School District.

On August 14, 2000, in response to the defendants' motion for summary judgment, the plaintiff acknowledged that the Dreises could not be found liable under the Consumer Fraud Act. The plaintiff, however, sought leave to file an amended complaint against the Dreises for common law fraud.

On September 14, 2000, following a hearing, the trial court granted the defendants' motion for summary judgment and denied the plaintiff leave to file an amended complaint against the Dreises. The plaintiff thereafter filed this timely notice of appeal.

On appeal, the plaintiff argues that the trial court erred in entering summary judgment because a question of material fact existed as to whether she could readily ascertain the truth or falsity of the defendants' misrepresentation at the time she executed the contract on Saturday, April 25, 1999. The plaintiff argues that she could not verify which school district served the property because there is no evidence that either the school office or the tax assessor's office was open on a Saturday. The plaintiff further argues that the trial court erred in denying her leave to amend her complaint against the Dreises.

The purpose of a motion for summary judgment is to determine whether a genuine issue of triable fact exists. Nickel v. Hollywood Casino-Aurora, Inc., 313 Ill. App. 3d 925, 928 (2000). Such a motion should be granted only when "the pleadings, depositions, and admissions on file, together with the affidavits,

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2--1005(c) (West 1998). An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law. Clausen v. Carroll, 291 Ill. App. 3d 530, 536 (1997).

A plaintiff alleging violations of the Consumer Fraud Act does not have to show actual reliance on the deceptive acts or that the defendant committed the deceptive acts in bad faith. Munjial v. Baird & Warner, Inc., 138 Ill. App. 3d 172, 182-83 (1985). However, a plaintiff must show that the deceptive act related to a material fact. Warren v. LeMay, 142 Ill. App. 3d 550, 565 (1986). A deceptive representation or omission of law generally does not constitute a violation of the Consumer Fraud Act because both parties are presumed to be equally capable of knowing and interpreting the law. Hamming v. Murphy, 83 Ill. App. 3d 1130, 1135 (1980). In other words, a defendant's misrepresentations will not be actionable if they were discoverable through the exercise of ordinary prudence by the plaintiff. Randels v. Best Real Estate, Inc., 243 Ill. App. 3d at 801, 807 (1993). A person may not enter into a transaction with his eyes closed to available information and then charge that he has been deceived by another. Chicago Export Packing v. Teledyne Industries, 207 Ill. App. 3d 659, 663 (1990).

To prevail on a negligent misrepresentation claim, the plaintiff must prove that the defendant made a false statement of material fact on which the plaintiff justifiably relied. Neptuno Treuhand-Und Verwaltungsgesellschaft MBH v. Arbor, 295 Ill. App. 3d 567, 571, 574 (1998). Whether an injured party justifiably relied upon the defendants' words or silence depends on the surrounding circumstances. Zimmerman v. Northfield Real Estate, Inc., 156 Ill. App. 3d 154, 167 (1986). A party is not justified in relying on representations made when he had ample opportunity to ascertain the truth of the representations. Zimmerman, 156 Ill. App. 3d at 167.

Turning to the case at bar, the record reveals that the plaintiff can demonstrate neither ordinary prudence nor justifiable reliance. The sole representation the plaintiff relied upon as to the location of the school district was the statement in the MLS form. However, the MLS form explicitly provided that the information contained in it was not guaranteed. The plaintiff never asked the defendants which school district serviced the property. She also never contacted the school office or the tax assessor's office to verify the location of the school district. Because the plaintiff could have verified the information through the exercise of ordinary prudence, we believe that the trial court properly found that she could not prevail on her consumer fraud allegations.

Furthermore, and despite the plaintiff's contentions to the contrary, we do not believe that the plaintiff's reliance on the representation in the MLS was justifiable. The plaintiff argues

that because the contract was executed on a Saturday, it was impossible for her to contact either the school district office or the tax assessor's office. However, the plaintiff acknowledged that the real estate contract contained a contingency for attorney approval. This provision allowed her several days in which she could have terminated the contract. During this contingency period, the plaintiff had ample time to contact either the school district office or the tax assessor's office. As she failed to do so, she cannot now claim that circumstances prevented her from verifying the information on the MLS form. Thus, we believe the trial court also properly granted the defendants summary judgment on the plaintiff's negligent misrepresentation claim.

Finally, we do not believe that the trial court erred in denying the plaintiff leave to amend her complaint to assert a claim of common law fraud against the Dreises. It is well settled that the decision to permit a party leave to amend a pleading is within the discretion of the trial court. Selcke v. Bove, 258 Ill. App. 3d 932, 937 (1994). In order to prevail on an action for fraud, the plaintiff must show that she reasonably relied upon the statement of another to her detriment. Connor v. Merrill Lynch Realty, Inc., 220 Ill. App. 3d 522, 528 (1991). As discussed above, we do not believe that the plaintiff could have justifiably relied on the defendants' representations as to what school district served the property. Accordingly, we do not believe that the trial court erred in denying the plaintiff leave to amend her complaint.

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

Affirmed.

GEIGER, J., with HUTCHINSON, P.J., and BOWMAN, J., concurring.