

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2015 CA 0197**

**ASHLEY AND KIMMIE PREJEAN**

**VERSUS**

**THE ESTATE OF JOHN D. MONTEIRO, SR., DOROTHY ANNE COIGNET  
MONTEIRO, AND HOUMA'S TOWN & COUNTRY REAL ESTATE, INC.**

**Judgment Rendered: SEP 18 2015**

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On Appeal from the Thirty-Second Judicial District Court  
In and for the Parish of Terrebonne  
State of Louisiana  
No. 165,525

Honorable John R. Walker, Judge Presiding

\* \* \* \* \*

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Real Estate

\* \* \* \* \*

**BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.**

*McDonald, J. Concurs.*

*Handwritten initials: JME and MA*

**McCLENDON, J.**

Homebuyers seek review of a trial court judgment that granted a motion for summary judgment in favor of the defendant realtor and dismissed the homebuyers' claims against the realtor. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

On December 17, 2010, buyers Ashley and Kimmie Prejean entered into a "Louisiana Residential Agreement to Buy or Sell" ("purchase agreement") with seller John Monteiro, now deceased, to purchase Mr. Monteiro's home in Houma, Louisiana.<sup>1</sup> At all pertinent times, Mr. Monteiro was represented by his wife Dorothy Anne Coignet Monteiro, a real estate agent whose sponsoring broker was Houma's Town and Country Real Estate, Inc.<sup>2</sup> Ms. Monteiro had been in the house many times over the course of its listing, but she never lived there.

At the time the purchase agreement was executed, the Prejeans were provided with a Property Disclosure Agreement for Residential Real Estate, which had been completed by Mr. Monteiro. This disclosure indicated that the property had previously had termites and termite damage.

After receiving the initial disclosure and prior to closing, the Prejeans had the property inspected by Terminex in December 2010 or January 2011. Terminex found live termites, as well as termite damage, in three separate locations: (1) by a window next to the driveway; (2) in one of the walls of the courtyard; and (3) at the southwest corner of the house.

Also prior to closing, on January 6, 2011, the Prejeans had a home inspection completed by St. Pierre's Home Inspection. The inspector's report indicated "major defects that need further evaluation or repair by appropriately Licensed Contractors." The list of major defects included rusty roof flashing, a wet spot on the wall next to the wet bar interior wall in the kitchen, standing water on

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<sup>1</sup> The purchase price was \$610,000.00 and the Prejeans intended to spend an additional \$200,000.00 to \$300,000.00 to renovate and update the home.

<sup>2</sup> During the sale, the Prejeans were represented by real estate agent Tiffany Rabalais.

the floor in the same area, and peeling and scaling on the drywall in two areas in the hall possibly due to previous insect intrusion. The report also stated:

It is strongly recommended that you have appropriate licensed contractors evaluate each concern further and the entire system for additional concerns that may be outside our area of expertise or the scope of our inspection BEFORE the close of escrow.

In response to the inspector's report, on January 13, 2011, the Prejeans requested that Mr. Monteiro make numerous repairs to the house prior to closing, including treatment for termites, placing the house under a termite contract with Terminex, and removing sheetrock in four areas for inspection and repair. Although the Prejeans specifically reserved their right to have the open walls re-inspected before and after repairs were made to ensure that no moisture or termite damage was found, the Prejeans did not re-inspect the home.

On April 5, 2011, the Prejeans executed an Act of Cash Sale, which provided that the sale was to be "as is," waiving all warranties on the property. After closing, the Prejeans began renovating the home as previously planned but ceased work when "defects" were discovered.

On December 19, 2011, the Prejeans filed suit naming Mr. Monteiro's estate,<sup>3</sup> Ms. Monteiro, individually and in her capacity as a real estate agent, and Town and Country, in its capacity as Ms. Monteiro's sponsoring broker, as defendants. The plaintiffs alleged that the defendants "concealed and/or failed to disclose known defects in order to sell the Property to Petitioners." The Prejeans also alleged that the defects included "water damage, termite damage, termite infestation, and leaks." The Prejeans sought damages under the Louisiana Fair Trade Practices Act in an amount of three times the actual damages sustained. Alternatively, the Prejeans sought return of the purchase price of the property, as well as reimbursement of the reasonable expenses, and all other damages and relief provided in LSA-C.C. art. 2545.<sup>4</sup>

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<sup>3</sup> Plaintiffs filed a "Voluntary Motion to Dismiss with Prejudice the Estate of John D. Monteiro, Sr.," which was granted by the trial court on October 29, 2012.

<sup>4</sup> Louisiana Civil Code article 2545 provides, in part:

Ms. Monteiro and Town and Country subsequently filed a motion for summary judgment, asserting that plaintiffs were aware, or should have been aware, of every defect about which they complain, and that plaintiffs have no evidence to prove that Ms. Monteiro had actual knowledge of the existing defects in the property that she failed to disclose them.

Plaintiffs opposed the defendants' motion for summary judgment, contending that genuine issues of material fact remained as to whether plaintiffs were aware of the defects at the time of sale and whether Ms. Monteiro had actual knowledge of the defects she failed to disclose.

Following a hearing, the trial court orally granted the defendants' motion for summary judgment. In so ruling, the trial court reasoned "that the plaintiffs knew about the termite damage, and they should have been on notice that this is a serious issue based on what was told to them." The trial court also indicated that the "home inspection noted moisture problems ... and the home inspector strongly recommended that the plaintiffs have appropriate licensed contractors evaluate the concerns." As such, the trial court concluded that the plaintiffs were on notice of the defects and that the sale was "as is" with no warranty. The trial court subsequently signed a judgment dismissing plaintiffs' claims against defendants with prejudice.

Plaintiffs have appealed, asserting that the trial court erred in granting summary judgment because genuine issues of material fact exist regarding: (1) whether Ms. Monteiro was aware of the various defects that are the subject of this action; and (2) whether plaintiffs had notice at time of the sale of the various defects.

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A seller who knows that the thing he sells has a defect but omits to declare it, or a seller who declares that the thing has a quality that he knows it does not have, is liable to the buyer for the return of the price with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the sale and those incurred for the preservation of the thing, and also for damages and reasonable attorney fees. If the use made of the thing, or the fruits it might have yielded, were of some value to the buyer, such a seller may be allowed credit for such use or fruits.

## DISCUSSION

An appellate court's review of a grant of summary judgment is *de novo* under the same criteria that govern the trial court's consideration of whether a summary judgment is appropriate. **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181 (La. 2/29/00), 755 So.2d 226, 230; **Smith v. Terrebonne Parish Consol. Gov't**, 02-1423 (La.App. 1 Cir. 7/2/03), 858 So.2d 671, 673. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). A motion for summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that the mover is entitled to summary judgment as a matter of law. LSA-C.C.P. art. 966(B)(2).

On a motion for summary judgment, the mover has the burden of proof. However, a mover who will not bear the burden of proof at trial on the matter before the court on the motion is not required to negate all essential elements of the adverse party's claim, action, or defense. Rather, the mover need only point out an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. If the adverse party then fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact and summary judgment is appropriate. See LSA-C.C.P. art. 966(C)(2). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material for purposes of summary judgment can be seen only in light of the substantive law applicable to the case. **Gaspard v. Graves**, 05-1042 (La.App. 1 Cir. 3/29/06), 934 So.2d 158, 160, writs denied, 06-0882, 06-0958 (La. 6/16/06), 929 So.2d 1286, 1289.

A purchaser's remedy against a realtor is limited to damages for fraud under LSA-C.C. art. 1953, *et seq.*, or for negligent misrepresentation under LSA-C.C. art.

2315. **Duplechin v. Adams**, 95-0480 (La.App. 1 Cir. 11/09/95), 665 So.2d 80, 84, writ denied, 95-2918 (La. 2/2/96), 666 So.2d 1104.<sup>5</sup>

A claim of fraud under LSA-C.C. art. 1953 generally applies in cases where a contract exists. The article defines fraud as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." LSA-C.C. art. 1953. Fraud may also result from silence or inaction. **Id.**

We note, however, that no contract existed between plaintiffs and Ms. Monteiro. As such, plaintiffs' fraud claims may be tortious in nature. The elements of the tort of fraud, similar to contractual fraud, is a misrepresentation of material fact made with the intent to deceive where there was reasonable and justifiable reliance by the plaintiff and resulting injury. **Patrick v. Dupont**, 14-0812 (La.App. 1 Cir. 3/11/15)(unpublished opinion), 2015 WL 1129092, p. 8, writs denied, 15-0715, 15-0722 (La. 6/1/15), \_\_\_ So.3d \_\_\_, 2015 WL 3795873, 2015 WL 3867741.

In order for a plaintiff to recover for negligent misrepresentation, there must be a legal duty on the part of the defendant to supply correct information, a breach of that duty, and damage to plaintiff caused by the breach. **Duplechin**, 665 So.2d at 84.

A realtor owes a specific duty to relay accurate information about property, a duty which extends to both vendor and purchaser, and may be held liable if such duty is breached. **Duplechin**, 665 So.2d at 84; see also LSA-R.S. 37:1455(A)(15). The duty to disclose any material defects extends only to those defects of which the broker or agent is aware. **Reeves v. Weber**, 509 So.2d 158, 160 (La.App. 1 Cir. 1987).

Any alleged misrepresentations that relate to defects that are apparent and discoverable on simple inspection, when inspection is afforded the buyer before the sale, and where the buyer inspects the property before the sale, the buyer

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<sup>5</sup> Although the plaintiffs' petition does not specifically plead fraud or negligent misrepresentation, sufficient facts are alleged which would support a cause of action against Ms. Monteiro for fraud and negligent misrepresentation. See **Duplechin**, 665 So.2d at 84, n.3.

cannot then complain of fraud or negligent misrepresentation. **Long v. Bruns**, 31,427 (La.App. 2 Cir. 1/20/99), 727 So.2d 664, 669, writ denied, 99-0480 (La. 4/23/99), 742 So.2d 881. In other words, there can be no recovery for fraud or negligent misrepresentation for defects discoverable by simple inspection and where the buyer inspects the property prior to purchasing it. It is the buyer's burden to prove that the alleged defects were hidden. **Long**, 727 So.2d at 669.

#### TERMITES AND TERMITE DAMAGE

Whether termite damage should be apparent to the buyer of a home is a question of fact. **Amend v. McCabe**, 95-0316 (La. 12/1/95), 664 So.2d 1183, 1188. Typically, when *all* of the termite damage is concealed within the home's structure, it is unapparent because it is not discoverable by a simple inspection. **Id.** In such situations, the buyer has no obligation to inspect. On the other hand, when *some* of the termite damage is detectable by a simple inspection, the buyer has a duty to investigate further. **Id.**

On appeal, plaintiffs acknowledge that they were aware of termite activity and termite damage prior to purchasing the home, but assert that they acted reasonably to eradicate the termites and repair such damage prior to the sale. Plaintiffs assert that whether their actions were reasonable under the standard set forth in **Amend** is an issue of fact that precludes summary judgment.

Regarding their efforts prior to purchase, plaintiffs refer to deposition testimony of Mr. Prejean and Ms. Monteiro. Mr. Prejean described the termite repairs that took place prior to closing, including how he, Mr. Monteiro, and Mr. Monteiro's licensed contractor Dean Porche opened up the walls where evidence of termite damage was found and made repairs until the contractor reached "good wood," which Mr. Prejean defined as non-moisture<sup>6</sup> and non-termite damaged wood. Similarly, Ms. Monteiro testified that the parties "did a graph ...showing the areas that had termite damage" and that Mr. Monteiro hired Mr. Porche to repair those areas. Plaintiffs contend that following these repairs, even though they

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<sup>6</sup> Mr. Prejean acknowledged that he knew termites needed moisture to survive.

retained the specific right to inspect after the repairs were completed, they had no notice of further concealed termite defects, which they assert went undiscovered by their own termite inspector and were only found during renovations after closing.

Notwithstanding plaintiffs' knowledge about the termites and termite damage, they cannot meet their burden of proving that Ms. Monteiro was aware of a termite infestation or termite damage beyond which plaintiffs were aware and failed to disclose this information to the plaintiffs. Specifically, Ms. Monteiro testified that she was not aware of any termite damage or ongoing termite activity. Also, both plaintiffs testified that they had no evidence or information to suggest that Ms. Monteiro knew about the defects, including the termites, or that she failed to disclose such defects.

Rather, the only additional evidence plaintiffs offered on the termite issue was the affidavit of Ms. Mary Parfait, Mr. Monteiro's granddaughter, who attested that she lived on the property at issue from 1983 to 2003 and again from 2009 to 2010.<sup>7</sup> Ms. Parfait indicated that she "observed termite damage and insects appearing to be termites in the house." However, Ms. Parfait observed the termites and damage before the plaintiffs signed the purchase agreement wherein they were specifically informed of termites and termite damage. Further, Ms. Parfait lived on the property before any eradication efforts or repairs to the damaged areas had been made. Plaintiffs presented no evidence to suggest that Ms. Monteiro would have been aware of an ongoing termite issue following these repairs. As such, the evidence is insufficient for plaintiffs to meet their burden of proof at trial to show that Ms. Monteiro failed to disclose ongoing termite activity or termite damage beyond which plaintiffs were aware.

#### MOISTURE ISSUES

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<sup>7</sup> In her deposition, however, Ms. Parfait testified she lived on the property at issue from 1983 to 2003 and again from 2006 to 2007.

Plaintiffs also assert that genuine factual issues remain regarding Ms. Monteiro's knowledge about the moisture issues and whether plaintiffs were on notice of same. Plaintiffs assert that contrary to the trial court's conclusion, the inspection report did not put plaintiffs "clearly on notice" of "serious problems." Plaintiffs acknowledge that the inspection report indicated that there was rusty roof flashing, but note that their inspector found no sign of water penetration. The report also referenced a wet spot on the wall next to the wet bar interior wall in the kitchen, and standing water on the floor in the same area, but this was attributed to a leaking ice maker. Plaintiffs aver that the only other explicit mention of apparent water damage in the inspector's report is where the inspector remarked that "stains/defects may be hidden from view" including on the ceilings which "appear to be freshly painted."<sup>8</sup> Plaintiffs assert, however, that the inspector's report did not place them on notice of the following: (1) undisclosed structural problems with the driveway that led to chronic water intrusion and moisture issues to the east wall of the house; (2) moisture issues related to the roof flashing; and (3) courtyard drainage and surrounding walls.

Plaintiffs contend that Ms. Monteiro was very familiar with the property and failed to disclose these defects. Plaintiffs assert that the affidavit of Ms. Parfait creates genuine issues in this regard. Specifically, Ms. Parfait attested that between 2009 and 2010, she "observed water problems and water damage problems throughout the house," which she believed "were from the [r]oof and drainage issues."<sup>9</sup> Ms. Parfait further attested that she believed Ms. Monteiro "knew about this water damage and water intrusion problem, as it was apparent on the existing walls and ceilings ... and [Ms. Monteiro] was in the house often." Ms. Parfait further indicated that she "observed an employee of Town and Country paint over some of this water damage at the direction of Dorothy Anne Monteiro,"

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<sup>8</sup> The inspector's report also noted peeling and scaling on the drywall in two areas in the hall, which the inspector attributed to possible termite intrusion.

<sup>9</sup> Ms. Parfait also attested that the water damage was primarily in three locations: (1) in the main living area; (2) in the hallways between the kitchen and the patio; and (3) in the hallway between the main living area and the master bedroom.

and that the water damage was no longer apparent after paint was applied. Plaintiffs argue that they had no knowledge of the foregoing moisture-related defects until they began renovations, and given Ms. Parfait's affidavit, that genuine issues of material fact remain as to the extent of Ms. Monteiro's knowledge regarding these defects.

Even so, the summary judgment evidence shows that plaintiffs acknowledged moisture issues in the home prior to their purchase. Specifically, plaintiffs sent a "Buyer Response to Property Inspection" to the seller after the inspection was completed, requesting, in part, the following:

The conditions below are unsatisfactory and not approved by buyer. Deficiencies and requested remedies are as follows:

Buyers request that the home be treated and placed under a Sentricon Termite Protection Plan with Terminex according to the attached estimate date 1/10/11.

After treatment, buyer requests that the sheetrock be removed and the studs exposed in 4 areas to include the wet area near the bar, window to window at the front corner of the home, from the sliding glass door (located at the rear of the left hall, if you are facing the house) from stairwell to stairwell, from the fireplace to the wet bar, the garage wall parallel to the courtyard (12 inch squares for spot checking is sufficient on this wall) from stairwell to stairwell, as recommended by Terminex **buyer requests that the walls be opened until there is no moisture or termite damage found. This includes areas extending past the requested openings if applicable.** This would include the ceiling if applicable. **Buyer and Termite contractor shall inspect the openings prior to repair.**

Upon acceptable inspection, seller to repair any structural damage and replace the sheetrock, etc. to like new condition by a licensed, insured contractor. The repairs need not be painted but shall be primed.

**Buyer and their inspectors to have the opportunity to inspect the open walls within 7 days after opening and shall have an additional 7 day inspection period after repairs are completed.** [Emphasis added.]

Given plaintiffs' response to the seller, plaintiffs were aware of moisture issues in the home. While the plaintiffs submit that whether their actions in response thereto were reasonable is a question of fact, we note that despite their reservation of right to have the open walls re-inspected before and after repairs were made by Mr. Monteiro's contractor, plaintiffs chose not to re-inspect, including the areas

that had been repaired. Given plaintiffs' knowledge prior to the sale, we conclude that plaintiffs were on notice and cannot now complain of fraud or negligent misrepresentation. As such, the defendants are entitled to summary judgment as a matter of law. See LSA-C.C.P. art. 966(B)(2). Accordingly, the trial court did not err in granting summary judgment in favor of the defendants.

### **CONCLUSION**

For the foregoing reasons, on *de novo* review, we affirm the trial court's October 29, 2014 judgment granting summary judgment in favor of the defendants, Dorothy Anne Coignet Monteiro and Houma's Town and Country Real Estate, Inc., and dismissing Ashley and Kimmie Prejean's petition with prejudice. Costs of this appeal are assessed to plaintiffs, Ashley and Kimmie Prejean.

**AFFIRMED.**