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DISTRICT II

August 19, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1137

Kristie Kapke v. Julie Newborg and William F. Spreberg
(L.C. #2018CV1162)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kristie Kapke purchased a house from Julie Newborg and William F. Spreberg (hereafter the sellers) and then sued them for misrepresentation and breach of contract. Kapke

appeals from a circuit court order dismissing her complaint on summary judgment. Based upon our review of the briefs and the record, we conclude at conference this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm because the record supports the circuit court’s summary judgment decision.

After closing on the house, Kapke sued the sellers claiming that the basement had seepage issues and there were plumbing problems in a bathroom and the pool. All of Kapke’s claims were premised on the sellers’ statements in the real estate condition report that they were not aware of defects in the house. Kapke alleged a variety of misrepresentation claims, including a fraudulent representation claim under WIS. STAT. § 100.18. Kapke also alleged breach of contract because the sellers’ representations in the condition report formed part of the contract, and the sellers did not convey a property that was in the condition represented in the condition report.

The sellers sought summary judgment. In support of their summary judgment motion, the sellers offered evidentiary affidavits and Kapke’s deposition testimony to show the following. The sellers’ late father resided in the house, neither one of the sellers had resided in the house for many years, the sellers completed the condition report based upon their personal knowledge of the house’s condition and they did not make misrepresentations because they were unaware of the defects later claimed by Kapke, neither seller made any other representation to Kapke about the condition of the house, Kapke could not recall reviewing the condition report before she made an offer to purchase “but it was brought to [her] attention at closing,” Kapke did

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

not rely upon the condition report, and Kapke was aware of water damage in the basement before closing because her own inspector alerted her to the problem. Based on the foregoing, the sellers argued, Kapke could not establish either her breach of contract claim or that the sellers made misrepresentations upon which she relied to her detriment. See *Whipp v. Iverson*, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969) (elements of misrepresentation claims); see *Novell v. Migliaccio*, 2008 WI 44, ¶44, 309 Wis. 2d 132, 749 N.W.2d 544 (elements of a WIS. STAT. § 100.18 fraudulent representation claim).

The circuit court reviewed the summary judgment record and concluded that Kapke did not show that there were material facts in dispute. Kapke did not refute the sellers' claims that they had no knowledge of the defects and did not make any misrepresentations upon which Kapke relied. The court granted summary judgment to the sellers and dismissed Kapke's complaint. Kapke appeals.

We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

The condition report upon which Kapke relies to show that the sellers misrepresented the house's condition is not included in the record on appeal and was not before the circuit court on summary judgment. We do not consider matters outside of the record. *Roy v. St. Lukes Med.*

Ctr., 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256. Therefore, we do not consider any arguments relating to the condition report.

Where, as here, the moving party makes a *prima facie* case for summary judgment by showing the absence of disputed facts, the summary judgment opponent must affirmatively counter with evidentiary materials demonstrating a factual dispute. *Dawson v. Goldammer*, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106. Kapke did not counter the sellers' evidentiary submissions on summary judgment. Rather, she submitted a brief in opposition to summary judgment. On appeal, she argues that the brief demonstrated the existence of disputed material facts. We disagree. In the absence of evidentiary submissions supporting Kapke's brief, the circuit court did not err in concluding that she did not show the existence of genuine factual issues for trial. *Id.*, ¶32.

The summary judgment record supports the sellers' claims that they did not make any representations that would be the basis for a breach of contract claim or any misrepresentations upon which Kapke relied. The circuit court properly granted summary judgment.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals