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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0320**

Jason W. Burmeister, et al.,
Appellants,

vs.

Nancy A. Westerhouse,
Respondent,

Lori Gustafson, et al.,
Respondents.

**Filed February 3, 2009
Affirmed
Collins, Judge***

Rice County District Court
File No. 66-CV-07-278

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Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Collins,
Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellants challenge the district court's grant of summary judgment in favor of respondents, arguing that material issues of fact exist on each of appellants' claims. We affirm.

FACTS

In 2005, respondent Nancy Westerhouse listed her home for sale with respondents Lori Gustafson and G&H Real Estate Co., LLC (collectively realtors). Appellants Jason Burmeister, Angela Cornell, Devin Burmeister, and Isaac Cornell (collectively Burmeisters) were interested in purchasing the property and contacted realtors. The Burmeisters subsequently agreed to have realtors represent them in the ensuing transaction as well.

The Burmeisters and Westerhouse initially signed a purchase agreement for the property in September 2005. Because the property is served by a septic system, the Burmeisters received and acknowledged a Private Sewer System Disclosure, which states that the septic system complies with all applicable laws and rules and contains no known defects. This disclosure was based on a certificate of compliance that was issued on April 5, 2005, after a home inspection had been completed. Also, because water is supplied to the property from a private well, the Burmeisters received and acknowledged a Well Disclosure Statement, which states that the well was last tested in February 2005. The report from that test indicates that the well was potable and free of contaminants.

The September 2005 purchase agreement, which was contingent on the Burmeisters selling their home, expired. The parties entered into a second purchase agreement through realtors in April 2006, and the sale closed on May 12, 2006. The Burmeisters assert that they were not provided sewer-system and well disclosures in connection with the April 2006 purchase agreement.

Within one month after the Burmeisters moved to the property, they experienced problems with the septic system. The Burmeister children were infected with *E. coli*, which the Burmeisters believed was caused by coming into contact with effluent from the backed up septic system. And a test of the well water conducted in September 2006 found the presence of coliform¹ bacteria. Consequently, the Burmeisters sued Westerhouse on claims of failure-to-disclose, fraudulent-misrepresentation, and breach-of-contract; and realtors on claims of negligence, fraudulent-misrepresentation, and breach-of-fiduciary-duty. The district court granted summary judgment on all claims in favor of Westerhouse and realtors. This appeal followed.

DECISION

The Burmeisters challenge the district court's respective grants of summary judgment in favor of Westerhouse and realtors. Summary judgment is appropriate if "the

¹ The Burmeisters state that the test revealed the presence of "chloroform," but the deposition testimony referring to the test states that "coliform" was found. *E. coli* is a species of coliform bacteria, and chloroform is a chemical compound. See *The American Heritage Dictionary of The English Language* 336, 371, 583 (3d ed. 1992) (defining "coliform" as "[o]f or relating to the bacilli that commonly inhabit the intestines of human beings . . . especially the colon bacillus[;]" "E. coli" as "[a] bacillus . . . normally found in the human gastrointestinal tract and existing as numerous strains, some of which are responsible for diarrheal diseases[;]" and "chloroform" as "[a] clear, colorless, heavy, sweet-smelling liquid.")

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. A defendant is entitled to summary judgment as a matter of law if “the record reflects a complete lack of proof on an essential element of the plaintiff’s claim.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). All doubts and factual inferences, however, must be resolved in favor of the nonmoving party. *Hamilton v. Indep. Sch. Dist. No. 114*, 355 N.W.2d 182, 184 (Minn. App. 1984). On appeal from summary judgment, we review whether (1) there are any genuine issues of material fact and (2) the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

I.

Disclosures

The Burmeisters argue that there are genuine factual issues as to whether Westerhouse provided them with statutorily required disclosures. There are two sets of disclosures at issue: (1) disclosures relating to the property’s sewage-treatment system, and (2) disclosures relating to the Burmeisters’ use and enjoyment of the property.

The Burmeisters’ argument with respect to the sewage-treatment system disclosures is without merit. “Before signing an agreement to sell . . . real property, the seller . . . must” provide a written disclosure containing information on “how sewage generated at the property is managed.” Minn. Stat. § 115.55, subd. 6(a) (2008). If there is a septic tank in use on the property, the disclosure must include information about

whether, to the seller's knowledge, it complies with the applicable sewage-treatment laws and rules. *Id.*, subd. 6(a)(2); *see also* Minn. Stat. § 115.55, subd. 1(g) (2008) (defining "individual sewage treatment system" as a sewage-treatment system that uses a holding tank). A seller who fails to provide this disclosure is liable for "costs relating to bringing the system into compliance with the individual sewage treatment system rules" Minn. Stat. § 115.55, subd. 6(b) (2008).

Here, it is undisputed that Westerhouse provided the Burmeisters with a disclosure form before the parties signed the September 2005 purchase agreement. That disclosure form states that the property's sewer system complies with the applicable sewage-treatment system laws and rules and is based on a certificate of compliance issued on April 5, 2005. That certificate was valid through April 5, 2008. *Id.*, subd. 5(c) (2008) (providing that certificate of compliance for existing system is valid for three years from date of issuance). Thus, although the September 2005 purchase was not completed, the statement that the property's sewage-treatment system complied with applicable laws was still effective when the Burmeisters entered into the April 2006 purchase agreement. Even had Westerhouse again provided a disclosure form, a copy of the same form would have sufficed.

The Burmeisters' argument with respect to the use-and-enjoyment disclosures also is without merit. A seller of real property must in good faith disclose all material facts that could "adversely and significantly affect" the prospective buyer's use and enjoyment of the property. Minn. Stat. § 513.55, subd. 1 (2008). The duty to disclose, however, is limited to facts of which the seller is aware, based on the seller's knowledge at the time

of the disclosure. *Id.* In support of their argument that Westerhouse was aware of such facts, the Burmeisters rely on invoices for work that was performed on the sewer system before the sale. But those were invoices for routine maintenance, repair of a leaky toilet, and the compliance-certificate inspection. They do not raise a genuine issue of fact as to Westerhouse's knowledge of "*material* facts . . . that could adversely and *significantly* affect" the Burmeisters' use and enjoyment of the property. Minn. Stat. § 513.55, subd. 1 (emphasis added).

Fraudulent Misrepresentation

The Burmeisters also argue that there is a genuine issue of material fact with respect to whether Westerhouse fraudulently misrepresented the functionality of the property's septic system. To establish a claim for fraudulent misrepresentation, a plaintiff must prove that

- (1) the defendant made a representation;
- (2) the representation was false;
- (3) the representation related to a past or present fact;
- (4) the fact was material;
- (5) the fact was susceptible of knowledge;
- (6) the defendant either knew the fact was false or asserted it as knowledge without knowing whether it was true or false;
- (7) the defendant intended the representation to induce the plaintiff to act or be justified in acting upon it;
- (8) the representation justifiably induced the plaintiff to act on it;
- (9) the plaintiff acted in reliance upon the representation;
- (10) the plaintiff suffered damage; and
- (11) the false statement proximately caused the plaintiff's injury.

See Davis v. Re-Trac Mfg. Corp., 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967) (listing elements of fraudulent misrepresentation). As discussed above, however,

Westerhouse relied on a valid certificate of compliance issued after the inspection of the septic system. The Burmeisters have presented no evidence that Westerhouse knew of any significant problems with the septic system notwithstanding the certificate of compliance. Thus, the Burmeisters failed to establish elements (2), (4), and (7) of their claim.

Breach of Contract

The Burmeisters next argue that there is a genuine factual dispute regarding whether Westerhouse breached the April 2006 purchase agreement. To establish a claim for breach of contract, the plaintiff must prove that “(1) a contract was formed; (2) the plaintiff performed any conditions precedent; and (3) the defendant breached the contract.” *Commercial Assocs. Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006). Here, there is no dispute that the April 2006 purchase agreement was a valid contract and that the Burmeisters performed all conditions precedent. Rather, the Burmeisters argue that the property contracted for in the purchase agreement “is substantially different from that which was promised, with a well tainted with [coliform] and a septic system that is not in compliance and needed to be replaced.” Under the terms of the April 2006 purchase agreement, Westerhouse agreed to obtain and provide the Burmeisters with either a licensed inspector’s septic-system inspection or a notice indicating whether the system complies with the applicable regulations. But the Burmeisters also agreed that “a valid certificate of compliance for the system may satisfy this obligation.” (Emphasis omitted.) The valid certificate of compliance issued April 2005, discussed above, therefore satisfied Westerhouse’s obligation.

Moreover, even assuming that the Burmeisters' contention that Westerhouse failed to provide them with the certificate of compliance before closing is true, their claim nonetheless fails. Under the terms of the April 2006 purchase agreement, Westerhouse was obligated to satisfy this obligation by the date of closing. The Burmeisters had the option to unilaterally cancel the contract on written notice if Westerhouse failed to satisfy this obligation by the date of closing. When one party fails to perform within a contractual time limit included for the other party's benefit, the latter must promptly object to the delay or the time-limit provision is deemed waived. *Fowlds v. Evans*, 52 Minn. 551, 560, 54 N.W. 743, 744 (1893). The Burmeisters did not exercise the option to cancel, electing instead to complete the contract and purchase the property. Thus any objection for Westerhouse's alleged failure to timely fulfill this obligation is waived.

Further, a breach-of-contract claim fails as a matter of law if the plaintiff cannot establish any damage occasioned by the alleged breach. *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578-79 (Minn. App. 2004). Because Westerhouse in fact obtained the requisite certificate of compliance, the Burmeisters cannot prove that they were damaged by Westerhouse's alleged failure to provide it to them before the date of closing.

The Burmeisters' breach-of-contract claim also fails with respect to the well-water provisions of the April 2006 purchase agreement. Under the terms of the contract, Westerhouse agreed to obtain and provide the Burmeisters with a water-quality test by the date of closing. As with the sewer-testing provisions, if Westerhouse failed to provide a water-quality test, under the purchase agreement the Burmeisters had the option to unilaterally cancel the contract. Westerhouse provided the Burmeisters with a well-

disclosure statement when they signed the September 2005 purchase agreement, which stated that the property's well was last tested for contaminants in 2005. That test did not reveal any contaminants present in the well water; indeed, the results specifically state that coliform bacteria were absent. Even though Westerhouse did not provide the Burmeisters with a second copy of the 2005 well-test report, Jason Burmeister acknowledged in his deposition that he was not concerned that the well had been tested in 2005 when buying the property in 2006.² Consequently, the Burmeisters cannot now object because they failed either to request another test or to exercise their option to cancel the contract. *Fowlds*, 52 Minn. at 560, 54 N.W. at 744.

II.

Negligence

The Burmeisters next argue that there is a genuine factual dispute as to whether realtors were negligent. To prevail on a claim for negligence, a plaintiff must prove that (1) a duty of care existed; (2) the defendant breached that duty; (3) the plaintiff suffered an injury; and (4) the defendant's breach of duty proximately caused that injury. *Lubbers*

² The Burmeisters suggest that a well-test result is valid for only 90 days. Unlike the certificate of compliance for the property's sewer system, a well-water test does not have a statutory expiration date. Newly constructed drinking-water wells must be tested for coliform bacteria within 30 days of completion. Minn. R. 4725.5650(C) (2007). The department of health recommends that well owners have wells tested yearly for bacteriological contamination. Minn. Dep't of Health, *Well & Water System Disinfection for Private Wells*, 1 (May 15, 2008) available at <http://www.health.state.mn.us/divs/eh/wells/waterquality/disinfection.pdf>. But there is no legal obligation for well owners to conduct subsequent testing, nor are there requirements for such a test's legal "validity."

v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995). Failure to provide evidence of any one of these elements entitles the defendant to summary judgment. *Id.*

Generally, negligence claims implicate factual questions that render such claims inappropriate for summary judgment. *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 383 (Minn. App. 2001). Here, however, the district court found that the Burmeisters failed to establish that realtors breached their duty of care. And because negligence is essentially

a departure from a standard of conduct required by the law for the protection of others against unreasonable risk of harm, . . . the standard of care presents a question of law because it defines a legal obligation to be determined only by the court and from which the jury may not deviate.

Id. at 383-84 (quotation omitted).

The district court found that realtors satisfied their duty of reasonable care by providing the Burmeisters “with all the disclosure forms . . . at the time Burmeister signed the Purchase Agreements.” The Burmeisters argue that they did not receive the well-water or sewer-system disclosures until after closing on the April 2006 purchase agreement. But as discussed in context of the claims against Westerhouse, the statutory sewer-system disclosure provided in September 2005 was no less valid when the Burmeisters signed the April 2006 purchase agreement. Minn. Stat. § 115.55, subd. 5(c). Thus, even if the Burmeisters did not receive the sewer-system disclosure until after closing, they have not demonstrated that realtors breached their duty to act with reasonable care. Had the Burmeisters been provided a sewer-system disclosure in connection with the April 2006 purchase agreement, it would have been the same

disclosure that they indisputably received before signing the September 2005 purchase agreement, and the certificate of compliance based on that disclosure was still effective.

Fiduciary Duty

The Burmeisters argue that there is a genuine factual dispute as to whether realtors breached a fiduciary duty owed them. A real-estate broker owes a fiduciary duty to communicate to a principal “all facts of which [the broker] has knowledge which might affect the principal’s rights or interests.” *White v. Boucher*, 322 N.W.2d 560, 564 (Minn. 1982) (quotation omitted). This includes a common-law duty of loyalty, *id.*, and a statutory duty to disclose material facts that might reasonably affect the prospective buyer’s use and enjoyment of the property being purchased, *see* Minn. Stat. § 82.22, subd. 4 (2008) (listing fiduciary duties that must be set forth in broker disclosure form). The Burmeisters claim that realtors breached both of these duties by failing to deliver the well-water test results and sewage-system disclosure.

We are not persuaded. As discussed above, the sewage-system disclosure would have indicated only that the property’s septic system complied with applicable law, based on a still-valid certificate of compliance. The Burmeisters have presented no evidence that realtors knew of any noncompliance contravening the certificate. Likewise, as discussed above, the well-water-test results indicated that the property’s well was free of contaminants. And although the Burmeisters asserted in an interrogatory response that realtors informed them that well-water-test results expire after 90 days, they cite no authority supporting such an expiration date. Indeed, as noted above, the department of health recommends only yearly testing. Thus, the Burmeisters have failed to establish a

genuine factual dispute as to whether realtors had knowledge that the property's well might be contaminated.

Fraudulent Misrepresentation

The Burmeisters argue that there is a genuine factual dispute as to whether realtors fraudulently misrepresented the septic system's compliance and the validity of the well-water-test results. The Burmeisters assert that realtors orally informed them that the certificate of compliance was "current." But the Burmeisters acknowledge that whether there was a misrepresentation "hinges upon what is considered 'current' in the context of [those] disclosure[s]." Because the duration of the septic system's compliance is set by statute, Minn. Stat. § 115.55, subd. 5(c), this argument fails as a matter of law. And the Burmeisters' argument with respect to the well-water-test results hinges entirely on their assertion that realtors later told them that the well-water-test results were valid for only 90 days. However, they provide no substantive evidence of the existence of such a standard.

Affirmed.