IN THE COURT OF APPEALS OF IOWA

No. 0-818 / 10-0839
Filed November 24, 2010

LAWRENCE G. O'BRIEN and
SEANNA O'BRIEN
Plaintiffs-Appellants,

vs.

CHARLES WALKER, Individually, and
CHARLIE WALKER INC. REAL ESTATE,
Defendants-Appellees.

Appeal from the Iowa District Court for Page County, Timothy O'Grady, Judge.

Plaintiffs appeal from summary judgment entered in favor of defendants. **AFFIRMED.**

Seth E. Baldwin of Johnson Law, P.L.C., Shenandoah, for appellants.

Mark D. Swanson of Swanson Law Firm, Red Oak, for appellees.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Charles Walker of Charlie Walker Inc. Real Estate was the selling agent in this dispute concerning the purchase of real estate by Lawrence and Seanna O'Brien. O'Briens filed a petition for fraudulent misrepresentation in which they alleged they had relied upon representations made by Walker that the real estate was free from significant material defects and that after closing they had "discovered several significant material defects."

Walker denied the allegations and subsequently moved for summary judgment on grounds that more than two months before closing, plaintiffs had signed a seller's disclosure statement, which provided: the broker was "not generally qualified to advise the Purchasers on the . . . Structural conditions of the property"; the property was "marketed in a **Where is/As is** condition"; that purchasers "should obtain professional advice and inspections of the property"—bolded, italicized, and in capital letters; and an additional disclosure that the purchasers "ha[ve] not relied on the accuracy or completeness of any representations that have been made by the Seller and/or its Agents as to the condition of this property. . . ." O'Briens resisted, but did not provide a statement of disputed facts or any affidavits in support of their resistance.

The district court granted summary judgment in favor of Walker. The court accepted as true the allegations in the petition that Walker made representations that the real estate was free from significant material defects. The court wrote:

> The record is devoid of any evidence that O'Briens relied on any representations Walker made or that any reliance was reasonable. The Sellers Disclosure Statement which stated the property was being sold "as is" was signed nearly two months prior to closing. This was not a boilerplate clause hidden by possible

> misrepresentations made at closing, but a wholly separate agreement signed prior. The Disclosure Statement warning that the O'Briens seek their own professional inspection was typed in bold, italicized, and underlined font. Given such a warning, the reliance element is not supported by the evidence in the record. The O'Briens had two months to have the property inspected and failed to do so. The O'Briens failed to show that any genuine issue of material fact remains on [the] reasonable reliance element.

O'Briens now appeal contending the district court erred in granting summary judgment.

> We review summary judgments for correction of errors at law, and we will affirm them only when the entire record establishes no genuine issue of material fact. The moving party has the burden of showing the nonexistence of a material fact. The evidence bearing on this question is viewed in the light most favorable to the nonmoving party. *However, the nonmoving party may not rest upon the mere allegations of his pleading but must set forth specific facts showing the existence of a genuine issue for trial*. Speculation is not sufficient to generate a genuine issue of fact.

Hlubek v. Pelecky, 701 N.W.2d 93, 95-96 (Iowa 2005) (emphasis added).

We find no error. We do not disagree with the general rule enunciated in the case relied upon by O'Briens: "Where there is evidence of fraudulent misrepresentations in the inception of a contract such misrepresentations can be the basis for . . . an action . . . for damages, despite the limiting provisions of a contract." *Hall v. Crow*, 240 Iowa 81, 88, 34 N.W.2d 195, 199 (1948). However, the case also contains the following statement:

> If the parties have equal opportunity to know the facts, and the circumstances are such that the buyer could not have reasonably relied upon the statements and representations of the seller . . . , he will not have a right to rely thereon.

Id. at 90, 34 N.W.2d at 200.

O'Briens do not deny they signed the disclosure statement more than two months before closing on the sale of the property. This case is not like *Hammes*

v. JCLB Properties, L.L.C., 764 N.W.2d 552, 554 (Iowa Ct. App. 2008), in which a disclosure form allegedly misrepresented there were no known problems with the structure. Here, the disclosure signed by the O'Briens two months before closing specifically states the sale was "as is" and cautioned the buyers they should obtain an inspection prior to making an offer. The buyers also "represent[ed] and warrant[ed] in signing this document" that they had not relied on any representations made as to the condition of the property.

We agree with the district court that in light of the warnings and statements contained in the disclosure statement, O'Briens must come forward with some evidence of the representations concerning the condition of the property and evidence that they reasonably relied upon the representations. *See Whalen v. Connelly*, 545 N.W.2d 284, 294 (Iowa 1996) (finding district court did not err in granting summary judgment and directed verdict on fraudulent misrepresentation claims where alleged representations were specifically addressed in written agreements); *see also Alires v. McGehee*, 85 P.3d 1191, 1200 (Kan. 2004) (holding "the buyer of real estate could not reasonably rely upon representations of the seller when the truth or falsity of the representation would have been revealed by an inspection of the subject property and the misrepresentations were made prior to or as part of the contract in which the buyer contracted for the right to inspect, agreed that the statements of the seller were not warranties and should not replace the right of inspection, declined inspection, and waived any claims arising from defects which would have been revealed by an inspection"); *Brennan v. Kunzle*, 154 P.3d 1094, 1109 (Kan. Ct. App. 2007) (holding summary judgment for seller on buyers' fraudulent

misrepresentation claim was proper as reasonable reliance could not be established where buyer signed a disclosure statement that stated, "there are no important representations concerning the condition of . . . property . . . on which I am relying . . . .").

Iowa Rule of Civil Procedure 1.981(5) specifically states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.

Here, O'Briens alleged in their petition that they "relied upon representations made by Charles E. Walker." They also cite the proposition that Walker cannot make false representations and hide behind the disclosure statement citing *Hall*, 240 Iowa at 88, 34 N.W.2d at 199. However, O'Briens did not file any affidavits, exhibits, depositions, answers to interrogatories, or any other evidence to provide specific facts to establish a genuine issue of material fact. *See* Iowa R. Civ. Proc. 1.981(6). "Opposing affidavits are not required, . . . but the party that does not file affidavits in response takes the risk of standing on the record established by the moving party." *In re Estate of Eickman*, 291 N.W.2d 308, 312 (Iowa 1980). With only allegations, and no evidence showing the specific facts supporting the allegations, the seller's disclosure statement stands as uncontroverted evidence that there were no representations, warranties, or guarantees upon which they relied. *See Smidt v. Porter*, 695 N.W.2d 9, 22-23 (Iowa 2005) (finding no error where district court ruled as matter of law that

plaintiff had filed to prove reasonable reliance of "long-term" employment where plaintiff signed a one-year contract). We therefore affirm.

AFFIRMED.