

IN THE COURT OF APPEALS OF IOWA

No. 1-468 / 11-0019
Filed July 13, 2011

JOHN MATUSZEWSKI and LISA MATUSZEWSKI,
Plaintiffs-Appellants,

vs.

JAMES PALMER and JENNIFER PALMER,
Defendants-Appellees.

Appeal from the Iowa District Court for Marion County, Arthur E. Gamble,
Judge.

Buyers appeal the dismissal of their action against sellers of real property
for fraudulent nondisclosure. **AFFIRMED.**

Scott L. Long of Law Office of Scott L. Long, P.C., Des Moines, for
appellants.

John A. Templer Jr. of Whitfield & Eddy, P.L.C., West Des Moines, for
appellees.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Buyers appeal the dismissal of their action against sellers of real property for fraudulent nondisclosure. Because we agree with the district court that the sellers had no duty to disclose that they had filed a lawsuit against their builder to recover the cost of repairs for the defects that the sellers did disclose, we affirm the dismissal.

I. Background Facts and Proceedings.

The Matuszewskis (buyers) purchased a house from the Palmers (sellers) on November 17, 2004. The sellers informed the buyers of defects and repairs to the house prior to the sale, providing the disclosures required by Iowa Code section 558A (2003). The sellers had filed, on November 10, 2004, an action against the builder of the house to recover the cost of repairs for the defects disclosed to the buyers.

On September 8, 2010, the buyers filed suit against the sellers alleging they committed a fraudulent omission when they failed to disclose the lawsuit against the builder. The sellers moved to dismiss the suit for failure to state a claim upon which relief could be granted, and asserting a statute of limitations defense. The buyers resisted, asserting the sellers had a common law duty to disclose the lawsuit as a material fact relating to the property. They also contended the action was not time-barred as they “did not learn of the existence of the Lawsuit [against the builder] until approximately July 2010.”

On December 9, 2010, following hearing, the district court granted the motion to dismiss. The court concluded (1) the sellers had no duty to disclose the suit against the builder under Iowa Code chapter 558A or common law; (2)

the lawsuit was a matter of public record and could have been discovered by the buyers with reasonable diligence; and further, (3) the matter was time-barred by Iowa Code section 614.1 as it was filed more than five years from time when the underlying lawsuit could have been discovered with reasonable diligence. Because we affirm the granting of the motion to dismiss, we do not address the statute of limitations argument.

II. Scope and Standard of Review.

We review the grant or denial of a motion to dismiss for errors at law. *Geisler v. City Council of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009). “We accept as true the facts alleged in the petition and typically do not consider facts contained in either the motion to dismiss or any of its accompanying attachments.” *McGill v. Fish*, 790 N.W.2d 113, 116 (Iowa 2010). A motion to dismiss is “sustainable only when it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claims asserted.” *Haupt v. Miller*, 514 N.W.2d 905, 911 (Iowa 1994).

III. Discussion.

The buyers do not assert a violation of the statutorily required disclosures of chapter 558A. Rather, they assert their common law fraud action is recognized by *Jensen v. Sattler*, 696 N.W.2d 582 (Iowa 2005).

There is no doubt *Jensen* acknowledges the viability of a common law fraud action against sellers. 696 N.W.2d at 588 (“In sum, the district court should have permitted Jensen to independently pursue his common law and statutory claims, and it erred when it ruled otherwise.”). The *Jensen* court cited *Robinson*

v. Perpetual Services Corp., 412 N.W.2d 562, 565 (Iowa 1987), which sets forth the seven elements for recovery in a fraud action. See *id.*

“Concealment of or failure to disclose a material fact can constitute fraud in Iowa.” *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987). However, “[t]o be actionable, the concealment must be by a party under a duty to communicate the concealed fact.” Such a duty may arise from “superior knowledge or a special situation. See *id.* at 375. In *Jensen*, 696 N.W.2d at 588, the court noted there was no claim “the district court’s instruction erroneously characterized his common law fraud claims.” That instruction grounded the buyer’s claim upon the seller’s duty to disclose pursuant to Iowa Code chapter 558A. See *Jensen*, 696 N.W.2d at 584 n.1.¹ There is no chapter 558A claim here, and no separate

¹ That instruction read:

The Plaintiff must prove all of the following propositions by a preponderance of clear, satisfactory, and convincing evidence.

1. *Special circumstances existed which gave rise to a duty of disclosure between the Plaintiff and the Defendant. The Defendant was a seller or transferor of real estate and owed a duty of disclosure pursuant to Iowa Code chapter 558A.*

2. While such relationship existed, the Defendant was aware of the following facts: There were material defects with the roof, and/or the ventilation in the attic, and/or the tiling around the foundation, and/or the dome lighting.

3. While such relationship existed, the Defendant concealed or failed to disclose that there were material defects with the roof, and/or the ventilation in the attic, and/or the tiling around the foundation, and/or the dome lighting.

4. The undisclosed information was material to the transaction.

5. The Defendant knowingly failed to make the disclosure.

6. The Defendant intended to deceive the Plaintiff by withholding such information.

7. The Plaintiff acted in reliance upon the Defendant’s failure to disclose and was justified in such reliance.

8. The failure to disclose was a proximate cause of the Plaintiff’s damage.

9. The nature and extent of the Plaintiff’s damage.

(Emphasis added.)

ground alleged that would confer a duty on the sellers to disclose the existence of litigation.

Whether a duty exists is a question of law for the court. *Van Essen v. McCormick Enters. Co.*, 599 N.W.2d 716, 718 (Iowa 1999). The buyers provide no Iowa law, statutory or common law, which imposes a duty upon sellers to disclose litigation for recovery of the cost of repairs for defects the sellers *did* disclose. They do, however, cite a California case in which the court found the seller had a duty to disclose to the buyer the existence of litigation involving the property. *Calemine v. Samuelson*, 89 Cal. Rptr. 3d 495, 504 (Cal. Ct. App. 2009). The duty recognized in that case was statutorily imposed. See Cal. Civ. Code § 1102.6 (requiring disclosure of “[a]ny lawsuits by or against the Seller threatening to or affecting this real property . . .”). Iowa imposes no such duty upon a seller. See Iowa Code ch. 558A.

Because we agree with the district court that the sellers had no duty to disclose their suit against the builder to recover the cost of repairs for the defects they did disclose, we affirm.

AFFIRMED.