

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1316

Cir. Ct. No. 2009CV2041

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PHILLIP J. SIKORSKI AND KATHLEEN MCGOVERN,

PLAINTIFFS-APPELLANTS,

V.

JAMES L. WASSERBURGER AND KELLY WASSERBURGER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Phillip J. Sikorski and Kathleen McGovern have appealed from an order granting summary judgment dismissing their complaint against James and Kelly Wasserburger. We affirm the order.

¶2 Sikorski and McGovern purchased the Wasserburgers' home in the spring of 2007, pursuant to an offer to purchase and an amendment to the offer to purchase executed in March 2007. In late May 2009, Sikorski and McGovern commenced this action to recover damages arising from a leaky basement. In their complaint, they alleged that prior to the sale, the Wasserburgers represented that they were unaware of defects in the basement. They alleged that this representation was made in the Real Estate Condition Report (condition report) provided by the Wasserburgers to them pursuant to WIS. STAT. §§ 709.02(1) and 709.03 (2009-10).¹ They alleged breach of contract, intentional misrepresentation, a violation of WIS. STAT. § 895.446 and WIS. STAT. § 943.20(1)(d), and a violation of WIS. STAT. § 100.18. They demanded damages or rescission. The trial court subsequently granted the Wasserburgers' motion for summary judgment based on its determination that nothing in the summary judgment record provided a basis to conclude that the Wasserburgers had notice or knowledge of a defect in the basement.²

¶3 Pursuant to WIS. STAT. §§ 709.02(1) and 709.03, sellers are required to disclose certain defects in the property they are selling in a real estate condition report. A defect that must be disclosed in a condition report is defined as “a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

² The trial court also determined that, based on the inspection report received by them, Sikorski and McGovern could not reasonably have relied on the Wasserburgers' representations. We do not address this issue or the parties' remaining arguments on appeal because our determination that summary judgment was properly granted based on the lack of evidence of notice or knowledge of a defect fully resolves this appeal. See *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 295 n.6, 507 N.W.2d 136 (Ct. App. 1993).

property; or that if not repaired, removed or replaced would significantly shorten or adversely affect the expected normal life of the premises.” WIS. STAT. § 709.03. A seller must also be aware of the defect, meaning that the seller has notice or knowledge of the defect. *Id.*

¶4 Sikorski and McGovern concede that in order to prevail on any of their claims at trial, they would have to prove that the Wasserburgers had notice or actual knowledge that the basement leaked.³ In moving for summary judgment, the Wasserburgers denied that they were aware of any defect in the basement that they did not disclose.

¶5 We review a trial court’s grant or denial of summary judgment de novo, applying the same methodology as the trial court. *Malzewski v. Rapkin*, 2006 WI App 183, ¶11, 296 Wis. 2d 98, 723 N.W.2d 156. If the pleadings state a claim and demonstrate that material factual issues exist, our inquiry shifts to the moving party’s affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶22, 241 Wis. 2d 804, 623 N.W.2d 751. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. *Id.*

³ In their appellants’ brief, Sikorski and McGovern also concede that the economic loss doctrine barred their common law intentional misrepresentation claim. This matter therefore is addressed no further.

¶6 The party moving for summary judgment must explain the basis for its motion and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that it believes demonstrate that no genuine issue of material fact exists for trial. *Leske v. Leske*, 197 Wis. 2d 92, 97, 539 N.W.2d 719 (Ct. App. 1995). If the moving party can demonstrate that there are no facts of record which support an element on which the opposing party has the burden of proof at trial and sufficient time for discovery has passed, the party who bears the burden of proof at trial must make a showing sufficient to establish the elements of its case. *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (1993).

¶7 The evidentiary materials relied on by the Wasserburgers in support of their motion for summary judgment provided a prima facie basis for relief. The record indicated that the Wasserburgers owned the home from October 2004 until the sale to Sikorski and McGovern in the spring of 2007. The offer of purchase underlying the sale to Sikorski and McGovern contained a provision stating:

PROPERTY CONDITION REPRESENTATIONS: Seller represents to Buyer that as of the date of acceptance Seller has no notice or knowledge of conditions affecting the Property or transaction (see below) other than those identified in Seller's Real Estate Condition Report dated 3-5-07, which was received by Buyer prior to Buyer signing this offer and which is made a part of this Offer by reference.

¶8 In affidavits in support of their motion for summary judgment, the Wasserburgers attested that prior to the sale of their home to Sikorski and McGovern, they completed the condition report, but left question C.10 unanswered. Question C.10 stated: "I am aware of defects in the basement or foundation (including cracks, seepage and bulges). [BASEMENT DEFECTS:

include, without limitation, moisture or dampness; defective drain systems; bulging or walls not plumb.]”

¶9 The Wasserburgers attested that they did not know how to answer this question because they knew there had been a repair to the foundation prior to their purchase of the property. However, they further attested that they were unaware of any moisture, dampness, leaking, bulging, out-of-plumb walls, or any other defects in the basement at any time during their ownership of the property. They attested that neither their real estate agent nor Sikorski or McGovern asked them for any additional information concerning the basement. In support of their motion for summary judgment, the Wasserburgers also relied on the deposition testimony of Sikorski and McGovern, in which they indicated that they did not know whether the Wasserburgers had any problems with the basement or foundation during the time they owned the property.

¶10 The evidentiary materials submitted by the Wasserburgers prima facie established that they were unaware of any defect in the basement during their ownership of the property. As already noted, they specifically attested that they were unaware of any moisture, dampness, leaking, bulging, out-of-plumb walls, or any other defects in the basement at any time during their ownership of the property. The affidavits and deposition testimony relied on by them also established that they were not required to disclose the work performed by a previous owner, John Mirecki, to repair and reinforce the basement foundation

because those repairs related to a past condition that had been corrected, not to a defect that existed at the time the Wasserburgers owned the property.⁴

¶11 Nothing in the affidavits and evidentiary material submitted by Sikorski and McGovern in opposition to the summary judgment motion was sufficient to rebut the Wasserburgers' defense. Sikorski and McGovern contend that the summary judgment record permitted the inference that the basement leaked during the time the Wasserburgers owned the home, and that the Wasserburgers knew that it leaked. However, nothing in the summary judgment record reasonably permits this inference.

¶12 In support of their position, Sikorski and McGovern relied on Sikorski's affidavit and deposition testimony that, beginning in June 2007, water leaked in the unfinished area of the basement during every significant rainfall, coming from the northeast corner and the west wall underneath the staircase.⁵ They also relied on the affidavit of Chris Wilson of The Mudjackers, LLC, who was hired by Sikorski to perform repairs in July 2009, after Sikorski pulled up the carpet in the finished portion of the basement. Although he acknowledged that they had not had problems in the finished area of the basement at any time prior to

⁴ The summary judgment record indicates that Mirecki provided Sikorski with a copy of the contract pertaining to the prior repair work, which was completed on June 23, 2000. Although Sikorski testified in his deposition that he did not recall whether he was told of the work done by Mirecki prior to his purchase of the home, he acknowledged that he had observed the reinforcement beams in the basement and knew that there had been work done on the foundation of the house before he purchased it.

⁵ Sikorski testified at his deposition that he first observed a pool of water coming from the northeast corner of the basement and flowing across the floor to a drain on the west side of the basement in June 2007, and that almost every time it rained they had water emitting in varying amounts from the northeast corner of the basement as well as the west wall underneath the stairwell to the basement.

2009, Sikorski attested that he pulled up the carpet in the spring of 2009 because it smelled bad. He attested that he then discovered wet carpet padding. He attested that he eventually uncovered all of the walls in the finished area of the basement and discovered wet wood studs, wet batt insulation, and block basement walls that were wet to the touch. He also described rotted baseboards and tack strips, rusty reinforcement beams, and rust stains on the floor.

¶13 Wilson attested that when he evaluated the basement, he saw inside drain tiles that were plugged with dirt and clay and heavily stained wood studs. He stated that in his experience, “inside drain tiles do not get plugged with dirt and clay overnight,” and that “the amount of staining I saw in this basement takes years to develop.” Wilson attested that in his professional opinion, water regularly leaked into the basement for several years prior to The Mudjackers’ repairs. Sikorski also added that he did not recall hearing the sump pump run before The Mudjackers completed repairs, and that since those repairs, the sump pump runs and regularly pumps out water during rainfalls and snowmelts.

¶14 As noted by the trial court, even if Wilson’s affidavit permitted an inference that problems were developing in the drain tiles and basement during the years that the Wasserburgers owned the property, it does not permit an inference that they had notice or knowledge of a defect or leaking. Even if the drain tiles were becoming plugged during the years the Wasserburgers owned the home, absent evidence that the Wasserburgers experienced water problems, a factfinder could not reasonably infer that they had notice or knew of the problem with the drain tiles.

¶15 In reaching this conclusion, we note that, contrary to the arguments of Sikorski and McGovern, nothing in James Wasserburger’s deposition testimony

supports an inference that he had notice or knowledge of a water problem when he remodeled the finished portion of the basement in 2005. Nothing in the record indicates that the walls or studs were wet when Wasserburger removed the paneling on the walls, installed insulation, and replaced some of the wood studs so that they faced the right direction and accommodated electrical boxes and the installation of drywall. Wasserburger's testimony indicated that he never noticed any discoloration of the basement walls behind the paneling, and that the only crack he observed was a small step crack high up on a wall that he filled in with spray foam. Wasserburger testified that the only black marks he observed on the block towards the floor were from an adhesive that previous owners had used in remodeling the basement. Wasserburger also testified that Home Depot installed the replacement carpet and never mentioned anything to him about the condition of the basement floor. Finally, Wasserburger denied ever observing water in the stairwell against the west wall and indicated that the only leaks he had observed were a small plumbing leak in the basement sink and a spill that occurred one time when a hose detached from the washing machine. He also testified that he did not remember the sump pump running when he owned the property, noting that the property was located on the top of a hill.

¶16 Based upon this record, it would be nothing more than speculation to conclude that the Wasserburgers had notice or knew of water problems in the basement during the time they owned the home. Sikorski's discovery of water damage underneath the carpet and behind the finished walls in 2009, like Wilson's discovery of the clogged drain tiles and stained wood studs, does not permit an inference that the Wasserburgers observed signs of water damage or infiltration in 2005 or at any other time prior to the sale in 2007. Similarly, James Wasserburger's failure to recall hearing the sump pump running during the time he

owned the home does not permit an inference that he had notice that the basement was leaking, since there are many other reasons that a sump pump might not run or be heard.

¶17 We also reject Sikorski and McGovern’s contention that because they experienced leaking in the unfinished area of the basement during periods of significant rainfalls commencing in June 2007, it can be inferred that the Wasserburgers also must have experienced leaks during the time they owned the home. Standing alone, the fact that leaking occurred in June 2007 does not mean that it also occurred earlier, nor may such an inference reasonably be drawn. Because nothing in the record provides a basis to infer that the Wasserburgers had notice or knowledge that the basement leaked during the time they owned the home, summary judgment was warranted.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

