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Court Of Appeals Affirms Recent Ruling That Violation Of Duty To Disclose A Property Is A Part 201 “Facility” Gives Rise To A Claim For Fraud; Remands Case Due To Insufficient Evidence

The Michigan Court of Appeals recently issued a second unpublished decision addressing a seller’s duty to disclose a property’s status as a Part 201 “facility” to potential buyers or lessees. The case, *A.D. Transport, Inc. v. Michigan Materials & Aggregates Co.*, No. 290236 and 290250 (Mich. Ct. App. Sept. 30, 2010), held that a seller of real property who fails to disclose knowledge that the property is contaminated and meets the definition of a facility under Part 201 (Environmental Remediation) of the Michigan Natural Resources and Environmental Protection Act (“NREPA”) of 1994, as amended (“Part 201”), may be liable to the buyer for damages under a claim of “silent fraud” even though the property was sold on an “as is” basis. In early August, the same court upheld in another unpublished opinion, which has since been released for publication, a trial court’s decision to void a lease because of a landlord’s failure to disclose a property’s status as a Part 201 facility in accordance with Section 20116(1) of NREPA. *1031 Lapeer LLC v. Rice*, ___ Mich. App. ___, 2010 WL 3062153 (Mich. Ct. App. Aug. 5, 2010). Although in *A.D. Transport*, the existence of material questions of fact precluded summary disposition for either the plaintiff or the defendant, it serves as a reminder that sellers who are aware that a property is a Part 201 facility must disclose the property’s status and the general nature and extent of any releases that occurred on the property.

A.D. Transport arose out of a July 2005 sale of a 22-acre parcel of real property in Van Buren Township, Michigan for approximately \$1.4 million by Michigan Materials & Aggregates Company (“MMAC”) to A.D. Transport, Inc. (“ADT”), pursuant to a written contract containing an “as is” provision. In August, ADT assigned its rights under the contract to M & G Development, Inc. (“MG Development”). MMAC then executed a warranty deed conveying the property to MG Development.

In February 2007, the plaintiffs, ADT and MG Development, filed suit against MMAC and its parent company alleging that the defendants were aware that contaminated waste was buried on the property. The plaintiffs sought recovery of remediation costs from defendants under a variety of common-law and statutory theories of liability, including common-law fraud, negligent misrepresentation, negligence, trespass, nuisance, unjust enrichment, common-law indemnification, and Part 201. The fraud, misrepresentation and negligence claims were based on defendants’ alleged failure to comply with Section 20116(1) of NREPA, which provides that “a person who has knowledge or information or is on notice through a recorded instrument that a parcel of his or her real property is a facility shall not transfer an interest in that real property unless he or she provides written notice” to the transferee disclosing the property’s status as a facility, as defined by Part 201, and the general nature and extent of the release. (*Emphasis added.*) A “facility” generally means any property with hazardous substances above the Part 201 generic residential cleanup standards, regardless of the use of the property.

The trial court granted summary disposition in favor of the plaintiffs for their claims for fraud, negligent misrepresentation, negligence, and Part 201 and granted summary disposition in favor of the defendants for plaintiffs’ claims for trespass, nuisance, unjust enrichment, and common-law indemnification. The trial court then awarded the plaintiffs

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approximately \$1.6 million on their claims.

The defendants appealed the trial court's decision, arguing that trial court's decision was erroneously based on a determination that the defendants had a duty under Part 201 to disclose the property's status as a Part 201 facility before transferring an interest in the property. The Court of Appeals noted that summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. It then determined that the trial court erred by finding that there was no genuine issue of material fact as to whether property was a facility at the time of the sale and that the defendants had a duty of disclosure under Part 201. A claim of silent fraud requires a suppression of material facts and a legal or equitable duty to make the disclosure. The existence of a Part 201 duty to disclose a property's status as a facility at the time of transfer is material to a claim of silent fraud because it gives rise to a legal duty of disclosure.

The Court found that the affidavits and other documentary evidence that the plaintiffs presented were insufficient to establish that the property was a facility and that the defendants had knowledge of its status. In particular, the plaintiffs' expert witness made inconsistent statements in a deposition and a later affidavit. In the deposition, the expert witness testified that a January 2006 report created by his company concluded that the property was unlikely to be considered a Part 201 facility even though petroleum substances were found in the soil and groundwater because there were no pertinent exposure pathways for those chemicals because there was no known aquifer on the property. In a later affidavit, the same expert witness reached the opposite conclusion based on additional information, including an earlier report made by another firm, North American Reserve ("NAR"), in 1999 that indicated that No. 6 fuel oil had been placed in the ground. However, the statement in the 1999 NAR report was not based on soil or groundwater testing, but on an alleged statement by the defendant's vice president, who denies he ever made such a statement to NAR. Moreover, the expert's affidavit did not address the issue of a lack of a pertinent exposure pathway. Because a genuine issue of material fact existed regarding whether the property was a Part 201 facility at the time it was transferred from the defendants to the plaintiffs, and the property's status as a facility is the basis for the Part 201 duty of disclosure, the trial court's grant of summary disposition with respect to the silent fraud claim was found improper.

The defendants also argued that the trial court failed to enforce the "as is" provision in the contract when it granted summary disposition in favor of the plaintiffs. The Court of Appeals clarified that an "as is" clause does not allocate the risk of loss to the purchaser where fraud in the inducement is alleged. Accordingly, an "as is" contract will not preclude a silent fraud claim. Furthermore, while Part 201 does not preclude private parties from allocating cleanup costs among themselves, the contract in question only obligated the plaintiffs to take the property in an "as is" condition; it did not allocate the responsibility for statutory cleanup costs. Therefore, the "as is" provision provided no defense to the plaintiffs' Part 201 claim.

Ultimately, the Court of Appeals determined that neither the plaintiffs nor the defendants were entitled to summary disposition for the plaintiffs' claims of silent fraud, fraudulent misrepresentation, negligent misrepresentation, negligence, and the Part 201 claim. Accordingly, it reversed the trial court's judgment for the plaintiffs and remanded for further proceedings with respect to those claims.

Please contact any member of the Honigman Environmental Law Department for further guidance on Part 201 disclosures and the possible implications of failing to disclose a property's status.