STATE OF MICHIGAN

COURT OF APPEALS

SAYO, INC., d/b/a RAMADA INN OF SOUTHFIELD,

Plaintiff-Appellee,

v

CTM GROUP, INCORPORATED,[1]

Defendant,

and

YORK INTERNATIONAL CORPORATION,

Defendant-Appellant.

UNPUBLISHED
May 29, 2003

No. 232868
Oakland Circuit Court
LC No. 98-004091-CK

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant, York International Corporation, appeals as of right from a judgment for plaintiff following a bench trial. We reverse and remand for entry of a judgment of no cause of action in favor of defendant.

Sam Yono, the principal owner of plaintiff hotel, worked in the family hotel business before moving to the United States in 1968. In the U.S., Yono was involved in the construction of many commercial buildings, including retail stores, supermarkets, video stores, and restaurants. In fact, Yono had acted as his own general contractor on at least four projects. In 1996, Yono purchased the hotel that consisted of guest and conference rooms, a banquet facility, ballroom, nightclub, restaurant, bars, and commercial stores. The hotel never closed despite ongoing renovations.

[1] Prior to trial, plaintiff settled its claims against CTM Group, Inc., (hereinafter CTM), an entity not a party to this appeal. For ease of reference, the term "defendant" refers to York International Corporation only.

Yono began entertaining bids for replacement of the heating/ventilation/air conditioning (HVAC) system. Detroit Edison came to the hotel, at its own expense, and made recommendations regarding the necessary replacements. Detroit Edison recommended R.W. Meade to replace the system. However, Yono also discussed the HVAC system replacement with other entities, including Pete's Heating & Cooling, the company that performed repairs at the hotel. The principal of Pete's Heating & Cooling, Peter Shatara, submitted a proposal for replacement of the system that included utilizing a chiller manufactured by defendant. Yono contacted defendant, an equipment manufacturer of chillers only, and spoke to their representative Kurt Rillema. Rillema recommended CTM to perform the replacement of the HVAC system at the hotel. It was represented to Yono that CTM had its own in-house engineering staff, did its own designing, planning, and construction, had been in business for many years, had a large staff, worked in different cities, and had good references. Yono was told that CTM performed work on hospitals, including Heritage Hospital, and worked on navy ships and post offices for the U. S. Government. Rillema also represented that defendant would work in "partnership" with CTM on many occasions. Yono cited to the following language in a letter from Rillema:

> A project of this importance and size [it] is critical that a qualified mechanical contractor perform the work. Design / Build contracting is a highly specialized skill that many people think they can try, but few people have proven the success, through happy customers and continued business operations, that CTM Group has proven. As an employee of York International [defendant] for several years, I can attest to the fact that CTM is the finest full service contractor I have had the privilege to do work with. This is an unbiased opinion, since both contractors bidding on this job are using York equipment and is not meant with any disrespect to Pete's Heating, since York has never had the opportunity to see them install a chiller or large air unit to form judgement [sic] of the quality of their work. Though, I have seen design / build jobs of this type end unsuccessfully due to lack of real expertise and experience with chiller and large boiler work. For this reason York International's professional recommendation is that CTM is a much more qualified contractor to handle this project.
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> Additionally, as you can see the revised pricing CTM has presented is extremely aggressive. The project cost breakouts demonstrate that all issues are addressed and the turnkey completion of this project is complete in content. CTM Group strongly desires to be awarded this project as evidenced by the preparation put into the bid and the pricing set forth.

Based on the recommendation by defendant, Yono did not investigate CTM's qualifications or the references. Yono's agent did contact Heritage Hospital, but did not determine if the hospital was satisfied with CTM's work. Rather, Yono accepted the information "without blinking an eye." Yono selected defendant and CTM based on the representation that they would "partner" on the job. Despite the testimony regarding selection of CTM as the contractor, Yono acknowledged that he rejected the first three proposals submitted by CTM and defendant because he wanted to "cut costs to the bone." Yono continued to negotiate with Shatara as a "back up."

Ultimately, Yono signed a contract for replacement of the HVAC system.[2] However, this contract was only signed by Yono and David Sanford, CTM's principal. The contract was not signed by defendant, and defendant's participation was limited to providing the chiller and an agent to "start up" the chiller after installation by CTM. CTM was responsible for obtaining the boiler and components to replace the heating system and had to utilize products from other manufacturers because defendant's production was limited to manufacture of chillers. The contract provided that CTM would complete the process of installation within eight weeks of delivery of the chiller. Time was an important factor because the hotel had booked reservations for summer travelers. The chiller was delivered late purportedly because a new chiller had to be manufactured.

Larry Bembas, defendant's service technician, went to the hotel in early July 1997, to "start up" the chiller. He compiled a list of problems that needed to be corrected by CTM as the contractor. Bembas opined that the chiller was poorly installed. After the installation of the HVAC system, problems with water leaks began to occur at the hotel. Pipes within the individual guest rooms would burst. Frequently, the problem would not be discovered until the water had spread to a main area of the hotel, such as a hallway or lobby. Buckets had to be placed in main areas to collect water. Guests complained about the appearance of the hotel and the temperature within the guest rooms. Additionally, the burst of a pipe during a New Years' Eve celebration caused the hotel to lose power and close for eight days. Thus, plaintiff presented extensive testimony regarding the damage incurred at the hotel.

Rillema acknowledged his recommendation of CTM as the contractor and testified that his opinion was unbiased because the only other bidder for the HVAC system replacement, Pete's Heating & Cooling, would utilize defendant's chiller equipment. While Rillema recommended CTM, there was no partnership agreement between the two corporations. He also testified that Yono's principal concern was the price of the HVAC replacement, not the selection of the contractor.

In addition to disputing the nature of any alleged misrepresentation, the defense of the litigation focused on the causation of any harm. Specifically, defendant was able to elicit testimony that water leaks did not occur following the installation of the chiller. The water leaks occurred after the chiller had been shut down for the season, and the boiler had been started. It was alleged that CTM was not contractually responsible for maintenance of the pipes within the individual guest rooms. In support of this proposition, the contractual provisions regarding completion of the contract within eight weeks and a separate hourly labor charge were cited by the defense. Therefore, it was alleged that defendant could not have anticipated the damages at issue. Lastly, the defense contested the foundational documentation offered in support of the damage request.

Following a bench trial, the trial court acknowledged that three theories of liability had been pleaded by plaintiff. The trial court held that plaintiff's breach of contract claim failed

[2] Yono initially testified that he was concerned with the cost of the HVAC replacement. The next day when testimony resumed, Yono testified that he had decided to utilize defendant's equipment, and his only concern was quality, not price.

because plaintiff and defendant had not entered into a contract. The only contractual agreement was executed by Yono and Sanford. The trial court also denied a request for relief based on fraudulent misrepresentation, holding that clear and convincing evidence had not been presented. The trial court held that the theory of negligent misrepresentation presented in plaintiff's complaint was actually an action based on innocent misrepresentation. Although the trial court had ruled that a breach of contract had not been established, the trial court held that, for purposes of the innocent misrepresentation claim, defendant was accountable for the contract between plaintiff and CTM. The trial court awarded plaintiff $1,351,900 in damages.

Defendant first alleges that the trial court erred in entering a judgment based on innocent misrepresentation when it expressly concluded that there was no contract between plaintiff and defendant. We agree. When reviewing a judgment following a bench trial, the trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002); See also MCR 2.613(C). "A finding is clearly erroneous when, although evidence supports it, this Court is left with a firm conviction that the trial court made a mistake." *Lamp, supra*.

A plaintiff may utilize three different theories to establish fraud: (1) traditional common-law fraud; (2) innocent misrepresentation; and (3) silent fraud. *Diponio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 51; 631 NW2d 59 (2001). In *M & D, Inc v McConkey*, 231 Mich App 22, 27-28; 585 NW2d 33 (1998), this Court discussed the claim of innocent misrepresentation:

> A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a *fraudulent purpose* or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. *Id*. at 118. Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. *Id*. at 117. Finally, in order to prevail on an innocent misrepresentation claim, a plaintiff must also show that the plaintiff and defendant were in privity of contract. *Id*. at 118-119.

In *US Fidelity, supra*, the Supreme Court gave a brief summary of the distinctions between traditional and innocent misrepresentation:

> Briefly then, while the traditional and innocent misrepresentation actions are substantially similar, they are also significantly different. On the one hand, the innocent misrepresentation rule differs in eliminating *scienter* and proof of the intention that the misrepresentation be acted upon. However, on the other hand,

> the innocent misrepresentation rule adds the requirements that the misrepresentation be made **in connection with making a contract** and the injury suffered by the victim must inure to the benefit of the misrepresenter. Actually what this means is this: while it is unnecessary to show that the innocent misrepresenter knew his representation was false, it is necessary to show that not only does the victim suffer injury, but also the injury must inure to the misrepresenter's benefit. It also means, and this is the major legal issue in this case, that it is unnecessary to prove separately that the representer intended that the victim rely on the misrepresentation, because the representation must be made "in a transaction between them", where the misrepresenter should realize that the misrepresentation would be relied upon. …
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> Since the rule of innocent misrepresentation **only applies to parties in privity of contract**, the traditional requirement that the misrepresentation be made with the intention to induce the other party to act is automatically satisfied. Whenever a party engages in contractual negotiations that party attempts to persuade the other to accept the proposed terms, and vice-versa. The parties reach the goal of forming a mutually agreeable contract based upon the representations made in the course of bargaining. Thus, **in situations involving privity of contract, all representations may be presumed to be made for the purpose of inducing the other party to enter the contract**. [*Id.* at 118-119 (emphasis in bold added).]

Plaintiff relies on the language "in connection with making a contract" for the conclusion that contract negotiations will suffice to meet the privity of contract requirement. However, this language, reviewed in context, does not alter the privity of contract requirement, but rather is dicta. "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of adjudication." *Hett v Duffy*, 346 Mich 456, 461; 78 NW2d 284 (1956) (emphasis in original). See also *Perry v Sied*, 461 Mich 680, 687 n 9; 611 NW2d 516 (2000) (observations by way of dicta are not binding). The contract negotiation language was used by way of example to demonstrate why independent proof of reliance is unnecessary to maintain an action for innocent misrepresentation, and the requirement of privity of contract was not altered.[3] Furthermore, it is unnecessary to extend the privity of contract requirement to include contract negotiations where a plaintiff may pursue other theories of fraud

[3] Plaintiff cites to two federal decisions, *Wynn v State Automobile Mut Ins Co*, 856 F Supp 330, 336-337 (ED Mich 1994) and *Allendale Mut Ins Co v Triple-S Technologies, Inc*, 851 F Supp 277, 281-282 (WD 1993), for the proposition that contract negotiations will satisfy the privity of contract requirement of an innocent misrepresentation claim. However, both decisions cited the dicta in *US Fidelity, supra*, and did not expressly address whether contract negotiations satisfy the contract privity requirement.

that do not require privity.[4] Accordingly, the trial court erred in concluding that the claim of innocent misrepresentation was satisfied where the element of privity of contract was not established. *Lamp, supra*.

Although plaintiff did not file a cross appeal, it is alleged that the elements of the claim of negligent misrepresentation, the claim pleaded in the complaint, were satisfied. A cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was raised before and rejected by the trial court. *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83 n 6; 600 NW2d 348 (1999). Accordingly, we will address the claim of negligent misrepresentation.

A claim of negligent misrepresentation requires proof that a party, to his detriment, justifiably relied on information prepared without reasonable care by one who owed the relying party a duty of care. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 30; 436 NW2d 70 (1989). However, it is a well-known proposition that "there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992).

In *Schuler v American Motors Sales Corp*, 39 Mich App 276, 278; 197 NW2d 493 (1972), the plaintiff purchased stock in Rambler, Inc. from the defendant. The plaintiff filed a complaint alleging material misrepresentations regarding the new car, parts, and accessories inventory. Although the plaintiff alleged material misrepresentations, at trial, he acknowledged that he was given financial statements and schedules, which contained accurate information regarding the inventory. The plaintiff was given the schedules to read and signed them. This Court held:

> Plaintiff cannot show a misrepresentation by ignoring a part of the information supplied him, and then later claim he was defrauded because he was not told of the facts, which he chose to ignore. There is no fraud where means of knowledge are open to the plaintiff and the degree of their utilization is circumscribed in no respect by defendant. …

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[4] The tort of negligent representation requires proof that a party, to his detriment, justifiably relied on information prepared without reasonable care by one who owed the relying party a duty of care. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 30; 436 NW2d 70 (1989). This tort claim does not require any privity of contract to succeed on the claim. Additionally, a traditional fraud claim requires proof of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew it was false, or make it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *DiPonio, supra* at 51. The traditional fraud claim also does not require proof of privity of contract to establish the claim. In the absence of privity of contract, these theories of fraud may be pursued.

> Plaintiff's allegations that defendants misrepresented the inventories as to their value and salability are not such as will support an action in fraud. Such expressions are statements of opinion, not fact. ...
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> In sum, we find no evidence that the sale was induced by misrepresentation of a material fact on the part of defendants. Plaintiff either knew or could readily have discovered every material fact that was known by defendants at the time of the sale. Accepting plaintiff's claims at their face value, the strongest case he has made out is legally insufficient to constitute a cause of action. It thus became proper for the court to grant a judgment notwithstanding the verdict for defendants. [*Id.* at 279-280 (citations omitted).]

This Court held that, in light of the plaintiff's ability to discern the truth of the representations and in the absence of interference by the defendant to hide the truth of the representations, there was no justifiable reliance. *Schuler, supra*. Therefore, judgment in the plaintiff's favor was reversed. *Id.*

Likewise, in the present case, plaintiff cannot satisfy the justifiable reliance requirement because plaintiff's principal, Yono, had the ability to determine the truthfulness of Rillema's representations, and there was no evidence of interference by defendant to preclude the truth from surfacing. Yono was an experienced businessman who had acted as his own contractor on various construction projects. His business experience extended back to the 1960s, when he worked in the family's hotel business. Yono furthered his education after moving to the United States by attending an engineering institute and obtained a bachelor's degree in business administration. Yono had worked on many major construction projects including a 20,000 square foot building from demolition to new construction. Yono testified that he could ascertain the actual price of equipment and was adamant that he obtain an actual cost deal with defendant and CTM. He acknowledged rejecting at least four proposals submitted by defendant and CTM until they agreed to his terms. Yono was given the names of specific projects that CTM had worked on, and his representative called the Heritage Hospital project to determine if work had been done on the project. However, additional inquiry regarding the quality of the work did not occur. There was no evidence that defendant tried to interfere with any investigation of its representations regarding CTM. Therefore, the justifiable reliance requirement was not established, *Stockler, supra; Schuler, supra*, and the trial court did not err in failing to enter a judgment on the pleaded claim of negligent misrepresentation. *Lamp, supra*.[5]

Reversed and remanded for entry of a judgment of no cause of action in favor of defendant. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

[5] Because of our disposition of this issue, we need not address defendant's challenge to the sufficiency of the proofs in support of the damage award and the request for a new trial based on newly discovered evidence.