NO. CV 16-6027100

PAMELA EGAN, ET AL

V.

EASTLAND TITLE SERVICES, INC., ET AL

SUPERIOR COURT

JUDICIAL DISTRICT OF NEW LONDON AT NEW LONDON

SEPTEMBER 29, 2017

MEMORANDUM OF DECISION
RE: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT # 152 AND 154

FACTS

On June 2, 2016, the plaintiffs, Pamela Egan and Ronald Gieleghem, filed a complaint against the defendants, Old Republic National Title Insurance Company (Old Republic) and Susan and Lawrence Lang (Langs), arising out of a property transaction.[1] The complaint alleges the following relevant facts. The plaintiffs purchased a property located at 20 Riverhead Lane, Ease Lyme from the Langs . At the closing of the subject property, the plaintiffs purchased a homeowner's title insurance policy from Old Republic. After the closing, the plaintiffs learned that the property they had purchased was subject to an easement not disclosed in the title report. In count one, the plaintiffs allege that they presented their claimed loss to Old Republic, which failed to provide coverage under the title insurance policy. In count three, the plaintiffs allege that the Langs knew or should have known about the existence of the easement, yet, failed to disclose its existence prior to closing and, as a result, the plaintiffs suffered damages because they relied upon the Langs' representations that there was no easement.

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[1] Although it is immaterial to the present motions, Eastland Title Services, Inc. was also named as a defendant in the plaintiffs' complaint.

Presently before the court are two motions for summary judgment filed separately by Old Republic and the Langs. On March 30, 2017, Old Republic filed a motion for summary judgment on the ground that there is no genuine issue of material fact that the title insurance policy excludes coverage for the loss incurred as a result of the easement. On March 31, 2017, the Langs filed a motion for summary judgment on the ground that there is no genuine issue of material fact that the plaintiffs had actual and constructive notice of the easement prior to and at the closing. Both motions are accompanied by memoranda of law. On June 7, 2017, the plaintiffs filed an objection, in which they argue, as to both defendants, that that there is a genuine issue of material fact as to whether the plaintiffs were aware of the existence and scope of the easement prior to closing. On June 15, 2017, both defendants filed responses to the plaintiffs' objection. All four parties cumulatively submitted a number of exhibits. The court heard oral argument at short calendar on July 17, 2017.

ANALYSIS

Summary judgment standards are well established. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820, 116 A.3d 1195 (2015). "[T]he 'genuine issue' aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted;

internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

"[T]he burden of showing the nonexistence of any material fact is on the party seeking summary judgment." (Internal quotation marks omitted.) *Tuccio Development, Inc.* v. *Neumann*, 114 Conn. App. 123, 126, 968 A.2d 956 (2009). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

I
OLD REPUBLIC

The court first considers whether Old Republic is entitled to summary judgment on the grounds that because there is no genuine issue of material fact that the title insurance policy excludes coverage for the loss incurred as a result of the easement. Neither party disputes that the property is subject to an easement, the relevant provision of the title insurance policy affords coverage for the plaintiffs' claimed loss due to the easement,[2] and the

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2 The relevant portion of the policy affording coverage provides: "This [p]olicy covers [y]our actual loss from any risk described under [c]overed [r]isks," which includes when "[s]omeone else has an [e]asement on the [l]and." The term "easement" is defined by the policy to mean "the right of someone else to use the [l]and for a special purpose."

language of the policy is unambiguous. Consequently, the dispositive issue is whether coverage is excluded by the policy's fourth exclusion, which provides in relevant part: "You are not insured against loss, costs, attorneys' fees, and expenses resulting from: . . . Risks: a. that are created, allowed, or agreed to by [y]ou, whether or not they are recorded in the [p]ublic [r]ecords . . . ." Old Republic argues that this exclusion applies because there is no genuine issue of material fact that the plaintiffs had knowledge of its existence prior to closing and allowed or agreed to the easement. In response, the plaintiffs argue that there is a genuine issue of material fact as to whether they were aware of the easement because they were presented with conflicting information regarding its existence. The plaintiffs also argue that they were unaware of the scope of the easement prior to closing.

Our Supreme Court in *Cohen* v. *Security Title & Guarantee Co.*, 212 Conn. 436, 562 A.2d 510 (1989), had occasion to consider the applicability of a substantially identical title policy exclusion.[3] In that case, the day before closing, the plaintiffs learned "that the legal description contained in the contract of sale and in the proposed deed, included more property than the plaintiffs had intended to buy and the sellers had intended to sell." Id., 437-38. Based upon this defect, the plaintiffs filed suit against their title insurance company alleging that it wrongfully denied coverage for their claim. The trial court found for the title insurance company based upon, inter alia, a determination that the loss was excluded by the relevant exclusion as provided by the title insurance policy. Our Supreme Court affirmed the trial court, and held that "[b]y failing timely to raise the issue of the discrepancy between the piece

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[3] Specifically, the insurance policy at issue in *Cohen* contained "an exclusion for [d]efects, liens, encumbrances, adverse claims, or other matters . . . created, suffered, *assumed or agreed* to by the insured claimant." (Emphasis altered; internal quotation marks omitted.) *Cohen* v. *Security Title & Guarantee Co.*, 212 Conn. 436, 440, 562 A.2d 510 (1989).

of land they intended to buy and the piece of land they in fact bought, the plaintiffs agreed to receive a defective deed. The plaintiffs were well aware of the discrepancy between the two descriptions. Although they could have timely brought this problem to the attention of the sellers, they did not do so. The plaintiffs cannot now complain of the defect to which they acquiesced at closing. We agree with the trial court that this policy exclusion precludes the plaintiffs from recovering damages since they agreed to the defect of which they now complain." Id., 440-41. At least two Superior Court decisions have denied summary judgment based upon virtually identical policy exclusions when the parties' knowledge of the alleged defect was disputed.[4] Based upon these principles, if there is no genuine issue of material fact that the plaintiffs in the present case were aware that the property was subject to an easement prior to closing, their loss will be excluded.

In the present case, viewing the evidence in the light most favorable to the plaintiffs, the parties' submissions establish that there is no genuine issue of material fact that the plaintiffs were aware of the easement prior to closing and, thus, their loss is excluded by the policy because they allowed or agreed to the easement. First, it is undisputed that the Langs presented the plaintiffs with a property condition report prior to closing, pursuant to the requirements of General Statutes § 20-327b,[5] that disclosed the existence of the easement. In

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4 See *Chicago Title Ins. Co.* v. *Bristol Heights Assn., LLC,* Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X02-CV-07-4020477-S (December 30, 2009, *Shortall, J.*) (denying summary judgment based upon virtually identical exclusion because resolution of what the parties knew depended upon jury's assessment of facts and credibility); *Pace Construction, Inc.* v. *Citrano*, Superior Court, judicial district of Fairfield, Docket No. CV-318508 (January 30, 1996, *Ballen, J.*) (denying summary judgment based upon virtually identical exclusion because genuine issue of material fact existed as to the knowledge of the defect).

5 General Statutes § 20-327b (a) provides in relevant part: "[E]ach person who offers residential property in the state for sale . . . shall provide a written residential condition report to the prospective purchaser at any time prior to the prospective purchaser's execution of any . . . contract to purchase . . . . [an] . . . exact reproduction or duplicate of the written residential

the report, the Langs indicated that their property was subject to an easement and expressly indicated on an addendum that "[n]eighbors have ROW near water to access their property." On March 11, 2013, prior to the closing, the plaintiffs initialed each page and signed the last page of the report directly below the express written disclosure of the easement. This report was attached to the purchase and sale agreement, which was signed by both plaintiffs. Not only was this report signed and initialed by the plaintiffs, but the plaintiffs testified at their depositions that they were aware of the disclosures contained within the report prior to closing. Specifically, Gieleghem testified that he understood "ROW" to mean right of way. Gieleghem further testified that he was aware of the disclosure of the easement in the condition report, but that he interpreted it to mean that the neighbors could only use it to traverse the plaintiffs' property with their lawn tractor. Egan testified that she understood "ROW" to mean that the owner would allow the traversing of property by anyone that they give permission to. In light of this understanding, Egan testified that she questioned what the disclosure of the easement meant and that she shared Gieleghem's interpretation of the disclosure; she thought it was restricted to lawnmower use only.

Second, it is undisputed that the plaintiffs were aware of the easement because they toured the property with their real estate agent, Evan Griswold, who explicitly noted the existence of the easement. The plaintiffs' testimony regarding their conversation with Griswold establishes that they knew that the neighbors had a right to traverse their property. In particular, Gieleghem testified that Griswold explained to him that the easement was established to permit their neighbor to traverse a lawn tractor over the property. In response to this disclosure, Gieleghem testified that he knew about the easement and that the neighbors'

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condition report containing the prospective purchaser's written receipt shall be attached to any written offer . . . contract to purchase . . . . [and] any agreement to purchase the property."

right of way for that purpose was no big deal. Further, Egan was also present during this conversation and testified that she did recall Griswold mentioning that the neighbors did come across the property with their tractors. The right of the neighbor to cross their property with a tractor undeniably fits either of the plaintiffs' proffered definitions of a right of way or easement.

The fact that the plaintiffs conducted a title search that did not reveal the existence of the easement and were presented with contradictory disclosures does not create a genuine issue of material fact as to their knowledge of the easement. As previously outlined, the plaintiffs testified that they were aware of the easement, although they were presented with these contradictory discoveries. Moreover, the plaintiffs had the occasion to confront the Langs regarding the discrepancies and to further inquire as to the extent of the easement, and there was no evidence presented, or argument proffered, that they were prohibited from doing so. The plaintiffs "cannot now complain of the defect to which they acquiesced at closing." *Cohen* v. *Cohen* v. *Security Title & Guarantee Co.*, supra, 212 Conn. 441. Therefore, the evidence before the court establishes that there is no genuine issue of material fact that the plaintiffs' loss is excluded by the policy because they had knowledge of the easement prior to closing, thus, the burden shifts to the plaintiffs to demonstrate the existence of some disputed factual issue.

The plaintiffs argue, notwithstanding their knowledge of the existence of the easement, that there is a factual dispute as to whether the policy excludes coverage because they were unaware, at closing, that the easement permitted their neighbor to repeatedly drive vehicles across the plaintiffs' property to access the waterfront. Although this contention is supported by the evidence, it fails to create a disputed factual issue that their loss is not

excluded by the policy. Again, the plaintiffs had the opportunity to confront the Langs in an effort to reveal the true nature of the easement and failed to do so. Because they chose not to pursue such a concern, the plaintiffs cannot now rely upon their limited understanding of the scope of the easement to preclude the application of the policy exclusion. Essentially, the plaintiffs' argument attempts to import an extraneous standard into the unambiguous policy exclusion. The policy exclusion cannot be read to require full knowledge and understanding of an easement; rather, it simply excludes losses "that are created, allowed, or agreed to by [the plaintiffs]." The fact that the plaintiffs were aware that the property was subject to an easement that permitted the neighbors to traverse their tractors, but, were unaware that the easement permitted the neighbors traverse other vehicles to the waterfront does not create a disputed factual issue that would preclude the application of the unambiguous policy exclusion.[6]

Consequently, Old Republic is entitled to summary judgment because it has established that the plaintiffs knew the property was subject to an easement prior to closing and, thus, their loss is excluded term of the policy.

II
THE LANGS

The Langs move for summary judgment as to the allegations against them contained within count three on the ground that they are not liable because the plaintiffs had actual or constructive notice of the easement. In support of this ground, the Langs argue that they disclosed the existence of the easement, that the plaintiffs were made aware of the easement

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[6] The parties raise the issue of the comparative sophistication of the parties as outlined by *Malkin* v. *Realty Title Ins. Co.*, 244 Md. 112, 223 A.2d 155 (1966), which was relied upon by *Cohen* v. *Security Title & Guarantee Co.*, supra, 212 Conn. 440, to reach a separate conclusion. The court will not undertake such an analysis because Connecticut courts have not adopted such a factor.

through other sources, and that the plaintiffs' notice is conclusively presumed because the easement was recorded on the land records. In opposition, the plaintiffs argue that there is a genuine issue of material fact as to whether they were aware of the existence or the scope of the easement. The plaintiffs also argue that the Langs provided them with documents that did not disclose the existence of the easement.

As a preliminary matter, it is well established that "[o]n a motion by [the] defendant for summary judgment the burden is on [the] defendant to negate each claim as framed by the complaint." (Internal quotation marks omitted.) *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 594, 113 A.3d 932 (2015). In particular, count three alleges that the plaintiffs were unaware of the existence of the easement prior to closing and that the Langs knew or should have known about the existence of the easement, yet, failed to disclose its existence prior to closing and, as a result, the plaintiffs suffered damages based upon the Langs' representations. Although neither party endeavors to classify the claim, or claims, alleged in count three, it is readily apparent that the cause of action alleged therein sounds in negligent misrepresentation. Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result. *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 73, 873 A.2d 929 (2005).

In the present case, viewing the evidence in the light most favorable to the plaintiffs, there is no genuine issue of material fact that the Langs made a misrepresentation that the property was not subject to an easement. Although it is undisputed that the Langs presented the plaintiffs with a property condition report prior to closing, pursuant to § 20-327b, and

several survey documents that represented that the property was subject to an easement prior to closing, it is also undisputed that the Langs presented the plaintiffs with documents that failed to disclose the easement. Specifically, Gieleghem testified that the Langs provided him with three maps of the property that did not reference the easement and that the Langs never provided him the recorded easement. Further, the Langs provided the plaintiffs' closing attorney with an owners' title affidavit, which was signed by the Langs that explicitly indicated there were no easements on the property. There is also no genuine issue of material fact that the plaintiffs knew or should have known that a portion of their representations concerning the easement were false. In light of the fact that the court lacks authority to consider whether the plaintiffs suffered harm as a result of the representations,[7] the dispositive issue is whether the plaintiffs reasonably relied on the nondisclosure of the easement.

"Reliance on a statement may become reasonable based on context, the statement's formal nature, the relationship between the parties . . . or when the statement is made by an individual with specialized knowledge . . . . We have consistently held that reasonableness is . . . determine[d] based on all of the circumstances. . . . Reliance on . . . a writing is not automatically reasonable—a court still must give due consideration to the surrounding circumstances. . . . The plaintiff's knowledge is particularly relevant to determining whether,

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[7] The court "lacks authority to render summary judgment on a ground not raised or briefed by the parties that does not implicate the court's subject matter jurisdiction. . . . [T]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented . . . ." (Citations omitted; emphasis original; internal quotation marks omitted.) See *Kurisoo* v. *Ziegler*, 174 Conn. App. 462, 470-71, 166 A.3d 75 (2017). The issues of the plaintiffs' knowledge of the easement and the Langs' failure to disclose the existence of the easement necessarily implicates the first three elements of a negligent misrepresentation claim. Nevertheless, the court lacks authority to consider whether the plaintiffs suffered pecuniary harm because this issue is not intertwined with the elements for a negligent misrepresentation claim and was neither raised nor briefed by the Langs.

under all the circumstances, reliance was reasonable. . . . Knowledge of the fact misrepresented can preclude a claim that reliance on a contrary representation was reasonable. . . . The plaintiff's knowledge of the misrepresentation carries significant weight. (Citations omitted; internal quotation marks omitted.) *National Groups, LLC* v. *Nardi*, 145 Conn. App. 189, 194-95, 75 A.3d 68 (2013).

Our appellate courts "have consistently held that reasonableness is a question of fact for the trier to determine based on all of the circumstances. . . . In making this determination, the fact finder certainly could take into account the casualness of the allegedly false statements and the context in which they were made." (Citations omitted; internal quotation marks omitted.) *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 580, 657 A.2d 212 (1995). Nevertheless, in light of this principle, a trial court's granting of summary judgment has been affirmed in situations where a plaintiff's reliance is not in dispute. See *Stuart* v. *Freiberg*, supra, 316 Conn. 830-31 (affirming trial court's rendering of summary judgment on negligent misrepresentation claim because no genuine issue of material fact existed as to reliance); *Rafalko* v. *University of New Haven*, 129 Conn. App. 44, 52-53, 19 A.3d 215 (2011) (same).

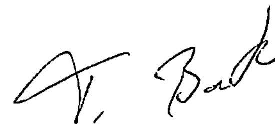
In the present action, viewing the evidence in the light most favorable to the plaintiffs and considering the totality of the circumstances, there is no genuine issue of material fact that the plaintiffs' reliance was unreasonable because it is undisputed that they knew of the existence of the easement prior to closing. First, the fact that the plaintiffs were presented with three maps of the property that did not reference the easement is mitigated by the fact that the Langs simultaneously provided them with a map that did disclose the easement. Furthermore, Gieleghem testified that he did not ask the Langs about the discrepancies

between the maps because there was no time. Second, the fact that the Langs never provided the plaintiffs with the recorded easement does not establish that their reliance was reasonable because the plaintiffs knew that the property was subject to an easement. Likewise, as outlined previously, the plaintiffs chose to forgo an opportunity to inquire as to the actual recorded easement. Third, it is unclear from the evidence presented whether the plaintiffs had even seen the owners' title affidavit prior to closing. Gieleghem testified that he could not recall whether he received this title affidavit before or after the closing. Therefore, the plaintiffs' reliance on the title affidavit could not have been reasonable because it is unclear if they actually relied on it. "Without *actual* reliance, reasonable reliance cannot possibly exist." (Emphasis original.) *Stuart* v. *Freiberg*, supra, 316 Conn. 829. After agreeing to purchase a property they knew was subject to an easement, the plaintiffs cannot now claim that they reasonably relied upon the several nondisclosures to hold the Langs liable.

Accordingly, the Langs are entitled to summary judgment because there is no genuine issue of material fact that the plaintiffs' reliance on the Langs' nondisclosures was unreasonable.

CONCLUSION

For the foregoing reasons, both defendants' motions for summary judgment are granted.



Bates, J.