

**IN THE SUPREME COURT OF GUAM**

**P.D. Hemlani,**  
Plaintiff-Appellant,

**vs.**

**Michael Flaherty, Anao Point Estates,  
a Guam Limited Partnership,**  
Defendants-Appellees

**OPINION**

Supreme Court Case No. CVA02-009  
Superior Court Case No. CV0343-00

**Filed: August 7, 2003**

**Cite as: 2003 Guam 17**

Appeal from the Superior Court of Guam  
Argued and submitted on February 11, 2003  
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

**CARBULLIDO, C.J.:**

[1] Plaintiff-Appellant P.D. Hemlani (“Hemlani”) filed suit for fraud, intentional misrepresentation, and negligent misrepresentation against Defendant-Appellee Michael Flaherty (“Flaherty”) arguing that Flaherty failed to disclose a mortgage on real property sold by Flaherty to Hemlani and transferred through a grant deed. Flaherty moved for and was granted summary judgment by the trial court. We affirm.

**I.**

[2] This is an appeal from a summary judgment. Although the facts underlying the real property conveyance were disputed by the parties, Flaherty, in his summary judgment motion, accepted Hemlani’s version of the facts. Thus, the facts as alleged by Hemlani control this analysis.

[3] Hemlani’s Complaint alleged the following facts. In May 1998, Flaherty offered to sell a parcel of real property located in Yigo, Guam for \$30,000.00. Hemlani accepted the offer and tendered a check for \$30,000.00 in exchange for a grant deed to the property. Hemlani attempted to record the grant deed at the Department of Land Management but was denied because he did not have affidavits of transferee and true consideration from Flaherty. Hemlani subsequently ordered a title report on the property and discovered a mortgage that had been recorded on December 6, 1993 and another mortgage that was recorded on December 30, 1998. Hemlani made repeated requests for delivery of free and clear title, but Flaherty failed to comply.

[4] In March 2000, Hemlani filed suit against Flaherty for fraud, intentional misrepresentation, and negligent misrepresentation. Hemlani sought Flaherty’s specific performance in the execution of a deed which was free and clear of all liens and encumbrances, and compensation in the form of general, special, consequential and punitive damages.

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[5] In July 2001, Flaherty filed a motion for summary judgment. The trial court granted this motion. In March 2002, the remaining issue on specific performance went to bench trial. Hemlani did not appear and the trial court entered judgment of dismissal. Hemlani appealed.

## II.

[6] This court has jurisdiction over this appeal from a final judgment of the Superior Court. Title 7 GCA §3107(b) (1993).

[7] A grant of summary judgment is reviewed *de novo*. *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10, ¶7. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c).

## III.

[8] Flaherty presented three arguments in his summary judgment motion: (1) the undisputed facts showed that no fraud, or intentional or negligent misrepresentation occurred; (2) the alleged encumbrance on the property did not exist; and (3) Hemlani suffered no damages in removing any encumbrance and therefore cannot recover damages. The trial court's Order granting summary judgment offered no analysis other than to state that "Defendant is entitled to judgment as a matter of law for the reasons stated in Defendant's memorandum of points and authorities which accompanied Defendant's motion of summary judgment." Appellant's Excerpts of Record, p. 22 (Order).<sup>1</sup> Our determination of whether Flaherty is entitled to summary judgment based upon his three arguments begins with a *de novo* examination of

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<sup>1</sup> The format of this order violates Rule 5(G) of the Superior Court of Guam Rules of Court which requires the prevailing party to prepare an order consistent with the ruling of the court and submit the order to the opposing party for review. The format of the order is a disservice to the non-movant and this court, especially considering that it granted summary judgment and ended Hemlani's case in chief, and is discouraged. We are not confronted in this case with the effect, if any, of a violation of Rule 5 (G). We reserve this issue for another case."

Hemlani's Complaint and causes of action.

[9] The Complaint presents causes of action for fraud, intentional misrepresentation and negligent misrepresentation. The elements of fraud are: "(1) a misrepresentation; (2) knowledge of falsity (or scienter); (3) intent to defraud to induce reliance; (4) justifiable reliance; and (5) resulting damages."

*Transpacific Export Co. v. Oka Towers Corp.*, 2000 Guam 3 ¶ 23. The tort of intentional misrepresentation has the same elements as fraud. *See Lim v. The TV Corp. Int'l*, 121 Cal. Rptr. 2d 333, 339 (Ct. App. 2002). The elements of a cause of action for negligent misrepresentation are: "(1) a misrepresentation of a past or existing material fact; (2) without reasonable grounds for believing it to be true; (3) with intent to induce another's reliance on the fact misrepresented; (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages."

*Fox v. Pollack*, 226 Cal. Rptr. 532, 537 (Ct. App. 1986). The first element of all three causes of action requires a complainant to prove, *prima facie*, that a misrepresentation occurred.

#### **A. The Alleged Misrepresentation.**

[10] With respect to the cause of action for fraud, Hemlani's Complaint alleges the following misrepresentation.

On or about May 7, 1998, the defendant, with intent to defraud plaintiff and induce plaintiff to buy property described in paragraph 5 for the sum of \$30,000.00 represented to plaintiff that the property was free and clear of all liens and encumbrances and that he would deliver marketable title. The representation was false and defendant knew it to be false at the time it was made, and at all times mentioned in this complaint.

Appellant's Excerpts of Record, p. 3, ¶ 13 (Complaint). With respect to the cause of action for intentional misrepresentation, the Complaint states:

Defendant Michael P. Flaherty represented to plaintiff that the property was free and clear of all liens and encumbrances and that he would deliver marketable title. In addition, defendant Michael P. Flaherty represented to plaintiff that he would execute all the necessary documents to deliver such marketable title.

Appellant's Excerpts of Record, p. 5, ¶ 24 (Complaint). Finally, with respect to the cause of action for negligent misrepresentation, the Complaint states:

Defendant Flaherty with the intent to induce plaintiff to purchase the aforementioned property, represented to plaintiff that the property was free and clear of all liens and encumbrances and that he would deliver marketable title. In addition, defendant Flaherty represented that he would execute all the necessary documents to consummate the conveyance of said property, which he failed to do so [sic].

Appellant's Excerpts of Record, p. 6, ¶ 30 (Complaint).

[11] Flaherty's summary judgment motion argued that he made no express statements to Hemlani that the property title was free and clear. Upon review of Hemlani's Opening Brief, it becomes clear that he now admits that misrepresentation was not an express statement, but that it was implied.<sup>2</sup> Hemlani makes two arguments: (1) pursuant to Title 21 GCA §4210, Flaherty made an implied statement that the property title was free and clear, and (2) Flaherty had a duty to disclose the mortgages and failed to do so to Hemlani's detriment.

### **B. 21 GCA §4210.**

[12] Hemlani's argument here is correct. Section 4210 provides:

From the use of the word grant in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heir to the grantees, his heirs, and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantees.
2. That such estate is at the time of the execution of conveyance free from encumbrance done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

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<sup>2</sup> It is problematic that the Complaint fails to allege these specifics as a complaint for fraud must be pled with particularity. Guam R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally."). Notwithstanding Rule 9, Flaherty did not challenge the Complaint on sufficiency grounds and this court must decide the propriety of Hemlani's argument.

Title 21 GCA § 4210 (1994). This section states that, unless otherwise expressly provided, a grantor who conveys property by a grant deed warrants or represents that the grantor has not conveyed the same estate, or any right, title, or interest to any person other than the grantee. Further, at the time of the conveyance the property is free of any encumbrance made by the grantor or any person claiming under him. However, in and of itself, section 4210, and the implied statement therefrom, does not give rise to a cause of action for fraud or misrepresentation.

[13] Section 4210 was taken from California and is identical to section 1113 of the Civil Code of California. Actions normally taken pursuant to section 1113 are to remedy breaches of implied warranties.

When there is a breach of one of the implied covenants in a grant deed, the grantee can rescind the conveyance or recover the purchase price in quasi-contract. The grantee can recover damages caused by the breach of an implied covenant from the grantor, but the grantee cannot recover damages unless he or she has suffered some loss as a result of the breach. Thus, the grantee cannot recover damages if the encumbrance can be removed before he or she suffers injury.

HARRY D. MILLER & MARVIN B. STARR, MILLER AND STARR CALIFORNIA REAL ESTATE § 8:10 (3D ED. 2003) (footnotes omitted). By basing his claims in section 4210, it is necessarily Hemlani's contention that Flaherty breached an implied warranty. When there is a breach of an implied covenant in a grant deed, the grantee can rescind the conveyance or recover the purchase price in quasi-contract. *Id.* Suing for fraud or misrepresentation is not a remedy available to Hemlani under section 4210. In the case of *Gustafson v. Dunham, Inc.*, 22 Cal. Rptr. 161 (Ct. App. 1962), the plaintiffs sued for breach of warranty in the sale of a residence. Plaintiff's complaint alleged that the failure of the grantor to disclose that the land was filled would sustain an action for fraud and for breach of warranty. *See id.* at 163. The court disagreed stating: "It is an untenable contention. . . . The causes of action are entirely independent. Fraud is not an element of a liability for breach of warranty, which is based upon breach of contract." *Id.* Thus, section 4210 does not provide the basis for causes of action for fraud, intentional misrepresentation or negligent misrepresentation. Hemlani nonetheless argues that Flaherty breached a duty to disclose the mortgages.

### C. Duty to Disclose.

[14] Hemlani argues that Flaherty had a separate duty to disclose material facts known to him, which were not accessible to Hemlani. The general rule Hemlani cites is

where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer.

*Lingsch v. Savage*, 29 Cal. Rptr. 201, 204 (Cal. Ct. App. 1963). However, the cases which resort to this rule, including the cases cited by Hemlani, indicate that the duty is to disclose physical or structural defects in buildings or property being sold. *See Herzog v. Capital Co.* 164 P.2d 8, 9 (Cal. 1945) (involving a failure to disclose serious leaks in a house caused by defective materials and improper bracing); *Rothstein v. Janss Inv. Corp.*, 113 P.2d 465, 467 (Cal. Dist. Ct. App. 1941) (involving a failure to disclose that the property was filled); *Shapiro v. Sutherland*, 76 Cal. Rptr. 2d 101, 111 (Ct. App. 1998) (involving a failure to disclose a noise problem); *Lingsch*, 29 Cal. Rptr. at 207 (failure to disclose that a building on the property had been condemned); *Karoutas v. HomeFed Bank*, 283 Cal. Rptr. 809, 911 (Ct. App. 1991) (involving a failure to disclose soil conditions and other defects). *Barder v. McClung*, 209 P.2d 808, 809 (Cal. Dist. Ct. App. 1949) (involving a failure to disclose violations of zoning ordinances).

[15] These cases are distinguishable from the one before this court. Hemlani has failed to offer, and this court could not find, case law to support his contention that a grantor has a duty to disclose an encumbrance such as a mortgage when property is transferred by grant deed. In fact, whether a grantor discloses or fails to disclose the existence of a mortgage is rendered irrelevant by use of a grant deed because the statute provides an implied covenant against such an encumbrance, unless otherwise expressly provided in the conveyance document. Thus, Hemlani has failed to prove that Flaherty had a separate duty to disclose the mortgages in addition to the implied covenants of a grant deed.

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[16] Moreover, because the subject mortgage was duly recorded at the Department of Land Management, Hemlani had constructive notice of it. *See* Title 21 GCA §37101 (1993) (“Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the Director of Land Management is constructive notice of the contents thereof to subsequent purchasers and mortgagees.”); *see also* Title 18 GCA §36115 (1992). (“An assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor.”). Because Hemlani had constructive notice of the mortgage he cannot claim that Flaherty misrepresented the existence of the mortgage. Thus, the first two essential elements of Hemlani’s claim of fraud are defeated.<sup>3</sup>

[17] Under the facts of this case, Title 21 GCA §4210 does not provide a basis for the implied misrepresentation as alleged by Hemlani in his Complaint and on appeal. Further, and because Hemlani has conceded that there was no express misrepresentation, we find that there is no genuine issue of material fact that Flaherty made no misrepresentation, express or implied, to sustain Hemlani’s causes of action for fraud, intentional misrepresentation or negligent misrepresentation. Accordingly, Flaherty is entitled to judgment as a matter of law.

[18] Because we decide that Flaherty is entitled to summary judgment based upon his first argument we need not address the remaining issues of whether the mortgage, as alleged, existed or whether Hemlani suffered no damages. Further, although Hemlani appealed from the trial court’s judgment dismissing the remaining count of specific performance, this issue was not argued in Hemlani’s Opening or Reply Briefs

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<sup>3</sup> This finding is based on Hemlani’s claim of fraud. A grantee, such as Hemlani, is still entitled to rely on the implied covenants in a grant deed and may recover damages in removing encumbrances. HARRY D. MILLER & MARVIN B. STARR, MILLER AND STARR CALIFORNIA REAL ESTATE § 8:8 (3D ED. 2003) (“If the encumbrance is a cloud on the title that may be recorded but is not apparent by viewing the property, such as a deed of trust or a lease, the grantee is entitled to rely on the implied covenant contained in the deed, even if he or she had actual knowledge of the encumbrance before the deed was received. In such cases, any exception from the implied covenant must be expressed in the deed, and in the absence of an express or implied agreement between the grantor and grantee, the grantee’s knowledge of the breach of the covenant does not preclude recovery of damages by the grantee.”) (footnotes omitted). Hemlani may have used the grant deed’s implied warranties to seek removal of the mortgage. As stated above, 21 GCA §4210 and the implied warranties in a grant deed do not provide a cause of action for fraud.

and was therefore abandoned. *See Seafood Grotto v. Leonardi*, 1999 Guam 30, ¶ 13; *Rinehart v. Rinehart*, 2000 Guam 14, ¶ 23.

#### IV.

[19] Hemlani's claims for fraud, intentional misrepresentation and negligent misrepresentation were based upon an alleged implied misrepresentation or omission by Flaherty and the implied covenants and alleged duty imposed by Title 21 GCA §4210. We find under the facts of this case that section 4210 does not provide the basis for causes of action for fraud, intentional misrepresentation or negligent misrepresentation. Further, under the facts of this case, Flaherty did not have a separate common law duty to disclose the existence of a mortgage. We find that there is no genuine issue of material fact that Flaherty made no express or implied misrepresentation, and that Flaherty is entitled to judgment as a matter of law. Therefore, summary judgment and the judgment of dismissal are **AFFIRMED**.