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Judge Joan Dubuque

Hearing: Friday 3-8-2008 9:00 a.m.

SUPERIOR COURT OF KING COUNTY

E-FILED

CASE NUMBER: 12-2-28170-0 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

XI-JING ("JAMES") ZHOU and HONG LEI
("LUCY") ZHOU, husband and wife,

Plaintiffs,

v.

FIRST AMERICAN TITLE INSURANCE
CO.; RONALD EDGBERT, BETTY
EDGBERT, husband and wife; SUSAN
STASIK; (EDDY) CHO F. PANG; and
WINDERMERE REAL ESTATE
NORTHWEST, INC.,

Defendants.

NO. 12-2-28170-0 SEA

MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL BY
DEFENDANTS WINDERMERE REAL
ESTATE NORTHWEST, INC. AND
SUSAN STASICK

I. Relief Requested

Defendants Windermere Real Estate Northwest, Inc. and Susan Stasik, through their counsel of record, ask the court for an order of summary judgment dismissing them with prejudice. Plaintiffs, the Zhous, buyers of real property, and their agent, Eddy Cho F. Pang, cannot hold moving defendant real estate brokerage and seller's agent liable for non-disclosure of easements which were in the public records prior to their offer, and written notice of which was in the Zhous' hands during a title review contingency more than three years before this action was filed.

Motion for Summary Judgment by Defendants Windermere R.E. NW Inc. and
Stasik - I

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II. Summary of Facts

Plaintiffs Xi-Jing "James" Zhou and Hong Lei "Lucy" Zhou purchased real property located at 16188 NE 29th Street in Bellevue, Washington (the "Property") from defendants Ronald and Betty Edgbert in August 2009. Complaint ¶¶ 1 - 2 (Exh. A to Declaration of Philip T. Mattern). The Edgberts as sellers were represented by the moving defendants, real estate broker Susan Stasik of Windermere Real Estate Northwest, Inc. (Agency Disclosure, Exh. 2, p. 8 to Declaration of Susan Stasik). The Zhous as buyers were represented by defendant real estate broker (Eddy) Cho F. Pang and not by the moving defendants. *Id.*, and Complaint ¶ 6 (Exh. A to Mattern Decl.)

According to the Zhous' Complaint, more than two years after the transaction closed, they discovered that the Property is encumbered by an easement in favor of the City of Bellevue for a sewer vault (what they call the "vault easement") and a "walking easement". Complaint ¶¶ 7-9 (Exh. A to Mattern Decl.).

The legal description of the Property is "Lot 24, Peachtree, according to the plat recorded in Volume 126 of Plats, pages 55, 56, and 57, in King County, Washington". *See also* 1st Requests for Admission to Plaintiff by Defendant Windermere Real Estate / Northwest, Inc. (hereinafter "1st Requests for Admission"), No. 1, 2, 3; 2nd Requests for Admission to Plaintiff by Defendant Windermere Real Estate / Northwest, Inc. (hereinafter "2nd Requests for Admission"), No. 1. (Exh. B and C to Mattern Decl.) That plat, which was recorded with King County Records in 1984, shows both easements complained of plainly on Lot 24. 1st Requests for Admission No. 4 (Exh. B to Mattern Decl.). The Zhous have admitted that the "vault easement" they complain of is the same easement as what is identified on the plat map as "*CITY OF BELLEVUE DRAIN. ESM'T*", and that the "walking easement" they complain of is identified on the plat map as "*WALKWAY ESM'T*", and that both easements have been of record with King County Records since prior to the date the Zhous purchased the Property. 1st Requests for Admission No. 4 and 5; 2nd Requests for Admission No. 2 and 3 (Exh. B and C to Mattern Decl.).

1 The "Dedication" paragraph on page 1 of the Peachtree plat document includes the
2 following language:

3 An easement for pedestrian ingress and egress over those portions labeled as
4 walkway easement and an easement for storm drainage is hereby granted with the
recording of this plat to the City of Bellevue.

5 Exh. 1, p. 1, to Mattern Decl.

6 The Edgberts as sellers completed and signed a Seller Disclosure Form (NWMLS Form
7 17). 2nd Requests for Admission to Plaintiff, No. 7 and Exhibit 2 thereto (Exh. C to Mattern
8 Decl.). This form included statements in the "NOTICE TO BUYER" paragraph on page 1 that the
9 disclosures are made "based on Seller's actual knowledge" and are disclosures of the Seller and
10 not any real estate licensee. The Edgberts filled in answers as follows, in Part I.1. on page 1:

11 YES NO

12 E. Are there any rights-of-way, easements, or access limitations that
13 may affect Buyer's use of the property? x

14 F. Are there any written agreements for joint maintenance of an
15 easement or right-of-way? See title x

16 K. Are there any covenants, conditions, or restrictions which affect
the property? See title - CC&R's x x

17 See Stasik Decl. ¶ 3 and Exh. 1 thereto. On paragraphs F. and K, someone, most likely Susan
18 Stasik, wrote in the words "See title" and "See title - CC&R's" and it appears someone crossed
19 out the "No" answer and marked "Yes" for K. *Id.* A copy of the form was given to the Zhous
20 via their agent Eddie Cho Pang, and the Zhous signed acknowledging receipt. 2nd Req. Adm.
21 No. 7 (Exh. C to Mattern Decl.); Stasik Decl. ¶ 4. Mr. Zhou admitted that he noticed at least
22 paragraph "F." prior to purchasing the Property. Zhou Dep. 90:4-18 (Exh. D to Mattern Decl.)

23 The purchase and sale agreement signed by the Zhous as buyers and Edgberts as sellers
24 included the following:

25 **d. Condition of Title.** Unless otherwise specified in this Agreement, title to the Property shall
26 be marketable at Closing. The following shall not cause the title to be unmarketable: rights,
reservations, covenants, conditions and restrictions, presently of record and general to the
area; easements and encroachments, not materially affecting the value of or unduly interfering
with Buyer's reasonable use of the Property

1 Exh. 2, p. 1 to Stasik Decl. (underlining added.) It also included in paragraph "q", "Buyer and
2 Seller are advised to seek the counsel of an attorney ... to review the terms of this Agreement."
3 *Id.*, p. 3.

4 A "Title Contingency Addendum" to the same Agreement provided in pertinent part:

5 1. **Title Contingency.** This Agreement is subject to Buyer's review of a preliminary
6 commitment for title insurance, together with easements, covenants, conditions and
7 restrictions of record, which are to be obtained by Buyer, to determine that they are consistent
8 with Buyer's intended use of the Property. Buyer shall have 10 days (5 days if not filled in)
9 from _____ mutual acceptance of this Agreement or x from the date of Buyer's receipt of the
preliminary commitment for title insurance (from mutual acceptance, if neither box is checked)
to give written notice of Buyer's disapproval and the reasons therefore. Buyer may only
disapprove exceptions that are contained in the preliminary commitment and may not object to
matters not contained therein.

10 Seller shall have 5 days (5 days if not filled in) after receipt of Buyer's notice of disapproval
11 to give Buyer written notice that Seller will clear all disapproved exceptions. Seller shall have
12 until the Closing Date to cure all disapproved exceptions. If Seller does not give timely notice
13 that Seller will clear all disapproved exceptions, Buyer may terminate this Agreement within 3
14 days after the deadline for Seller's notice. In the event Buyer elects to terminate the
Agreement, the Earnest Money shall be returned to Buyer, less any unpaid costs described in
the Agreement. Buyer shall have no right to specific performance or damages as a
consequence of Seller's inability to provide insurable title. If Buyer does not terminate the
Agreement, Buyer shall be deemed to have waived all objections to title, which Seller did not
agree to clear.

15 Exh. 2, p. 7 to Stasik Decl. (underlining of words in second and third lines added).

16 The contract also included in paragraph 1 of the Optional Clauses Addendum the
17 statement that "The Listing Agent and Selling Licensee make no representations concerning (a)
18 the lot size or the accuracy of any information provided by the Seller" Exh. 2, p. 5 to Stasik
19 Decl. (underlining added).

20 First American Title Company opened two separate title orders for this sale: #4209-
21 1443863 opened on July 8, 2009 (commitment / report attached as Exh. F to Mattern Decl.) and
22 #4209-1444606 opened two days later (commitment / report attached as Exh. G to Mattern
23 Decl.) Lyman-1stAmerican Dep. 19:1 to 20:7 (Exh. E to Mattern Decl.) (the reports were
24 Exhibits 1 and 2 to Lyman-1st American Deposition and were produced in discovery by First
25 American). The first report included the following Exhibit B exceptions on page 5:

26 7. Covenants, conditions, restrictions and/or easements ...:
Recording Information: 8405290613

....

8. Any and all offers of dedication, conditions, restrictions, easements, fence line/boundary discrepancies, notes and/or provisions shown or disclosed by the filed or recorded map referred to in the legal description.

The second report included the same above-quoted paragraph 7 Exhibit B language, but not paragraph 8. The Zhous received both of these title commitments / reports. Xi-Jing Zhou Dep. pp. 47-49 (Exh. D to Mattern Decl.). Mr. Zhou read at least one of these reports "a little after we signed the agreement". Zhou Dep. 50:17-20 (Exh. D to Mattern Dec.). The Zhous' agent, Mr. Pang, received a copy of the "Protective Covenants Running With Land", King County Records number 8405290613 (referenced as special exception number 7 on Schedule B of the title reports) that included the statement:

3. Easements for installation and maintenance of utilities and drainage facilities are reserved as shown on the recorded plat (and/or as disclosed on title policy) Within these easements, no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation and/or maintenance of utilities, or which may change the direction of flow of drainage channels in easements.

(A copy of the full document is Exh. 3 to Stasik Decl.; the same document was also produced in discovery as part of Mr. Pang's transaction file and identified as PANG 000132-000137, indicating that Mr. Pang received it in the course of the transaction. Mattern Decl. ¶ 3.

The testimony of the First American representative was that the documents affecting title, including a plat map showing the easements on the Property, were distributed by First American to the parties and agents. Lyman-First American Dep. pp. 40-41, pp. 49-50 (Exh. E to Mattern Decl.). At least, all such documents, including the plat map showing easements on the Property, were readily available to both real estate agents. Stasik Decl. ¶ 9.

On July 19, 2009, the Zhous signed, and their agent Mr. Pang sent to Ms. Stasik, an addendum removing the above-quoted title review contingency, and the seller signed the addendum soon thereafter. Stasik Decl. ¶ 7 and Exh. 4 thereto.

III. Issues

1 1. Were the easements complained of "material facts" that were "not readily
2 ascertainable" within the meaning of the agency statute, RCW 19.86, and did the Windermere
3 defendants breach this statute?

4 2. Did the Windermere defendants breach any duty with respect to the Seller
5 Disclosure Statement, where that Statement disclosed the existence of encumbrances against title
6 and warned buyers to look at the title report and CC&R documents, and the form makes clear
7 that it is the statement of seller, not agents?

8 3. Can plaintiffs' claims for fraud be sustained where they have not stated with
9 particularity the circumstances of alleged fraud in their Complaint?

10 4. Can any claim for fraudulent concealment against the Windermere defendants be
11 sustained where the easements were an intrinsic part of the plat; and the easements were of
12 record on the face of the plat prior to the Zhous' purchase, the Zhous received a title report
13 stating the existence of covenants and easements and referencing a specific "covenants"
14 document to explicitly referred to easements on the plat, and the sale agreement allocated to
15 buyers to responsibility to obtain easements?

16 5. Can the Zhous sustain any claim of fraud or negligent misrepresentation against
17 the Windermere defendants?

18 6. Can the Zhous sustain any claim against the Windermere defendants for
19 Consumer Protection Act violation?

20 IV. Evidence Relied Upon

21 1. Declaration of Susan Stasik and attached Exhibits:

22 (1) Seller Disclosure Statement (first and last pages)

23 (2) Edgbert to Zhou Purchase and Sale Agreement
24 (omitting addenda that are immaterial)

25 (3) "Protective Covenants Running With Land", King County Records
26 No. 8405290613

1 (4) Addendum to Purchase and Sale Agreement
2 (removing title contingency)

3 (5) Email from The Talon Company to Susan Stasik and Eddie Pang
4 dated July 21, 2009

5 (6) Plat map of Peachtree showing easements on Lot 24

6 2. Declaration of Philip T. Mattern, with attached Exhibits:

7 A. Complaint (submitted only for certain admitted reference information and not
8 otherwise admitting truth of any allegations)

9 B. First Requests for Admission to Plaintiffs by Defendant Windermere Real Estate /
10 Northwest, Inc., and responses thereto (with Exhibit 1, Peachtree Plat)

11 C. Second Requests for Admission to Plaintiffs by Defendant Windermere Real
12 Estate / Northwest, Inc., and responses thereto, with attached Exhibits 1 - 4

13 D. Excerpts of Deposition of Xi-Jing Zhou taken before a court reporter on
14 January 28, 2013

15 E. Excerpts of Deposition of 30(b)(6) Daryl W. Lyman (of First American Title
16 Insurance Co.) taken before a court reporter on December 17, 2012

17 F. Preliminary commitment for title (title report), First American Title Insurance
18 Company file number 4209-1443863 (this was Exhibit 1 to Lyman-First
19 American Deposition)

20 G. Preliminary commitment for title (title report), First American Title Insurance
21 Company file number 4209-1444606 (this was Exhibit 2 to Lyman-First
22 American Deposition)

23 V. Authority and Argument

24 The Zhous are not claiming that Ms. Stasik or Windermere / Northwest made any
25 affirmative misrepresentations. Instead, they are claiming only that they "knew or should have
26 known" of the easements and failed to disclose their existence. Complaint ¶¶ 8, 16-18 (Exh. A to
Mattern Decl.).

5.1 Broker's duties limited under agency statute, RCW 19.86

Under Washington's agency statute, real estate licensees such as the moving defendants
are charged with several specified duties. The Zhous' Complaint alleges only that the
Motion for Summary Judgment by Defendants Windermere R.E. NW Inc. and
Stasik - 7

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1 Windermere defendants failed to disclose something that should have been disclosed, and
2 therefore only the duty to disclose material facts is pertinent in this action (Exh. A to Mattern
3 Decl.). A real estate licensee has the duty to disclose to parties such as buyers only those
4 *material* facts that are known to the licensee and *not readily ascertainable* by the buyers:

5 (1) Regardless of whether the licensee is an agent, a licensee owes to all parties to
6 whom the licensee renders real estate brokerage services the following duties,
7 which may not be waived:

8

9 (d) To disclose all existing material facts known by the licensee and not apparent
10 or readily ascertainable to a party: provided that this subsection shall not be
11 construed to imply any duty to investigate matters that the licensee has not agreed
12 to investigate:

13

14 (2) Unless otherwise agreed, a licensee owes no duty to conduct an independent
15 inspection of the property or to conduct an independent investigation of either
16 party's financial condition, and owes no duty to independently verify the accuracy
17 or completeness of any statement made by either party or by any source
18 reasonably believed by the licensee to be reliable.

19 RCW 18.86.030. Note that this statute twice disclaims any duty of a real estate licensee to
20 investigate, once in subsection (1)(d) and again in (2). The Zhous admit that no one associated
21 with Windermere/Northwest acted as their agent or represented that they would investigate for
22 them whether the Property was subject to any easements, or the state of title, nor did Ms. Stasik
23 ever agree to do any such investigation. 2nd Requests for Admission, No. 4, 5 (Exh. C to
24 Mattern Decl.); Stasik Decl. ¶ 10.

25 A "material fact" is defined as "information that substantially adversely affects the value
26 of the property or a party's ability to perform its obligations in a real estate transaction". RCW
27 18.86.010(9). As further explained in part 5.3.3, the existence of an easement that appears on the
28 face of a plat that is at the heart of the very legal description of the property is not a "material
29 fact" because the easement is an integral part of the plat itself.

Even if we were dealing with "material facts" here, the easements now complained of
were "readily ascertainable" by the Zhous, and therefore their nondisclosure is not actionable

1 under RCW 18.86, because (1) they appeared in a document (1984 plat map) recorded in public
2 records and therefore the Zhous had constructive notice of them as a matter of law; (2) the Zhous
3 had in their hands during the title review contingency period the "Protective Covenants" which
4 specifically stated that the plat is subject to easements, including a drainage easement; and (3)
5 the title review contingency (and other contract provisions) specifically allocated to the Zhous as
6 buyers the burden and risk of obtaining any easements against the property and reviewing them
7 to their satisfaction. These points are more fully discussed, with legal authority, in part 5.3.4.

8 5.2 Moving parties' duties limited under Seller Disclosure Statement and RCW 64.06

9 The Windermere defendants had no duty to ensure that the Seller Disclosure Statement
10 (NWMLS Form 17) required under RCW 64.06 included a disclosure of the easements. The
11 statute makes abundantly clear that the disclosure is the requirement of sellers and not any other
12 party. RCW 64.06.02(1) opens as follows:

13 In a transaction for the sale of improved residential real property, **the**
14 **seller** shall, unless the buyer has expressly waived the right to receive the
15 disclosure statement under RCW 64.06.010, or unless the transfer is
16 otherwise exempt under RCW 64.06.010, deliver to the buyer a completed
seller disclosure statement in the following format

17 (Boldface added.) As a required part of the format prescribed under RCW 64.06.02(1), the
18 Seller Disclosure Statement signed by the Edgberts and the Zhous in this transaction included the
19 following:

20 SELLER MAKES THE FOLLOWING DISCLOSURES OF EXISTING MATERIAL FACTS
... BASED ON SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY ...

21 THE FOLLOWING ARE DISCLOSURES MADE BY SELLER AND ARE NOT THE
22 REPRESENTATIONS OF ANY REAL ESTATE LICENSEE OR OTHER PARTY.

23 2nd Requests for Admissions to Plaintiff, No. 7 and Exh. 2 thereto, p. 1, lines 15-16, 22-23
24 (underlining added) (Exh. C to Mattern Decl.). Just above the Zhous' signature on the last page
25 of the form is the following:

26 THE DISCLOSURES MADE HEREIN ARE THOSE OF THE SELLER ONLY, AND
NOT OF ANY REAL ESTATE LICENSEE OR OTHER PARTY.

Id., p. 5.

1 RCW 64.06.050(2) states in pertinent part:

2 Any real estate licensee involved in a real property transaction is not liable for any error,
3 inaccuracy, or omission in the real property transfer disclosure statement if the licensee
4 had no actual knowledge of the error, inaccuracy, or omission. Unless the licensee has
5 actual knowledge of an error, inaccuracy, or omission in a real property transfer
6 disclosure statement, the licensee shall not be liable for such error, inaccuracy, or
7 omission if the disclosure was based on information provided by public agencies, or by
8 other persons providing information within the scope of their professional license or
9 expertise, including, but not limited to, a report or opinion delivered by a land surveyor,
10 title company, title insurance company, structural inspector, pest inspector, licensed
11 engineer, or contractor.

12 The Edgberts as sellers represented that, to the best of their knowledge, "No", there were
13 no easements that "may affect Buyer's use of the property" but that "Yes", there are "any written
14 agreements for joint maintenance of an easement or right-of-way" (with the added note "*See*
15 *title*"), and "Yes", there are covenants, conditions, or restrictions which affect the Property, and
16 buyers should "*See title - CC&R's*". *Id.*, Seller Disclosure Statement, ¶¶ 1E, 1F, and 1K, quoted
17 above at page 10, lines 10-17. In other words, buyers were advised that there are encumbrances,
18 that Seller does not believe they would affect a buyer's use, but that the buyers should check out
19 the title and CC&R's for themselves. There was no misrepresentation or concealment on the
20 Seller Disclosure Form, and certainly no agent liability arising from it.

21 5.3 The Zhous have no claim for fraudulent concealment because this was not
22 adequately pleaded, there was no "defect", and the easements were readily
23 ascertainable.

24 5.3.1 Lack of pleading.

25 The Zhous have not pleaded any theory of fraud, nor have they "stated with
26 particularity" the "circumstances" of fraud as required under CR 9(b) and for that reason alone
the court should not now entertain any fraud claim. They only allege in conclusory fashion a
"breach" of a "duty to disclose" that amounts to a "misrepresentation". This by itself is grounds
for dismissal of all "fraud" claims.

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5.3.2 Elements of fraudulent concealment.

Our courts recognize a buyer's cause of action for fraudulent concealment in certain limited circumstances. As stated in terms of a claim against a property seller:

[T]he vendor's duty to speak arises (1) where the residential dwelling has a concealed defect; (2) the vendor has knowledge of the defect; (3) the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by a careful, reasonable inspection by the purchaser.

Alejandro v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007)¹. Plaintiff must prove each of these elements by clear, cogent, and convincing evidence. Hughes v. Stusser, 68 Wn.2d 707, 709, 415 P.2d 89 (1966). This heightened standard of proof must be taken into account in a motion for summary judgment. Herron v. King Broadcasting Co., 112 Wn.2d 762, 768, 776 P.2d 98 (1989).

5.3.3 There was no defect: the Zhous received exactly what they bargained for.

The Zhous bargained for the purchase of the Property described as "Lot 24, Peachtree, according to the plat recorded in Volume 126 of Plats, pages 55, 56, and 57, in King County, Washington". That recorded Peachtree plat included on its face the two easements now complained of. The easements were an intrinsic part of the Property the Zhous were purchasing. See M.K.K.I., Inc. v. Krueger, 135 Wn.App. 647, 145 P.3d 411 (2006) (easement shown on the face of a short plat could only be amended by following the procedure to change the short plat itself). Therefore, the Zhous cannot be heard to complain that the easements were "defects" (element 1 above), or that they present a "danger to the property, health, or life of the purchaser" (element 3) -- they are an intrinsic part of the plat in the Property's legal description.

5.3.4 The Zhous had constructive, inquiry, and contractual notice; therefore a careful, reasonable inspection by them would have revealed the easements.

¹ Alejandro is best known for its holding concerning the "economic loss rule". However, its discussion and holding on fraudulent concealment have nothing to do with the economic loss rule.

1 The Zhous must prove the fifth element, that the easements complained of "would
2 not be disclosed by a careful, reasonable inspection by the purchaser". As a matter of law, the
3 Zhous were on notice of all information contained in the recorded plat, including the easements
4 referenced on the face of the recorded plat:

5 When an instrument involving real property is properly recorded,
6 it becomes notice to all the world of its contents. Allen v. Graaf,
7 1934, 179 Wash. 431, 38 P.3d 236. See Dowgialla v. Knevage,
8 1956, 48 Wash.2d 326, 294 P.2d 393. When the facts upon which
9 the fraud is predicated are contained in a written instrument which
is placed on the public record, there is constructive notice of its
contents[.]

10 Strong v. Clark, 56 Wn.2d 230, 232, 352 P.2d 183 (1960).

11 Even if this Strong doctrine did not exist, the Zhous and their agent had sufficient
12 information *in their hands* that makes it impossible for them to claim the information about the
13 easements now complained of was not "reasonably ascertainable" to them:

14 It is a well-settled rule that where a purchaser has knowledge or
15 information of facts which are sufficient to put an ordinarily prudent
16 man upon inquiry, and the inquiry, if followed with reasonable
17 diligence, would lead to the discovery of defects in the title or of
18 equitable rights of others affecting the property in question, the
19 purchaser will be held chargeable with knowledge thereof and will
not be heard to say that he did not actually know of them. In other
words, knowledge of facts sufficient to excite inquiry is constructive
notice of all that the inquiry would have disclosed.

20 Miebach v. Colasurdo, 102 Wn.2d 170, 175-76, 685 P.2d 1074 (1984), quoting Peterson v.
21 Weist, 48 Wash. 339, 341, 93 Pac. 519 (1908). The "knowledge of facts sufficient to excite
22 inquiry" is not limited to searching record title. Kirk v. Tomulty, 66 Wn.App. 231, 240-41, 831
23 P.2d 792 (1992) (held, a successor in interest to a property was on inquiry notice of an equitable
24 easement that had not met the formal requirements of a deed). In the more recent case of
25 Alejandre, supra, 159 Wn.2d at 689-90, the court noted that the plaintiff's claim of fraudulent
26 concealment of defective septic system had to be denied because plaintiffs "failed to meet their

1 burden of showing that the defect in the septic system would not have been discovered through a
2 reasonably diligent inspection." In the case of Hoel v. Rose, 125 Wn.App. 14, 105 P.3d 395
3 (2004), the court held that a buyer who received an appraisal report showing boundary lines at
4 odds with the seller's incorrect representations could not have reasonably relied on the seller
5 misrepresentations and so had no claim against the seller. The Zhous admit that they received,
6 during the title inspection review contingency period of their pending purchase, a title report
7 referencing (as special exception 7) the "Protective Covenants Running With the Land", King
8 County Records number 8405290613, a document actually received by their agent, Mr. Pang,
9 and which specifically stated:

10 3. **Easements for installation and maintenance of utilities and drainage**
11 **facilities are reserved as shown on the recorded plat** (and/or as disclosed on
12 title policy) Within these easements, no structure, planting or other material
13 shall be placed or permitted to remain which may damage or interfere with the
14 installation and/or maintenance of utilities, or which may change the direction of
15 flow of drainage channels in easements.

16 (Boldface added.) This language practically screams to the prospective buyer, "Go look at the
17 recorded plat!" Mr. Zhou admits that had he looked at the plat and seen the dotted lines
18 indicating easements across Lot 24, he would have been concerned. Zhou Dep. 84:14-23.

19 In addition, the Title Contingency Addendum made the purchase agreement contingent
20 on the Zhous' review and approval of the title commitment (report) "together with easements,
21 covenants, conditions and restrictions of record, **which are to be obtained by Buyer**, to
22 determine that they are consistent with Buyer's intended use of the Property" (Exh. 2, p. 2 to
23 Stasik Decl.). (Boldface added.) See Scott v. Pettet, 63 Wn.App. 50, 816 P.2d 1229 (1991)
24 (feasibility contingency in purchase and sale agreement had the effect of allocating risk of certain
25 matters to the buyer, precluding buyer from later claiming misrepresentation and frustration of
26 purpose with regard to such matters). The agreement also specified that easements not
materially affecting the value of the Property or unduly interfering with Buyer's use of the

1 Property did not render title unmarketable, and that buyers were advised to "seek the counsel of
2 an attorney". ¶¶ "d" and "q" of agreement (Exh. 2 to Stasik Decl.).

3 Thus, the Zhous were on notice of the easements because (1) the easements appeared on
4 the face of the plat recorded in 1984 (constructive notice by operation of law), and (2) they had
5 in their hands title reports referencing the "Protective Covenants" that explicitly stated the plat
6 was subject to drainage and other easements, and their agent had that actual document in his
7 possession (inquiry notice), and (3) their contract allocated to them the responsibility to procure
8 and review to their satisfaction any "easements ... of record". Accordingly, it is impossible for
9 the Zhous to claim that a "careful, reasonable inspection" would not have revealed the easements
10 now complained of.

12 5.4 The Zhous' have no valid claim for affirmative fraud or negligent
13 misrepresentation.

14 5.4.1 Failure to plead circumstances precludes such claims.

15 CR 9(b) states in pertinent part, "In all averments of fraud or mistake, the
16 circumstances constituting fraud or mistake shall be stated with particularity." Paragraphs 16
17 through 19 on page 3 of the Complaint simply make conclusory allegations that Stasik and
18 Windermere "knew or should have known" of the "vault easement", that they had a duty to
19 disclose, and that they breached that duty. For this reason alone, the claim of
20 "misrepresentation" should be dismissed. Nevertheless, the following argument based on the
21 elements of fraud and negligent misrepresentation is made just in case the Zhous present, and the
22 court accepts, some newly minted allegation of specific circumstances of "misrepresentation".

24 5.4.2 The elements.

25 To prove intentional, fraudulent misrepresentation, a plaintiff must prove nine
26 elements by clear, cogent, and convincing evidence:

1 The nine **elements** of intentional misrepresentation (**fraud**) are:

2 *205 (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its
3 falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its
4 falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon the
5 representation; and (9) damages suffered by the plaintiff.^[20]

6 Carlisle v. Harbour Homes, Inc., 147 Wn.App. 193, 205, 194 P.3d 280 (2008).

7 The legal test for the tort of negligent misrepresentation in Washington is:

8 One who, in the course of his business, profession or employment, or in any other
9 transaction in which he has a pecuniary interest, **supplies false information** for
10 the guidance of others in their business transactions, is subject to liability for
11 **pecuniary loss caused to them** by their **justifiable reliance** upon the
12 information, if he **fails to exercise reasonable care or competence in obtaining**
13 **or communicating the information**.

14 ESCA Corp. v. KPMG Peat Marwick, 135 Wash.2d 820, 826, 959 P.2d 651 (1998), (quoting
15 Restatement (Second) of Torts § 552(1) (1977) (boldface added to highlight key elements).

16 Each of the elements must be proved by clear, cogent, and convincing evidence. Borish v.
17 Russell, 155 Wn.App. 892, 905, footnote 7, 230 P.3d 646 (2010).

18 5.4.3 Stasik/Windermere did not supply false information.

19 The Zhous have not alleged that Ms. Stasik made any false statement or supplied
20 false information. *See* Complaint (Exh. A to Mattern Decl.). Instead, they claim Ms. Stasik
21 "knew or should have known" about the easements in question and that she should have
22 disclosed them. Although a failure to disclose known information can be fraudulent, this falls
23 squarely and solely under the rubric of fraudulent concealment, discussed above in part 5.3.
24 However, for the sake of completeness, the remaining elements of affirmative misrepresentation
25 are discussed as follows.

26 5.4.4 No "right to rely".

The element of "right to rely" in a claim for fraudulent or negligent
misrepresentation is limited by the buyer's duty to exercise diligence:

1 The "right to rely" element of fraud is intrinsically linked to the duty of the one to
2 whom the representations are made to exercise diligence with regard to those
3 representations. *Id.* at 698, 399 P.2d 308; *Puget Sound Nat'l Bank v. McMahon*,
4 53 Wash.2d 51, 54, 330 P.2d 559 (1958). As explained, the Alejandres were on
5 notice that the septic system had not been completely inspected but failed to
6 conduct any further investigation and indeed, accepted the findings of an
7 incomplete inspection report. Having failed to exercise the diligence required,
8 they were unable to present sufficient evidence of a right to rely on the allegedly
9 fraudulent representations.

10 Alejandre, supra, 159 Wn.2d at 690.

11 If, contrary to their own Complaint, the Zhous now claim Ms. Stasik passed along some
12 "false information", i.e. some affirmative representation that there were no easements of the type
13 complained of, they would have had no "right to rely" on such representation for the same
14 reasons that the easements were "reasonably ascertainable" as discussed at length above in part
15 5.3.4. Of particular significance is the Title Contingency Addendum (Exh. 2, p. 6 to Stasik
16 Decl.) which had the effect of allocating to the Zhous as buyers the burden to obtain any
17 easements of record and the risk that any such easements might be inconsistent with their
18 intended use of the Property. Scott v. Pettet, cited and discussed *supra*, part 5.3.4, p. 13, line 17
19 to p. 14, line 2.

20 5.4.5 No negligence in obtaining or communicating information.

21 The Windermere defendants had no duty to investigate and discover the existence
22 of the easements or the extent to which they could affect an owner's use of the property. *See*
23 parts 5.1 and 5.2 with regard to applicable statutes. In fact, as pointed out above in parts 5.4.4
24 and 5.3.4, the Title Review Contingency had the effect of allocating to the Zhous (and thus away
25 from other parties) the burden and risk of obtaining any easements and determining their impact
26 on the ability to utilize the Property. Scott, supra, discussed p. 13, line 17, to p. 14, line 2. In
addition, paragraph "d" of the purchase and sale agreement (Exh. 2, p. 2 to Stasik Decl.) (quoted

1 above at the bottom of page 3) states the parties' agreement that title to the Property "shall be
2 marketable at closing" and among the listed items that "shall not cause title to be unmarketable"
3 are "easements ... not materially affecting the value of or unduly interfering with Buyer's
4 reasonable use of the Property". Ms. Stasik is *still* not aware of any such easement on the
5 Property. Stasik Decl. ¶ 11. Moreover, in communicating information, the Windermere
6 defendants had the right to rely on information from other sources that reasonably seemed to be
7 accurate. In Hoffman v. Connall, 108 Wn.2d 69, 736 P.2d 242 (1987), our Supreme Court held
8 that a real estate broker was not liable to a buyer for passing along to the buyer seriously flawed
9 information from the seller concerning the location of a boundary line: the broker was not
10 negligent since he reasonably relied on the representations of the seller and had no knowledge or
11 suspicion that the seller representations were incorrect and had no duty to undertake the
12 investigation that would have unearthed the truth. Ms. Stasik had no reason to believe that there
13 was any easement that would affect the buyer's use of the Property -- the Seller Disclosure Form
14 explicitly denied this. Stasik Decl. ¶ 3 and Exh. 1 thereto.

15
16
17 5.5 Fraud / concealment / misrepresentation claims barred by statute of limitations.

18 The statute of limitations for claims of fraud or negligent misrepresentation is three years
19 from the date the cause of action accrued, and the cause of action is not deemed to accrue until
20 the aggrieved party has discovered, or in the exercise of due diligence could have discovered, the
21 facts constituting the fraud. RCW 4.16.080; Strong, *supra*, 56 Wn.2d at 232. For purposes of
22 the "discovery rule" for statute of limitations, notice which should lead a party to further inquiry
23 is notice of everything to which such inquiry would lead. Sherbeck v. Lyman's Estate, 15
24 Wn.App. 866, 552 P.2d 1076 (1976).
25
26

1 Once a defendant provides evidence that facts alleged to constitute the fraud had to have
2 taken place more than three years prior to the commencement of the lawsuit, the burden shifts to
3 the plaintiff to prove that the statute was tolled, i.e. that s/he could not through due diligence
4 have discovered the pertinent facts prior to the key date of three years prior to the lawsuit filing.
5 Douglass v. Stanger, 101 Wn.App. 243, 256, 2 P.3d 998 (2000); Giraud v. Quincy Farm &
6 Chemical, 102 Wn.App. 443, 450, 6 P.3d 104 (2000).

7
8 Recall that the Title Contingency Addendum to the sale agreement included the
9 following:

10 This Agreement is subject to Buyer's review of a preliminary commitment for title insurance,
11 together with easements, covenants, conditions and restrictions of record, which are to be
12 obtained by Buyer, to determine that they are consistent with Buyer's intended use of the
13 Property.

14 Exh. 2 to Stasik Decl. (underlining added.) As explained at length in part 5.3.4, the Zhous were
15 on constructive notice of the contents of the 1984 plat because it was of record, and had actual
16 notice of the easements on the plat when they received the title report referencing the Protective
17 Covenants, also known as CC&R's, and their agent had in his hand the actual Protective
18 Covenants document. Therefore, if Windermere made a "false statement" or "concealed"
19 information about easements, the Zhous had notice of that fact as of mid-July 2009. On July 19,
20 2009, the Zhous signed an addendum removing the title review contingency (Exh. 4 to Stasik
21 Decl.). From then on, the Zhous had no opportunity to get out of the contract based on
22 dissatisfaction with title or title related documents such as easements without serious risk of
23 being in breach of contract. Therefore, from that point on, the Zhous were on notice of being
24 "damaged" by the alleged misdeeds of the Windermere defendants.

25 Accordingly, if the Windermere defendants committed the "fraud" or "misrepresentation"
26 or "concealment" that is alleged, the Zhous should have known through due diligence all of the

1 essential elements of such claim on July 19, 2009, the date their "investigation" of title was
2 complete. This action was filed more than three years later than that, on August 24, 2012. The
3 Zhous' claims for fraud, misrepresentation, and concealment are time-barred.

4 5.6 The Zhous have no basis for claiming Stasik/Windermere violated
5 RCW 19.86, the Consumer Protection Act (CPA)

6 The Complaint includes no CPA allegation against defendants Stasik or Windermere.
7 Recently, the Zhous brought a motion to file and serve an Amended Complaint which would
8 have included the following:

9 22. Defendants Stasik and Windermere had actual knowledge of the
10 existence of the encumbrances complained of and failed to inform
11 Plaintiffs of their existence before the sale. Such conduct constitutes
a deceptive practice under the Consumer Protection Act.

12 On January 22, 2013, plaintiffs' counsel advised the court that they were striking their motion but
13 that "I will file a new motion, adding another Defendant and some additional causes of action in
14 the near future." Mattern Decl. ¶ 4. Although there is no currently pleaded CPA claim against
15 the Windermere defendants, apparently such a claim is coming. In the interest of judicial
16 economy, the court should rule at this time that as a matter of law, the Zhous have no CPA claim
17 against defendants Stasik or Windermere.

18 To sustain a CPA claim, a plaintiff must establish that (1) the defendant engaged in an
19 unfair or deceptive act or practice (2) occurring in trade or commerce (3) that impacts public
20 interest, (4) the plaintiff has suffered injury to business or property, and (5) the injury is causally
21 linked to the unfair or deceptive act or practice. Hangman Ridge Training Stables, Inc. v. Safeco
22 Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). "All elements must be present; a
23 finding that any element is missing is fatal to the claim." Goodyear Tire & Rubber Co. v.
24 Whiteman Tire, Inc., 86 Wn.App. 732, 743, 935 P.2d 628 (1997), citing Hangman, *supra*.
25
26

1 5.5.1 No unfair or deceptive act or practice by Stasik or Windermere.

2 To establish this first element of a CPA claim, "the plaintiff must show that the
3 act in question had 'the capacity to deceive a substantial portion of the public'". Roger Crane &
4 Associates, Inc. v. Felice, 74 Wn.App. 769, 780, 875 P.2d 705 (1994), quoting and citing
5 Hangman, *supra*, 105 Wn.2d at 780 (Roger Crane court omitting italics that Hangman had
6 included). The question of whether an act is unfair or deceptive in violation of the CPA is generally
7 a question of law. Keyes v. Bollinger, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982).
8

9 To date, the Zhous have not pleaded facts or presented evidence showing that Stasik /
10 Windermere engaged in *any* "unfair" or "deceptive" acts or practices, much less any acts that had
11 the capacity to deceive a substantial portion of the public. Their whole case seems to be that Ms.
12 Stasik knew (or should have known) about the easements in question and failed to disclose the
13 easements. But as pointed out above in part 5.3.3, the easements were an essential part of the
14 plat that was in the heart of the very legal description of this property. Moreover, Ms. Stasik had
15 good reason to believe that the state of title, including encumbrances against title such as
16 easements, were being disclosed to the Zhous and their agent Eddie Cho Pang. Mr. Zhou and
17 Mr. Pang admit they saw the title report referencing the 1984 Protective Covenants and at least
18 Mr. Pang saw the Protective Covenants document itself, which explicitly stated the plat was
19 subject to easements. Nothing was concealed from the Zhous and there was no "deception". The
20 Zhous had ample opportunity to review the title report and all recorded documents including
21 easements under the title review contingency of their purchase agreement (under which the
22 Zhous had the responsibility to "obtain" any such easements, as discussed above, p. 13, lines 17
23 to p. 14, line 2), so the Zhous can hardly complain that they were treated "unfairly".
24
25

26 5.5.2 No public interest impact within the meaning of the CPA.

1 RCW 19.86.093 provides:

2 In a private action in which an unfair or deceptive act or practice is alleged under
3 RCW 19.86.020, a claimant may establish that the act or practice is injurious to
the public interest because it:

4 (1) Violates a statute that incorporates this chapter;

5 (2) Violates a statute that contains a specific legislative declaration of public
6 interest impact; or

7 (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c)
8 has the capacity to injure other persons.

9 There is no statute applicable to this situation that "incorporates" RCW 19.86 or that "contains a
10 specific legislative declaration of public interest impact".

11 Generally, disputes between real estate professionals and property buyers are private
12 rather than public and therefore do not have a "public interest impact" within the meaning of the
13 CPA. *E.g., Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984). The Zhous must prove
14 that there was some "unfair or deceptive act or practice" that Stasik/Windermere committed that
15 injured others or had or has the capacity to injure others. Even if, contrary to the evidence and
16 authority discussed above, the court were to find that Ms. Stasik's "failure" to pass along
17 information about the easements was "unfair or deceptive", this remains a private dispute
18 between the Zhous and Stasik/Windermere.
19

20 5.5.4 No causation of injury or damage.

21 As discussed above, the "cause" of the Zhous' ending up with property that was
22 burdened by easements they now decide they don't like was their own failure to look at the face
23 of the very plat identified in the legal description of their purchase agreement (indeed, in the
24 offer they signed before it even became an agreement), and their failure to heed the "Private
25 Covenants" referenced in the title report and in the hands of their agent that explicitly stated that
26

1 property within the plat would be subject to certain easements as referenced on the plat. That it
2 was the Zhous' responsibility to "obtain" such easements and evaluate them to their own
3 satisfaction was made clear in the Title Contingency Addendum as discussed above on p. 13, line
4 17, to p. 14, line 2. *See Hangman, supra*, 105 Wn.2d at 793-95 (held, escrow officer did not
5 engage in an unfair or deceptive act by not warning a party to a refinance and deed transfer of
6 adverse tax consequences, and such lack of warning also did not proximately cause plaintiff's
7 loss).

8
9 5.6 Cross claim of defendant Eddy Cho F. Pang also should be dismissed.

10 Defendant Eddy Cho F. Pang included a "cross-claim" against "the other defendants"
11 conditional on plaintiffs recovering any amount against Mr. Pang. No specific facts are alleged
12 in the "cross-claim". Because the Zhous' claims must fail as a matter of law, so must Mr. Pang's
13 cross-claim as it pertains to the Windermere defendants.

14 5.7 Summary judgment principles.

15 Summary judgment "shall be rendered" if the evidence presented shows that there is no
16 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
17 matter of law. CR 56(c). A moving defendant may meet its initial burden by showing that there
18 is a lack of evidence supporting the nonmoving party's case. Young v. Key Pharmaceuticals,
19 Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). Once this initial burden is met, the
20 nonmoving plaintiff must present admissible facts sufficient to establish the essential elements to
21 its claims or they must be dismissed. *Id.* Mere speculation is not sufficient to defend against a
22 summary judgment motion. Boguch v. Landover Corp., 153 Wn.App. 595, 224 P.3d 795 (2009).
23 As pointed out in Tegland, 4 Washington Practice: Rules Practice, p. 383 (2006):
24
25
26

1 As the United States Supreme Court itself put it, summary judgment should be
2 denied only 'if the evidence is such that a reasonable jury could return a verdict
3 for the nonmoving party.' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251,
4 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

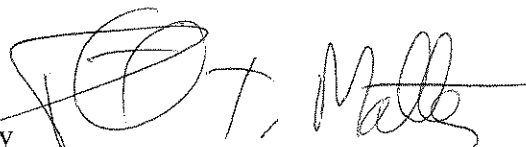
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8 VI. Conclusion

9 The Zhous cannot meet their burdens as plaintiff. As a matter of law, all claims and cross-
10 claims against defendants Windermere and Stasik should be dismissed. A proposed Order is
11 attached.
12

13 DATED this 5th day of February, 2013

14 DEMCO LAW FIRM, P.S.

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