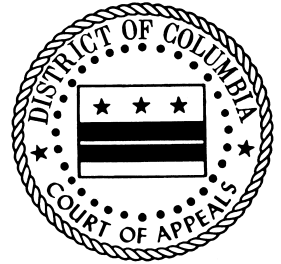


DISTRICT OF COLUMBIA COURT OF APPEALS



Clerk of the Court
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No. 21-CV-597

SIM DEVELOPMENT, LLC

Appellant,

v.

DISTRICT OF COLUMBIA, *et al.*

Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division, Civil Action No. 2019 CA 004477 B
The Honorable Shana Frost Matini

BRIEF OF APPELLEE 2011 COUNTIES, LLC

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This listing is provided so the court may evaluate the parties and counsel for recusal.

I hereby certify that the contents of the foregoing Certificate as to Parties Pursuant to D.C. App. R. 28(a)(2) are true to the best of my knowledge, information and belief.

/s/ John J. Callahan
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ASSERTION PURSUANT TO D.C. APP. R. 28(a)(5)

This appeal is from a final order that disposes of all parties' claims.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the trial court erred by ruling that Appellant Sim Development, LLC's ("Sim") failure to allege any facts to support that it had reasonably relied upon alleged misrepresentations made by Appellee 2011 Counties, LLC ("2011 Counties") to the Superior Court of the District of Columbia in a tax sale lawsuit warranted summary judgment in favor of 2011 Counties and against Sim with regard to Sim's claims against 2011 Counties for fraud and/or negligent misrepresentation.

STATEMENT OF THE CASE

In the Complaint filed on July 8, 2019 (APX 12-20) in the case that is the subject of this appeal, Superior Court of the District of Columbia Case No. 2019 CA 004477 B, captioned *Sim Development, LLC vs. The District of Columbia, et al.*, Sim, the plaintiff, *inter alia*, alleges fraud and/or negligent misrepresentation on the part of 2011 Counties, one of three defendants named in that Complaint, in connection with Superior Court of the District of Columbia Case No. 2016 CA 001915 L(RP), captioned *2011 Counties, LLC vs. Sim Development, LLC, et al.* (the "Tax Sale Lawsuit"). The Tax Sale Lawsuit was filed on March 14, 2016 by 2011 Counties pursuant to the provisions of D.C. Code § 47-1330 *et seq.* to

foreclose the rights of redemption in and to certain real property located in the District of Columbia at 1916 15th Street, SE, Washington, D.C. (Lot 845 in Square 5766) (the “Property”) and owned by Sim. The lead defendant in the Tax Sale Lawsuit was Sim. The only other defendant named in the Tax Sale Lawsuit was the District of Columbia (the “District”), a statutory defendant pursuant to D.C. Code § 47-1371(b)(1)(G).

At issue in this appeal as concerns 2011 Counties is the allegation in Count II of Sim’s Complaint in the case below that 2011 Counties is liable to Sim for alleged fraud and/or negligent misrepresentation through 2011 Counties’ having allegedly made misrepresentations to the Superior Court of the District of Columbia in the Tax Sale Lawsuit. On November 2, 2020, the trial court issued a ruling (APX 525-537) granting 2011 Counties’ motion for summary judgment in the case below on the grounds, *inter alia*, that Sim’s claims against 2011 Counties did not satisfy the requirements for fraud and/or negligent misrepresentation, in particular, that Sim had not alleged any facts to support that it had reasonably relied upon 2011 Counties’ alleged misrepresentations to the Superior Court of the District of Columbia in the Tax Sale Lawsuit. (In issuing that ruling, the Court considered 2011 Counties’ Motion for Summary Judgment and Exhibits A-M filed on September 11, 2020 (APX 236-327), Sim’s Opposition thereto and Exhibits A-

D filed on September 25, 2020¹, and 2011 Counties' Reply thereto filed on October 2, 2020 (APX 508-510)). This appeal by Sim followed that ruling.

The underlying facts as concerns Sim and 2011 Counties are not complicated and are set forth, mostly in chronological order, in the Statement of Facts below.

STATEMENT OF FACTS

Sim has not disputed the facts set forth below.

In 2010, Sim purchased the Property. (APX 239 ¶ 1.) In July, 2015, the District sold the Property at a tax sale due to an unpaid charge from the District of Columbia Water and Sewer Authority (now known as DC Water). *Id.* ¶ 2. The successful bidder for the Property at the July, 2015 tax sale was 2011 Counties. *Id.* ¶ 3. On March 14, 2016, 2011 Counties filed the Tax Sale Lawsuit. *Id.* ¶ 4. Sim and the District were the sole defendants in the Tax Sale Lawsuit. *Id.* ¶ 5. The District informed 2011 Counties, by an e-mail dated January 24, 2017, that it did not consider the Property redeemed for tax sale purposes. *Id.* ¶ 6. 2011 Counties thereafter continued the Tax Sale Lawsuit in which it sought to foreclose Sim's right of redemption in and to the Property. *Id.* ¶ 7. Sim became aware that the Tax Sale Lawsuit had been filed "[a]t the time of Plaintiff's (Sim's) refinance closing in early 2017." *Id.* ¶ 8. (The date of this refinance closing was February

¹ It appears that the Appendix submitted by counsel for Sim inadvertently does not contain Sim's Opposition and Exhibits A-D notwithstanding the fact that the Index to Appendix submitted by counsel for Sim states that Sim's Opposition and Exhibits A-D are contained at APX 481-507.

24, 2017.) (APX 240 ¶ 9.) In the Tax Sale Lawsuit, 2011 Counties obtained a judgment foreclosing the rights of redemption in and to the Property on November 20, 2018. *Id.* ¶ 10. After obtaining its judgment foreclosing the rights of redemption, 2011 Counties recorded a tax deed among the land records of the District of Columbia on February 13, 2019 and became the record owner of the Property. *Id.* ¶ 11.

On March 22, 2019, in the Tax Sale Lawsuit, Sim filed a Motion to Re-open Case, Vacate Judgment, Void Tax Sale Deed and for Injunctive Relief,² which motion was denied as moot on May 28, 2019. *Id.* ¶ 12. All parties to the Tax Sale Lawsuit – 2011 Counties, Sim, and the District – settled the Tax Sale Lawsuit and on June 12, 2019 filed a Joint Motion for Entry of Final Order and Declaration that the Court granted through the issuance of an Order and Declaration on June 21, 2019, resulting in the restoration of Sim’s title to the Property and the Tax Sale Lawsuit being dismissed without prejudice. *Id.* ¶ 13. The June 21, 2019 Order and Declaration was recorded among the land records of the District of Columbia on June 26, 2019. *Id.* ¶ 14.

SUMMARY OF ARGUMENT

Sim’s claims against 2011 Counties for fraud and/or negligent misrepresentation do not satisfy the basic requirements for causes of action for fraud or negligent misrepresentation. In particular, Sim failed to allege any facts to

²This was the first time that Sim took any action in the Tax Sale Lawsuit.

support that it had reasonably relied upon alleged misrepresentations made by 2011 Counties to the Superior Court of the District of Columbia in the Tax Sale Lawsuit. The trial court's grant of 2011 Counties' Motion for Summary Judgment should accordingly be affirmed.

STANDARD OF REVIEW

An appellate court reviews the trial court's grant of summary judgment *de novo*, using the same standard the trial court uses to evaluate the motion. *See Young v. U-Haul Co. of the District of Columbia*, 11 A.3d 247, 249 (D.C. 2011). 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 of material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Bruno v. Western Union Fin. Servs., Inc.*, 973 A.2d 713, 717 (D.C. 2009)); Super. Ct. Civ. R. 56(c). The movant has the initial burden to demonstrate the absence of a genuine issue of material fact, but once the movant has done so, the burden shifts to the non-movant to show a factual dispute, by presenting admissible evidence of a *prima facie* case to support his cause of action. *See id.* It is appropriate to enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Doe v. Safeway, Inc.*, 88 A3d 131, 132-33 (D.C. 2014).

ARGUMENT

In Count II of the Complaint (APX 18-19), Sim seeks damages for “fraud or negligent misrepresentation” against 2011 Counties arising out of the Tax Sale Lawsuit. The allegations relating to 2011 Counties in this Count are contained only in paragraphs 42 and 43 of the Complaint, which consist, in their entirety as follows:

42. When obtaining its judgment foreclosing Plaintiff’s (SIM’s) right of redemption, 2011 Counties defrauded and/or negligently represented to the Court that Plaintiff (Sim) had been properly served and had not redeemed the Property when 2011 Counties knew or should have known otherwise. The actions of 2011 Counties also represented a reckless disregard for Plaintiff’s (SIM’s) property and its rights.

43. It can be presumed that the Court reasonably relied upon the misrepresentations of 2011 Counties when entering judgment and authorizing the tax deed.

To succeed on a claim for fraudulent misrepresentation, a plaintiff must prove (1) that a false representation was made (2) in reference to a material fact (3) with knowledge of its falsity (4) with intent to deceive and (5) action taken in detrimental reliance upon the representation. *Sibley v. St. Albans*, 134 A.3d 789 (D.C. 2016); *Va. Acad. Clinical Psychologists v. Grp Hospitalization & Med. Servs., Inc.*, 878 A.2d 1226 (D.C. 2005). The elements of a negligent misrepresentation claim are the same as those of a fraudulent misrepresentation claim, except that a negligent misrepresentation claim does not include the intent to

deceive element required for fraud. *Regan v. Spicer HB, LLC*, 134 F. Supp. 3d 21 (D.D.C. 2015). However, “(b)oth negligent misrepresentation and fraudulent misrepresentation require . . . reasonable reliance.” *Venable, LLP v. Overseas Lease Grp., Inc.*, No. 14-cv-2010, 2015 WL 4555372 at 4 (D.D.C. July 28, 2015); *see also, In re U.S. Office Prods. Co. Sec Litig*, 251 F.Supp.2d 58, 74 (D.D.C. 2003); *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1131 (D.C. 2015) (holding that a plaintiff claiming negligent misrepresentation must show that he reasonably relied upon the false statement or omission to his detriment, quoting *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1207 (D.C. 1999). *See also Kumar v. District of Columbia Water and Sewer Authority*, 25 A.3d 9, 15, 16 (2011) (holding that to prevail on a claim for negligent or fraudulent misrepresentation, a plaintiff must show that his reliance on the defendant’s misrepresentation was to his detriment (citing *Redmond, supra*, and *Dresser v. Sunderland Apartments Tenants Association*, 465 A.2d 835, 839 (D.C. 1983)). Finally, in considering the requirement for “reasonable reliance,” in order for any reliance to be “reasonable,” there must not be an adequate opportunity to conduct an independent investigation to learn the truth of the matter. *Howard v. Riggs Nat’l Bank*, 432 A.2d 701, 707 (D.C. 1981); *Estate of McKenney*, 953 A.2d 336 (D.C. 2008). Indeed, if a party has suspicions of wrongdoing, he has an “obligation to move promptly and with reasonable diligence to inquire further into the matter” and take appropriate action.

Drake v. McNair, 993 A.2d 607, 617 (D.C. 2010).

Against this background, 2011 Counties stressed in its Motion for Summary Judgment - filed on September 11, 2020 - that Sim had never alleged that it had reasonably relied on what it deemed the “misrepresentations” of 2011 Counties to the Superior Court of the District of Columbia in the Tax Sale Lawsuit. (APX 252-253.) Sim only alleged (at ¶ 43 of the Complaint) that “[i]t can be **presumed** that **the Court** reasonably relied upon the misrepresentations of 2011 Counties when entering judgment and authorizing the tax deed.” (emphasis added). Nowhere did Sim allege that it relied on any misrepresentation of 2011 Counties, nor did Sim allege any adverse consequences that it suffered as a result of its own “reasonable reliance.” It is undisputed that Sim became aware of the Tax Sale Lawsuit at the time of its refinance closing, on February 24, 2017, more than two years before it took any action in that suit by filing on March 22, 2019 its Motion to Reopen Case, Vacate Judgment, Void Tax Sale Deed and for Injunctive Relief. (APX 239-240 ¶¶ 8-9, 12.) It is also undisputed that Sim failed to move promptly and with reasonable diligence to inquire further into the Tax Sale Lawsuit, and to take appropriate action, when it learned of the Tax Sale Lawsuit on February 24, 2017. And further, Sim made no claim that it relied at all, let alone reasonably, on alleged representations made by 2011 Counties in the Tax Sale Lawsuit, to Sim’s detriment.

In its Motion for Summary Judgment, 2011 Counties carried its initial burden through establishing that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law (i.e., that Sim had not satisfied the basic requirements for fraud and/or negligent misrepresentation, in particular, that Sim had not alleged any facts to support that it had reasonably relied upon alleged misrepresentations made by 2011 Counties to the Superior Court of the District of Columbia in the Tax Sale Lawsuit). The burden then shifted to Sim to show the existence of an issue of material fact, by producing admissible evidence of a *prima facie* case to support its cause of action. Sim did not even come close to doing that. In fact, in its Opposition filed on September 25, 2020, Sim did not present any evidence, admissible or inadmissible, to support that it had reasonably relied upon alleged misrepresentations made by 2011 Counties to the Superior Court of the District of Columbia in the Tax Sale Lawsuit. By not doing so, it was as if Sim had conceded that it never relied, let alone reasonably, upon alleged misrepresentations made by 2011 Counties to the Superior Court of the District of Columbia in the Tax Sale Lawsuit. On November 2, 2020, the trial court issued a ruling granting 2011 Counties' Motion for Summary Judgment (APX 525-537). With regard to Sim's negligent misrepresentation claim against 2011 Counties, the trial court noted in that ruling, *inter alia*, "[t]hat the undisputed material facts do not demonstrate that the elements of negligent misrepresentation have been met

[and that] “[e]ven if there was a misrepresentation of fact by 2011 Counties to the Court, Sim’s argument centers around the Court’s reliance of the misrepresentation, not Sim’s reliance.” (APX 534-535.) The trial court reached the same conclusions with regard to Sim’s fraud claim against 2011 Counties. (APX 535.)

In its Appellate Brief filed with this Court on February 10, 2022, Sim raises the new argument that the fact that 2011 Counties may not have made alleged misrepresentations directly to Sim (Sim alleges in Count II of its Complaint that “2011 Counties defrauded and/or negligently represented **to the Court** that . . . ” (emphasis added)) does not necessarily defeat Sim’s causes of action against 2011 Counties for fraud and/or negligent misrepresentation. (Appellant Brief at 27-29.) In support of its new argument, Sim references six cases where courts acknowledge that there are instances where third parties may recover damages in their causes of action for misrepresentation that are based on misrepresentations that were not made directly to them. A review of those six cases reveals that all six of the rulings note that in order to prevail on a claim for misrepresentation, the plaintiff must show reliance on the defendant’s misrepresentation.³ As such, there

³ The six cases are: (1.) *Nader v. Allegheny Airlines, Inc.*, 167 U.S. App. D.C. 350, 370, 512 F.2d 527, 547 (D.C. Cir. 1975) (the court addressed the issue of “when may a third party recover his pecuniary losses for **reliance** on a misrepresentation that was not made to him.”) (emphasis added); (2.) *Mills v. Cosmopolitan Insurance Agency, Inc.*, 424 A.2d 43, 49 (D.C. 1980) (defendant liable if plaintiff “can establish that he **relied** upon . . . [the misrepresentation] to his detriment . . .) (emphasis added) (citing *Peerless Mills, Inc. v. American Telephone & Telegraph Co.*, 527 F.2d 445, 450 (1975)); (3.) *Peerless Mills, Inc. v. American Telephone &*

is little about these six cases that helps Sim’s cause as concerns Sim’s claims against 2011 Counties for fraud and/or negligent misrepresentation.

Lastly, it should be noted that in its Motion for Summary Judgment, 2011 Counties made an alternative argument that Sim’s claims for fraud and/or negligent misrepresentation against 2011 Counties were barred as a result of the doctrine of judicial privilege (also known as “the judicial proceedings privilege” or “the litigation privilege”). (APX 243-245.) In its November 2, 2020 ruling (APX 525-537) granting 2011 Counties’ Motion for Summary Judgment, the trial court declined to address 2011 Counties’ judicial privilege argument, reasoning that “the Court need not decide whether the judicial privilege applies as the undisputed material facts demonstrate that Sim cannot, as a matter of law, prevail on its claims for . . . fraud [] and negligent misrepresentation against 2011 Counties.” (APX 531.) 2011 Counties would urge this Court to address 2011 Counties’ judicial

Telegraph Co., 527 F.2d 445, 450 (1975) (*see supra*); (4.) *Countryside Casualty Co. v. Orr*, 523 F.2d 870, 875 (8th Cir. 1975) (“The finding of the District Court that the insurance company **relied** upon the misrepresentations and ‘would not have issued the policy had it known the true facts that existed at the time’ is supported by substantial evidence and is not clearly erroneous.” (emphasis added)); (5.) *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139, 170 (3rd Cir. 1973) (“The second reason justifying the entry of summary judgment against Gloria Landy, Harry Gross, and Freehold Glass is the absence of evidence that they **relied** on [misstatements.]”) (emphasis added), and; (6.) *Shapiro v. Sutherland*, 64 Cal. App. 4th 1534, 1548 (1998) (“The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable **reliance** upon it . . . ” (quoting the Restatement Second of Torts (section 533)) (emphasis added).

privilege argument in the event this Court is inclined to reverse the November 2, 2020 ruling granting 2011 Counties' Motion for Summary Judgment on other grounds.

CONCLUSION

This Court should affirm the Order issued by the trial court on November 2, 2020 granting summary judgment in favor of 2011 Counties and against Sim.

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