FOURTH DIVISION
DILLARD, P. J.,
MERCIER and MARKLE, JJ.

October 20, 2022

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A22A0848. NICASTRO et al. v. EXPO HOMES, LLC et al.

MERCIER, Judge.

After purchasing a house from Expo Homes, LLC., Lawrence and Idalisa Nicastro filed a lawsuit against Expo, its owner, Joe Dixon, KCT Landscaping, Inc., the City of Grayson, Madison Park Homeowners Association, Inc., and various unknown entities, alleging that improper grading and development caused an unnatural amount of storm water runoff to enter their property. Expo and Dixon filed a motion for partial summary judgment[1] regarding the Nicastros' fraud claim against

[1] Expo and Dixon filed a joint motion for partial summary judgment, which is the subject of this appeal. For the purpose of clarity, where Expo and Dixon have acted jointly, we will refer to them collectively as "the appellees."

them, which the trial court granted. The Nicastros filed this appeal arguing that their fraud claim should be submitted to a jury.[2] Finding no error, we affirm.

Summary judgment is appropriate when, having construed the evidence and all reasonable inferences in favor of the nonmoving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. See OCGA § 9-11-56 (c); *Meyer v. Waite*, 270 Ga. App. 255, 255 (606 SE2d 16) (2004). We review the grant or denial of summary judgment de novo. See id.

This matter previously appeared before us in *Nicastro et al. v. Expo Homes, LLC et al*, A20A1002 (October 27, 2020) (unpublished) ("*Nicastro I*") regarding other motions for summary judgment. The facts relating to the Nicastros' lawsuit and underlying claims, viewed in the light most favorable to the Nicastros as the nonmoving parties, were set forth in the prior appeal:

> Moon Road Partners, LLC, began the development of Madison Park Subdivision in 2004, but then shut it down in 2007. In 2014, Expo/Dixon began purchasing lots in the subdivision. According to Dixon, a hedge fund group purchased 39 of the lots, including adjacent Lots 6 and 7 in Block B, and Expo/Dixon "bought individual lots from them on a takedown schedule." As of June 2017, Expo had built on 38

[2] The appellees and the Nicastros are the only parties in this appeal.

of its 39 lots; one of the first homes Expo built in the subdivision was on Lot 6.

At the time Expo purchased the lots, the subdivision was "totally developed, and had all electrical, roads, drains, and sewage" and two-thirds of the homes had been built. Expo hired KCT to install sod and perform landscaping services on its purchased lots in the subdivision, including Lot 6 and later Lot 7. Both lots are located at the end of a cul-de-sac. Lot 6 is located to the immediate right of Lot 7, and slopes towards Lot 7. They are surrounded by Lots 16-19 and Lots 20-23,[3] which are higher in elevation and drain towards Lots 6 and 7. According to the subdivision plat, Lots 6 and 7 are separated from Lots 16-19 and Lots 20-23 by a dedicated 20-foot easement which contains a drainage swale[4] that is designed to collect and transport surface runoff flowing from Lots 16-19 and Lots 20-23, and carry it around Lots 6 and 7.[5] The runoff is then supposed to be collected by pedestal inlets located within the easements; the inlets are designed to transport the water via subsurface pipes to a detention pond located within the subdivision.

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[3] Lots 20, 21, 22, and 23 were never owned or built upon by Expo. The homes on those lots already had been built at the time Expo/Dixon began building on Lot 6.

[4] A swale is a shallow channel or ditch with gently sloping sides, designed to slow down or direct water.

[5] Water on Lot 6 is supposed to drain to the property line of Lot 7, where it enters the easement.

About three weeks before Expo was set to receive a certificate of occupancy for Lot 6, KCT's owner, David Evans, was landscaping Lot 6 when he discovered that Lot 6 was not draining properly and that water was ponding on Lots 5 and 6. Evans advised Dixon of his discovery, explaining that he was concerned that water was flowing from Lot 6 onto Lot 7 when "it should have been going in the drain." According to Evans, "Lot 6 had problems."[6] These included that (1) a drain inlet located within the easement between Lots 6 and 23 was buried and water was ponding on Lots 5 and 6; (2) there were not enough drop inlets; (3) the slope of Lot 6 was improper; and (4) the fence on Lot 23 encroached onto both the 20-foot drainage easement and Lot 6. According to Evans, Lots 21, 22, and 23 drain toward Lot 6, which then drains toward Lot 7 (the Nicastro lot), but Lot 7 had "[n]o catch basins to retrieve the water."

On December 9, 2014, Expo's attorney sent a letter to Liberty Community Management, the HOA's management company, advising that the HOA is required — but has failed — to maintain the drainage easements and drop inlets behind Lots 5 and 6 of Block B, and that the adjoining property owners of Lots 4, 5, and 6 on Block B have fences that are encroaching on "the drainage easement servicing Expo's lots." The letter further advised that the encroachments "are restricting Expo's ability to address and maintain certain storm water issues upon construction of the houses for Lots 4, 5, and 6," and concluded by

[6] According to Evans, Expo had not yet purchased Lot 7 at the time Evans discovered the problem.

stating that "this letter serves as official notice that Expo will remove the adjoining property owners' fences within five days to repair the drainage and run-off concerns." Expo was subsequently given permission to move the fence on Lot 23 to the property line, though it still remained on the easement. In Dixon's opinion, this resolved the ponding or puddling problem on Lot 6; Dixon deposed that at the time Expo sold Lot 6 to the homeowners, he did not believe there was a problem with drainage on the property: "There was no problem with Lot 6 as far as the drainage. We fixed it. We opened that drop inlet up where the water was ponding right there."

On May 29, 2015, the Nicastros purchased their home on Lot 7 from Expo, and began experiencing storm water flooding shortly thereafter, including a "vast amount of ponding water." On March 14, 2016, the City of Grayson inspected the property after receiving an inquiry about a possible drainage violation. The resulting report noted that the standing water at the rear of the property "does not appear to create a hazard or have a detrimental impact on the structure of the home and appears to drain/dissipate in 24-48 hours." The report concluded that the issue is a homeowner/builder one that does not implicate the City, and includes the investigator's handwritten note that "it appears that drainage from neighboring property is not sufficiently being channeled to the yard inlet in the rear of Lot 23."

The Nicastros subsequently complained to their home warranty company, and on April 18, 2016, Expo conducted an investigation, concluding that "water flowing across Lot 7 all comes from the adjacent

Lot 6" and that the problem is complicated by a number of factors including: (1) "the permanent drainage easement located between the back of lot 6 and the backs of lots 20 through 23 is not being properly maintained and is no longer an adequate depth and size due to fill-in and sediment"; (2) improper fencing on Lots 20-23 encroach on the easement, preventing the HOA from maintaining the easement; (3) the drain for the easement, located between Lots 6 and 23, is overgrown and partially blocked, inhibiting water flow; and (4) the drain located on the easement on Lot 2 is completely covered and provides no assistance to the drain located between Lots 6 and 23. The report also noted that Lot 7 had been inspected and that its grading meets the warranty standards and "properly provides a positive flow of all drainage swells leaving the property."

On April 19, 2016, the Nicastros hired an expert civil engineer to evaluate their drainage problems. According to the expert, drainage is running off of adjacent lots onto the Nicastros' lot, where it "tends to pond and stay on the lot." On the day she inspected the property, the expert noted that the soil in the backyard was saturated in some areas, even though it had not rained recently. The expert identified three contributing factors to the excessive water on the Nicastros' lot: (1) improper grading of the Nicastros' lot; (2) improper grading of the neighboring lots, particularly Lot 6; and (3) an inadequate drainage system, including the easement and inlets.[7] The expert deposed that

[7] According to the expert, easements in Gwinnett County are on the homeowner's property.

water from Lots 21-23 flow onto Lot 6, and then over Lot 6 and onto Lot 7. She explained that neighboring Lot 6 is flat and has no proper method of draining, functioning as "somewhat of a collection basin" for water flowing from Lots 21-23, which are sloped to drain onto Lot 6, and that the issue could be resolved if an effective drainage system was installed on Lot 6.

As to the first factor, the expert's report explained that the grade around the foundation of the Nicastros' home does not meet the requirements of the International Residential Code, 2012 Edition, which applied to the structure at the time it was built in 2015.[8] The IRC requires a grade falling at a minimum of six inches within the first ten feet, but the grade of the rear wall of the Nicastro home drops only 1.2 inches from the foundation of the home to a point ten feet away. As to the second factor, the expert concluded that the grading on the adjacent properties is too steep and that the properties are sloped to drain directly to the Nicastros' lot. As to the third factor, the expert opined that water is not flowing into the inlets correctly, the easements are not properly graded, and the swale on the Nicastros' lot is neither in the correct location nor adequate enough to serve its purpose. The expert noted that "[t]he 20-foot wide drainage easement along the fenceline of the Nicastro yard is not properly configured and the runoff is not contained

[8] According to the expert's report, the relevant section of the IRC provides that: "*Surface drainage shall be diverted to a storm sewer conveyance or other approved point of collection that does not create a hazard. Lots shall be graded to drain surface water away from foundation walls. The grade shall fall a minimum of 6 inches within the first 10 feet."* (Emphasis in original.)

> within this easement area." Further compromising the drainage system is the accumulation of silt and other conditions during the 10-15 years that the subdivision sat idle after the original developer abandoned the project. According to the expert, the easement behind Lot 6 should have been maintained and taken care of before construction of the house on Lot 6; and that the builder of a home "should be responsible for the proper grading and the proper drainage on the lot itself." Citing to Expo's attorney's letter, the expert concluded that the drainage problems were "obvious" as far back as 2014.
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> On August 31, 2016, the Nicastros sued Expo, Dixon, and KCT for nuisance, alleging, inter alia, that Expo and KCT failed to properly develop Lot 6, which was improperly graded. They subsequently amended their complaint, adding the City of Grayson and the HOA as defendants.

Nicastro I, slip op. at 2-9 (puncutation omitted).

KCT and the appellees filed separate motions for summary judgment on the nuisance claim. See *Nicastro I*, slip op. at 11-12. The Nicastros then amended their complaint to add a claim for fraud against Expo, Dixon and KCT. The appellees filed a motion for summary judgment, or, in the alternative, a motion to compel arbitration regarding the Nicastros' fraud claim, arguing that a stipulation signed by the Nicastros barred their fraud claim, or, at least, subjected their fraud claim to

arbitration. The trial court granted summary judgment to the appellees and KCT on the Nicastros' nuisance claim, and to KCT on the fraud claim, and it granted the appellees' motion to compel arbitration on the Nicastros' fraud claim, but denied their summary judgment motion on this claim. See id. at 1. In *Nicastro I*, this Court affirmed the orders granting summary judgment to KCT, but reversed the order granting summary judgment to the appellees for the nuisance claim and the order granting the appellees' motion to compel arbitration. See id. at 1-2.

Following the remittitur, the appellees took the Nicastros' depositions regarding their fraud claim. The appellees then filed a motion for partial summary judgment as to the Nicastros' fraud claim.[9] Finding that there was no issue of material fact as to whether the appellees had scienter and whether the Nicastros justifiably relied on representations made by the appellees, the trial court granted the appellees' partial motion for summary judgment. The Nicastros filed this appeal, arguing that the trial court erred by finding that there was no issue of material fact regarding their fraud claim.

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[9] The appellees' first motion for summary judgment as to the Nicastros' fraud claim argued that the stipulation barred the fraud claim, but did not address the underlying merits of the claim. As such, this argument is not foreclosed by any prior rulings. See *Parks v. State Farm Gen. Ins.*, 238 Ga. App. 814, 815 (1) (520 SE2d 494) (1999).

"The tort of fraud has five elements: (1) a false representation or omission of a material fact; (2) scienter; (3) intention to induce the party claiming fraud to act or refrain from acting; (4) justifiable reliance; and (5) damages." *Meyers*, 270 Ga. App. at 257 (1) (citation and punctuation omitted). "Failure to show, in opposition to summary judgment, some evidence from which each element could be found by a jury allows the action to be disposed of summarily." *Atlanta Partners Realty, LLC v. Wohlgemuth*, ___ Ga. App. ___, at *4 (1) (___ SE2d ___) (A22A0634, A22A0635) (2022) (citation and punctuation omitted). A purchaser of real estate "who alleges fraudulent concealment must prove these same five elements, including, as a factor of justifiable reliance, that he or she could not have discovered the alleged defect in the exercise of due diligence." *Meyers*, 270 Ga. App. at 257-258 (1) (citation omitted).

> Unless a purchaser of real property is fraudulently prevented from examining the property, or an examination would not have disclosed the falsity of a misrepresentation . . . the rule is that one cannot be permitted to claim that he has been deceived by false representations about which he could have learned the truth of the matter and could have avoided damage.

Gospel Tabernacle Deliverance Church v. From the Heart Church Ministries, 312 Ga. App. 355, 359 (718 SE2d 575) (2011) (citation and punctuation omitted). "While questions of due diligence often must be resolved by the trier of fact, that is not always the case. One may fail to exercise due diligence as a matter of law." *Meyers*, 270 Ga. App. at 258 (1) (citation and punctuation omitted).

The Nicastros argue that the appellees committed fraud by failing to inform them of the drainage issues at the property and that they exercised due diligence to discover the drainage problem. However, as addressed in *Nicastro I*, the Nicastros hired a professional engineer, who opined that prior to the Nicastros' home being built, it was "obvious that there were problems with drainage." See *Nicastro I*, at 9; see also *Parks v. State Farm Gen. Ins.*, 238 Ga. App. 814, 815 (1) (520 SE2d 494) (1999) ("When a case is brought to this [C]ourt, all questions as to pleadings and the effect of evidence adjudicated by this [C]ourt are binding as the law of the case on this [C]ourt and in the court below, unless additional pleadings and evidence prevail to change such adjudications.") (citation and punctuation omitted). In her report, the expert also stated that it was "obvious that the rear of the property along the fence is

at a higher elevation" and that "the slope from Lot 6 onto the property is clearly visible."

Prior to purchasing the house, the Nicastros were told by a real estate agent that the adjacent lot (Lot 6) had a drainage problem. Further, pursuant to the terms of the sales agreement, the Nicastros were responsible for a property inspection, which was to include "drainage and excessive moisture[.]" However, while the Nicastros had two home inspections performed prior to closing on the house, the Nicastros chose not to direct the inspector to look at drainage or flooding issues. After they closed on the house, the Nicastros requested that the same home inspector return to conduct another inspection and, this time, to specifically examine the property for flooding. The inspector subsequently reported that the property had flooding problems.

"When the means of knowledge are at hand and equally available to both parties if the purchaser does not avail himself of these means he will not be heard to say, in impeachment of the contract, that he was deceived by the representations of the seller." *Meyers*, 270 Ga. App. at 258 (1) (a) (citation and punctuation omitted). Given the obvious nature of the flooding issues at the house, and the Nicastros contractual responsibility to inspect the house for flooding issues, the Nicastros cannot prove that they justifiably relied on representations made by the appellees. See

id. (buyers failed to exercise due diligence as a matter of law where they alleged that the sellers fraudulently concealed stucco issues, but elected not to have their own stucco inspection performed). Due to the Nicastros' failure as a matter of law to exercise due diligence, there was an absence of justifiable reliance. See generally id. As such, the trial court did not err by granting the appellees' motion for partial summary judgment as to the Nicastros' fraud claim.

Judgment affirmed. Dillard, P. J., and Markle, J., concur.