2019 IL App (2d) 181001-U
No. 2-18-1001
Order filed September 11, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT COSENTINO and LEAH COSENTINO Plaintiffs-Appellants, v. KURT KUNKLE, STEFANIE KUNKLE, KAREN GOINS, REMAX UNLIMITED, N.W., and EARL ROLOFF, Defendants, (Kurt Kunkle, Stefanie Kunkle, Karen Goins, and ReMax Unlimited, N.W., Defendants-Appellees).	)	Appeal from the Circuit Court of McHenry County. No. 18-LA-138 Honorable Kevin G. Costello, Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiffs had actual knowledge of the roadway improvement project occurring adjacent to the subject property; therefore the trial court properly dismissed with prejudice plaintiffs' claims for breach of contract (failure to disclose) and common law fraud.

¶ 2 Plaintiffs appeal the judgment of the circuit court of McHenry County dismissing with prejudice their complaint for breach of contract and common law fraud against defendants, Kurt

Kunkle and Stefanie Kunkle (collectively, the Kunkles), and for common law fraud against defendants, Karen Goins and ReMax Unlimited, N.W. (collectively, the broker). Plaintiffs argue that, despite their actual knowledge of the impending roadway improvement project to widen the two-lane roadway adjacent to the subject property into a four-lane roadway, the Kunkles as sellers of the subject property and the broker defendants had an obligation to disclose to them the project. Plaintiffs assert that the Kunkles' failure to disclose the roadway improvement project constituted a breach of the real estate sales contract and common law fraud. Likewise, plaintiffs assert that the broker's failure to disclose the roadway improvement project constituted common law fraud. However, because the title commitment disclosed the project, plaintiffs had actual knowledge of the project and we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 The matter comes before us pursuant to the grant of the Kunkles' and the broker's motions to dismiss plaintiffs' complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2018)). Accordingly, we summarize the pertinent allegations from plaintiffs' complaint and other documents appearing in the record.

¶ 5 Plaintiffs were first-time homebuyers. The subject property is in the Brittany Hills subdivision in the Village of Algonquin, adjacent to Longmeadow Parkway. At the time of the purchase, Longmeadow Parkway was a two-lane road; there were no signs that the roadway was to be improved, either at that time or in the future. On October 30, 2014, the purchase of the property was finalized.

¶ 6 Sometime after the purchase, Longmeadow Parkway was improved into a four-lane arterial road the purpose of which was to alleviate traffic congestion and to permit high volumes of traffic to move at high rates of speed. Plaintiffs alleged that they had no knowledge about the

planned roadway improvement at any time until the construction began. This included before the purchase of the subject property. Conversely, plaintiffs alleged that the Kunkles and the broker knew about the planned improvement—the Kunkles, because they and other neighboring homeowners fought over the roadway expansion and, in 2000, they signed a letter of awareness at the behest of the Village, and the broker, because she sold property extensively within the Brittany Hills subdivision.

¶ 7 The Village had eventually entered into an agreement with the developer of the Brittany Hills subdivision, wherein the subject property is located, requiring a purchaser of property within the subdivision to sign a letter of awareness. The letter of awareness provided that Longmeadow Parkway was being designed to accommodate an arterial road with a four-lane cross section plus a fifth turning lane at intersections. Plaintiffs alleged that the letter of awareness and the planned roadway improvement negatively affected the value of the subject property.

¶ 8 Plaintiffs alleged that Kurt Kunkle became aware that construction of the planned improvement was imminent due to his role as board member and president of the Brittany Hills Homeowners Association during the period when the roadway improvement was being discussed and resisted.[1] Plaintiffs alleged that the Kunkles wanted to sell the subject property before it became common knowledge that the construction of the improvement was soon to begin. According to plaintiffs, the Kunkles claimed that they were selling the subject property in order

[1] We note that this would have been before the signing of the letter of awareness, more than a decade before the sale of the subject property and the construction of the roadway improvement.

to downsize. Plaintiffs alleged that, in reality, however, the Kunkles purchased another property about a mile-and-a-half from the subject property.

¶ 9 The Kunkles listed the subject property for sale with the broker. Plaintiffs alleged that the broker knew about the imminence of the construction of the roadway improvement and that the expanded road would materially affect the subject property's value. The broker, however, did not disclose to any other broker or prospective purchaser the information about the conversion of Longmeadow Parkway into an arterial roadway or its likely effect on the subject property. This information also was omitted from the listing and from marketing materials prepared by the broker. According to plaintiffs, the Kunkles were both aware of the broker's strategy and approved of it; the Kunkles themselves did not disclose their knowledge of the imminent construction either to plaintiffs or to any other prospective purchasers.

¶ 10 On April 20, 2018, plaintiffs filed a four-count complaint against the Kunkles, the broker, and Earl Roloff, plaintiffs' attorney in the transaction. In count I, plaintiffs alleged that the Kunkles breached the real estate contract by failing to disclose the planned roadway improvement project. Plaintiffs characterized the improvement as "a material condition of the Property greatly affecting its value," and that the construction of the roadway improvement diminished the value of the property. Plaintiffs alleged that the "concealment" was a breach of a material term of the contract. Interestingly, plaintiffs did not cite to the precise provision of the real estate sales contract that was allegedly breached. Rather, they attached a copy of the contract to the complaint. The contract contained a title commitment clause (paragraph 18) providing that the Kunkles would provide to plaintiff a customary title insurance commitment as evidence of their good title in the subject property. The contract also provided (paragraph 23) the following representations on the part of the Kunkles:

"Seller represents that with respect to the Real Estate Seller has no knowledge of nor has Seller received any written notice from any association or governmental entity regarding:

a) zoning, building, fire or health code violations that have not been corrected;

b) any pending rezoning;

c) boundary line disputes;

d) any pending condemnation or Eminent Domain proceeding;

e) easements or claims of easements not shown on the public records;

f) any hazardous waste on the Real Estate;

g) any improvements to the Real Estate for which the required initial and final permits were not obtained;

h) any improvements to the Real Estate which are not included in full in the determination of the most recent tax assessment; or

i) any improvements to the Real Estate which are eligible for the home improvement tax exemption.

Seller further represents that:

There is not a pending or unconfirmed special assessment affecting the Real Estate by any association or governmental entity payable by Buyer after the date of Closing.

The Real Estate is not located within a Special Assessment Area or Special Service Area, payments for which will not be the obligation of Seller after the year in which the Closing occurs.

All Seller representations shall be deemed re-made as of Closing. If prior

> to Closing Seller becomes aware of matters that require modification of the representations previously made in this Paragraph 23, Seller shall promptly notify Buyer. If the matters specified in such Notice are not resolved prior to Closing, Buyer may terminate this Contract by Notice to Seller and this Contract shall be null and void."

¶ 11 In count II, plaintiffs alleged that the Kunkles committed common law fraud. Plaintiffs alleged that the Kunkles knew, by virtue of the letter of awareness, that the Village intended, at some point, to construct the planned roadway improvement. Further, the Kunkles provided a pretextual reason for selling the subject property and ended up fleecing plaintiffs, "a young couple not particularly experienced in the purchasing of real estate," by concealing their knowledge of the impending construction of the roadway improvement or not divulging "the meaning or content" of the letter of awareness. Plaintiffs alleged that, as a result, they purchased the subject property for $301,500 while the actual value of the property after the expansion of Longmeadow Parkway was at least $50,000 less.

¶ 12 In count III, plaintiffs alleged that the broker committed common law fraud by aiding and abetting the Kunkles' concealment of the imminence of the roadway improvement. The broker further created listings and other promotional materials that omitted mention of the planned roadway improvement. Plaintiffs alleged that the broker's actions resulted in damages of at least $50,000.

¶ 13 Finally, in count IV, plaintiffs alleged that Roloff, their attorney for the transaction, committed legal malpractice. Plaintiffs alleged that Roloff failed to ascertain the roadway improvement project and missed the mention of the letter of awareness in the title commitment report. Roloff's motion to dismiss ultimately was denied—he remains a party to the ongoing

litigation below and is not a party to this appeal.

¶ 14 The Kunkles and the broker promptly moved to dismiss plaintiffs' complaint in hybrid motions pursuant to section 2-619.1 of the Code. The Kunkles attached to their combined motion to dismiss a copy of part of the title commitment report showing that the recorded letter of awareness was excepted from coverage. From this, both the Kunkles and the broker argued that plaintiffs had actual notice of the roadway improvement project. Following briefing and argument, on September 10, 2018, the trial court ruled orally:

> "Well, I think the dispositive fact here is—that has—at least to my mind has not been disputed is that the plaintiffs here, the Cosentinos, obtained a title commitment which would have been provided to them before or at the latest at the closing, which was the letter of awareness, which made them aware of the whole argument that they're making here, which is plans for a potential expansion of the road that abutted their property. The whole gist of their case is that if they had been made aware of that, they would not have proceeded with purchasing the property, and their contention is that the defendant sellers, the Kunkles, and the defendant real estate broker, Miss [*sic*] Goins, and Re/Max, her employer, had a duty to disclose that information to them prior to the closing and that they intentionally concealed that information.
>
> The case that is cited in I believe the real estate broker's motion is [*Randels v. Best Real Estate, Inc.*, 243 Ill. App. 3d 801, 807 (1993)], talking about a situation where you have—in this case I think it was a sewer hook-up. And the argument was that the defendants should have told the buyers of that and the defense to that was it was of public record through the village ordinances.
>
> Talking about that issue, it says, quote, 'Under this analysis, the key question is

whether defendant's representations or omissions were discoverable through the exercise of ordinary prudence by the plaintiff and a finding of liability is made when the defendant misrepresents or omits facts of which he possesses almost exclusive knowledge, the truth or falsity of which is not readily obtainable by the plaintiff.[']

So I think what that's referencing is situations where perhaps flooding in the house, something where it would be known to the sellers, but not necessarily of public record or public knowledge. And it goes on to say, 'applying these principles to this case, we find no violation of the Consumer Fraud Act.' The village ordinances requiring the sewer hook-up [were] a matter of public knowledge and the ordinance plainly sets out the circumstances under which property owners were required to hook up to the public sewers at their expense.

Now, what—the argument was made by Miss [*sic*] Goins' attorney is that the—IDOT's plans were of public record and that the letter of awareness which was originally provided to the defendant sellers also was of public record through a recording, and, therefore, that would have charged the plaintiffs with knowledge of the potential expansion.

But—and that's how I originally was kind of looking at this case and whether these facts would fit into the definition in [*Randels*] or not. But I really don't have to do that because it's undisputed that the plaintiffs were provided with a title commitment which included the letter of awareness. That put them on notice of the potential expansion just as well, if not better, than any verbal statement that they suggest that the Kunkles or Miss [*sic*] Goins should have told them of.

So it's not a situation of constructive notice. It's a situation of actual notice.

> They were put on actual notice prior to purchasing this property that there was this potential expansion. They purchased it anyways, so I don't see any basis for a fraud claim to exist here.
>
> [The trial court confirms that defendants are moving to dismiss the breach of contract claim.]
>
> Okay. Well I think the analysis is the same. It's—the theory of the case is that there was a breach of the contract by the failure to disclose the information. I'm not aware of any other allegations of a breach of contract other than these that are centered on that alleged concealment or lack of providing of information. Again, as the Court is finding that the plaintiffs were made aware of the potential expansion through their own title commitment prior to selling the home—or purchasing the home, I don't see any basis for a breach of contract, so I'm going to dismiss that as well with prejudice."

In its September 10, 2018, written order, the trial court dismissed with prejudice the counts of plaintiffs' complaint pertaining to the Kunkles (counts I and II) and the broker (count III). The trial court also included a Supreme Court Rule 304(a) (eff. Mar. 8, 2016) finding of immediate appealability with respect to the dismissed counts.

¶ 15 On October 5, 2018, plaintiffs filed a motion to reconsider the September 10 order. Plaintiffs asserted that the trial court had ignored factual questions regarding whether the Kunkles and the broker intentionally withheld the information about their knowledge of the imminent construction of the Longmeadow Parkway roadway improvement. Plaintiffs noted that they had filed an affidavit of Leah Cosentino averring that plaintiffs had no actual knowledge of the construction until informed by a neighbor some six months after they purchased the subject property, and from this, plaintiffs argued that a factual issue precluded the dismissal with

prejudice.

¶ 16 On October 31, 2018, the trial court denied plaintiffs' motion to reconsider, concluding as a matter of law that the title commitment provided plaintiffs with actual knowledge of the roadway improvement through their agent/attorney. Plaintiffs timely appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiffs argue that the trial court erred in dismissing with prejudice their counts against the Kunkles and the broker. Plaintiffs argue that, with respect to the Kunkles, they adequately pleaded causes of action for breach of contract and fraud, and that the trial court's holding based on the actual knowledge arising from the title commitment was erroneous. Similarly, plaintiffs argue that, with respect to the broker, she was under a duty to disclose notwithstanding the title commitment's disclosure of the letter of awareness, and that her silence was equivalent to fraudulent concealment. Finally, plaintiffs argue that questions of fact concerning whether defendants' omissions were intentional, whether plaintiffs reasonably relied on defendants' disclosures, and whether plaintiffs had actual knowledge of the planned roadway improvement should have precluded both the dismissals as well as the dismissals with prejudice. We consider the contentions in turn.

¶ 19 A. Preliminary Matter

¶ 20 Before addressing plaintiffs' substantive arguments, we must first note plaintiffs' serious and troubling noncompliance with applicable Supreme Court Rules. Specifically, Supreme Court Rule 341(h)(6) (eff. May 25, 2018) requires a party to include in his or her statement of facts an "appropriate reference to the pages of the record on appeal." Plaintiffs have not done so. Instead of citing to a particular page in the record, when referencing a particular potion of their complaint, plaintiffs have cited to the entire complaint. This is both improper and unhelpful to

the court. We remind plaintiffs' counsel that our supreme court's rules are neither aspirational nor suggestions; they have the force of law and must be fully complied with. *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995). While we could strike plaintiffs' statement of facts or even dismiss the appeal based on the violations, we decline to do so. The record is relatively brief and the violations, while many, do not unduly hinder our review. Nevertheless, we admonish counsel, whom we note has been licensed to practice in Illinois for nearly 40 years, to carefully follow the applicable rules in the future.

¶ 21 B. Standard of Review

¶ 22 Defendants moved to dismiss the relevant counts of plaintiffs' complaint pursuant to section 2-619.1 of the Code which allows a party to move for dismissal under both sections 2-615 (failure to state a claim) and 2-619 (defects or defenses). 735 ILCS 5/2-619.1 (West 2018). A motion to dismiss pursuant to section 2-615 challenges the legal sufficiency of the complaint, while a motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matters appearing on the face of the complaint or established by external submissions that defeats the action. *Garlick v. Bloomingdale Township*, 2018 IL App (2d) 171013, ¶ 24. Under section 2-615, our review is limited to the face of the complaint. *Khan v. Deutsche Bank, AG*, 2012 IL 112219, ¶ 56. We accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Doe v. Coe*, 2019 IL 123521, ¶ 20. The complaint's allegations are also construed in the light most favorable to the plaintiff. *Id.*

¶ 23 Under section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2018)), the defendant admits the legal sufficiency of the claim but asserts that an affirmative matter defeats or avoids the effect of the claim. *McIntosh v. Walgreens Boots Alliance, Inc.*, 2019 IL 123626, ¶ 16. As in a

section 2-615 motion to dismiss, the section 2-619 motion to dismiss admits the well-pleaded allegations of fact, but it does not admit conclusions of law and conclusory factual allegations unsupported by specific factual allegations in the complaint. *Id.* Additionally, the defendant does not admit the truth of any allegations in the complaint touching on the affirmative matters raised in the section 2-619(a)(9) motion to dismiss. The defendant's external evidentiary submissions, such as affidavits or other evidentiary matter, shift the burden to the plaintiff to establish that the defense is unfounded or that there exists a genuine issue of material fact that must be resolved. *Id.* Thus, the question becomes, on the section 2-619(a)(9) motion to dismiss, whether there exists a genuine issue of material fact that should have precluded the dismissal, or absent the factual issue, whether the dismissal was proper as a matter of law. *Id.* ¶ 17. We review *de novo* the trial court's judgment on a section 2-619.1 motion to dismiss. *Garlick*, 2018 IL App (2d) 171013, ¶ 24.

¶ 24 C. Common Law Fraud Against Defendants

¶ 25 Plaintiffs alleged common law fraud against the Kunkles and the broker. To state a claim for common law fraud against a defendant, the plaintiff must prove the following elements: (1) a false statement of material fact; (2) the defendant knew that the statement was false; (3) the defendant intended that the statement induce the plaintiff to act; (4) the plaintiff relied upon the truth of the statement; and (5) the plaintiff incurred damages resulting from relying on the statement. *Village of Bensenville v. City of Chicago*, 389 Ill. App. 3d 446, 487 (2009). The false-statement element is also satisfied if the defendant fails to disclose or omits a material fact. *Butler v. Harris*, 2014 IL App (5th) 130163, ¶ 31. The defendant's knowledge of the falsity of the statement or deliberate concealment with the intent to deceive is key. *Id.* Here, plaintiffs argue that both the Kunkles and the broker concealed the upcoming roadway improvement

project from them with the intent to deceive, plaintiffs had no reason to investigate, and their reliance on defendants' putative full disclosure directly resulted in damages. The viability of plaintiffs' claim of common law fraud turns, in our estimation, on whether plaintiffs were entitled to reasonably rely on defendants' representations in the face of the undisputed fact of the title commitment's disclosure of the letter of awareness recorded against the subject property. In other words, the question becomes, what is the effect of actual knowledge on the element of reasonable reliance?

¶ 26 It has been long held that, in determining whether a plaintiff's reliance was reasonable, all of the facts of which the plaintiff had actual knowledge must be taken into account, as well as the facts the plaintiff might have discovered through the use of ordinary prudence. *Connor v. Merrill Lynch Realty, Inc.*, 220 Ill. App. 3d 522, 529 (1991). A plaintiff's reliance is unjustified where there is ample opportunity to discover the truth. *Id.* at 529-30. Stated another way, the law consistently requires that a person may not close his or her eyes to the available information when entering into a transaction and then charge the other party with deceiving him or her. *Johnson v. Waterfront Services Co.*, 391 Ill. App. 3d 985, 993 (2009); *Central States Joint Board v. Continental Assurance Co.*, 117 Ill. App. 3d 600, 606 (1983).

¶ 27 Here, it is undisputed that, as a matter of fact, the title commitment disclosed the letter of awareness. In turn, it is similarly undisputed that the letter of awareness was recorded against the subject property. These facts provided plaintiffs with actual notice of the planned roadway improvement project. Where plaintiffs had actual notice of the precise false statement or omission of which they complain, their reliance is unreasonable—they cannot close their eyes to that fact and claim to be deceived. *Johnson*, 391 Ill. App. 3d at 993; *Connor*, 220 Ill. App. 3d at 529-30.

¶ 28 *Connor* is particularly apt. There, the plaintiffs, who were homebuyers, alleged that they had been deceived by the brokers selling the property when the brokers minimized the water marks present in the basement and represented, despite living in the area, that the home had flooded only once when, after the plaintiffs purchased the property, the home repeatedly flooded. *Id.* at 528. The court held that the plaintiffs' actual notice of previous flooding precluded their reliance on the brokers' representations or omissions. *Id.* at 530.

¶ 29 Likewise here. Plaintiffs had actual knowledge of the impending roadway improvement as a result of the title commitment and its disclosure of the letter of awareness which was recorded against the subject property. Therefore, plaintiffs could not rely on the silence of the Kunkles or the broker.

¶ 30 Plaintiffs argue that, where a person has the duty to speak, the failure to disclose material information constitutes fraudulent concealment. *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154, 161 (1986). *Zimmerman*, however, is distinguishable. In that case, the plaintiffs alleged that the brokers had actual knowledge of all of the defects the plaintiffs were to discover (*e.g.*, smaller-than-listed lot size, plumbing issues, flooding and water damage, and a concealed hole in the living room wall). *Id.* The plaintiffs in *Zimmerman* had no knowledge of the defects and had no way of discovering the defects about which the brokers were alleged to have known, and these were sufficient allegations to survive a motion to dismiss. *Id.* at 161-162. *Zimmerman* does not deal with plaintiffs who had actual knowledge of the matter claimed to have been concealed. Here, plaintiffs had the actual knowledge of the roadway improvement project by virtue of the title commitment and this fact renders *Zimmerman* inapposite.

¶ 31 Plaintiffs also rely on *Dee v. Peters*, 227 Ill. App. 3d 1030, 1032 (1992), for the proposition that the sellers, too, can fraudulently conceal material facts by the combination of

silence and deceptive conduct. *Dee* is a curious choice because, in that case, the court determined from the plaintiff's complaint that the defendants had only been silent about the alleged defect and had not combined silence with other deceptive conduct. *Id.* at 1032. The court then affirmed the trial court's dismissal of the counts of the plaintiff's complaint based on silence alone, holding that the plaintiffs presented no reason to depart from the general rule that seller liability cannot be based on silence alone. *Id.* at 1032-33. Thus, *Dee* actually supports the result in this case because plaintiffs alleged only that the Kunkles "fail[ed] to speak up and inform [plaintiffs] of the major roadwork that was about to be occurring," with no allegations that the Kunkles undertook affirmative acts of deception or concealment.[2] In other words, as in *Dee*, plaintiffs alleged only silence and did not allege that the Kunkles otherwise concealed the impending roadway improvement. Nor could they, in light of the disclosure of the letter of awareness and plaintiffs' actual knowledge of the impending roadwork.

¶ 32 Plaintiffs rely on *Kinsey v. Scott*, 124 Ill. App. 3d 329, 337 (1984), for the proposition that concealment of material facts showing an intent to deceive creates a duty to speak. In *Kinsey*, the defendant represented to the plaintiff that he was selling a five-unit apartment building when he had obtained permission to construct a four-unit building and constructed the

[2] Plaintiffs alleged that the Kunkles gave a false reason for moving—that they wanted to downsize their home, when they actually purchased a home of similar size close by. This allegation goes to the element of intent to deceive. The seller's reason for selling generally is not a material fact in the buyer's decision to purchase. Moreover, to the extent that it shows active concealment, the actual notice of the roadway improvement project still negates the element of reasonable reliance.

fifth unit in the basement without obtaining permission from the city and without having the fifth unit inspected. *Id.* at 332-33. The defendant also represented that the building was fully in compliance with the city's building code even though he had obtained neither a building permit to add the fifth unit nor the city's approval. *Id.* at 334. This court held that, "[h]aving represented to [the] plaintiff that he was selling a five-unit apartment building, [the defendant's] concealment of the actual facts surrounding the construction of the basement apartment shows an intention to deceive, and under the circumstances creates a duty to speak." *Id.* at 337. *Kinsey*, however, is distinguishable.

¶ 33 First, for *Kinsey* to apply to the circumstances in this case, silence must equate to active concealment. *Dee*, however, shows that silence alone does not mean that a defendant is actively concealing a material fact. *Dee*, 227 Ill. App. 3d at 1032-33. Second and more importantly, the circumstances in *Kinsey*, namely the defendant's creation of the defective condition and his concealment of the defective condition combined to "create[] a duty to speak." *Kinsey*, 124 Ill. App. 3d at 337. Here, neither the Kunkles nor the broker created the condition of which plaintiffs complain—the roadway improvement project. As well, while the project affected the subject property, it was not a part of that property and the allegations of the complaint indicate that the broker and the Kunkles did not disclose the project (silence), not that they misrepresented its parameters or claimed that there would be no effect. In other words, while the Kunkles and the broker were silent, they did not affirmatively misrepresent information about the project. This, too, distinguishes our circumstances from *Kinsey*. Finally, even had there been active concealment by the Kunkles and the broker, the title commitment demonstrates that plaintiffs had actual notice of the impending roadway improvement, which means that plaintiffs

could not reasonably rely upon defendants' silence. *Johnson*, 391 Ill. App. 3d at 993; *Connor*, 220 Ill. App. 3d at 529-30.

¶ 34 Plaintiffs dispute whether they possessed enough knowledge to even understand that they were being deceived by the Kunkles' and the broker's silence. Plaintiff again mines *Kinsey* for the proposition that it is only when, given the particular circumstances, either the facts are readily apparent to one of plaintiff's experience and understanding, or the plaintiff has discovered something that ought to raise the plaintiff's suspicions that he is being deceived, that the plaintiff will be required to conduct his own investigation. *Kinsey*, 124 Ill. App. 3d at 337 (quoting *Chicago Title & Trust Co. v. First Arlington National Bank*, 118 Ill. App. 3d 401, 409-10 (1983) (quoting Prosser, Torts § 108, at 718 (4th ed. 1971))). Plaintiffs' framing of the issue mistakenly focuses only on their own inexperience and credulity; the passage from *Kinsey* that they quote, however, also emphasizes a plaintiff's obligation to further investigate when information is discovered "which should serve as a warning that he is being deceived." *Id.* In short, *Kinsey* supports the principle that a party cannot close his or her eyes to actually discovered information. See *Johnson* 391 Ill. App. 3d at 993; *Connor*, 220 Ill. App. 3d at 529-30. Here, plaintiffs undisputedly received the title commitment which pointed out the letter of awareness. This is precisely "something which should serve as a warning that he is being deceived" mentioned in *Kinsey*. *Kinsey*, 124 Ill. App. 3d at 337. Thus, following plaintiffs' own reasoning, they were required to further investigate because they received actual notice of the roadway improvement project via the title commitment and letter of awareness recorded against the property, notwithstanding plaintiffs' subjective inexperience in and ignorance of the ins and outs of real estate transactions. *Kinsey*, therefore, does not support plaintiffs' contention.

¶ 35 The trial court granted with prejudice both portions of the Kunkles' and the broker's combined motions to dismiss. We affirm that judgment. With respect to section 2-619, the title commitment's disclosure of the letter of awareness, the fact of which is undisputed, imparted to plaintiffs actual knowledge of the impending roadway improvement project as a matter of law. *Johnson,* 391 Ill. App. 3d at 993. To hold otherwise would both defeat the purpose of the title commitment and allow a party to a transaction to ignore any information the party chose to in order to make out a claim against the other party. The plaintiffs' actual knowledge of the roadway improvement means that they could not reasonably rely on defendants' silence. Because reasonable reliance is an essential element of a common law fraud claim (*Village of Bensenville*, 389 Ill. App. 3d at 487), plaintiffs' claim fails because they cannot prove an essential element of the action. Likewise, under section 2-615, because plaintiff cannot state an essential element of the action, their claim fails. Accordingly, we hold that the trial court correctly dismissed with prejudice plaintiffs' claims of common law fraud against the Kunkles and against the broker.

¶ 36 Plaintiffs dispute the trial court's reasoning. Specifically, plaintiffs contend that the trial court's reliance on the fact that the letter of awareness was a public document, like the village ordinance in *Randels*, was misplaced rendering its judgment erroneous. See *Randels*, 243 Ill. App. 3d at 807 (the contents of an ordinance are deemed to be public knowledge providing the plaintiff with actual knowledge of the claimed misrepresentation of material fact). As is seen above, we did not rely on *Randels* in reaching our conclusion that plaintiffs had actual knowledge of the roadway improvement project, and our reasoning differs somewhat from that of the trial court. The fact that the trial court's reasoning may not be correct (we believe that the trial court's holding was essentially that plaintiffs had actual knowledge even if it approached

that holding from a somewhat different direction than we did) is of no moment because we review the trial court's judgment, not its reasoning, on appeal. *First Mortgage Co. v. Dina*, 2017 IL App (2d) 170043, ¶ 39.

¶ 37 The remainder of plaintiffs' contentions that the trial court erred in dismissing with prejudice their common law fraud claims against the broker focus on the broker's duty to disclose. However, keeping in mind that plaintiff alleged only a claim of common law fraud against the broker, it is unavailing to ignore plaintiffs' actual knowledge in favor of concentrating on the broker's duty to disclose information. Moreover, plaintiffs are fuzzy on precisely what a broker is required to disclose. Plaintiffs assert a broker must disclose "material information" without providing any analysis of whether conditions extrinsic to a subject property are material where no defects intrinsic to the subject property have been alleged. Thus it is not necessarily as clear as plaintiffs contend that the broker did not disclose all material information about the subject property even if they omitted to disclose upcoming conditions and events extrinsic to the subject property. Nevertheless, even accepting plaintiffs' contentions that the broker had a duty to disclose the upcoming roadway improvement project, plaintiffs possessed actual knowledge of the project, and that actual knowledge negates an essential element of the singular claim made against the broker. Thus, regardless of the broker's fault, plaintiffs cannot state a claim and prevail for common law fraud.

¶ 38 Plaintiffs also complain that factual issues should have precluded the trial court's dismissal. With regard to common law fraud, plaintiffs argue that defendants' intent and plaintiffs' reliance are actually factual questions that should have precluded the dismissal of the common law fraud claim, relying upon *Mitchell v. Skubiak*, 248 Ill. App. 3d 1000, 1006 (1993). *Mitchell* is inapt, however, because it involved a question of whether a plaintiff without actual

knowledge of the circumstances could rely upon the affirmative representation of the defendant. Here, by contrast, we have the silence of defendants coupled with plaintiffs' actual knowledge. Further, it has long been held that actual knowledge of the complained-of circumstance negates one's reasonable reliance in claim for common law fraud. *Johnson*, 391 Ill. App. 3d at 993; *Connor*, 220 Ill. App. 3d at 529-30. Accordingly, plaintiffs' contention remains unavailing.

¶ 39 Plaintiffs also rely upon *Gilmore v. Kowalkiewicz*, 234 Ill. App. 3d 522 (1992), for the same point: an issue of fact regarding the plaintiff's reliance on the defendant's representations precluded judgment. In that case, however, the matter had passed beyond the pleading stage and was decided on a motion for summary judgment. *Id.* at 525. Here, by contrast, we have determined that plaintiffs simply cannot maintain a claim of common law fraud because their actual knowledge defeats, as a matter of law, an essential element of their action. Also, in *Gilmore*, there was no issue of the plaintiff's actual knowledge; the *Gilmore* court held that the issue could not be resolved simply by looking at the applicable ordinance or law (*id.* at 530), while here, the plaintiffs already actually possessed the necessary information about the roadway improvement project. Thus, *Gilmore* does not help plaintiffs.

¶ 40 Similarly unavailing is Leah Cosentino's affidavit averring that she, personally, did not have actual knowledge of the roadway improvement project until April 2015, some six months after plaintiffs closed on the subject property. Essentially, this affidavit states that plaintiffs closed their eyes to the actual information in their possession and then used their willful blindness as the foundation of the claim of common law fraud against defendants. As stated above, plaintiffs' actual knowledge defeats their common law fraud claim. *Johnson*, 391 Ill. App. 3d at 993; *Connor*, 220 Ill. App. 3d at 529-30.

¶ 41 Therefore, for the foregoing reasons, we hold that the trial court correctly dismissed with prejudice plaintiff's common law fraud claims against the Kunkles and the broker. The trial court's judgment on that point is affirmed.

¶ 42 D. Breach of Contract Against the Kunkles

¶ 43 Plaintiffs alleged breach of contract only against the Kunkles. Plaintiffs' arguments regarding breach of contract are minimal and disjointed. One part of plaintiffs' argument consists of the following:

> "The Complaint alleged that a material term of the real estate contract required disclosure of a project. (C12-C39; A1-A28) For example, as part of the Real Estate Contract, [the Kunkles] knowingly made representations that there were no special assessments affecting the Property and that the Property was not located in a special assessment area."

From that snippet, plaintiffs turned to discussing common law fraud.

¶ 44 The next portion of plaintiffs' breach of contract argument is as follows:

> "The Trial Court erred in finding that [the Kunkles were] not liable for a breach of the Real Estate Contract. 'It is well-established that a person breaching a contract can be held liable for such damages as may fairly and reasonably be considered as naturally arising from the breach thereof, in light of the facts known or which should have been known, or such as may reasonably be supposed to have been within the contemplation of the parties as a probable result of a breach thereof.' *Jones v. Melrose Park National Bank*, 228 Ill. App. 3d 249[, 258] (1st Dist., 1992).
>
> In this case, plans for major roadwork that would dramatically diminish the value of the Property would have or should have been contemplated between the buyers and

> sellers in this case. The Complaint alleged that [plaintiffs] were inexperienced home buyers and were not aware of any such plans."

¶ 45 The foregoing quotes appear to be the sum and total of plaintiffs' argument regarding breach of contract in the initial brief on appeal.[3]

¶ 46 These brief passages are simply insufficient. A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and legal argument presented. *In re Marriage of James & Wynkoop*, 2018 IL App (2d) 170627, ¶ 37. A party may not foist upon the appellate court the burden of constructing its argument and conducting its research. *Id.* Doing so, along with failing to follow Supreme Court Rule 341 (eff. May 25, 2018), may result in the forfeiture of an issue on appeal. *Id.* Such is the case here.

¶ 47 Even had plaintiffs adequately presented pertinent authority and competent legal argument, we would remain unconvinced. A breach of contract claim consists of the following essential elements: (1) a valid and enforceable contract between the parties; (2) the plaintiff performed the contract; (3) the defendant breached the contract; and (4) the plaintiff was injured as a result of the breach. *Performance Food Group Co., LLC v. ARBA Care Center of Bloomington, LLC*, 2017 IL App (3d) 160348, ¶ 19. Here, plaintiffs do not expressly argue the elements of breach of contract as just set forth. For instance, plaintiffs do not argue that they had a valid and enforceable contract between the parties. Plaintiffs did, however, attach a copy of the

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[3] Plaintiffs intermingle the quoted passages with a discussion of fraudulent concealment. It is possible that they intended this discussion to demonstrate that they alleged that the Kunkles did not make disclosures required by the contract. If so, the argument is too opaque to countenance.

contract to the complaint and there is no dispute about the validity or enforceability of the contract, but such an acknowledgment for the sake of completeness would have been welcome.

¶ 48 More problematically, plaintiffs do not argue how the Kunkles breached the contract. Specifically, plaintiffs do not indicate which particular provision of the real estate contract was breached. Plaintiffs conclusorily argue that the Kunkles "had a duty to truthfully disclose the plans for the expansion prior to the sale." But plaintiffs do not indicate which contractual provision was allegedly breached. Instead, plaintiffs somewhat confusingly and confusedly contend that the Kunkles "knowingly made representations that there were no special assessments affecting the Property and that the Property was not located in a special assessment area." The making of affirmative representations would seem to conform to the duties specified for the sellers in the real estate contract. Moreover, there is no allegation in the complaint that the roadway improvement was being constructed pursuant to a special assessment or that a special assessment area had been assembled to accomplish the construction of the roadway improvement. Finally, there are no provisions in the contract requiring "disclosure of a project," let alone a project that itself is extrinsic to the property. Indeed, there are terms dealing with condemnation or eminent domain, but from the allegations in the complaint, it does not appear that the village condemned any part of the subject property to complete the roadway improvement project.

¶ 49 In addition, damages are an essential element of a breach of contract claim. By having actual notice of the roadway improvement project via the title commitment, even had the Kunkles' nondisclosure breached their duties under the contract, plaintiffs could not have been injured by the nondisclosure as they had actual knowledge of the roadway improvement and nevertheless proceeded to close on the transaction. In other words, plaintiffs could not have been

injured as a result of the breach because they had actual knowledge of the subject matter of the purported breaching nondisclosure. See *Performance Food Group*, 2017 IL App (3d) 160348, ¶ 19 (a plaintiff's injury resulting from the defendant's breach is an essential element of a breach of contract action). Therefore, even if plaintiffs had not failed to argue which particular provision of the contract was breached, they would be unable to maintain an action for breach of contract because their actual knowledge of the impending roadway improvement project defeats the essential element of damages stemming from the breach.

¶ 50 Plaintiffs rely on *Jones*, 228 Ill. App. 3d at 258, for the proposition that a party breaching a contract is liable for damages arising from the breach that were reasonably within the contemplation of the parties. This principle, however, applies to claims of implied contractual indemnity where the one party's breach of contract causes a second party to breach a separate contract with a third party. *Riley Acquisitions, Inc. v. Drexler*, 408 Ill. App. 3d 397, 405 (2011). Indeed, in *Jones*, the plaintiff was attempting to secure moving expenses as a result of the defendant's breach (*i.e.*, the costs incurred while the plaintiff was forced to deal with a third party). *Jones*, 228 Ill. App. 3d at 258. Here, aside from the fact that plaintiffs' claim of damages were not arising from the Kunkles' purported breach because plaintiffs had actual knowledge of the roadway improvement project and thus imputed knowledge about the effect of the project on the subject property, plaintiffs were not alleging some sort of implied indemnity, but were attempting to allege that any damages they experienced was directly attributable to the Kunkles' purported breach. *Jones*, therefore, is inapposite.

¶ 51 Plaintiffs note that the Kunkles argue as a reason to support the trial court's dismissal with prejudice of the breach of contract count that plaintiffs did not specify which provisions of the contract were breached. Plaintiffs contend that, even so, the trial court should have given

them an opportunity to replead, this time with the appropriate references to the contract, as this would not have really impacted their ability to state a claim. We might agree if plaintiffs' only infirmity was to have conclusorily alleged a breach of contract. However, as noted above, plaintiffs cannot maintain a claim for breach of contract because they cannot establish the essential element of damages resulting from the breach owing to their actual knowledge of the roadway improvement project. Therefore, the trial court correctly dismissed with prejudice plaintiffs' claim for breach of contract against the Kunkles.

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 54 Affirmed.