2013 IL App (3d) 120244-U

Order filed September 3, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

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| MALCOLM W. THORNE, as Trustee of the MALCOLM W. THORNE REVOCABLE TRUST and DINOS CONSTANTINE, | ) | Appeal from the Circuit Court of the 13th Judicial Circuit, LaSalle County, Illinois, |
| Plaintiffs-Appellees, | ) | Appeal No. 3-12-0244 |
| | ) | Circuit No. 09-CH-264 |
| v. | ) | |
| ERIC RIGGS and SCOTT RAGAN, | ) | Honorable Eugene P. Daugherity, Presiding Judge. |
| Defendants-Appellants. | ) | |

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JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held*: The trial court did not err when it rescinded the contract between the plaintiffs and the defendants because the evidence showed that the defendants committed fraud. Additionally, the court did not abuse its discretion when it denied the defendants' affirmative defenses of laches and waiver, because the defendants were not harmed by any delay in the plaintiffs' filing of the instant lawsuit, and because after learning of the fraud, the plaintiffs did not act inconsistently with the filing of the this lawsuit.

¶ 2 Malcolm Thorne, as trustee of the Malcolm W. Thorne revocable trust, and Dinos Constantine, the plaintiffs, filed suit against Eric Riggs and Scott Ragan, the defendants. The

plaintiffs sought to dissolve the limited liability corporation, Heritage Fields Oglesby, LLC (HFO), alleging that the defendants had committed fraud in connection with the plaintiffs' purchase of Ragan's interest in HFO. The trial court found that the defendants committed fraud and rescinded the purchase contact. The defendants appeal, arguing that the trial court erred when it found that they committed fraud and denied their affirmative defense of waiver, and abused its discretion when it denied their affirmative defense of laches. We affirm.

¶ 3 FACTS

¶ 4 On March 27, 2009, the plaintiffs filed a lawsuit alleging that the defendants fraudulently induced them to purchase Ragan's 50% share in HFO. In count one, the plaintiffs alleged that the defendants deliberately and intentionally concealed and/or misrepresented several material facts about HFO and the property it owned, causing them to enter unknowingly into a detrimental business arrangement pursuant to a purchase contract. The plaintiffs sought, among other relief, rescission of the purchase contract. In count two, the plaintiffs asked the court to dissolve HFO. The cause ultimately proceeded to trial solely on count one.

¶ 5 I. Trial

¶ 6 The four named parties and the following three individuals testified at trial: Thomas Schmidt, a friend of the plaintiffs who was a potential investor in HFO; Andy Washelesky, an engineer who worked on the Heritage Fields subdivision; and John Kusek, the engineer for the city of Oglesby, Illinois (the City). The testimony of these seven witnesses and documentary evidence produced at trial revealed the following facts.

¶ 7 Harold Oliver and Barry Niles originally developed Heritage Fields as a mixed-use development in Oglesby. In 1994, Oliver and Niles employed Andy Washelesky and Advanced Engineering Associates (AEA), to plat the development of Heritage Fields in three phases.

Oliver and Niles secured preliminary approval from the city to proceed in three phases.

¶ 8 However, during the preliminary approval process, the planning commission and a neighboring property owner raised concerns about adequate handling of storm water drainage for phases II and III. Although lot 54 had been set aside for storm water detention, it would not provide an adequate solution because it needed substantial additional engineering work in order to contain water runoff from phases I and II and the eastern portion of phase III, and it would do nothing for the western portion of phase III, which drained in the opposite direction, away from lot 54. The City required a solution for phase III water detention issues before the developers could obtain final plat approval for it. Oliver and Niles pursued final plat approval for and ultimately developed only phase I.

¶ 9 In 2004 or 2005, Riggs and Ragan became interested in the Heritage Fields subdivision and retained AEA's services to begin exploring its further potential development. Although the defendants did not then own any of the property that comprised Heritage Fields, Riggs was negotiating with Oliver and Niles to purchase their interest in the subdivision. Riggs and Ragan hired Washelesky to provide consulting and design engineering services for developing phase II, which was all they sought to develop at that time. Washelesky discussed the "storm water issues associated with phase II" with Riggs during their initial meetings, and also discussed the fact that the western portion of phase III did not flow into lot 54 and, thus, created drainage issues. In addition, Riggs attended a planning commission meeting in November 2005 in which the drainage problems were discussed.

¶ 10 In July 2005, at Riggs' request, Washelesky prepared an Estimate of Probable Costs (EOPC) for phase II, positing costs of $550,000, including $80,000 for "[e]arth [e]xcavation for [d]etention."

¶ 11 Constantine, who had a bachelor's degree in chemistry and an MBA from the University of Wisconsin, testified that he was in the business of creating software and was not experienced in real estate or development. Around 2004, however, he was looking for an investment opportunity in real estate. He knew Riggs from an earlier investment in ROI, and between August and November 2005, the parties had numerous discussions concerning Constantine's possible investment in HFO. Constantine specifically recalled that he and Thomas Schmidt visited the site of Heritage Fields, and that he, Schmidt, Thorne and both defendants met at the Hilton Garden Inn near O'Hare Airport on October 11, 2005, to discuss the potential investment in Heritage Fields.

¶ 12 According to Constantine (and, later, Thorne), during these discussions, Riggs and Ragan represented that: (1) Heritage Fields could and would be developed in a single phase within one year; (2) they already owned the land necessary to develop Heritage Fields; (3) they were experienced developers who had developed phase I and had taken the rest of Heritage Fields through preliminary plat approval; (4) the total development costs would be $550,000; (5) there were no impediments to developing Heritage Fields; and (6) there were no material encumbrances on the land on which Heritage Fields would be developed.

¶ 13 Constantine testified that he believed the parties would develop the entire property at once and that the $550,000 cost for development was for the entire property. The defendants did not provide him with the EOPC for phase II, nor did he ask for any documentation. The defendants stated that there were no hurdles or obstacles to obtaining the City's approval of the development, that it would be a "relatively quick project," and that it would take approximately six months from the time of final plat approval to the construction and marketing of the lots. Riggs specifically projected a 24-month "absorption rate"—that is, a two-year period during

which all of the lots were expected to be sold. Neither defendant disclosed the storm water concerns, that lot 54 would need additional work to handle the drainage from phase II, or any encumbrances on the land.

¶ 14 Constantine also stated that between August and December 2005, the defendants advised that the project had preliminary plat approval with the City and they were in the "fairly quick process" of securing final plat approval. At no point in 2005 did either Riggs or Ragan mention any issues with storm water, nor did they disclose any encumbrances and specifically did not advise them that another entity held an easement and a right to repurchase on part of phase III. Overall, the plaintiffs trusted Riggs because of Constantine's prior dealing with him, and relied on him because he was their "local guy" and "the guy that had experience already in th[e] field."

¶ 15 Thorne, who had an undergraduate degree and two master's degrees in marketing from the University of Wisconsin, but no real estate development experience, offered testimony consistent with Constantine's. He testified that the defendants stated "that they saw no obstacles to achieving final plat approval." He also added that Riggs represented that he was a development expert, and Riggs informed the plaintiffs of other developments on which he worked in Illinois and Iowa.

¶ 16 In September 2005, Riggs and Ragan submitted a preliminary plat of phases II and III to the City for approval. Washelesky testified that he essentially resubmitted the plat that he had prepared for Oliver and Niles in 1995. The City tentatively approved the plat in November 2005; however, it conditioned final approval on the developers generating a regional solution for the storm water issues. According to Washelesky, both he and Riggs attended this meeting. Around this same time, Riggs and Ragan formed HFO. Juul Thompson, their attorney, drafted the operating agreement, which was executed on December 23, 2005.

¶ 17 Constantine and Thorne decided to invest in Heritage Fields. On November 1, 2005, James Cooke, the plaintiffs' attorney, prepared a letter of intent (LOI), which Ragan signed. The LOI specified that the plaintiffs would purchase 36 lots—33 single-family home sites and 3 duplex lots—for $750,000. The LOI also specified that the total "development expenses of the property [were] not to exceed $550,000," with the *pro rata* share allocable to the plaintiffs not to exceed $275,000, with Riggs and Ragan responsible for any overage.

¶ 18 The parties signed a purchase agreement, prepared by Cooke, in December 2005. Pursuant to this agreement, Constantine and Thorne purchased Ragan's 50% interest in HFO; thus, Riggs retained 50% of HFO and Constantine and Thorne each owned 25%. This agreement included the earlier language and terms in the LOI. It also recited that Riggs and Ragan held title to the real property, and that "[t]here [were] no leases, mortgages, pledges, liens, charges, security interests, encumbrances or restrictions undisclosed to" the plaintiffs.

¶ 19 Also in December 2005, Ragan entered into an agreement with First Chair Skin Care to purchase the westernmost portion of the property in phase III for $130,000. Pursuant to this agreement, Ragan agreed to build a road, Lewis Drive, at his expense, and until the road was built, First Chair Skin Care retained an easement over the right of way contemplated for the road. Additionally, if Ragan did not construct the road within three years, First Chair Skin Care had the right to repurchase this parcel of land for the purchase price of $130,000. This agreement stated that Ragan was to file a "Memorandum of Agreement" indicating that First Chair Skin Care retained an easement and right of repurchase. The record does not disclose that Ragan or Riggs ever filed the "Memorandum of Agreement." The plaintiffs testified that they never saw the purchase agreement. The deed conveying this property to Ragan did not disclose the easement or the right of repurchase.

¶ 20 In February 2006, Riggs and Ragan closed on their purchase of the property owned by Oliver and Niles. The record indicates that they paid $250,000, financed by American Bank and Trust. Thereafter, on March 10, 2006, the plaintiffs and defendants closed on their purchase/development agreement. Approximately half of the plaintiffs' purchase money went to pay off the mortgages on the property. Ragan was paid $364,000.

¶ 21 In August 2006, AEA submitted a plat of phase II for final approval by the City. Riggs did not seek approval for phase III. The City approved the final plat for phase II, but conditioned the issuance of any building permits on "a suitable storm water management plan, for this addition and the subdivision in general, [being] approved by the City." The City also required a regional storm water study, *i.e.*, a drainage study of the entire watershed, totaling approximately 480 acres, of which HFO comprised approximately 20%.

¶ 22 According to Constantine and Thorne, in September 2006, Riggs informed them that he had sought and received final plat approval for phase II only. According to the plaintiffs, this information was a surprise because they had been led to believe that the project would proceed in one phase. The plaintiffs also testified that at that time, they believed that $550,000 represented the cost to develop the entire property; however, Riggs had just informed them that this estimate only covered phase II, and that the total development costs would be approximately $1.2-$1.3 million.

¶ 23 Constantine and Thorne further testified that in February or March 2007 they learned that the City was withholding the building permits for phase II until HFO submitted a regional storm water study. However, in March 2007 HFO secured 10 building permits in exchange for funding the regional storm water study. The record indicates that Riggs and Ragan each paid for half of this study, and were reimbursed from tax increment financing (TIF) funds from phase I.

The City subsequently gave HFO an additional 10 building permits in October 2007 on the condition that HFO construct temporary retention.

¶ 24 The parties executed a revised operating agreement on October 29, 2007, which the plaintiffs characterized as a clarification of the existing agreement with added detail. Pursuant to the terms of this agreement, Riggs received 20 lots in phase II. That same day, Riggs transferred 10 of these lots to Ragan for a total price of $175,000, although the market price of each lot was $45,000 at that time. Ragan subsequently sold three of these lots for $45,000 each.

¶ 25 Constantine and Thorne met with Washelesky in September 2008. At that meeting, they learned from Washelesky for the first time, that lot 54 would need additional engineering work to provide drainage for the subdivision, that the western portion of phase III did not flow into lot 54 and that phase III was encumbered with First Chair Skin Care's easement and right of repurchase. Thorne acknowledged that he had attended a meeting in February or March 2007 where storm water issues were discussed, and that he learned in March 2007 that the City would only issue 10 building permits. However, he did not know the underlying facts until September 2008. The plaintiffs ultimately spent over $1.2 million on HFO.

¶ 26 Schmidt testified that he met with the defendants four times to discuss HFO, including once at the site location and once at the O'Hare Hilton in October 2005. Riggs only discussed costs of $550,000, which Schmidt presumed to be the total cost for the development because they did not speak of anything other than total cost. Riggs said nothing about developing the property in separate phases, and affirmatively represented that the project had no encumbrances to building, and that it was possible to be "in and out" in 24 months. When Schmidt left this meeting, he believed that the project was "shovel ready" and "ready to go." Schmidt also stated that, when he met with Ragan, he was not shown any documents or cost estimates. Schmidt

ultimately decided not to invest in HFO.

¶ 27 Washelesky informed Riggs and Ragan at the time of the preliminary plat approval process in 2005 that the western half of phase III did not flow into lot 54. Riggs had attended a 2005 planning commission meeting where the individuals discussed that phase II would need additional detention and that the City would withhold some building permits pending a resolution. At that time, Riggs only sought approval of the plat for phase II. AEA believed that building would have to occur before most of the detention problems surfaced. Kusek was the City's engineer both at the time Oliver and Niles submitted the original plat in 1995, and again when Riggs submitted the plat of phase II in 2005. According to Kusek, Riggs was present at a meeting at the mayor's office in 2005, when he discussed the storm water solutions for the subdivision. He also stated that "the historical water control issues from 1995[,]" and a "regional solution" to the water problem were discussed at a November 2005 planning commission meeting.

¶ 28 Ragan testified that he was in the construction business. He and Riggs had originally intended to purchase and develop only phase II of HFO, but the Oglesby mayor requested that they also develop phase III, and they agreed. He negotiated the purchase of the land that comprised phase III from Badge-a-Minit and First Chair Skin Care. As part of the purchase contract, First Chair Skin retained an easement and a right to repurchase the land within three years if Ragan did not construct a road for their ingress and egress.

¶ 29 Ragan denied knowledge of significant issues regarding storm water in 2005. At the time he signed the LOI, he knew that total development costs for phases two and three would exceed $550,000, but the costs to the plaintiffs would not exceed $275,000. He provided the July 2005 EOPC to Constantine when he first met him, and showed it to Thorne during the meeting at the

O'Hare Hilton, and therefore, believed that everyone was aware that the $550,000 development costs represented only phase II.

¶ 30 Ragan denied telling the plaintiffs that Heritage Fields could be developed in one phase in 2006 or that he and Riggs owned the land that would comprise Heritage Fields prior to the plaintiffs' purchase into HFO. He acknowledged, however, that the latter statement appeared in the December 2005 purchase contract and it was not true at the time. Ragan further acknowledged that he had informed the plaintiffs that he had worked on a subdivision similar to phase II in Leland, Illinois, but he did not hear Riggs inform the plaintiffs that he was a developer. Ragan denied: (1) informing plaintiffs that there were no impediments to final plat approval; (2) discussing the First Chair Skin Care purchase with them; (3) intentionally keeping the easement or the right of repurchase from the plaintiffs, asserting that the easement was evident from the plat; and (4) representing that the total development costs for phases II and III would be $550,000. Ragan acknowledged that he was unsure how he was harmed by any purported delay on the part of the plaintiffs in the filing of the instant lawsuit.

¶ 31 In Riggs' testimony, he confirmed that he purchased the land comprising phase II from Oliver and Niles in 2005 for $250,000, and he subsequently agreed to purchase and develop phase III after speaking with the mayor and after the plaintiffs expressed an interest in investing in HFO. Riggs was at the October 2005 meeting at the O'Hare Hilton with Thorne and Constantine. He asserts that he advised Constantine, prior to the time the parties signed the purchase contract, that the project had increased in size.

¶ 32 Riggs acknowledged knowing in 2005 that lot 54 was not sufficient to provide all of the drainage for phase II and that it would need some additional work, but because the EOPC for phase II had a line item of $80,000 for detention work, plaintiffs also knew that work would

need to be done. With regard to phase III, Riggs denied knowing of any drainage issues with the western portion of that phase until after the November 2007 water study. He did not participate in meetings with Washelesky or the mayor about storm water issues and was unsure whether he attended the November 2005 preliminary plat approval meeting. Riggs gave Constantine the EOPC for phase II before December 2005. Riggs was aware of First Chair Skin Care's easement and right of repurchase, and he had provided plaintiffs with a copy of the purchase agreement.

¶ 33 Riggs denied telling the plaintiffs that Heritage Fields could be developed in one phase in 2006. He contended that the plaintiffs knew that he did not have development experience, but admitted knowing the plaintiffs were relying on him for information. In 2006, he informed the plaintiffs that the total costs of development for both phases would be between $1.2-$1.3 million. According to Riggs, by April 2008, the parties' relationship had deteriorated to the point that Riggs sent a notice to sever to Constantine and Thorne. Riggs did not know how to determine any harm caused by the plaintiffs' alleged delay in the filing of the instant lawsuit.

¶ 34 II. Trial Court's Ruling

¶ 35 The court found that the defendants engaged in fraud and, among other relief, rescinded the purchase contract.

¶ 36 The court specifically found that the following facts or representations were not of such significance to deter the plaintiffs from investing in HFO: the defendants' lack of title to the property at the time of the purchase contract, that construction would not proceed in one phase or within one year, the defendants' lack of prior development experience, and that the development expenses would not exceed $550,000. However the court found that "the crux of the alleged fraud in the view of this trier of fact revolve[d] around the disclosure that there were no impediments to obtaining final plat approval and/or the omission of any information to the

plaintiffs pertaining to the storm water detention issues on lot 54 and the northwestern portion of Phase III." These statements were false and, in conjunction with the other facts, were sufficient to constitute fraud.

¶ 37 More specifically, the court found the representation in the purchase agreement that there were no encumbrances on the property and the oral statements indicating that there were no impediments to final plat approval to be false; the plaintiffs did not learn of the falsity until their September 2008 meeting with Washelesky; Riggs' testimony that he furnished a copy of the purchase agreement with First Chair Skin Care parcel was not credible; the purchase agreement was not part of a public record and thus, plaintiffs could not have discovered it; defendants had a duty to disclose the easement and right of repurchase and failed to do so.

¶ 38 With regard to the non-disclosure of the drainage issues, the court determined that Ragan's statement that he delivered the EOPC for phase II to the plaintiffs at their first meeting and had it available at the October 2005 Hilton meetings was also not credible; the parties engaged in a co-business venture and owed one another fiduciary duties; the defendants should have disclosed the storm water issues and the encumbrances, and their failure to do so was fraudulent.

¶ 39 The court also found that the failure to disclose the drainage and encumbrances issues was material because it "created an open-ended issue for the potential flow of money in addition to the undisputed fact that it caused a significant delay in the final plat approval by the city and the ultimate sale of lots in the subdivision." The court noted that the plaintiffs' reliance on Riggs' and Ragan's representations was reasonable because they created a "false sense of security" and the statements were presumed to be within their knowledge.

¶ 40 The court rejected the defendants' affirmative defenses of waiver and laches. Regarding

waiver, the court noted that the plaintiffs did not learn of the totality of the fraud until the September 2008 meeting with Washelesky and did not thereafter engage in conduct inconsistent with the instant lawsuit. The court further found that the defendants "would have a very strong argument" for laches were it not for the fact that the plaintiffs' learned of the totality of the fraud in late 2008 and filed suit in March 2009. Thus, the delay between learning the facts and filing the lawsuit was not sufficiently significant to prove this defense.

¶ 41 The court ultimately rescinded the purchase contract and ordered the defendants to return the $1.205 million the plaintiffs had spent on the project.

¶ 42 The defendants appeal.

¶ 43 ANALYSIS

¶ 44 On appeal, the defendants assert that the trial court erred when it found their statements that there were no encumbrances and no obstacles to final plat approval to constitute fraudulent misrepresentations, that the plaintiffs did not justifiably rely on these statements, and that these purported statements were not intended to deceive the plaintiffs. The defendants also claim that the evidence was insufficient to show that they fraudulently concealed the storm water issues and encumbrances. Finally, the defendants allege that the court erred by denying their affirmative defense of waiver and abused its discretion by denying their affirmative defense of laches.

¶ 45 To establish a claim for fraud, the plaintiffs must show: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) intended to induce the plaintiff to act; (4) the plaintiff acted on the statement in reliance of the truth of the representation; and (5) resulting damage. *Fogel v. Enterprise Leasing Co. of Chicago*, 353 Ill. App. 3d 165, 171 (2004). A misrepresentation is material if the listener would have acted

differently had he known the truth of the statement, or if the speaker knew the statement was likely to induce the listener to engage in the action in question. *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 285 Ill. App. 3d 201, 209-10 (1996). "In order to consist of fraud in the inducement, defendant must have made a false representation of material fact knowing or believing it to be false and doing it for the purpose of inducing plaintiff to act." *Hassan v. Yusef*, 408 Ill. App. 3d 327, 343 (2011).

¶ 46 A party must prove fraud by clear and convincing evidence, and a trial court's determination on this matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Warren Chevrolet v. Bemis*, 197 Ill. App. 3d 680, 686 (1990). A decision is against the manifest weight of the evidence only if the opposite conclusion is readily apparent or when the finding is arbitrary, unreasonable or not based on the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002).

¶ 47 I. Fraudulent Misrepresentations

¶ 48 The defendants first contend that the trial court erred when it determined that they engaged in fraudulent misrepresentation when it found that they stated there were no impediments to final plat approval and due to the statement in the written contract that there were "no encumbrances."

¶ 49 A. No Impediments

¶ 50 Here, the court found the defendants' statements that there were no impediments to final plat approval to be fraudulent. The defendants specifically assert that this finding was against the manifest weight of the evidence because any statement that there were no impediments to final plat approval was a nonactionable representation of a future event. The defendants also assert that any impediment was a matter of law, not fact, and disclosed by public records. The

plaintiffs counter that they presented sufficient evidence indicating that the defendants made these statements and that misrepresentations about the approval process, including the substance of conversations with Washelesky and city officials, were statements of fact and were not discoverable by the plaintiffs through the public records.

¶ 51 Our review of the record reveals that the trial court properly found that the defendants made statements indicating that there were no impediments to final plat approval and other statements to this effect. Specifically, Constantine and Thorne each testified that the defendants stated that there were no obstacles to final plat approval. Both plaintiffs also stated that the defendants represented that the project would be quick, thus supporting the assertion that there were no impediments to obtaining final plat approval from the City and proceeding with the project. Schmidt's testimony further supports the trial court's finding, as he specifically stated that he believed the project to be "shovel ready" after a meeting with Riggs.

¶ 52 The record also supports the finding that the defendants knew that any statement indicating that there were no impediments or obstacles to final plat approval was false. Although the defendants testified that they did not know there were significant storm water issues in 2005, and any issues did not appear major, other evidence in the record rebuts these assertions. Specifically, Washelesky stated that he informed Riggs and Ragan about the drainage concerns for the western portion of phase III in 2005, and that Riggs attended a planning commission meeting in 2005 where the individuals discussed that phase II would need additional storm water detention. Kusek confirmed that Riggs attended the 2005 planning commission meeting where the individuals discussed the "historical water control issues" and that a regional solution was needed for the drainage problems.

¶ 53 In reaching this conclusion, we reject the defendants' contention that any statement that

there were no impediments to final plat approval was a nonactionable statement of future events. Rather, this statement by the defendants was one of present fact—that the property was in a condition at that time to receive final plat approval. Furthermore, the defendants have not pointed to any evidence in the record on appeal showing that the conversations regarding the storm water issues were indeed matters of public record and thus, a matter of law that could have been ascertained by the plaintiffs.

¶ 54 Essentially, the evidence shows that the defendants were aware that the storm water issues originally surfaced in 1995, and were surfacing again in 2005 and were of major concern to the City. Thus the defendants knew or should have known that the issue of drainage was sufficiently significant to create an obstacle to final plat approval. Consequently, the trial court properly found that the defendants knew any statement purporting that there were no impediments or obstacles to final plat approval was false.

¶ 55 B. No Encumbrances

¶ 56 The defendants next assert that the statement in the purchase agreement that there were no encumbrances on the property was not fraudulent because the plaintiffs' attorney drafted the agreement and because encumbrance is a term of art and not a factual statement that can support fraud.

¶ 57 We conclude that the court also correctly found that the statement in the purchase agreement that the property was not encumbered was false. Quite simply, at the time the parties entered into the purchase agreement, and for the duration of the plaintiffs' involvement in HFO, the property was encumbered with First Chair Skin Care's right of repurchase and easement. Ragan obviously knew this because he entered into the purchase agreement with First Chair Skin Care, and Riggs acknowledged that he knew of the easement and right of repurchase. While the

trial court found Riggs' testimony that he provided the plaintiffs with a copy of the purchase agreement between Ragan and First Chair Skin Care was not credible, the testimony itself indicates that Riggs understood the significance of the information in the contract.

¶ 58 Furthermore, the fact that Cooke drafted the purchase agreement is of no consequence to our determination. The record suggests that Cooke was simply memorializing the parties' conversations and included this provision to reflect the assurances that there were, in fact, no encumbrances on the property. Once the defendants signed the purchase contract without "correcting" it, they misrepresented that the property comprising Heritage Fields was not encumbered. Such a representation was false and the defendants knew it was false before, during, and after the signing of the purchase agreement. Thus, the record amply supports the trial court's finding that the statement in the purchase contract indicating that Heritage Fields was not encumbered was false and that the defendants signed the agreement knowing it was false.

¶ 59 II. Fraudulent Concealment

¶ 60 The defendants next assert that the court erred when it determined that they fraudulently concealed the information about the storm water issues and the encumbrances. In this regard, the court specifically found that the defendants fraudulently concealed the storm water issues and First Chair Skin Care's easement and right of repurchase from the plaintiffs at a time when they had a fiduciary relationship due to their status as joint venturers, and thus had a fiduciary duty to disclose this information to the plaintiffs.

¶ 61 The defendants argue that there was no legal relationship between the parties prior to the time they signed the December 2005 purchase contract. Thus, they did not have a precontractual duty to disclose this information. The plaintiffs have not embraced the trial court's finding that they were joint venturers with the defendants either at trial or on appeal. Rather they argue that

they were inexperienced developers and relied on the defendants, who held themselves out as experienced developers, and that the defendants thus had a duty to disclose the storm water concerns and encumbrances to them.

¶ 62 Fraud can encompass an intentional misrepresentation or an intentional concealment. *Obermaier v. Obermaier*, 128 Ill. App. 3d 602, 606 (1984). In order to prove a claim of fraudulent concealment, or fraudulent omission, the plaintiff must establish that: "(1) the defendant concealed a material fact under circumstances that created a duty to speak; (2) the defendant intended to induce a false belief; (3) the plaintiff could not have discovered the truth through reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and justifiably relied upon the defendant's silence as a representation that the fact did not exist; (4) the concealed information was such that the plaintiff would have acted differently had he or she been aware of it; and (5) the plaintiff's reliance resulted in damages. [Citation.]" *Bauer v. Giannis*, 359 Ill. App. 3d 897, 902-903 (2005).

¶ 63 To successfully assert a claim for fraudulent concealment, the plaintiff must establish the existence of a special or fiduciary relationship, which in turn gives rise to a duty to speak. *Hassan v. Yusef*, 408 Ill. App. 3d 327, 345 (2011). In a fiduciary or special relationship, the dominant party's silence alone may constitute fraudulent concealment. *Hassan*, 408 Ill. App. 3d at 345. A fiduciary relationship exists as a matter of law between attorneys and their clients, principals and agents (*Bremer v. Bremer*, 411 Ill. 454, 465 (1952)), as well as in a partnership or joint venture (*Hassan*, 408 Ill. App. 3d at 345).

¶ 64 In instances where a fiduciary relationship does not exist as a matter of law, it may arise due to a special or confidential relationship between the parties. "The proof of a confidential relationship requires a showing that one party has reposed trust and confidence in another who

thereby gains an influence and superiority over the other. [Citation.] 'The relationship may be moral, social, domestic, or merely personal.' [Citation.] Factors to be considered in determining whether a confidential relationship exists are the degree of kinship of the parties, the disparity in age, health, mental condition, education and business experience between them and the degree of trust placed in the dominant party. [Citation.]" *Taino v. Sanchez*, 147 Ill. App. 3d 871, 874 (1986).

¶ 65 When a fiduciary relationship does not arise as a matter of law, the party asserting the special relationship must establish its existence by clear and convincing evidence. *State Security Ins. Co. v. Frank B. Hall & Co*., 258 Ill. App. 3d 588, 595 (1994). A reviewing court will not overturn a trial court's finding on the breach of a fiduciary duty unless it is against the manifest weight of the evidence. *Hassan*, 408 Ill. App. 3d at 345.

¶ 66 In this case, the record is sufficient to support a finding that the parties shared a special, and thus fiduciary, relationship.

¶ 67 Concerning the relevant factors, the record does not disclose the parties' relative ages, health, or mental conditions. It does not appear that the parties were related. Thus, these factors do not pertain to our analysis.

¶ 68 The evidence does show that the plaintiffs were well educated, but had no real estate development experience. Even if the defendants were not experienced developers, they held themselves out as such based on their representations that they developed phase I of Heritage Fields. Additionally, the plaintiffs invested with Riggs in ROI, and it does not appear that that venture encountered problems like the ones in the instant case. During his testimony, Riggs acknowledged that the plaintiffs relied on him to provide them with information about Heritage Fields. Thus, given their prior dealings in ROI, the plaintiffs were entitled to believe that Riggs

would furnish accurate and complete information as to Heritage Fields. Additionally, although Riggs and Ragan may not have been dominant parties from an educational standpoint, they were dominant in that they were local to the Oglesby area, represented that they had development experience and had developed phase I, and also because Riggs served as the contact person for information on Heritage Fields from the City and Washelesky. Essentially, Riggs could control what information, if any, the plaintiffs received, and he in fact did so.

¶ 69 We acknowledge the defendants' assertion that they did not owe any fiduciary duties to the plaintiffs before the signing of the purchase agreement. See *Lagen v. Balcor Co*., 274 Ill. App. 3d 11, 21 (1995) ("[T]he conduct objected to by plaintiffs predate[d] plaintiffs' status as limited partners. Plaintiffs, therefore, cannot rely on their subsequent partnership status to give rise to a fiduciary relationship."). Nonetheless, other courts have noted that a party may present sufficient facts to support a finding of a precontractual fiduciary duty. See *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 47 (1994) (in a complex commodities transaction, where the plaintiffs were at the mercy of the broker to learn of certain expenses, the plaintiffs had placed sufficient trust and confidence in the broker to support a fiduciary duty of fair dealing). Here, the record shows that plaintiffs had an established relationship with Riggs in ROI, and that Riggs represented HFO in the development process with the City. Additionally, the record does not support the defendants' assertion that the concealed information on the encumbrances or storm water issues were matters of public record. Therefore, the plaintiffs showed sufficient trust and confidence in Riggs as well as a need to get relevant information from Riggs and Ragan, who were in possession of it, to warrant a precontractual duty to disclose the information regarding the encumbrances and storm water concerns.

¶ 70 In so concluding, we are also mindful of avoiding a result that will encourage parties to

misrepresent or conceal pertinent information, information which may be difficult or impossible for the other party to obtain, during the negotiation process so as to encourage the innocent party to enter the transaction. Additionally, as soon as the parties in such a situation enter the relationship that gives rise to fiduciary duties, the innocent party should be made aware of the pertinent information. In this case, neither Riggs nor Ragan informed the plaintiffs of the encumbrances or the storm water concerns even after entering into the purchase agreement; instead they learned of the problems from Washelesky nearly three years after signing it.

¶ 71 Based on the aforementioned evidence, we conclude that the parties shared a special relationship. Because the defendants controlled the flow of information about HFO to the plaintiffs, they had a duty to disclose this information before, during, and after the plaintiffs signed the purchase agreement. See *Burdett v. Miller*, 957 F.2d 1375, 1381-82 (1992) (in a case involving breach of a fiduciary duty under Illinois law, the federal appeals court found that the defendant, an accountant, breached a fiduciary duty to the plaintiff, an investor, by failing to disclose pertinent information about the investment in which the defendant sold and the plaintiff purchased, as the defendant represented that he was an expert and was trustworthy). Consequently, the defendants had a duty to disclose the storm water issues and encumbrances with the plaintiffs at the time they had this information in 2005, and they breached this duty by failing to do so. Therefore, albeit on a different basis, the trial court properly determined that the defendants had a duty to disclose the storm water concerns and encumbrances to the plaintiffs. See *Cwik v. Giannoulias*, 237 Ill. 2d 409, 424 (2010) (a reviewing court can affirm the judgment of the trial court on any basis apparent from the record).

¶ 72 III. Inducement

¶ 73 We further conclude that the record supports that the defendants made the

aforementioned statements and concealments to induce the plaintiffs to invest in HFO. There is no other reason for the defendants to represent that there were no impediments to final plat approval or that there were no encumbrances on the property that comprised Heritage Fields, or to fail to disclose these concerns to the plaintiffs.

¶ 74 In reaching this conclusion, we reject the defendants' contention that because the EOPC for phase II included an item that excavation and detention would cost $80,000, they sufficiently disclosed that work would have to be performed on lot 54 to properly prepare the subdivision for its detention issues. We do not believe that this line item sufficiently conveyed to the plaintiffs that additional work would need to be performed on lot 54 so that it may properly handle all of the storm runoff from phase II, or that it indicated that the western portion of phase III did not flow into lot 54 and would need another solution.

¶ 75 The defendant's contention that they could not have intended to deceive the plaintiffs because the plaintiffs' attorney drafted the purchase contract is likewise without avail. Rather, as previously discussed in paragraph 58, it is more likely that Cooke was memorializing the terms of the arrangement as reported by the plaintiffs, who had no way of knowing that the property was encumbered at the time they entered into the purchase agreement. Furthermore, by signing the agreement, the defendants affirmatively represented that there were no encumbrances. However, both Riggs and Ragan were aware that First Chair Skin Care held an easement and right of repurchase. Given the defendants' knowledge of the easement and right of repurchase, there is no rational reason why they did not disclose them to the plaintiffs other than to induce the plaintiffs to invest in Heritage Fields.

¶ 76 IV. Justifiable Reliance

¶ 77 We next consider whether the plaintiffs justifiably relied on the defendants'

representations that there were no impediments to final plat approval and no encumbrances on the property, as well as their omissions concerning the storm water issues and encumbrances. The defendants assert that the plaintiffs could not have properly relied on the purported statements because they were vague and the plaintiffs could have ascertained this information because it was a matter of public record. The plaintiffs contend that Riggs and Ragan held themselves out to be experienced developers, and due to their prior relationship with Riggs in ROI, they were entitled to trust the defendants' representations. Additionally, Riggs and Ragan signed the letter of intent and purchase agreements, thereby affirming to the terms contained in them.

¶ 78 To determine whether one party justifiably relies on the other's representations, a court takes into consideration "all of the circumstances surrounding the transactions, including the parties' relative knowledge of the facts available, opportunity to investigate the facts and prior business experience." *Luciani v. Bestor*, 106 Ill. App. 3d 878, 884 (1982). In general, reliance is not justified when the parties have equal knowledge or means of obtaining knowledge of the misrepresented facts. *Hassan*, 408 Ill. App. 3d at 345. However, a party may justifiably rely on the representation of another where the other has created a false sense of security or blocked further inquiry, as long as the facts were not such to put a reasonable person on inquiry. *Marino v. United Bank of Illinois, N.A.*, 137 Ill. App. 3d 523, 527 (1985). Additionally, one party may justifiably rely on the representations of the other, absent any independent investigation, where the listener did not have the same ability to discover the truth as the person making the representations. *Gerill Corp. v. Jack L. Hargrove Builders, Inc.* 128 Ill. 2d 179, 195 (1989). Like the other elements of a fraud claim, justifiable reliance is a question of fact that a reviewing court will not disturb unless it is against the manifest weight of the evidence. *Brown v.*

*Broadway Perryville Lumber Co*., 156 Ill. App. 3d 16, 23 (1987).

¶ 79 In this case, the trial court did not err when it found that the plaintiffs justifiably relied on the defendants' statement that there were no impediments to final plat approval and the provision in the purchase contract that the Heritage Fields property was not encumbered. Based on the cited precedent, the overall circumstances of the parties' relationship and the transaction support this finding.

¶ 80 First, as we have already concluded, the record indicates that neither Constantine nor Thorne knew of First Chair Skin Care's right of repurchase or easement, or of the storm water concerns, until the September 2008 meeting with Washelesky. Conversely, Ragan and Riggs knew of the encumbrances when Ragan entered the purchase contract in December 2005, and also knew of the storm water detention issues in 2005. Thus, the defendants knew the falsity of their representations regarding the encumbrances and the storm water issues two or three years before the plaintiffs acquired this knowledge.

¶ 81 We next consider the plaintiffs' ability to investigate the facts and their prior business experience. Along these lines, we note that both Constantine and Thorne are well-educated and sophisticated business men. Additionally, we do not disagree with the defendants' assertion that the plaintiffs should have searched the public records before they entered this transaction. However, the defendants have not established that Ragan's contract with First Chair Skin Care was recorded. Also, the warranty deed conveying the property to Ragan does not disclose the easement or right of repurchase. Additionally, while Lewis Road may appear on the plat, there is nothing to indicate that First Chair Skin Care retained an easement as a means of ingress and egress.

¶ 82 We further acknowledge the defendants' contention that any statement of "no

impediments" concerned the municipal plat approval process and the plat itself and that any "approval conditions" were matters of public record available to all of the parties. However, the defendants have not shown that the storm water issues were, indeed, matters of public record. Rather, these concerns were voiced during conversations in the planning stages. Although some concerns were discussed at a planning commission meeting, the record does not contain the minutes of this meeting and it also does not disclose whether the minutes were made public. Thus, we cannot say that the plaintiffs would have discovered any impediments even if they had searched the public records.

¶ 83 Overall, the plaintiffs were entitled to rely on the defendants' representations. The evidence shows that Riggs and Ragan held themselves out as experienced developers, and due to the plaintiffs' relationship with Riggs in ROI, they trusted him. The plaintiffs also noted that Riggs was their "local guy" and they relied on him to furnish information to them about Heritage Fields. Essentially, this situation is one where the defendants created a false sense of security in the plaintiffs. Therefore, we conclude that the plaintiffs had no duty to conduct an investigation because they properly relied on the defendants. Consequently, the trial court's determination that the plaintiffs' reliance on the defendants' fraudulent misrepresentations and concealments concerning the encumbrances and storm water issues was not against the manifest weight of the evidence.

¶ 84 V. Injury

¶ 85 The defendants next assert that the plaintiffs were not injured because they did not establish that the value that they received from their involvement with HFO was less than the value they were promised, and also because the real estate market crash of 2007 proximately caused the plaintiffs' injuries. The plaintiffs, on the other hand, contend that they were injured

because they invested in a project much different than the project represented by the defendants and that the court properly rescinded the contract and restored the parties to their *ex ante* positions.

¶ 86 When a party is induced by fraud to enter a contract, the contract is voidable at the option of the innocent party. *23-25 Building Partnership v. Testa Produce Inc.*, 381 Ill. App. 3d 751, 757 (2008). In that instance, the innocent party may elect to rescind the contract and restore the parties to their initial status. *23-25 Building Partnership*, 381 Ill. App. 3d at 757.

¶ 87 We conclude that the defendants' fraudulent misrepresentations and concealments proximately caused the plaintiffs to sustain a pecuniary injury. Here, pursuant to the terms of the purchase agreement, the defendants represented that the total cost of the project would be $550,000, and the plaintiffs' share of these costs was limited to $275,000. However, the plaintiffs actually spent $1.205 million on Heritage Fields. Thus, the trial court correctly found that the project in which the plaintiffs invested was significantly different than what it was represented to be. In reaching this conclusion, we reject the defendant's assertion that the real estate market crash of 2007 proximately caused the plaintiffs' injury, noting that if the project had proceeded as the defendants represented, Heritage Fields would have been developed in one phase and in one year, and perhaps prior to the 2007 real estate market downturn.

¶ 88 VI. Waiver and Laches

¶ 89 The defendants lastly claim that the trial court erred when it rejected their affirmative defenses of waiver and laches. Among other things, the defendants assert that the revised operating agreement of 2007 effectuated a waiver of the plaintiffs' right to relief. The plaintiffs disagree, and contend that because they were unaware of the totality of the defendants' fraudulent conduct until their September 2008 meeting with Washelesky, they did not waive

their right to relief. The plaintiffs also assert that the revised operating agreement did not contain any language waiving a claim against the defendants. Regarding laches, the plaintiffs assert that the defendants did not suffer any prejudice resulting from any delay in the filing of their lawsuit.

¶ 90 Waiver is the voluntary relinquishment of a known right or claim. *Vaughn v. Speaker*, 126 Ill. 2d 150, 161 (1988). Regarding fraud, waiver arises when a party, after discovering the fraud and with full knowledge of its material aspects, engages in conduct that is inconsistent with the party's right to sue. *Kaiser v. Olson*, 105 Ill. App. 3d 1008, 1014 (1981). Laches, on the other hand, is an equitable doctrine which precludes the assertion of a claim by a party who unreasonably delays raising it, thus resulting in prejudice to the opposing party. *Ulm v. Memorial Medical Center*, 2012 IL App (4th) 110421, ¶ 52. Two elements are necessary to a finding of laches: (1) lack of diligence by the party asserting the claim; and (2) prejudice to the opposing party resulting from the delay. *Ulm*, 2012 IL App (4th) 110421, ¶ 52.

¶ 91 We review a trial court's ruling on the matter of waiver to determine if it was against the manifest weight of the evidence. See *Galesburg Clinic Association v. West*, 302 Ill. App. 3d 1016, 1020 (1999). A trial court's ruling on the affirmative defense of laches is reviewed for an abuse of discretion. *Ulm v. Memorial Medical Center*, 2012 IL App (4th) 110421, ¶ 52.

¶ 92 We have already concluded that the plaintiffs did not discover the totality of the defendant's fraudulent conduct until the September 2008 meeting with Washelesky. Thereafter, on March 27, 2009, the plaintiffs filed the instant lawsuit. Thus, no action of the plaintiffs prior to September 2008, including the execution of the revised operating agreement in October 2007, properly serves as a waiver of their right to relief. Furthermore, our review of the record reveals no conduct subsequent to September 2008 that is inconsistent with the filing of the instant

lawsuit. Consequently, the trial court did not err when it denied the defendants' affirmative defense of waiver.

¶ 93 Concerning laches, we do not believe that the six-month delay between the time the plaintiffs learned of the totality of the defendant's fraudulent conduct and when they filed the instant suit was either so significant or so unreasonable as to bar their claim on the basis of laches. Moreover, both the defendants acknowledged that they could not say how they were prejudiced by any purported delay in the filing of the instant lawsuit. Therefore, the trial court did not abuse its discretion when it denied the defendant's affirmative defense of laches.

¶ 94 CONCLUSION

¶ 95 For the foregoing reasons, he judgment of the circuit court of LaSalle County is affirmed.

¶ 96 Affirmed.