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May 3, 2018

VIA HAND DELIVERY
Hon. Raag Singhal
Broward County Courthouse
201 S.E. 6th Street, Room 15125
Fort Lauderdale, FL 33301

Re: ***Lauderhill Lending, LLC v. Florida Holding 4800, LLC***
Case No. CACE-16-012986

Dear Judge Singhal:

Our firm represents the Defendant, Florida Holding 4800, LLC. Your Honor was gracious enough to allow us time to respond relating to one hanging issue from the continued motion for summary judgment hearing that took place last week. We thank you in advance for the opportunity to provide this response and will keep it short.

The hanging issue is whether or not an "AS IS" clause within a purchase agreement for commercial real property insulates a seller from liability for fraud and, even more specifically, the active concealment of a known defect.

After conducting sufficient research, it appears that the analysis boils down to whether or not the condition could have been discovered through the exercise of ordinary diligence. The standard for "ordinary diligence" is a cursory examination or investigation. In other words, a purchaser is not obligated to conduct destructive testing to verify the condition of the property.

There are a few cases on point.

Just like our case, *Hayim Real Estate Holdings, LLC v. Action Watercraft International, Inc.*, 15 So.3d 724 (Fla. 3d DCA 2009), involved an "AS IS" provision within a purchase agreement for commercial real property. Interestingly, the reported decision is also a reversal of a summary judgment that had been granted in favor of the plaintiff. The Court stated that "to affirm summary judgment, this Court would have to agree that no genuine issue of material fact remained as to whether … (3) the defendants actively concealed known defects from the plaintiff." *Id.* at 727. The Court went on to state that "[w]e hold that [defendant's] affidavit provides a genuine issue of material fact as to whether the defendants actively concealed a known defect." *Id.* Again, and important to this memo, is that *Hayim* involved an "AS IS" disclaimer and squarely addressed

whether or not such a disclaimer is effective to avoid allegations of active concealment. The *Hayim* Court said no.

Wasser v. Sasoni, 652 So.2d 411 (Fla. 3d DCA 1995), is another summary judgment case involving an "AS IS" purchase agreement relating to commercial property. In *Wasser*, the Court reiterated the long-standing notion that "the doctrine of *caveat emptor*, or "buyer beware," is still the common law rule apply to purchasers of commercial property." *Id.* at 412. The Court went on to state that "a misrepresentation is not actionable where it's truth might have been discovered by the exercise of ordinary diligence." *Id. citing Steinberg v. Bay Terrace Apartment Hotel, Inc*., 375 So.2d 1089 (Fla. 3d DCA 1979); *Welbourn v. Cohen*, 104 So.2d 380 (Fla. 2d DCA 1958).

Besett v. Basnett, 389 So.2d 995 (Fla. 1980), is a seminal case in Florida on the issue of affirmative misrepresentations relating to the sale of commercial real property. The *Besett* case involved allegations "that the sellers knowingly misrepresented the amount of the lodges business for 1976 to be $80,000 and that the roof on the building was brand-new, when, in fact, the business income was substantially lower and the roof was not new and leaked." *Id.* at 996. The Court stated that "a person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of *caveat emptor*" and cited the following from the Restatement (Second) of Torts:

> § 540. Duty to Investigate.
>
> The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made investigation.
>
> Comment:
>
> a. The rule stated in this Section applies not only when an investigation would involve an expenditure of effort and money out of proportion to the magnitude of the transaction, but also when it could be made without any considerable trouble or expense.

Id. at 997. The *Besett* Court went on to state that "[w]e hold that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made investigation, unless he knows the representation to be false or its falsity is obvious to him." *Id.* at 998.

The point of the foregoing cases seems to be that (a) all commercial real property transactions are considered "AS IS" by virtue of the doctrine of *caveat emptor*; (b) allegations of fraud may defeat "AS IS" disclaimers if the truth could not have been discovered by the exercise of ordinary diligence; and (c) ordinary diligence involves a cursory inspection that may be made without any considerable trouble or expense.

In our case, the Defendant buyer (FH 4800) has filed into the record an affidavit which states that the seller actively concealed a leaking roof condition that eventually caused mold throughout the

property and resulted in a substantial loss of commercial lease revenues. Based on the cases cited above (copies attached), a jury could redetermine that the active concealment prevented the Defendant from discovering the true condition of the roof through ordinary diligence. If so, the "AS IS" provision will not protect the Plaintiff from a finding of fraud and the remedy of rescission set forth in the pleadings.

Should you require anything further, please do not hesitate to have your Judicial Assistant contact me directly.

Respectfully submitted,

Murdoch Weires PLLC

Scott A. Weires
For the Firm

SAW/cjs
Enclosure
cc: Glenn Widom, Esq. (counsel for Plaintiff)

15 So.3d 724 (2009)

HAYIM REAL ESTATE HOLDINGS, LLC., Appellant,

v.

ACTION WATERCRAFT INTERNATIONAL INC., Mooney Investments, Ltd., and Howard F. Mooney, Appellees.

No. 3D08-3132.

District Court of Appeal of Florida, Third District.

July 15, 2009.

725 *725 Ehrenstein Charbonneau Calderin, and Edward Welch, and Michael D. Ehrenstein, for appellant.

Robinson & Associates, and Raymond L. Robinson, and Douglas C. Hiller, for appellees.

Before RAMIREZ, C.J., and COPE, and SUAREZ, JJ.

RAMIREZ, C.J.

Plaintiff Hayim Real Estate Holdings, LLC, appeals the trial court's final order granting the defendants' Motion for Final Summary Judgment. Because we conclude that there are unresolved genuine issues of material fact, we reverse and remand for further proceedings consistent with this opinion.

I. *Factual Background*

On April 3, 2004, Hayim, as purchaser, and defendant H. Moony Investments, Ltd. ("HMI"), as seller, entered into a Purchase Agreement for the transfer of certain commercial real property as part of the asset purchase of a business that operated at that site. Article V, Section 5.03 A, of the Purchase Agreement allowed the purchaser a fifteen day grace period from the effective date of the agreement to inspect the property. During this inspection period, the purchaser could terminate the agreement for any reason without incurring liability. Furthermore, subsection 5.03 D stated as follows:

> Purchaser is purchasing the property in "AS IS" condition. Notwithstanding anything to the contrary contained in this subsection 5.03 D, all mechanical, electrical, plumbing, heating, cooling and/or ventilating system in the Property shall be in working order at Closing.

In Article XII(e), Mooney represented having "no knowledge of any facts which would indicate that the property suffers from any environmental or hazardous waste contamination."

Approximately four months following the execution of the Purchase Agreement, the parties completed the sale of the property and possession transferred to Hayim. Subsequent to the transfer, Hayim claims to have discovered several latent problems on the property. The discoveries, which included problems involving the septic tank and drainage field, resulted in this action. Hayim sued the defendant for breach of contract and fraudulent concealment/nondisclosure.

Hayim's complaint alleged that the defendants had prior knowledge of the septic tank and drainage field problems which they chose to ignore and failed to make the needed repairs. Mr. Garrett Hayim, principal of the plaintiff, claimed in his deposition that he examined the property during the inspection period including the area above the drain field, which was located underneath an asphalt lot. However, Mr. Hayim stated that prior to the inspection, the asphalt located above the drain field was torn out, and the area resurfaced with pavers. He claimed that
726 this was done by *726 the defendant to conceal signs of a problem such as would be demonstrated by water and waste overflow. Consequently, Hayim alleged that as a result of the septic tank and drainage field problems, the plumbing system was not in working order at the time of "Closing" and that this problem caused the property to suffer an environmental or hazardous waste contamination. Hayim further alleged that the defendants' failure to inform Hayim of the problems and their active concealment of them resulted in both a breach of the defendants' contractual obligations and a fraudulent misrepresentation.

In support of the plaintiff's allegations, the record includes an affidavit by Ms. Dulce Lopez-Proveyer. Ms. Lopez-Proveyer is a former employee of the business that the defendant sold in connection with the transfer of the real property. After the sale closed, Ms. Lopez-Proveyer continued her employment with the purchaser as its business manager. In her affidavit, Ms. Lopez-Proveyer stated that Mr. Howard Mooney "had knowledge, prior to the closing of the sale of the premises, of a defective septic drain field which he undertook to conceal by placing cement pavers over the problem." The defendants countered with an affidavit from Mr. Howard Mooney, who conceded that "prior to the installation of the pavers, the area in question was covered with asphalt" and that "Hayim executed the contract to purchase the property prior to the installation of the pavers." However, Mr. Mooney claimed that "the pavers that were installed were not installed to conceal any problems with the drainage field." This contradicts Ms. Lopez-Proveyer statement. The trial court granted the defendants' Motion for Final Summary Judgment, which Hayim now appeals.

II. *Analysis*

This court reviews de novo the decision of a trial court to grant summary judgment. "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla.2000); *see also* Fla. R. Civ. P. 1.510(c). Further, the party moving for summary judgment has the burden of proving the "absence of a genuine issue of material fact." *Holl v. Talcott*, 191 So.2d 40, 43 (Fla.1966).

In reaching its decision to grant summary judgment, the trial court relied on this Court's holding in *Futura Realty v. Lone Star Building Centers. (E.), Inc.*, 578 So.2d 363 (Fla. 3d DCA 1991). *Futura* stands for the doctrine of caveat emptor with regard to the sale of commercial real property: "the commercial property vendor owes no duty for damage to the land to its vendee because the vendee can protect itself in a number of ways, including careful inspection and price negotiation." *Id.* at 365. However, the instant case is distinguishable from *Futura* in that here, the plaintiff claims it owed it a duty under the express agreement it negotiated: to provide specific systems in working order as well as communicate their knowledge of specific problems. The plaintiff alleges that the defendants' failure to provide specified systems in working order at closing as well as their failure to communicate the known problems constitutes an express breach of the agreement. Intertwined with the facts regarding its contract breach argument, the plaintiff further alleges an alternate basis for a claim, the defendants' active concealment of known defects. Consequently, to affirm summary judgment, this Court would have to agree that no genuine issue of material fact remained as to whether: (1) the defendants breached an
727 express contractual duty to inform Hayim of specified problems, (2) *727 the defendants breached an express contractual duty by failing to have the specified systems in working order at closing; and (3) the defendants actively concealed known defects from the plaintiff.

In a commercial real property transaction, Florida law distinguishes between the mere nondisclosure of a known defect, a non-actionable offense, and the active concealment of one, an actionable offense:

> The doctrine of caveat emptor (literally, "let the buyer beware") provides that, when parties deal at arm's length, buyers are expected "to fend for themselves, protected only by their own skepticism as to the value and condition of the subject of the transaction." Biff Craine, Note, Real Property—Sellers' Liability for Nondisclosure of Real Property Defects—*Johnson v. Davis*, 480 So.2d 625 (Fla.1985), 14 FL. ST. U.L.Rev. 359, 361 (1986). Absent an express agreement, a material misrepresentation or active concealment of a material fact, the seller cannot be held liable for any harm sustained by the buyer or others as the result of a defect existing at the time of the sale. See, e.g., W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 64, at 447 (5th ed.1984); Frona M. Powell, The Seller's Duty to Disclose in Sales of Commercial Property, 28 AM. BUS. L.J. 245, 248-50 (1990).

Haskell Co. v. Lane Co., 612 So.2d 669, 671 (Fla. 1st DCA 1993).

Because the facts regarding the claims in the present case are intertwined, this Court does not need to examine the plaintiff's claims separately. The presence of a genuine issue of material fact regarding the active concealment of known defects by the defendants would likewise provide a genuine issue of material fact concerning the defendant's breach of its express contractual duties. We hold that Ms. Lopez-Proveyer's affidavit provides a genuine issue of material fact as to whether the defendants' actively concealed a known defect.

The First District Court of Appeal held that "the mere fact that evidence as to certain material facts is uncontroverted does not at all mean that there is no genuine issue as to the material facts if the uncontroverted evidence is lawfully susceptible to two or more conflicting inferences." *Smith v. City of Daytona Beach*, 121 So.2d 440, 443 (Fla. 1st DCA 1960). In the present case, the parties agreed to a 15-day inspection period and required that certain disclosures be made. Once the parties entered into the Purchase Agreement, their duties towards each other were altered. *Sepe v. City of Safety Harbor*, 761 So.2d 1182, 1184 (Fla. 2d DCA 2000).

Mr. Mooney's affidavit acknowledges both that prior to the installation of the pavers, the area above the drain field was covered with asphalt and that the pavers were installed after the Purchase Agreement was executed. In Mr. Garrett Hayim's deposition, he stated that when he first inspected the property, within the 15-day window provided by the Purchase Agreement, the pavers had already been installed. These statements also raise a genuine issue of material fact as to when and why the defendants installed the pavers, particularly because the pavers represented a capital expenditure on property which had already contracted to sell for a fixed price. Similar to the First District Court of Appeal's holding in *Smith* with regards to "uncontroverted evidence," this Court adopted 30 Fla. Jur., Summary Judgment § 9 at 347, in its holding in *Berlanti Constr. Co. v. Miami Beach Fed. Sav. & Loan Asso'n.*, 183 So.2d 746, 748 (Fla. 3d DCA 1966):

728 > Even where the facts are undisputed, issues as to the interpretation of such *728 facts may be such as to preclude the award of a summary judgment. If the evidence raises the slightest doubt on any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it. Where reasonable men might justifiably make different inferences and deductions and reach different conclusions it cannot be said that there is no genuine issue of material fact.

Id. at 748.

III. *Conclusion*

In sum, there remain genuine issues of material fact that should be submitted to a jury. We therefore reverse the trial court's final order granting the defendants' Motion for Final Summary Judgment.

Reversed and remanded for further proceedings consistent with this opinion.

652 So.2d 411 (1995)

Mark C. WASSER, Appellant,
v.
Michael SASONI and Anna Sasoni, his wife, Appellees.

No. 94-1761.

District Court of Appeal of Florida, Third District.

March 8, 1995.
Rehearing Denied April 19, 1995.

Kenney Burd & Markowitz, and Joseph W. Downs, III, Miami, for appellant.

Steven Friedman, Pembroke Pines, for appellees.

Before NESBITT, BASKIN and GERSTEN, JJ.

412 *412 GERSTEN, Judge.

Appellant, Mark C. Wasser (Wasser), appeals a summary judgment in favor of appellees, Michael and Anna Sasoni (Sasonis). We affirm.

Wasser contracted to purchase a 67-year-old apartment building from the Sasonis. The contract contained a standard inspection clause, and provided that the apartment building was being sold "as is." The contract also contained an integration clause providing:

> "It is expressly understood and agreed that, unless otherwise provided for herein, premises are being sold in their present condition; that all agreements are merged herein; and that there are no other agreements, representations statements or warranties, express or implied, oral or written, of any kind on which the undersigned has relied unless reduced to writing and attached hereto as part hereof."

After the purchase, Wasser had the building inspected and was advised that it needed structural repairs. Wasser then sued the Sasonis, essentially claiming that they made affirmative misrepresentations, and failed to disclose certain alleged defects. The trial court granted summary judgment in favor of the Sasonis, and Wasser filed this appeal.

The record reveals that Wasser failed to plead any actionable specific misrepresentations of fact. Indeed, Wasser did not meet the Sasonis until after the purchase contract had been negotiated and signed. Therefore any statements the Sasonis made thereafter would be irrelevant.

In any event, the Sasoni's statements that the building was "a very good building" requiring "normal type of maintenance," and "an excellent deal," were clearly statements of opinion. A

seller's "puffing" or statements of opinion do not relieve a buyer of the duty to investigate the truth of those statements and do not constitute fraudulent misrepresentations. *See* *Lambert v. Sistrunk*, 58 So.2d 434 (Fla. 1952); *Greenberg v. Berger*, 46 So.2d 609 (Fla. 1950); *Glass v. Craig*, 83 Fla. 408, 91 So. 332 (1922); *Hart v. Marbury*, 82 Fla. 317, 90 So. 173 (1921); *Keating v. DeArment*, 193 So.2d 694 (Fla. 2d DCA), *cert. denied,* 201 So.2d 549 (Fla. 1967).

Moreover, several courts, including this court, have recently stated that even an intentional nondisclosure of known facts materially affecting the value of commercial property, is not actionable under Florida law. *See* *Green Acres, Inc. v. First Union Nat'l Bank of Fla.*, 637 So.2d 363 (Fla. 4th DCA 1994); *Mostoufi v. Presto Food Stores, Inc.*, 618 So.2d 1372 (Fla. 2d DCA), *review denied,* 626 So.2d 207 (Fla. 1993); *Futura Realty v. Lone Star Bldg. Ctrs. (Eastern), Inc.*, 578 So.2d 363 (Fla. 3d DCA), *review denied,* 591 So.2d 181 (Fla. 1991). In other words, the doctrine of caveat emptor, or "buyer beware," is still the common law rule applied to purchasers of commercial property.

Although the doctrine of caveat emptor was abolished in residential real estate transactions, *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985), this court has specifically found that *Johnson* did not extend a duty to disclose to commercial transactions, and thus did not "change the long line of case law establishing caveat emptor as the rule in the sale of commercial property." *Futura Realty*, 578 So.2d at 364 (citing *Conklin v. Hurley*, 428 So.2d 654 (Fla. 1983)).[1]

Assuming arguendo that false representations had been made, a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence. *See* *Steinberg v. Bay Terrace Apartment Hotel, Inc.*, 375 So.2d 1089 (Fla. 3d DCA 1979); *Welbourn v. Cohen*, 104 So.2d 380 (Fla. 2d DCA 1958).

We recognize that exceptions to the general rule could exist under certain circumstances, for
413 example, where specific misrepresentations regarding a latent defect are *413 made to a negligent purchaser. *See* *Besett v. Basnett*, 389 So.2d 995 (Fla. 1980); *Fry v. J.E. Jones Constr. Co.*, 567 So.2d 901 (Fla. 5th DCA 1990). However, there is no exception where the parties are equally sophisticated, and have an equal opportunity to discover a defect. As noted in *Besett,* a negligent purchaser is not justified in relying upon a misrepresentation which is obviously false, and "which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." *Besett*, 389 So.2d at 997 (quoting from Restatement (Second) of Torts § 541 (1976)). *See also* *Greenberg v. Berger*, 46 So.2d at 610 (no grounds for misrepresentation; purchaser has duty to investigate truth of statements); *Gonzalez v. Patane*, 234 So.2d 8 (Fla. 3d DCA 1970) (no cause of action for misrepresentation; purchasers failed to exercise diligence to discover readily available information).

Wasser was a sophisticated buyer who had a full and fair opportunity to inspect and formulate his own opinion as to the condition of the building. Moreover, Wasser agreed to the "as is" and integration clauses, which are recognized as valid defenses to claims of fraud, particularly where, as in the instant case, there are no allegations or evidence that the contract itself was induced by fraud. *See* *Cassara v. Bowman*, 136 Fla. 302, 186 So. 514 (1939); *Ortiz v. Orchid*

Springs Dev. Corp., 504 So.2d 510 (Fla. 2d DCA 1987); *Weiss v. Cherry,* 477 So.2d 12 (Fla. 3d DCA 1985), *review denied,* 488 So.2d 69 (Fla. 1986); *No-Risk Chem. Co. v. El-Kerdi,* 453 So.2d 482 (Fla. 2d DCA 1984); *Coble v. Lekanidis,* 372 So.2d 506 (Fla. 1st DCA 1979).

In conclusion, a sophisticated purchaser of commercial property who agreed to an "as is" purchase contract, had ample opportunity to conduct inspections, and could have discovered an alleged defect through the exercise of ordinary diligence, may be disgruntled, but does not have a cause of action for fraud. Finding no genuine issue of material fact that no affirmative misrepresentations or deceptions were made, we affirm the trial court order granting the Sasonis' motion for summary judgment. *See Futura Realty,* 578 So.2d at 363; *Pieter Bakker Management, Inc. v. First Fed. Sav. and Loan Ass'n,* 541 So.2d 1334 (Fla. 3d DCA), *review denied,* 549 So.2d 1014 (Fla. 1989); *Welbourn v. Cohen,* 104 So.2d at 380.

Affirmed.

[1] Interestingly, in an apparent attempt to avoid the application of *Futura,* Wasser initially argued that the rental building was not commercial property, and thus the Sasonis did have a duty to disclose defects under *Johnson.* We find such an argument disingenuous and agree with the trial court's conclusion that the apartment building was in fact commercial property. Paraphrasing the words of the trial court, if it sounds like a basset hound, talks like a basset hound, and walks like a basset hound, you know it's got to be a basset hound.

389 So.2d 995 (1980)

Merle E. BESETT, Irene D. Besett, and C. Joe Czerwinski, Petitioners,
v.
Robert K. BASNETT and Barbara L. Basnett, Respondents.

No. 57201.

Supreme Court of Florida.

October 23, 1980.
Rehearing Denied December 22, 1980.

996 *996 C. Guy Batsel and Leo Wotitzky of Wotitzky, Wotitzky, Johnson, Mandell & Batsel, Punta Gorda, and Charles J. Cheves, of Cheves & Rapkin, Venice, for petitioners.

Michael R. Karp of Wood, Whitesell & Karp, Sarasota, for respondents.

ALDERMAN, Justice.

The petitioners, Mr. and Mrs. Besett and Mr. Czerwinski, the appellees in the district court and the defendants in the trial court, seek review of the district court's decision in *Basnett v. Besett,* 371 So.2d 705 (Fla.2d DCA 1979). In this case, the district court found that a fraudulent misrepresentation complaint stated a cause of action even though the plaintiffs failed to allege that they had investigated the truth of the defendants' misrepresentations. We accept jurisdiction on the basis of conflict with *Potakar v. Hurtak,* 82 So.2d 502 (Fla. 1955), approve the decision of the district court, and hold that the plaintiffs' fraudulent misrepresentation complaint does state a cause of action.

The respondents, Mr. and Mrs. Basnett, the appellants in the district court and the plaintiffs in the trial court, were Connecticut residents interested in resettling in Florida. They obtained information about Redfish Lodge from its owners, the Besetts, and the Besetts' real estate broker, Czerwinski. As prospective buyers, they made several trips to Florida to inspect the lodge. They allege that the sellers misrepresented the size of the land offered for sale to be approximately 5.5 acres, when, in fact, the sellers knew it to be only 1.44 acres. They allege that the sellers knowingly misrepresented the amount of the lodge's business for 1976 to be $88,000 and that the roof on a building was brand new, when, in fact, the business income was substantially lower and the roof was not new and leaked. They also allege the defendants misrepresented to them the availability of additional land for expansion. Relying on these misrepresentations, which they allege were made to induce them to buy, they bought the lodge and the land.

Upon the motion of the defendants, the trial court, relying on *Potakar v. Hurtak,* dismissed the complaint for failing to state a cause of action. The district court reversed on the authority of its decision in *Upledger v. Vilanor, Inc.,* 369 So.2d 427 (Fla.2d DCA 1979), *cert. denied,* 378 So.2d

350 (Fla. 1979). These cases represent the two divergent lines of authority on this issue which have developed in Florida.

Potakar v. Hurtak was also a fraudulent misrepresentation action. Potakar alleged that he had asked Hurtak if the previous lessees of a restaurant had made a profit, and Hurtak replied they had, even though he knew the previous lessees had lost money for several years. Potakar alleged the misrepresentations were made to defraud, deceive, and influence him to lease the business. In affirming the trial court's dismissal of the complaint for failure to state a cause of action, the court observed that there were "no allegations as to the past profits, no showing as to the right of the plaintiff to rely on past statement, no fact stated as to the diligence on the plaintiff's part in investigating, or failing to investigate such facts, or how he was prevented from investigating the past profits of the said business." 82 So.2d at 503. The Court looked to 23 Am.Jur., *Fraud and Deceit* § 155, at 960-61 (1940), for a statement of the general rule that "a person to whom false representations have been made is not entitled to relief because of them if he might readily have ascertained the truth by ordinary care and attention, and his failure to do so was the result of his own negligence." 82 So.2d at 503. The Court concluded that Potakar's complaint did not state a cause of action.

997 *997 The district court, in *Upledger,* reached a different result. In that case, Upledger, who was purchasing an apartment building from Vilanor, relied upon misrepresentations made by Vilanor concerning the amounts for which the apartments rented and the duration of the leases. Upledger admitted that he did not undertake an independent investigation, and he claimed that he would not have completed the purchase if he had known the true facts. In reversing the trial court's dismissal of Upledger's complaint, the district court, recognizing that there are conflicting lines of authority, concluded:

> [W]hen a specific false statement is knowingly made and reasonably relied upon, we choose to align ourselves with the growing body of authorities which holds that the representee is not precluded from recovery simply because he failed to make an independent investigation of the veracity of the statement... .

369 So.2d at 430.

The district court, we believe, made the correct choice. A person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of caveat emptor. The principle of law which we adopt is expressed in Sections 540 and 541 of *Restatement (Second) of Torts* (1976) as follows:

> § 540. Duty to Investigate.
>
> The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.

Comment:

a. The rule stated in this Section applies not only when an investigation would involve an expenditure of effort and money out of proportion to the magnitude of the transaction, but also when it could be made without any considerable trouble or expense. Thus it is no defense to one who has made a fraudulent statement about his financial position that his offer to submit his books to examination is rejected. On the other hand, if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious under the rule stated in § 541.

b. The rule stated in this Section is applicable even though the fact that is fraudulently represented is required to be recorded and is in fact recorded. The recording acts are not intended as a protection for fraudulent liars. Their purpose is to afford a protection to persons who buy a recorded title against those who, having obtained a paper title, have failed to record it. The purpose of the statutes is fully accomplished without giving them a collateral effect that protects those who make fraudulent misrepresentations from liability.

§ 541. Representation Known to Be or Obviously False.

The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.

Comment:

a. Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

998 *998 A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two-fraud and negligence-negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter. As the Michigan Supreme Court said many years ago:

There may be good, prudential reasons why, when I am selling you a piece of land, or a mortgage, you should not rely upon my statement of the facts of the title, but if

> I have made that statement for the fraudulent purpose of inducing you to purchase, and you have in good faith made the purchase in reliance upon its truth, instead of making the examination for yourself, it does not lie with me to say to you, "It is true that I lied to you, and for the purpose of defrauding you, but you were guilty of negligence, of want of ordinary care, in believing that I told the truth; and because you trusted to my word, when you ought to have suspected me of falsehood, I am entitled to the fruits of my falsehood and cunning, and you are without a remedy."

Bristol v. Braidwood, 28 Mich. 191, 196 (1873).

We hold that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him. We recede from *Potakar v. Hurtak* insofar as it is inconsistent with our present holding, and we disapprove all other decisions inconsistent with our holding in this case.

As was the case in *Upledger,* the petitioners in this case, as owners of the property being sold, had superior knowledge of its size, condition, and business income. As prospective purchasers, the respondents were justified in relying upon the representations that were made to them although they might have ascertained the falsity of the representations had they made an investigation. From the complaint, it does not appear that the respondents knew that the alleged misrepresentations were false, nor can we conclude from that complaint as a matter of law that the misrepresentations were obviously false.

Accordingly, we approve the decision of the district court.

It is so ordered.

SUNDBERG, C.J., and BOYD, OVERTON, ENGLAND and McDONALD, JJ., concur.

ADKINS, J., dissents.