DOCKET NO: FST CV 22-6057587-S : SUPERIOR COURT

KARL ROBINSON AND NIAM BONUS : JUDICIAL DISTRICT OF

: STAMFORD-NORWALK

V. : AT STAMFORD

EDWARD MCCULLOCH, PATRICIA MCCULLOCH, MICHELLE NYGAARD, AND CTRE LLC : MAY 14, 2024

MEMORANDUM OF DECISION – PLAINTIFF'S APPLICATION FOR PREJUDGMENT REMEDY

Plaintiffs Karl Robinson and Niam Bonus have petitioned for a prejudgment remedy against defendants Edward McCulloch and Patricia McCulloch arising from the plaintiffs' purchase of real property known as 37 Deepwoods Lane in Old Greenwich. Upon the facts found by the court and as explained below, the court grants the plaintiffs' application for a PJR against the defendants Edward and Patricia McCulloch in an amount of $1,400,000.00.

FACTS

For the purposes of this PJR application and the relief sought, the court makes certain findings from the following facts and circumstances. These findings are based on the evidence and testimony it finds credible. The plaintiffs purchased the property from defendants Edward and Patricia McCulloch ("the defendants") pursuant to a Residential Real Estate Sales Agreement ("the contract") that the parties entered into on June 12, 2021. Defendant Michelle Nygaard ("Nygaard"), who is the daughter of defendants Edward and Patricia McCulloch, was the listing real estate agent for the residence and was involved in the marketing and sale of the residence on behalf of her parents. At that time, Nygaard was employed by CTRE LLC, doing business as Berkshire Hathaway Home Services New England Properties ("Berkshire

Hathaway"). Berkshire Hathaway is a real estate brokerage firm that is licensed to conduct business in the State of Connecticut and specializes in listing and marketing real estate. Nygaard was licensed by the State of Connecticut as a real estate salesperson at the time of this transaction. Nygaard had also resided in the premises and was thus familiar with the conditions of the property. At the outset of the hearing on the application for the PJR, the parties stipulated to the fact that Nygaard is not a part of the plaintiff's application for the PJR. Consequently, the court's order in regard to the PJR application is limited to defendants Edward McCulloch and Patricia McCulloch.

Edward McCulloch, a professional homebuilder who had built approximately sixteen other homes in the Deepwoods Lane neighborhood, built the subject residence in 1985. The McCullochs were the sole owners of the property, and their family occupied the property from the time it was built until September 30, 2021, at which time the plaintiffs took possession of the property. The property consists of a 4,511 square foot home and is situated on a parcel of land that is approximately 0.34 acres. Berkshire Hathaway (through Nygaard as the listing agent) listed the property for sale for $2, 295,000.00 or about June 2, 2021. Berkshire Hathaway and Nygaard had marketed the home in a variety of ways, including listing it on websites such as Zilow.com, MLS.com, as well as on Berkshire Hathaway's own company website. In all of the listings, they described the home as having been "built and meticulously cared for by one owner".

The plaintiffs, a married couple who are highly educated professionals working in the financial services industry, have lived abroad as well as in the United States. As part of their global lifestyle, they had previously purchased real estate both in the United States and abroad. In the years after the COVID-19 pandemic, the plaintiffs were part of an influx of individuals

who were looking to relocate to Connecticut, and in particular, to Greenwich. At that time, the Greenwich real estate market was extremely competitive with potential buyers engaging in bidding wars and often making offers on homes that included terms of no contingencies, no inspections, as well as other incentives that would enable them to purchase a home in Greenwich.

The defendants listed the home for sale with Berkshire Hathaway on June 2, 2021, and held a brokers open house the next day. The Berkshire Hathaway real estate listing for this home stated that the home was "Built and meticulously cared for by one owner, on a private road in desirable quiet neighborhood...One of only 16 homes in Laddin's Wood Property Homeowner's Assoc. The Builder/Owner built all the homes in the Association...Professionally manicured .34 acres with pool site...". This Zillow listing was placed into evidence at the PJR hearing and Karl Robinson testified at the hearing that this listing was one of the things that he and his wife relied on in forming their belief that the home was a good quality home.

Moreover, when Karl Robinson later visited the home with the plaintiffs' real estate agent, Angela Swift and with Nygaard, Nygaard had stated that because her father had built the home and had owned the home from the time it was built, the home was extremely well cared for. Thus, all parties were fully aware of the fact that Nygaard was the sellers' daughter as well as their real estate agent for this transaction. The plaintiffs therefore trusted her representations and accepted them as being accurate based on her personal connection with the home and the sellers, and based on her professional judgment and experience as a real estate agent who was very familiar with the Greenwich market.

On June 3, 2021, the same date as the brokers open house, the plaintiffs made an initial

offer to purchase the home after seeing the home on a video call with Swift. This initial offer was below the asking price and contained contingencies for a mortgage and an inspection. However, before the defendants had responded to this offer, the plaintiffs submitted a second and higher offer later that night, and this offer included a waiver of the mortgage contingency. On June 5, 2021, Nygaard informed Swift that the plaintiffs' initial offer was lower than the other offers that the defendants had received and that as a result, the plaintiffs would have to increase the purchase price in their offer if they wanted to purchase the home. On that date, the plaintiffs made another offer for $2, 625,000.00 with only an inspection contingency.

That day, the plaintiffs both viewed the property in person and subsequently submitted another offer for a higher purchase price and without any mortgage or inspection contingencies and a closing date of the defendants' choice. On June 6, 2021, the plaintiffs submitted a "last, best, and final" offer as requested by Nygaard. This offer was for a higher purchase price and with no contingencies. The final offer was for a purchase price of $2,805,000.00 with no contingencies and was accepted by the defendants. The plaintiffs then moved forward with the purchase of the home.

After the defendants accepted the plaintiffs final written offer, the plaintiffs visited the property again on June 10, 2021. On this date, as occurred on prior occasions, Nygaard indicated to the plaintiffs that because her father was the homebuilder who built this home, he took great pride in building this premises as well as the other homes in the area, and that this home had been extremely well cared for during the thirty-six years during which her parents had owned and resided in the home. Based on these representations, the plaintiffs believed that the premises was in above average condition and were thus eager to sign a purchase agreement.

At that time, the plaintiffs' real estate attorney advised them to have a pre-contract inspection, despite the no contingencies provision that was included in the purchase agreement. While a full inspection was precluded under the terms of the purchase agreement, the defendants were amenable to a limited scope inspection. Thus, the parties agreed that the plaintiffs would be permitted to conduct a "systems and termite inspection" which was done on June 11, 2021.

On that date, the plaintiffs, Swift, and the McCullochs were present at the premises for the inspection, though Nygaard was not. Despite the limited scope of the inspection, the plaintiffs had retained the services of a team of four inspectors from Greenwich Home Inspections to conduct the systems inspection. This team included the company's owner, Richard Hvolbeck. At that time, the McCullochs, Nygaard, Nygaard's husband, and Nygaard's children were all still living in the fully furnished home. Given this and given that the inspection was intended to be a "systems and termite inspection" only, when Nygaard arrived home later that same day, she was visibly upset to learn that the plaintiffs had attempted to expand the scope of the inspection to make it a full home inspection.

Ultimately, Hvolbeck and his team conducted an abbreviated inspection that was 45 minutes in duration. Jonathan Miller, a member of the inspection team prepared a report based on this limited inspection and testified at the PJR hearing. The report, which was dated June 11, 2021, was an abbreviated and incomplete report. Miller explained that he had omitted multiple sections from the inspection report because the inspection that his team had conducted was not a full home inspection so that the report could not include certain items that his team had been unable to examine during their inspection.

He testified that given the size of the home and the fact that this was a visual inspection only, his company's inspection was far less through than a normal full home inspection report

would be and as a result, he included a disclaimer in the report which explained that the inspection report did not include anything that was not easily visible at the time of the inspection. Despite that, Hvolbeck informed Nygaard that it was a "great inspection". Swift also informed Nygaard at that the inspection that had been conducted had been more than a "systems and termite inspection" as the parties had agreed to prior to the start of the inspection.

On June 11, 2021, the defendants provided a signed Residential Property Condition Disclosure Report to the plaintiffs. In this report, which was placed into evidence at the PJR hearing, the defendants also made a series of representations. In this document, the defendants represented that (1) there was no basement water seepage or dampness; (2) the roof was a shingled roof that was fifteen years old; (3) one roof leak had occurred and that as a result, a new flat roof had been installed on the second floor balcony; (4) there was no chimney or fireplace problems; (5) there was no patio or deck problems; (6) there was no water drainage problems; and (7) there was no rot or water damage problems. Based on the representations in this report, the plaintiffs signed the report and proceeded with their purchase of the property.

On June 12, 2021, the plaintiffs entered into a written contract for the purchase of the home. The contract (which was admitted into evidence at the PJR hearing) contained explicit language in Paragraph 8 stating that "This agreement is not subject to any inspection contingencies", that the plaintiffs were "satisfied with the physical condition" of the property, and that the plaintiffs agreed to "accept at closing the Premises in their Present Condition."

Notably, the purchase agreement also contained a rider, and pursuant to paragraph four of that rider, the defendants also represented that throughout the period of their ownership of the property, there had never been water intrusion from an exterior source that had accumulated to a measurable depth. They further represented that there were no leaks in the roof nor in any other

exterior portion of the building and that they had never experienced any drainage problems while living at the premises. They also represented that the roof would be free of any leaks at the time of closing and that the premises shall be free of standing water.

Based on the representations contained in the Residential Property Condition Disclosure Report, the rider to the purchase agreement, and Nygaard's repeated assurances throughout the pendency of this home sale stating that the defendants had maintained the home extremely well, the plaintiffs conducted a final walkthrough of the property and closed on the property on September 30, 2021.

A week after closing on the property, the plaintiffs moved into the home. They had hired contractors to refinish the floors and as a result of the ongoing work at the home, the plaintiffs resided on the first floor of the home while the contractors refinished the floors on the second floor. It was during this time that the plaintiffs first became aware of water damage, rot, moisture, and mold presence in the home. Upon seeing the extent of the damage in the home, the plaintiffs documented what they discovered by taking numerous photographs and videos on a continual basis as they discovered further problems with the home. At the PJR hearing, the plaintiffs placed into evidence a multitude of photographs and videos that demonstrated the extent of the preexisting damage in the home. These photographs and videos had been taken in various parts of the home over the course of many days, and the damage depicted in them came to light when the contractors that the plaintiffs had hired began refinishing the floors throughout the home.

Specifically, as the contractors were working on refinishing the floors, the workers discovered problems in the area of the home leading to the flat roof, as well as throughout the entire second floor of the home. Soon thereafter, in October 2021, the plaintiffs discovered a

significant leak on the first floor of the residence and found water leaking down the chimney and onto the mantelpiece. They determined that this leak originated from the ceiling underneath the flat roof. They also discovered a black water mark on the ceiling of the circular room on the first floor of the home – a location that was directly underneath the flat roof.

Moreover, the plaintiffs then observed paint patches on the ceilings and the walls and determined that these patches had not been previously visible during their prior visits to the home due to the lighting in the room. They further discovered an active water leak from the flat roof on the second floor into the hallway, additional paint touch ups in the first floor circular room under the flat roof, an active water leak in the hallway outside the main bedroom, and water damage and rot in the walk in closet in the main bedroom near the chimney. There was also staining on the walls, additional patches of paint, wet areas in the area of the bedroom window above the garage, and water pooling in the basement after it had rained. Significantly, during her testimony at the PJR hearing, Nygaard admitted that her parents had used touch up paint in certain areas of the home.

Based on the subsequent discovery of mold in certain parts of the home when the plaintiffs were having the floors refinished, the plaintiffs then hired BNF Consulting to test for the presence of mold throughout the home. On October 14, 2021, Justin Joe of BNF Consulting commenced testing for mold on the second floor of the home. Joe, who also testified at the PJR hearing, conducted the mold testing after he discovered evidence of water damage and water stains throughout the second floor and numerous areas of potential water intrusion. He then determined that the main source of the water intrusion appeared to be the roof. Joe took photographs of the water damage and produced a report after completing his testing, and these materials were placed into evidence at the PJR hearing.

Based on the mold testing conducted in the home, Joe discovered the presence of mold in the master bedroom, the master bedroom closet, and in the additional second floor bedrooms. Due to the amount and extent of the mold discovered, Joe determined that the second floor of the home was unsafe for occupation until the mold had been remediated. Given that mold takes several months to form, it was also clear that the mold that had developed in the home had formed as a result of previous instances of water intrusion so that that the mold only started to appear months after the incidents of water intrusion has occurred. Joe conducted additional mold testing on October 23, 2021, and discovered additional water intrusion in the finished basement, under the staircase to the finished basement, mold growth in the crawlspace, dark spots on the foundation walls, and insulation that had been improperly installed so that air circulation had been limited as a result.

Upon discovering these numerous and significant issues with the home, the plaintiffs contacted the defendants in an attempt to reverse the home sale. The defendants refused to reverse the sale and instead, presented the plaintiffs with an invoice for the roof installation that established that the roof was actually 20 years old, and not fifteen years old as had been disclosed in the Property Condition Disclosure Report. Based on the defendants' recommendation, the plaintiffs engaged the services of CPM Remediation to remediate the mold in the home. The plaintiffs also retained Scott Eames of Sea-Dar, a residential construction company to provide guidance regarding the mold and water damage in the homes. Although Eames had initially been retained for the purpose of conducting renovation work independent of the water damage and mold infiltration, his scope of work increased as a result of the mold presence that the plaintiffs discovered in the home.

During his time working on the home, Eames (who testified at the PJR hearing) discovered additional problems with the property. Given the already existing mold and water damage, the plaintiffs then decided to vastly expand the scope of work from mere mold remediation and water damage repair to a much more extensive home renovation project. To that end, the plaintiffs then hired Cormic Byrne to provide architectural services in connection with the renovation of the plaintiffs' home. As the plaintiffs had already moved out of the home ten days after they had moved into it and after they had discovered the water damage and mold presence, the plaintiffs then decided to reside elsewhere until the end of August 2023 when the full renovation of the home had been completed.

It should be noted here that in their initial application for a PJR, the plaintiffs had sought a prejudgment remedy in the amount of $1,400,000.00. Subsequently, in their post-hearing brief, the plaintiffs argued that the court should award them a remedy in the amount of $2.8 million based on the cost of rebuilding the home and based on their request for punitive damages. However, the court finds that the plaintiffs' calculation of damages as alleged in their post hearing brief is inflated as it includes renovation costs for the home – costs which are secondary to the expenses they incurred from the repairs done to remedy the existing damages in the home. Moreover, the plaintiffs' increased claim for damages also includes a claim for punitive damages. As discussed below, the court finds that increased claim for damages is unsupported by the facts in this case and lacks any legal authority to warrant such an award by the court.

PROCEDURAL HISTORY

The plaintiffs served and filed a summons and complaint on or about July 26, 2022. On September 13, 2022, the plaintiffs filed a motion to cite in an additional party in order to cite Nygaard as a defendant in the case. The court (*Clark. J.)* granted this motion on October 31,

2022. The McCullochs filed an answer and special defenses on November 7, 2022.

The plaintiffs then served and filed a summons and complaint on Nygaard on or about November 17, 2022. Nygaard filed an answer and special defenses on January 24, 2023. On March 10, 2023, the plaintiffs filed an application for prejudgment remedy. Nygaard filed an objection on March 30, 2023.

A four-day hearing on the plaintiffs' PJR application commenced on August 1, 2023 and evidence was concluded on September 8, 2023. The parties filed simultaneous post-hearing briefs on December 11, 2023. On December 22, 2023, the McCullochs filed a motion for permission for extension of time to file a reply brief and the plaintiffs filed their objection in response to this motion on December 22, 2023. On January 8, 2024, this court overruled the plaintiffs' objection. The McCullochs then filed a reply memorandum on January 18, 2024.

LEGAL PRINCIPLES

A. PREJUDGMENT REMEDY

Connecticut General Statutes §§ 52-278a through 52-278n govern prejudgment remedies. § 52-278a(d) defines "prejudgment remedy" in relevant part as "any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment...General Statutes § 52-278a (d).

"A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, considering any defenses, counterclaims or setoffs, will be rendered in the matter in favor of the plaintiff. Proof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair

preponderance of the evidence." *Valencis v. Nyberg*, 160 Conn. App. 777, 782, 125 A. 3d 1026 (2015). "The legal idea of probable cause is a bona fide belief in the existence of facts essential under the law for the action and such as would warrant a [person] of ordinary caution, prudence and judgment, under the circumstances, in entertaining it...Probable cause is a flexible common-sense standard. It odes not demand that a belief be correct or more likely true than false." (Internal quotation marks omitted.) *Spilke v. Spilke*, 116 Conn. App. 590, 594 n. 6, 976 A. 2d 69, cert. denied, 294 Conn. 918, 984 A. 2d 68 (2009).

Therefore, "the law is clear that the standard of proof for a prejudgment remedy is lower than the standard that a plaintiff must meet to prevail at trial." *ASPIC, LLC v. Poitier*, 179 Conn. App. 631, 642, 181 A. 3d 593 (2018). However, the standard of proof applicable at trial is a factor that the court must consider when deciding whether to enter a prejudgment remedy. "[A]lthough the plaintiff does not have to prove its case by clear and convincing evidence [or a fair preponderance of ethe evidence or other heightened standard of proof] at the prejudgment remedy hearing, it nonetheless, must present sufficient evidence to lead the court to conclude that it could do so at trial." *Id.* at 643-44.

"[A] hearing in probable cause is not intended to be a full-scale trial on the merits of the [moving party's] claim. The [moving party] does not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim...The court's role in such a hearing is to determine probable success by weighing probabilities." *Spilke v. Spilke,* supra, 116 Conn. App. 594 n. 6. "At a probable cause hearing on a prejudgment remedy, a trial court may properly consider all evidence presented, including testimony of witnesses, documentary evidence, and affidavits." *Fleet Bank of Connecticut v. Dowling*, 28 Conn. App. 221, 225, 610 A. 2d 707 (1992), appeal dismissed, 225 Conn. 447, 623 A. 2d 1005 (1993). "[I]t is well settled

that, in determining whether to grant a prejudgment remedy, the trial court must evaluate both parties' evidence as well as any defenses, counterclaims and setoffs...Such consideration is significant because a valid defense has the ability to defeat a finding of probable cause." (Citation omitted.) *TES Franchising, LLC v. Feldman*, 286 Conn. 132, 141, 943 A. 2d 406 (2008).

"[A] finding [of probable damages] is an integral part of the probable cause determination." *Rafferty v. Noto Bros. Construction, LLC,* 68 Conn. App. 685, 694, 795 A. 2d 1274 (2002). "[I]n an application for a prejudgment remedy, the amount of damages need not be determined with mathematical precision...A fair and reasonable estimate of the likely potential damages is sufficient to support the entry of a prejudgment attachment...Nevertheless, the plaintiff bears the burden of presenting evidence which affords a reasonable basis for measuring her loss." (Citations omitted; internal quotation marks omitted.) *Id.* at 693; see also *J.E. Robert Co., v. Signature Properties, LLC*, 309 Conn. 307, 339, 71 A. 3d 492 (2013) (court must also make probable cause determination as to amount of remedy sought and evidence must simply be sufficient for court to make educated prediction as to probable amount.)

Superior Courts in Connecticut have adopted the standard for granting a prejudgment remedy. In *Harris v. Elliott*, 2017 WL 951017 *2 (Conn. Super. 2017) (Povodator, J.), Judge Povodator set forth the well-accepted standards for granting a prejudgment remedy:

> "In the context of a prejudgment remedy proceeding, 'probable cause' has been defined as a 'bona fide belief in the existence of the facts essential under the law for the action, in as such as would warrant a man of ordinary caution, prudence and judgment under the circumstances in entertaining it.' *TES Franchising, LLC v. Feldman*, 286 Conn. 132, 137 (2000). The burden of proof required for a prejudgment remedy is less than proof required by the preponderance of the evidence standard. *CC Cromwell LTD. Partnership v. Adames*, 124 Conn. App. 191, 194 (2010). Probable cause must be established both as to the merits of the case and the amount of the prejudgment remedy, 124 Conn. App. 196. The hearing in

probable cause is not contemplated to be a full scale trial on the merits of the plaintiff's claim. *Three S. Development Company v. Santore*, 193 Conn. 174 (1984).

A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or setoffs, will be rendered in the matter in favor of the plaintiff ... General Statutes § 52–278d(a)(1) ... Under this standard, the trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits ... *General Electric Capital Corp. v. Metz Family Enterprises, LLC*, 141 Conn. App. 412, 427 (2013) (internal quotation marks, omitted)."

In *Harris* Judge Povodator held that the amount of damages to be secured by a prejudgment remedy must reflect the amount that would actually be awarded to plaintiff taking into consideration the collateral source rule and other factors:

"As the issue before the court is the amount of security that the plaintiff may need, the court must not only consider the likely determination of a factfinder on the merits, but also the net/practical impact of other considerations, most obviously including the existence of liability insurance covering the defendant." 2017 WL 951017 *3.

Connecticut General Statutes Section 52-278d enumerates the factors a court must consider before it issues a prejudgment remedy:

"(a) The defendant shall have the right to appear and be heard at the hearing. The hearing shall be limited to a determination of (1) whether or not there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff, (2) whether payment of any judgment that may be rendered against the defendant is adequately secured by insurance, (3) whether the property sought to be subjected to the prejudgment remedy is exempt from execution, and (4) if the court finds that the application for the prejudgment remedy should be granted, whether the plaintiff should be required to post a bond to secure the defendant against damages that may result from the prejudgment remedy or whether the defendant should be allowed to substitute a bond for the prejudgment remedy. If the court, upon consideration of the facts before it and taking into account any defenses, counterclaims or set-offs, claims of exemption and claims of adequate insurance, finds that the plaintiff has shown probable cause that such a judgment will be rendered in the matter in the plaintiff's favor in the amount of the prejudgment remedy sought and finds that a prejudgment remedy securing the judgment should be granted, the prejudgment remedy applied for shall be granted as requested or as modified by the court."

B. INTENTIONAL MISREPRESENTATION & NEGLIGENT MISRPESRESENTATION

"Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." (Internal quotation marks omitted.) *Coppola Construction Co. v. Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 351-52, 71 A. 3d 480 (2013). "In other words, in addition to proving that a defendant negligently made a misrepresentation of fact, a plaintiff must also demonstrate that any claimed demonstrable harm was a direct result of his reasonable reliance on that misrepresentation. It is the plaintiff's failure at trial to produce evidence to demonstrate this causal link that is at issue." *Bernblum v. Grove Collaborative, LLC*, 211 Conn. App. 742, 762-63, 274 A. 3d 165 (2022).

"A claim of intentional misrepresentation requires the same elements as negligent misrepresentation except that the plaintiff also must prove that the defendant made the misrepresentation to induce the other party to act upon it ...." (Footnote omitted; internal quotation marks omitted.) *Brown v. Otake*, 164 Conn. App. 686, 706, 138 A. 3d 951 (2016). With regard to the latter, the "essential elements of an action in common law fraud ... are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury"; (internal quotation marks omitted) *Sturm v. Harb Development, LLC,* 298 Conn. 124, 142, 2 A. 3d 859 (2010).

C. FRAUDULENT CONCEALMENT

Fraudulent concealment is a form of fraud and requires an intent to conceal known facts, a duty to disclose and an occasion to speak. See *Egan v. Hudson Nut products*, 142 Conn. 344, 347-48 (1955). Accord, *Asnat Realty, LLC v. United Illuminating Co.*, , 204 Conn. App. 313, 326 (2021).

"It is, of course, true that, under certain circumstances, there may be as much fraud in a person's silence as in a false statement. ... Mere nondisclosure, however, does not ordinarily amount to fraud. ... It will arise from such a source only under exceptional circumstances. ...To constitute fraud on that ground, there must be a failure to disclose known facts and, in addition thereto, a request or an occasion or a circumstance which imposes a duty to speak. ... To be actionable for fraud, the nondisclosure must be by a person intending or expecting thereby to cause a mistake by another to exist or to continue, in order to induce the latter to enter into or refrain from entering into a transaction. ... 'A vendor of property may not do anything to conceal from the vendee a material fact affecting it or deliberately hide defects, for in so doing he is not merely remaining silent but is taking active steps to mislead. So, the surrounding circumstances may be such that the effect of his silence is actually to produce a false impression in the mind of the vendee, and the making of an agreement or doing of some other act may in itself lead the vendee to believe that a certain fact exists and so amount to an affirmation of it. So the vendor may stand in such a relationship of trust and confidence to the vendee that it is his duty to make a full disclosure.' " (Citations omitted).

"It is well settled that '[w]hether or not there is a duty to disclose depends on the relationship of the parties ... or, to put it in another way, whether the occasion and circumstances are such as to impose a duty to speak ....' " *Asnat*, 204 Conn. App. At 326 "A duty to disclose will arise if the parties share a 'special relationship.' " *Id.* "Under the common law, a duty to disclose 'is imposed on a party insofar as he voluntarily makes disclosure. A party who assumes to speak must make a full and fair disclosure as to the matters about which he assumes to speak.'" *DiMichele v. Perrella*, 158 Conn. App. 726, 731 (2015) quoting *Duksa v. Middletown*, 173 Conn. 124, 127, 376 A. 2d 1099 (1977).

DISCUSSION

In their complaint, the claims the plaintiffs have alleged against McCullochs are claims of (1) intentional misrepresentation or fraud; (2) fraudulent concealment; and (3) negligent misrepresentation. Although they have alleged additional claims against Nygaard and Berkshire Hathaway, as their PJR application is limited to seeking a prejudgment remedy solely against the McCullochs based on these three counts, the court has reviewed these claims as they pertain solely to the McCullochs.

COUNT 1 – INTENTIONAL MISREPRESENTATION/FRAUD

In the first count, the plaintiffs have alleged that the defendants intentionally made material misrepresentations about the high quality of the property and that these misrepresentations induced the plaintiffs to purchase the home based on their reliance on these false statements. These statements consisted of assurances that the defendants had meticulously cared for the home, that there had been no water intrusion in the home, that there had been no roof leaks, no water seepage in the basement, no rot or water damage problems, no water drainage problems, no exterior siding problems, no chimney problems, no plumbing problems, no problems with the interior floors, walls, or ceiling, and that all home improvements had been after having obtained the necessary permits and in accordance with the relevant building codes.

The plaintiffs have alleged that these material misrepresentations were made in several ways: (1) by way of the various real estate listings for the home in the form of the Zillow listing, Berkshire Hathaway listing, and MLS listing; (2) by way of the misrepresentations the defendants made in the Property Condition Disclosure Report; (3) by way of the misrepresentations contained in the purchaser's rider to the purchase agreement; and (4) by way of Nygaard's statements throughout the home purchasing process.

As a preliminary matter, the court does not give any weight to the Zillow listing, the Berkshire Hathaway listing, or the MLS listing for the home. Despite testimony from Karl Robinson during the PJR hearing that these listings were among the various representations from the defendants on which the plaintiffs relied when they decided to purchase the home, the court is aware that these are merely marketing materials that consist of advertisements designed to generate interest in the home from unspecified potential buyers rather than any specific

promises made by the defendants to the plaintiffs. Moreover, as evidenced by Robinson's testimony, the plaintiffs are intelligent, highly educated, worldly and sophisticated people who can certainly distinguish between general advertisements offered for the general public and affirmative representations made to a specific party to a transaction.

With respect to the plaintiff's claim that the defendants made intentional misrepresentations and engaged in fraud by making assurances about the quality of the home by way of the misrepresentations contained in the Property Condition Disclosure Report, the purchaser's rider to the purchase agreement, and in Nygaard's statements, the court finds that these are valid bases to support a claim of intentional misrepresentation and fraud on the part of the defendants. In addition, the plaintiffs offered sufficient evidence to establish probable cause as to this claim at the PJR hearing.

The elements of intentional misrepresentation or fraud as enunciated by the Connecticut Supreme Court require that the plaintiffs must prove by clear and convincing evidence that (1) the defendants made a false misrepresentation as a statement of fact, (2) that the statement was untrue and known by the defendants to be so, (3) that the statement was made with the intent of inducing reliance thereon, and that (4) the defendants relied on the statement to their detriment. See *Stuart v. Freiberg*, 316 Conn. 809, 821 (2015); see also *Nazami v. Patrons Mutual Ins. Co.*, 280 Conn. 619, 628, 910 A. 2d 209 (2006). Here, the court finds that the plaintiffs offered sufficient evidence at the PJR hearing to demonstrate probable cause as to all four elements of fraud.

While the defendants did not testify at the PJR hearing, numerous other witnesses did and the totality of their testimony in conjunction with the extensive photographic and video evidence of the damage in the home that the plaintiffs discovered upon moving into the residence has demonstrated that the representations made by the defendants were materially inaccurate and misrepresentative of the quality and condition of the home. The defendants affirmatively made certain representations about the home in the Property Condition Disclosure Report, the purchaser's rider to the purchase agreement, and through Nygaard's repeated statements, but these representations were misleading insofar as they left the plaintiffs with the impression that if the home had any issues, these would be a of a minor nature.

However, given that immediately after moving into the home the plaintiffs experienced numerous instances of leaking water, discovered preexisting water damage and mold, rot, and