National Center for Dispute Settlement
12900 Hall Road, Suite 401
Sterling Heights, MI 48313

NCDS File # 17-[redacted]-MN

In the Matter of the Arbitration Between
[redacted]

Claimants,

vs.

ORDER

[redacted]

Respondents.

This matter involves a dispute between Claimants [redacted] (herein, "Claimants," or "Buyers") and Respondent (herein, "Respondent," or "Seller") involving real property located at [redacted], Eagan, MN 55122 (the "Home"). Pursuant to written notice sent to the parties, the hearing was held on January 10, 2018, at the Home.

Claimants represented themselves. Respondent was represented by attorney Peter Barry of Barry & Helwig, LLC.

Witnesses who presented testimony were Claimants and Respondent.

FACTS

Background. Claimants currently reside at the Home. The Home and the accompanying pool were built in 1993. Respondent is the previous owner, having owned the Home for approximately one year during which time the pool was professionally opened in Spring 2016, and professionally closed in October 2016.

Claimants, as purchasers, and Respondents, as sellers, entered into a Purchase Agreement dated May 1, 2017 (the Final Acceptance Date on Line 336 is blank) for the sum of $455,000 (the "PA"). Contemporaneously, the parties entered an Arbitration Disclosure and Residential Real Property Arbitration Agreement whereby they agreed to arbitrate any disputes about the disclosure of material facts affecting the use or enjoyment of the Property.

Prior to execution of the PA, Respondent prepared a January 11, 2017, Seller's Property Disclosure Statement (the "SPDS"). Claimants acknowledged their receipt of this document on Line 436 on May 1, 2017. At Line 5, in bold print, the SPDS states that "*The Information Disclosed is Given to the Best of Seller's Knowledge*." At Line 8, the SPDS explains that Minnesota statutes require Seller to disclose to prospective buyers all material facts *of which Seller is aware* that could adversely and significantly affect an ordinary buyer's use or enjoyment of the Home. At Lines 15 -16, the SPDS explains that "*This disclosure is not a warranty or guaranty of any kind by Seller…and is not a substitute for any inspections or warranties the party(ies) may wish to obtain*." At Line 30 – 31, Seller is instructed to "*Describe conditions affecting the property to the best of your knowledge*."

The PA included an Inspection Contingency Addendum granting Claimants the right to obtain any inspection or tests by inspectors or testers of Claimants choice. The Addendum expressly states that "*Buyer shall satisfy Buyer as to the qualifications of the inspectors or testers*."

On May 13, 2017, following Respondents' inspection of the Home, the parties executed an Amendment to Purchase Agreement reducing the purchase price to $447,500. The Amendment specifically includes the requirement that "*Gate to the outdoor fence to pool to be functional*."

Claimants allege that at SPDS Line 178, Respondent falsely stated that the pool and equipment were in working order. They further allege that seller hid the true condition of the pool to obtain the maximum selling price; that Respondent failed to answer questions about the pool; and was generally evasive in regard to the pool during the sale process. The only evidence they offer is Respondent's statement received from Respondent's real estate agent, which Claimants view as evasive, stating that "*I'm officially moved 4 hours away and won't be able to meet the buyers. I'll certainly accept a phone call while they are walking through to go over any questions if that helps. As for the pool…was professionally opened and closed, heating and sump system worked great throughout the year. I can provide more advice on new chemicals and stuff like that if the buyer would like*." Respondent received no such phone call from Claimants, nor did the parties actually meet or otherwise communicate prior to closing.

All parties agree that Claimants failed to request that the pool be opened or drained so that a proper inspection could have been obtained. Claimants further testified that although they had the opportunity to inspect the pool, it would have required removal of the pool cover; that they did not ask Respondent to remove the pool cover; and that they never asked Respondent's permission to open and drain the pool at their own inspectors cost. They further testified that although they had the opportunity to inspect the pool, it was "filled with black water" at the time. Claimants lifted the pool cover slightly before closing, however at no time remove the entire cover.

The Inspection Contingency Addendum granted Claimants the contractual right to hire a pool inspector and/or perform a pool inspection, however they themselves chose not to do so.

Claimants allege that there was a large gash in the steps and other damage to the steps; that al ill-fitting liner was being held up by concrete screws; that when opened, freshly cleaned water had gotten between the liner and vermiculite; and that there were loose rocks underneath the liner. Claimants are or should be aware that they were purchasing a 24-year-old pool. All such alleged conditions could have been disclosed by a professional pool inspection. Further, given the age of the pool, it cannot be assumed that such alleged defects were "material facts" for purposes of Minn. Stat. §§513.52 – 513.60, discussed below.

The Arbitrator is unable to conclude that the pool was not in working order on the date Respondent completed Line 178 of the SPDS, or on the date of closing. Respondent chose not to reopen the pool in Spring 2017, prior to the June 12 closing. She testified that during Summer 2016 she and her guests experienced no loose rocks underneath the liner. Assuming, arguendo, that there were rocks present during Claimants' 2017 use of the pool, it cannot be concluded that such a condition existed during Summer 2016. All other defects alleged by Claimants easily could have been discovered by a professional pool inspection, had Claimants elected to have done.

DISCUSSION

Burden of Proof. It is helpful to understand that in an arbitration proceeding the burden is on Claimant to provide evidence sufficient to prove Respondent's intentional representation. The Arbitrator cannot simply conclude that a condition (for example, rocks beneath the pool liner) that was discovered in 2017 also existed in 2016 on the date that the SPDS was completed.

Statutory Disclosure Requirement. Minn. Stat. §§513.52 to 513.60 set forth the disclosure requirement for sellers of residential real estate. Minn. Stat. 513.55, Subd. 1, requires that before signing an agreement to sell or transfer residential real property, the seller shall make a written disclosure to the prospective buyer. The disclosure must include all material facts *of which the seller is aware* that could adversely and significantly affect an ordinary buyer's use and enjoyment of the property, or any intended use of the property of which the seller is aware. The disclosure must be made in good faith and *based upon the best of the seller's knowledge* at the time of the disclosure. There is no statutorily required disclosure form. Therefore, as is customary, Respondent in the instant case utilized the Seller's Disclosure Statement drafted and approved by the Minnesota Association of REALTORS® which, at Line 178 stated that the pool was in working order when it was closed in 2016.

Seller's Statutory Disclosure Requirements, and the Requirement of "Scienter." If a seller fails to disclose a known adverse condition, the seller is liable for any resulting harm. *Minn. Stat. §513.57, subd, 2*. The statutory standard is not one of negligence, but rather that of "scienter," such that an offending party must know that his act or omission is wrongful. *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 186 (1999), citing *Restatement (Second) Torts §876(b).* In this case, Claimants have failed to meet this burden of proof.

The SPDS is intended to assist Respondent in complying with statutory disclosure requirements. It specifically states that it is not a warranty or guarantee of any kind by seller, and that the information disclosed is given to the best of seller's knowledge.

Fraudulent Misrepresentation. A seller also may be liable for fraudulent representation. The leading case of *Davis v. Re-Trac*, 149 N.W.2d 37, 38-39 (Minn. 1967), sets forth the following eleven elements, each of which Claimant must prove, to prevail in such a claim.

(1) A representation;

(2) The representation must be false;

(3) It must have to do with a past or present fact;

(4) The fact must be material;

(5) The fact must be susceptible of knowledge;

(6) Respondent must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false;

(7) Respondent must intend that Claimant be induced to act, or justified in acting upon it;

(8) Claimant must have been induced to act or so justified in acting;

(9) Claimant's action must be in reliance upon the representation;

(10) Claimant must suffer damage; and

(11) Damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of Claimant's injury.

Here, Claimants have not established the required eleven elements of a fraud claim. The Arbitrator is unable to conclude that Line 178 of the SPDS contained false representations or omissions prior to Claimant signing PA.

Two unpublished Minnesota cases considered the theory of fraudulent misrepresentation within the context of alleged failure to disclose in connection with the sale of a home. In *Burmeister v. Westerhouse*, 2009 WL 234072 (Minn. App. 2009), buyers alleged that seller fraudulently failed to disclose the lack of functionality of the property's septic system. Therein the court found that buyers had presented no evidence that seller actually knew of any significant septic system problems and therefore held as a matter of law that buyers had failed to establish elements 2, 4 and 7 required by *Davis v. Re-Trac*.

In *Nance v. Evje*, 2007 WL 247499 (Minn. App. 2007), the court rejected buyers' claim, noting that buyers had failed to produce evidence that sellers Evje and Atkins knew that they were making false statements when they disclosed that the home had not experienced mold, water intrusion, or rodent infestation; and that there was nothing in the record showing that the Evjes ever experienced similar issues.

Here, Claimants have offered no evidence that Respondent actually knew of any material adverse facts pertaining to the pool that otherwise could not have been discovered by a prudent professional pool inspection.

The "Out of Pocket Rule." Minnesota follows the "out of pocket" rule, by which damages are the difference between the price paid for the Home and its actual market value. *Johnson Bldg. Co. v. River Bluff Development*, 374 N.W.2d 187, 193-194 (Minn. App. 1985). Assuming, arguendo, that Claimants have suffered damages, they introduced no evidence on the question of whether, or by how much, any alleged damages affected the market value of the Home. It cannot be assumed that the cost to correct results in a direct reduction oif the market value of the Home.

Accord and Satisfaction. The Amendment reduced the purchase price $455,000 to $447,500, based upon the results of the inspection that Claimants actually performed. This constituted an "accord and satisfaction." The purpose of accord and satisfaction is to allow a buyer and seller to resolve disputes by discharging all contractual rights and duties under the PA, in exchange for payment of a sum of money. "Satisfaction" is the performance of the "accord," generally buyer's acceptance of the negotiated reduction of the purchase price, which operates to discharge the seller's duty, as agreed to in the accord. *Webb Business Promotions, Inc. v. American Electronics & Entertainment Corp.*, 617 N.W.2d 67, 72 (Minn. 2000).

An enforceable accord and satisfaction may arise when a seller accepts part payment of an unliquidated debt which the buyer tenders in full satisfaction of the contract, or when the buyer offers to pay a definite amount or provide a different performance in settlement of a liquidated or undisputed debt and the seller accepts that offer. An executory accord is an agreement for the future discharge of an existing claim by substituted performance of the original purchase agreement. *Don Kral Inc. v. Lindstrom*, 173 N.W.2d 921. 923(1970), citing *Butch Levy Plumbing & Heating, Inc. v. Sallblad*, 126 N.W.2d 380 (1964).

Here, the negotiated reduction in the purchase price establishes accord and satisfaction.

AWARD OF ARBITRATOR

After considering the testimony and reviewing the documents submitted into evidence, the Arbitrator orders the following:

Claimant's claim is denied.

This constitutes my complete Order as to all items in dispute submitted to me for determination.

Date: February 12, 2018

Arbitrator