OPINION AND ORDER

EPPINGER, P.J., November 29, 1985:

Betty and Elwood Armstrong (buyers) purchased a house from Ruth and John Shearer (sellers). Simpson Associates (agents) acted for the sellers throughout the transaction.

After the buyers took possession, the well went dry. In this action against sellers and the agent, buyers are asking for $2,898, the cost of digging a new well.

The agent has filed a motion for summary judgment pursuant to Pa.R.C.P. 1035, alleging there are no undetermined issues of fact, that it made no misrepresentations concerning the conditions of the existing well, but even if it did or failed to disclose the condition, neither are grounds for relief as the existence or non-existence of a well sufficient to supply the property does not relate to a dangerous condition.

In support of this motion, the agent filed the transcript of its depositions of the buyers. The buyers filed nothing in turn, but relied alone on their allegations in the amended complaint and a contention that discovery is not complete.

Summary judgment may be granted only when the moving party proves there is no genuine issue of material fact. *Pa.P.U.C. Bar Association v. Thornburgh,* 62 Pa. Cmwlth. 88, 93, 434 A.2d 1327, affd. 498 Pa. 589, 450 A.2d 613 (1981).

In ruling on a motion for summary judgment we must "accept as true all well-pleaded facts and consider any admissions of record." *Dunn v. Teti,* 280 Pa. Super. 399, 401, 421 A.2d 782, 783 (1980); "resolving against the moving party any doubts as to the existence of a genuine issue of material fact." *Id.* at 402, 783.

We must view the record in the light most favorable to the nonmoving party, the plaintiffs, and give them the benefit of all reasonable inferences. *First Pennsylvania Bank v. Triester,* 251 Pa. Super. 372, 378, 380 A.2d 826, 829 (1977); *Pa.P.U.C. Bar Association v. Thornburgh,* supra. Our function is not to decide issues of fact, only to determine whether there is an issue of fact to be tried. *Matson v. Parking Service Corp.,* 242 Pa. Super. 125, 134-35,

363 A.2d 1192, 1197 (1976). Even if the facts are not in dispute, but the parties disagree about the inferences to be drawn from the facts and what the parties' intention was as shown by the facts, then the motion for summary judgment must be denied. *Brua v. Bruce-Merrilees Electric Co.*, 63 D. & C. 2d 652, 653 (Lawrence Cty. 1973).

However, Rule 1035 (d) provides that where a motion for summary judgment has been supported with depositions, answers to interrogatories, or affidavits, the non-moving party may not rest on the mere allegations or denials of its pleading. Pa.R.C.P. 1035 (d). Where the allegations of the non-moving party's pleading have been controverted by the moving party's supporting material, the non-moving party must by affidavit, or in some other way provided for by the rule, set forth specific facts showing that a genuine issue of material fact exists. *Tom Morello Const. Co., Inc. v. Bridgeport Fed. Sav. & Loan Ass'n,* 280 Pa. Super. 329, 334-35, 421 A.2d 747, 750 (1980). Since the plaintiffs did not so respond, we must accept as true the agents' statement of the facts contained in the buyers' depositions. *Nicastro v. Cuyler,* 78 Pa. Cmwlth. 539, 543, 467 A.2d 1218, 1220 (1983).

The very purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is need for a trial. The doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified motion for summary judgment, is incompatible with the basic purpose of the rule. Therefore, although the pleadings may sufficiently state a genuine issue of material fact, a motion for summary judgment was designed to remedy the situation where there is a sufficiently pleaded but factually improper claim or answer. *Amabile v. Auto Kleen Car Wash,* 249 Pa. Super. 240, 246, 376 A.2d 247, 250 (1977).

However, just because a party does not oppose by affidavit, deposition or the like, a factually supplemented motion for summary judgment, it does not follow that the motion must be granted. The last sentence of Pa.R.C.P. 1035 (d) provides that if the non-moving party "does not so respond, summary judgment, *if appropriate,* shall be entered against him." (Emphasis ours).

Granting a defendant's motion for summary judgment is never appropriate when depositions filed in support of such motion do not either, (1) refute a material allegation in the plaintiffs' complaint, thus destroying the prima facie case, or (2) present a complete defense to the action. *Id.* at 247, 250. The mere fact that the plaintiffs failed to submit counter-affidavits or depositions does not automatically render summary judgment appropriate under Rule 1035 (d). It is preliminarily imperative that the agents' deposition evidence clearly dispel the existence of any factual issues and we grant its motion for summary judgment.

Buyers allege in their amended complaint that the agents committed fraud, (1) by their representative telling the buyers at the time she showed them the house that all the property needed was a bath, a commode, a water heater and a septic system; (2) by giving the buyers the results of a successful "perk test"; and (3) because they knew, should have known, or were imputed to have known, of the well's shallow depth and propensity for going dry but did not disclose this information to the buyers.

Buyers, on the one hand, allege that the agents made affirmative misrepresentations in saying that all the property needed was a bath, a commode, a water heater and a septic system, and in conveying the results of the "perk test" 1 to the buyers. On the other hand they allege that the agents had a duty to disclose the condition of the well.

To show an affirmative misrepresentation the buyers must allege and prove by clear, precise and undubitable evidence the following elements: (1) that agents made a misrepresentation of an existing fact; (2) that if the misrepresentation was innocently made, it related to a matter material to the transaction (if it was knowingly made, materiality is not required); (3) actual knowledge of the falsity of the misrepresentation, reckless ignorance of its falsity, or mere false information where a duty to know is imposed on a person by reason of special circumstances; (4) justifiable reliance on the misrepresentation; and (5) damage. *Glanski v. Ervine,* 269 Pa. Super. 182, 191, 409 A.2d 425, 430 (1979); *Shane v. Hoffman,* 227 Pa. Super. 176, 182, 324 A.2d 532, 536 (1974).

[1] We understand that the so called "perk test", has to do not with the well-spring of water from the ground, but whether water will pass through and be filtered by the ground. The "perk test" has to do with the suitability of the lot for a septic system, not with the supply of water.

The buyers' depositions show that none of the above requirements were met. On the contrary, one of the buyers, Mr. Armstrong, testified that the only thing he asked about the water system was where the well was actually located and the only thing the agents' representative said concerning the well was that it was located somewhere around the kitchen window. He assumed from what he observed on the property, not from anything said, that the well would be adequate for his needs.

One of the buyers, Mrs. Armstrong, testified that all the agents' representative said about the well was that there was a drilled well, approximately a hundred plus feet, and she pointed out its location. Neither of the buyers mentioned anything about a "perk test" or any misrepresentations made by the agents. Their deposition testimony meets none of the elements of misrepresentation listed in *Glanski* and *Shane.* What buyers seem to be claiming is an implied contract that agents know or have reason to know of the condition of the property and a duty to communicate such knowledge to the buyers. There is no such duty. *Henry v. Babecki,* 65 D. & C.2d 4, 15 (Phil. Cty. 1974).

For purposes of summary judgment, we will assume that the well was shallow and had a propensity for going dry and that Simpson Associates knew of this condition. Even if we assumed the well was shallow, had a propensity for going dry and that agents knew it, the agents had no duty to disclose this knowledge to the plaintiffs. The agents would be under a duty to disclose this condition only if were latent and could prove dangerous "to life, limb or to the general health or safety of the purchaser and his family." *Shane v. Hoffman,* supra at 185, 537-38; *Quashnock v. Frost,* 299 Pa. Super. 9, 19, 445 A.2d 121, 128 (1982).

While we certainly recognize that home buyers like the Armstrongs may be dissatisfied with their purchase because the house is imperfect, we can find no reason why the agents would be liable to them. There is no suggestion why a shallow well or one with a propensity for going dry would prove dangerous to plaintiffs' health or safety. In the absence of any evidence or implication that the condition of the well was a latent, dangerous condition there is no duty to disclose by the agent. *Gozen v. Henderson-Dewey & Associates, Inc.,* 312 Pa. Super. 242, 245, 458 A.2d 605, 607 (1983).

The only evidence before us, plaintiffs' deposition testimony, shows that no misrepresentations were made to the buyers by the agents. In the absence of any affidavits or depositions presented by the buyers, we have no choice but to find that there is no genuine issue of material fact and grant the agents' motion for summary judgment.

ORDER OF COURT

November 29, 1985, defendant Simpson Associates' motion for summary judgment is granted.

PETERS v. RECTOR, ETAL. C.P. Franklin County Branch, No. A.D. 1983 - 262

Medical Malpractice - Voir Dire Exam

1. Voir dire is limited to ascertaining whether or not a juror has formed a fixed opinion.

2. Voir dire examination is not intended to provide a better basis on which to exercise peremptory challenges.

3. Neither party may inquire of a prospective juror his present impressions or opinions.

Terry S. Hyman, Esquire, Counsel for Plaintiff
S. Walter Foulkrod, III, Esquire, Counsel for Defendant, Stader
Christopher W. Matson, Esquire, Counsel for Defendant, Rector.

OPINION AND ORDER

KELLER, J., December 17, 1985: