

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-428

JUNE TERM, 2004

	}	APPEALED FROM:
	}	
James W. and M. Martha Marble	}	Washington Superior Court
	}	
v.	}	
	}	
First American Flood Data	}	DOCKET No. 87-2-01 Wncv
Services, Inc. and Banknorth	}	
Group, Inc.	}	Trial Judge: Hon. Mary Miles Teachout
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Plaintiffs James and Martha Marble appeal from a summary judgment in favor of defendants First American Flood Data Services, Inc., and Banknorth Group, Inc. Plaintiffs contend the court erred in concluding that a failure of proof on the essential element of reliance barred their claim for negligent misrepresentation. We affirm.

The facts may be briefly summarized. Plaintiffs own a home in the Town of Waitsfield located on the banks of the Mad River. They purchased the home in 1980, and did not then, or at any time thereafter, attempt to obtain flood insurance for the property. Between 1985 and 1994, plaintiffs obtained loans secured by mortgage deeds on at least five separate occasions. None of the lenders required flood insurance in connection with any of these transactions.

In February 1998, plaintiffs refinanced the property through a loan secured with a mortgage deed from defendant Banknorth Group. In connection with the loan, Banknorth requested B apparently as a matter of course in connection with all residential loans B a flood hazard determination from defendant First American Flood Data Services, Inc. (FDSI). FDSI is a Texas corporation in the business of providing flood hazard determinations to facilitate lenders= compliance with the National Flood Insurance Act of 1968, 42 U.S. C. ' ' 4001-4129. The Act prohibits loans for real estate located in areas identified as subject to special flood hazards unless the property is covered for the term of the loan by flood insurance made available at reduced rates under the federal law. On February 17, 1998, FDSI produced the requested flood hazard determination on a one-page federal form, indicating that plaintiffs= property was not located in a special flood hazard area. On the same date, it sent a form notice explaining that the property was not in a special flood hazard area and that, as a result, plaintiffs were not required by federal law to obtain mandatory flood insurance in connection with the loan.

At the closing on February 20, 1998, plaintiffs recalled that they were informed that they would not be required to purchase flood insurance, and signed the form notice. In June, and again in August 1998, plaintiffs= property sustained severe damage when the Mad River flooded. In February 2001, they filed a complaint against defendants, alleging that plaintiffs had made a decision not to purchase flood insurance in reliance on the flood hazard determination, that contrary to the determination the property was located in a special flood hazard area, and that they had suffered substantial financial damage as a result of the negligent misrepresentation. Defendants filed separate motions for summary judgment, asserting various defenses. Following a hearing, the court granted the motions, concluding that even if defendants owed a duty to plaintiffs, and assuming that the flood determination was inaccurate, the evidence conclusively showed that plaintiffs had not actually relied on the determination as a basis for their decision not to purchase flood insurance. Accordingly, the court entered judgment for defendants. This appeal followed.

Plaintiffs contend the court erred in granting summary judgment because triable issues remained on the element of

reliance. On an appeal from a grant of summary judgment, this Court applies the same standard as that used by the trial court. Hedges v. Durrance, 2003 VT 63, & 5, 834 A.2d 1. Summary judgment will be granted if A the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.@ V.R.C.P. 56(c) (3). In determining whether any genuine issue of material fact exists for trial, all reasonable doubts are resolved in favor of the party opposing summary judgment. O= Donnell v. Bank of Vermont, 166 Vt. 221, 224 (1997).

We have adopted the definition of negligent misrepresentation set forth in the Restatement, which provides that one who A supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss to them caused by their justifiable reliance upon the information.@ Hedges, 2003 VT 63, at & 10 (quoting Restatement (Second) of Torts, ' 552(1) (1977)). The predicate to a finding of justifiable reliance is actual reliance. See, e.g., In re Sofamor Danek Group, Inc., 123 F.3d 394, 404 (6th Cir. 1997) (construing Tennessee law to A require a showing of actual reliance as a condition of recovery for common law fraud or negligent misrepresentation@ ); In re ValuJet, Inc., 984 F.Supp. 1472, 1481 (N.D. Ga. 1997) (A [T]he majority of courts have held that ' 552 of the Restatement requires actual reliance before a party may be held liable for negligent misrepresentation.@ ); Cahill v. Eastern Benefit Sys., Inc., 603 N.E.2d 788, 792 (Ill. App. Ct. 1992) (A Claims for negligent misrepresentation require a showing of actual reliance.@ ); Brinkman v. Barrett Kays & Assocs., 575 S.E.2d 40, 44 (N.C. Ct. App. 2003) (to find defendant liable for common law negligent misrepresentation jury must find A that the plaintiff actually relied on the false information supplied by the defendant, and that the plaintiff= s reliance was justifiable@ ) (internal citation omitted).

Viewing the record in its entirety, and resolving all doubts in favor of plaintiff, we discern no basis to disturb the court= s finding that there was no credible evidence that plaintiffs had, in fact, relied on the flood hazard determination as the basis for their decision not to purchase flood insurance. As the court noted, the uncontroverted evidence showed that plaintiffs had resided in a house on the banks of the Mad River for nearly twenty years, and had previously financed or refinanced the house, without ever having attempted to purchase flood insurance. Plaintiffs acknowledged, furthermore, that their only awareness of the flood hazard determination was a pre-closing communication from their attorney that the bank had referred the matter for a flood certificate, and a A very brief conversation@ at the closing indicating, in James Marble= s words, that A we do not require flood insurance, therefore, there would be no additional cost.@ The record thus shows that plaintiffs had no intention of purchasing flood insurance, and that the flood hazard determination simply did nothing to alter their preconceived design.

Plaintiffs assert that the record contains evidence showing otherwise. However, the bare allegation, without any objective factual support, that they relied on the flood hazard determination in declining to purchase insurance was insufficient to raise a genuine issue of fact. See Starr Farm Beach Campowners Ass= n v. Boylan, 174 Vt. 503, 506 (2002) (mem.) (parties= affidavit containing A wholly conclusory@ assertion that they detrimentally relied on certain representations failed to raise triable issue on collateral estoppel claim A as it supplied no factual basis for the court to evaluate their claim of detrimental reliance@ ); Cataldo Ambulance Serv., Inc. v. City of Chelsea, 688 N.E.2d 959, 962 (Mass. 1998) (bare assertion in affidavit that plaintiff relied on defendant= s representations insufficient to raise genuine triable issue where factual record otherwise plainly demonstrated lack of reliance). Plaintiffs list several additional record citations in support of their claim that summary judgment was improper, but none B upon examination B contains evidence raising a genuine factual dispute on the issue of actual reliance. Accordingly, we discern no basis to disturb the summary judgment in favor of defendants.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Paul L. Reiber, Associate Justice