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DISTRICT COURT
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DEPUTY

7 MONTANA FOURTEENTH JUDICIAL DISTRICT COURT, MUSSELSHELL COUNTY

8 NATASHA SEYDEL,)
9 Plaintiff,)
10 vs.)
11 ROBERT SAMUELS, A ROUND TOWN)
REALTY, EDWIN BOHLMAN, JEAN)
12 BOHLMAN,)
13 Defendants.)

Cause No. DV-12-19

**ORDER GRANTING EDWIN AND
JEAN BOHLMAN'S MOTION FOR
SUMMARY JUDGMENT**

14 EDWIN AND JEAN BOHLMAN,)
15 Counterclaimants,)
16 vs.)
17 NATASHA SEYDEL,)
18 Counterdefendant.)

20 EDWIN AND JEAN BOHLMAN,)
21 Cross-Claimants,)
22 vs.)
23 ROBERT SAMUELS,)
24 Cross-Defendant.)

26 This matter comes before the Court on Defendants Edwin Bohlman and Jean Bohlman's

1 Motion for Summary Judgment, Pursuant to Rule 56, Mont. R. Civ. P. A hearing was held and
2 oral argument presented by counsel on February 25, 2013, at the Musselshell County Courthouse,
3 in Roundup, Montana. The motion is deemed submitted and the Court, having reviewed and
4 considered the briefing and oral arguments of the parties, is prepared to rule. For the reasons
5 submitted below,

6 **IT IS HEREBY ORDERED THAT** Defendants, Edwin Bohlman and Jean Bohlman's
7 Motion for Summary Judgment, Pursuant to Rule 56, Mont. R. Civ. P., is hereby **GRANTED**.

8 **MEMORANDUM**

9 FACTUAL BACKGROUND:

10 Plaintiff, Natasha Seydel (hereafter "Plaintiff"), brought this civil suit alleging damages
11 resulting from the alleged misrepresentations regarding material facts related to the purchase of
12 Defendants, Edwin and Jean Bohlman's (hereafter "Bohlmans") property (hereafter "the
13 Property"). These alleged misrepresentations included whether or not Plaintiff could construct a
14 culvert across an irrigation ditch which runs through the property, failure to disclose whether the
15 property flooded from time-to-time, and failure to disclose any restrictive covenants on the
16 property.

17 After visiting Montana, Plaintiff and her husband became interested in owning property
18 within the state, especially property with water for livestock use. In 2006, Plaintiff and her
19 husband became interested in a piece of property owned by the Bohlmans offered for sale on a
20 website. Located off of Highway 12 in Musselshell County roughly 20 miles east of Roundup,
21 the Property is approximately a 100 acre parcel. The southern portion of the Property is a low-
22 lying area within the Musselshell River flood plain that is bordered to the south by Highway 12
23 running east to west and a cliff to the north that also runs east to west. A ditch, owned by the
24 Cooley-Goffena Ditch Users, runs west to southeast leaving roughly 5-6 acres of the Property
25 along the southern border inaccessible to livestock and vehicles. At the southeastern corner of
26 the Property, the ditch leaves the Property via a concrete culvert at a southeastern direction and

1 crosses under Highway 12. The Musselshell River runs along the opposite side of Highway 12.

2 Finding the Property listed online, Plaintiff's husband contacted the Bohlman's inquiring
3 details of the Property and after a brief conversation, was referred to their agent. In April 2006,
4 the Bohlman's agent faxed Plaintiff a Buy-Sell Agreement for the Property which they signed in
5 Colorado. Therefore, Plaintiff and her husband inspected the Property for a couple hours with
6 the Bohlman's agent. Satisfied with their inspection, Plaintiff proceeded with the sale by
7 scheduling a closing on the Property. Prior to closing, the Bohlman's agent, in a letter, informed
8 them that they could install a culvert in the ditch to access the 5-6 acres cut off from the rest of
9 the Property and that several contractors in Roundup would be able to do this for them.

10 In 2009, Plaintiff's husband personally installed a culvert and bridge in the ditch. After it
11 was installed, the Cooley-Goffena Ditch Users objected to the type of culvert installed and
12 ordered it to be removed. The two parties went to trial which resulted in the Montana Supreme
13 Court finding for the Cooley-Goffena Ditch Users. (See *Musselshell Ranch, Co. v. Seidel-*
14 *Joukova*, 2011 MT 217, 362 Mont. 1, 261 P.3d 570). In 2011, the Musselshell River experienced
15 its biggest flood in recorded history. As a result, the southern low-lying portion of the Property
16 flooded making the house on the northern portion of the Property inaccessible for weeks.

17 The Complaint asserts claims for: Breach of Contract, Negligent Misrepresentation, and
18 Fraud. (Complaint, ¶¶ 15-17.) Based on such claims, Plaintiffs seek the following relief:

- 19 - damages for breach of contract;
- 20 - damages for negligence;
- 21 - punitive damages;
- 22 - attorney's fees and costs;

23 (Complaint, Prayer for Relief.) The Bohlman's have moved the Court for summary judgment
24 dismissing all of Plaintiff's claims.

25 STANDARD OF REVIEW:

26 Summary judgment is proper when no genuine issue of material fact exists and the

1 moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c); *Jenkins v.*
2 *Hillard*, 119 Mont. 1, 5, 647 P.2d 354, 356 (1982). The burden of establishing the lack of an
3 issue of material fact is on the moving party. *Roope v. Anaconda Co.*, 159 Mont. 28, 31, 494
4 P.2d 922, 924 (1972). Upon meeting that burden, the burden shifts to the nonmoving party to
5 present evidence to prove the existence of a genuine issue of a material fact. *Id.* The opposing
6 party must present material and substantial evidence, rather than mere denial, speculation, or
7 conclusory assertions, to raise a genuine issue of material fact. *Olympic Coast Inv., Inc. v.*
8 *Wright*, 2005 MT 4, ¶ 20, 325 Mont. 307, 105 P.3d 743. Once it has been established that no
9 genuine issue of material fact exists, the court must determine whether the moving party is
10 entitled to judgment as a matter of law. *Id.*

11 COUNTS 1, 2 & 3 - BREACH OF CONTRACT, NEGLIGENT MISREPRESENTATION, &
12 FRAUD:

13 Each count alleged by Plaintiff stems from the same transaction, the Plaintiff's purchase
14 of the Bohlman's Property, and thus, will be addressed together. The Bohlman's met their burden
15 of establishing the lack of an issue of material fact and that burden shifted to Plaintiff to come
16 forward with specific facts establishing an issue of material fact. Plaintiff has failed to provide
17 any evidence of the presence of an issue of material fact. Plaintiff relies on speculative and
18 conclusory statements to assert that the Bohlman's have made material misrepresentations.
19 Plaintiff has also asked this Court to anticipate possible proof that may be forthcoming once
20 discovery is completed or that may be adduced at trial. This reliance on such statements and
21 future evidence that may or may not exist, however, does not meet the shifted burden and
22 summary judgment is appropriate here.

23 Under Montana law, a party alleging fraud must make a prima facie case based on nine
24 elements: 1) a representation; 2) falsity of the representation; 3) materiality of the representation;
25 4) the speaker's knowledge of the falsity of the representation or ignorance of its truth; 5) the
26 speaker's intent that the representation shall be relied upon; 6) the hearer's ignorance of the

1 falsity of the representation; 7) the hearer's reliance on the representation; 8) the hearer's right to
2 rely upon the representation; 9) the consequent and proximate injury caused by the reliance on
3 the representation. *Northwest Truck & Trailer Sales, Inc. v. Dvorak*, 269 Mont. 150, 154, 887
4 P.2d 260, 262. Montana civil procedure requires "[i]n all averments of fraud or mistake, the
5 circumstances constituting fraud or mistake shall be stated with particularity." Mont. R. Civ. P.,
6 Rule 9(b). Where a party has to make a prima facie case of fraud with particularity, summary
7 judgment is appropriate. *Northwest Truck*, 269 Mont. 150, 887 P.2d 260. The elements of fraud
8 require a representation to be made as the basis of the prima facie case. Without a representation,
9 the elements of fraud cannot be met.

10 With or without a representation, the Montana Supreme Court has held that a buyer of
11 property is responsible for the property's obvious defects that a reasonable buyer would have
12 noticed. *Wagner v. Cutler*, 232 Mont. 332, 339, 757 P.2d 779, 784 (1988). An independent
13 investigation clause may be rejected as a defense if the buyer justifiably relies on
14 misrepresentations by the buyer. *Garrison v. Averill*, 282 Mont. 508, 518, 938 P.2d 702, 708
15 (1997). However, the court has held:

16 [w]hen it appears that a party who claims to have been deceived to his prejudice,
17 has investigated for himself, or that the means were at hand to ascertain the truth .
18 . . of any representations made to him, his reliance upon such representations,
however false they may have been, affords no ground of complaint.

19 *Lowe v. Root*, 166 Mont. 150, 531 P.2d 674 (1975) (citing *Grinrod v. Anglo-American Bond Co.*,
20 34 Mont. 169, 85 P. 891; *Power & Bros. v. Turner*, 37 Mont. 521, 97 P. 950; 26 C.J. 1149). This
21 was later distinguished by *Jenkins v. Hillard* where the court narrowed the ruling in *Lowe* to hold
22 that when a superficial inspection of a property would have revealed the open and notorious
23 deficiencies in the property, a buyer may not, as a matter of law, have the right to rely on a
24 representation by the seller. 199 Mont. 1, 6-7, 647 P.2d 354, 357 (1982).

25 In the present case, Plaintiff has alleged that the Bohlman's, through their agent, made
26 false and negligent representations regarding her ability to install a culvert in the ditch running

1 through the Property. (Complaint, ¶ 8-9.) Second, Plaintiff alleges the fact that the Property
2 flooded from time-to-time is a material defect and the Bohlmans negligently failed to disclose
3 this defect. (Complaint, ¶ 10.) And third, Plaintiff alleges the Bohlmans negligently failed to
4 disclose that the Property was subject to various restrictive covenants. (Complaint ¶ 11.) As a
5 result, Plaintiff alleges that the Bohlmans are in breach of contract. (Complaint, ¶ 15.)

6 Plaintiff was informed through the Bohlmans' real estate agent that a culvert could have
7 been installed in the ditch to allow them to access the cut off 5-6 acre portion of their property.
8 Rather than obtaining permission from the ditch owners or consulting with a contractor about
9 installing the culvert, Plaintiff decided to install one on her own. The result was a culvert that the
10 Montana Supreme court ruled as an unreasonable interference with the ditch owner's easement
11 right. (See *Musselshell Ranch, Co. v. Seidel-Joukova*, 2011 MT 217, 362 Mont. 1, 261 P.3d
12 570). This outcome was not predicated on a false representation by the Bohlmans regarding her
13 ability to install a culvert in the ditch but rather a failure to solicit advice from individuals with
14 knowledge and expertise regarding the installation of a culvert in a ditch.

15 Next, the Property's flood risk is an open and obvious condition of the Property Plaintiff
16 was or should have been aware of when she toured the Property prior to its purchase. There
17 should be no disputing that the Musselshell River is open and obvious. It runs the length of the
18 southern edge of the Property and is readily visible traveling to and from the Property along
19 Highway 12. Furthermore, it is not called "Musselshell Creek." There are irrigation flumes,
20 ditches, pivots, sprinklers, gated pipe, and flooded fields. The low-lying portion of the Property
21 is effectively marshland with flora and fauna consistent with a low-lying area susceptible to
22 flood. In applying *Wagner* and *Garrison*, this Court finds that Plaintiff's argument that the
23 Property's susceptibility to flood is a latent defect that should have been disclosed and was
24 unknown to Plaintiff unpersuasive. The fact is, rivers flood and this fact is not a latent defect.
25 The fact that a river may flood is a readily available feature a prospective purchaser should take
26 notice of. Upon investigating the Property, by noticing the proximity of the Musselshell River


1 along with the characteristics of the low-lying area, Plaintiff knew or should have been on notice
2 to make a reasonable inquiry under the circumstances regarding the Property's flood risk.
3 Instead, Plaintiff made no inquiries as to the susceptibility of flooding on the Property at no fault
4 of the Bohlmans. And, the flood event that occurred in 2011 was a 157-year event, not the sort
5 of thing that the Bohlmans should reasonably be expected to anticipate or be expected to
6 disclose.

7 Plaintiff's independent investigation should have made her aware of the Property's flood
8 risk and also the restrictive covenants that were on the Property as a result from their subdivision
9 from the rest of the Bohlmans property. Regardless, Plaintiff has provided to evidence that these
10 restrictive covenants has caused her any damages and therefore, she has failed to make a prima
11 facie case under the *Northwest Truck* factors. Because there is no evidence of the Bohlmans'
12 making false representations or a failure to disclose any material defects on the Property, there is
13 no breach of contract.

14 **CONCLUSION**

15 For the reasons stated above, even when the facts are viewed in the light most favorable
16 to Plaintiff, Plaintiff has not provided any evidence that would entitle her to relief under all
17 Counts in her Complaint. Therefore, without the existence of a genuine issue of material fact,
18 the Bohlmans are entitled to summary judgment. Plaintiff's claims against the Bohlmans under
19 Counts 1, 2, and 3 of the Complaint are hereby dismissed.

20 DATED this 3rd day of June, 2013.

21
22 
23 RANDAL I. SPAULDING, District Judge

24 c: Randall G. Nelson
25 *Netasha Geydel*
26 Craig R. Buehler

CERTIFICATE OF SERVICE

This is to certify that the foregoing document was duly served by mail, fax, personal service or office inbox upon all attorneys of record and necessary parties this 3 day of

June, 2013
Clerk of Court
By: *Jeresa Stamm*

No. DV-12-19

1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on this 25th day of March, 2013, a copy of the
3 foregoing **PROPOSED ORDER GRANTING EDWIN AND JEAN BOHLMAN'S MOTION**
4 **FOR SUMMARY JUDGMENT** was duly served by first class mail, postage prepaid, upon the
5 following:

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18 c: Kathy A. Brick (Claim No. 1 AR 088857)
19 Carey Bertsch (Claim No. K7696)
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