[Cite as *Klaus v. Klosterman*, 2015-Ohio-2545.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Teresa M. Klaus et al.,	:	
Plaintiffs-Appellants,	:	
		No. 14AP-960
v.	:	(C.P.C. No. 13CV-04-4625)
Kevin M. Klosterman et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 25, 2015

Law Offices of James P. Connors, and *James P. Connors*, for appellants.

Kevin M. Klosterman, pro se.

Curtis H. Knapp, pro se, and for appellee Polaris Title Agency, LLC.

APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiffs-appellants, Teresa and Frederick Klaus ("appellants"), appeal two decisions of the Franklin County Court of Common Pleas: the July 16, 2014 decision granting summary judgment in favor of defendants-appellees, Curtis Knapp and Polaris Title Agency, LLC ("appellees Knapp/Polaris Title"); and the October 21, 2014 decision denying appellees' combined motion for default judgment and, alternatively, summary judgment against defendants-appellees, Kevin and Karen Klosterman ("appellees Klosterman"), and sua sponte dismissing the complaint. For the reasons that follow, we affirm in part and reverse in part.

{¶ 2} The genesis of this case stems from a purported cognovit note and the filing of a complaint by appellees Klosterman against appellants, among others, to enforce such note. The facts regarding the note are summarized in *Klosterman v. Turnkey-Ohio, L.L.C.*, 10th Dist. No. 08AP-774, 2009-Ohio-2508, and will not be repeated here. Relevant here, in *Klosterman*, this court determined that the trial court did not have subject-matter jurisdiction to enter judgment in favor of appellees Klosterman on the cognovit note because it did not comply with an R.C. 2323.13(A) requirement that it contain a warrant of attorney. Accordingly, we reversed the judgment of the trial court as void abinitio and remanded the case for further proceedings consistent with our decision and the law.

{¶ 3} On remand, on June 8, 2009, the appellants (as the defendants in the case), filed a "Motion for Return of Funds by [Klosterman] Pursuant to the Voided Judgment, Withdrawal of Collection Efforts and Liens and Payment of Fees and Expenses Incurred." The trial court denied the same. (Feb. 21, 2014 Decision, 3.) Subsequently, appellees Klosterman dismissed their complaint on January 27, 2010.

{¶ 4} On April 25, 2013, appellants filed a complaint against appellees Klosterman, appellees Knapp/Polaris Title, and defendants, Michael Hrabcak and Hrabcak & Company LPA ("Hrabcak defendants"), alleging: (1) breach of contract and duties of good faith and fair dealing based on the void cognovit note; (2) fraud and negligent misrepresentation; (3) unjust enrichment, money had and received, and quantum meruit/valebant; (4) injunctive relief; (5) declaratory judgment; (6) constructive trust; and (7) breach of contract and fiduciary duties based on an alleged agreement to resolve the claim related to the void cognovit note from funds from the sale of the Rensch Road property.

{¶ 5} On February 21, 2014, the trial court granted summary judgment upon the motion of and in favor of the Hrabcak defendants. The court determined that the claims for breach of fiduciary duty and fraud and negligent misrepresentation were barred by the four-year statute of limitations under R.C. 2305.09. Appellants have not appealed this decision.

{¶ 6} On July 16, 2014, the trial court granted summary judgment upon the motion of and in favor of appellees Knapp/Polaris Title. The court determined that Count 7, breach of contract and fiduciary duty based on the alleged agreement to resolve the claim from the sale of Rensch Road property, were the only claims in the complaint that are clearly directed against appellees Knapp/Polaris Title. The court further found that: (1) the statute of limitations on the breach of fiduciary duty claim expired in 2011; (2) appellants failed to comply with Civ.R. 10(D) on the breach of contract claim by not attaching the alleged agreement to the complaint; and (3) the evidence established that appellants authorized appellees Knapp/Polaris Title to take the actions for which they are now being sued. The court dismissed appellees Knapp/Polaris Title. Appellants now appeal this decision.

{¶ 7} Finally, on August 27, 2014, appellants filed a "Combined Motion for Default Judgment and, Alternatively, for Summary Judgment against Defendants Kevin and Karen Klosterman." Appellants argued that appellees Klosterman never filed an answer, never asserted the affirmative defense of statute of limitations, and never served appellants with an untimely, unsigned document they filed with the court on June 28, 2013. Appellants further argued, in the alternative, that the evidence in the case entitled them to summary judgment. Appellees Klosterman did not file a memorandum contra.

{¶ 8} On October 21, 2014, the trial court denied appellants' combined motion and sua sponte dismissed the case with prejudice based upon the doctrine of the law of the case and estoppel. The court stated:

> While Ohio law generally holds that sua sponte dismissals without first notifying all parties of the court's intent and giving the plaintiff an opportunity to respond is in error, an exception exists for those cases "where the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint." * * *
>
> In this instance, both the facts in the Complaint and the doctrine of the law of the case establish that Plaintiff's claims against the Klostermans are barred by the statute of limitation, that there is no evidence of an enforceable contract, and that Plaintiffs are estopped from pursuing their claims for unjust enrichment, monies had and received an quantum meruit/valebant. Plaintiffs' claims against the

> Klostermans are clearly frivolous and further litigation is futile. As such, they must be dismissed.

(Citations omitted.) (Oct. 21, 2014 Decision, 3.)

{¶ 9} Appellants timely appeal and allege the following assignments of error:

> 1. THE TRIAL COURT ERRED BY DENYING PLAINTIFF'S UNOPPOSED COMBINED MOTION FOR DEFAULT JUDGMENT AND SUMMARY JUDGMENT AGAINST APPELLEES KEVIN AND KAREN KLOSTERMAN, AND BY SUA SPONTE DISMISSING THE ENTIRE CASE FOLLOWING ITS DECISION.
>
> 2. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO APPELLEES CURTIS KNAPP AND POLARIS TITLE AGENCY LLC.

{¶ 10} For ease of discussion, we will address the second assignment of error first. Appellants allege that the court erred in granting summary judgment in favor of appellees Knapp/Polaris Title. Appellants argue that the trial court erred in deciding that: (1) no written agreement was attached to the complaint; (2) no evidence supported the claim for a breach of contract; and (3) the statute of limitations barred the breach of fiduciary duty claim. Appellants further suggest that the trial court erred by dismissing the claims of fraud, negligent misrepresentation, constructive trust and unjust enrichment,[1] as well as the other equitable claims, because appellees Knapp/Polaris Title did not address the same in their motion. Finally, appellants suggest that the court erred in dismissing the unjust enrichment and quantum meruit/valebant claims because "it is now clear that [appellees Knapp/Polaris Title] received a benefit in the form of a release on the Klosterman mortgage on 15 Grandview to avoid a title insurance claim." (Appellants' Brief, 49.)

{¶ 11} We review a summary judgment motion de novo. *Reed v. Davis*, 10th Dist. No. 13AP-15, 2013-Ohio-3742, ¶ 9. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court

[1] Appellant does not allege error as to the trial court's determination that Count 1, breach of contract and duties of fair dealing, were alleged against appellees Klosterman only. Therefore, we do not address the same.

and conducts an independent review without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103, 107 (10th Dist.1992); *Brown* at 711.

{¶ 12} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978).

{¶ 13} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). The requirement that a party seeking summary judgment disclose the basis for the motion and support the motion with evidence is well founded in Ohio law. *Vahila v. Hall*, 77 Ohio St.3d 421, 429 (1997). Thus, the moving party may not fulfill its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. *Dresher* at 293. Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C), which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.* If the moving party has satisfied its initial burden under Civ.R. 56(C), then "the nonmoving party * * * has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id.*

{¶ 14} We note at the outset, upon carefully reviewing the complaint, that we agree with the trial court that the claims are poorly and vaguely pled, and it is difficult to

decipher which of the claims actually apply to appellees Knapp/Polaris Title. We also agree with the trial court that the complaint does not state the following claims against appellees Knapp/Polaris Title: the claims for breach of contract and duties of good faith and fair dealing, fraud and misrepresentation, unjust enrichment, monies had and received, and quantum meruit/valebant. Furthermore, more specifically to the unjust enrichment, monies had and received, and quantum meruit/valebant claims, although appellants now allege that appellees Klosterman received a benefit in the form of a release on the Klosterman mortgage on 15 Grandview to avoid a title insurance claim, the complaint did not allege the same. The complaint alleged:

> It would be unfair under the circumstances for the defendants to retain the benefits of the additional funds beyond those which were due to be paid under the note or under a bogus judgment. By taking an improper legal action to obtain payment using a void judgment, the defendants were enriched to the detriment of the plaintiffs. The defendants have retained money and benefits which in justice and equity belong to the plaintiffs, and which they knew about and fully understood at the time, received from her between 2004 and 2009, and for which the defendants are liable to the plaintiffs in damages.

(Complaint, ¶ 37.)

{¶ 15} There is no evidence that appellees Knapp/Polaris Title retained the additional funds allegedly paid beyond the note or bogus judgment. Furthermore, the alleged benefit of avoiding a title insurance claim never belonged "in justice and equity" to appellants.

{¶ 16} Finally, we note that, in the February 21, 2014 decision, the trial court found that the fraud and misrepresentation claims were barred by the statute of limitations. Appellants do not appeal that decision now, nor did they otherwise object to such determination. Therefore, taking all this into consideration, we find that the trial court did not err in granting summary judgment in favor of appellees Knapp/Polaris Title on the negligent misrepresentation, fraud, unjust enrichment, monies had and received, and quantum meruit/valebant claims.

{¶ 17} We also find that the statute of limitations expired on the breach of fiduciary duty claims based on an alleged agreement to resolve the claim related to the void cognovit note from funds received for the sale of the Rensch Road property. Appellants' argument here is confusing. Initially, they state that the "statute of limitations does not run until at least August 10, 2014, which is the end of the four year statute of limitations." (Appellants' Brief, 46-47.) They go on to state that they did not "learn until late 2013 that Knapp and Polaris Title had released the funds." (Appellants' Brief, 47.) However, this statement contradicts the affidavit of appellant Frederick Klaus filed as an exhibit to appellants' memorandum contra filed February 13, 2014. At paragraph 21 of the affidavit, appellant Frederick Klaus states that, "[i]n late 2007, I asked Curtis Knapp and Polaris Title for our funds from the Rensch Road closing which they agreed to keep in escrow for us. Knapp responded that he had paid those funds to Hrabcak and Klosterman. I became very angry upon learning this." A claim for breach of fiduciary duty is subject to the four-year statute of limitations provided in R.C. 2305.09. *Wells v. C.J. Mahan Constr. Co.*, 10th Dist. No. 05AP-180, 2006-Ohio-1831, ¶ 26. Upon independent review of the record, we find that the statute of limitations for the breach of fiduciary duty claim against appellees Knapp/Polaris Title accrued in late 2007 and, thus, expired in late 2011. Therefore, we find that the trial court did not err in granting summary judgment in favor of appellees Knapp/Polaris Title on the breach of fiduciary duty claim.

{¶ 18} Finally, regarding the breach of contract claim, we note that, "[t]o successfully prosecute a breach of contract claim, a plaintiff must present evidence of (1) the existence of a contract, (2) plaintiff's performance of the contract, (3) defendant's breach of the contract, and (4) plaintiff's loss or damage as a result of defendant's breach." *Barlay v. Yoga's Drive Thru*, 10th Dist. No. 03AP-545, 2003-Ohio-7164, ¶ 6, citing *Doner v. Snapp*, 98 Ohio App.3d 597, 600 (1994). Therefore, first we must determine whether a contract exists.

{¶ 19} To support the existence of contract, appellants referred to the affidavits of Frederick and Theresa Klaus. Frederick Klaus stated in his affidavit at paragraphs 26-27: "My wife and I had an escrow agreement with Curtis Knapp and Polaris Title under which

they were to retain the funds mentioned above, among other conditions." Frederick Klaus further stated at paragraph 28 of his affidavit that "[t]he only reason I signed the exhibit was because we had agreement to conduct the reconciliation of amounts due to Klosterman under his note for which he had already been overpaid." Similarly, Theresa Klaus stated in her affidavit at paragraphs 14-15: "We had an escrow agreement with Curtis Knapp and Polaris Title under which they were to retain the funds mentioned above, among other conditions." She further stated at paragraph 6: "The funds due to us from the closing on Rensch Road were to be kept in escrow by Curtis Knapp and Polaris Title Agency, Knapp's alter ego." And at paragraph 16, she stated: "The only reason I signed the exhibit was because we had agreement to conduct the reconciliation of amounts due to Klosterman under his note for which he had already been overpaid."

{¶ 20} " 'To prove the existence of a contract, a plaintiff must show that both parties consented to the terms of the contract, that there was a "meeting of the minds" of both parties, and that the terms of the contract are definite and certain.' " *Barlay* at ¶ 6, quoting *Nilavar v. Osborn*, 137 Ohio App.3d 469, 484 (2d Dist. 2000), citing *McSweeney v. Jackson*, 117 Ohio App.3d 623, 631 (4th Dist.1996).

{¶ 21} Although appellants averred they had an agreement with appellees Knapp/Polaris Title, the court cannot conclude, construing the evidence in a light most favorable to appellants, that the terms of any such agreement were definite and certain. In this regard, appellants contradict themselves. First, at paragraph 25 of his affidavit, Frederick Klaus states: "The email referenced by Knapp in his motion for summary judgment dated 4/23/07 was sent with the understanding that Knapp had *agreed with Hrabcak and Klosterman* to hold the funds until a reconciliation could be done and that the funds would not be released until then. Knapp and Polaris Title had no right to release the funds prior to that happening." (Emphasis added.) Second, attached to their motion for summary judgment, appellees included an affidavit signed by appellee Knapp, wherein he averred at paragraph 4: "The emails and exhibits attached to the Motion for Summary Judgment of Curtis H. Knapp and Polaris Title Agency, LLC are true and accurate copies thereof that have been kept in the ordinary course of business." (Jan. 30, 2014 Motion for Summary Judgment, Exhibit A.) An email was attached, dated April 23,

2007, in which appellee Knapp asks appellant Frederick Klaus to review the attached letter. (Motion, Exhibit B.) The attached letter was addressed to appellee Knapp and was signed by defendant Michael Hrabcak. The April 20, 2007 letter stated:

> As you will recall, I had indicated to you that Mr. Klosterman's judgment would be released as to the property which is the subject matter of the upcoming closing upon receipt of approximately $45,000 which would represent the proceeds from the sale. Please be advised that the sum will not be accepted if there is any "reservation of rights" as it relates to the remittance.

(Motion, Exhibit C.)

{¶ 22} In response to appellee Knapp's email request to review the letter, appellant Frederick Klaus, from email account fred.klaus@cprrealestate.com, responded:

> [J]ust f * * * pay him and close the transaction, I understand that Teresa can still sue for the dilution of her proceeds from the fraud for the attorney who took the cog statement judgment in the initial case. Further I am not signing any releases, the payment will simply be made and the property released. The case still continues as he is unlikely to dismiss the foreclosure case and a full hearing of the amounts will be done at some point and any overpayments will need to be returned.

(Motion, Exhibit B.)

{¶ 23} Finally, appellants point to a check register from appellees Knapp/Polaris Title showing disbursements from its escrow account, a settlement statement identifying appellees Knapp/Polaris Title as the settlement agent, the property deed and release of mortgage on 15 Grandview.[2] None of these documents clarify the terms of an alleged agreement, nor make the terms definite and certain.

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[2] Attached as an exhibit to their February 13, 2014 memorandum contra is a copy of the unanswered requests for admissions appellants sent to appellees Knapp/Polaris Title. Request for Admission 1 states: "Mr. Knapp and or Polaris Title Agency had an escrow agreement with the Klauses for the sale and closing of the sale of 4769 Rensch Road." Admissions 4 and 5 state: "Mr. Knapp and Polaris Title Agency did not have written authority from Theresa Klaus/Frederick Klaus to release funds to Mr. Hrabcak or Mr. Klosterman from the sale and closing of the 4769 Rensch Road." On February 6, 2014, appellants filed a motion to compel discovery from appellees Knapp/Polaris Title requesting responses to the written discovery request served with the court and on appellees Knapp/Polaris Title on October 21, 2013. The appellees formally filed a motion to withdraw admissions to appellants' request for admission on February 21, 2014. Therein, appellees stated that they filed their response to the request for admission on

{¶ 24} Construing this evidence in a light most favorable to appellants, the court does not find that a contract existed between appellants and appellees Knapp/Polaris. Therefore, the trial court did not err in finding the same. Appellants' second assignment of error is overruled.

{¶ 25} With regard to the first assignment of error, we find that the trial court erred in sua sponte dismissing appellants' claims against appellees Klosterman without providing the prior notice of its intention to dismiss. Although it is not clear pursuant to what grounds the trial court dismissed the claims, it is clear that the claims were dismissed with prejudice.

{¶ 26} Civ.R. 41(B)(1) states: "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, *after notice to the plaintiff's counsel*, dismiss an action or claim." (Emphasis added.)

{¶ 27} The Supreme Court of Ohio has held: "We hold that the notice requirement of Civ.R. 41(B)(1) applies to *all* dismissals with prejudice, including those entered pursuant to Civ.R. 37(B)(2)(c) for failure to comply with discovery orders. A dismissal on the merits is a harsh remedy that calls for the due process guarantee of prior notice." (Emphasis sic.) *Ohio Furniture Co. v. Mindala*, 22 Ohio St.3d 99, 101 (1986). This court in *Otterbacher v. Roadway Package Sys., Inc.*, 10th Dist. No. 97APE01-136 (Sept. 16, 1997), 4, acknowledged the *Ohio Furniture* holding: "In *Ohio Furniture*, the court stated that the 'notice requirement of Civ.R. 41(B)(1) applies to *all* dismissals with prejudice.' " (Emphasis sic.)

February 6, 2014 and denied each and every request for admission. Contemporaneously, appellees filed a memorandum contra appellants' motion to compel filed February 7, 2014. On May 8, 2014, the trial court denied appellants' motion to compel and granted appellees' motion to withdraw admissions.

Furthermore, review of the interrogatories filed with the court reveals that question 18 of the interrogatories requests: "Please state whether you had an escrow agreement for the proceeds from a closing on sale of 4769 Rensch Road, with whom and when the agreement was reached, and the identity of the escrow agent." In response to question 18, appellees stated: "No escrow agreement existed for the proceeds from a closing of a property located at 4769 Rensch Road." Question 21 requests: "Please state the terms of the escrow agreement for the sale of the property located at 4769 Rensch Road, whether the terms were completed, and if so by whom they were completed and when they were completed." In response to Question 21, appellees stated: "Objection. Plaintiffs have propounded more than forty interrogatories with subparts and have therefore reached the maximum number of interrogatories permitted pursuant to Ohio Civ.R. 33. Further, this interrogatory is argumentative and assumes facts not admitted. Finally, this interrogatory has been asked and answered pursuant to Interrogatory No. 18." Appellees filed their responses with the court on March 3, 2014.

{¶ 28} The trial court cited to *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 108 (1995), for the proposition that there are exceptions to the general rule of notice where the complaint is frivolous or the claimant obviously cannot possibly prevail on the facts alleged in the complaint. *Edwards* acknowleged the existence of two federal cases which have held the same, analyzing the similarly worded Fed.R.Civ.P. 12. The court then determined that the relator's claim was not frivolous.

{¶ 29} Likewise, we do not find to be frivolous appellants' arguments regarding: (1) failure to raise statute of limitations as an affirmative defense; (2) untimeliness of appellees Klosterman's document;[3] (3) lack of signature on appellees Klosterman's document; (4) lack of compliance with the civil rules of appellees Klosterman's document; (5) lack of service of appellees Klosterman's document on appellants; and (6) lack of certificate of service. We also cannot say that appellants cannot possibly prevail on the facts alleged in the complaint without a determination as to these same arguments. The trial court did not address the merits of these arguments. To address these merits at this time would be premature. The trial court also did not comply with the notice requirement of Civ.R. 41(B)(1). Accordingly, we sustain the first assignment of error as to the trial court's sua sponte dismissal of appellants' claims against appellees Klosterman.

{¶ 30} Finally, we decline to address whether the trial court erred in its (1) application of the statute of limitations to the claims asserted against appellees Klosterman; (2) application of estoppel to the unjust enrichment, monies had and received, and quantum meruit/valebant claims; and (3) application of law of the case in general. Upon remand, after appellants have been provided notice of the trial court's intention to sua sponte dismiss their claims, the court may choose to reconsider the same. Therefore, at this time it would be premature for us to address the same.

{¶ 31} For the foregoing reasons, appellants' first assignment of error is sustained in part and moot in part, and their second assignment of error is overruled. The July 16, 2014 judgment of the Franklin County Court of Common Pleas is affirmed, and the

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[3] Appellants assert that the document was untimely by at least 31 days. However, appellants stipulated to an extension of time to move or plead and agreed the deadline by which appellees Klosterman were required to move or plead was extended from Tuesday, May 28 to Tuesday, June 25, 2013. The document was filed on June 28, 2013. Therefore, pursuant to the stipulation, the document was untimely only by three days.

October 21, 2014 judgment is reversed. This cause is remanded to the trial court for further proceedings in accordance with law and consistent with this decision.

July 16, 2014 judgment affirmed;
October 21, 2014 judgment reversed;
cause remanded.

TYACK and KLATT, JJ., concur.

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