[Cite as *Brown v. Sasak*, 2010-Ohio-2676.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

TIMOTHY BROWN,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-A-0054**
- vs -	:	
JAMES SASAK,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 005.

Judgment: Affirmed.

David M. Lynch, 29311 Euclid Avenue, #200, Wickliffe, OH 44092 (For Plaintiff-Appellant).

William H. Keis, *Jr*., Keis George, L.L.P., 55 Public Square, #800, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This litigation arises from a complaint filed by appellant, Timothy Brown, alleging, inter alia, that appellee, James Sasak, defrauded him by making misrepresentations about certain real property that was the subject of a contract into which the parties had previously entered. The matter is now before this court on appeal from the Ashtabula County Court of Common Pleas entry of summary judgment in appellee's favor. For the reasons discussed infra, the trial court's judgment is affirmed.

{¶2} In January of 2005, appellee purchased a 17.2 acre tract of real estate from a third party. On the property was a pole barn that was in the process of having its second floor converted into a living space. Although not a contractor by trade, appellee continued to renovate the structure and, over the next two years, he had run wire throughout the structure and installed dry wall, insulation, radiant floor heat, and plumbing. Appellee neither obtained building permits for the construction nor had the structure inspected subsequent to the renovations he performed. Appellee underscored, however, that he believed the property was zoned "agricultural" and therefore no permits or inspections were necessary.

{¶3} Eventually, appellee decided to sell the property. In the winter of 2007, appellant, a contractor who owns a construction company, was made aware of the property through an on-line advertisement. Before contacting appellee, appellant drove to the property to look at it. During this visit, appellant noted that certain aspects of the structure's exterior "needed attention and fixed ***."

{¶4} Appellant phoned appellee and the men scheduled a formal meeting at the property. During the meeting, appellant inquired into the work appellee had completed on the structure. Appellee detailed the various projects he had initiated and completed. Appellant was aware appellee was not a contractor and, moreover, appellee explained this was his first foray into upgrading a pole barn.

{¶5} During this meeting, appellant testified he noticed certain additional problems with the structure he had not observed during his first visit. He testified the exterior siding had "buckled really bad on the left side of the house and was exploding actually off the house." In appellant's view, this meant "[t]here were obviously no studs

in the walls. *** If you want wood to stay, you need 16 inches on center layout. I knew they were horizontal four foot apart."

{¶6} With respect to the structure's interior, he testified he observed signs of water damage and flooding on the first floor of the structure. Despite his observations, however, appellant testified he did not discuss the issue of water entry with appellant. Appellant additionally noticed the staircase leading up to the living area needed some modifications due to the steepness of the angle. He further testified:

{¶7} "I seen there was stuff unfinished. I didn't really have a problem with it as far as like no exhaust fan in the bathroom. That was miscellaneous. There were little things; taping and mudding downstairs. He didn't finish taping and mudding. *** I seen the floor was uneven upstairs. I seen that it needed to be finished basically."

{¶8} As a contractor, appellant testified he has been involved in the construction of "hundreds" of homes. Due to his occupation, appellant testified he was familiar with permit requirements pertaining to construction projects. Appellant also indicated construction work is invariably inspected by a local building department. Despite the various problems and imperfections he observed as well as appellee's inexperience in construction, appellant conceded he did not ask appellee whether permits had been obtained or inspections completed. Appellant also conceded that appellee did not directly represent he obtained permits or inspections for the construction he completed. Appellant simply "figured this thing had passed or didn't know how, but I didn't think there was going to be any problems with permits or anything like that."

{¶9} On May 1, 2007, appellant entered into an agreement with appellee to purchase the property for $133,900. The contract for sale provided that the property would be sold "as-is." Neither appellant nor his mortgage company asked appellee to file a disclosure statement pertaining to the structure. Moreover, appellant specifically declined to have the structure independently inspected because he "was trying to save some money." The sale closed on June 1, 2007 and appellant moved into the structure.

{¶10} On March 19, 2008, however, appellant received a notice from the Ashtabula County Health Department asking him to call their agency. After receiving a second notice several days later, appellant called the department. The department subsequently performed several inspections and, on June 5, 2008, appellant was issued a "Stop Work Order" by the Ashtabula County Department of Building Regulations due to multiple building code violations, including the failure to pull permits for past construction and the failure to have past improvements inspected. The record indicates the nature and severity of the violations rendered the structure uninhabitable.[1]

{¶11} On January 2, 2009, appellant filed a complaint for breach of contract, failure to disclose material defects, and fraud. Appellee later filed his answer to appellant's complaint denying all allegations. On September 1, 2009, appellee filed a motion for summary judgment, which appellant duly opposed on October 23, 2009. On November 18, 2009, the trial court granted appellee's motion.

{¶12} Appellant now appeals and assigns the following as error:

1. Appellant testified he was granted an indefinite extension to come into compliance with the code during the pendency of this suit.

{¶13} "Appellant contends the [t]rial [c]ourt committed error in granting [s]ummary [j]udgment to [d]efendant because there were material facts placed in dispute by submission of [p]laintiff's deposition."

{¶14} A trial court's decision to grant summary judgment is reviewed de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-336. Summary judgment is appropriate under Civ.R. 56(C) when (1) there is no genuine issue of material fact remaining to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence in favor of the nonmoving party, that conclusion favors the moving party. *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327.

{¶15} The moving party bears the initial burden of providing the trial court with a basis for the motion and is required to identify portions of the record demonstrating the absence of genuine issues of material fact pertaining to the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The burden then shifts to the non-moving party to set forth specific facts that would establish a genuine issue for trial. Id. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a blank assertion that the nonmoving party has no evidence to prove its case, but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C). *Dresher*, supra. Similarly, the non-moving party may not rest on conclusory allegations or denials contained in the pleadings; rather, he or she must submit evidentiary material sufficient to create a genuine dispute over material facts at issue. Civ.R. 56(E); see, also, *Dresher*, supra.

{¶16} Appellant argues that the trial court erred in granting summary judgment in appellee's favor on his fraud claim.[2] Regardless of the substantive features of appellant's claim, his complaint suffers from a fundamental procedural deficiency. Civ.R. 9(B) provides when a complainant alleges a claim for fraud or mistake, "the circumstances constituting fraud or mistake shall be stated with particularity." In order to meet this obligation, the complaint must include "[t]he 'circumstances constituting fraud' include the time, place and content of the false representation; the fact represented; the identification of the individual giving the false representation; and the nature of what was obtained or given as a consequence of the fraud." *Aluminum Line Products Co. v. Brad Smith Roofing Co., Inc*. (1996), 109 Ohio App.3d 246, 259. See, also, *Castrataro v. Urban*, 155 Ohio App.3d 597, 606, 2003-Ohio-6953.

{¶17} Appellant's complaint alleged that, on May 1, 2007, appellee, "in the course of the sale transaction discussed herein did make representations (regarding the condition of the home) that were false, knowing them to be false, with the Plaintiff reasonably relying on said representations to his financial detriment ***." Appellant's allegation of fraud does not particularly state the content of the allegedly false representation(s) or the fact(s) represented. Because appellant failed to plead his fraud claim with particularity, it must fail as a matter of law.

{¶18} Even had appellant met his obligation to plead his fraud claim with particularity, the record fails to disclose any triable issue regarding his allegation. The elements of a cause of action for fraud are as follows: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction

2. Appellant does not take issue with the trial court's ruling as it relates to the other claims alleged in his complaint.

at hand; (3) made falsely, with knowledge of its falsity, or with such disregard and recklessness as to its truth or falsity that knowledge may be inferred; (4) with the intent to mislead another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Burr v. Bd. of Cty. Commrs. Stark Cty.* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus (superseded on other grounds).

{¶19} In his brief, appellant argues the trial court erred in awarding appellee summary judgment on his fraud claim because, after the purchase, he discovered of a "fake[,] 'glued-on' water spigot" attached to the pole barn. Appellant maintains this defect is sufficient evidence to create a material issue of fact for trial. This defect, as well as others to which appellant testified, cannot, given their nature, serve as material evidence of fraud.

{¶20} In *Layman v. Binns* (1988), 35 Ohio St.3d 176, the Supreme Court of Ohio addressed whether a defect in a home that was open to observation, yet not expressly disclosed, can serve as a basis for fraudulent concealment. In that case, the plaintiffs purchased a home in which a basement wall was "bowed" and "bulging." To stabilize and support the wall, the defendants installed steel I-beams. Several years later, when the plaintiffs attempted to sell the home, they were told the damaged wall would cost between $32,000 and $49,000 to repair. The plaintiffs filed suit alleging the seller's failure to disclose the bow in the wall constituted fraud. With respect to the plaintiff's theory, the Court determined the test for liability under such circumstances "is whether the defect was open to observation." The Court held the defect in the wall was, in fact, sufficiently obvious:

{¶21} "*** Here, witnesses who viewed the basement detected the bow and steel beams with little effort. The defect was described as obvious and highly visible. The basement wall was bulging.

{¶22} "***

{¶23} "The purchasers had an unhindered opportunity to examine the basement. Mr. Layman saw the steel beams, yet failed to inspect the wall in detail or to ask about the purpose of the beams. The purchasers had a duty to inspect and inquire about the premises in a prudent, diligent manner." Id. at 178.

{¶24} Accordingly, the Court concluded, "[t]he non-disclosure *** [did] not rise to the level of fraud for the reason that the defect here was not latent. It could have been detected by inspection." *Layman*, supra.

{¶25} Similarly, in *Tipton v. Nuzum* (1992), 84 Ohio App.3d 33, 38, the Ninth Appellate District held:

{¶26} "Once alerted to a possible defect, a purchaser may not simply sit back and then raise his lack of expertise when a problem arises. Aware of a possible problem, the buyer has a duty to either (1) make further inquiry of the owner who is under a duty not to engage in fraud, *Layman*, 35 Ohio St. 3d at 177, 519 N.E.2d at 643, or (2) seek the advice of someone with sufficient knowledge to appraise the defect."

{¶27} In this case, appellant noticed multiple defects in the structure, but admittedly failed to request appellee to file a disclosure statement. Moreover, he had the opportunity to have a formal inspection conducted; had he opted into an inspection, the existence of the "fake" spigot would have been revealed. In other words, appellant had the means to detect this problem but voluntarily failed to do so. Clearly, the "glued-

on" spigot is not a latent defect and appellee's failure to disclose it does not rise to the level of fraud.

{¶28} Moreover, after appellee demonstrated the absence of genuine issues of material fact, the burden shifted to appellant to set forth evidence creating a genuine issue for trial. Appellant failed to meet his burden. There is nothing in the record indicating appellee "installed" or knew about the spigot. Without some evidence appellee was aware of the spigot's existence, he could not have knowingly represented or actively concealed its existence. Because appellant failed to meet his reciprocal burden under Civ.R. 56, the trial court did not err in awarding summary judgment.

{¶29} Furthermore, although appellant's brief is wanting in detail, the record indicates his fraud claim was not only premised upon the obvious defects to the structure, but also certain alleged misrepresentations made by appellee regarding the structure's habitability. Attached to his memorandum in opposition to appellee's motion for summary judgment, appellant filed an affidavit in which he averred appellee represented the pole barn was "habitable" when, in reality, it failed to meet various building code requirements. Evidence of the code violations was submitted in the form of a letter from the Ashtabula Department of Building Regulations citing previous failures to obtain permits for past construction projects on the structure and subsequent failures to have certain improvements to the structure inspected. Because such violations render the structure uninhabitable, appellant argued there is sufficient evidence to create a material issue of fact on his fraud claim. We disagree.

{¶30} The record is bereft of any evidence indicating appellee represented that he obtained permits or had the property inspected. Rather, appellee specifically

testified to his belief that the property was zoned agricultural, thus negating the need for building permits. Consequently, even if appellee specifically represented that the structure was habitable, such a statement would be completely consistent with his belief that no permits were necessary. Without some evidence that appellee expressly represented he obtained permits and the necessary inspections or concealed the fact that he did not obtain them knowing they were necessary conditions for habitability, appellee failed to meet his reciprocal burden for overcoming summary judgment.

{¶31} This matter presents a scenario in which the parties entered into a real estate contract to sell property "as is." We have already concluded there are no issues of material fact indicating appellee engaged in any active fraud in his indication that the structure was habitable. Moreover, nothing in the record suggests appellee engaged in passive nondisclosure. Appellee testified, at length, that he was unaware he was required to obtain permits or inspections and appellant failed to produce any evidence from which one could draw the inference that appellee was untruthful. Accordingly, we hold the trial court did not err in awarding appellee summary judgment.

{¶32} Appellant's assignment of error is overruled.

{¶33} For the reasons discussed in this opinion, the judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.