[Cite as *Marcus v. Seidner*, 2011-Ohio-5592.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

LILA MARCUS,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-12-103
	:	O P I N I O N
- vs -		10/31/2011
	:	
ARTHUR SEIDNER,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CVH1523

Denise S. Barone, 385 North Street, Batavia, Ohio 45103, for plaintiff-appellant

Donald M. Lerner, 120 East Fourth Street, 8th Floor, Cincinnati, Ohio 45202, for defendant-appellee

HENDRICKSON, J.

{¶1} Plaintiff-appellant, Lila Marcus, appeals from a judgment of the Clermont County Court of Common Pleas denying her complaint against defendant-appellee, Arthur Seidner, in which she sought reformation of the deed, mortgage and land installment contract to a farm she had conveyed to Seidner, allegedly, as a result of his fraudulent conduct. We conclude that there was some competent, credible evidence to support the trial court's

decision to reject Marcus' claims against Seidner, and therefore we affirm the trial court's judgment.

{¶2} In 2004, Marcus was undergoing bankruptcy. On December 31 Seidner loaned Marcus $125,000 so she could retain her 30-acre farm located at State Route 131 in Clermont County, Ohio. The loan was secured by a promissory note and mortgage on the farm, and the note was to be repaid in full by August 31, 2005. The bankruptcy court approved the transaction between Marcus and Seidner, and terminated Marcus' bankruptcy. During this time, Marcus and Seidner became romantically involved. The parties would later dispute when their relationship ended, with Seidner claiming that it ended several months after it began and well before the parties had any subsequent financial dealings with one another, but with Marcus insisting that the parties had a close personal relationship during the entire period of the transactions in question.

{¶3} On September 6, 2005, the parties executed a Loan Modification Agreement that extended the maturity date on the parties' promissory note and mortgage to August 31, 2006 and that rolled in $10,000 of accrued interest to the total loan amount, raising it to $135,000. On October 6, 2006, the parties cancelled their promissory note and loan, and Marcus conveyed to Seidner the deed to her 30-acre farm and a nearby eight-acre parcel that Marcus had purchased with a $37,000 loan from Seidner. At the same time, the parties executed a "Land Installment Contract" (LIC) for the balance due on the mortgage, including the accrued interest, and several other amounts that Marcus owed Seidner, including the $37,000 loan for the eight-acre parcel. The LIC's purchase price was for $207,360.16 and had a maturity date of July 30, 2007.

{¶4} The LIC's maturity date was extended multiple times in 2007 and 2008. On July 6, 2008, the parties signed an agreement extending the maturity date to December 30, 2008. The agreement also stated that both parties acknowledged that the balance due on

the LIC was $284,343.46. Marcus did not make any payments on the LIC until July 14, 2008, at which time she made a $3,000 payment for that month. She then made another $3,000 payment for August, and then a $3,775 payment for each of the months of September, October, and November. However, shortly before the LIC's December 30, 2008 maturity date, Marcus again filed for bankruptcy.

{¶5} In 2009, Marcus filed a complaint against Seidner in the Clermont County Court of Common Pleas, raising several claims against him, including breach of fiduciary duty and fraud. Marcus requested the trial court to reform the deed, mortgage and land installment contract to the farm she had transferred to Seidner; to order Seidner to return possession of the farm to her; and to quiet title to the farm in her favor. Seidner filed an answer and counterclaim to Marcus' complaint, requesting that the trial court quiet title to the farm in his favor. In 2010, the trial court, after holding a bench trial on the matter, granted judgment against Marcus and in favor of Seidner on the parties' claims.

{¶6} Marcus now appeals, assigning the following as error:

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW WHEN IT DENIED THAT PART OF PLAINTIFF'S COMPLAINT ASKING THE COURT TO REFORM THE DEED, MORTGAGE AND LAND INSTALLMENT CONTRACT AND RETURN POSSESSION OF THE PROPERTY TO THE PLAINTIFF."

{¶9} Marcus argues the trial court erred when it denied her requests to reform the deed, mortgage and land installment contract on the farm and to order Seidner to return possession of the farm to her, because the evidence showed that Seidner defrauded her by having her transfer the deed to the farm to him and by "push[ing] her into signing a land installment contract." We disagree with this argument.

{¶10} "Although separate standards of review apply in criminal cases, the standards for sufficiency and manifest weight have essentially merged in civil cases. *Wolfe v. Walsh,* Montgomery App. No. 21653, 2008-Ohio-185, ¶18. As a result, appellate courts may conduct a 'civil' manifest-weight analysis, in which the court reviews the trial court's rationale and the evidence the trial court has cited in support of its decision.' Id., quoting *Gevedon v. Ivey*, 172 Ohio App.3d 567, * * * 2007-Ohio-2970 at ¶60. The appropriate standard of review is whether competent, credible evidence exists to support the trial court's decision, and an appellate court must presume that the findings of the trier of fact are correct. Id.; *State v. Wilson,* 113 Ohio St.3d 382, * * * 2007-Ohio-2202, ¶24. This presumption arises because the trial court had an opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' *Wilson* at ¶24, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80[.]" *Chivukula v. Williams*, Butler App. No. CA2009-Ohio-07-187, 2010-Ohio-1634, ¶8.

{¶11} "A claim for common-law fraud requires proof of the following elements: (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance." (Citations omitted.) *Sutton Funding, L.L.C. v. Herres*, 188 Ohio App. 3d 686, 697, 2010 -Ohio- 3645, ¶49. See, also, *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 1998-Ohio-196.

{¶12} In support of her fraud claim, Marcus contends that Seidner knew she was in "dire financial circumstances" and "was struggling with serious health issues at the time," and

that he used their romantic relationship "as an opportunity to manipulate her into making terrible financial decisions[,]" including transferring the deed to her farm to him and having her sign the LIC. She points out that while she was represented by counsel only at the time of the parties' original loan negotiations in 2004, she was not represented by counsel thereafter. She asserts that she trusted Seidner and believed they were going to marry, and that she "really had no idea what she was signing" when she executed the deed and the LIC. However, there was ample evidence presented to support the trial court's determination that Marcus failed to establish her fraud claim.

{¶13} The evidence showed that Marcus is college-educated and has substantial experience in the business world, having owned a company that published a city guide, and that she was living off the proceeds from that publication at the time of trial. The parties disputed the length and seriousness of their personal relationship, with Seidner testifying that their relationship lasted for only a few months after their initial loan and ended well before they had any further financial dealings, while Marcus insisted that their relationship lasted throughout the time of the transactions at issue. However, it is apparent that the trial court believed Seidner's version of events more than Marcus', and the trial court's decision to do so is supported by the fact that Marcus acknowledged that she and Seidner never exchanged keys to each other's residences. The trial court was in the best position to determine whether Marcus or Seidner was more credible on this issue, as well as the other issues in the case, including the credibility of Marcus' claim that she was sick at the time of her dealings with Seidner. See *Chivukula*, 2010-Ohio-1634 at ¶8.

{¶14} Marcus also alleges that Seidner manipulated her into signing the LIC so that he would have "an easier time of taking away the farm from her" than he would have had if the parties had simply extended the maturity date on the mortgage for another year as they had done on previous occasions. Marcus explains that by replacing his mortgage on the

farm with the LIC, Seidner effectively "cut off [her] right to redemption" since the foreclosure process on mortgages "provides significantly more time and other due process rights than does Land Installment Contract forfeiture." She also denounces Seidner's behavior as "unbelievable [sic] sleazy." However, Marcus has failed to cite any authority or offer any persuasive explanation as to how Seidner defrauded her by insisting that she convey the deed to the farm to him and sign the LIC. It is apparent that Marcus was having financial difficulties because she was living beyond her means, and that Seidner was merely protecting his interests in securing the debt Marcus owed to him by having her convey the deed to the farm to him and sign the LIC.

{¶15} Marcus also argues that she did not know what she was signing when she executed the deed and the LIC. However, this argument is unavailing, as it is a "long-held principle that parties to contracts are presumed to have read and understood them and that a signatory is bound by a contract that he or she willingly signed." *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St. 3d 429, 432, 2007-Ohio-257, ¶10. As previously noted, Marcus is college-educated and has ample business experience, and she was free to hire counsel as she had done in her initial dealings with Seidner if she believed such assistance was necessary or would have been helpful.

{¶16} In light of the foregoing, Marcus' first assignment of error is overruled.

{¶17} Assignment of Error No. 2:

{¶18} "THE TRIAL COURT ERRED AS A MATTER OF FACT AND OF LAW WHEN IT FAILED TO AWARD MONETARY DAMAGES TO LILA MARCUS FOR ARTHUR SEIDNER'S FAILURE TO DRAW UP A PROPER LAND INSTALLMENT CONTRACT."

{¶19} Marcus argues the trial court erred by not awarding her monetary damages as a result of Seidner's failure to draft a proper land installment contract that complied with the requirements for such contracts set forth in R.C. 5313.02. In support of her argument,

Marcus cites *Park View Federal Savings v. Lion Estate, Inc.* (Oct. 8, 1986), Summit App. No. 12498. However, we find that case distinguishable from this one.

{¶20} R.C. 5313.01 states that for purposes of R.C. Chapter 5313:

{¶21} "(A) 'Land installment contract' means an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation. Option contracts for the purchase of real property are not land installment contracts.

{¶22} "(B) 'Property' means real property located in this state improved by virtue of a dwelling having been erected on the real property.

{¶23} "(C) 'Vendor' means any individual * * * making a sale of property by means of a land installment contract.

{¶24} "(D) 'Vendee' means the person who acquires an interest in property pursuant to a land installment contract, or any legal successor in interest to that person."

{¶25} R.C. 5313.02(A) sets forth 16 requirements for land installment contracts, including that such contracts must contain the parties' full names and addresses, the contract price of the property, and the principal balance owed. See R.C. 5313.02(A)(1), (4), and (7). R.C 5313.02(B) and (C) state:

{¶26} "(B) No vendor shall hold a mortgage on property sold by a land installment contract in an amount greater than the balance due under the contract, except a mortgage that covers real property in addition to the property that is the subject of the contract where the vendor has made written disclosure to the vendee of the amount of that the [sic] mortgage and the release price, if any, attributable to the property in question. No vendor

shall place a mortgage on the property in an amount greater than the balance due on the contract without the consent of the vendee.

{¶27} "(C) Within twenty days after a land installment contract has been signed by both the vendor and the vendee, the vendor shall cause a copy of the contract to be recorded as provided in section 5301.25 of the Revised Code and a copy of the contract to be delivered to the county auditor."

{¶28} R.C. 5313.04 provides:

{¶29} "Upon the failure of any vendor to comply with Chapter 5313. [sic] of the Revised Code, the vendee may enforce such provisions in a municipal court, county court, or court of common pleas. Upon the determination of the court that the vendor has failed to comply with these provisions, the court shall grant appropriate relief."

{¶30} In *Johnson v. Maxwell* (1988), 51 Ohio App. 3d 137, 139-140, the court noted that R.C. Chapter 5313 is inapplicable to purely commercial properties, and thus held that where it was undisputed that no dwelling existed on the land covered by the land installment contract in question, then R.C. Chapter 5313 does not apply.

{¶31} In this case, the question arose at trial as to whether a "dwelling" existed on the farm property at issue for purposes of R.C. 5313.01(B). Marcus presented evidence showing that at the time the parties entered into the LIC, there was a "run down mobile home" on the farm property, and that people were still living in the mobile home at least part of the time. Seidner unsuccessfully claimed at trial that the mobile home was insufficient to constitute a dwelling for purposes of R.C. 5313.01(B). On appeal, however, Seidner no longer relies on this argument, but instead relies on the alternative argument he made at trial, to wit: that the parties' LIC is not controlled by R.C. Chapter 5313 since it does not qualify as an "executory agreement which by its terms is not required to be fully performed by one or more of the

parties to the agreement within one year of the date of the agreement[.]" We find this argument unpersuasive.

{¶32} Seidner's argument ignores the fact that while the parties' LIC initially was to be fully performed within one year, the parties amended their LIC several times, thus ensuring that the contract would not be fully performed within one year. Moreover, the trial court found that both parties' intended for the LIC to be a valid land installment contract—a finding that Seidner did not dispute. Thus, we reject Seidner's argument that the parties' LIC is not governed by the provisions of R.C. Chapter 5313. We now turn to Marcus' argument that the trial court erred by not awarding her monetary damages under R.C. 5313.04 for Seidner's failure to comply with R.C. 5313.02.

{¶33} In *Park View Federal Savings*, Summit App. No. 12498, the Ninth District Court of Appeals affirmed a trial court's decision to award monetary damages under R.C. 5313.04 to the vendee of a land installment contract as a result of the vendor's failure to comply with the requirements of R.C. 5313.02. In that case, the vendee, Emily Yane, purchased a house, referred to as the Shepard Hills property, from Leo DiEgidio, with the sale contingent upon the sale of Yane's property, referred to as the Meadowlawn property. Id. at *1.

{¶34} When Yane was unable to sell her Meadowlawn property, the parties reached a new agreement, in which Yane sold the Meadowlawn property to DiEgidio's wife, Sally DiEgidio. Id. After deducting Leo DiEgidio's sales commission and the amount needed to satisfy Yane's mortgage on the Meadowlawn property, Yane was left with $19,450. Id. Yane used this money as a down payment to buy the Shepard Hills property, which was owned by Sally DiEgidio, for $90,000, leaving a sum due of $70,550, which Yane agreed to pay in monthly installments of $700 per month, with the purchase price completely paid in four years. Id. The agreement required Sally DiEgidio to execute a quitclaim deed to Yane, subject to a first mortgage to Park View Federal Savings & Loan Association (Park View). Id.

The agreement did not indicate the amount of the mortgage owed to Park View, nor was Yane made aware of the amount. Id.

{¶35} The mortgage to Park View arose through a $76,500 mortgage given to it in January 1981 by Lion Estates, Inc., a corporation wholly-owned by Leo DiEgidio. Id. Later, without Park View's knowledge, Lion Estates quit-claimed its interest in the Shepard Hills property to the DiEgidios, and Sally DiEgidio later entered into the transaction described above with Yane. Id. At the time of the Yane/Sally DiEgidio transaction, the balance due on the Park View mortgage was more than the balance due on the land contract. Id.

{¶36} Yane made her $700 monthly payments on the Shepard Hills property beginning in November 1981, and continuing until May 1983. Id. at *2. However, the DiEgidios stopped making their mortgage payments on the property after May 1982. Id. In early 1983, Yane, wishing to sell the Shepard Hills property, discovered that she had no recorded interest in it. Id.

{¶37} Park View filed an action to foreclose the various interests in the Shepard Hills property, naming the DiEgidios and Yane as defendants. The DiEgidios and Yane eventually disclaimed any interest in the Shepard Hills property. Id. Yane then brought an action for monetary damages against the DiEgidios, alleging fraud. Id. The trial court found that Yane failed to establish fraud, but nevertheless awarded her $23,650 in monetary damages against the DiEgidios under R.C. 5313.04 for violations of R.C. 5313.02. The $23,650 award included Yane's $19,450 down payment and $4,200 in monthly payments she had made to the DiEgidios. Id.

{¶38} Marcus, relying on *Park View Federal Savings*, argues the trial court erred in failing to award her monetary damages for Seidner's failure to draft a proper land installment contract that met the requirements set forth in R.C. 5313.02(B). However, Marcus has failed

to convince us that the trial court committed reversible error by not granting her monetary damages under R.C. 5313.04.

{¶39} R.C. 5313.04 permits a vendee of a land installment contract to enforce the provisions of R.C. Chapter 5313 in a municipal court, county court, or common pleas, and if the trial court finds that the vendor has failed to comply with the provisions of that chapter, the trial court is obligated to grant the vendee "appropriate relief." However, in this case, Marcus never raised this issue in her complaint against Seidner or at any other point in the trial court's proceedings. It is well settled that issues not called to the trial court's attention at a time when the error could have been corrected or avoided altogether are generally deemed to have been waived. *Schade v. Carnegie*, (1982), 70 Ohio St.2d 207, 210.

{¶40} Marcus implicitly acknowledges that she failed to raise this issue in her complaint. However, she contends that in *Park View Federal Savings*, "the court of appeals noted that an implied agreement to amend the pleadings under Civ.R. 15(B) occurred during trial." She then asserts that during the trial held in this case, Seidner's "counsel was open about the fact that the [parties' LIC] was not a proper Land Installment Contract." We find this argument unpersuasive.

{¶41} In *Park View Federal Savings* at *3, the appellants argued that the trial court erred in awarding damages to Yane under R.C. 5313.04, because Yane failed to plead violations of R.C. Chapter 5313 and failed to amend her complaint to include this issue. The court of appeals rejected appellants' argument on the ground that "[t]here is abundant evidence * * * to uphold the trial court's determination that the pleadings were implicitly amended under Civ.R. 15(B)." Id. While Yane failed to raise her claim for monetary damages under R.C. 5313.04 in her initial pleadings, it appears that Yane raised this claim at the close of the proceedings, as there is no indication in *Park View Federal Savings* that the trial court raised this issue sua sponte on Yane's behalf. It is possible that the trial court in

that case raised the issue sua sponte. However, even if this is true, Marcus still has failed to show reversible error in the trial court's failure to award such damages in this case.

{¶42} R.C. 5313.04 obligates a trial court to grant "appropriate relief" to a vendee of a land installment contract when the trial court determines that a vendor has failed to comply with the provisions of R.C. Chapter 5313. While Marcus has alleged that Seidner failed to comply with R.C. 5313.02(B), she has failed to offer any explanation as to why granting relief to her would have been "appropriate" under the circumstances of this case. In *Park View Federal Savings*, Yane was granted monetary damages under R.C. 5313.04 when she purchased the Shepard Hills Property in October 1981 and began making monthly payments on the property until May 1983. She made a $19,450 down payment and $4,200 in monthly payments to the DiEgidios, while the DiEgidios stopped making their mortgage payments to Park View after May 1982. Id. at *2. It was under these circumstances that the trial court awarded Yane monetary damages against the DiEgidios for their failure to comply with the provisions of R.C. Chapter 5313.

{¶43} By contrast, in this case, Marcus and Seidner entered into their LIC in October 2006. The contract was extended several times until December 2008, at which time Marcus filed for bankruptcy. Marcus did not make any payments under the LIC until July 2008. Between July 2008 and November 2008 she made a total of only $17,325 in payments, which was well short of the $284,343.46 balance due. Marcus has failed to point to any action taken by Seidner that was analogous to the DiEgidios' failure to inform Yane of the amount of their first mortgage with Park View on the Shepard Hills property and the DiEgidios' failure to continue making their mortgage payments to Park View, which led to the Park View's foreclosing on the Shepard Hills property. Id. at *1-2. As stated by the court of appeals in *Park View Federal Savings* at *5:

{¶44} "Emily Yane did suffer a loss * * *. [She] made large payments to the DiEgidios in belief that she was building an equity interest in the Shepard Hills Property, only to find * * * that she had no record title and Park View was foreclosing on the property. Surely the appellants do not assert that Emily Yane's own actions caused the delinquency and subsequent foreclosure on the Shepard Hills property."

{¶45} In this case, by contrast, the facts show that Marcus' own actions led to her decision to transfer the deed to her farm to Seidner and to sign the parties' LIC, and ultimately to her default on the LIC. We conclude that in light of Marcus' failure to raise a claim for monetary damages under R.C. 5313.04 in her complaint or at any other point in the trial court's proceedings, or to offer any explanation as to why such monetary damages would have been "appropriate" under the facts of this case, the trial court did not err in failing to award her monetary damages under R.C. 5313.04.

{¶46} Marcus also argues the parties' LIC should be declared null and void, and the parties' mortgage revived, because she received no consideration from Seidner in exchange for signing the LIC. However, Seidner clearly provided Marcus with consideration for the benefits she gave him, by loaning her an additional $37,000 to purchase the 8-acre parcel adjacent to the farm and by his forbearance on his right to collect the money she owed him at the time the parties executed the LIC. It is well settled that "[t]he actual forbearance or promise to forbear to prosecute or pursue a legal right or a claim on which one has a right to sue is sufficient consideration to support an agreement." *Klamo v. Hobbs* (Aug. 10, 1983), Butler App. No. CA83-02-019, *2; see, also, *HomEq Servicing Corp. v. Schwamberger*, Scioto App. No. 07CA3146, 2008-Ohio-2478, ¶19.

{¶47} Therefore, Marcus' second assignment of error is overruled.

{¶48} Assignment of Error No. 3:

{¶49} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FINDING THAT SHE HAD FAILED TO PROVE HER CASE."

{¶50} Marcus argues "[i]t was an abuse of discretion for the trial court to deny [her] request for relief, especially insofar as Real [sic] estate law is a matter of equity." (Italics deleted.) She alleges that "the trial court missed the pertinent issues" and "rendered a *Decision* that glibly touched on the issues, but did not delve further." She further alleges that the trial court "did not put any care, nor any consideration of the nature of equity, into its decision." We find these arguments unpersuasive.

{¶51} Despite accusing the trial court of missing the "pertinent issues" and only "glibly touch[ing]" upon them, the only specific argument that Marcus raises in this assignment of error is that the trial court failed to consider the equities in this case before denying her request for relief. However, it does not appear to us that the equities in this case weigh in Marcus' favor. As previously noted, the evidence showed that Marcus was college-educated and experienced in business, and the trial court simply did not believe her claim that Seidner took advantage of their romantic relationship to cause her to convey the deed to the farm to him and to sign the LIC.

{¶52} Marcus also claims that her trial counsel provided her with ineffective assistance of counsel under *Strickland v. Washington* (1984), 466 U.S. 668, 690, 104 S.Ct. 2052 by "failing to make these critical issues abundantly clear to the court." However, "[w]hile the law clearly allows a reversal for incompetent or inadequate representation of counsel in criminal actions, such allegations cannot constitute a basis for reversal in civil matters." *McGlothin v. Stout* (Aug. 14, 1989), Butler App. No. CA89-03-050, *3. Moreover, a party in Marcus' position is free to bring a civil action against her trial counsel if he or she chooses.

{¶53} Therefore, Marcus' third assignment of error is overruled.

{¶54} Judgment affirmed.

PIPER, J., concurs.

POWELL, P.J., concurs in judgment only.