[Cite as *Ferraro v. Cristiano*, 2009-Ohio-4789.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

VINCENZO FERRARO :

Plaintiff-Appellee : C.A. CASE NO. 23146

v. :

T.C. NO. 2007 CV 10599

ANNITA CRISTIANO : (Civil appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 11th day of September, 2009.

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MICHAEL W. SANDNER, Atty. Reg. No. 0064107, 2700 Kettering Tower, Dayton, Ohio 45423

Attorney for Plaintiff-Appellee

JOHN M. RUFFOLO, Atty. Reg. No. 0006234 and RUSS B. COPE, Atty. Reg. No. 0083845, 7501 Paragon Road, Dayton, Ohio 45459

Attorneys for Defendant-Appellant

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FROELICH, J.

{¶ 1} Annita Cristiano appeals from a judgment of the Montgomery County Court of Common Pleas, which granted summary judgment to her brother, Vincenzo Ferraro, on his claim for breach of a real estate contract and awarded specific performance. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 2} The following facts are undisputed. On April 8, 2002, Cristiano and her younger brother, Ferraro, purchased the real estate located at 222 Stonemill Road[1] in Dayton, Ohio, from their mother's estate for $255,000. The siblings also entered into a Buy-Sell Agreement, which is dated April 8, 2002. Although Cristiano acknowledges that she signed the Agreement, she claims that she did so in June 2002 and based on Ferraro's representations to her regarding the terms of the Agreement.

{¶ 3} The Buy-Sell Agreement provides, in part, that either party electing to sell his or her interest in the property was required to first make a written offer to the other. Specifically, Paragraph 9 of the Agreement, captioned "Restriction on Alienation of Interest in the Property," reads:

{¶ 4} "9.1. No Property Owner shall sell, assign, encumber or otherwise dispose of his or her interest in the Property, either in whole or in part, during his or her lifetime without first making a written offer to sell said interest in the Property to the other Property Owners.

[1] The property originally consisted of 214 Stonemill Road and 222-224 Stonemill Road. However, after modifications to the structures, the property at issue is now referred to only as 222 Stonemill Road. The four-unit building currently provides housing for up to 24 students at the University of Dayton.

{¶ 5} "9.2. Each Property Owner shall have sixty (60) days in which to elect to purchase his or her pro-rata portion of the Property of the withdrawing Property Owner. If an election to purchase is made, written notice of the election must be delivered to the withdrawing Property Owner within the sixty (60) day period. If any Property Owner does not purchase his or her portion of the interest offered, such portion shall then be available to the other Property Owners on a proportional basis. If no election is made, the withdrawing Property Owner shall be free to dispose of his or her interest in the Property without regard to the terms of this Agreement.

{¶ 6} "9.3. If an election is made to purchase the interest in the Property of a withdrawing Property Owner, the price for the interest in the Property shall be the value of such interest in the Property as determined herein."

{¶ 7} Under Paragraph 3 of the Buy-Sell Agreement, the value of each owner's interest "shall be determined by the Property Owners or by a formula *** [as] set forth in Exhibit 'B'." The formula in Exhibit B states that the value equals the percentage of ownership of the selling partner multiplied by the highest of (1) the appraised value determined by "a licensed real estate appraiser that is acceptable to both parties"; (2) an offer to purchase solicited from the University of Dayton; or (3) an offer to purchase solicited from Frank Z, a nearby car dealership.

{¶ 8} On August 13, 2007, Cristiano sent a letter to Ferraro, by certified mail, the entire contents of which stated:

{¶ 9} "I offer to sell my interest in the real estate located at 222 A, B, C, D Stonemill Road Dayton, Ohio 45409.

{¶ 10} "Please advise me of your interest in buying the property."

{¶ 11} Acting in accordance with the Buy-Sell Agreement, Ferraro solicited offers from

Frank Z and the University of Dayton. On September 12, Ferraro wrote to Cristiano regarding distribution of the rental income for the first and second semesters at the Stonemill property. He noted that, "[i]n the event I exercise the Option to Purchase, pursuant to your offer of August 13," certain rental income would have to be pro-rated and that, "[a]s these monies have already been paid to you, I would anticipate the same being treated as a credit against the purchase price for your one-half interest in the property." He informed her that Frank Z was not interested in purchasing the property and that he was waiting for a response from the University of Dayton.

{¶ 12} Ferraro spoke with Cristiano about getting an appraisal for the property, but Cristiano responded that she did not "want to be involved." Ferraro arranged for an appraisal from Michael Moorhead. Using an income approach, Moorhead valued the property at $839,800. (An appraisal obtained by Cristiano after the initiation of this lawsuit valued the property at $1,500,000.) Because the appraisal was higher than the offers from both Frank Z and the University of Dayton, the purchase price of Cristiano's interest under the Buy-Sell Agreement was $419,900.

{¶ 13} On September 24, 2007, Ferraro notified Cristiano, in writing, that "I am accepting your offer to sell and exercising the option to purchase as contained in the Buy-Sell Agreement" and that, pursuant to the Buy-Sell Agreement, the closing must occur on or before November 24, 2007. Ferraro informed Cristiano that he would have his attorney prepare a purchase contract for her review and signature and that he would provide the appraisal to her.

{¶ 14} In October 2007, Ferraro's counsel prepared documents in preparation for closing on October 29, 2007. Those documents, including an Agreement to Purchase Real Estate, were provided to Cristiano. After Cristiano received the documents, she contacted an attorney, who informed Ferraro's counsel that Cristiano would not go forward with the sale of her interest in

the property. Closing was rescheduled for November 21, 2007. On that day, Cristiano's counsel informed Ferraro's counsel, in writing, that Cristiano would not attend the closing. He wrote: "Mrs. Cristiano states that she did not consent to the appraiser chosen by Mr. Ferraro and disputes the appraiser's evaluation, and, as a result, Mrs. Cristiano does not believe that the terms of the Buy-Sell Agreement have been met."

{¶ 15} On December 19, 2007, Ferraro brought suit against Cristiano, claiming breach of contract, unjust enrichment, and promissory estoppel due to Cristiano's failure to attend and participate in the closing of the sale of her one-half interest in the property at 222 Stonemill Road. Ferraro sought specific performance of the contract and damages. Cristiano filed counterclaims, alleging that Ferraro had fraudulently induced her to execute the Buy-Sell Agreement by misrepresenting its terms to her and that Ferraro was unjustly enriched by the Buy-Sell Agreement, because it allowed him to retain the property upon her death. Cristiano sought damages and a declaration that the Buy-Sell Agreement was invalid.

{¶ 16} On September 2, 2008, Ferraro moved for summary judgment against Cristiano on his breach of contract claim. He asserted that the parties had entered into a valid Buy-Sell Agreement, that Cristiano had agreed to sell her interest in 222 Stonemill Road, and that she breached the agreement.

{¶ 17} In response, Cristiano asserted that the Buy-Sell Agreement had been entered into fraudulently and that the parties had never executed the Agreement to Purchase Real Estate. Cristiano characterized her August 13 letter as an inquiry as to whether Ferraro would be interested in purchasing her interest in 222 Stonemill Road and that she never made an offer to sell pursuant to the Buy-Sell Agreement. She further asserted that the Agreement to Purchase Real Estate included additional material terms, such as the waiver of dower rights, and that,

assuming that Buy-Sell Agreement controls, Ferraro failed to comply with the terms of that agreement.

{¶ 18} The trial court found that no genuine issues of material fact existed and that Ferraro was entitled to judgment as a matter of law. The court stated that Cristiano "does not dispute that she signed the [Buy-Sell] [A]greement, nor does she argue that Plaintiff fraudulently induced her into signing it." The court indicated that it was insufficient for Cristiano to assert that she had not read the Agreement before she signed it. The trial court further found that the Buy-Sell Agreement was unambiguous, that Cristiano had made an offer under the terms of the Agreement, and that Ferraro had accepted the offer on September 24, 2007. In addition, the trial court concluded that Cristiano had waived her right to consent to the appraisal by Moorhead and that her husband had waived his dower interest. Accordingly, the court granted judgment to Ferraro on his breach of contract claim and ordered specific performance of the sale of Cristiano's interest to Ferraro. In so holding, the trial court implicitly rejected Cristiano's counterclaims.

{¶ 19} Cristiano appeals from the trial court's judgment, raising two assignments of error, which we will address together.

II

{¶ 20} Cristiano's assignments of error state:

{¶ 21} "THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

{¶ 22} "THE TRIAL COURT ERRED IN ORDERING THAT DEFENDANT, ANNITA CRISTIANO, DO ALL THINGS NECESSARY TO CONSUMMATE THE SALE OF HER

INTEREST IN 222 A, B, C, D STONEMILL ROAD, DAYTON, OHIO FOR THE AMOUNT OF $839,800.00."

{¶ 23} Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (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 and that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Our review of the trial court's decision to grant summary judgment is de novo. See *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162.

{¶ 24} Cristiano claims that the trial court failed to construe the facts most strongly in her favor, and it erred in granting summary judgment to Ferraro due to the presence of genuine issues of material fact. Cristiano states five reasons as to why she did not breach a real estate contract with Ferraro: (1) the Buy-Sell Agreement was not valid due to fraudulent inducement by Ferraro; (2) Cristiano did not make an offer to sell her interest in the property; (3) the Agreement to Purchase Real Estate was a counteroffer, which Cristiano did not accept; (4) Ferraro breached the Buy-Sell Agreement and Cristiano did not waive that breach; and (5) Cristiano's husband did not waive his dower interest. Cristiano further asserts the court erred in ordering specific performance, because she did not breach a contract to sell her interest in 222 Stonemill Road and her husband's unreleased dower interest precluded specific performance. We will address each argument in turn.

{¶ 25} First, Cristiano asserts that trial court erroneously stated that she "did not argue

that Plaintiff fraudulently induced her into signing [the Buy-Sell Agreement]." The record supports Cristiano's assertion that she repeatedly challenged the validity of the Buy-Sell Agreement by claiming that Ferraro fraudulently induced her to sign it. In fact, Cristiano expressly raised that issue in a counterclaim. Nevertheless, the trial court properly found that no genuine issues of material fact existed as to the validity of the Buy-Sell Agreement.

{¶ 26} "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, at ¶28, quoting *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414; *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, at ¶16. The parties must have a "meeting of the minds" as to the essential terms of the contract in order to enforce the contract. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369.

{¶ 27} In order to establish that a contract was procured by fraudulent inducement, "a plaintiff must prove that the defendant made a knowing, material misrepresentation, with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment." *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 502, 1998-Ohio-612. However, the misrepresentations must concern matters not addressed in the contract. See id. "An individual who fails to read what he signs cannot argue that he has been misled; willing ignorance is the very antithesis of being fooled by another." *Swayze v. The Huntington Inv. Co.*, Montgomery App. No. 20630, 2005-Ohio-2519, at ¶24.

{¶ 28} In her deposition, Cristiano described Ferraro's presentation of the Buy-Sell

Agreement to her, saying:

{¶ 29} "[Ferraro] fanned the paper like this and said I did this to close the transaction. If I die you buy. If you die I buy. And then he continued to say if you die your husband – my husband was leaning on the counter in the kitchen – he say if you die, Pasquale gets. If I die, Mary gets. And he fanned the page, gave me a pen, said sign it here."

{¶ 30} Cristiano reiterated in her affidavit that Ferraro "held the documents in his hands and did not go through the terms and explain the document to me." Cristiano testified that she signed the agreement at that time, because she "trusted him what was in there and what wasn't." She acknowledged that she did not read the document before she signed it.

{¶ 31} Even when construing the facts in Cristiano's favor, Cristiano has presented no evidence to support her allegation of fraudulent inducement. Rather, her statements demonstrate that she relied on her brother's summary of the terms of the Buy-Sell Agreement, and she signed the Agreement without reading those terms herself. Such conduct, as a matter of law, does not amount to fraudulent inducement. It is also relevant to note that when Cristiano did not attend the closing, it was because of her belief that one of the terms of the Buy-Sell Agreement had been breached, not that the Agreement itself was invalid because of fraud. The trial court properly concluded that the Buy-Sell Agreement was validly executed.

{¶ 32} Second, Cristiano argues that the trial court erred in finding, as a matter of law, that she had made a binding offer to sell her interest in 222 Stonemill Road.

{¶ 33} "Although no particular form is required, an offer is defined as 'the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.' Id., quoting 1 Restatement of the Law 2d, Contracts (1981) 71, Section 24. The Restatement further clarifies the existence of an offer

by stating that, '[a] manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of intent.' *Gruenspan v. Seitz* (1997), 124 Ohio App.3d 197, 211, 705 N.E.2d 1255, quoting Restatement of the Law 2d, Contracts (1981) 75, Section 26." *Frazier v. Navistar Intern. Transp. Corp.* (April 21, 2000), Clark App. No. 99-CA-89.

{¶ 34} On August 13, 2007, Cristiano sent a letter to Ferraro, which stated in its entirety:

{¶ 35} "I offer to sell my interest in the real estate located at 222 A, B, C, D Stonemill Road Dayton, Ohio 45409.

{¶ 36} "Please advise me of your interest in buying the property."

{¶ 37} The trial court found these statements to be unambiguous and to constitute an offer to sell her interest in the Stonemill property.

{¶ 38} Cristiano asserts that the letter is ambiguous, because the second sentence could be construed as inviting Ferraro merely to inform her if he had any interest in purchasing her interest in the property. She claims that there are genuine issues of material fact as to her purpose in writing the August 13 letter, and the court failed to construe facts in her favor when it determined that an offer was made pursuant to the Buy-Sell Agreement.

{¶ 39} The general rules of contract interpretation apply to our review of Cristiano's alleged offer. In general, courts must first review the plain language of a contract for evidence of the parties' intent. *In re Estate of Davidson*, Montgomery App. No. 22943, 2009-Ohio-3014, at ¶51. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Shifrin v. Forest City Ent., Inc.*, 64 Ohio St.3d 635,

638, 1992-Ohio-28. "If no ambiguity appears on the face of the instrument, parol evidence cannot be considered in an effort to demonstrate such an ambiguity." Id.

{¶ 40} In contrast, if the language in the contract is ambiguous, the court should construe the language against the drafting party and the court should consider extrinsic evidence to determine the parties' intent. *Estate of Davison* at ¶51, citing *Klug v. Klug*, Montgomery App. No. 19369, 2003-Ohio-3042, at ¶13.

{¶ 41} We find no error in the trial court's conclusion that Cristiano's August 13, 2007, letter constituted a offer to sell her interest in 222 Stonemill Road. The plain language of the August 13 letter expressed an offer to sell the property, and Cristiano acknowledged that her letter was an "offer to sell my interest in the real estate." Although Cristiano stated in her deposition that her subjective intent was to "see how much *** the property was worth and if I like it I will sell," the August 13 letter did not express her subjective intent. Rather, the letter unambiguously informed Ferraro that she was offering to sell her interest to him and that he should inform her if he wished to buy it..

{¶ 42} Moreover, Cristiano testified at her deposition that she decided not to sell her interest when she received "a whole package" from Ferraro's attorney. At that point, Cristiano "changed [her] mind" and "decided that I don't want to sell anymore." Cristiano testified that she then contacted her attorney and had him inform Ferraro's counsel that she would not participate in the closing. There are no genuine issues of material fact that the August 13, 2007, letter constituted an offer to sell.

{¶ 43} Moreover, the trial court did not err in concluding that the offer to sell was in accordance with the Buy-Sell Agreement. It is undisputed that the parties entered into the Buy-Sell Agreement in 2002, five years prior to Cristiano's August 13, 2007, letter. The Agreement

governed alienation of an owner's interest in 222 Stonemill Road and included the requirement that an owner first make a written offer to other property owners. The Agreement also addressed material terms of that offer, including providing a formula to determine the price for the interest and setting time limitations for accepting the offer and for payment of the purchase price.

{¶ 44} Cristiano conceded that she had been aware of the terms of Buy-Sell Agreement since 2003, when she showed the Agreement to her accountant. Cristiano further testified at her deposition that, since 2003, she had spoken with Ferraro on a few occasions regarding modifying or annulling the Buy-Sell Agreement, but Ferraro would not agree to alter the Agreement's terms.

{¶ 45} Although Cristiano's August 13, 2007, offer did not reference the Buy-Sell Agreement, the terms of that Agreement were automatically incorporated into the offer due to the unambiguous terms of the Buy-Sell Agreement. Under the Buy-Sell Agreement, Cristiano could not alienate her interest in 222 Stonemill Road except in accordance with that Agreement. If Cristiano's offer to sell her interest was conditioned on Ferraro's waiving some or all of the terms of the Buy-Sell Agreement, including the valuation formula set forth in Exhibit B of the Agreement, Cristiano should have expressly included that condition in her offer. Cristiano also did not respond to Ferraro's September 12 letter, in which he informed her that he was considering whether to "exercise the Option to Purchase, pursuant to [her] offer of August 13."

{¶ 46} Next, Cristiano argues that Ferraro's Agreement to Purchase Real Estate was a counteroffer. On October 19, 2007, Ferraro's counsel sent Cristiano copies of an Agreement to Purchase Real Estate. Prior to the time, however, Ferraro wrote to Cristiano that, "[a]s of the date of this letter [September 24, 2007], I am accepting your offer to sell and exercising the option to purchase as contained in the Buy-Sell Agreement." Ferraro's correspondence of

September 24, 2007, operated as an acceptance of Cristiano's offer to sell her interest in 222 Stonemill Road. Thus, at the time that Cristiano received the Agreement to Purchase Real Estate, the parties had already entered into a contract whereby Ferraro would purchase Cristiano's interest under the terms set forth in the Buy-Sell Agreement. The Agreement to Purchase Real Estate, therefore, did not constitute a counteroffer. Rather, even accepting Cristiano's argument that the Agreement to Purchase Real Estate contained additional material terms, it would represent a proposal to modify the terms of the existing contract.

{¶ 47} Fourth, Cristiano argues that, even assuming that there were a valid contract between the parties, Ferraro breached the Buy-Sell Agreement by failing to obtain her consent to the appointment of an appraiser. Cristiano further contends that the trial court erred in finding that she had "explicitly waived" her right to consent to the appraiser.

{¶ 48} Exhibit B of the Buy-Sell Agreement provided that "[t]he Property shall be appraised by a licensed real estate appraiser *that is acceptable to both parties*[.]" (Emphasis added.) That appraisal would then be compared with offers to purchase solicited from the University of Dayton and Frank Z in order to determine the purchase price for the partner's interest.

{¶ 49} In his deposition, Ferraro stated that he had asked Cristiano if she wanted to be involved in talking to Frank Z and the University of Dayton and in selecting an appraiser for the property; Cristiano had said, "no." During her deposition, Cristiano agreed that Ferraro had talked with her about getting an appraisal. However, she asserted in her answers to Ferraro's requests for admissions that she "never authorized an appraiser" and she repeated in her affidavit that she "never gave [her] acceptance of Michael Moorhead as the appraiser of the real estate." Construing the facts in Cristiano's favor, Cristiano did not expressly approve Michael Moorhead

as the appraiser.

{¶ 50} As noted by the trial court, however, the evidentiary material establishes that Cristiano waived her right to consent to Moorehead as the real estate appraiser. At her deposition, Cristiano testified as follows:

{¶ 51} Q: "You acknowledge that Vince talked to you about getting an appraisal for the property?

{¶ 52} A: "Yeah, he told me.

{¶ 53} Q: "And he asked you who you wanted to use, correct?

{¶ 54} A: "But I didn't make nothing out of it because I just, I don't want to be involved. I wasn't involved with the appraisal or anything.

{¶ 55} Q: "Okay. I'm not asking you about what you wanted to be involved with, I'm asking he called you and asked you who you wanted to use as an appraiser, correct?

{¶ 56} A: "He didn't say what I want to use.

{¶ 57} Q: "What did he say?

{¶ 58} A: "He say I got a , he name some names I don't even remember, but he got it.

{¶ 59} Q: "And you said that's fine, I don't want to be involved with that, correct?

{¶ 60} ***

{¶ 61} A: "Yes."

{¶ 62} Cristiano's deposition testimony establishes that she had the opportunity to provide input regarding who would appraise the property and, instead of expressly asserting her right to approve or reject a proposed real estate appraiser, she informed Ferraro "that's fine" and that she did not "want to be involved in that." Cristiano argues, however, that her "not wanting to be involved" is not the same as agreeing that Ferraro's proposed appraiser "is acceptable to

both parties." Cristiano denies consenting to Moorhead as the appraiser, and Ferraro agrees that Cristiano never expressly indicated that Moorhead was acceptable.

{¶ 63} Ferraro's September 24 acceptance letter said that he "will provide the offers/appraisals as required by Exhibit 'B' to the Buy-Sell Agreement so as to determine the purchase price. I am waiting on the appraisal to be certified to both of us." On October 15, Ferraro's attorney sent the appraisal report to Cristiano, and he sent a proposed purchase contract on October 19. No objection was voiced by Cristiano as to the process of selecting an appraiser or to the appraisal until her counsel spoke with Ferraro's counsel. By this time, Ferraro had spoken with Cristiano regarding her interest in being involved with getting an appraiser, retained an appraiser, obtained a report, provided that report to Cristiano, and was prepared to close on the sale. The trial court did not err in holding that Cristiano's actions, inactions, and statements amounted to her acquiescence to Ferraro's selection, which constituted a waiver or forfeiture of her right to challenge the selection. See, e.g., *Vivi Retail, Inc. v. E&A Northeast Ltd. Partnership*, Cuyahoga App. No. 90527, 2008-Ohio-4705, at ¶30 ("[W]aiver of a contract term can occur when a party conducts itself in a manner inconsistent with an intention to insist on that term.").

{¶ 64} Finally, Cristiano contends that the trial court erred in concluding that Cristiano's husband waived his dower interest in 222 Stonemill Road and that, because her husband's dower interest remained, specific performance was not an appropriate remedy.[2] In its decision, the trial

[2] Although the parties' depositions indicate that Ferraro and Cristiano jointly purchased the property in order to build student housing, we note that Ferraro has not argued that Cristiano's husband lacked dower rights because the property was partnership property. See R.C. 1775.24; *Weithman v. Weithman*, Crawford App. No. 3-02-08, 2002-Ohio-3400. Rather, Ferraro argued in the trial court that Cristiano's husband waived his rights by signing the mortgage

concluded that Cristiano's husband had waived all of his dower interests when he twice released his dower interests in mortgage documents. The trial court ordered Cristiano "to do all things necessary to consummate the sale of her interest in 222 A, B, C, D Stonemill Road Dayton, Ohio 45409 at the appraised price of $839,800."

{¶ 65} "A dower interest is an interest in real estate that is intended to protect a non-title-holding spouse." *Std. Fed. Bank v. Staff*, 168 Ohio App.3d 14, 2006-Ohio-3601, at ¶16.

{¶ 66} As the First District has astutely noted, "[dower] has been a bane to real estate professionals, lenders, and first-year law students for eons. It is a dour subject."[3] (Footnote added.) Id.

{¶ 67} "In feudal times, land was the chief form of wealth and provided the power base for the head of the family. Thus, the common law created the marital life estate of dower to protect a widow from disinheritance by her husband. Dower provided a lifetime protection for the widow consisting of a one-third interest in the real estate titled to the husband during the marriage." (Internal citations omitted.) Id. at ¶17. With the equalization of property rights among spouses and the modernization of probate laws, most states no longer recognize dower interests. See Id. at ¶19 (noting that Ohio is one of four states that continues to recognize dower interests).

{¶ 68} In Ohio, dower interests are codified in R.C. 2103.02. That statute provides, in part: "[A] spouse who has not relinquished or been barred from it shall be endowed of an estate for life in one-third of the real property of which the consort was seized as an estate of inheritance at any time during the marriage." Thus, under R.C. 2103.02, whenever a married

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documents.

[3] And, we would add, to experienced attorneys and judges.

person buys real property in Ohio, the person's spouse automatically receives a dower interest, and "any document that intends to convey or mortgage an interest in the property is not effective as to the non-title-holding spouse's dower interest unless that spouse has also signed the document." *Staff* at ¶21. Dower interests terminate "upon the death of the consort" unless certain exceptions apply. R.C. 2103.02.

{¶ 69} In several respects, Ohio's codification of dower interests has not substantially changed in more than 100 years. Compare R.C. 2103.02 with 84 Ohio Laws 135, section 4188. Applying a prior version of the law, the Supreme Court of Ohio has addressed the effect of a wife's release of her dower rights in a mortgage document on her dower interest with respect to other parties. *Mandel v. McClave* (1889), 46 Ohio St. 407. Upon review, the Court concluded that the wife's release of her dower interests, by joining in the mortgage to secure her husband's debt, did not "inure to the benefit of a stranger to the [mortgage] instrument." Id. at 413. The Court reasoned that "[t]here is nothing in the nature of the transaction from which it can be inferred that a wife, by joining with her husband in a mortgage of his lands to secure his debt, intends more than to pledge her contingent right of dower for that particular debt." Id. at 411. In other words, the release of a spouse's dower interest in a mortgage document did not constitute a release of the spouse's dower interests for all purposes.

{¶ 70} This conclusion in *Mandel* has stood the test of time. The Tenth District has recently applied *Mandel*, stating that a wife's release of her dower interest in a mortgage agreement did not constitute an absolute release of her dower interests, but merely subordinated her dower interest with respect to the mortgagee. *Stand Energy Corp. v. Epler*, 163 Ohio App.3d 354, 2005-Ohio-4820, at ¶14-15. See, also, *In re Rosario* (Bankr.N.D. Ohio 2009), 402 B.R. 223, 229 (wife's signature on mortgage document "operates to subordinate the dower interest for

the benefit of the creditor lending money, but not as to all creditors."). We likewise find *Mandel* to be applicable and conclude that a spouse's release of dower in a mortgage instrument does not constitute a release of dower as to other third parties. Accordingly, the trial court erred in holding that Cristiano's husband fully released his dower interest in 222 Stonemill Road by releasing his dower rights in mortgage documents.

{¶ 71} Ferraro contends in his brief and at oral argument that the trial court, nevertheless, properly ordered specific performance, because Cristiano's obligation to convey her interest in the real property exists notwithstanding her husband's dower interest. In support of his assertion, Ferraro relies upon *Longo v. Walter* (1954), 99 Ohio App. 299. Cristiano asserts that specific performance is not an appropriate remedy, citing *Barnes v. Christy* (1921), 102 Ohio St. 160, approving and following *People's Savings Bank Co. v. Parisette* (1903), 68 Ohio St. 450.

{¶ 72} "Specific performance of a contract is a distinctly equitable remedy." *Quarto Mining Co. v. Litman* (1975), 42 Ohio St.2d 73, 87. The remedy of specific performance is available when the promisor's failure to perform constitutes a breach of contract and a legal remedy for that breach, such as money damages, will not afford the promisee adequate relief. See *Gehret v. Rismiller*, Darke App. No. 06CA1705, 2007-Ohio-1893, at ¶14. In general, a contract to purchase real estate may be enforced by specific performance. Id.

{¶ 73} In *Barnes*, the Supreme Court of Ohio continued Ohio's long-standing rule that an award of specific performance, with an abatement from the contract price of the prospective value of a dower interest, is not proper when the contract contains no stipulation to convey with a release of dower, the non-title-holding spouse refuses to release the inchoate right of dower, and the refusal is not procured directly or indirectly by the title-holding spouse. Id. at paragraph seven of the syllabus. See, also, *Sterling v. Wilson* (1993), 86 Ohio App.3d 657.

{¶ 74} In contrast, when a spouse has agreed to convey the property with release of dower, but the non-title-holding spouse is not a party to the contract, appellate courts have awarded specific performance with an abatement from the purchase price of the value of the other spouse's unrelinquished dower interest in the property. *See Findley v. Davis* (1955), 100 Ohio App. 316. The *Findley* court distinguished *Barnes* on the ground that the contract in *Findley* included a stipulation to release dower rights whereas the contract in *Barnes* did not. *Findley*, 100 Ohio App. at 320. Both of these cases, however, focus on when an abatement may be ordered along with specific performance, not whether specific performance may be ordered.

{¶ 75} In *Longo*, the First District held that a buyer was entitled to specific performance, notwithstanding the fact that the wife did not waive her inchoate dower right, when he was willing to accept the conveyance without any abatement from the purchase price and without a determination of the value of the inchoate right of dower. Id. at 302. More recently, the Twelfth District noted that, where there was no evidence that a seller's wife would have conveyed her dower interest in the property, the buyer "would have been required to take the property subject to that dower interest if he elected to complete the transaction." *DeSantis v. Soller* (1990), 70 Ohio App.3d 226, 238.

{¶ 76} Reading all of these cases together, a trial court may award specific performance of the sale of one spouse's interest in realty, regardless of whether the contract includes a provision for the release of dower or whether the other spouse is willing to release his or her dower interest. The existence of contractual provision for release of dower and the basis for a spouse's refusal to release his or her dower right is relevant only as to whether the court may order an abatement from the purchase price of the value of the dower. But, see, *Sterling*, supra (holding that the lack of a contractual provision requiring the release of dower precluded specific

performance).

{¶ 77} Because the trial court properly granted summary judgment to Ferarro on the liability portion of his breach of contact claim based on Cristiano's failure to convey her interest in 222 Stonemill Road, the trial court properly ordered specific performance. Although the trial court erroneously concluded that Cristiano's husband had absolutely waived his dower rights in the mortgage documents, the trial court could – and did – properly order Cristiano to convey *her* interest in 222 Stonemill Road. Although Ferraro and Cristiano both acknowledge that Cristiano's husband's unreleased dower interest may detrimentally affect Ferraro's ability to finance or convey the real estate, this fact does not preclude the trial court from ordering Cristiano to convey her interest as required by the parties' agreement, notwithstanding her husband's unrelinquished inchoate dower interest in the property, and Ferraro has specifically sought this remedy.[4]

{¶ 78} The assignments of error are overruled.

III

{¶ 79} The judgment of the trial court will be affirmed.

. . . . . .

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Michael W. Sandner

[4] Ferraro has not argued that he is entitled to an abatement of the purchase price due to Cristiano's husband's unreleased dower right. To the contrary, he repeated at oral argument that the trial court's order of specific performance would result in the conveyance of his sister's interest in 222 Stonemill Road and he would take the property subject to her husband's remaining dower interest.

John M. Ruffolo
Russ B. Cope
Hon. Barbara P. Gorman