[Cite as *Family Songs Ministries v. Morris*, 2010-Ohio-280.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

FAMILY SONGS MINISTRIES, et al.	:	
	:	Appellate Case No. 09-CA-16
Plaintiff-Appellants	:	
	:	Trial Court Case No. 08-CV-760
v.	:	
	:	
MARK A. MORRIS	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 29th day of January, 2010.

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BROGAN, J.

{¶ 1} Brenda Jackson, Bruce Jackson and Family Song Ministries appeal from the order of the Miami County Common Pleas court grating partial summary judgment to appellee, Mark Morris.

{¶ 2} On August 26, 2008, Brenda Jackson and Family Song Ministries filed a breach of contract action against Morris contending that Morris breached his

contract with them to purchase their personal residence and farm for $495,000. Appellants sought specific performance of the contract or, in the alternative, money damages. Morris answered the complaint denying that he had breached the contract. Morris also filed a counterclaim against appellants in which he asserted that appellants had breached the same contract, and he sought to recover $25,000 he had paid as an earnest-money deposit. Morris also brought a "third-party complaint" against Bruce Jackson for breach of contract, negligent misrepresentation, and fraud. Morris also alleged, in a separate count, a claim of abuse of process against the appellants. The appellants answered and denied the averments in the appellee's counterclaim and third-party complaint.

{¶ 3} On November 19, 2009, Morris moved for summary judgment on the plaintiffs' claim against him and for partial summary judgment on four of the five claims he asserted in his counterclaims and third-party claim. In his motion he asserted that he had, on September 30, 2008, sent his first request for admissions to plaintiffs' counsel as required by Civ.R. 36, and they had not responded as required under the rule. Morris requested that his request for admissions therefore be deemed admitted pursuant to Civ.R. 36. Among the requested admissions which the Jacksons did not answer were the following:

{¶ 4} That they were required to attach an Inspection Addendum to the purchase contract and they failed to do so.

{¶ 5} That they failed to check the box in Paragraph D titled "Water Intrusion" in the Residential Property Disclosure Form and that they knew that their home had experienced prior water leakage, water accumulation and damage.

{¶ 6} That the sewer next to the home was not able to handle significant rainfall.

{¶ 7} Morris provided the court his own affidavit in which he explained the circumstances behind the aborted real estate sale. Morris stated he agreed to purchase the plaintiffs' property for $600,000 with three payments of $25,000, $80,000 and $495,000. Morris stated the first payment was made before the closing date of July 31, 2008. Morris stated that Bruce Jackson represented that his home had never experienced any water intrusion. Morris stated in June 2008 he was notified the basement of the Jackson home had flooded and during the remediation process he discovered the basement had experienced prior water intrusion. In addition, Morris stated in his affidavit that Bruce Jackson encouraged him to proceed with completing the walk-out basement prior to the flooding and he expended $7,300 in purchasing materials to complete that work based on Jackson's representations.

{¶ 8} On December 1, 2008, the Jacksons and Family Song moved the court for an order permitting them to withdraw their admissions and requesting leave from the court to submit responses to Morris' request for admissions. Counsel stated that he had met with the Jacksons on October 11, 2008, to review Morris' answer, counterclaims, and third-party complaint as well as Morris' request for production of documents, request for answers to certain interrogatories, and 104 requests for admission. Counsel stated he asked the Jacksons to review, complete, and return the documents to him, but for "reasons not completely known to counsel the documents were not returned." Counsel also noted that the Jacksons had been served with a foreclosure complaint during this same time period and the various

filings and submissions may have overwhelmed them. Counsel for the Jacksons argued that Morris would not be prejudiced by permitting the Jacksons' admissions to be withdrawn. Counsel offered to file the requested answers to the request for admissions instanter.

{¶ 9} The trial court overruled the Jacksons' request because the court found they had not set forth any compelling circumstances that led to this failure to respond to the proposed admissions. Therefore, the court held that the admissions would stand.

{¶ 10} The court held that Morris was entitled to summary judgment on the Jacksons' claims for breach of contract, and he was entitled to judgment on his claims against the Jacksons, save the abuse of process claim. After Morris voluntarily dismissed his abuse of process claim, the trial court then entered judgment in favor of Morris in the amount of $33,453.59 after taking testimony.

{¶ 11} In a single assignment of error, the Jacksons argue that the trial court abused its discretion by denying their motion to withdraw their admissions, contrary to Civ.R. 36(B).

{¶ 12} Rule 36(A) of the Rules of Civil Procedure provides, in part, that:

{¶ 13} " * * * *The matter* is admitted unless, within a period designated in the request, not less than twenty-eight days afer service thereof *or within such shorter or longer time as the court may allow*, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter; signed by the party or by his attorney. * * * "

{¶ 14} Further, rule 36(B) includes the following, in pertinent part:

{¶ 15} "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing modification of a pretrial order, *the court may permit withdrawal or amendment when* the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits * * * "

{¶ 16} The Jacksons argue that Morris never established through motion or evidence that his case would be prejudiced by the trial court granting his motion to withdraw the admissions. They note there was no pressing court deadline that would preclude Morris from preparing its defense because the case was in its early stages. Discovery was not complete, they note, and trial was set 270 days from the appellee's filing of the request for the admissions.

{¶ 17} In *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, the Ohio Supreme Court held that the trial court has discretion pursuant to Civ.R. 36(B) to permit withdrawal or amendment of an admission made pursuant to a request for admissions. The court noted that it is important to recognize that a request for admissions can be used to establish a fact that goes to the heart of the case. This furthers the primary purpose of resolving potentially disputed issues, thereby expediting trial or avoiding one altogether. Id. at 67, citing *St. Paul Fire & Marine Ins. Co. v. Battle* (1975), 44 Ohio App.2d 261, 269. Although there were 104 requests for admission, many of them were redundant and requested the Jacksons' admission that they had mislead him concerning prior water damage to the Jacksons'

residence.

{¶ 18} In *Cleveland Trust Co. v. Willis*, supra, the court held the trial court refused to permit a defendant to file responses to requested admissions fourteen days late, and the requested admissions were thus deemed admitted under Civ.R. 36. The supreme court affirmed the trial court's refusal to allow the defendant's late response. In response to the appellant's suggestion that his illness prevented a timely response, the court noted that Willis could have moved for a protective order or for an extension of time to answer the plaintiff's requests. The court stated the defendant failed to present a "substantial reason" for not responding earlier.

{¶ 19} In *Gwinn v. Dave Dennis Volkswagen* (Feb. 8, 1988), Greene App. No. 87-CA-56, this court held that the trial court did not abuse its discretion in finding that Gwinn had shown no "compelling circumstances" to excuse his failure to file timely responses to the request for admissions made by defendants in the litigation. Gwinn's attorney had cited "office personnel problems" as the reason for the late answers, but the court noted counsel did not seek additional time from opposing counsel to respond. We also noted in the *Gwinn* opinion that the trial court appropriately granted summary judgment to the defendants when Gwinn never filed any evidentiary material permitted by Civ.R. 56 controverting the matters deemed admitted by his failure to have responded to the requests for admissions.

{¶ 20} We cannot say the trial court abused its discretion in finding that the Jacksons had not demonstrated a compelling reason for not answering Morris' requests for admissions in a timely manner. Their counsel told the trial court that he did not know why the Jacksons did not return completed responses to the requests to

him for review but they may have been simply overwhelmed by their volume. We have examined the 104 requests for admissions. The requests were simple and straightforward. If the Jacksons needed more time to respond to them they should have conveyed that request to their counsel in this matter. Also, it is relevant that the Jacksons never controverted with Civ.R. 56 materials Morris' claim that the Jacksons had fraudulently concealed evidence of prior water damage to their residence. The trial court did not abuse its discretion in refusing to allow the Jacksons to withdraw their admissions or err in granting Morris summary judgment on the Jacksons' complaint and his counterclaims.

{¶ 21} The judgment of the trial court is Affirmed.

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FAIN and FROELICH, JJ., concur.

Copies mailed to:

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Hon. Jeffrey M. Welbaum