[Cite as *Getz v. Taylor*, 2004-Ohio-5506.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DONALD J. GETZ, et al.	:	JUDGES:
	:	John W. Wise, P.J.
Plaintiffs-Appellants	:	Julie A. Edwards, J.
	:	John F. Boggins, J.
-vs-	:	
	:	Case No. 03 CA 99
B. F. TAYLOR, et al.	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Fairfield County Court of Common Pleas Case 2002CV005
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 4, 2004

APPEARANCES:

For Plaintiffs-Appellants

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For Defendants-Appellees

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Edwards, J.

{¶1} Plaintiff-appellants Donald and Melissa Getz appeal from the December 17, 2003, Entry of the Fairfield County Court of Common Pleas granting summary judgment to defendants-appellees Taylor Building Corp. of America, Eric Taylor and the Estate of B. F. Taylor.

STATEMENT OF THE FACTS AND CASE

{¶2} In 1996, appellee Taylor Building Corp. of America [hereinafter "Taylor Building"] began construction of a house for Charles and Susan Bailey. After the foundation was completed and the house was 80% framed, the north foundation wall[1] collapsed due to the excavator's failure to properly brace the wall while backfilling. The excavator had been hired by the Baileys. As a result, Gary Wilhelm, a registered professional structural engineer hired by the Baileys, conducted a visual inspection of the basement foundation walls in December of 1996.

{¶3} In a written report to the Baileys dated December 4, 1996, Wilhelm noted that the "front and rear basement walls have inward bulging, with the maximum being approximately one inch" and that "the exterior basement walls are reinforced at irregular intervals." Wilhelm, in his report, further stated that "[f]or the North wall, the strap anchors have not been secured to the sill plate" and that the basement walls were wet and there was standing water on the basement floor, which did not slope towards the sump crock. In a January 2, 1997, addendum to his original report, Wilhelm stated that, during his second visit to the home, "I observed that the open vertical mortar joints near the floor were also open on the exterior side of the wall, permitting mud to enter the cavities of the block. This multiplies my previous concern that the foundation drainage

[1] Facing the back of the house, the wall that collapsed was in the rear right corner.

for this home is not satisfactory." On January 17, 1997, Chris Taylor, the Corporate Vice-President of Taylor Building, received a copy of both reports along with a letter dated January 8, 1997, from the Bailey's attorney. Based on Wilhelm's reports, the Baileys exercised their right to rescind the contract and appellee Taylor Building bought the land and structure back from the Baileys.

{¶4} Thereafter, in August of 1997, after repairing the foundation and prior to offering the property for sale, appellee Taylor Building had an inspection of the property performed by S.T.A. Building Consultants, Inc., a structural engineer. In a report to appellee Chris Taylor dated August 19, 1997, S.T.A. stated, in relevant part, as follows**:**

{¶5} "1. The portion of the Basement wall to be examined was the wall farthest from the Garage. The wall apparently had to be reconstructed during the early stages of construction. We found this wall to be plumb, with all block and joints consistent with good construction practice. There were no cracks or any other indications of any distress apparent on the wall. We would consider the wall structurally sound and capable of carrying the loads imparted to it by the framing system of the house.

{¶6} "2. We also examined the front wall, which appeared to be slightly out of plumb. We measured the wall, and it was approximately 3/8" out of plumb in 4' -0" at the top ½ of the wall. We do not consider this situation as one which compromises the structural integrity of the wall. This wall is structurally sound, and capable of carrying the loads transferred to it by the framing.

{¶7} "3. There were two areas where water appeared to be seeping through the brick. Both areas were behind the window wells at the front of the house. Seepage was minor, and was only at the joints.

{¶8} "4. The drainage around the house appeared adequate, since there had been recent heavy rains, and there was no apparent standing water…"

{¶9} "5. We generally examined many elements of the house for consistency with good construction practice, and we feel the following areas exceed what one would expect to see. This is only a partial list of the total elements of the house, and represents only those areas we had time to examine.

{¶10} "a. Roofing and the cricket installed at the chimney.

{¶11} "b. Deck and railing construction.

{¶12} "c. Roof and attic ventilation.

{¶13} "d. Construction joints in Garage floor

{¶14} "e. Flooring

{¶15} "6. From examining other elements of the house, we found all elements of the house to be generally installed according to good construction practice. Specific areas included in our examination are brick, siding, interior doors, exterior doors, windows, plumbing, roofing and gutters."

{¶16} In January of 1998, appellants Donald and Melissa Getz entered into a real estate purchase contract with appellees Eric Taylor and B.F. Taylor[2] for the purchase of the house, which had yet to be completed, for the price of $144,000.00. Appellants had been advised by representatives of Taylor Building, prior to the purchase, that the north wall in the basement had collapsed during construction, but that the problem had been repaired and that there were no latent defects. Appellants also were informed, prior to closing, that the property had been inspected by a structural engineer. Upon advice of their realtor, appellants hired a home inspection firm, The

[2] The home was owned by the individual appellees in their personal capacity.

HomeTeam Inspection Service, to conduct an inspection. In a letter to appellant Don Getz dated January 21, 1998, The HomeTeam Inspection Service indicated that, on January 21, 1998, it had made a visual inspection of the property "to examine the structure and report major defects." In the report accompanying the letter, the inspection company, which had full access to the property, stated that "there were no major visual defects observed to the foundation at the time of the inspection" and that "there were no major visual defects found" at the time of the inspection of the basement, which was dry. The report did note, however, that since the basement was below the grade of the land, there "exists a vulnerability to moisture penetration after heavy rains." As a result of the inspection's findings, appellant Donald Getz, on January 22, 1998, executed an addendum to the purchase contract, requesting that specified items unrelated to the foundation be repaired.[3] Appellee Chris Taylor, for Taylor Properties, agreed to complete the repairs before the closing. The closing was then held on January 30, 1998.

{¶17} Subsequently, on January 3, 2002, appellants filed a complaint against appellees Eric Taylor and Taylor Building and against B.F. Taylor. Appellants, in their complaint, alleged that appellees and B.F. Taylor "fraudulently, and with knowledge, and intent to deceive,…withheld knowledge of latent defects from plaintiffs to induce plaintiffs to purchase said property." In an amended complaint filed on March 12, 2002, appellants alleged as follows**:**

{¶18} "5. Fraudulently, and with knowledge, and with intent to deceive, Defendants B.F. Taylor, Eric W. Taylor, and Taylor Building Company of America,

[3] Appellants specifically requested that repairs be made to the dishwasher, various doors, and the master bedroom window, and that breaker service from the furnace to the service panel be matched and abandoned wiring at the service panel be attached.

withheld knowledge of latent defects from plaintiffs to induce plaintiffs to purchase said property. To wit, the foundation having been dug during an unusually wet season, the foundation of the house in question was defective both as a result of sinking and splaying, and as a result of short cuts taken to effect completion and leaving the building without sufficient elevation which said defendants knew or should have known, would exacerbate the damage as a result of latent defects therein. Additionally, the house was built without proper drainage, and without roof tarpaper underlayment.

{¶19} "6. Latent defects, which plaintiffs could not have reasonably discovered prior to purchase or within a reasonable time thereafter, have manifested in the single family home, subject of this action, said defects rendering the building unsafe, and significantly damaging plaintiffs, in an amount greater than the purchase price. Said defects include but are not limited to, sinking of the house in areas, causing windows not to seal, base boards to pull away from floors and walls, floor warpage etc. Said factors occurring have indicated upon inspection, that said activity will continue to worsen as the building ages, making the building virtually un-saleable, and ultimately subject to collapse."

{¶20} Appellants, in their amended complaint, also substituted appellee Estate of B.F. Taylor for B.F. Taylor [hereinafter referred to as "B. F. Taylor"], who had died on November 25, 2001.

{¶21} Appellees filed a Motion for Summary Judgment. As memorialized in a Judgment Entry filed on December 17, 2003, the trial court granted appellees' motion, finding that "[r]easonable minds can come to but one conclusion regarding the latent defects alleged by Plaintiffs as well as their allegations of fraud against Defendants, and

viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to Plaintiffs."

{¶22} It is from the trial court's December 17, 2003, Entry that appellants now appeal, raising the following assignments of error:

{¶23} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS/APPELLEES, B.F. TAYLOR ET AL. AS GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER DEFENDANTS/APPELLEES COMMITTED FRAUD UPON MR. AND MRS. GETZ.

{¶24} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS/APPELLEES B.F. TAYLOR ET AL. AS THE DOCTRINE OF CAVEAT EMPTOR DOES NOT APPLY TO THIS CASE.

{¶25} "III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS/APPELLEES, B.F. TAYLOR ET AL. AS APPELLANTS' CAUSE OF ACTION WAS NOT TIME BARRED BY THE STATUTE OF LIMITATIONS."

STANDARD OF REVIEW

{¶26} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C) which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that 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, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor ."

{¶27} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial." *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶28} It is pursuant to this standard that we review appellants' assignments of error.

I, II

{¶29} Appellants, in their first two assignments of error, argue that the trial court erred in granting summary judgment to appellees Eric Taylor and B.F. Taylor, the sellers of the property. We disagree.

{¶30} Appellants, in the case sub judice, allege that there is a genuine issue of material fact as to whether appellees Eric Taylor and B. F. Taylor committed fraud. Appellants specifically contend that such appellees defrauded them by failing to inform appellants of the two major problems with the house: (1) that the east and west walls of the basement bulged by approximately one inch, and (2) that the house had water problems in the basement.

{¶31} To prove fraud, a plaintiff must show that there was:

{¶32} "(a) a representation, or where there is a duty to disclose, concealment of a fact,

{¶33} "(b) which is material to the transaction at hand,

{¶34} "(c) 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,

{¶35} "(d) with the intent of misleading another into relying on it,

{¶36} "(e) justifiable reliance upon the representation or concealment, and

{¶37} “(f) a resulting injury proximately caused by the reliance."

{¶38} *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101, paragraph two of the syllabus.

{¶39} In Ohio, a seller may be liable for nondisclosure of a latent defect where the seller is under a duty to disclose facts and fails to do so. *Brewer v. Brothers* (1992), 82 Ohio App.3d 148, 151, 611 N.E.2d 492, (citing *Miles v. McSwegin* (1979), 58 Ohio St.2d 97, 100- 101, 388 N.E.2d 1367, 1369-1370).

{¶40} The Ohio Supreme Court in *Layman v. Binns* (1988), 35 Ohio St.3d 176, 519 N.E.2d 642, set forth the doctrine of caveat emptor in the syllabus, wherein it stated:

{¶41} "The doctrine of caveat emptor precludes recovery in an action by the purchaser * * * where (1) the condition complained of is open to observation or discernable upon reasonable inspection, (2) the purchaser had the unimpeded opportunity to examine the premises, and (3) there is no fraud on the part of the vendor." A seller has a duty to disclose material facts which are "latent, not readily observable or discoverable through a purchaser's reasonable inspection." Id. at 178.

{¶42} However, "[o]nce 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 to (1) make further inquiry of the owner, who is under a duty not to engage in fraud * * *, or (2) seek the advice of someone with sufficient knowledge to appraise the defect." *Tipton v. Nuzum* (1992), 84 Ohio App.3d 33, 38, 616 N.E.2d 265.

{¶43} There is no dispute that appellants were informed that the north foundation wall had collapsed during construction. However, as is stated above, appellants contend that appellees failed to inform them that the east and west basement walls bulge inward by approximately one inch. However, there is no evidence that appellees had knowledge that such alleged defect existed at the time appellants purchased the house. The evidence reveals that after the Baileys rescinded the purchase agreement in January of 1997, appellees procured the opinion of S.T.A. Building Consultants, a structural engineer, which inspected the property in August of

1997. S.T.A., in a letter dated August 19, 1997 to appellee Chris Taylor, stated, in relevant part, as follows:

{¶44} "1. The portion of the Basement wall to be examined was the wall farthest from the Garage. The wall apparently had to be reconstructed during the early stages of construction. We found this wall to be plumb, with all block and joints consistent with good construction practice. There were no cracks or any other indications of any distress apparent on the wall. We would consider the wall structurally sound and capable of carrying the loads imparted to it by the framing system of the house.

{¶45} "2. We also examined the front [east] wall, which appeared to be slightly out of plumb. We measured the wall, and it was approximately 3/8" out of plumb in 4' - 0" at the top ½ of the wall. We do not consider this situation as one which compromises the structural integrity of the wall. This wall is structurally sound, and capable of carrying the loads transferred to it by the framing….

{¶46} "6. From examining other elements of the house, we found all elements of the house to be generally installed according to good construction practice. Specific areas included in our examination are brick, siding, interior doors, exterior doors, windows, plumbing, roofing and gutters."

{¶47} Although appellants were aware, prior to closing, that there was such a report, they never procured a copy of the same and proceeded with the closing.[4] Nor did appellants seek additional professional advice after being informed that the wall had collapsed during construction. The following is an excerpt from appellant Donald Getz's deposition testimony:

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[4] Appellee Chris Taylor, during his deposition, testified that he personally gave appellants a report confirming that the basement wall was okay. Deposition of Chris Taylor at 49. It is, however, unclear exactly what report was given to appellants and when such report was given.

{¶48} "Q. What additional action did you take at the time of purchase to ascertain the soundness of the wall?

{¶49} "A. We didn't.

{¶50} "Q. But you had already - -

{¶51} "A. We were waiting on the engineer's report from Taylor through Greg Carr.

{¶52} "Q. But you did not request that report in writing?

{¶53} "A. I don't believe that we did, no.

{¶54} "Q. I'll remind you that you did modify the purchase contract through this Exhibit D, the home inspection addendum?

{¶55} "A. Yes.

{¶56} "Q. After your home inspection you requested five items be remedied prior to your closing on the house?

{¶57} "A. Yes.

{¶58} "Q. But you didn't feel this item warranted the same type of attention; is that correct?

{¶59} "A. Out of the people we met in Taylor, we trusted Greg. He presented himself well. I had no reason to doubt him. He has quite a bit of experience in the business.

{¶60} "Q. But you had already gotten an inspection. You apparently - - To whatever extent, you trusted him, you felt it necessary to get an inspection of the house. Is that correct?

{¶61} "A. The inspection was before he told us about this.

{¶62} "Q. Right. Were you dealing with Greg before that?

{¶63} "A. Yes. Occasionally, we met with him out there.

{¶64} "Q. So despite your trust in Greg, you got an inspection report, right?

{¶65} "A. Yes. Certainly.

{¶66} "Q. But you did not seek any additional professional advice concerning this disclosure?

{¶67} "A. This being our first house, the inspection team we actually used was suggested to us. And if we had a little more experience, we never would have used them. No, we did not receive any other information on it.

{¶68} "Q. Did you request an extension of time in which to take any action like this?

{¶69} "A. No.

{¶70} "Q. Did you request an extension of the warranty?

{¶71} "A. No. It was all we could do to get one year out of them." Deposition of Donald Getz at 105-107. Furthermore, as is stated in detail in the statement of facts, the inspection company hired by appellants failed to find anything wrong with the foundation.

{¶72} While appellants argue that appellees Eric Taylor and B.F. Taylor had a duty to disclose the report of Gary Wilhelm, who was hired by the Baileys to conduct an inspection after the foundation wall collapsed, we know of no such duty under Ohio law.[5] Appellants have not cited, nor have we found, any cases stating that a seller of real property is under a duty to disclose to third parties a report prepared by an engineer or other professional hired by a potential purchaser of the property. Nor is there any

[5] Appellants learned of such report after the closing.

requirement that a seller of real estate produce documents for review by a potential purchaser. Rather, as is stated above, under Ohio law, a seller is required to disclose all known defects which are not open and observable to a purchaser. See *Layman*, supra.

{¶73} Appellants further contend that appellees committed fraud by failing to inform appellants that the home had water problems in the basement. Appellants specifically contend that after they inquired about the potential of water problems in the basement, appellees "purposely withheld photographs which revealed prior flooding and water saturated and stained walls in the basement. However, appellant Donald Getz, during his deposition, repeatedly testified that, during the over five years he had lived in the house, he had never seen water in the basement and that his wife, who goes down to the basement on average three times a week, had never seen water. Appellant Donald Getz further testified that, although his kids played down the basement, they had never told him that they had seen water and that no property in the basement had been ruined by water. The following is an excerpt from appellant Donald Getz's deposition testimony:

{¶74} "Q. Have any of the inspectors that you had in the house ever told you they [sic] seen water down there?

{¶75} "A. No.

{¶76} "Q. Has your engineer or any other expert or consultant ever told you they [sic] seen water down there?

{¶77} "A. No engineers, no, no consultants.

{¶78} "Q. What color is your basement wall?

{¶79} "A. It's been painted white.

{¶80} "Q. So do you think you'd notice if there was water down there?

{¶81} "A. Yes.

{¶82} "Q. What color is your basement floor?

{¶83} "A. Concrete grey.

{¶84} "Q. So you would notice if there was water there?

{¶85} "A. Yes. Deposition of Donald Getz at 75-76.

{¶86} Moreover, assuming, arguendo, that the basement did have a water problem, appellants were put on notice of the same prior to the closing. Appellants' own inspector, in its report, stated that since the basement was below the grade of the land, there "exits a vulnerability to moisture penetration after heavy rains."

{¶87} Based on the foregoing, we find that the trial court did not err in granting summary judgment to appellees Eric Taylor and B.F. Taylor. We find that appellants failed to show a genuine issue of material fact as to the elements of fraud, and we find that the doctrine of caveat emptor precludes recovery by appellants as a matter of law.

{¶88} Appellant's first and second assignments of error are, therefore, overruled.

III

{¶89} Appellants, in their third assignment of error, argue that the trial court erred in granting summary judgment in favor of appellee Taylor Building "as [a]ppellants' cause of action was not time barred by the Statute of Limitations."

{¶90} As is stated above, appellants, in their complaint, alleged that appellee Taylor Building constructed the home in an unworkmanlike and unsafe manner. Appellees, in their motion for summary judgment, argued, in part, that Taylor Building was entitled to summary judgment "because the applicable statute of limitations bars

the Plaintiffs' [Appellants'] claims and/or alternatively because Taylor Building constructed the subject home in a workmanlike manner and no latent defect exists or existed at the time of Plaintiffs' [Appellants'] purchase of the home."

{¶91} Subsequently, the trial court, in its December 17, 2003, Entry, granted summary judgment to appellees. In its Entry, the trial court stated, in relevant part, as follows:

{¶92} "…In order to prevail against Taylor Building, Plaintiffs must prove that Taylor Building failed to construct the building in a workmanlike manner and such failure was the proximate cause of a latent defect which damaged Plaintiffs….

{¶93} "After reading the parties' respective Motion, Memorandum Contra and Reply, reviewing the pertinent law and considering the evidence available to the Court pursuant to Civ. R. 56, the Court finds that granting summary judgment in favor of Defendants Taylor Building, Eric Taylor and the estate of B. F. Taylor is appropriate. Reasonable minds can come to but one conclusion regarding the latent defects alleged by Plaintiffs as well as their allegations of fraud against Defendants, and viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to Plaintiffs."

{¶94} Clearly, based on the foregoing, the trial court ruled in favor of appellee Taylor Building on the merits, after reviewing the evidence. At no point in its September 17, 2003, Entry granting summary judgment does the trial court mention the statute of limitation as the basis for its decision to grant summary judgment to appellee Taylor Building.

{¶95} However, as noted by appellees in their brief, appellants "have not assigned as error the trial court's finding on the merits that appellee Taylor Building was entitled to judgment as a matter of law." Rather, the only issue addressed by appellants in their brief is the application of the statute of limitations. At no point do appellants, in their brief, argue that the trial court erred in holding that appellee Taylor Building was entitled to summary judgment because appellants failed to prove that appellee Taylor Building failed to construct the building in a workmanlike manner.

{¶96} In short, we concur with appellees that the trial court's decision granting summary judgment to appellee Taylor Building cannot be reversed because appellants have not assigned as error the trial court's finding or challenged in their brief on the merits that appellee Taylor Building was entitled to judgment as a matter of law.

{¶97} Appellants' third assignment of error, is, therefore, overruled.

{¶98} Accordingly, the judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Edwards, J.

Wise, P.J. and

Boggins, J. concur

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JUDGES

JAE/0629

[Cite as *Getz v. Taylor*, 2004-Ohio-5506.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DONALD J. GETZ, et al.	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
B. F. TAYLOR, et al.	:	
Defendants-Appellees	:	CASE NO. 03 CA 99

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs assessed to appellants.

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JUDGES