

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BERNARD G. BRADY
Plaintiff-Appellant

-VS-

SARA JANE GAHM
Defendant-Appellee

: JUDGES:
:
: Hon. Sheila G. Farmer, P.J.
: Hon. W. Scott Gwin, J.
: Hon. William B. Hoffman, J.

:
:
: Case No. 2009CA00020

: O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 06CV974

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 28, 2009

APPEARANCES:

For Plaintiff-Appellant

RAY R. MICHALSKI
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For Defendant-Appellee

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Farmer, P.J.

{¶1} On March 20, 2003, appellant, Bernard Brady, purchased a residential property from appellee, Sara Gahm. On September 21, 2006, appellant filed a complaint against appellee for failure to disclose latent defects. Appellant was experiencing problems with the septic system.

{¶2} On November 6, 2008, appellee filed a motion for summary judgment. By entry filed March 12, 2009, the trial court granted the motion.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT RELATING TO THE ISSUE OF NON-DISCLOSED DEFECTS IN THE SEPTIC SYSTEM ON THE RESIDENTIAL PROPERTY SOLD BY APPELLEE TO APPELLANT."

I

{¶5} Appellant claims the trial court erred in granting summary judgment to appellee as there exist genuine issues of material fact as to the non-disclosure of a latent defect. We disagree.

{¶6} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶7} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be

litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶8} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶9} In his complaint filed September 21, 2006, appellant alleged the following at ¶4:

{¶10} "At the time Defendant executed and delivered the Residential Property Disclosure Form to Plaintiff, Defendant knew, or should have known, that, due to problems with the septic system on the property, water leached into the barn on the property causing damage thereto and that the basement had a significant water leakage problem."

{¶11} R.C. 5302.30 governs the issue of latent defects and is applicable in this case. Subsection (F)(1) states the following:

{¶12} "A transferor of residential real property is not liable in damages in a civil action for injury, death, or loss to person or property that allegedly arises from any error in, inaccuracy of, or omission of any item of information required to be disclosed in the

property disclosure form if the error, inaccuracy, or omission was not within the transferor's actual knowledge."

{¶13} Appellee can be held accountable for a latent defect only if "actual knowledge" was found. In her motion for summary judgment filed November 6, 2008, appellee denied any knowledge of any defect with the septic system. In her affidavit attached to her motion, appellee averred the following:

{¶14} "2. From the time we moved into the property in 1978 until the time of his death in 1997, my husband, Gary Gahm, was the one who took primary responsibility for making sure our septic system was functioning properly. We never experienced any backups or any problems at all with our septic system. The only things that we did to maintain it was to have the septic tank pumped out every three years or so by a certified pumper, on occasion put an industry approved additive into the system that, to my understanding, was to help break down any solid waste that was in the system, and periodically use the distribution box to switch from one leach bed to the other. As indicated, my husband took care of all of these tasks up until his untimely death.

{¶15} "3. After his death, I continued his maintenance outlined above. The last time I had it pumped was in June of 2000, approximately 33 months prior to closing in March of 2003.

{¶16} "6. As I indicated above, in the 25 years I resided at the property, we never had the slightest bit of problem with either our septic tank or the leach fields. Therefore, when I completed the Residential Property Disclosure Form in 2002, at the time I listed the house for sale, I correctly stated that the system consisted of a septic

tank and leach field and that I had never experienced any problems with, nor was I aware of, any backups, leaks, or other problems with regards to the septic system."

{¶17} Attached to appellee's motion for summary judgment is a home inspection report conducted by Assured Home Inspection, Inc. on February 3, 2003, one month prior to the sale. There was no report as to the condition of the septic system:

{¶18} "*Septic Systems*

{¶19} "The check of septic systems is not included in our visual inspection. You should have the local health authorities or other qualified experts check the condition of a septic system. In order for the septic system to be checked, the house must have been occupied within the last 30 days."

{¶20} It is undisputed that five months after the closing, appellant experienced problems with the east leach field. Brady depo. at 72-74. Appellant called appellee and she told him she had never had a problem with the leach fields and the practice was to switch back and forth between the east and west fields. Id. at 76, 88.

{¶21} Appellant switched to the west field. Id. at 76, 78. In November of 2004, appellant called the Health Department to come out and inspect the leach fields because he wanted to run electric from the house to a pole barn and did not want to dig through a field. Id. at 76-77. Dye was put into the west field to find any leakages, and no leakages were found. Id. at 78, 82-83. In examining the east field, the health department inspector determined the east field was either "compacted or exhausted." Id. at 84.

{¶22} Appellant argues appellee had actual knowledge that the septic fields were unusable because of her routine of switching back and forth between the two

fields. We note the trial court struck the affidavit of appellant's expert, Jeremiah Upp, for failure to timely disclose the expert pursuant to Loc.R. 2.4 and Civ.R. 26(E). See, Entry filed March 12, 2009. Appellant's other expert, Wayne Custer, found the soil of the west field was "predominately saturated, largely impermeable, clay." Custer depo. at 23. Mr. Custer inspected the property four times in August through October of 2006. Id. at 13. When asked, Mr. Custer could not say within a reasonable degree of engineering certainly that problems existed in March 2003 at the time of sale and closing. Id. at 46-47. Mr. Custer opined that absent visible signs i.e., odors out in the yard, excessive wetness, appellee would not have known of any latent defects with the septic system. Id. at 49. In 2006, Mr. Custer found two visual signs which led to "suspicions" of septic problems: greener grass over the septic tank and black water in the pole barn. Id. at 54. Mr. Custer had no opinion as to whether these conditions existed in 2003 as he had "no way of knowing that." Id. at 54. Mr. Custer also opined that unless the septic is pumped out every three years, "you risk jeopardizing the integrity of the leach bed." Id. at 77.

{¶23} A licensed sanitarian, Bruce Carpenter, opined that per county health regulations, a septic tank "must be pumped out at least once within the 3 year period prior to the sale of the residence***." Carpenter aff. at ¶6, attached to Appellee's December 11, 2008 Supplemental Memorandum as Exhibit A. Mr. Carpenter explained "if the tank overflows then it can damage the integrity of the leaching system and shorten its lifespan significantly." Id.

{¶24} In her affidavit submitted with her November 6, 2008 motion for summary judgment, appellee stated the septic tank was last pumped in "June of 2000,

approximately 33 months prior to closing in March of 2003. Gahm aff. at ¶3. Appellee stated she did not observe any indication of a failing septic system or water inside the pole barn as stated by Mr. Custer, except for a leaking roof around the skylight on the barn. Gahm depo. at 43-66.

{¶25} Appellant's argument is based upon inferences. The first inference is that the problem existed in 2003 because appellee switched back and forth between the fields. The second inference is that appellee knew about the problem because again, she switched back and forth between the fields. The trial court concluded appellant's argument was an inference upon an inference which is not permitted.

{¶26} We concur with this conclusion, and further find that appellant did not overcome the unrefuted evidence presented by appellee. Appellant's own expert, Mr. Custer, was unable to state a septic problem existed in 2003 absent any conclusive facts pointing to a problem. There is no evidence in the record of any of the physical indicators being present to put one on notice or to be "suspicious" (per Mr. Custer's terminology) of a problem.

{¶27} Upon review, we conclude genuine issues of material fact were not presented to bar the granting of appellee's motion for summary judgment.

{¶28} The sole assignment of error is denied.

{¶29} The judgment of the Court of Common Pleas of Fairfield County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William B. Hoffman

JUDGES

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JUDGES