

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

MILLERSPORT HARDWARE, LTD	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	Case No. 08-CA-86
THE WEAVER HARDWARE CO.,	:	
ET AL	:	
	:	<u>OPINION</u>
Defendant-Appellee	:	

CHARACTER OF PROCEEDING: Civil appeal from the Fairfield County Court of Common Pleas, Case No. 07-CV-00543

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: December 9, 2009

APPEARANCES:

For Plaintiff-Appellant

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*Gwin, J.*

{¶1} Plaintiff-appellant Millersport Hardware, Ltd. appeals a summary judgment of the Court of Common Pleas of Fairfield County, Ohio, entered in favor of defendant-appellee the Weaver Hardware Company on its claim for breach of contract. Millersport also appeals the court's subsequent award of damages arising from the breach. Millersport assigns three errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED WHEN GRANTING SUMMARY JUDGMENT AS TO WEAVER HARDWARE, INC.'S DECLARATORY JUDGMENT CLAIM WHEN GENUINE ISSUES OF MATERIAL FACT REMAINED.

{¶3} "II. THE TRIAL COURT ERRED WHEN DENYING SUMMARY JUDGMENT TO MILLERSPORT HARDWARE, LTD. WHEN NO GENUINE ISSUES OF MATERIAL FACT REMAINED.

{¶4} "III. THE TRIAL COURT ERRED IN AWARDING DAMAGES TO WEAVER HARDWARE, INC."

{¶5} In the trial court's judgment entry of January 23, 2008, it outlined the undisputed facts, in granting partial summary judgment on Millersport's motion for summary judgment on its claim for fraudulent inducement and/or mutual unilateral mistake (rescission) and/or declaratory judgment and on Weaver Hardware's motion for partial summary judgment. In late January 2007, Millersport, entered into an asset purchase agreement with Weaver Hardware Company, located in Baltimore, Ohio, and with defendant Brad Weaver, as President of Weaver Hardware. Brad Weaver is not a party to this appeal.

{¶6} After the agreement had been executed by the parties, Millersport refused to close on the transaction because it learned Ace Hardware would be opening a store in Baltimore, Ohio, creating competition for Millersport's planned store.

{¶7} The contract between the parties stated in pertinent part:

**“REPRESENTATIONS AND WARRANTIES**

{¶8} “H. Except as provided in this Agreement, Buyer and Buyer's Guarantors have not been furnished or relied upon any written and/or verbal representation, guarantee or other statement made by Seller or by any representation of Seller's regarding the prospective profits or prospective volume of business which will materialize with respect to the Business subsequent to the Closing Date, and that all business, financial and other risks attributable to the ownership and operation of Business Assets and Business from and after the Closing Date shall be borne solely by the Buyer.

{¶9} \*\*\*

**“ENTIRE AGREEMENT; WAIVERS**

{¶10} “19.01 This Agreement supersedes all prior agreements and understandings between the Parties, written or oral, including the Letter of Intent, and may not be changed or terminated orally; no attempted change, termination or waiver of any of the provisions hereof shall be binding unless in writing and signed by the Party against whom the same is sought to be enforced. Furthermore, this Agreement represents the entire understanding of the Parties; neither Party is relying on contemporaneous statements or writings except as expressly contained herein. No waiver by either Party of any default, misrepresentation, or breach of warranty or

covenant hereunder, whether intentional or not, extends to any prior or subsequent default, misrepresentation or breach of warranty or covenant hereunder or affects in any way any rights arising by virtue of any prior or subsequent occurrence.”

{¶11} Millersport supported its claim of fraud in the inducement with an affidavit from Jeff Mavis, one of the principals of Millersport Hardware. Another Millersport representative involved in the negotiations, Keith Sheets, is not a party to this appeal. Mavis’ affidavit states in late December, 2006 or early January, 2007, during the negotiation of the asset purchase, Mavis asked Weaver whether any existing businesses in the area sold hardware items, and if Weaver was aware of any other retail hardware businesses and/or competition looking to come into the Baltimore, Ohio area in the near future. Mavis alleges Weaver stated he was not aware of any. Mavis states there were no other retail hardware stores in the Baltimore, Ohio area, and Millersport would not have entered into an agreement to purchase the assets of Weaver Hardware if it had known that any other retail hardware business and/or competition was looking to come into the area in the near future.

{¶12} The record also contains a deposition and an affidavit from Russell Jenkins, a direct seller representative for Househasson Hardware Company for various hardware stores in the central Ohio area, including Weaver Hardware. In his affidavit Jenkins states that in mid-November, 2006, he discussed with Brad Weaver a rumor that Baltimore Builders Supply was interested in starting a hardware store. Thereafter, he made a sales call to Baltimore Building Supply and the owner informed him they were considering building an Ace Hardware store of 12,000 square feet.

{¶13} Jenkins discussed the matter with his regional sales manager and they agreed it would not happen because the Baltimore market could not support it. Jenkins relayed this information to Brad Weaver, including what the owner of Baltimore Building Supply had told him, as well as Jenkins's belief and his manager's belief that the store would not be built.

{¶14} In his deposition, Jenkins elaborated on the subject, and indicated the owner of Baltimore Builders' Supply had done a full fledged demographic study of the area, and showed him a blue print of the projected 10,000 square foot store and an outline of where they were going to be laying stakes for construction. The deal had not been finalized, but the parties were in solid discussions, and the owner of Baltimore Builders' Supply believed the deal would go through.

{¶15} Jenkins testified in his deposition that the rumors were apparently true, and he had communicated this to Brad Weaver. Jenkins denied telling Brad Weaver it would not happen, stating he had been in the business too long to make such a projection.

{¶16} Mavis' affidavit alleged Brad Weaver was in a hurry to close on the deal and insisted the sale of the assets be wholly maintained on a confidential basis. Mavis alleged Weaver told both Mavis and Sheets that Weaver did not want either of them to contact anyone, including Weaver Hardware's vendors, employees, or bank, prior to the closing.

{¶17} After the contract was signed, but before the closing, Mavis was told, and then observed for himself, a large banner announcing that Ace Hardware, a large franchised retail hardware business, was coming to Baltimore, Ohio. Thereafter, Mavis

and Brad Weaver discussed the matter. Mavis alleges he informed Weaver this was a substantial and material fact previously unknown to Millersport, and the competition would put it at a substantial competitive disadvantage. Mavis alleged Weaver agreed it was a material fact relating to the agreement and the transaction. Weaver denied making the statement.

I

{¶18} In its first assignment of error, Millersport argues the trial court erred in granting summary judgment to Weaver Hardware because there were genuine issues of material fact.

{¶19} Civ. R. 56 states in pertinent part:

{¶20} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”

{¶21} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶22} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186.

{¶23} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶24} In its judgment entry granting summary judgment in favor of Weaver, the court set out the elements of fraudulent inducement: (1) an actual or implied

misrepresentation or concealment of a matter of fact which relates to the present or past, and which is material to the transaction; (2) knowledge of the falsity or such disregard and recklessness towards the truth or falsity of the representation that knowledge may be inferred; (3) intent to mislead another into relying on the representation; (4) actual justified reliance on the representation; and (4) injury proximately caused by the reliance. Judgment Entry of January 23, 2008, at pages 5-6, citing *Schluter v. PSL, Inc.* (February 3, 1998), Richland App. No. 96-CA-111; *Burr v. Stark County Board of Commissioners* (1986), 23 Ohio St. 3d 69; and *Freidland v. Lipman* (1980), 68 Ohio App. 2d 255.

{¶25} The court found promises or representations concerning the future cannot serve as a basis for a claim of fraud, and the actual or implied misrepresentation or concealment of a matter of fact must relate to the present or past and must be material to the transaction. The court found any alleged misrepresentation related to future events.

{¶26} The trial court found Millersport's parol evidence in support of its claim of fraudulent inducement was barred because of the language of the written contract, particularly the representation and warranty section and the integration clause quoted supra. The court quoted *Wall v. Planet Ford, Inc.*, 159 Ohio App. 3d 840, 825 N.E. 2d 686, 2005-Ohio-1207, in which the Second District Court of Appeals found the parol exclusion evidence rule may not be avoided using a fraudulent inducement claim which alleges the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing. A fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different



from what now appears in written contract. Contradictory assertions are exactly what the parol evidence rule was designed to prohibit. Judgment Entry of January 23, 2008, at 6.

{¶27} The court found reasonable minds could come to but one conclusion on Millersport's claim for fraudulent inducement. We disagree. Construing Millersport's allegations most favorably against Weaver Hardware, we find reasonable minds could conclude Millersport had set forth evidence on each element of fraudulent inducement. As to the first element, an actual or implied misrepresentation or concealment of a matter of fact which relates to the present or past and is material to the transaction, we find Brad Weaver's statement did not pertain to the future, but rather referred to the intent of any businesses presently "looking to come into" the Baltimore, Ohio area". If the trier of fact believed Millersport's allegation the question about Ace Hardware's present intention was asked and answered, then it could conclude Brad Weaver's alleged response he did not know of any business looking to come into the area is false.

{¶28} A trier of fact could find knowing whether a potential competitor was presently exploring the possibility of opening a store would be a material issue in the transaction. Mavis states Millersport would not have entered into the agreement to purchase Weaver Hardware's assets if it had known it would be competing with an Ace Hardware Store.

{¶29} With regard to the third element, intent to mislead another, Mavis alleges Brad Weaver's request that the negotiations be held confidential until after the closing was an attempt to keep Mavis and Sheets from having any contact with persons who might be in a position to give them information concerning Ace Hardware.

{¶30} In its judgment entry of September 2, 2008, the trial court found Weaver had attempted to sell the hardware business through three primary methods. First, Weaver listed the hardware through True-Value, which had an internal listing for True-Value stores nationally through printed advertisement and on its website. True-Value also had a co-op program to help its store owners mediate the terms of sales/purchase of any of the stores it has listed through its service. When this method did not produce any purchase offers or leads, Weaver then adopted a regional approach to marketing, informing regional sales representatives that his store was for sale and asking them to spread the word as they made their sales calls. Although Weaver got two leads, they failed to produce a sale. Thereafter, Weaver made cold telephone calls to local hardware stores, informing them his store was for sale. One of the hardware stores he contacted was Millersport.

{¶31} While there are any number of sound business reasons to keep negotiations confidential until the deal is finalized, one inference to be drawn from the facts is that because it was common knowledge Weaver Hardware was for sale, the reason Weaver wanted Millersport's purchase of the assets confidential was to prevent Mavis and Sheets from gathering any information about the proposed Ace Hardware store.

{¶32} Mavis alleges he relied on the representation because Brad Weaver had the only hardware store in the Baltimore area. Whether or not the reliance was justified under the facts of the case is a question of fact for the trier of fact, and not appropriate for determination on summary judgment. *Rucker v. Everen Securities, Inc.*, 102 Ohio St.3d 1247, 2004 -Ohio- 3719, 811 N.E.2d 1141, at paragraph 7.

{¶33} In *Rucker*, the Supreme Court examined a situation where the Cuyahoga County Court of Appeals found the parol evidence rule barred claims of promissory estoppel because the contract in question contained an integration clause. The court 's reasoning is instructive:

{¶34} “An integration clause is nothing more than the contract's embodiment of the parol evidence rule, i.e., that matters occurring prior to or contemporaneous with the signing of a contract are merged into and superseded by the contract. *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 27-28, 734 N.E.2d 782. “The parol evidence rule is a rule of substantive law which, when applicable, defines the limits of a contract.’ ” *Id.* at 27, 734 N.E.2d 782, quoting *Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313, 324, 49 O.O. 174, 109 N.E.2d 265, paragraph one of the syllabus. Yet a claim based on promissory estoppel does not contravene the parol evidence rule. Promissory estoppel is an equitable doctrine for enforcing the right to rely on promises. \*\* *Karnes v. Doctors Hosp.* (1990), 51 Ohio St.3d 139, 142, 555 N.E.2d 280. It is based on the principles of good faith, equity, and conscience. Eric Mills Holmes, *The Four Phases of Promissory Estoppel* (1996), 20 *Seattle U.L.Rev.* 45, 64. The doctrine may be invoked in various ways.

{¶35} “One use is as an affirmative theory of recovery. *Id.* at 63. Under such a theory, the plaintiff asserts an independent claim for damages based on detrimental reliance. *Id.* at 67-68. Courts confronting such a claim focus on “a promissory commitment centering on the promisee's right to rely, and the promisor's duty to prevent (or not cause) harmful reliance which was reasonably foreseeable by the promisor.” *Id.* at 68. “The right to rely arises from promissory statements, assurances, and

representations that show sufficient commitment to induce reasonable reliance in another.” *Id.* Whether the reliance is objectively reasonable and foreseeable is a jury question. *Id.* Thus, the integration clause in the agreement holds no significance for the promissory estoppel claim. Instead, what is involved is a separate enforceable promise and not a variation or modification of the agreement. *Id.* Therefore, the subsequent execution of an integration clause does not preclude a claim based on detrimental reliance that occurred before the execution of that clause.” *Rucker*, *supra*, paragraphs 6-7.

{¶36} The trial court found parol evidence could not be introduced to contradict the integration clause. However, the language of the integration clause does not directly contradict the allegations made by Millersport except in the very broadest sense that all the negotiations centered on whether entering into the asset purchase agreement would be profitable. Brad Weaver did not make any representation, guarantee or other statement regarding the prospective profits or volume of business, and he was not required to volunteer any information. However, when directly asked, he withheld information which Mavis alleged would have been pertinent to Millersport’s assessment of whether its proposed store would be profitable enough to justify the purchase of Weaver Hardware’s assets.

{¶37} The evidence Millersport seeks to introduce does not attempt to change or modify any provision of the contract. As in *Rucker*, Millersport’s claim of detrimental reliance based on Brad Weaver’s alleged previous statements is not barred by the parol evidence rule.

{¶38} In conclusion, we find reasonable minds could differ regarding whether Brad Weaver misrepresented a fact material to the transaction, i.e., that there was a business looking to come into the Baltimore area, which would have raised a red flag with Sheets and Mavis. Accordingly, we conclude the trial court erred in granting summary judgment in favor of Weaver Hardware on Millersport's claim of fraud in the inducement.

{¶39} The first assignment of error is sustained.

## II

{¶40} In its second assignment of error, Millersport argues the trial court erred in not granting summary judgment in favor of Millersport. However, an order denying summary judgment to a party is not a final appealable order, see *Manley v. Marsico*, 116 Ohio St. 3d 85, 2007-Ohio-5543, 876 N.E. 2d 910.

{¶41} We find we have no jurisdiction over this issue, and accordingly the second assignment of error is dismissed.

## III

{¶42} In its third assignment of error, Millersport argues the trial court erred in awarding damages to Weaver Hardware. Because we find summary judgment was inappropriate, the issue of damages is premature.

{¶43} The third assignment of error is dismissed.

{¶44} For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By Gwin, J.,

Farmer, P. J.,

Hoffman, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN

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IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

MILLERSPORT HARDWARE, LTD	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
THE WEAVER HARDWARE CO.,	:	
ET AL	:	
	:	
Defendant-Appellee	:	CASE NO. 08-CA-86

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion. Costs to appellee.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. WILLIAM B. HOFFMAN