

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Raymond J. Schaefer, Inc.

Court of Appeals No. OT-09-026

Appellee

Trial Court No. 08CV361H

v.

Lawrence S. Pytlik, et al.

DECISION AND JUDGMENT

Appellants

Decided: September 30, 2010

* * * * *

Richard D. Panza and Amy L. DeLuca, for appellee.

James Alexander, Jr. and Sarah J. Harper, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas, which granted summary judgment and awarded sanctions and attorney's fees in favor of plaintiff-appellee, Raymond J. Schaefer, Inc., against defendants-appellants,

Lawrence S. Pytlik and Carolyn E. Pytlik. For the reasons that follow, we affirm the trial court's decision.

{¶ 2} The relevant facts of the case are as follows. In December 2005, appellee and appellants entered into an agreement for the construction of a residence in Lakeside, Marblehead, Ottawa County, Ohio ("Construction Agreement"). The Construction Agreement listed a total construction cost of \$303,542. During the course of the construction of the home, appellee alleged that appellants made a number of changes to the scope of the services requested of appellee and authorized such additional services and delivery of materials. Appellee also alleged that appellants ordered materials such as cabinets, windows, and flooring at costs that exceeded the Construction Agreement allowance.

{¶ 3} Appellee asserted that it fully complied with all of its obligations set forth in the Construction Agreement and appellants' requests for extra work. It was alleged that appellants failed to make the required payments for the completed work, delivered materials, and additional charges for costs that exceeded the Construction Agreement allowance or that were paid by appellee on behalf of appellants.

{¶ 4} Appellee claimed that appellants breached the Construction Agreement and owed appellee an unpaid sum of \$86,752 plus interest and other costs. A dispute arose regarding this alleged breach. With the assistance of legal counsel, the parties agreed to resolve their dispute through mediation.

{¶ 5} The mediation regarding the alleged breach of the Construction Agreement took place on April 18, 2008. The parties reached a settlement agreement which stated the following: 1) appellants were to release \$21,130 being held by Westfield Bank to appellee within 30 days of signing the Settlement Agreement; 2) appellants were to pay an additional \$20,000 to appellee within 45 days of signing the Settlement Agreement; * * * 5) full releases of all claims signed by both parties, except appellee holds appellants harmless on all subs, material men, laborers of subs, laborers, agents, officers of Raymond Schaefer, Inc., and Anthony Schaefer and a release to contain confidentiality provisions; 6) appellants to accept house at 1105 Lake St. "as is," any and all needed repairs for any and all items needing completion to be at the expense of appellants; and 7) the release signed by appellants is not as to any subcontractors, in particular Fresch Electric and Windau Plumbing, which need to do some minor work on their systems.

{¶ 6} Appellants did release the \$21,130 being held by Westfield Bank, but failed to pay appellee the additional \$20,000 and did not make the required financing arrangements for such payment. Appellee then filed its complaint on June 18, 2008, alleging breach of the Settlement Agreement and fraud. Appellee requested that the court enter judgment in its favor for \$20,000, plus interest, costs, and attorney fees. On August 21, 2008, appellants filed an answer, denying all allegations set forth in appellee's complaint. Furthermore, appellants requested a change of venue and raised the counterclaims of breach of contract, fraud, and poor workmanship.

{¶ 7} Appellee filed an answer to appellants' counterclaims on September 11, 2008, denying all the allegations and asserting the following affirmative defenses: failure to state a claim, accord and satisfaction, failure to mitigate damages, unclean hands, waiver, laches, and estoppel. On January 22, 2009, appellee filed a motion to compel appellants' attendance at deposition and for sanctions. On January 23, 2009, the trial court ordered appellants to attend the deposition and awarded sanctions against appellants, including but not limited to attorney's fees associated with appellee's responses to appellants' various motions and notices.

{¶ 8} On February 2, 2009, appellants filed an amended counterclaim and amended answer. In response, appellee filed a motion to strike appellants' amended answer and counterclaim and requested sanctions. Appellee argued that, in contravention of Civ.R. 15(A), appellants failed to first seek leave of court. Appellee also argued that the amended answer was filed for purposes of delay and that the fraud claim was not stated with particularity under Civ.R. 9(B). Thereafter, on February 10, 2009, appellants filed a request for leave to file an amended answer and amended counterclaim.

{¶ 9} Appellee filed a motion for summary judgment on May 11, 2009. Appellants filed a memorandum in opposition on June 26, 2009. On July 22, 2009, the trial court granted appellee's motion for summary judgment and awarded appellee damages of \$20,000 plus interest. The trial court also determined that appellee was entitled to attorney's fees the amount of which was to be determined at a later hearing.

The hearing for the attorney's fees was held on August 17, 2009, and the trial court granted appellee \$13,722.50 in attorney's fees.

{¶ 10} On August 20, 2009, the trial court denied appellants' request for leave to file amended answer and amended counterclaim and granted appellee's motion to strike. The court awarded sanctions against appellants, including, but not limited to attorney's fees. This appeal followed.

{¶ 11} On appeal, appellants raise three assignments of error:

{¶ 12} "First Assignment of Error: The trial court erred when it granted Raymond J. Schaefer's motion for summary judgment.

{¶ 13} "Second Assignment of Error: The trial court abused its discretion in denying defendants' motion to amend its answer and counterclaim and in granting plaintiff's motion to strike same.

{¶ 14} "Third Assignment of Error: The trial court abused its discretion by awarding attorney fees and sanctions."

{¶ 15} We first note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. A motion for summary judgment should only be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact

exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 16} In moving for summary judgment, the moving plaintiff not only bears the initial burden of demonstrating that there exists no genuine issue of material fact on its own claim, but the moving party must also show that there is no genuine issue of material fact on the nonmoving defendant's affirmative defenses. *ABN AMRO Mortgage Group v. Meyers*, 159 Ohio App.3d 608, 2005-Ohio-602, ¶ 7. If the moving plaintiff fails to address the nonmoving defendant's affirmative defenses, then the affirmative defenses remain pending in the litigation and the moving plaintiff is not entitled to complete summary judgment. *Id.* at ¶ 12-13. But, if the plaintiff does address the nonmoving defendant's affirmative defenses, then the defendant has a reciprocal burden to show that there is a genuine issue of material fact regarding the affirmative defenses. *Id.* at ¶ 7.

{¶ 17} Appellants' first assignment of error disputes the trial court's determination that appellee was entitled to summary judgment on its breach of the Settlement Agreement claim. Specifically, appellants argue that appellee entirely ignored appellants' affirmative defenses and counterclaims in its summary judgment motion. Furthermore,

appellants argue that the trial court failed to consider appellants' affirmative defenses and counterclaims that still remained from the original pleading.

{¶ 18} As appellee notes, appellants' reliance on *ABN AMRO Mortgage Group v. Meyers* is misplaced because no affirmative defenses were raised by appellants in their original answer and counterclaim. Therefore, appellee had no affirmative defenses to address in its summary judgment motion because none existed. In *ABN*, appellant raised affirmative defenses that were not considered by appellee or the trial court, but this is not the same situation at hand. Since there are no affirmative defenses present in appellants' original answer and counterclaim, the trial court does not have to consider them when determining a summary judgment motion.

{¶ 19} In appellants' original answer and counterclaim, they raise three counterclaims: breach of contract, fraud, and poor workmanship. Appellants' breach of contract counterclaim is based on the failure of appellee to fulfill its original agreement by not completing construction of the last seven percent of appellants' home, making necessary repairs, or correcting building code violations. Appellants' fraud counterclaim is regarding charges and invoices associated with the construction of the home. Furthermore, appellants contend that during mediation appellee fraudulently led them to believe that only minimal repairs had to be done to the house. Appellants' poor workmanship counterclaim is regarding appellee's construction of appellants' home.

{¶ 20} Appellants' counterclaims are without merit. Under a valid settlement agreement, the parties agree to settle all previously existing claims. *Maitland v. Ford*

Motor Co., 103 Ohio St.3d 463, 2004-Ohio-5717, ¶ 20. Furthermore, a pre-existing claim is extinguished under the settlement agreement and all rights of recovery under the pre-existing claims are barred. *Id.* Appellants allege breach of contract and poor workmanship under the original Construction Agreement, and not the Settlement Agreement. Under the Settlement Agreement, the parties agreed to release all claims signed by both parties, which included the original Construction Agreement, and appellants accepted the house "as is." Appellants' breach of contract and poor workmanship counterclaims are extinguished under the Settlement Agreement, meaning that the Settlement Agreement is the final embodiment of the terms agreed upon by appellants and appellee. Therefore, the trial court did not err by not ruling on these counterclaims.

{¶ 21} Appellants' fraud counterclaim relates to charges, invoices, and repairs to the home, which refer back to the original Construction Agreement and not the Settlement Agreement. In addition, any allegation of fraud shall be stated with particularity. Civ.R. 9(B). In pleading a fraud claim with particularity, the party alleging fraud must state the specific statements claimed to be false, the time and place the statements were made, and which defendant made the false statements. *Pollock v. Kanter* (1990), 68 Ohio App.3d 673, 681-682, citing *Korodi v. Minot* (1987), 40 Ohio App.3d 1. Appellants do not allege with particularity in their original answer and counterclaim any allegations of fraud concerning the Settlement Agreement. Appellants' fraud allegations in the original answer and counterclaim relate back to the Construction Agreement which

essentially is embodied in the Settlement Agreement that is signed by appellants.

Therefore, appellants' fraud claims concerning the charges, invoices, and repairs to the home do not have to be considered by the trial court in ruling on a motion for summary judgment.

{¶ 22} Appellants also assert that they were fraudulently induced into signing the Settlement Agreement based on information provided in appellee's expert's opinion. Appellants claim that, in part, they relied on upon the expert report of George Poulus when considering whether to sign the Settlement Agreement, and that the report turned out to be altered by appellee's attorney. Appellants contend that they learned about the false report from a letter they received on November, 18, 2008, from the Ohio Architects Board, which was after the mediation had taken place. This allegation regarding being fraudulently induced into signing the Settlement Agreement was not stated with particularity in appellants' August 21, 2008 original answer and counterclaim. Appellants did assert this allegation in their amended counterclaim and amended answer filed February 2, 2009, but again it was not made with particularity as required by Civ. R. 9(B). Therefore, the trial court correctly entered a judgment striking appellants' fraud claim. Appellants in their original answer and counterclaim as well as the amended answer and amended counterclaim did not specifically mention the fraudulent misrepresentation of appellee's expert's opinion, therefore the fraud in the inducement claim is without merit.

{¶ 23} Furthermore, to prove that they were fraudulently induced into signing the Settlement Agreement, appellants must establish that appellee made a knowing, material representation with the intent of inducing appellants' reliance, and appellants relied upon that misrepresentation to their detriment. *ABN Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 502. Appellants did not provide evidence that appellee made a knowing, material misrepresentation of the expert's opinion report in order to induce appellants into agreeing to mediation and signing the Settlement Agreement. Appellants did not provide evidence that they relied on the misrepresentation to their detriment. Furthermore, appellee's expert was deposed by appellants' attorney and no error was found before proceeding to mediation. Therefore, appellants have not proven that they were fraudulently induced into agreeing to the Settlement Agreement.

{¶ 24} The real issue before this court is whether a Settlement Agreement was made between appellants and appellee during mediation and whether appellants breached this agreement. Settlement agreements are essentially a contract and are governed by the law of contracts. *Rondy, Inc. v. Goodyear Tire Rubber Co*, 9th Dist. No. 21608, 2004-Ohio-835, ¶ 7. To establish a breach of a settlement agreement, the party alleging the breach must prove: 1) existence of the Settlement Agreement, 2) performance by the plaintiff, 3) breach by the defendant, 4) resulting damages or loss to the plaintiff. *Id.*

{¶ 25} Appellants have admitted that the mediation took place and that with the assistance of counsel they reached a Settlement Agreement. Appellants have also admitted that they signed the Settlement Agreement, and have failed to fully perform

their end of the agreement. Appellants breached the Settlement Agreement by not paying appellee \$20,000 that appellants agreed to pay. A valid settlement agreement was formed between the parties and appellants have breached that agreement. Therefore, the trial court was correct in granting appellee's motion for summary judgment. Appellants' first assignment of error is not well-taken.

{¶ 26} Appellants contend in their second assignment of error that the trial court abused its discretion in denying appellants' motion to amend their answer and counterclaim and in granting appellee's motion to strike the same. In general, a motion for leave to amend should be granted to a party absent a finding of bad faith, undue delay or prejudice to the opposing party. *CommuniCare, Inc. v. Wood Cty. Bd. of Commrs.*, 161 Ohio App.3d 84, 2005-Ohio-2348, ¶ 17. However, a trial court has discretion to either grant or deny a motion for leave to amend a pleading. *State ex rel. Askew v. Goldhart* (1996), 75 Ohio St.3d 608, 610; *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 6. Furthermore, the trial court's decision will not be reversed by an appellate court absent an abuse of its discretion. *CommuniCare*, at ¶ 18.

{¶ 27} In this case, the trial court reviewed the record, all pleadings, exhibits, and relevant case law and ultimately denied appellants' motion for leave to amend. The trial court also noted that appellants' pro se status did not excuse them from complying with the Ohio Rules of Civil Procedure and that appellants' amended answer and counterclaim as well as the fraud claim must be stricken.

{¶ 28} Upon review we note that, although not clearly delineated by the trial court, in this case appellants' sought a 60-day extension to file their initial answer and counterclaims. Thereafter, five months after filing their tardy initial answer, appellants attempted to assert claims based on events that occurred, and were known, months prior to filing their initial answer. Further, the amended answer failed to comply with Civ.R. 8(B) as it contained factual allegations well beyond the scope of the complaint. Finally, the amended fraud claim was also stricken due to appellants' failure to comply with Civ.R. 9(B). Based on the foregoing, we find that the trial court did not abuse its discretion in deciding not to grant appellants' motion for leave to amend.

{¶ 29} Similar to a motion for leave to amend, a trial court also has discretion to either grant or deny a motion to strike. *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, 2005-Ohio-1509, ¶ 10. The trial court's decision will not be overturned absent an abuse of discretion. *Id.* Here, the trial court denied appellants' motion for leave to amend and granted appellee's motion to strike. There is no showing that the trial court abused its discretion by granting appellee's motion to strike. Therefore, appellants' second assignment of error is not well-taken.

{¶ 30} Under the third assignment of error, appellants contend that the trial court abused its discretion by awarding attorney fees and sanctions. On July 22, 2009, within its decision to grant appellee's motion for summary judgment, the trial court held, in part, that: "Plaintiff is entitled to attorneys fees, and the amount shall be set by this Court following a hearing."

{¶ 31} The hearing was held on August 17, 2009, and the testimony of appellee's attorney and expert testimony as to the reasonableness of the fees was presented. Appellee also submitted an itemized billing statement. Following the hearing, the trial court entered judgment on August 20, 2009, which awarded appellee's attorney's fees in the amount of \$13,722.50.

{¶ 32} To dispute the award of attorney's fees in breach of settlement agreement cases, appellants rely on *Murray & Murray, Co., L.P.A. v. Brugger*, 6th Dist. No. E-04-032, 2005-Ohio-5262, ¶ 28, a decision from this court where we stated that in a contract action, attorney fees are recoverable as compensatory damages based upon a showing of bad faith. The current case can be distinguished from *Murray* in that the trial court did not award attorney fees based upon a showing of bad faith by appellants. The trial court did note that appellants' conduct in choosing to represent themselves without counsel caused a substantial portion of the attorney's fees incurred by appellee; therefore, the court based its award of attorney's fees on the time and labor involved in maintaining this litigation.

{¶ 33} Further, in *Murray*, the decision to not award attorney fees was based on the nature of the claim which was a breach of an attempted novation. *Id.* at ¶ 29-31. This is not the case here. This case can be better compared to *Tejada-Hercules v. State Auto. Ins. Co.*, 10th Dist. No. 08AP-150, 2008-Ohio-5066. In *Tejada-Hercules*, the court ruled that the insureds were entitled to attorney fees as compensatory damages. In so holding, the court reasoned that the fees directly stemmed from the insurer's breach of the pre-

litigation settlement agreement. *Id.* at ¶ 10. The breach was the direct cause of the insureds' commencement of the action. *Id.* See *Shanker v. Columbus Warehouse Ltd. Partnership* (June 6, 2000), 10th Dist. No. 99AP-772.

{¶ 34} Applying the law in *Tejada- Hercules* and *Shanker*, appellee is entitled to an award of attorney's fees as compensatory damages because those fees were incurred as a direct result of appellants' breach of the settlement agreement. In determining the amount of attorney's fees to award to appellee, the Supreme Court of Ohio stated that the trial court has discretion in determining whether to award a party attorney fees. *Brittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146. Furthermore, the trial court's decision to award attorney fees should not be reversed absent an abuse of discretion. *Id.*

{¶ 35} In calculating the amount of attorney fees to be awarded to appellee, the trial court utilized the guidelines set forth in DR 2-106 of the Code of Professional Responsibility, Rule 1.5 of the Ohio Rules of Professional Conduct, *Swanson v. Swanson* (1976), 48 Ohio App.2d 85, 90, and *Brittner v. Tri-County Toyota, Inc.*, *supra*. The court found that "the time and labor involved in maintaining this litigation (71.50) hours was not unreasonable, particularly given the inherent difficulty in working with pro se defendants, the discovery conducted, and the results obtained. It is clear that plaintiff's counsel employed the 'highest degree of professional skill.'" Furthermore, the court noted that "defendant does not object to the reasonableness of the hourly rate and hours charged, which total \$13,722.50 (with the exception of the time plaintiff's counsel spent traveling to Ottawa County for deposition)." Upon review, we conclude that the trial

court's application of these guidelines was reasonable, and not an abuse of discretion.

Therefore, appellants' third assignment of error is not well-taken.

{¶ 36} On consideration whereof, the court finds that substantial justice was done the parties complaining and the judgment of the Ottawa County Court of Common Pleas is affirmed. Pursuant to App. R. 24, appellants are ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.