[Cite as *Czerniak v. Aziz*, 2011-Ohio-3112.]

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

Charlene M. Czerniak, et al.	Court of Appeals No. L-10-1211
Appellees/Cross-Appellants	Trial Court No. CI0200801847
v.	
Walid Y. Aziz, et al.	**DECISION AND JUDGMENT**
Appellants/Cross-Appellees	Decided: June 24, 2011

* * * * *

David G. Wise and Stephen M. Szuch, for appellees/cross-appellants.

Erik G. Chappell and Benjamin Z. Heywood, for appellants/cross-appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This case is before the court on appeal of the October 8, 2009 judgment of the Lucas County Court of Common Pleas granting summary judgment to plaintiffs-appellees/cross-appellants, Charlene and David Czerniak, on their claim against defendants-appellants/cross-appellees, Walid and Adenilde Aziz, for breach of a real

estate purchase agreement. Appellees/cross-appellants have also filed a cross-appeal challenging the amount of damages awarded in the trial court's July 2, 2010 judgment entry.

{¶ 2} This case concerns a failed real estate transaction. Appellees listed their condominium on Woodforest Drive, in Sylvania, Ohio, with Danberry realtor Alan Robertson. On May 18, 2007, through Welles Bowen realtor, Nancy Kabot, appellants submitted an offer for $247,900, which included the condition that their home on Indian Road, in Toledo, Ohio, be sold. The purchase agreement also included the condition that appellees repair the energy star button on the dishwasher. The closing date was listed as May 31, 2007. Appellees rejected the offer.

{¶ 3} On May 21, 2007, appellants submitted a second offer for $278,900; it, too, had a closing date of May 31, 2007, with possession at closing. The purchase agreement listed the following items to be included in the sale: the kitchen appliances, basement television, two built-ins in the basement, dining room table and chairs, and the kitchen chairs. The agreement included a condominium addendum providing that within five days of the accepted purchase agreement, appellees were required to deliver the condominium by-laws, and rules and regulations to appellants. Thereafter, appellants had five days after receipt of the documents to terminate the agreement.

{¶ 4} The inspection took place on May 24, 2007. On May 31, 2007, the parties were prepared to close on the property when the buyer of appellants' home was not able to close on the sale of their home and, thus, could not proceed with the purchase of

appellants' property. Appellants then refused to proceed with the purchase of the condominium. It was then discovered that the final purchase agreement failed to contain the condition of appellants' successful closing on their home prior to purchase. On October 26, 2007, appellees sold the property to another buyer for $263,900.

{¶ 5} On February 6, 2008, appellees commenced the instant action against appellants alleging breach of contract. In their answer, appellants raised the affirmative defenses of unilateral and mutual mistake and asserted a counterclaim for reformation. On December 3, 2008, appellants filed a motion to amend their answer to include the defense of failure of a condition precedent. Appellees opposed the motion. The court granted appellants' request to amend.

{¶ 6} On December 10, 2008, appellants filed a motion for summary judgment. Appellants argued that appellees failed to satisfy a condition precedent to the contract—the delivery of the condominium documents. Appellants further argued their defenses of unilateral and mutual mistake regarding the omission of the contingency of the sale of their home.

{¶ 7} On January 14, 2009, appellees filed a memorandum in opposition and on January 15, 2009, they filed a motion for summary judgment. Appellees argued that if there was a unilateral mistake, appellants should bear the burden of that mistake. Appellees stated that there was no mutual mistake. As to the condominium documents, appellees argued that appellants were fully prepared to close on the condominium without reviewing the documents; thus, appellants waived the condition. Appellees also relied on

the affidavits of appellees' realtor, Alan Robertson, and appellee, Charlene Czerniak, for the additional argument that the documents had, in fact, been delivered.

{¶ 8} On January 22, 2009, appellants filed a motion to strike the above affidavits. Appellants argued that the affidavits impermissibly conflicted with prior deposition testimony.

{¶ 9} On March 11, 2009, the trial court ruled on appellants' motion to strike and the cross-motions for summary judgment. The court granted appellants' motion to strike, in part. The court struck portions of the affidavits which conflicted with the deposition testimony regarding the delivery of the condominium documents. Robertson was not present during the occasions where appellees claimed to have delivered the documents. As to appellee, Charlene Czerniak, she testified during her deposition that she pointed out the legal documents in the kitchen cabinet while, in her affidavit, she stated that they "tendered" the documents to appellants on two occasions but that they would not take them. As to the summary judgment motions, the court denied them because the parties failed to provide a complete copy of the May 21, 2007 purchase agreement as required under Civ.R. 56(E).

{¶ 10} Subsequently, the parties refiled their summary judgment motions. On October 8, 2009, the trial court granted appellees' motion for summary judgment and denied appellants' motion for summary judgment. The court concluded that appellants bore the risk of their failure to include the condition of the prior sale of their property in the final purchase agreement. Further, the court found that appellants waived the

condition precedent of review of the condominium documents by proceeding with the sale. The court ordered that a damages hearing be held.

{¶ 11} A hearing on the damages was held on January 19, 2010, and appellee, Charlene Czerniak, and realtor, Alan Robertson, testified and documentary evidence was presented. Appellees argued that they were entitled to $49,749.04 in damages. The damages included the difference in the sale price, mileage and turnpike tolls, fuel costs, vacation days, utility and insurance bills, association fees, and other amounts associated with the failed transaction.

{¶ 12} On July 2, 2010, the trial court issued its finds of fact, conclusions of law and judgment entry. The court ultimately determined that appellees were entitled to damages in the sum of $36,283.02, plus interest, and the costs of litigation. This appeal and cross-appeal followed.

{¶ 13} Appellants/cross-appellees raise the following assignments of error for our review:

{¶ 14} "I. The trial court erred when it granted appellees' motion for summary judgment and denied appellants' summary judgment motion on the basis of waiver of a known contractual right.

{¶ 15} "II. Assuming arguendo, appellees are entitled to summary judgment, appellees have not met their burden of proof establishing that they are entitled to monetary damages."

{¶ 16} Appellees/cross-appellants raise the following assignment of error:

{¶ 17} "In addition to the damages awarded to the Czerniaks in the trial court, Czerniaks are entitled to damages for (1) "additional losses;" (2) relocation and moving expenses; (3) lost rent; and (4) mileage expenses and turnpike fees because each expense arose directly from the Azizes' breach."

{¶ 18} In appellants' first assignment of error, they argue that the trial court erroneously awarded appellees summary judgment where the contract was voidable due to the failure of a condition precedent, the delivery of the condominium documents, and that the contract was voidable on the basis of a unilateral or a mutual mistake, the exclusion in the second purchase agreement of the condition that appellants must first sell their home. Appellants argue that on the basis of the mistake, the court should have granted their counterclaim for reformation.

{¶ 19} We review de novo the trial court's ruling on the summary judgment motions. *Conley–Slowinski v. Superior Spinning & Stamping Co*. (1998), 128 Ohio App.3d 360, 363. A movant is entitled to summary judgment pursuant to Civ.R. 56(C) when it is demonstrated "that there is no issue as to any material fact, that the moving party is entitled to judgment as a matter of law, and that reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party." *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617; Civ.R. 56(C).

{¶ 20} Appellants first argue that appellees' failure to deliver the condominium documents in accordance with the addendum to the purchase agreement entitled them to

void the contract. Conversely, appellees contend that appellants waived any objection to the non-delivery of the documents by proceeding to closing and that they failed to raise the issue until approximately a year and one-half following the failed closing date. The addendum provided:

{¶ 21} "CONDOMINIUM DOCUMENTS. Within five (5) days after Acceptance of the Agreement, Seller will deliver to Purchaser true, complete and current copies of the Declaration of Condominium, the By-Laws of the Association, the Rules and Regulations (if any), the Developer's Disclosure Statement (if any), and any other material document(s) relating to the creation or operation of the Condominium. Purchaser shall have a period of five (5) days after receipt of the documents to approve the documents or to terminate this Agreement and the provisions of Paragraph 21 of the Agreement shall apply."

{¶ 22} In general, a condition precedent "'may be waived by the party to whom the benefit of the condition runs; the waiver may arise expressly or by implication, and the key to its application in a particular case is a showing of some performance pursuant to the terms of the contract.'" *Corey v. Big Run Indus. Park, LLC*, 10th Dist. No. 09AP-176, 2009-Ohio-5129, ¶ 18, quoting *Mangan v. Prima Constr., Inc.* (Apr. 9, 1987), 1st Dist. No. C-860234. See *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 3d Dist. No. 2-05-17, 2006-Ohio-1773.

{¶ 23} In support of their argument that the condition was not waived, appellants rely on *Weaver v. Romaniuk* (Nov. 14, 1990), 1st Dist. No. C-890642. In *Weaver*, a real

estate purchase agreement was contingent on the buyer's ability to obtain financing. The court found that the contingency was not waived because all changes to the agreement were required to be in writing. The court further noted that the record was devoid of any additional evidence to "support a finding that [the buyer] waived the financing contingency by his conduct." Id. Appellants argue that in this case because the purchase agreement stated that all changes were required to be initialed and dated, the delivery of the condominium documents condition could not have been waived.

{¶ 24} Reviewing *Weaver*, we do not agree that it stands for the proposition that a waiver could not have proceeded absent a signed or initialed amendment. Here, there was no evidence presented to suggest that appellants were refusing to proceed with the closing because they had not received the condominium documents. Appellants' realtor, Nancy Kabot, testified:

{¶ 25} "Q: Was an issue ever called to your attention concerning the condominium documents?

{¶ 26} "A: No.

{¶ 27} "* * *

{¶ 28} "Q: That's all right, the main question is no one came to you, the Azizes or their attorney saying we can't close because we don't have the condominium documents?

{¶ 29} "A: No.

{¶ 30} "* * *

{¶ 31} "Q: And the only reason the transaction didn't close in your mind was because the purchaser of the Wades' property didn't complete that purchase?

{¶ 32} "A: I would say yes."

{¶ 33} Upon review, it is apparent that appellants would have proceeded with closing without being in physical possession of the condominium documents. Appellants were present at closing and, but for their failed closing, would have purchased the property. Further, following the failed closing, appellants continued to express a desire to purchase the property. Thus, we conclude that appellants waived the condition precedent to review the documents.

{¶ 34} Appellants next argue that the purchase agreement was voidable due to appellants' unilateral mistake with regard to the omission of the contingent-on-sale provision. Conversely, appellees contend that because appellants' alleged mistake arose from their own negligence they must bear the risk of the mistake.

{¶ 35} A unilateral mistake "'occurs when one party recognizes the true effect of an agreement while the other does not.'" *Ohio Turnpike Comm. v. Alexanderian*, 6th Dist. No. WD-05-060, 2006-Ohio-4301, ¶ 12, quoting *Gen. Tire, Inc. v. Mehlfeldt* (1997), 118 Ohio App.3d 109, 115. A unilateral mistake can form the basis of the rescission of a contract; however, rescission "'will be denied where such mistake is the result of the party seeking relief.'" Id., quoting *Nationsbanc Mtge. Corp. v. Jones* (Mar. 30, 2001), 7th Dist. No. 99-CA-236; Restatement of the Law 2d, Contracts (1981) 394, Section 153. Further, the other party must not have reason to know of the mistake and take advantage of it.

Restatement of the Law 2d, Contracts (1981) 394, Section 153; *Galehouse Constr. Co., Inc. v. Winkler* (1998), 128 Ohio App.3d 300, 303. Parol evidence may be considered in order to determine whether a mistake has occurred. *Faivre v. DEX Corp. Northeast*, 182 Ohio App.3d 563, 2009-Ohio-2660, ¶ 13.

{¶ 36} Further, Restatement of the Law 2d, Contracts (1981) 402, Section 154 provides that a party bears the risk of the mistake when:

{¶ 37} "(a) the risk is allocated to him by agreement of the parties, or

{¶ 38} "(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

{¶ 39} "(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so."

{¶ 40} Here, appellants' realtor, Nancy Kabot, testified in her deposition that appellants were very clear that their home had to be sold prior to purchasing a new home. Kabot stated that appellees never indicated their objection to the contingent-on-sale condition in the first offer. Kabot admitted that she failed to include the term in the second offer/purchase agreement which was ultimately accepted. Appellee, David Czerniak, testified in his deposition that he and his wife rejected the first offer over their cellular phone based solely on price; there is no evidence that they actually reviewed the initial written offer. In appellee Charlene Czerniak's affidavit she stated that she and

her husband would not have accepted the second offer if it had included the contingent-upon-sale provision. She opined that the condition had been removed from the second offer to make it more attractive and to offset the possession at closing provision.

{¶ 41} Upon review, appellants have presented no evidence that appellees knew of the mistake and tried to take unfair advantage of it. The offer was accepted on May 22, 2007, and possession was scheduled to be on the date of the May 31, 2007 closing. Thus, it was reasonable that the trial court allocated the risk of the mistake to appellants.

{¶ 42} Appellants also contend that the trial court should have reformed the purchase agreement due to the parties' mutual mistake regarding the contingent-on-sale provision. Appellants rely on the Restatement of the Law 2d, Contracts (1981) 385, Section 152, which provides, in part:

{¶ 43} "(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154."

{¶ 44} Reviewing the record, there was no evidence presented to demonstrate that appellees were mistaken regarding the terms of the purchase agreement. Appellants' first assignment of error is not well-taken.

{¶ 45} In appellants' second assignment of error they contend that the trial court erred by awarding monetary damages to appellees. In appellees' cross-assignment of

error they argue that the monetary award was insufficient. Because the arguments are related they will be jointly addressed.

{¶ 46} A trial court's determination as to whether special damages are appropriate is a question of law. *Sharp v. Andisman*, 9th Dist. Nos. 24999, 25002, 2010-Ohio-4452, ¶ 33. Questions of law are reviewed de novo. Id.

{¶ 47} A damages hearing was held on January 19, 2010. Charlene Czerniak testified regarding the damages she and her husband incurred directly and incidental to appellants' breach of the purchase agreement. A three-ring binder of detailed documents was admitted into evidence. Appellees' realtor, Alan Robertson, testified as to the fair market value of the property. Appellants did not present any evidence.

{¶ 48} Following the hearing, the parties presented memoranda. Appellants argued that appellees were not entitled to damages for "holding costs," i.e., property taxes, utilities, maintenance expenses, and other associated fees. Further, that appellees were not entitled to costs that they would have incurred had the transaction been completed. Appellants also argued that appellees failed to prove the value of their property at the time of resale.

{¶ 49} In response, appellees relied on the First Appellate District case of *Callahan v. Richardson* (Apr. 4, 1979), 1st Dist. No. C-780119, to argue that they were entitled to any amounts that would not have been expended had the sale been completed. Appellees argued that the moving costs incurred far exceeded the amounts had the sale taken place.

{¶ 50} In its July 2, 2010 judgment entry, the trial court awarded $36,283.02 in damages to appellees. This amount was derived as follows: loss of bargain, $15,000; attorney fees for failed closing, $575; deposition of Nancy Kabot, $129.85; broker commission fees-resale, $15,056; prejudgment interest, $5,522.17. The court denied appellees' request for damages for "additional losses," relocation and moving expenses, lost rent, and mileage and turnpike fees.

{¶ 51} Regarding the loss of bargain amount, appellants argue that there was insufficient proof as to the market value of the property. Specifically, appellants contend that realtor, Alan Robertson, was neither qualified as an expert to give an opinion on value nor was his testimony based on any analysis of comparable sales.

{¶ 52} In *Roesch v. Bray* (1988), 46 Ohio App.3d 49, this court held that, following a purchaser's default on a real estate sales contract, where a property is sold within a reasonable time after the breach, the sale amount may be used to establish the market value of the property at the time of the breach. Id. at 50. Accord *Reitz v. Giltz & Assoc., Inc.*, 11th Dist. No. 2005-T-0126, 2006-Ohio-4175.

{¶ 53} During the damages hearing, Robertson testified that due to the decrease in the housing market, the ultimate sale price of the property, $263,900, represented the fair market value of the property. Further, the house was sold approximately four months after the failed closing. Accordingly, we find that sufficient evidence was presented as to the loss of bargain and the trial court did not err when it awarded appellees $15,000.

{¶ 54} We further find that the court did not err when it awarded prejudgment interest. R.C. 1343.03(A) provides, in relevant part:

{¶ 55} "(A) In cases * * * when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, * * *."

{¶ 56} Appellants also argue that the trial court erred when it awarded attorney fees in relation to the failed closing, deposition costs, and the broker's commission. Conversely, appellees claim that in addition to such damages, the court erred in failing to award monies for maintenance and utility costs and moving and commute costs.

{¶ 57} Regarding the attorney fees, appellants argue that in Ohio and under the "American Rule" each party is responsible for his attorney fees. However, the attorney fees awarded were not incurred as costs of litigation; rather, the fees were incurred on the date of the failed closing. Appellees submitted a statement from their attorney and the court awarded only those amounts directly related to the closing. We find no error in the court's calculation.

{¶ 58} As to the deposition costs, the trial court granted appellees the cost of transcribing the deposition of appellants' realtor, Nancy Kabot. In support of its award,

the court relied on R.C. 2303.21 and *Boomershine v. Lifetime Capital, Inc.*, 182 Ohio App.3d 495, 2009-Ohio-2736.

{¶ 59} R.C. 2303.21 provides that "[w]hen it is necessary in an appeal, or other civil action to procure a transcript of a judgment or proceeding * * * as evidence in such action or for any other purpose, the expense of procuring such transcript * * * shall be taxed in the bill of costs and recovered as in other cases." In *Boomershine*, the court found that because the local court rule required that a deposition transcript be filed when needed for consideration of a motion, the transcript was "necessary" as contemplated by statute. Id. at ¶ 11. Similarly, this court has held that where a local rule required that a deposition transcript be filed if it is to be used as evidence at trial, then the cost may be recovered. See *Jackson v. Sunforest Ob-Gyn Assoc., Inc.*, 6th Dist. No. L-08-1133, 2008-Ohio-6170; *Atkinson v. T.A.R.T.A.*, 6th Dist. No. L-05-1106, 2006-Ohio-1638.

{¶ 60} Unlike *Boomershine*, *Jackson*, and *Atkinson*, there is no specific local rule or statute making the submission of a discovery deposition transcript "necessary." Accordingly, we find that the court erred when it granted appellees $129.85 for deposition costs.

{¶ 61} We next examine the court's $15,056 award for "broker commission fees-resale." Ohio courts have held that damages may be awarded for the difference in broker commission fees from the failed sale and the subsequent sale. See *Peterman v. Dimoski*, 1st Dist. No. C-020116, 2002-Ohio-7337; *Saylor v. Eno*, 12th Dist. No. CA2006-07-165, 2007-Ohio-351. Further, a seller may recover the broker's commission on a second sale

but only if the seller paid commission on the failed sale. *Holmes v. Wilson* (Aug. 2, 2010), S.D. Ohio No. 2:08-cv-602, citing *Knight v. Hughes* (Sept. 17, 1987), 10th Dist. No. 86AP-1106.

{¶ 62} In the trial court's July 2, 2010 judgment, the court noted, citing *Callahan v. Richardson* (Apr. 4, 1979), 1st Dist. No. C-780119, that a broker's commission is recoverable as special damages. In *Callahan*, however, it appears as though the broker was hired only after the breach in order to sell the property as quickly as possible. In the present case, appellees originally listed the property with realtor Alan Robertson; thus, they anticipated paying a real estate commission had the May 31, 2007 sale been consummated. However, unlike *Holmes*, supra, there was no evidence presented to demonstrate an increase in the realtor's commission or any increase in costs due to the failed sale. Accordingly, we find that the trial court erred in awarding broker commission fees.

{¶ 63} We next examine appellees' claim that the court erred in failing to award damages for additional losses relating to the maintenance and upkeep of the condominium, relocation and moving expenses, lost rent, and mileage expenses and turnpike fees.

{¶ 64} In support of their argument that they are entitled to damages for additional losses, appellants rely on *Callahan*, supra. In *Callahan*, the sellers moved from the residence after the purchase agreement was signed but prior to closing. The court concluded that the sellers were entitled to recover damages for insurance and utilities

paid during the time the house remained unsold. The court stated that such damages were reasonably anticipated as a result of the breach. Appellants stress that *Callahan* controls in this case because, unlike the cases relied upon by appellants, appellees moved prior to the breach.

{¶ 65} Conversely, in *Roesch v. Bray*, supra, this court also examined the propriety of damages awarded for "maintenance and utility expenses for several months, plus certain costs for resale." We determined that such amounts were not recoverable as they were "incidental to ownership." Id. at 51. We noted that "to allow recovery for expenses of this kind could lead to harsh consequences. Such expenses '* * * could mount indefinitely to unlimited amounts if [the sellers] * * * failed to use, rent or resell their property. * * *.'" Id., quoting *Kauder v. Thompson* (May 9, 1986), 2d Dist. No. 9265. See, also, *Hussy v. Daum* (May 3, 1996), 2d Dist. No. 15434.

{¶ 66} Accordingly, we conclude that appellees are not entitled to the additional losses claimed. Appellants' second assignment of error is well-taken, in part, and appellees' cross-assignment of error is not well-taken. Appellants' assignment of error is well-taken as to the award of deposition costs and the broker commission.

{¶ 67} On consideration whereof, we find that the judgment of the Lucas County Court of Common Pleas is affirmed as to the court's award of summary judgment to appellees, and reversed, in part, as to the damages. Pursuant to App.R. 12(B), we hereby enter judgment in favor of appellees for $15,575, plus interest as calculated under R.C 1343.02(A) from the date of the breach. The matter is remanded to the trial court for

execution of judgment. Pursuant to App.R. 24, appellants and appellees are ordered to equally pay the costs of this appeal.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE