[Cite as *Graber v. Emch*, 2012-Ohio-1395.]

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

Sheridan L. Graber	Court of Appeals No. S-11-018
Appellant	Trial Court No. 10CV531
v.	
David R. Emch, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: March 30, 2012

* * * * *

David N. Patterson, for appellant.

Bradley R. Waugh, for appellees.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Sheridan L. Graber, appeals a judgment entry entered by the Sandusky County Court of Common Pleas granting summary judgment in favor of appellees, David R. Emch and Wendy J. Emch. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} This case was initiated on May 6, 2010, when appellant brought an action against appellees arising out of the sale of appellees' home. Appellant asserted in his complaint claims for breach of contract, fraud, negligent concealment and misrepresentation, breach of the duty of good faith, conversion and unjust enrichment.

{¶ 3} On November 8, 2010, appellees filed a motion for summary judgment.

{¶ 4} On December 22, 2010, the trial court issued a judgment entry that referred the case for mediation and, further, stated that the mediation was scheduled to take place on March 22, 2011. The judgment entry also provided that "[a]ll necessary discovery shall be completed prior to mediation," and that "[t]he Clerk shall remove the case from its reporting requirements to the Supreme Court as this matter is STAYED as a code X and the case is inactive for reporting purposes."

{¶ 5} On January 7, 2011, appellant filed his response to appellees' motion for summary judgment. Appellant never did, however, serve this response on appellees.

{¶ 6} On February 4, 2011, appellees, who were still awaiting a response to their discovery requests, renewed their motion for summary judgment.

{¶ 7} On March 11, 2011, appellees filed a motion requesting a continuance of the mediation proceedings to a later date. The reasons given for the request were twofold. First, they stated that surgery had been scheduled for appellees' counsel. Second, they pointed out that they had not yet received from appellant any responses to their first set of discovery requests or to their motion for summary judgment. On March 15, 2011, the

trial court granted appellees' request to continue the mediation; it did not, however, set a new date for the proceedings.

{¶ 8} Finally, in an order journalized on March 28, 2011, the trial court granted appellees' motion for summary judgment. Appellant appealed the trial court's order, raising the following assignments of error:

> I. "The trial court abused its discretion when it ruled on [appellees'] motion for summary judgment while a stay of proceedings was still in place."
>
> II. "The trial court abused its discretion when it granted [appellees'] motion for summary judgment despite the existence of genuine issues of material fact."

{¶ 9} Appellant argues in his first assignment of error that the trial court abused its discretion when it granted appellees' motion for summary judgment while a "stay of proceedings" was in effect.

{¶ 10} To constitute an abuse of discretion, a trial court's decision must be unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 11} In examining appellant's argument, we note that "[m]ediation is, by its very nature, a voluntary process." *U.S. Bank Natl. Assn. v. Morales*, 11th Dist. No. 2009-P-0012, 2009-Ohio-5635, ¶ 23. And, unlike in the case of arbitration, there is no statutory provision permitting a court to stay the trial of an action pending arbitration.

See Oliver Design Group v. Westside Deutscher Frauen-Verein, 8th Dist. No. 81120, 2002-Ohio-7066, ¶ 13 (noting that R.C. 2711.02 allows a court to stay the trial of an action pending arbitration, but not pending mediation).

{¶ 12} Looking to the language of the judgment entry containing the so-called stay, we note that the trial court appears to have stayed the instant case only for reporting purposes. At no time did it relinquish jurisdiction of the matter and at no time was jurisdiction otherwise removed.

{¶ 13} With all of the foregoing in mind, together with the fact that appellees elected to renew their motion for summary judgment before engaging in any mediation proceedings and the fact that appellant, for his part, never did respond to appellees' discovery requests, we do not find that the trial court abused its discretion in deciding appellees' motion for summary judgment and effectively removing any possibility of pre-judgment mediation in this case.

{¶ 14} In addition, as will be discussed subsequently in this decision, summary judgment was properly granted in favor of appellees. As discussed by the court of appeals in *U.S. Bank Natl. Assn. v. Bayless*, 5th Dist. No. 09 CAE 01 004, 2009-Ohio-6115, in order for an appellant to secure reversal of a judgment, the appellant must generally show that a recited error was prejudicial to his case. *Id*. at ¶ 26.

{¶ 15} As in *Bayless*, the trial court's decision to order mediation in this case was wholly discretionary. In such a case, and where—again, as here—the appellate court has

concluded that summary judgment in favor of appellees was proper, any effective rescission of the mediation order cannot be deemed prejudicial. *See id.*

{¶ 16} For all of the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 17} Appellant argues in his second assignment of error that summary judgment was improperly granted against him, because there existed genuine issues of material fact. We disagree.

{¶ 18} An appellate court reviewing a trial court's granting of summary judgment does so de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Civ.R. 56(C) provides:

> 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 considered in this rule.

{¶ 19} Summary judgment is proper where: "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party." *Ryberg v. Allstate Ins. Co.*, 10th Dist. No. 00AP-1243, 2001 WL 777121

(July 12, 2001), citing *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629, 605 N.E.2d 936 (1992).

{¶ 20} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id*.

{¶ 21} In the instant case, appellant failed to respond to appellees' requests for admissions. Under Ohio law, unanswered requests for admission render the requested matter established. *Asset Acceptance, L.L.C. v. Witten*, 8th Dist. No. 90297, 2008-Ohio-3659, ¶ 12; *see also* Civ.R. 36(A)(1). "Further, a summary judgment motion may be based upon admissions deemed admitted for failure to answer them." *Id*.

{¶ 22} Although this court has held that a party seeking summary judgment is generally required to file the deemed admissions with the court, *Szigeti v. Loss Realty Group*, 6th Dist. No. L-03-1160, 2004-Ohio-1339, ¶ 16, this requirement may be waived if the party opposing the admission fails to object to its use. *Kanu v. George Dev.*, 6th Dist. No. L-02-1140, L-02-1139, 2002-Ohio-6356. ¶ 13. Here, appellees did not file admissions with the trial court. Nevertheless, because appellant never objected to the use of the admissions in the trial court, we conclude that waiver of the filing requirement properly applies in this case.

{¶ 23} The requests for admission that are both deemed admitted and relevant to the instant case are as follows:

1. Please admit that the contract for the sale of the home, signed by Plaintiff and the Defendants, contained an 'As-Is' clause.

2. Please admit that you were given the opportunity to inspect the home.

3. Please admit that the Defendants did not affirmatively act to conceal from you any facts as to the home.

4. Please admit that the Defendants did not prevent you from inspecting or inquiring as to the condition of any part of the home.

{¶ 24} In Ohio, a seller of real property must complete a statutorily required form, disclosing "material matters relating to the physical condition of the property and any material defect relating to the physical condition of the property that is within the actual knowledge of the seller." *Abrogast v. Werley*, 6th Dist. No. L-09-1131, 2010-Ohio-2249, ¶ 37. Therefore, even with an "as is" clause, a seller may be liable for nondisclosure of a material, latent defect that is actually known to him. *Id.* at ¶ 38. On the other hand, where a buyer conducts an inspection of the property and learns that problems existed in the past and chooses not to undertake further investigation, the "as is" clause may remove the seller's duty to disclose information relating to the defect. *Id.*

{¶ 25} "To overcome the 'as is' clause, a buyer must establish that a seller failed to disclose a material defect on the disclosure form and that this failure constituted fraud." *Id.* at ¶ 39; *see also Mynes v. Brooks*, 4th Dist. No. 08CA3211, 2009-Ohio-5017, ¶ 32 (holding that the principles of caveat emptor and "as is" bar a claim for negligent misrepresentation). To prove fraudulent misrepresentation, a plaintiff must demonstrate:

> (a) a representation or, where there is a duty to disclose, concealment of a fact,
>
> (b) which is material to the transaction at hand,
>
> (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,
>
> (d) with the intent of misleading another into relying upon it,
>
> (e) justifiable reliance upon the representation or concealment, and
>
> (f) a resulting injury proximately caused by the reliance. *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986), paragraph two of the syllabus.

{¶ 26} In the instant case, appellant's failure to respond to appellees' written discovery request established for purposes of this case that appellees did not affirmatively act to conceal any facts from him. In addition, appellant has failed to point to any evidence to show that appellees misrepresented any material fact regarding the sale of the

home. Thus, appellant has failed to demonstrate the existence of a genuine issue of material fact, both with respect to his claim for fraud and his claim for negligent misrepresentation. (We note that appellant does not argue, nor does this court discern upon its review of the record, the existence of a genuine issue of material fact with respect to any of the other claims asserted in appellant's complaint.) For all of the foregoing reasons, appellant's second assignment of error is found not well-taken.

{¶ 27} The judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE