

[Cite as *Walters v. Lewis*, 2016-Ohio-1064.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ROBERT D. WALTERS,)	CASE NO. 15 MA 0135
ANDREA L. WALTERS,)	
)	
PLAINTIFFS-APPELLANTS,)	
)	
VS.)	OPINION
)	
MARCIA M. LEWIS,)	
DOUGLAS J. BROWN,)	
)	
DEFENDANTS-APPELLEES.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the County Court
Number 2, Mahoning County, Ohio
Case No. 2014 CVF 00263 BDM

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiffs-Appellants: Atty. Stephen J. Chuparkoff
50 S. Main Street, Ste. 615
Akron, Ohio 44308-1808

For Defendants-Appellees: Atty. Daniel S. White
34 Parmelee Drive
Hudson, Ohio 44236

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 4, 2016

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ROBB, J.

{¶1} Plaintiffs-Appellants Robert and Andrea Walters appeal the decision of Mahoning County Court Number 2 granting Defendants-Appellees Burgan Real Estate and Matthew Heikkinen's motion for summary judgment. This appeal is comprised of two issues. First, did Appellants waive the arguments by failing to object to the magistrate's decision? Second, if they did not waive the arguments, is there a genuine issue of material fact as to the claims that Appellees prevented them from inspecting the property and made false statements regarding the home?

{¶2} For the reasons expressed below, the trial court's decision is affirmed. Appellants did not waive the arguments when they failed to object to the magistrate's decision. The waiver rule is inapplicable because the magistrate's decision failed to comply with Civ.R. 53(D)(3)(a)(iii). Although the merit argument is reviewable, it lacks merit. Appellants failed to present any evidence that established a genuine issue of material fact regarding the claims against Appellees; Appellants did not meet their reciprocal summary judgment burden.

Statement of the Case

{¶3} In late 2010, Appellants were relocating from Indiana to Boardman, Ohio. They contacted Laura Tellman of Right Place Real Estate to look at a few homes in Boardman, one of which was located at 4138 Stratford Road. The property was being sold by Defendants Marcia Lewis, Douglas J. Brown and Marcia M. Lewis, successor Trustee for the Robert A. Brown Family Trust (collectively referred to as Sellers). Appellee Heikkinen was the listing agent and he was working for Appellee Burgan Real Estate. After viewing the house twice in a day, Appellants presented Sellers an offer for a land contract. The offer was accepted, and Appellants took possession on November 1, 2010.

{¶4} After a rain and thaw in January 2011, the basement wall leaked. Upon inspection it was discovered that there were cracks in the walls and asbestos was found. Appellants continued to comply with the terms of the land contract and paid their monthly payments until March 2012. At that point they ceased making the monthly land contract payments. Appellants stayed in the house without paying the

monthly payment until October 2012 when Sellers obtained a court order to evict them.

{¶15} In March 2014, Appellants filed a complaint against Sellers and Appellees. The first two counts of the complaint were for fraud and fraudulent inducement. The allegations in those two counts were not against Appellees but against Sellers. The third count alleged Appellees failed and refused to allow Appellants to walk through the home on one or more occasions, failed to allow Appellants to inspect the property, and provided a brochure to Appellants that contained incorrect information and mischaracterized certain portions of the premise. 3/27/14 Complaint.

{¶16} Sellers filed an answer and counterclaimed for breach of contract. 5/7/14 Sellers' Answer. Appellees filed an answer denying all allegations. 5/22/14 Appellees' Answer.

{¶17} Following discovery, Appellees filed a motion for summary judgment. 1/16/15 Appellees' Summary Judgment Motion. They asserted the evidence indicated Appellants were not denied access to the property, were not denied the opportunity to inspect, and the brochure did not contain any incorrect information. 1/16/15 Appellees' Summary Judgment Motion.

{¶18} Sellers also filed a motion for summary judgment. 1/21/15 Sellers' Summary Judgment Motion.

{¶19} Appellants filed a motion in opposition to summary judgment. 2/27/15 Motion. They asserted the Residential Property Disclosure Form contained false statements. Specifically, in the form Sellers denied having any knowledge of material cracks in the basement, of any previous or current water leakage in the basement, and of any current flooding or drainage problems affecting the property. On this basis, Appellants asserted there is a genuine issue of material fact.

{¶110} Sellers and Appellees filed replies. 3/9/15 Sellers' Reply; 3/10/15 Appellees' Reply. In Appellees' reply, they asserted the Residential Property Disclosure Form was filled out by the sellers and the specific statement on the top of

the form indicates, "The representations contained on this form are made by the owner and are not the representations of the owner's agent or subagent."

{¶11} The magistrate granted Appellees' motion for summary judgment, but denied sellers' motion for summary judgment. 3/23/15 J.E. It explained:

11. The Magistrate notes that the Plaintiffs' brief in opposition, and supporting affidavits, raise no allegations as to Defendants, Burgan Real Estate and Matthew Heikkinen. Civil Rule 56(E) provides that,

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

There is nothing within the plaintiffs' supporting affidavits which sets forth any specific facts showing a genuine issue of material fact as to any claims against Defendants, Burgan Real Estate and Matthew Heikkinen. For those reasons, the motion for summary judgment of Defendants, Burgan Real Estate and Matthew Heikkinen, is well founded.

12. The affidavits of Plaintiffs do however set forth specific facts showing a genuine issue of material fact to the Defendants', Lewis and Brown's, knowledge of the defects of the subject premises and subject to disclosure. The alleged recent repainting of the subject basement and the discovery of a Kilz waterproofing paint can do raise a genuine issue of material fact as to whether Defendants, Lewis and Brown, had knowledge of the true condition of the subject basement which was not properly disclosed or characterized in the residential property disclosure statement. Such issue precludes summary [sic]. The Magistrate finds that the prior judgment entry in this Court under case number 2011 CV

G 819 merely served to terminate the Defendants', Lewis and Brown's, ongoing rights under the subject land contract, but does not preclude any claims that might have existed for fraud or misrepresentation in the execution of such land contract.

3/23/15 Magistrate's Decision.

{¶12} The trial court adopted the decision one month later noting neither Appellants, nor Sellers filed objections. 4/23/15 J.E. In June 2015, the trial court issued its final judgment disposing of all claims. 6/30/15 J.E. The judgment indicated the remaining parties, Sellers and Appellants, agreed all claims were dismissed with prejudice. 6/30/15 J.E. It was signed by both the trial court and the magistrate.

{¶13} Appellants timely appealed the trial court's decision to grant Appellees' summary judgment motion.

Assignment of Error

The trial court's decision to grant the defendants' motion for summary judgment constitutes reversible error.

{¶14} Appellants' arguments on appeal are the same arguments they made in their motion in opposition to summary judgment; they contend there is a genuine issue of material fact concerning the affirmative written representations in the Residential Property Disclosure Form.

{¶15} Appellees counter by arguing Appellants did not object to the magistrate's decision granting them summary judgment and thus, waived all but plain error. Alternatively, they contend that there is no genuine issue of material fact concerning the claims against them.

{¶16} In addressing this assignment of error, we will first address Appellees' counter argument that Appellant did not preserve the error for appeal. After discussing that issue, the arguments pertaining to genuine issues of material facts will be addressed.

A. Objections

{¶17} The record indicates Appellants did not file written objections to the magistrate's March 23, 2015 decision. Appellees contend the failure to file written objections waives all but plain error.

{¶18} Appellees are correct that the failure to file written objections to a magistrate's decision typically waives all but plain error. Civ.R. 53(D)(3)(b)(i) states: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision." Subsection (iv) further provides, "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." However, the mandates of subsection Civ.R. 53(D)(3)(b)(iv) is not applicable when the magistrate fails to comply with Civ.R. 53(D)(3)(a)(iii). *Cooper v. Cooper*, 3d Dist. No. 9-13-62, 2014-Ohio-4991, ¶ 8, citing *Larson v. Larson*, 3d Dist. No. 13-11-25, 2011-Ohio-6013, ¶ 14 ("If a magistrate fails to provide the parties with notice of the requirement to file objections, the aggrieved parties, at a minimum, are relieved from Civ.R. 53(D)(3)(b)(iv)'s waiver rule and are permitted to raise their arguments for the first time on appeal."); *Keller v. Keller*, 9th Dist. No. 25967, 2012-Ohio-4029, ¶ 7 (Where the magistrate's decision does not notify the parties of need to file objections, the appropriate remedy is for this court to reverse and remand the matter to the trial court for the magistrate to prepare a decision which complies with Civ.R. 53(D)(3)(a)(iii), giving the parties an opportunity to file timely objections.).

Civ.R. 53(D)(3)(a)(iii) states:

A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

Civ.R. 53(D)(3)(a)(iii). The requirement that the magistrate's decision include a "conspicuous" notice serves to warn the parties of the consequences of failing to file objections, i.e. the waiver rule, which bars the party from assigning errors to the magistrate's findings and conclusions on appeal. *Cooper*, 2014-Ohio-4991 at ¶ 4, citing *State ex rel. Johnson v. Ryan*, 127 Ohio St.3d 267, 2010-Ohio-5676, 939 N.E.2d 146, ¶ 3 and *Williams v. Ormsby*, 9th Dist. No. 09CA0080-M, 2010-Ohio-3666, ¶ 12.

In the case at hand, the notice stated:

Pursuant to Rule 53 of the Ohio Rules of Civil Procedure the parties have fourteen (14) days within which to file objections to the Decision of Magistrate.

3/23/15 Magistrate's Decision.

{¶19} This notice does not comply with Civ.R. 53(D)(3)(a)(iii); it does not advise the parties of the effect of failing to file objections, i.e. the waiver rule. In *Cooper*, the Third Appellate District cited its former decision in *Lawson* for the position that no notice of the effect of failing to object relieves the aggrieved party from Civ.R. 53(D)(3)(b)(iv)'s waiver rule and permits the party to raise their arguments for the first time on appeal. *Cooper*, 2014-Ohio-4991 at ¶ 8, citing *Larson*, 2011-Ohio-6013 at ¶ 14. In *Cooper*, a notice similar to the one given in this case was given. The aggrieved party in *Cooper*, however, did not raise any arguments on appeal except for the magistrate's failure to abide by Civ.R. 53(D)(3)(a)(iii). *Cooper*. Therefore, the appropriate remedy in *Cooper* was to reverse the trial court's decision allowing the aggrieved party the opportunity to file objections to the magistrate's findings of fact and conclusions of law. *Id.* However, given the language in *Cooper*, if the aggrieved party had raised merit issues then the Third Appellate District may have found Civ.R. 53(D)(3)(b)(iv)'s waiver rule was inapplicable and the merit argument would have been permitted to be raised for the first time on appeal. See *Id.*

{¶20} In this instance, the waiver rule is not applicable because the advisement concerning objections was inadequate. Since the waiver rule is not applicable, we can reach the merits of whether the trial court erred in granting summary judgment to Appellees.

B. Summary Judgment Ruling

{¶21} Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. In determining whether there exists a genuine issue of material fact to be resolved at trial, the court is to consider the evidence and all reasonable inferences to be drawn from that evidence in the light most favorable to the non-movant. *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008–Ohio–1041, 883 N.E.2d 1060, ¶ 11. The movant has the initial burden to show no genuine issue of material fact exists. *Byrd v. Smith*, 110 Ohio St.3d 24, 26–27, 2006–Ohio–3455, 850 N.E.2d 47, ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden. *Id.* The non-movant's response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing there is a genuine issue for trial and may not rest upon mere allegations or denials in the pleadings. Civ.R. 56(E). We consider the propriety of granting summary judgment under a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005–Ohio–4559, 833 N.E.2d 712, ¶ 8.

{¶22} In granting summary judgment for Appellees, the trial court adopted the magistrate's decision. The magistrate's decision found that nothing in Appellants' supporting affidavits in opposition to the summary judgment motion set forth any specific facts which created a genuine issue of material fact as to any claim against Appellees.

{¶23} The magistrate's reasoning is correct. The complaint contained three claims. The first two were for fraudulent inducement and fraud. The allegations in both of these claims appear to be solely against Sellers. Specifically as to the claim that the property disclosure form contained false and fraudulent representations,

Appellants stated these claims were against Sellers. 3/27/14 Complaint paragraph 8, 19. Count three of the complaint was solely against Appellees. Appellants alleged Appellees failed and refused to allow Appellants and their representatives to properly inspect the property and prevented them on one or more occasions from walking through the home. 3/27/14 Complaint paragraph 30. They also asserted Appellees provided them or their representative with a brochure containing incorrect information and mischaracterizing portions of the premise. 3/27/14 Complaint paragraph 31. There was no allegation Appellees made false representations in the residential property disclosure form; that claim was solely asserted against Sellers.

{¶24} Moreover, Appellant Robert D. Walters' deposition refuted the allegations against Appellees.

His testimony indicated he was never denied access to the house:

Q. How many times did you see the Stratford home before you entered into the land contract?

A. The two times that same day.

Q. Okay. So it would have been in – if I tell you it was October the 16th, at, say, 5:04 and then at 5:56, would those have been the only two times that you actually went inside the Stratford home before you entered into the land contract?

A. Yes, sir.

Q. Were there ever times when you requested to go into the Stratford home – inside the Stratford home but you were denied access?

A. No, sir.

Q. Was there any discussion with your realtor, with anybody else, that you – you wish you could have seen the inside more before you entered into the land contract?

Not that I recall.

* * *

Q. Did anybody from Burgan Real Estate, either Mr. Heikkinen or anybody else, say that you were not permitted to go inside the Stratford home before you signed the land contract?

A. No.

Q. Did they ever – Burgan ever deny you access to the home?

A. No.

Walters Depo. 47-48.

{¶25} Likewise, Walters testimony indicated the residential property disclosure form, not a brochure, contained false statements:

Q. Okay. Did anybody from Burgan Real Estate tell you or your wife that there were no leaks in the basement?

A. Not that I recall.

* * *

Q. Did anybody from Burgan Real Estate tell you that there was no asbestos in the basement?

A. No, sir.

Q. So is it fair for me to conclude, then, that the issues of water leaks in the basement and the asbestos, your allegation that the false statements were made to you are based on the content of the residential property disclosure form?

A. That's fair to say.

Q. Is there any other document that you believe you reviewed or was given to you that – that contains false information?

A. No.

Q. Okay. You mentioned earlier that there was a brochure that was provided to you when you went to look at the Stratford home; is that correct?

A. Yes.

Q. Okay. Was there anything on that brochure that you believe was false or deceptive in any way?

A. Not that I recall.

* * *

Q. But as you sit here today, is there anything about that brochure that you believe was false?

A. No.

Q. So the only document that contains false information that you're aware of, sitting here today, is that residential property disclosure form; correct?

A. Yes, sir.

Walters Depo. 50-52.

{¶26} Nothing in the Robert Walters and Andrea Walters affidavits attached to the motion in opposition to summary judgment refutes the above testimony. In fact, the affidavits and the motion solely focus on the residential property disclosure form. As stated above, the claims regarding misrepresentations in the residential property disclosure form were raised solely against Sellers. Therefore, Appellants did not meet their reciprocal burden for claims asserted against Appellees, i.e., failure to allow inspection of the property and misrepresentations in the brochure. The magistrate and the trial court correctly determined Appellees were entitled to a grant of summary judgment and to have the claims against them dismissed.

C. Conclusion

{¶27} For all the above stated reasons, the sole assignment of error is meritless. Although Appellants did not object to the magistrate's decision, the merits of the appellate argument are addressed because the magistrate's decision did not contain an adequate advisement pursuant to Civ.R. 53(D)(3)(a)(iii). Despite being reviewable, Appellants' merit argument fails. Appellants failed to meet their reciprocal burden to overcome summary judgment; no evidence was presented to show there was a genuine issue of material fact. The trial court's decision is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.