

[Cite as *Danial v. Lancaster*, 2009-Ohio-3599.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92462

ABDELMESEH DANIAL

PLAINTIFF-APPELLEE

vs.

GERALD E. LANCASTER, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-635402

BEFORE: Dyke, J., Rocco, P.J., and Celebrezze, J.

RELEASED: July 23, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendants-appellants, Gerald Lancaster and CWC Industries, Inc. (“CWC”) (collectively “defendants”), appeal the trial court’s award of damages. For the reasons set forth below, we affirm in part, reverse in part and remand the matter to the trial court for proceedings consistent with this opinion.

{¶ 2} On September 15, 2006, plaintiff-appellee, Abdelmeseh Danial (“plaintiff”), signed an agreement to purchase two properties located on Lisbon Road and owned by CWC. In the agreement, plaintiff agreed to satisfy all delinquent taxes, pay all water and sewer charges, pay the real estate fee, assume responsibility for current and existing violations, and correct all violations to the satisfaction of the City of Cleveland and EPA of Ohio. In return, as admitted by defendants in the requests for admissions,¹ defendants agreed to transfer ownership to plaintiff and to dispose of a mechanic’s lien filed against the property by Ameriwash Systems, L.L.C. (“Ameriwash lien”).

{¶ 3} Prior to selling the property to plaintiff, both parties were aware of the Ameriwash lien and the case of *Ameriwash Systems, LLC v. CWC Industries, Inc.*, Cuyahoga County Court of Common Pleas No. CV-569499 (“Ameriwash case”). Defendants, however, represented to plaintiff that the claims were meritless, that they had a complete and valid defense to all claims, and that they would, at their expense, dispose of all claims in that case.

¹Defendants failed to answer plaintiff’s request for admissions. Accordingly, they are deemed admitted pursuant to Civ.R. 36(A).

{¶ 4} After transferring title of the property to plaintiff pursuant to the terms of the agreement, defendants failed to defend or otherwise plead in the Ameriwash case. As a consequence, Ameriwash foreclosed on its lien on November 11, 2007, plaintiff lost possession of the property, and an order of sale was issued to the sheriff.

{¶ 5} On September 12, 2007, plaintiff instituted the instant action against defendants alleging fraud, breach of contract, and individual liability for corporate acts. Defendants filed a motion for summary judgment on April 30, 2008, which the trial court denied on July 1, 2008. Plaintiff then filed his own motion for summary judgment on May 2, 2008. The trial court, noting defendants' failure to oppose the motion, granted plaintiff's motion on July 1, 2008.

{¶ 6} The court also scheduled a hearing on damages for July 9, 2008. After the matter was continued pursuant to defendants' request, counsel for both parties appeared and agreed with the court that, rather than holding a hearing, the parties would submit briefs and exhibits on the issue of damages by August 8, 2008. The parties complied with these directives, and on October 24, 2008, the court awarded damages in the amount of \$137,519.72. The court also awarded attorney fees in the amount of \$17,370.70 plus interest and costs.

{¶ 7} Defendants now appeal the court's award of damages and present one assignment of error for our review. In their sole assignment of error, defendants argue that the trial court improperly awarded damages to plaintiff. First, defendants maintain that the damages awarded to the plaintiff were not directly and proximately

related to the cause of action advanced by plaintiff and on which plaintiff received judgment. Second, defendants assert that plaintiff did not sufficiently establish that the claimed damages were directly and proximately caused by the defendants' conduct. For the reasons that follow, we find appellants' arguments without merit.

{¶ 8} As a procedural matter, we note that an appellate court will not disturb a trial court's award of damages absent an abuse of discretion. *Roberts v. United States Fid. & Guar. Co.*, 75 Ohio St.3d 630, 634, 1996-Ohio-101, 665 N.E.2d 664. An abuse of discretion is more than an error of judgment, but instead, demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency," or an arbitrary, unreasonable, or unconscionable attitude. *Cronin v. Cal. Fitness*, Franklin App. No. 04AP-1121, 2005-Ohio-3273, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E.2d 748 and *Schafer v. Schafer* (1996), 115 Ohio App.3d 639, 642, 685 N.E.2d 1302.

{¶ 9} In the case at bar, the trial court granted plaintiff summary judgment on all three causes of action: breach of contract, fraud, and individual liability for corporate acts. Plaintiff notified defendants in his complaint that "as a direct and proximate result of Defendants' breaches, Plaintiff has suffered damages." Additionally, plaintiff indicated that "as a result of such false and fraudulent representations and promises, Plaintiff has suffered significant financial damages, and may also lose the Property."

{¶ 10} In a breach of contract action, compensatory damages are frequently classified as one of two types of damages: general damages and special damages.

General damages are those which “naturally and necessarily result from a wrongful act and which are directly traceable to, and the probable and necessary result of, injury caused by that act.” *Corsaro v. ARC Westlake Village, Inc.*, Cuyahoga App. No. 84858, 2005-Ohio-1982. Special damages are those which “do not follow as a necessary consequence of the injury complained of, though they may in fact naturally flow from it.” *Id.*

{¶ 11} In a fraud action, a plaintiff is entitled to recover as compensatory damages “such damages as will fairly compensate him for the wrong suffered, that is, the damages sustained by reasons of the fraud or deceit and which have naturally and proximately resulted therefrom.” *Foust v. Valleybrook Realty Co.* (1981), 4 Ohio App.3d 164, 166, 446 N.E.2d 1122. In any tort action, it is important to remember that the objective is to determine the “amount of money which will compensate and make whole the injured party.” *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St.2d 178, 184, 327 N.E.2d 654.

{¶ 12} In the instant matter, it is clear from the contract and the evidence presented by plaintiff that he was entitled to \$135,788.96.² Pursuant to the contract, plaintiff agreed to incur the delinquent property taxes, perform all necessary repairs in order to restore the land to compliance with all environmental laws, and assume

²We note plaintiff’s error in the calculation of his compensatory damages. The three forms of damages, i.e., rehabilitation, real estate taxes and commission, and transfer taxes totals \$135,788.96 not \$137,519.72. Therefore, we find the trial court erred in awarding plaintiff \$137,519.72. Therefore, we reverse with instructions to modify the court’s award to \$135,788.96.

the real estate commission. In return, defendants agreed to transfer title of the land to plaintiff and satisfy the Ameriwash lien on the property.

{¶ 13} Plaintiff performed his duties under the agreement. He presented evidence establishing that he paid \$120,585.32 to repair the property in order to comply with environmental laws. He also demonstrated that he paid \$11,811.94 for delinquent real estate taxes. Finally, as a result of his purchase of the property, plaintiff incurred \$3,391.70 in real estate commissions and transfer taxes.

{¶ 14} Defendants, however, failed to fully perform under the agreement. While they did relinquish property rights to plaintiff, they failed to defend in the Ameriwash case or otherwise satisfy the lien. As a result, Ameriwash foreclosed on the property and a sheriff's sale was to ensue. In the end, as the trial court determined by granting summary judgment in favor of plaintiff, plaintiff had expended \$135,788.96 pursuant to the purchase agreement but lost the property due to defendants' breach and fraudulent representation that they would satisfy the lien.

{¶ 15} \$135,788.96 properly compensates plaintiff for the defendants' breach of the purchase agreement because the award reflects the general damages suffered by plaintiff. The \$120,585.32 expended to repair the property, the \$11,811.94 paid for delinquent real estate taxes, the \$3,000 paid for the real estate commission, and the \$391 paid in transfer taxes are the losses that an ordinary person would anticipate as a result of the breach. These expenses were expressly detailed in the purchase agreement.

{¶ 16} The amount awarded also reflects compensatory damages for a tort cause of action, such as fraud. But for the fraudulent sale or defendants' fraudulent statements that it would defend or otherwise satisfy the Ameriwash lien, there would be no \$135,788.96 loss. The claimed damages were directly and proximately caused by the defendants' conduct.

{¶ 17} Furthermore, despite defendants' assertions to the contrary, plaintiff would not be adequately compensated for the defendants' breach by receiving the amount of the Ameriwash lien, or \$55,442 plus interest. Satisfying the lien was no longer an option for plaintiff. The property had already been foreclosed upon and the order of sale had been issued to the sheriff. Thus, the property was unretrievable to the plaintiff at the time the trial court determined the amount of damages. In light of the foregoing, defendants' argument regarding the court's award of compensatory damages is without merit.

{¶ 18} Finally, we find that the trial court erred in awarding plaintiff attorney fees. The Supreme Court of Ohio, as well as this court, has held that attorney fees are recoverable as part of compensatory damages only when punitive damages have been awarded. *Davis v. Tunison* (1959), 168 Ohio St. 471, 477, 155 N.E.2d 904; *Wilson v. Harvey*, 164 Ohio App.3d 278, 290, 2005-Ohio-5722, 842 N.E.2d 83. In *Digital & Analog Design Corporation v. North Supply Company* (1992), 63 Ohio St.3d 657, 662, 590 N.E.2d 737, 742, the Ohio Supreme Court provided that "the requirement that a party pay attorneys fees * * * is a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages. *

* * Without a finding of malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees, unless there is a basis for sanctions under Civ.R. 11.” Therefore, without an award of punitive damages, there can be no award of attorney fees. *Wilson v. Harvey*, supra; *Spalding v. Coulson* (1995), 104 Ohio App.3d 62, 78, 661 N.E.2d 197; see, also, *Tulloh v. Goodyear Atomic Corp.* (1994), 93 Ohio App.3d 740, 756-757, 639 N.E.2d 1203; *Henry v. Akron* (1985), 27 Ohio App.3d 369, 371, 501 N.E.2d 659.

{¶ 19} In the case sub judice, the court awarded compensatory damages but not punitive damages. Therefore, plaintiff was not entitled to attorney fees and the trial court erred in awarding these damages. Consequently, we reverse in part and remand for proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part and remanded.

It is ordered that appellants and appellee each pay their respective costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
KENNETH A. ROCCO, P.J., CONCURS IN JUDGMENT ONLY