[Cite as *Jain v. Omni Publishing, Inc.*, 2009-Ohio-5221.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92121

MOHAN JAIN DBA BUSINESS PUBLISHING

PLAINTIFF-APPELLANT

vs.

OMNI PUBLISHING, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-619295

BEFORE: Boyle, J., Gallagher, P.J., and Stewart, J.

RELEASED: October 1, 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).

MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Mohan Jain, appeals the trial court's order granting summary judgment in favor of defendants-appellees, Omni Publishing, Inc. and William Bornmiller (collectively "Omni"), on his claims for breach of contract and fraud. Because Jain cannot demonstrate that Omni breached its agreement or engaged in fraud, we find that the trial court properly granted summary judgment on these claims and affirm.

Procedural History and Facts

{¶ 2} In a well-written opinion, the trial court succinctly set forth the material undisputed facts as follows:

{¶ 3} "In late 2004, Omni placed an ad in the Wall Street Journal advertising a business opportunity. Omni was looking for someone to market community resource guides for new home buyers in set geographical areas. [Jain] answered the ad and was told that he could purchase the right to procure realtors who would receive and distribute the books at no cost to them or their clients. The books would be supported by advertising that plaintiff would sell to local merchants.

{¶ 4} "After initial discussions with Omni's marketing director and subsequent discussions with defendant William Bornmiller ("Bornmiller"), Omni's president, Omni agreed not to give this opportunity to anyone else in the state of Ohio. According to the complaint, [Jain] paid Omni $16,900 for the program, which

included the right to solicit advertising in Ohio, a training manual and samples of the books. Omni agreed to print the first one thousand books without charge to [Jain] once he had procured the distributing realtor and advertisers. [Jain] could purchase additional books from Omni as needed.

{¶ 5} "Omni sent [Jain] a letter and a written agreement. [Jain] was anxious to get started, so he wired the required funds to Omni who, at [Jain's] request, sent him the materials necessary to get started. However, [Jain] never signed or returned the written agreement. However, according to [Jain's] complaint, 'in or around June 2006 the plaintiff and the defendant merged their oral agreements into a contract.'

{¶ 6} "[Jain] formed a new corporation (not a party to this lawsuit) and hired an employee, Peter Wilson ("Wilson"), who began contacting realtors. At some point, Mr. Wilson contacted Mr. Bornmiller and asked for training. Mr. Bornmiller offered to come to Ohio to meet with [Jain] and Mr. Wilson without compensation as long as [Jain] paid his travel expenses. However, neither [Jain] nor Mr. Wilson scheduled or arranged any such meeting.

{¶ 7} "Neither [Jain] nor Mr. Wilson could convince any realtors to participate in the program. After several months, they abandoned the program. [Jain] asked Omni for a refund of the $16,900 he had paid for the program, the training manual, and the samples."

{¶ 8} Claiming that he was "duped" out of more than $16,000, Jain later commenced the underlying lawsuit against Omni and its president, Bornmiller, alleging numerous claims, including breach of contract and fraud. Omni and Bornmiller moved for summary judgment, attaching: (1) an affidavit from Bornmiller, (2) the written agreement that Omni had delivered to Jain, and (3) Jain's deposition testimony. The gravamen of their motion was that Jain could not establish a breach of contract because Omni fulfilled all of its obligations under the written agreement, which embodied the parties' understanding of the material terms with the exception of the governing-law provision. In support of this argument, Omni relied on Jain's deposition testimony attesting to this fact.

{¶ 9} Jain opposed the motion, arguing that the written agreement could not be binding because it contained an express provision that the "agreement shall not be binding or effective until accepted and executed by an officer of Omni Publishing, Inc., at its offices in St. Johns County, Florida." Jain, however, offered no evidence to overcome his deposition testimony or Bornmiller's affidavit that the written agreement embodied the material terms of the parties' oral agreement.

{¶ 10} In a detailed opinion, the trial court granted Omni and Bornmiller's motion for summary judgment, finding that Jain's claims lacked merit.

{¶ 11} Jain appeals, raising a single assignment of error:

{¶ 12} "The trial court erred in granting Appellees' motion for summary judgment."

{¶ 13} Although the trial court granted summary judgment against Jain on all of his claims, Jain challenges the court's decision as to his claims for breach of contract and fraud only. Accordingly, we limit our discussion to these two claims. See App.R. 12(A)(2).

Standard of Review

{¶ 14} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Northeast Ohio Apartment Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192. Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Duganitz v. Ohio Adult Parole Auth.* (1996), 77 Ohio St.3d 190, 191.

{¶ 15} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher*

v. Burt (1996), 75 Ohio St.3d 280, 292-293. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

Breach of Contract

{¶ 16} Jain argues that summary judgment was improper as to his breach of contract claim because genuine issues of material fact exist regarding the terms of the contract. He contends that the trial court erred in relying on the written agreement in determining whether Omni breached its obligations because such agreement did not contain all the material terms of the parties' oral agreement, namely, Omni's promise to negotiate the initial contracts with realtors. But the evidence presented below, including Jain's own deposition testimony, reveals otherwise.

{¶ 17} Jain testified that the written agreement attached to Omni's motion for summary judgment reflected all the material terms and conditions of the parties' oral agreement with the exception of the governing law provision. (Notably, neither party raised an issue regarding the governing law provision and the trial court applied Ohio law; thus, there is no issue involving this clause.) Bornmiller likewise stated in his affidavit the same: the written

agreement embodied all the material conditions and terms of the parties' oral agreement.

{¶ 18} Bornmiller further stated that he "offered to assist Jain's employees in their meetings with realtors at no compensation so long as [his] travel expenses were covered." But neither Jain nor his employees scheduled any meetings.

{¶ 19} Although Jain now argues that Bornmiller traveling to Ohio to assist with the meetings (at no expense to Jain) was a material term of their oral agreement – despite it not being stated in the written agreement – he failed to raise this argument below. See, e.g., *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220, overruled on other grounds in *Collins v. Sotka* (1998), 81 Ohio St.3d 506; *Maust v. Meyers Products, Inc.* (1989), 64 Ohio App.3d 310 (failure to raise an issue in the trial court waives a litigant's right to raise that issue on appeal). Nor did he rebut the evidence presented by Omni demonstrating that the written agreement embodied the parties' oral agreement. See *Whiteleather v. Yosowitz* (1983), 10 Ohio App.3d 272 (adverse party does have the responsibility of rebuttal and must supply evidentiary materials supporting his position). Thus, Jain failed to meet his burden and demonstrate that a genuine issue of material fact existed that precluded summary judgment. See *Dresher*, 75 Ohio St.3d at 293.

{¶ 20} Our review of the record reveals that Omni performed to the extent possible all of its obligations under the agreement. In exchange for Jain's payment, Omni delivered the training manual and sample books to Jain. Although Omni never published a booklet for Jain, it was not required to do so as provided under the agreement (and conceded by Jain) until Jain secured a relator and advertisements for the booklet. Jain never satisfied this condition precedent, thereby relieving Omni of its obligation to publish the booklets. See, e.g., *Ballard v. Cleveland*, 10th Dist. No. 02AP-485, 2002-Ohio-7202, ¶21; *Moody v. Ohio Rehab. Services Comm.*, 10th Dist. No. 02AP-596, 2002-Ohio-6965, ¶9 (if a condition precedent – an act or event that must occur before the contractual obligation to perform will become effective – is not fulfilled, the parties are excused from performing under the contract).

{¶ 21} Accordingly, based on the evidence in the record and Jain's failure to rebut such evidence, reasonable minds could only conclude that Omni performed its obligations under the contract to the extent possible and that Jain cannot establish a breach. Thus, his claim fails as a matter of law. See *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶18 (breach by the defendant is an essential element to a breach of contract claim).

{¶ 22} Finally, we also find that the trial court properly granted summary judgment as to the claim asserted against Bornmiller individually. The record

overwhelmingly demonstrates that Jain's agreement was with Omni and not its president, Bornmiller. Accordingly, no action can stand against him individually. See *Marhofer v. Bauer* (1995), 101 Ohio App.3d 194, 198 (officer acting in corporate capacity cannot be liable on breach of contract claim against the corporation).

Fraud

{¶ 23} Jain also argues that the trial court erred in granting summary judgment as to his claim of fraudulent misrepresentation. We disagree.

{¶ 24} To prevail on a claim for fraud or fraudulent misrepresentation, the complaining party must prove the following elements: "(a) a representation * * *, (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." *Russ v. TRW, Inc*. (1991), 59 Ohio St.3d 42, 49 (citations omitted).

{¶ 25} Jain raises four instances of fraudulent misrepresentations made by Omni that he relied on in entering the contract: (1) Omni's "business was conducted in-house"; (2) "Omni directly negotiated agreements with realtors"; (3) Bornmiller would personally travel to Ohio to negotiate the initial contracts with realtors on Jain's behalf at no cost; and (4) "Bornmiller represented that the written

agreement would be revised to reflect their agreed-upon terms." Jain, however, failed to plead these instances in his complaint or raise them in his brief in opposition. He therefore is precluded from raising them now on appeal. See *Maust*, 64 Ohio App.3d at 313-314. Indeed, Jain raises these arguments now, only after Omni demonstrated that Jain has no evidence to support his allegations of misrepresentations averred in the complaint.

{¶ 26} Moreover, even if Jain had preserved this argument for appeal, Jain's claims that Omni failed to negotiate the initial agreements with the realtors and travel at no cost to him are the basis of his breach of contract claim. A breach of contract, however, does not create a tort claim. *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1995), 115 Ohio App.3d 137, 151, citing *Wolfe v. Continental Cas. Co.* (C.A.6, 1981), 647 F.2d 705, 710. As reiterated by the Ninth District:

{¶ 27} "Generally, the existence of a contract action * * * excludes the opportunity to present the same case as a tort claim. A tort claim based upon the same actions as those upon which a claim of contract breach is based will exist independently of the contract action only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed." *Textron* at 151. (Internal citations and quotations omitted.)

{¶ 28} We find that based on the allegations of the complaint and the evidence in the record, Jain cannot prevail on his claim for fraudulent

misrepresentation as a matter of law. Accordingly, the trial court properly granted summary judgment.

{¶ 29} The sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR