

[Cite as *Messina v. Clawges*, 2010-Ohio-3311.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93323

BIAGIO J. MESSINA

PLAINTIFF

vs.

ROBERT D. CLAWGES, ET AL.

DEFENDANTS-APPELLEES

[Appealed by Jeffrey F. Slavin]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-686452

BEFORE: Blackmon, J., Kilbane, P.J., and Stewart, J.

RELEASED: July 15, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Jeffrey Slavin, as assignee of Biagio J. Messina, appeals the trial court's dismissal of his complaint against defendant Sheila Rose and assigns the following error for our review:

“I. The judgment of the trial court as to the granting of a motion to dismiss based upon the pleading was an abuse of discretion.”

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On March 17, 2009, Slavin, as assignee of Messina, filed an amended fraudulent conveyance complaint against Robert Clawges and Sheila Rose. In the complaint, Slavin alleged that Rose acquired real property located at 3303 East 55th Street, Cleveland, Ohio from Emogene Mourino. Slavin specifically alleged that Rose's acquisition of the subject property was a transfer to defraud the creditors of Clawges.

{¶ 4} In the complaint, Slavin did not allege that Rose received the purchase money from Clawges, or that it was Clawges's money that was used by Rose to purchase the property from Mourino, or that Clawges used Rose to obtain the property. Consequently, the trial court in viewing the four corners of the complaint dismissed it for failure to state a claim against Rose.

The lawsuit remains pending against Clawges and this appeal is a final order, under Civ.R. 54(B).

Motion to Dismiss

{¶ 5} In the sole assigned error, Slavin argues the trial court erred when it dismissed his complaint.

{¶ 6} Appellant's review of a ruling on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim presents a question of law. *Schiavoni v. Steel City Corp.* (1999), 133 Ohio App.3d 314, 317, 727 N.E.2d 967, citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523, 1996-Ohio-298, 668 N.E.2d 889. As such, our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Edmond v. Trio Invest. Group, L.L.C.*, 5thDist. No. 2008CA0014, 2008-Ohio-6583, citing *Greely v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981.

{¶ 7} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 605 N.E.2d 378, 1992-Ohio-73. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584.

{¶ 8} Slavin alleges that Rose acquired the subject property utilizing funds Clawges provided, thus the complaint of transfer was fraudulent. However, under Civ.R. 9(B), claims of fraud must be pled with particularity. *Williams v. Ohio Edison*, Cuyahoga App. No. 92840, 2009-Ohio-5702. In his complaint, Slavin does not allege any facts regarding the state of mind of the parties, nor does he state with any specificity the acts or series of acts Rose and Clawges allegedly engaged in so as to defraud him. As such, he cannot state a claim upon which relief may be granted. Accordingly, we overrule the sole assigned error.

Judgment affirmed.

It is ordered that appellees recover from appellant their 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR