[Cite as *Miller v. Coldwell Banker Hunter Realty*, 2010-Ohio-5840.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93529 and 93662

LAWRENCE W. MILLER, M.D., ET AL.

PLAINTIFFS-APPELLEES

vs.

COLDWELL BANKER HUNTER REALTY, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-589925

BEFORE: Boyle, J., Kilbane, P.J., and McMonagle, J.

RELEASED AND JOURNALIZED: December 2, 2010

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MARY J. BOYLE, J.:

{¶ 1} Defendants-appellants, Coldwell Banker Hunter Realty, Silvana DiBiase, and Anthony Colantuono (collectively "Coldwell Banker"), appeal from a judgment finding that Coldwell Banker was negligent in its professional duty and breached its fiduciary duty to plaintiffs-appellees, Lawrence and Karen Miller (collectively "Millers"), and awarding the Millers $126,858 in damages. Finding merit to the appeal, we reverse and remand.

Procedural History and Factual Background

{¶ 2} In June 2003, the Millers entered into a written agreement to sell their home to Tony and Nina Zappitelli for $525,500. The Millers selected Coldwell Banker to handle the sale of their home; DiBiase was their Coldwell Banker real estate agent. The Millers disclosed on the residential disclosure form that the only "flooding, drainage, settling or grading problems" they were aware of was "[d]uring recent tornado (Oct/Nov 2002) with heavy rain, some water came into the basement." They further disclosed on the form that the only issue they had with the basement was "mildew on certain basement joints," but that it had been "inspected, cleaned, removed, and sealed."

{¶ 3} Eight days after the Zappitellis took possession of the property and prior to moving in, they discovered that the basement of the home was flooded, "and the land surrounding the residence was engulfed in water several feet deep." *Zappitelli v. Miller*, 8th Dist. No. 85895, 2006-Ohio-279, ¶9. The Zappitellis also learned from neighbors that "this flooding and drainage problem had occurred many times" over the years. Id.

{¶ 4} In September 2003, the Zappitellis sued the Millers for fraudulent misrepresentation, alleging that the Millers "knew at the time of the sale that the property was subject to severe and unremediable flooding and drainage problems." Id. at ¶12.[1] Through discovery, the Zappitellis also discovered that less than one month prior to their purchase contract with the Millers, another

couple had entered into a purchase agreement with the Millers, but then rescinded because their home inspector had discovered the presence of active mold in Millers' basement. The Zappitellis further discovered that the Millers had received a mold report confirming the existence of active mold spores "in their basement within days prior to completing the residential property disclosure form." Id. at ¶11.

{¶ 5} Ultimately, the Zappitellis' case against the Millers proceeded to a jury trial in June 2004, where the jury found that the Millers "fraudulently concealed material defects affecting the property." The jury awarded the Zappitellis $134,500 in damages for fraud, breach of contract, and negligence. Id. at ¶4. The Millers appealed. See *Zappitelli v. Miller*, 8th Dist. No. 85895, 2006-Ohio-279. This court affirmed, except that we remanded "solely to establish the appropriate amount of attorney fees to be paid" to the Zappitellis.[2] Id. at ¶68.

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[1]The Zappitellis also sued Coldwell Banker but settled with them prior to trial.

[2]During deliberations, the jury had asked the court: "If we answer, no, to punitive damages, can we add money to compensatory damages to cover the attorney fees?" The trial court instructed the jury that they could not. We reversed the trial court, stating that this court "has recognized the long-standing principle of law that attorney fees are recoverable as compensatory damages in a tort action for fraud." The Ohio Supreme Court reversed this court, holding that only where punitive damages are awarded can "compensatory damages *** include attorney fees." *Zappitelli v. Miller*, 114 Ohio St.3d 102, 2007-Ohio-3251, 868 N.E.2d 968, ¶6.

{¶ 6} This court announced the *Zappitelli* decision in January 2006. In April 2006, the Millers filed the action below against Coldwell Banker alleging breach of fiduciary duty, negligence, and fraud. Coldwell Banker denied the allegations and raised a number of defenses, including the defense of collateral estoppel. Coldwell Banker further sought an offset of damages from the amount the Millers were ordered to pay the Zappitellis in the first action and a declaratory judgment that the Millers were already adjudicated intentional tortfeasors.

{¶ 7} In March 2007, Coldwell Banker moved for summary judgment based upon res judicata, or more specifically, collateral estoppel, which the trial court denied.

{¶ 8} The case proceeded to a jury trial in October 2008. The facts relative to this appeal established that DiBiase assigned some of her duties to Colantuono, her son-in-law and a licensed agent with Coldwell Banker. Colantuono handled an open house at the Miller residence for DiBiase in late April or May 2003. The Millers' neighbor, Denise Megalis, went to the open house and talked to Colantuono. Megalis testified, as she had in the Zappitelli trial, that the Millers' home had flooded in early April, "that touched the front of the Millers' home." Megalis asked Colantuono "you do know this home floods, right?" She further stated that she told him how "it flooded across the empty lot," beside the home, "up to the Millers' home, up over the air conditioning, ***

[and] up on the willow tree." She further stated that she told Colantuono the house might be worth the asking price "if you can take care of the flooding issues."

{¶ 9} DiBiase agreed that the information Megalis told Colantuono was "material information," i.e., "it's the kind of information that in your profession should be reported by the seller, and to the buyer." Colantuono said that although he knew the flooding information to be material, he did not tell anyone what Megalis had told him. Colantuono and DiBiase stated they believed Megalis may have been lying about the flooding incident.

{¶ 10} The Millers testified they had no idea about the April 2003 flood. In fact, they said they were not aware of it until Megalis testified about it at the Zappitelli trial. Lawrence Miller explained that at the time, he was working in New Orleans, Georgia, and Florida, so he was often away from home. But in early to mid April, the Millers were actually visiting their son, but said they were home during periods of late April. Lawrence Miller explained that he had hired a yard service to take care of their yard because they were not home very often, but no one from that company had reported any flood damage to him.

{¶ 11} The jury found Coldwell Banker negligent and further that it breached its fiduciary duty to the Millers, but was unable to reach a verdict on the Millers' fraud claim. The jury awarded the Millers $126,858 in damages. The Millers voluntarily dismissed their claim for fraud and related punitive

damages. It is from this judgment that Coldwell Banker appeals, raising four assignments of error for our review:

{¶ 12} "[1.] Given the prior adjudication of fraud against the Millers in *Zappitelli v. Miller*, the trial court erred in denying the Coldwell Banker defendants' motion for summary judgment, directed verdict, and judgment notwithstanding the verdict based upon the doctrine of collateral estoppel.

{¶ 13} "[2.] The trial court erred in denying the Coldwell Banker defendants' motion for judgment notwithstanding the verdict as R.C. 2307.25(A) precludes the Millers from seeking contribution for their intentional tortious conduct (fraud) as adjudicated in *Zappitelli v. Miller*.

{¶ 14} "[3.] The trial court erred in failing to grant the Coldwell Banker defendants a new trial based upon: (1) erroneous evidentiary rulings; and (2) the failure to instruct the jury on the doctrine of collateral estoppel.

{¶ 15} "[4.] The trial court erred in awarding prejudgment interest and certain litigation costs to the Millers as the awards were both premature and unwarranted."

Summary Judgment, Directed Verdict, and JNOV

{¶ 16} Coldwell Banker first argues that the trial court erred when it denied its motions for summary judgment, directed verdict, and judgment notwithstanding the verdict ("JNOV") based upon the doctrine of collateral estoppel or issue preclusion. Specifically, Coldwell Banker maintains that the

Millers should have been precluded from litigating "the issue of their knowledge of flooding at their residence" because it was fully litigated in the *Zappitelli* case.

{¶ 17} "The standard applicable to a motion for summary judgment, a directed verdict, and a motion for [JNOV] *** are the same. Each of the motions should only be granted if the movant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the non-movant." *Siebert v. Lalich*, 8th Dist. No. 87272, 2006-Ohio-6274, ¶14 (citing a string of cases).

{¶ 18} "The trial court does not weigh evidence or consider the credibility of the witnesses, but rather, reviews and considers the sufficiency of the evidence as a matter of law. We are to conduct a de novo review of the trial court's decisions on these motions." (Internal citations omitted.) Id.

Collateral Estoppel

{¶ 19} The Millers contend that collateral estoppel does not apply because "[t]he Zappitellis' action involved only the breach of the sellers' duties to their buyer, not the realtors' professional duties to their principal and client, the seller, the Millers." The Millers maintain that the questions in this case "were neither at issue nor decided in the Zappitelli case."

{¶ 20} The doctrine of res judicata can be divided into two subparts: claim preclusion and issue preclusion. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226. Under claim preclusion, a party who prevails in one action is precluded from relitigating the same cause of action against the same party. Id. at syllabus. Under issue preclusion, also known as collateral estoppel, the party is precluded from relitigating in a second action an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action. *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435, 692 N.E.2d 140, citing *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 112, 254 N.E.2d 10. But "[a] prior judgment will not be afforded res judicata effect where the later proceeding to which it is sought to be applied involved different issues and different parties." *Quality Ready Mix, Inc. v. Mamone* (1988), 35 Ohio St.3d 224, 520 N.E.2d 193, paragraph two of the syllabus. As with any question of law, our standard of review is de novo. See *Children's Med. Ctr. v. Ward* (1993), 87 Ohio App.3d 504, 508, 622 N.E.2d 692.

{¶ 21} The Ohio Supreme Court explained:

{¶ 22} "The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the

same parties or their privies, whether the cause of action in the two actions be identical or different. *** While the merger and bar aspects of res judicata have the effect of precluding the relitigation of the same cause of action, the collateral estoppel aspect precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action. *** 'In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit.'" (Citations omitted.) *Fort Frye Teachers Assn., OEA/NEA,* supra.

{¶ 23} In *Monahan v. Eagle Picher Industries, Inc.* (1984), 21 Ohio App.3d 179, 180-181, 486 N.E.2d 1165, the court explained that to be successful in a claim of collateral estoppel, a party must prove the following four elements:

{¶ 24} "(1) The party against whom estoppel is sought was a party or in privity with a party to the prior action;

{¶ 25} "(2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue;

{¶ 26} "(3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and

{¶ 27} "(4) The issue must have been identical to the issue involved in the prior suit."

{¶ 28} The first three elements of collateral estoppel are easily met. The parties against whom estoppel is sought — the Millers — were a party in the *Zappitelli* case. There was a final judgment on the merits in that case. The issue of whether the Millers knew about the flooding was tried and decided — they did, and they fraudulently concealed their knowledge of it.

{¶ 29} But the pivotal question in this appeal is whether the issue — the Millers' fraudulent actions — is identical to the issue in the present case, such that the Millers should have been precluded from relitigating it. We agree with Coldwell Banker that it is.

{¶ 30} The Millers sued their real estate agent for fraud, breach of fiduciary duty, and negligence.[3] The Millers argue that Coldwell Banker, through the actions of Silvana DiBiase and Anthony Colantuono, was liable for not disclosing the April 2003 flood information that Megalis told Colantuono at the open house. The Millers also maintain that Coldwell Banker was liable for not advising them to disclose the flood information on the seller's disclosure form.

{¶ 31} R.C. 4735.62 imposes a fiduciary duty upon a real estate licensee to "use the licensee's best efforts to further the interest of the client." The statute specifies, as relevant here, that the duty requires the

[3]We need not address the Millers' fraud claim because they voluntarily dismissed it after the jury could not reach a verdict on that issue.

agent to exercise "reasonable skill and care in representing the client and carrying out the responsibilities of the agency relationship." R.C. 4735.62(A). In addition, the agent must perform "all duties specified in this chapter in a manner that is loyal to the interest of the client." R.C. 4735.62(D). Finally, the agent must disclose to his or her client "any material facts of the transaction" of which the agent "is aware or should be aware in the exercise of reasonable skill and care and that are not confidential information pursuant to a current or prior agency or dual agency relationship." R.C. 4735.62(F). Similarly, Section 2, Article 7, of the Canons of Ethics for the Real Estate Industry, which the commission adopted pursuant to R.C. 4735.03(A), provides that licensees "should disclose all known material facts concerning a property on which the licensee is representing a seller or a purchaser to avoid misrepresentation or concealment of material facts." The statutory fiduciary duties established in R.C. 4735.62 may not be waived and are in addition to those under common law. See R.C. 4735.52 and 4735.621(A).

{¶ 32} A party asserting breach of fiduciary duty "must establish the existence of a fiduciary duty, a breach of that duty, and an injury proximately resulting therefrom." *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, 527 N.E.2d 1235.

{¶ 33} In a negligence case, the plaintiff must prove that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached the duty; (3) the plaintiff suffered harm; and (4) the harm was proximately caused by defendant's breach of duty. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265.

{¶ 34} Coldwell Banker does not dispute that it owed a duty to the Millers, nor does it dispute the fact that the flooding was material information. But they claim that "[t]he main legal issue raised in this appeal is whether the Millers should have been collaterally estopped from claiming they had no knowledge of the flooding and other problems at their residence."

{¶ 35} In both of these claims, the Millers had to prove that any harm he or she incurred was proximately caused by the defendant's breach of duty. In the *Zappitelli* case, the jury specifically found that the Millers fraudulently concealed "material defects affecting" their property, that they fraudulently concealed facts on the disclosure form, that they did this "with the intent" to mislead the Zappitellis, and that their fraudulent actions proximately caused the Zappitellis $94,500 in actual damages.[4]

[4]The jury also found that the Millers breached their contract with the Zappitellis, were negligent, and caused the Zappitellis damages for these claims too ($30,000 for breach of contract and $10,000 for negligence).

{¶ 36} This court, in overruling the Millers' manifest weight of the evidence challenge, explained:

{¶ 37} "In addition to the many significant genuine issues of material fact in this case, there was substantial evidence presented in the record demonstrating that the trial court's decision was proper. For example, neighbors provided testimony that flooding conditions were common knowledge in the neighborhood. Numerous pictures of the property and its surroundings with significant and dramatic flooding were admitted as evidence. Evidence was presented demonstrating that appellants tried to sell the property immediately before this transaction. However, the previous sale was rescinded because of mold. Appellants failed to disclose previous inadequate drainage, basement water leakage and the presence of active mold." *Zappitelli* at ¶31.

{¶ 38} After reviewing the record in this case, we conclude that Coldwell Banker could not be liable to the Millers for not disclosing to them "material facts of the transaction" (i.e., the flooding) when the Millers fraudulently concealed their knowledge of same. Further, Coldwell Banker could not have proximately caused the Millers' damages — for failing to disclose knowledge of the flooding to the Millers — when the Millers intended to mislead the Zappitellis about the flooding to induce them to purchase their home.

{¶ 39} We agree that Coldwell Banker was liable to the Zappitellis, along with the Millers, for failing to disclose the flood information to the Zappitellis.

Indeed, Coldwell Banker settled with the Zappitellis in the prior suit. But Coldwell Banker is not liable to the Millers for not disclosing information that the Millers themselves fraudulently concealed from the buyer.

{¶ 40} Coldwell Bankers' first assignment of error is sustained.

{¶ 41} Coldwell Banker asserts that if this court sustains its first assignment of error, then its remaining three assignments of error will be rendered moot. We agree. Accordingly, we need not address Coldwell Banker's remaining assignments of error.

{¶ 42} We reverse the jury's verdict and vacate the award of damages.

Judgment reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellants recover from appellees 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

CHRISTINE T. McMONAGLE, J., CONCURS;

MARY EILEEN KILBANE, P.J., DISSENTS WITH SEPARATE OPINION

MARY EILEEN KILBANE, P.J., DISSENTING:

{¶ 43} I respectfully dissent from the majority opinion and would affirm the jury's verdict and award of damages.

{¶ 44} In the instant case, DiBiase and Colantuono were aware that the Millers' home flooded, but failed to advise the Millers of the same. The majority bases its decision on the fact that the Millers failed to prove that the harm they incurred was proximately caused by the defendants' breach of duty. However, this ignores the jury's assessment of the credibility of the witnesses and its interpretation of the evidence. Here, the jury heard the evidence and found Coldwell Banker negligent and that it breached its fiduciary duty to the Millers. It was wholly within the province of the jury to decide in favor of the Millers. See *Wasserman v. The Home Corp.*, Cuyahoga App. No. 90915, 2008-Ohio-5477. Thus, I would affirm the jury's verdict and award of damages.