[Cite as *Wallington v. Hageman*, 2010-Ohio-6181.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94763

RONALD WALLINGTON, ET AL.

PLAINTIFFS-APPELLANTS

vs.

MICHELLE HAGEMAN, TRUSTEE OF THE ESTATE OF STELLA RADSCHUK

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-663245

BEFORE: Stewart, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 16, 2010

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MELODY J. STEWART, J.:

{¶ 1} Plaintiffs-appellants, Ronald and Charlotte Wallington (collectively referred to as "the Wallingtons"), appeal the trial court's grant of summary judgment in favor of defendant-appellee, Michelle Hageman, trustee of the Stella Radschuk Trust ("Hageman"). Upon review, we conclude that no genuine issues of material fact exist, and appellee is entitled to judgment as a matter of law. Accordingly, we affirm.

{¶ 2} This case involves the sale of a property located at 6175 Vernondale Drive, in Parma Heights, that was owned by the Stella Radschuk Trust. The original trustee was Hageman's grandmother, who had lived in the house until the summer of 2003 when health problems forced her to move. Upon her grandmother's death in 2005, Hageman became successor trustee.

Hageman never lived in the house and, in April 2007, listed the house for sale with Realty One.

{¶ 3} In November 2007, the Wallingtons entered into a purchase agreement to buy the property. The purchase agreement contained an "inspection contingency" clause, permitting the Wallingtons to have the home inspected before the purchase was completed. After the inspection, the Wallingtons had the option of terminating the agreement, negotiating with the seller to fix any problems, or accepting the property "as is."

{¶ 4} The Wallingtons arranged to have the home inspected by Affordable Inspections, a professional inspection company recommended to them by their realtor. The inspector was given complete access to the house for his inspection.[1] Ronald Wallington accompanied the inspector as he inspected the basement. Wallington stated in his deposition that he was pleased with the inspection. After the inspection was completed, the Wallingtons accepted the property "as is." The purchase agreement specified that the Wallingtons bought the property in its "'AS IS' PRESENT CONDITION."

{¶ 5} As part of the transaction, Hageman completed and gave the Wallingtons a Residential Property Disclosure Form. Hageman signed the

[1] The inspector was not given access to the garage, however, all parties agree there are no issues relating to the condition of the garage.

form as trustee. At the top of the form, in the space for "Owner's Name," Hageman wrote, "STELLA RADSCHUK TRUST (ESTATE) trustee has never lived in house." By her responses on the form, Hageman disavowed any actual knowledge of current or previous problems with water in the basement.

{¶ 6} The Wallingtons took possession of the property on December 10, 2007. In mid-January 2008, the Wallingtons discovered water accumulation in the basement. After attempting to fix the problem themselves with waterproofing paint, "water plugs," and concrete seal, the Wallingtons contracted with Ohio State Waterproofing to waterproof the basement at a cost of $13,500.

{¶ 7} In June 2008, the Wallingtons filed a complaint against Hageman for damages arising from "undisclosed defects" in the home that required "extensive repair work." The complaint alleged Hageman "mistakenly represented" a lack of knowledge regarding "previous or current water leakage, water accumulation, excess moisture or other defects to the property," "water or moisture related damage to floors, walls or ceilings," "any material problems with the foundation, basement/crawl space, floors, or interior/exterior walls," and "any repairs, alterations or modifications to control the cause or effect of any problem identified above" on the disclosure

form. The complaint further alleged that the Wallingtons were induced to purchase the property based upon Hageman's "mistaken representations."

{¶ 8} After discovery was completed, Hageman moved for summary judgment. She argued that she was entitled to a judgment as a matter of law since the Wallingtons could not prevail on a "mutual mistake of fact" claim. She also argued that the Wallingtons could not establish an intentional fraud claim and the Wallingtons' claims were barred by the purchase agreement in which they agreed to purchase the property in its "present physical condition." Hageman supported her motion with transcripts of Ronald Wallington's and Charlotte Wallington's deposition testimony, copies of the purchase agreement and disclosure form, and her own affidavit in which she stated that she had never lived in the home; was unaware of any problems in the home, including water intrusion problems, prior to this litigation; had never seen or spoken to the Wallingtons prior to the taking of their depositions; and, had completed the disclosure form with statements that were true to the best of her knowledge. The Wallingtons opposed summary judgment arguing that the pleadings indicated that there were material issues of fact as to whether Hageman lied concerning the representations made in the disclosure form. They supported their opposition with their own affidavits that detailed the problems they encountered after January 2008, and an affidavit from the foreman of the

Ohio State Waterproofing Company crew that worked on the basement who stated that, in his opinion, the problems he found at the property "did not develop overnight and probably took a number of years" to get to the point at which he found them.

{¶ 9} The trial court granted summary judgment to Hageman finding that the property was sold in its "present physical condition," the Wallingtons had full access to the property and had the house inspected by Affordable Inspections, and Hageman made no fraudulent representations to the Wallingtons.[2]

{¶ 10} The Wallingtons timely appeal raising as a single assignment of error that the trial court erred in granting summary judgment.

{¶ 11} This court reviews the granting of summary judgment under a de novo standard. We afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

{¶ 12} Summary judgment is appropriate if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a

[2]We note that while the trial court stated in its order that the property "had never been seen by the Defendant," the record reflects only that Hageman stated she had never lived in the house, not that she had never seen it. This misstatement, however, does not impact our de novo review.

matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Duncan v. Mentor City Council,* 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 13} The party moving for summary judgment carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264. "When a motion for summary judgment is made and supported as provided in Civ.R. 56, the nonmoving party may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing that there is a genuine triable issue." *State ex rel. Mayes v. Holman*, 76 Ohio St.3d 147, 148, 1996-Ohio-420, 666 N.E.2d 1132.

Fraud

{¶ 14} The Wallingtons argue that summary judgment is inappropriate on their fraud claim because Hageman made deliberately misleading and incomplete representations on the property disclosure form.[3]

{¶ 15} "The elements of fraud are: (a) a representation or, where there is a duty to disclose, concealment of a fact, (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." *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101, paragraph two of the syllabus. Regarding fraudulent concealment or nondisclosure, the Ohio Supreme Court has held that "a vendor has a duty to disclose material facts which are latent, not readily observable or discoverable through a purchaser's reasonable inspection." *Layman v. Binns* (1988), 35 Ohio St.3d 176, 178, 519 N.E.2d 642.

{¶ 16} The doctrine of caveat emptor precludes a purchaser from recovering for a structural defect in real estate if "(1) the condition

[3]Hagemen argues that the Wallingtons failed to state a claim for fraud with particularity in their complaint as required by Civ.R. 9(B). However, this issue was not raised below and Hageman moved for summary judgment on the Wallingtons' "somewhat vague" fraud claim in her motion for summary judgment. Accordingly, we will address the Wallingtons' claimed error on this issue.

complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser had the unimpeded opportunity to examine the premises, and (3) there is no fraud on the part of the vendor." *Layman* at syllabus.

{¶ 17} While the doctrine of caveat emptor still applies, R.C. 5302.30 requires sellers of real estate to disclose patent or latent defects that are within their actual knowledge on a residential property disclosure form. The statute requires that the disclosure be made in good faith, which "means honesty in fact in a transaction." R.C. 5302.30(A)(1). Pursuant to statute, "the form constitutes a statement of the conditions of the property and of information concerning the property *actually known* by the transferor; that, unless the transferee is otherwise advised in writing, the transferor, *other than having lived at or owning the property*, possesses no greater knowledge than that which could be obtained by a careful inspection of the property by a potential transferee[.]" R.C. 5302.30(D)(1) (emphasis added).

{¶ 18} If the seller fails to disclose a material fact on the disclosure form with the intention of misleading the buyer and the buyer relies on the form, the seller is liable for any resulting injury. *Pedone v. Demarchi*, 8th Dist. No. 88667, 2007-Ohio-6809, at ¶31, citing *Juan v. Harmon* (Mar. 5, 1999), 1st Dist. No. C-980587. However, "[w]hen a plaintiff claiming fraud in the sale of property has had the opportunity to inspect the property, he is charged

with knowledge of the conditions that a reasonable inspection would have disclosed." *Pedone*, at ¶33, citing *Nunez v. J.L. Sims Co., Inc.*, 1st Dist. No. C-020599, 2003-Ohio-3386.

{¶ 19} The Wallingtons fraud argument fails because they did not present any evidence that Hageman knew, or should have known, that the house had a water intrusion problem. Neither are the facts of this case such that knowledge of the problem may be inferred. The evidence showed that Hageman's grandmother lived in the house until 2003, the house was then empty until sold, and Hageman never lived in the house. The Wallingtons admitted in their depositions that they had no facts to support their belief that Hageman had knowledge of the water intrusion.

{¶ 20} In her deposition, Charlotte Wallington claimed Hageman must have known about the water problem because of the obvious "outward signs" of water problems in the basement. She described mold on the bottom of a dresser in the basement and skirts pinned up on basement furniture with mold on the bottom that was "so intense" the furniture had to be discarded. However, if these signs were sufficiently obvious as to put Hageman on notice of a water problem, they would also have been discoverable by a reasonable inspection.

{¶ 21} The Wallingtons cite to multiple cases in which summary judgment was reversed because issues of fact were found as to the seller's

fraud. However, these cases are easily distinguishable from the present case. In some of the cited cases, there was evidence that the sellers actively concealed a known defect. See *Felty v. Kwitkowski* (Nov. 2, 1995), 8th Dist. No. 68530 (an issue of fact existed as to whether seller intentionally hid a known defect in the foundation by constructing a second wall, ostensibly for a work bench, in front of the foundation); *Vitanza v. Bertovich* (Dec. 2, 1993), 8th Dist. No. 64699 (knowledge of a defect could be inferred where sellers freshly painted the basement walls and floor and represented to the buyers that the basement was free of water leakage); *Schulz v. Sullivan* (1993), 92 Ohio App.3d 205, 634 N.E.2d 680 (evidence showed the basement had flooded twice in the prior three years and the sellers had been advised by the municipal sewer district that the property's drainage system was inadequate). In others, summary judgment was improper because the record contained evidence that the defendant-seller made positive, fraudulent representations as to the condition of the property. See *Harris v. Burger* (Aug. 24, 1995), 8th Dist. No. 68303 (the seller had stated that the home was in "excellent condition," that there were no problems with the walk or foundation, and that two cracks in the rear basement wall had been repaired); *Shumney v. Jones* (July 2, 1992), 8th Dist. No. 63019 (seller told buyer that the basement had never leaked); *Lance v. Bowe* (1994), 98 Ohio

App.3d 202, 648 N.E.2d 60 (seller orally assured buyers that although the fruit cellar had water problems, the rest of the basement did not leak).

{¶ 22} In the instant case there is no evidence that Hageman took any positive action to conceal a defect or had made any representations to the Wallingtons about the condition of the property. Additionally, in the cases cited, the sellers had actual or inferred knowledge that came from years of living in the house prior to the sale. See, e.g., *Dinapoli v. Lewandowski* (Sept. 30, 1998), 9th Dist. No. 18897 (seller built and then lived in residence from 1964 to 1994).

{¶ 23} From the record, we find that the Wallingtons have not met their burden of showing that Hageman knowingly misrepresented or concealed latent defects for the purpose of defrauding them. Accordingly, there is insufficient evidence of fraud to create a genuine issue of material fact and Hageman is entitled to summary judgment with respect to the fraud claim.

Mistake of Fact

{¶ 24} The Wallingtons argue that if the trial court accepted Hageman's claim that she did not have knowledge of the true condition of the basement, the court should have found there was a mutual mistake of fact, thus permitting rescission or cancellation of the contract. In *Reilley v. Richards*, 69 Ohio St.3d 352, 352-353, 1994-Ohio-528, 632 N.E.2d 507, the Ohio Supreme Court held that a mutual mistake as to a material fact in a real

estate transaction is grounds to rescind such transaction absent the failure to exercise ordinary care to discover the mistake on the part of the party seeking the rescission.

{¶ 25} "A mistake is material to a contract when it is 'a mistake * * * as to a basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances.' 1 Restatement of the Law 2d, Contracts (1981) 385, Mistake, Section 152(1). Thus, the intention of the parties must have been frustrated by the mutual mistake." Id. at 353.

{¶ 26} In *Reilley*, the supreme court reversed the appellate court's decision and affirmed the trial court's finding of a mutual mistake and rescission of a real estate contract. Id. The court held that "the lack of knowledge that a significant portion of the lot is located in a floodway is a mistake of fact of both parties that goes to the character of the property such that it severely frustrates the appellant's ability to build a home on the property. Thus, it is a mutual mistake of fact that is material to the subject matter of the contract." Id.

{¶ 27} We find the holding of *Reilley* is not appropriate to the instant case. The evidence shows that after having the home inspected, the Wallingtons entered into a contract for the sale of the property "as is." Therefore, the Wallingtons cannot argue that the absence of water problems in the basement was a basic assumption upon which the contract was made.

Also, the claimed defects in the property as to water intrusion issues do not go to the character of the property, were not material to the completion of the contract, and did not frustrate either side's ability to complete the contract. Finally, the "outward signs" of a water problem identified by Mrs. Wallington should have, upon the exercise of ordinary care, alerted the Wallingtons and their home inspector to the possibility of water intrusion problems prior to completing the purchase. Accordingly, the trial court did not err in granting summary judgment to Hageman on the Wallingtons' mutual mistake of fact claim.

Judgment affirmed.

It is ordered that appellee recover of appellants her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County 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.

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MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR