

[Cite as *Wolk v. Wolk*, 2011-Ohio-1065.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94850

KATHERINE WOLK, ET AL.

PLAINTIFFS-APPELLANTS

vs.

FRANKIE PAINO, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-676102

BEFORE: Celebrezze, J., Stewart, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 10, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiffs-appellants, Katherine Wolk, et al. (collectively “appellants”),
appeal the decision of the common pleas court that granted summary judgment in favor of

defendants-appellees, broker Realty One, Inc. (“Realty One”) and buyer agent Beverly Lacy (“Lacy”) (collectively “appellees”). For the reason stated herein, we affirm.

Statement of Facts

{¶ 2} Appellants’ claims stem from a 2005 real estate transaction in which they purchased a house on Westlawn in Olmsted Falls, Ohio, from Frankie and Geralyn Paino.¹ The property was purchased with proceeds from the Amie M. Campbell Living Trust. The initial relationship between the parties began when Lacy became appellants’ real estate agent. Lacy’s real estate license was held by Realty One at the time of the transaction, making Realty One the buyer’s broker.² As trustee, Katherine Wolk (“Wolk”) was designated to act on behalf of appellants throughout the purchasing process. As such, Lacy dealt primarily with Wolk.

{¶ 3} At all times, Lacy understood that the property was going to be utilized as a primary residence by Amie L. Campbell, who was suffering from a life-threatening illness that caused unusual sensitivity to chemicals, dust, molds, and other common contaminants.

{¶ 4} Todd Besch, property manager and handyman, was directly involved in the decision-making process concerning appellants’ purchase of the property. Since 2002, Besch had been on a retainer of \$2,400 a month with appellants. Besch stated in an

¹The Painos filed for summary judgment on or about November 19, 2008, which was granted by the trial court on all counts. On appeal, this court affirmed that decision. *Wolk v. Paino*, Cuyahoga App. No. 93095, 2010-Ohio-1755.

²Realty One has since sold all of its assets to brokerage firm Howard Hanna.

affidavit that he walked through the property with two construction friends and detected an odor; however, no mold or moisture problems were discovered by Besch at that time. Prior to the purchase of the home, Besch expressed his opinion to Lacy that the purchase price was too high and that he needed more time to make additional inspections.

{¶ 5} On November 3, 2005, Lacy met with Wolk while she was on a lunch break from her place of employment. At that time, Lacy presented Wolk with the purchase agreement for the property. The purchase agreement contained a section regarding the purchaser's right to a professional home inspection. Lacy reviewed that section of the agreement with Wolk. In that section, Wolk, on behalf of appellants, put her initials on the line titled "Waiver," thereby waiving her right to a home inspection. The following day, Lacy returned to Wolk's place of employment, and Wolk executed the purchase agreement.

{¶ 6} Shortly after taking possession of the property, appellants began remodeling the house. At that time, Besch indicated that he found substantial mold and water intrusion within the walls of the bathroom, the ceiling, the attic, and under the air conditioner unit. Because of Amie Campbell's sensitivity illnesses, they were unable to live in the house for over a year while repairs were being made.

{¶ 7} On November 12, 2008, appellants filed a complaint containing six counts against several defendants; only two counts pertain to appellees. Appellants alleged causes of action against appellees for "Breach of Agency Contract — Fiduciary Duty" and civil conspiracy stemming from Wolk's purchase of a home for which Lacy was

Wolk's real estate agent. Specifically, appellants alleged that Lacy breached her fiduciary duty by failing to direct appellants to obtain a home inspection.

Procedural History

{¶ 8} On May 20, 2009, the parties filed an agreed motion setting a May 28, 2009 deadline for submission of expert reports, a July 10, 2009 deadline for appellees' motion for summary judgment, and an August 10, 2009 deadline for appellants' brief in opposition to summary judgment. Accordingly, appellees filed their motion for summary judgment on July 10, 2009. On July 13, 2009, appellants propounded their first set of discovery on appellees.

{¶ 9} On August 10, 2009, rather than submitting their brief in opposition, appellants sought assistance of the court by filing a motion for additional time to obtain discovery necessary for a proper response to appellees' motion for summary judgment. On August 26, 2009, the court partially denied appellants' motion, noting that they had not supported the motion with an affidavit as required by Civ.R. 56(F), and the evidence sought from discovery was not relevant to the issue before the court. The trial court instructed appellants to file their brief in opposition by September 4, 2009.

{¶ 10} Nevertheless, on September 2, 2009, appellants filed an additional motion for extension of time and a motion to compel. Subsequently, the court denied appellants' motion for extension of time and denied the motion to compel as moot. However, the court directed appellants to "notify the court if defendant's production of documents was insufficient." Appellants filed their brief in opposition, *instante*, on September 8, 2009.

{¶ 11} On September 28, 2009, appellants filed a motion for reconsideration of the motion to compel, arguing that Lacy had failed to sufficiently respond to discovery requests. In granting the motion, the court found that Lacy had not properly complied with appellants’ discovery requests and directed her to “do it right.”

{¶ 12} On December 1, 2009, appellants filed a motion to supplement evidence for their brief in opposition to summary judgment. Appellants attempted to supplement evidence of Lacy’s educational background as well as the deposition testimony of two witnesses, Martha Keene and Jackie Cassara. In denying the motions, the trial court held that Civ.R. 56(C) limits the evidence considered on summary judgment to authenticated material, and appellants failed to authenticate any of the evidence in a properly formed affidavit. Additionally, the court found that appellants’ motion to supplement was untimely based on their own delays in seeking discovery.

{¶ 13} On February 16, 2010, the court granted summary judgment in favor of appellees, finding that appellees had established that Lacy did advise appellants of their right to a professional inspection, and appellants failed to establish issues of material fact to refute appellees’ evidentiary submissions.

Law and Analysis

{¶ 14} Appellants raise eight assignments of error for our review.³ For ease of discussion, we will address them out of order and together where appropriate.

³ Appellant’s eight assignments of error are included in the appendix to this opinion.

I. Pretrial Discovery Issues

{¶ 15} Appellants' first, second, third, and fifth assignments of error relate collectively to pretrial discovery issues.

{¶ 16} A decision regarding the disposition of discovery issues is reviewed under an abuse of discretion standard. *Contini v. Ohio State Bd. of Edn.*, Licking App. No. 2007CA0136, 2008-Ohio-5710, ¶46. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "[A]bsent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues." *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 1998-Ohio-329, 692 N.E.2d 198.

Motion to Compel and Motion for Extension of Time

{¶ 17} Appellants argue that the court abused its discretion by denying their September 2, 2009 motion to compel discovery and motion for extension of time to respond to appellees' motion for summary judgment.

A. Motion to Compel

{¶ 18} In the September 2, 2009 motion to compel, appellants argued that the appellees failed to comply with discovery requests made on July 13, 2009. According to the appellants, those requests were "critical and necessary for the reply in opposition to defendants' motion for summary judgment." In Realty One's memorandum in opposition to plaintiffs' motion to compel, it indicated that all discovery requests were submitted to the appellants on September 2, 2009. Similarly, in Lacy's reply to

appellants' motion to compel, she indicated that she also complied with their discovery requests and that the information they sought from her was contained in her August 25, 2008 deposition.

{¶ 19} We find that the trial court did not abuse its discretion in denying appellants' motion to compel. In light of appellees' apparent compliance with the discovery requests, the court denied appellants' motion to compel as moot, but directed appellants to "notify the court if defendants' production of discovery was insufficient." In reviewing the motion, the trial court could not know the quality of the discovery provided to appellants at the time of its ruling and, therefore, appropriately provided appellants with an available option if the discovery was insufficient. This determination was well within the discretion of the trial court, and no prejudice to appellants has been established.

B. Motion for Extension of Time

{¶ 20} Simultaneous to the motion to compel, appellants filed a motion for extension of time with the trial court. They argued that it was "not fair or reasonable" to expect them to file a timely brief in opposition without receiving discovery from the appellees. Specifically, appellants sought discovery regarding training manuals and the names of two former Realty One employees.

{¶ 21} In denying the appellants' motion for extension of time, the trial court stated: "Plaintiff seeks the employment and training manuals in an attempt to establish evidence that defendants breached their fiduciary duty to plaintiffs. However, those

manuals cannot establish a common law duty, or breach therein, since the manuals do not create contractual obligations between Lacy and the plaintiffs. The only contractual obligations created, if any, would be between Realty One and Lacy, the contracting parties.”

{¶ 22} Generally, “[t]he decision whether to grant a motion for extension of time lies within the broad discretion of the trial court and will be reversed on appeal only for an abuse of discretion.” *Kupczyk v. Kuschnir* (July 27, 2000), Cuyahoga App. No. 76614, citing *Miller v. Lint* (1980), 2 Ohio St.2d 209, 404 N.E.2d 752. Here, the discovery of these materials was irrelevant and had no effect on the summary judgment analysis in this case. Accordingly, the trial court did not abuse its discretion in denying appellants’ motion for extension of time.

Motion to Supplement

{¶ 23} A trial court enjoys considerable discretion in the regulation of discovery matters. *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 668, 591 N.E.2d 752. A trial court’s grant or denial of a motion to supplement will not be overturned unless the court abuses its discretion. *Ridgeway v. State Med. Bd.*, Franklin App. No. 07AP-446, 2008-Ohio-1373.

{¶ 24} On November 6, 2009, appellants filed a motion to supplement their September 8, 2009 memorandum in opposition to summary judgment. The trial court denied the motion, finding it untimely and in violation of the requirements set forth in Civ.R. 56(C). Subsequently, appellants filed a second motion to supplement on

December 1, 2009, claiming that appellees failed to provided discovery materials relating to Lacy's continuing education materials, thereby forcing appellants to subpoena the material from a third party. Appellants contend that under Civ.R. 56(F), they are entitled to file supplemental briefs opposing summary judgment because the delay in obtaining the material through subpoena justifies late inclusion.

{¶ 25} Civ.R. 56(E) provides, in relevant part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. *Sworn or certified copies of all papers or parts referred to in an affidavit shall be attached to or served with the affidavit.* The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits." (Emphasis added.)

{¶ 26} This court has previously recognized that "[u]nder Civ.R. 56(E), the proper procedure for introducing evidentiary matters not specifically authorized by Civ.R. 56(C) is to incorporate them by reference in a properly framed affidavit." *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 515 N.E.2d 632. Only facts that would be admissible in evidence can be relied upon by the trial court when ruling on a motion for summary judgment. *Norman v. Honeywell, Inc.* (1995), 105 Ohio App.3d 658, 664 N.E.2d 1017. Submitted documents that are neither sworn, certified, nor authenticated by affidavit have no evidentiary value and are not to be considered by the

trial court in deciding a motion for summary judgment. *Blanton v. Cuyahoga Cty. Bd. of Elections*, 150 Ohio App.3d 61, 2002-Ohio-6044, 779 N.E.2d 788.

{¶ 27} In denying appellants' second motion to supplement, the trial court found that appellants failed to authenticate any of the documents attached to their brief in a properly framed affidavit. Civ.R. 56(C). We agree. The affidavit submitted by appellants made no reference to the authenticity or certification of the numerous documents attached to the supplement. Accordingly, appellants failed to "set forth such facts as would be admissible in evidence," as required by Civ.R. 56(E).

{¶ 28} Additionally, in its discretion, the trial court found appellants' subpoenas of Keene and Cassara to be untimely. We agree. The record indicates that the court set an August 8, 2009 deadline for filing a brief in opposition to summary judgment. However, appellants did not subpoena the two witnesses for deposition until August 17, 2009, one week after their brief was due. In fact, appellants made no effort to propound any discovery in this case until after appellees filed their motion for summary judgment.

{¶ 29} According to the trial court, "[t]his Court cannot countenance such piecemeal litigation. If those two depositions were needed to defend on summary judgment, Plaintiffs should have deposed them in a timely fashion rather than waiting until after Defendants filed their motions and Plaintiffs' own opposition was due." Considering this case was filed against appellees on November 12, 2008, approximately eight months before appellants' first discovery request was made, we find that the trial

court did not abuse its discretion in finding the motion to supplement untimely. Appellants' second assignment of error is overruled.

Katherine Wolk's Affidavit

{¶ 30} Appellants argue that the trial court erred when it struck a paragraph from Wolk's affidavit. The court deemed paragraph seven of the affidavit to be inconsistent with statements Wolk made during her deposition. Specifically, paragraph seven stated that Wolk only had 15 minutes to review and sign the purchase agreement for the property. In her deposition, however, Wolk testified that the purchase agreement was signed and initialed on two separate days.

{¶ 31} An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, at paragraph three of the syllabus. The trial court's grant or denial of a motion to strike is within the sound discretion of the court and will not be overturned unless the court abuses its discretion. *Early v. Toledo Blade* (1998), 130 Ohio App.3d 302, 720 N.E.2d 107.

{¶ 32} Here, Wolk did not provide the trial court with any explanation for her contradicting statements. The fact that she had a second opportunity to review the purchase agreement directly contradicts her statement that she only had 15 minutes to review the purchase agreement. This information is relevant and material to the appellants' position in this case. Accordingly, we find that the trial court did not abuse

its discretion in striking a portion of Wolk's affidavit. Appellants' third assignment of error is overruled.

Expert Reports

{¶ 33} Appellants next argue that the trial court erred in striking the expert report of Richard Markosky. As stated, a trial court may not consider evidentiary items unless the document is accompanied by "a personal certification that it is genuine or is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E)." *Bowmer v. Dettlebach* (1996), 19 Ohio App.3d 680, 672 N.E.2d 1081. In turn, a court abuses its discretion when it considers evidence that has been improperly submitted in support of, or in opposition to, a motion for summary judgment. *McPherson v. Goodyear Tire & Rubber Co.*, Summit App. No. 21499, 2003-Ohio-7190, ¶7.

{¶ 34} In striking Markosky's report, the trial court found that appellants failed to authenticate the report in a properly framed affidavit. The record indicates that, although appellants properly authenticated the reports of two other experts, they failed to do so for the Markosky report. Appellants provide no reasons for the inconsistency. Merely attaching the report to the brief in opposition, without a proper affidavit, does not meet the evidentiary requirements of Civ.R. 56(C) and (E). The trial court did not abuse its discretion in excluding Markosky's expert report. Appellants' fifth assignment of error is overruled.

II. Substantive Issues

Civ.R. 8

{¶ 35} Appellants argue that the trial court erred when it limited its review of the allegation that Lacy, as a realtor, should not have allowed her clients, appellants, to waive the home inspection. Specifically, appellants argue that in addition to Lacy's failure to require an inspection, the trial court should have considered other acts of Lacy's that constituted a breach of her fiduciary duty. We disagree.

{¶ 36} A plaintiff is required to set forth a short and plain statement showing she is entitled to relief. Civ.R. 8(A). The purpose of notice pleading is to notify a defendant of the allegations against him so that he might prepare a defense thereon. In their complaint, appellants narrowly limited their cause of action to the allegation that Lacy breached her duty by allowing Wolk to waive the inspection. By making the allegations in the complaint so specific, appellees were not put on notice of any other alleged breaches. Generally, a plaintiff cannot enlarge her claims during a defense to a summary judgment motion and is limited to the allegations of her pleading.

{¶ 37} Here, appellants specifically alleged in their complaint that the breach of fiduciary duty resulted from Lacy's "failure to fulfill her duties * * * by not having inspections completed to fully review the conditions of the house that would have resulted in discovering mold and other conditions that were defects in the property." However, for the first time in their brief in opposition, appellants attempt to assert additional ways the fiduciary duty was breached.

{¶ 38} We find that appellants are limited to the allegations of their complaint. They had the opportunity to amend their complaint and failed to do so in accordance

with the civil rules. As such, appellees were not properly put on notice of these additional allegations. Therefore, in our review of the trial court's summary judgment determination, we will only consider the issue of whether Lacy breached her fiduciary duty by allowing appellants to waive inspection rights.

Summary Judgment Review

{¶ 39} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 186, 2005-Ohio-4459, 833 N.E.2d 712. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 286, 2009-Ohio-2136, 912 N.E.2d 637.

{¶ 40} Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that “(1) no genuine issue of any material fact remains, (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 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, 2005-Ohio-2163, 826 N.E.2d 832, ¶9, citing *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. “[A] non-movant may not rest on the mere allegations or denials of his pleadings, but must set forth specific

facts showing that there is a genuine issue for trial.” *Chaney v. Clark Cty. Agricultural Soc.* (1993), 90 Ohio App.3d 421, 424, 629 N.E.2d 513.

{¶ 41} In order to show a breach of fiduciary duty, appellants must establish three essential elements: (1) the existence of a duty arising from a fiduciary relationship, (2) a failure to observe the duty, and (3) an injury resulting from the breach. *Evans v. Chambers Funeral Homes*, Cuyahoga App. No. 89900, 2008-Ohio-3554. A “fiduciary” has been defined as “a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.” *Strock v. Pressnell* (1998), 38 Ohio St.3d 207, 527 N.E.2d 1235.

{¶ 42} As a real estate agent, it is undisputed that Lacy had a duty to use her best efforts to further the interests of the clients by instructing them to obtain expert advice when necessary or appropriate. R.C. 4735.62. Appellants allege that appellees breached a fiduciary duty by allowing Wolk to waive the right to inspection when Lacy was aware that a person with unusual sensitivity to contaminants would be living in the home. We disagree.

{¶ 43} Appellees have provided evidence that demonstrates that appellants were sufficiently informed, in writing, about the right to an inspection and the consequences associated with waiving that inspection. Generally, “[p]arties to a contract are presumed to have read and understood them and * * * a signatory is bound by a contract that he or she willingly signed.” *Cheap Escape Co., Inc. v. Crystal Windows & Doors Corp.*,

Cuyahoga App. No. 93739, 2010-Ohio-5002, ¶17, citing *Preferred Capital, Inc. v. Power Eng. Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, 860 N.E.2d 741, ¶10.

{¶ 44} There is no dispute that Wolk willingly signed the purchase agreement. Lines 111 through 120 of the purchase agreement stated, in relevant part, “if a buyer does not elect inspections, Buyer acknowledges that Buyer is acting against the advice of Buyer’s agent and broker.” On line 123, Wolk knowingly placed her initials on the clause titled, in bold letters, “Waiver,” thereby waiving her right to any and all professional inspections on the property. Wolk’s signature is also found at the bottom of the page.

{¶ 45} Additionally, appellees provided the court with the “Agency Agreement”⁴ that the parties entered into prior to the purchase of the property. This agreement states, in relevant part, “neither Realty One nor my agent are qualified to inspect for or identify mold in any property that [buyer] may purchase” and “buyer may request a specific inspection for mold in any house that they are interested in purchasing.” After reviewing the agreement, Wolk gave her signature in acceptance of the agreement’s terms.

{¶ 46} The record indicates that Lacy read through each of these agreements with Wolk and that Wolk personally initialed her name in acceptance of each, without objection. Collectively, these agreements recommended that the buyer obtain a professional home inspection. In accordance with R.C. 4735.62, Lacy adequately

⁴Lacy dep. at 114:8-19, as the document was read at the deposition without objection, and the signature was acknowledged by Wolk.

advised Wolk of her rights to a home inspection and, as evidenced by her initials and signatures, Wolk voluntarily waived her rights to such inspections.

{¶ 47} We find that Lacy did not breach her fiduciary duty by allowing appellants to proceed with the purchase of the property without inspection. Accordingly, the trial court properly granted summary judgment in favor of appellees. Appellants' sixth assignment of error is overruled.

{¶ 48} Based on the disposition in this case, we overrule the remaining assignments of error as moot. See App.R. 12(A)(1)(c).

Judgment affirmed.

It is ordered that appellees recover from appellants 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.

FRANK D. CELEBREZZE, JR., JUDGE

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

APPENDIX

Appellant's assignments of error:

I. "The trial court erred in not granting the plaintiffs' first motion to compel and extension of time to file brief with requested outstanding discovery."

- II. “The trial court erred in not accepting the motion to supplement the exhibits, and transcripts as permitted under C.R. 56(E) [sic] and (F).”
- III. “The trial court erred in striking Kathy Wolk’s affidavit paragraph 7.”
- IV. “The trial court erred in limiting the claims of plaintiffs’ complaint under civil rules for pleading breach of fiduciary duty, negligence, and breach of contract.”
- V. “The trial court erred in excluding the expert reports.”
- VI. “The trial court erred in granting summary judgment and not recognizing Lacy breached her duties to protect Wolk’s [sic] interest in purchase.”
- VII. “Plaintiff had proper standing from damages to the trust.”
- VIII. “The relationship of Lacy and Realty One is a shared legal liability.”