[Cite as *Legg v. Ryals*, 2016-Ohio-710.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103221

VERONICA M. LEGG

PLAINTIFF-APPELLANT

vs.

SUSAN E. RYALS, P.O.A. FOR ELIZABETH TIDERMAN

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-824988

BEFORE: Keough, P.J., E.T. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: February 25, 2016

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. The purpose of an accelerated appeal is to allow the appellate court to render a brief and conclusory opinion. *Crawford v. Eastland Shopping Mall Assn*., 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983); App.R. 11.1(E).

{¶2} Plaintiff-appellant, Veronica Legg ("Legg"), appeals the trial court's decision granting summary judgment in favor of defendant-appellee, Susan E. Ryals, as Power of Attorney for Elizabeth Tiderman ("Ryals"). For the reasons that follow, we affirm.

{¶3} Legg brought suit against Ryals, alleging actions for fraudulent inducement, fraud, and mutual mistake of fact. The claims arise from a 2013 sale and purchase of real estate where Legg, as purchaser, alleged that Ryals, as seller, failed to disclose water intrusion and accumulation in the basement.

{¶4} After discovery was completed, Ryals moved for summary judgment, contending that no genuine issue of material fact existed and she was entitled to judgment as a matter of law because Legg purchased the property "as is" despite being aware of potential water intrusion problems. Legg opposed summary judgment, claiming that the pleadings indicated that material issues of fact existed regarding whether Ryals "lied" concerning the representations made in the Ohio Residential Property Disclosure form.

{¶5} The trial court granted summary judgment in favor of Ryals. Legg now appeals, arguing in her sole assignment of error that the trial court erred in its decision.

{¶6} An appellate court reviews a decision granting summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is properly granted when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. Civ.R. 56(C); *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 672 N.E.2d 654 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), the nonmoving party must set forth specific facts demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996).

{¶7} Before addressing the merits of the case, we note that this court has repeatedly addressed and rejected the exact arguments raised by Legg in factually similar cases. *See Lewis v. Marita*, 8th Dist. Cuyahoga No. 99697, 2013-Ohio-5431; *Wallington v. Hageman*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181; *Yahner v. Kerlin*, 8th Dist. Cuyahoga No. 82447, 2003-Ohio-3967. However, Legg fails to distinguish, let alone cite to these cases. Furthermore, Legg fails to make any argument on appeal why the trial court's decision was in error; she merely recites her opposition to Ryals's summary judgment motion that was filed in the trial court.

{¶8} Based on our de novo review of the record, the relevant case law, and viewing the evidence in the light most favorable to Legg, we find that the trial court

properly granted summary judgment in favor of Ryals on Legg's claims for fraudulent inducement, fraud, and mutual mistake of fact.

{¶9} In *Wallington*, this court set forth the relevant and applicable case law when addressing fraud claims where it is alleged that the seller of real estate made "deliberately misleading and incomplete representations on the property disclosure form." *Wallington* at ¶ 14. *See* Legg's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 5-6; Legg's Appellate Brief, p. 7 (alleging that the seller of real estate made "deliberately misleading and incomplete representations on the property disclosure form").

> "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.
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> The doctrine of caveat emptor precludes a purchaser from recovering for a structural defect in real estate if "(1) the condition 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.
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> 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).
>
> 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. [Cuyahoga] No. 88667, 2007-Ohio-6809, at ¶ 31, citing *Juan v. Harmon* (Mar. 5, 1999), 1st Dist. [Hamilton] No. C-980587, 1999 Ohio App. LEXIS 833. 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. [Hamilton] No. C-020599, 2003-Ohio-3386.

Id. at ¶ 15-18.

{¶10} In this case, Legg alleges in her complaint that Ryals failed to disclose her full knowledge of defects in the home. However, no evidence was presented that Ryals failed to disclose any material fact or property defect with any intention of misleading Legg.

{¶11} The documents presented by Ryals in support of her motion for summary judgment evidenced that Ryals disclosed on the property disclosure form that there

was"minor leakage during very heavy rains near sump pump area." According to Ryals, she only noticed water near the sump pump when she was cleaning the house for sale.

{¶12} Legg has not provided any evidence to demonstrate the existence of a genuine issue of material fact that Ryals knew, or should have known, that the house had a water intrusion problem. In fact, Legg admitted at deposition that she had no evidence to support her belief that Ryals had knowledge of the water intrusion problems. But Legg believed Ryals should have known about any water issues because Ryals previously lived in the home and visited with her mother, the owner of the home. However, Ryals had not lived in the home since 1974 and was only acting in a representative capacity for her mother at the time of sale. Furthermore, Ryals's mother had not lived in the home for over two and one-half years prior to the sale. Maureen Wlodarczyk, Legg's real estate agent, testified at deposition that at the time of sale, the home was vacant. Therefore, according to the record, Ryals had no actual or inferred knowledge of defects that would have arisen from living in the house that would warrant disclosure.

{¶13} Legg was also afforded a full opportunity to inspect the home prior to sale. In fact, a general home inspection was performed where both Legg and and her son, Charles, were present. In the inspection report, the inspector stated:

> Stains were observed in the basement area. This is a positive indication that there has been some water intrusion into the basement. The amount of water may vary from season to season. We recommend further evaluation by a qualified waterproofing contractor.

Moreover, after the inspection, Legg visited the home with a friend while Ryals was there cleaning the house. Legg stated that she asked Ryals about water in the basement, and

Ryals told her that there was "water in the corner by the sump pump." Despite the representations and the inspector's report, Legg removed any sale contingencies from the purchase agreement and proceeded to purchase the home "as is."

{¶14} In light of the foregoing, Legg's assertion that she was entitled to justifiably rely upon Ryals's disclosure form is indefensible and her fraud claims must fail. After receiving the inspector's report indicating there was evidence of water intrusion problems and recommending further evaluation, Legg could not reasonably and justifiably rely on the representation set forth in the property disclosure form. Legg's fraud argument further fails because she did not present any evidence that Ryals knew, or should have known, that the basement had water intrusion problems.

{¶15} In the absence of fraud, Legg is precluded from recovering for damage caused by any defects because she purchased the home "as is." *See Wallington*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, at ¶ 16, citing *Layman*, 35 Ohio St.3d 176 at syllabus, 519 N.E.2d 642.

{¶16} Legg testified at deposition that she personally observed the basement conditions when she and her friend visited the home prior to the closing date. Additionally, Charles stated at deposition that he "looked around" the basement when the realtor initially showed them the home. Finally, both Legg and Charles admitted that they were present for the home inspection where the inspector reported that evidence of water intrusion existed in the basement and he recommended that the basement be further evaluated by a waterproofing contractor. Legg did not seek further evaluation, but

instead, removed all the contingencies from the purchase agreement and proceeded to purchase the home "as is." Because Legg personally observed the basement and had an inspection performed on the residence prior to purchase, any defects in the home were open, obvious, and discoverable by a reasonable inspection. *See Wallington* at ¶ 16, citing *Layman* at 178.

{¶17} Accordingly, Legg has failed to withstand her burden of identifying a genuine issue of material fact that Ryals knowingly misrepresented or concealed latent defects for the purpose of defrauding her; thus, the doctrine of caveat emptor precludes Legg's claims for fraudulent inducement and fraud. The trial court did not err in granting summary judgment on these claims.

{¶18} Summary judgment was also properly granted on Legg's claim for mutual mistake of fact. Ohio recognizes the doctrine of mutual mistake of fact as a ground for rescinding a real estate contract where: (1) there is a mutual mistake as to a material fact in the contract; and (2) the complaining party is not negligent in failing to discover the mistake. *Reilly v. Richards*, 69 Ohio St.3d 352, 352-353, 632 N.E.2d 507 (1994), citing *Irwin v. Wilson*, 45 Ohio St. 426, 15 N.E. 209 (1887). "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." *Reilly* at 353.

{¶19} In *Wallington*, this court held that where there is an "as is" clause in the executed purchase agreement followed by a professional inspection of the property, a buyer cannot argue that the absence of water problems in a basement was "a basic assumption under which a contract was made." *Wallington*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, at ¶ 27.

{¶20} In this case, just like in *Wallington*, Legg had actual knowledge, by virtue of the general inspection, of potential water intrusion problems in the basement. Nevertheless, Legg agreed to proceed with the purchase of the home "as is," without further evaluation by a waterproofing company as recommended. Because Legg was on notice, she cannot reasonably claim that there was a mutual mistake regarding any water intrusion problems. Accordingly, there is no genuine issue of material fact to be litigated on Legg's mutual mistake cause of action.

{¶21} Therefore, the trial court did not err in granting Ryals's motion for summary judgment. Legg's assignment of error is overruled.

{¶22} Judgment affirmed.

It is ordered that appellee 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR