[Cite as *Hendry v. Lupica*, 2018-Ohio-291.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105839

ANGUS HENDRY, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CHARLES M. LUPICA, III, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-851138

BEFORE: Celebrezze, J., E.T. Gallagher, P.J., and Jones, J.

RELEASED AND JOURNALIZED: January 25, 2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Angus Hendry, seeks to reverse the grant of summary judgment in favor of appellees, Charles M. and Christina S. Lupica. Hendry claims the trial court erred in granting summary judgment disposing of his claims arising from his purchase of a home from the Lupicas. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} In 2015, Hendry purchased a home in Olmsted Falls, Ohio from the Lupicas. As part of that process, the Lupicas filled out a residential property disclosure form. That form disclosed dampness and previous water damage in the basement. Hendry also had the home inspected by a professional inspector. The inspection report listed several issues with the basement, including foundation wall cracks, holes in the foundation wall, and signs of apparent water infiltration. The report also noted that the condition of the foundation was poor, and prompted Hendry to follow up with the sellers and other professionals about these issues prior to completing the purchase. Instead, Hendry obtained a reduction in the sale price and completed the purchase without further inquiry regarding the basement. Shortly after the sale was finalized in June 2015, Hendry began to experience water infiltration in the basement when it rained. He hired a waterproofing company to repair the foundation and fix water infiltration issues at significant cost.

{¶3} Hendry then filed suit against the Lupicas in September 2015, alleging fraudulent inducement, fraud, and mutual mistake, and requesting compensatory and punitive damages, or for rescission of the contract.

{¶4} The case survived motions to dismiss and for judgment on the pleadings filed by the Lupicas. Then, the Lupicas filed a motion for summary judgment and a renewed motion for sanctions in February 2017, which Hendry opposed. The trial court granted the Lupicas' motion for summary judgment in April 2017. However, the court set the Lupicas' motion for sanctions for a later hearing. Before that hearing took place, Hendry filed his notice of appeal, assigning two errors for review:

> 1. The trial court's decision to grant the [Lupicas'] motion for summary judgment constitutes reversible error.
>
> 2. The trial court's decision to grant the [Lupicas'] renewed motion for sanctions constitutes reversible error.

II. Law and Analysis

A. Summary Judgment

{¶5} Hendry first argues that the court erred in granting summary judgment in favor of the Lupicas because Hendry relied on false or incomplete responses the Lupicas made on a residential disclosure form.

1. Standard of Review

{¶6} The grant of summary judgment in favor of the Lupicas pursuant to Civ.R. 56(C) is reviewed de novo. *Beswick Group N. Am., L.L.C. v. W. Res. Realty, L.L.C.*, 8th Dist. Cuyahoga No. 104330, 2017-Ohio-2853, ¶ 12. That is, this court conducts an

independent review of the record and arrives at its own conclusions. *Id*. It is only where it is apparent from the appropriately submitted evidence and arguments that no material question of fact remains in dispute and a party is entitled to judgment as a matter of law that summary judgment is appropriate. *Camardo v. Reeder*, 8th Dist. Cuyahoga No. 80443, 2002-Ohio-3099, ¶ 11. The evidence must be viewed in a light favorable to the nonmoving party, and all reasonable inferences must be afforded to that party. *Id*.

2. Fraudulent Inducement and Fraud

{¶7} In the present context, this court has previously set forth the elements of fraud:

> "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.
>
> 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 [seller]." *Layman* at syllabus.
>
> 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 [seller]; that, unless the [buyer] is otherwise advised in writing, the [seller], 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 [buyer.]" R.C. 5302.30(D)(1).
>
> 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.

Wallington v. Hageman, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, ¶ 15-18. *See also Legg v. Ryals*, 8th Dist. Cuyahoga No. 103221, 2016-Ohio-710, ¶ 9.

{¶8} In *Legg*, this court analyzed the evidence and determined that the buyer presented no evidence that the seller had knowledge of any undisclosed water infiltration in the basement of a home. That is not the same as the present case. Here, the Lupicas admitted in their deposition testimony that they had knowledge of water infiltration in the basement of the home during rains. However, that does not sufficiently distinguish the cases. This court went on in *Legg* to note that the home inspector identified possible water issues in the basement and advised the buyer to consult a basement specialist. *Id*. at ¶ 16. Further, there was no indication of concealment of a defect through physical means, and that any issues in the basement were able to be discovered through reasonable inspection, and in fact were discovered. *Id*.

{¶9} Here, for summary judgment purposes, we assume the Lupicas failed to disclose the extent of water infiltration they experienced while living in the home. During deposition testimony, the Lupicas admitted that there were four or five occasions when some water leaked into the basement from the walls and went down the floor drains. This could constitute a material fact that the Lupicas failed to disclose on the residential disclosure form. They only disclosed some dampness and some water damage that occurred prior to their ownership of the home. However, more is required for Hendry to assert a successful claim against them.

{¶10} Just as in *Legg*, Hendry had actual knowledge of water infiltration in the basement through the property inspection. This notice came prior to the purchase of the home.

{¶11} Hendry acknowledges that the property inspection report includes notifications regarding the basement. The home inspection report described the foundation walls as in poor condition, and the home inspector identified large cracks and holes in the foundation walls, water stains, and signs of moisture. The home inspection report listed large cracks in the basement walls as a major concern. The report further advised Hendry to consult a basement specialist before completing the purchase of the home. Rather than doing that, during the negotiation of the purchase agreement, Hendry submitted a revised offer that requested that the Lupicas repair, among other things, cracks and holes in the foundation. Upon further negotiation, that request was removed

in exchange for a reduction in the purchase price. Hendry knew or could have found through reasonable inspection the extent of the issues with the basement of the home.

{¶12} The cases cited by Hendry all include some intentional concealment of problems in the home. *Southworth v. Weigand*, 8th Dist. Cuyahoga No. 80561, 2002-Ohio-4584 (damages concealed by carpet, wallpaper, paint, and cosmetic repairs); *Ferguson v. Cadle*, 5th Dist. Richland No. 2008 CA 0077, 2009-Ohio-4285 (undisclosed repair work not capable of being discovered during reasonable inspection); *Felty v. Kwitkowski*, 8th Dist. Cuyahoga No. 68530, 1995 Ohio App. LEXIS 4834 (Nov. 2, 1995) (seller erected a half wall ostensibly to conceal the fact that a support wall was built without a proper foundation); *Harris v. Burger*, 8th Dist. Cuyahoga No. 68303, 1995 Ohio App. LEXIS 3465 (Aug. 24, 1995) (numerous cracks throughout the house were covered by plaster, wallpaper, paint, and caulk); *Shumney v. Jones*, 8th Dist. Cuyahoga No. 63019, 1992 Ohio App. LEXIS 3463 (July 2, 1992) (finding a material question of fact when testimony about water intrusion differed completely from each side without determining whether a fraudulent representation occurred); *Vitanza v. Bertovich*, 8th Dist. Cuyahoga No. 64699, 1993 Ohio App. LEXIS 5730 (Dec. 2, 1993) (water intrusion in the basement was not open or reasonably discoverable during inspection); *Dinapoli v. Lewandowski*, 9th Dist. Summit No. 18897, 1998 Ohio App. LEXIS 4610 (Sept. 30, 1998) (appellant failed to file a transcript with the trial court so it could properly rule on objections to a magistrate's decision, and the court of appeals affirmed on those grounds).

{¶13} Hendry claims that there was intentional concealment in this case because the Lupicas painted "the play room" in the basement in December 2014. (Depo. of appellees at 34-35.) In a case where the seller painted the basement walls of a home three to five times just prior to the sale, the Fifth District Court of Appeals found this sufficient to constitute an act of concealment as an element of a fraud claim in the sale of a home. *Meadows v. Otto*, 5th Dist. Stark No. 2006CA00138, 2007-Ohio-4031. In that case, however, the home inspection noted fresh paint everywhere in the basement, but did not disclose any issues with the basement. *Id.* at ¶ 6. Similarly, where freshly painted basement walls were found to constitute concealment, the extent of the issues with the basement, including the development of significant mold, were not disclosed in a home inspection. *Nichols v. Petroff*, 5th Dist. Stark No. 2004CA00271, 2005-Ohio-481.

{¶14} Given the disclosure of significant issues with the basement walls in the home inspection report, the painting of the wall in the play area of the basement did not materially conceal the extent of the problem. Water stains, cracks, holes, and other damage were still evident during the inspection and included in the home inspection report. Without some material concealment that prevented Hendry from reasonably inspecting the basement, the cases he relies on are not helpful.

{¶15} Hendry makes much of the fact that the Lupicas did not check two boxes related to questions involving the basement on the residential disclosure form. However, those questions asked about whether conditions existed, and if they did to explain further

on the lines provided. While the Lupicas did not check a "yes" or "no" box, they did go on to describe issues as if the boxes were checked "yes."

{¶16} Further, given that issues were disclosed in the home inspection report, Hendry could not justifiably rely on the failure to check either box. The lack of justifiable reliance in this case leads us to the same conclusion as the trial court: The Lupicas are entitled to judgment as a matter of law. Therefore, the trial court did not err in granting summary judgment in favor of the Lupicas on Hendry's fraud and fraudulent concealment claims.

3. Mutual Mistake

{¶17} Hendry also claimed he was entitled to cancel the sale based on a mutual mistake of fact. The Ohio Supreme Court has held that a mutual mistake as to a material fact in a real estate transaction is grounds to rescind the transaction where a party is not negligent in failing to discover the mistake. *Reilley v. Richards*, 69 Ohio St.3d 352, 352-353, 632 N.E.2d 507 (1994). A mutual mistake 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.'" *Id.*, quoting 1 Restatement of the Law 2d, Contracts, Mistake, Section 152(1) (1981).

{¶18} As the trial court found, Hendry was aware of evidence of water infiltration at the time of the purchase. There is no basis to conclude that the lack of water infiltration in the basement was a basic assumption on which the contract was founded.

Therefore, the trial court did not err in granting summary judgment to the Lupicas on this claim.

{¶19} Hendry's first assignment of error is overruled.

B. Sanctions

{¶20} In his second assignment of error, Hendry claims that the court erred in setting a hearing on Lupicas' motion for sanctions. However, the court has not granted a motion for sanctions. Therefore, the claim is not yet ripe for review.

{¶21} A motion for sanctions is a demand for collateral relief separate from the underlying action. *Foland v. Englewood*, 2d Dist. Montgomery No. 22940, 2010-Ohio-1905, ¶ 21, citing *Miami Valley Hosp. v. Payson*, 2d Dist. Montgomery No. 18736, 2001 Ohio App. LEXIS 5463 (Dec. 7, 2001). There is a distinction that must be recognized between a claim for attorney fees set forth in a complaint and a motion for sanctions made pursuant to Civ.R. 11. *Dailey v. State Farm Mut. Auto. Ins. Co.*, 2d Dist. Montgomery No. 14732, 1994 Ohio App. LEXIS 4359, 7 (Sep. 27, 1994), citing *Harris v. S.W. Gen. Hosp*., 84 Ohio App.3d 77, 85, 616 N.E.2d 507 (8th Dist.1992).

{¶22} Hendry's second assignment of error is from a theoretical decision of the trial court that is yet to be made. It is not from a final order capable of invoking this court's jurisdiction. Therefore, we decline to address the second assignment of error.

III. Conclusion

{¶23} The trial court did not err in granting summary judgment in favor of the Lupicas where Hendry had notice of the basement issues sufficient to trigger a duty to

investigate further. Also, because no decision has been made on the motion for sanctions, this court cannot review that assigned error.

{¶24} Judgment affirmed.

It is ordered that appellees recover of appellant 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 common pleas 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

EILEEN T. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR