

[Cite as *Gindlesperger v. Starcher*, 2009-Ohio-2676.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DAVID GINDLESBERGER, et al.

C. A. No. 24421

Appellants

v.

CHARLES STARCHER, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 07 08 5582

Appellees

DECISION AND JOURNAL ENTRY

Dated: June 10, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} Three months after David and Mary Gindlesperger bought a house from Charles and Linda Starcher, they saw water on a basement wall. When there was more water and a foul smell in the basement the following spring, they hired a waterproofing company and sued the Starchers for the cost of the repairs. The Gindlespergers alleged that the Starchers misrepresented whether the house had water or moisture problems and concealed evidence of those problems. A magistrate found in favor of the Starchers, and the trial court overruled the Gindlespergers’ objections to his decision. This Court affirms because the trial court’s decision was not against the manifest weight of the evidence.

FACTS

{¶2} In May 2006, the Gindlespergers bought a house from the Starchers. Although the purchase agreement provided that the house was sold “AS IS,” the Starchers also signed a

residential property disclosure form, affirming that they did not know of any material defects with the property. Regarding “WATER INTRUSION,” the Starchers wrote that they did not “know of any previous or current water leakage, water accumulation, excess moisture or other defects to the property, including but not limited to any area below grade, basement, or crawl space[.]” They also wrote that they did not “know of any water or moisture related damage to floors, wall, or ceilings as a result of flooding; moisture seepage; moisture condensation; ice damming; sewer overflow/backup; or leaking pipes, plumbing fixtures, or appliances[.]”

{¶3} In August 2006, the Gindlespergers saw that some water had seeped through a wall of the basement and collected near the hot water tank. They did not have any other problems with water in the basement until March 2007, when they noticed a strong sewage-type odor coming from the fruit cellar. When they removed the wooden floor of that room, they discovered that there was an inch of standing water. They also saw discoloration on each of the basement walls.

{¶4} The Gindlespergers hired a waterproofing company to install drain lines in the basement and around the exterior of the house. The waterproofing company also treated mold that was growing on the basement walls. The Gindlespergers sued the Starchers for the cost of the repairs, alleging that the Starchers had fraudulently misrepresented whether the house had any water intrusion problems and fraudulently concealed those problems by painting the walls of the basement before selling the house.

{¶5} The trial court assigned the Gindlespergers’ case to a magistrate for a bench trial. Mr. Starcher testified that, although he sometimes saw moisture on some of the mortar joints of the basement walls, he did not consider the moisture excessive. He said that he believed it was from condensation, not seepage. He said he addressed the issue by painting the walls of the

basement with a waterproofing paint every two to three years. He said he had last painted the basement in 2005.

{¶6} The magistrate found that the Gindlespergers failed to prove that the Starchers actively concealed a known defect or falsely represented that they did not know of any defects. In particular, he found that the Gindlespergers did not establish that the water problems they had in August 2006 or March 2007 were preexisting. He noted that the Gindlespergers did not have an inspection done on the house before they purchased it. He also noted that the foreman for the waterproofing company discovered that the house's downspouts were clogged, but did not do anything to determine whether they were the source of the problem. The magistrate concluded that, even though Mr. Starcher testified that there was some moisture in the basement, the moisture was not excessive such that the Starchers would have had to disclose it.

{¶7} The Gindlespergers objected to the magistrate's decision, arguing that he was biased and that his decision was incorrect. The trial court overruled their objections, concluding that the magistrate's findings were consistent with the evidence presented at trial. The Gindlespergers have appealed, assigning one error regarding whether the trial court's adoption of the magistrate's decision was reversible error.

FRAUD

{¶8} In their complaint, the Gindlespergers alleged that the Starchers fraudulently misrepresented whether the house had water intrusion problems and fraudulently concealed those problems. "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 County Bd. of Comm’rs*, 23 Ohio St. 3d 69, paragraph two of the syllabus (1986).

{¶9} The Gindlespergers have argued that the trial court misread the language of the disclosure and incorrectly concluded that their claim failed for want of proof. The water intrusion section of the disclosure asked the Starchers three questions. It first asked whether the Starchers knew “of any previous or current water leakage, water accumulation, excess moisture or other defects to the property, including but not limited to any area below grade, basement, or crawl space?” It next asked whether they knew “of any water or moisture related damage to floors, walls, or ceilings as a result of flooding; moisture seepage; moisture condensation; ice damming; sewer overflow/backup; or leaking pipes, plumbing fixtures, or appliances?” Finally, it asked whether they had ever had the house inspected for mold. The Starchers answered “[n]o” to each of those questions.

{¶10} The Gindlespergers have argued that they proved their claims because Mr. Starcher admitted that he saw moisture in the basement and did not write that on the disclosure form. Their argument, essentially, is that the trial court’s determination that they did not prove their claims was against the manifest weight of the evidence. In *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶26, the Ohio Supreme Court held that the test for whether a judgment is against the weight of the evidence in civil cases is different from the test applicable in criminal cases. According to the Supreme Court in *Wilson*, the standard applicable in civil cases “was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279.” *Id.* at ¶24. The “explanation” in *C.E. Morris* was that “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court

as being against the manifest weight of the evidence.” *Id.* (quoting *C.E. Morris Co.*, 54 Ohio St. 2d at 279); but see *Huntington Nat’l Bank v. Chappell*, 9th Dist. No. 06CA008979, 2007-Ohio-4344, at ¶17-75 (Dickinson, J., concurring).

{¶11} Although Mr. Starcher said that he had seen moisture on some of the basement walls as a result of condensation, he did not consider the moisture excessive. He said that he was not aware of any damage to the basement walls or floor “as a result of” the condensation. He also said that the house had never had any problems with standing water or flooding.

{¶12} While Mr. Gindlesperger testified that he first noticed water in the basement only three months after he and Mrs. Gindlesperger bought the house, the Starchers offered an explanation for why they had not had the same problems as the Gindlespergers. Mr. Starcher testified that, when he owned the house, he cleaned the gutters and drains each year. Mr. Gindlesperger admitted that the gutters and downspouts were operating properly at the time he and Mrs. Gindlesperger bought the house. The foreman of the waterproofing company testified, however, that, when his company was repairing the basement a year later, he inspected the downspouts and discovered that they were clogged. One of the downspouts was near the fruit cellar where the Gindlespergers had an inch of standing water. The magistrate noted in his decision that the “water problem could well be the failure to rectify clogged-up downspouts which the salesman and the foreman of the waterproofing company blithely ignored.”

{¶13} This Court concludes that the trial court’s finding that the Starchers did not know about or try to conceal any water intrusion problems was supported by competent, credible evidence. The Gindlespergers’ assignment of error is overruled.

CONCLUSION

{¶14} The trial court's decision that the Starchers did not defraud the Gindlespergers was not against the manifest weight of the evidence. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

DANIEL S. WHITE, attorney at law, for appellants.

TIMOTHY P. ASSAF, attorney at law, for appellees.