

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

TIMOTHY HOOPS, et al.

C.A. No. 09CA009683

Appellants

v.

ROBERT E. KELLEY, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CV157346

Appellees

DECISION AND JOURNAL ENTRY

Dated: March 22, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellants, Timothy and Norma Hoops (collectively “the Hoops”), appeal from the judgment of the Lorain County Court of Common Pleas, granting summary judgment in favor of Defendant-Appellees, Robert Kelley and Jane Lyth-Kelley (collectively “the Kelleys”). This Court affirms.

I

{¶2} The Hoops purchased the Kelleys’ house in May 2007. Prior to the Hoops’ purchase, the Kelleys completed a residential property disclosure form (“disclosure form”) on April 9, 2007. The disclosure form indicated there was a known water intrusion problem, which the Kelleys described as “during a heavy rain only small ‘seepage’ approx 1” wide east wall – reparaire[d].” The disclosure form further indicated that it was not a warranty on the part of the sellers and that “POTENTIAL PURCHASERS ARE ENCOURAGED TO OBTAIN THEIR OWN PROFESSIONAL INSPECTION.” The Hoops signed a purchase agreement on May 11,

2007, subject to a loan approval and home inspection. The purchase agreement contained the language “‘AS IS’ PRESENT PHYSICAL CONDITION.”

{¶3} Several days later, the Hoops received a home inspection report from an inspector that they sought out and hired to perform their own inspection. The report identified several potential water and drainage problems in the house’s basement and foundation. Nevertheless, the sale of the property closed, and the Hoops took title to and possession of the property. The Hoops soon began to experience water-related problems in their basement, including extensive flooding. The Hoops had their basement waterproofed in June 2008. The foreman of the company who waterproofed their basement found water under the floor, stains on the wall, and cracks in the foundations. Accordingly, he informed the Hoops that he believed the problems “did not develop overnight and probably took a number of years to get to this point.”

{¶4} On June 23, 2008, the Hoops filed a complaint against the Kelleys, alleging fraud and mutual mistake of fact based on undisclosed defects. According to the Hoops, they experienced “severe [water-related] problems” in their basement after they took possession of the property. On June 16, 2009, the Kelleys filed a motion for summary judgment. The Hoops responded in opposition on July 6, 2009, and the Kelleys replied on July 14, 2009. On August 20, 2009, the trial court granted summary judgment in favor of the Kelleys.

{¶5} The Hoops now appeal from the judgment of the trial court and raise a single assignment of error for our review.

II

Assignment of Error

“THE TRIAL COURT’S DECISION TO GRANT THE DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT CONSTITUTES REVERSIBLE ERROR.”

{¶6} In their sole assignment of error, the Hoops argue that the trial court erred by granting the Kelleys' motion for summary judgment. The Hoops argue that genuine issues of material fact remain as to whether the Kelleys defrauded the Hoops or the parties had a mutual mistake of fact when they contracted for the sale of the Kelleys' home. We disagree.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

Fraud

“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. *** 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. 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. Fraudulent concealment exists where a vendor fails to disclose sources of peril of which he is aware, if such a source is not discoverable by the vendee. The nature of the defect and the ability of the parties to determine through a reasonable inspection that a defect exists are key to determining whether or not the defect is latent.” (Internal citations and quotations omitted.) *Brown v. Scheussler*, 9th Dist. No. 25008, 2010-Ohio-642, at ¶7-8.

A patent defect will not give rise to a claim of fraud against a seller. *Kramer v. Raterman*, 1st Dist. No. C-040344, 2005-Ohio-2742, at ¶13.

{¶9} The Hoops appear to argue that a genuine issue of material fact exists as to whether the Kelleys defrauded them by: (1) failing to disclose a latent defect in the basement of the home they sold to the Hoops; and (2) making material and false representations that their basement did not contain water-related defects of the caliber that the Hoops experienced. The Hoops’ brief contains scarce reference to the facts in this case. Instead, it presents this Court with numerous cases in which the Eighth District reversed summary judgment awards in favor of home buyers that later discovered water-related defects in their basements.

{¶10} In support of their motion for summary judgment, the Kelleys pointed to the parties’ purchase agreement, the disclosure form they gave the Hoops, a copy of the home inspection report that the Hoops received from their inspector, and a copy of a statement from

Jim Russell, the foreman who waterproofed the Hoops' basement. The Kelleys' disclosure form contained a "Water Intrusion" section that asked them if the home had "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." The Kelleys checked the box marked "yes" next to the foregoing inquiry. In the space marked "[i]f 'yes', please describe and indicate any repairs completed," the Kelleys wrote "during a heavy rain only small 'seepage' approx 1" wide east wall – repaire[d]."

{¶11} The purchase agreement into which the parties entered indicated that the Hoops were accepting the Kelleys' home "AS IS' PRESENT PHYSICAL CONDITION" subject to a home inspection. The Hoops only requested a general home inspection. They chose their own inspector, who completed an inspection report based on the inspection they selected to perform. The inspection report they received contained a separate section for "Basement, Foundation & Crawlspace." The report noted a potential problem with the following items:

"A. The basement, foundation and crawlspace.

"C. Any present conditions or indications of active water penetration by probing a representative sampling of structural components where deterioration is believed to be present.

"D. And report any general indications of foundation movement that are observed, such as but not limited to sheetrock cracks, brick cracks, out-of-square door frames or floor slopes."

In the Comments box directly under the potential problems that the inspector noted, the inspector included the following two comments:

"[Southeast] corner of finished room collected water after heavy rain, and owner repaired recently; moisture meter shows higher moisture in this corner stone, as well as in several areas around basement, in floor and walls, esp[ecially] where precipitate is visible where older cracking was repaired and painted. Drainage

improvements above ground may reduce moisture content over time. Cleaning and recoating inside walls and floor should minimize any interior penetration[.]

“Some cracking visible in [south] wall of storage/furnace room in basement. May have shifted slightly since wall was painted, apparently several years ago. Drainage improvement above ground may reduce the pressure on this wall and minimize further shifting/cracking. Also recommend caulking and repainting wall, and monitor crack over time for further shifting. If any shifting is observed, drainage may need further repair and wall may need more support, as determined by a qualified drainage/foundation specialist.”

The Hoops did not conduct any further inspections, nor did they request any repairs on the part of the Kelleys. Rather, they closed on the property and took possession shortly thereafter.

{¶12} The items the Kelleys relied upon in their motion for summary judgment demonstrate that the Hoops purchased the Kelleys’ property “AS IS” and were put on notice of potential water-related defects before completing their purchase. The Kelleys presented evidence that they were unaware of any latent defects in their property, they disclosed the patent defect they knew of with regard to the “seepage” problem in the east wall, and the Hoops purchased the property with notice of possible water-related defects that their home inspector uncovered. Accordingly, the Kelleys met their initial burden under *Dresher*. See *Brown* at ¶7-8 (noting that the doctrine of caveat emptor protects sellers from liability for defects if they are discoverable upon reasonable inspection, the purchaser had an unimpeded ability to inspect, and the seller did not engage in fraud).

{¶13} In opposing the Kelleys’ motion for summary judgment, the Hoops pointed to their own affidavits and an affidavit from Jim Russell, the foreman of the company they hired to waterproof their home. In the Hoops’ separate affidavits, they both attested to the following: (1) their basement leaked severely due to “hidden, latent defects”; (2) they believed the Kelleys intentionally concealed and/or failed to disclose latent defects as demonstrated by the fact that the Kelleys recently had painted the basement walls; and (3) they relied upon the written

representations that the Kelleys made in their disclosure form, indicating the absence of defects. Russell's affidavit indicated that the Hoops' water problems "did not develop overnight and probably took a number of years to get to the point at which he found them."

{¶14} Although the Hoops claimed in their motion in opposition that the problems they experienced were the result of "hidden, latent defects," the report they received from their own home inspection indicates the Hoops were on notice that the Kelleys' basement contained several potential problems. Neither of the Hoops explained how the defects their inspector uncovered differed from the "hidden, latent defects" they claimed the Kelleys concealed. Nor did they explain why further inspection would not have uncovered any additional defects, especially considering the warning of potential defects they received from their inspector. It would appear that the Hoops either did discover, or could have discovered upon reasonable inspection, the defects in the basement. See *Kramer* at ¶13-23 (rejecting claims of fraud based on patent defects).

{¶15} Moreover, there is no evidence that the Kelleys knew about the problems the Hoops experienced and intentionally concealed them. The inspection report indicated that the south basement wall was painted "apparently several years ago." The inspection report makes no mention of freshly painted basement walls.

"While [Russell,] the waterproofing company foreman[,] opined that the problems he fixed 'did not develop overnight and probably took a number of years to get to the point at which he found them,' he did not offer an opinion as to how long the water had been in the space under the house or whether the [Hoops] would have known it was there. Accordingly, there is no evidence that their representation that the house did not have any current water intrusion problems was '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.' [*Burr v. Board of County Com'rs of Stark County* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus.]" *Brown* at ¶9.

Because the Hoops failed to demonstrate a genuine issue of material fact remained with regard to their fraud claim, the trial court did not err in granting the Kelleys' motion for summary judgment on the fraud claim.

Mutual Mistake

“[Ohio] recognizes the doctrine of mutual mistake as a ground for the rescission of a contract under certain circumstances. [A] buyer is entitled to rescission of a real estate purchase contract [if] there is a mutual mistake as to a material part of the contract and *** the complaining party is not negligent in failing to discover the mistake. 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. [T]he intention of the parties must have been frustrated by the mutual mistake.” (Alterations in original and internal citations and quotations omitted.) *Brown* at ¶10.

As with the Hoops' fraud claim, their mutual mistake claim also fails based on this Court's holding in *Brown*.

{¶16} In *Brown*, this Court held that Brown's mutual mistake claim failed because there was no evidence that the house had a water intrusion problem when she bought it, she agreed to accept the house in “‘AS IS’ PRESENT PHYSICAL CONDITION,” and the purchase agreement noted that “there might be defects with the house that had not been discovered and assigned the risk of those problems to [] Brown.” *Id.* at ¶11. Here, the parties were aware that the Kelleys' home had a seepage problem at one point in time, but that the Kelleys had repaired the problem. The Hoops agreed to purchase the property “‘AS IS’ PRESENT PHYSICAL CONDITION,” and the Hoops were notified of the possibility of other defects. For the reasons set forth in *Brown*, the Hoops did not demonstrate a genuine issue of material fact with regard to their mutual mistake claim. Consequently, the trial court did not err by granting the Kelleys' motion for summary judgment. The Hoops' sole assignment of error lacks merit.

III

{¶17} The Hoops' assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas 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 Lorain, 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.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR

APPEARANCES:

DANIEL S. WHITE, Attorney at Law, for Appellants.

ALAN J. RAPOPORT, Attorney at Law, for Appellees.