[Cite as *Kowalski v. Smith*, 2010-Ohio-3662.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

KENNETH KOWALSKI, et al.	C.A. No. 09CA0059
Appellees	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
LISA M. SMITH, et al.	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellants	CASE No. 07 CV 00607

DECISION AND JOURNAL ENTRY

Dated: August 9, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Lisa M. Smith, Inc., dba Smith Quality Homes ("Smith, Inc."), appeals from the judgment of the Wayne County Court of Common Pleas, awarding compensatory damages, punitive damages, and attorney fees to Plaintiff-Appellees, Kenneth and Patricia Kowalski (collectively, "the Kowalskis"). This Court reverses.

I

{¶2} In December 2004, Kevin and Angela Geitgey ("the Geitgeys") sold their property at 1705 Steiner Road to Smith, Inc. The Geitgeys were family relations of Lisa Smith and her father, Robert Cogar. According to Smith, her corporation purchased the deed to the property as a favor to the Geitgeys because they were having difficulty financing it. The Geitgeys wished to build a manufactured home on the property, but only got so far as having the basement excavated and the foundation poured when their financing fell through. Cogar, a

contractor with thirty-one years of experience, began construction on the foundation before the transfer to Smith, Inc. took place and continued working on the property in 2005.

{¶3} Several months before March 2005, the Kowalskis expressed an interest in purchasing the Steiner Road property. Kenneth Kowalski repeatedly made trips to the property to observe Cogar's construction work and secured financing with the help of Benjamin Lackey, the owner of BTL & Associates, Inc. ("BTL"). The Kowalskis understood Lackey to be an employee of Smith, Inc., but Smith, Inc. later claimed that it only retained BTL as a subcontractor. The Kowalskis purchased the property from Smith, Inc. in March 2005. Shortly thereafter, they experienced numerous problems, including water damage. Smith, Inc. failed to respond to the problems, so Kenneth Kowalski contacted the Wayne County Building Department ("Building Department"). Kowalski learned that the Building Department had never issued an occupancy permit for the Steiner Road residence and a final inspection had never taken place.

{¶4} On August 30, 2007, the Kowalskis brought suit against Smith, Inc. and Lisa Smith, in her individual capacity, based on fraud and rescission. Smith, Inc. and Smith filed an answer. Smith, Inc. also later filed a counterclaim against the Kowalskis based on breach of contract and unjust enrichment. On August 28, 2007, the Kowalskis filed an amended complaint, which added: (1) Cogar and BTL as named defendants; and (2) a claim for negligence. All of the named defendants filed a joint answer.

{¶5} Subsequently, Deutsche Bank National Trust Company ("Deutsche") sought to intervene in the action. The Kowalskis apparently had defaulted on their mortgage, had been named as defendants in another suit, and had asked for a stay pending the resolution of their case against Smith, Inc. The trial court agreed to consolidate Deutsche's case against the Kowalskis

with the case at hand. The court later dismissed Deutsche's claims with prejudice for failure to prosecute. Deutsche is not a party on appeal.

{¶6} The trial court held a bench trial on May 22, 2009. Smith, Inc. and Smith moved for a directed verdict at the close of the Kowalskis' case-in-chief. The court denied the directed verdict motion as to the Kowalskis' fraud claim. Smith, Inc. and Smith never renewed their directed verdict motion. The trial court ultimately ruled in favor of the Kowalskis on their fraud claim against Smith, Inc. and awarded $18,223.50 in compensatory damages and $5,000 in punitive damages. The court dismissed all the remaining claims and counterclaims with prejudice. On August 27, 2009, the court held a hearing on the issue of attorney fees. The court awarded the Kowalskis $7,742 in attorney fees.

{¶7} Smith, Inc. now appeals from the trial court's judgment and raises three assignments of error for our review.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO GRANT DEFENDANTS' MOTION FOR DIRECTED VERDICT ON PLAINTIFFS' FRAUD CLAIM."

{¶8} In its first assignment of error, Smith, Inc. argues that the trial court erred by refusing to grant its motion for directed verdict on the Kowalskis' claim for fraud. Specifically, it argues that the Kowalskis failed to prove all the elements of their fraud claim by a preponderance of the evidence. We agree.

{¶9} Although Smith, Inc. moved for a directed verdict in the court below, this Court has held that "[a] motion for directed verdict, made at the close of a plaintiff's case in a bench trial, will be deemed to be a motion for involuntary dismissal under Civ.R. 41(B)(2)[.]" *Alh*

Properties, P.L.L. v. Procare Automotive Service Solutions, L.L.C., 9th Dist. No. 20991, 2002-Ohio-4246, at ¶8. See, also, *Nelson Jewellery Arts Co., Ltd. v. Fein Designs Co., Ltd., L.L.C.*, 9th Dist. No. 22738, 2006-Ohio-2276, at ¶5. Thus, this Court will construe Smith, Inc.'s motion as one for dismissal under Civ.R. 41(B)(2).

{¶10} "[W]hen the trial court rules on a motion for involuntary dismissal under Civ.R. 41(B)(2), the court weighs the evidence, resolves any conflicts, and may render judgment in favor of the defendant if the plaintiff has shown no right to relief." *Alh Properties, P.L.L.* at ¶9. When an appellant challenges a trial court's determination with regard to the weight of the evidence in a civil matter, this Court will apply a civil manifest weight standard of review. *Rogers v. Hood*, 9th Dist. No. 24374, 2009-Ohio-5799, at ¶22. In reviewing a manifest weight challenge, this Court will affirm a trial court's judgment if it is "supported by some competent, credible evidence going to all the essential elements of the case[.]" *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In applying the foregoing standard, this Court recognizes its obligation to presume that the trial court's factual findings are correct and that while "[a] finding of an error in law is a legitimate ground for reversal, [ ] a difference of opinion on credibility of witnesses and evidence is not." *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶15, quoting *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶11} Initially, the trial court determined that Benjamin Lackey of BTL and Robert Cogar were agents for Smith, Inc., rather than independent contractors. The court held that, through its agents, Smith, Inc. made "a number of representations" to the Kowalskis and led them to falsely believe that "their home had been constructed according to code; that it passed final inspection; that an occupancy permit had been issued; and that the basement was properly

sealed." The court further held that: (1) these representations were material; (2) Smith, Inc. made the representations with the intent to deceive and induce the Kowalskis to purchase the home; and (3) the Kowalskis relied upon the misrepresentations when they purchased their home. The court concluded that the Kowalskis were entitled to $18,223.50 in damages; the amount their expert claimed would be required to correct the problems with the home.

> "The elements of fraud are: (1) a representation, or where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) 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; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance." *Glenmoore Builders, Inc. v. Smith Family Trust*, 9th Dist. No. 24299, 2009-Ohio-3174, at ¶51, quoting *Baughman v. State Farm Mutual Auto. Ins. Co.*, 9th Dist. No. 22204, 2005-Ohio-6980, at ¶12.

"An action in fraud will only be found if all of the elements are present and 'the absence of one element is fatal to recovery.'" *Goodman Beverage Co., Inc. v. Kerr Beverage Co.*, 9th Dist. No. 02CA008142, 2003-Ohio-2845, at ¶21, quoting *Westfield Ins. Co. v. HULS Am., Inc.* (1998), 128 Ohio App.3d 270, 296.

{¶12} Kenneth Kowalski testified that he and his wife purchased their home from Smith, Inc. on March 31, 2005. Kenneth became interested in purchasing the home in the fall of 2004, when the home's foundation was still under construction. Kenneth visited the property multiple times and watched Cogar conduct the construction work. He testified that he had several conversations with Cogar during his visits and "after the house was in place," asked him about dampness that he noticed in the walls. Cogar explained that the dampness would dissipate if the Kowalskis used a dehumidifier. When asked if Cogar made statements about the dampness in the basement prior to the Kowalskis' purchase of the home, Kenneth testified that he did not believe so. That is, he believed Cogar made these statements after the Kowalskis purchased the

home. Kenneth testified that he did speak with Cogar about wetness in the basement before purchasing the home, but stated that his conversation was limited to asking Cogar if Cogar could drill holes in the foundation to relieve any water pressure. Cogar told Kenneth that he would not be able to drill such holes.

{¶13} As to Lackey, Kenneth testified that he believed Lackey worked for Smith, Inc. because Lackey held himself out as an officer for the company and Lackey had an office at Smith, Inc. Kenneth testified he worked with Lackey and Smith to secure financing in order to purchase the house. He further testified that Smith scheduled several closings on the house, each of which she cancelled before the final closing took place in March. Kenneth testified that Smith told him the third closing was cancelled "because there was no final inspection on [the home]." According to Kenneth, he was never informed that his home failed any inspections or that a final inspection never occurred. He only found out about the inspection problems after he and his wife purchased the home. Kenneth testified that he and his wife relied upon representations from a speaker that "[e]verything's approved" and that "when we closed [on the property] we could move right in." Yet, the Kowalskis never established the identity of that speaker. Moreover, Kenneth admitted that neither Lackey, nor anyone at Smith, Inc., ever told him that a final inspection had been completed. He also never testified that anyone ever discussed the matter of an occupancy permit with him. He only testified that he "assumed" Smith, Inc. had obtained any necessary inspections when he attended the final closing because he thought the closing could not take place without the inspections.

{¶14} Even if Lackey and Cogar were agents for Smith, Inc., Kenneth Kowalski did not point to a single misrepresentation that anyone from Smith, Inc. made to him before the purchase of his home. None of the other witnesses who the Kowalskis presented pointed to any

misrepresentations either. The trial court did not rely upon any specific testimony in setting forth its decision, so it did not set forth the "number of misrepresentations" it believed Smith, Inc. made to the Kowalskis. Based on our review, the Kowalskis failed to prove that Smith, Inc. made any misrepresentations that the Kowalskis could have relied upon when purchasing their home. See *Glenmoore Builders, Inc.* at ¶51 (providing that a claim of fraud requires a material misrepresentation of fact upon which the plaintiff relied). A claim of fraud first and foremost requires a misrepresentation or concealment of fact. Id. The record does not contain competent, credible evidence that Smith, Inc. made any such misrepresentation.

{¶15} Although the Kowalskis' brief contains an argument that might be construed as one alleging fraudulent concealment, the Kowalskis never attempted to proceed upon a theory of fraudulent concealment in their complaint or trial brief. See *LaSalle Bank N.A. v. Kelly*, 9th Dist. No. 09CA0067-M, 2010-Ohio-2668, at ¶30, quoting Civ.R. 9(B) ("Pursuant to Civ.R. 9(B), '[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.'"). They alleged five specific affirmative misrepresentations: (1) that their residence had been completed in compliance with the Ohio Board of Building Standards Residential Building Code; (2) that the basement had been properly sealed; (3) that the residence had passed final inspection; (4) that Smith, Inc. had obtained an occupancy permit for the residence; and (5) that the water present in the basement was normal and would cease once construction was completed. Post-trial, the Kowalskis then attempted to include a brief argument regarding fraudulent concealment in their written closing statement. The brief argument section was captioned "Representation or, where a duty exists, concealment." Smith, Inc. did not respond to this portion of the Kowalskis' written closing statement in its own closing statement. This Court has recognized that a trial court may, in its discretion, permit a party to

proceed upon an additional theory even when it was never specifically pleaded or argued. *N. Shore Neurological Servs., Inc. v. Midwest Neuroscience, Inc.*, 9th Dist. No. 08CA009373, 2009-Ohio-2429, at ¶11 (addressing additional theory where evidence at trial could arguably support such a theory and the trial court explicitly addressed the theory in its journal entry). Here, however, there is no evidence the trial court permitted the Kowalskis to proceed upon an additional theory of fraudulent concealment. Indeed, in its written decision, the trial court specifically: (1) noted that the Kowalskis' based their fraud claim on the distinct misrepresentations outlined above; and (2) awarded them judgment because Smith, Inc. had made "materially false representations." The court did not, in its discretion, consider a claim of fraudulent concealment. Compare *N. Shore Neurological Servs., Inc.* at ¶11. Therefore, this Court will not do so on appeal.

{¶16} The Kowalskis did not present any evidence that Smith, Inc. made any of the affirmative misrepresentations that the Kowalskis alleged in the court below. Accordingly, the trial court erred by denying Smith, Inc.'s motion, and the judgment against Smith, Inc. on the Kowalskis' fraud claim must be reversed. Smith, Inc.'s first assignment of error has merit.

Assignment of Error Number Two

"THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING PLAINTIFFS' ATTORNEYS' FEES."

{¶17} In its second assignment of error, Smith, Inc. argues that the court erred in awarding the Kowalskis' attorney fees. "[I]f punitive damages are awarded, the aggrieved party may also recover reasonable attorney fees." *LaFarciola v. Elbert*, 9th Dist. No. 08CA009471, 2009-Ohio-4615, at ¶10. Based on this Court's resolution of Smith, Inc.'s first assignment of error, the Kowalskis' judgment and damages award must be reversed. As such, the Kowalskis'

corresponding award of attorney fees is vacated pursuant to that determination. Smith, Inc.'s second assignment of error is sustained.

Assignment of Error Number Three

"THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT DEFENDANTS' MOTION TO EXCLUDE TESTIMONY AND IN ALLOWING THE PLAINTIFFS' EXPERT TO TESTIFY AT TRIAL."

{¶18} In its third assignment of error, Smith, Inc. argues that the court erred by admitting the testimony of the Kowalskis' expert. Specifically, it argues the court abused its discretion by not excluding the expert testimony on the basis of unfair surprise. Based on our resolution of Smith, Inc.'s first assignment of error, its third assignment of error is moot. App.R. 12(A)(1)(c).

III

{¶19} Smith, Inc.'s first and second assignments of error are sustained. Its third assignment of error is moot. The judgment of the Wayne County Court of Common Pleas is reversed, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

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 Wayne, 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 Appellees.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS, SAYING:

{¶20} Unfortunately, because of the Ohio Supreme Court's opinion in *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, sufficiency and manifest weight have become terribly confused in the civil context. It is important to keep sufficiency and weight analysis separate for a number of reasons. One of those, as noted by the Ohio Supreme Court in *Bryan-Wollman v. Domonko*, 115 Ohio St. 3d 291, 2007-Ohio-4918, at ¶4, is that, in jury cases, a court of appeals can only reverse a judgment as being against the manifest weight if it does so unanimously. A second reason it is important to keep the analysis separate is that a first reversal based on weight of the evidence leads to a new trial, while a reversal based on failure to present sufficient evidence results in entry of judgment in favor of the party defending the claim. That is why, while a conclusion that a "judgment is not sustained by the weight of the evidence" is ground for new trial under Rule 59(A)(6) of the Ohio Rules of Civil Procedure, a plaintiff's failure to present sufficient evidence leads to a directed verdict in the defendant's favor under Rule 50(A) of the Ohio Rules of Civil Procedure.

{¶21} As noted in the lead opinion, Mr. Kowlaski "did not point to a single misrepresentation that anyone from Smith Inc. made to him before the purchase of his home" and "[n]one of the other witnesses who the Kowlaskis presented pointed to any misrepresentations either." The flaw in the trial court's judgment, therefore, is that it is not supported by sufficient evidence. Accordingly, when the lead opinion says that "the cause is remanded for further proceedings consistent with the foregoing opinion," those further proceedings must consist of entry of judgment in defendants' favor rather than a new trial.

CARR, J.
DISSENTS, SAYING:

{¶22} I respectfully dissent. I would affirm the judgment of the trial court as I believe the record indicates that multiple affirmative misrepresentations were made to the Kowalskis prior to the purchase of the home. I would also hold that Smith, Inc. fraudulently concealed material facts prior to the purchase of the home.

{¶23} As the lead opinion notes, Kenneth Kowalski initially testified he did not believe his conversations with Mr. Cogar regarding dampness in the basement took place prior to purchasing the home. However, Mr. Kowalski went on to clarify during direct examination that he expressed concerns with the dampness in the walls prior to purchasing the home. Mr. Kowalski signed the contract to purchase the home on March 29, 2005. The negotiations between the parties, however, began to take place in the fall of 2004. Mr. Kowalski testified that the house was set on the property in either "late October [or] early November" of 2004. Mr. Kowalski testified that, after the house was in place, he began "asking a lot of questions." When asked which concerns he expressed once the house was in place, Mr. Kowalski testified he

inquired about "the dampness in the walls and the problem that we had with it." Mr. Kowalski testified that he was told that if he "just used a dehumidifier that it would take care of it and eventually it would all dry up and wouldn't be a problem." Mr. Kowalski suggested drilling holes in the bottom blocks to relieve the pressure but was told by Mr. Cogar that this was not a feasible plan. This testimony is consistent with the evidence that the house was purchased in March 2005. As such, any conversations at the construction site regarding water in the blocks would have been before the contract was signed. Mr. Kowalski specifically testified that he regarded Mr. Cogar as an expert and that he relied on these representations prior to signing the contract. On cross-examination, Mr. Kowalski again testified that he had inquired about issues with dampness and Mr. Cogar told him the problem would rectify itself over time. Mr. Kowalski emphasized that these conversations took place "during construction" and that he was told by Mr. Cogar that "once the house is put on it, that will cease to be a problem." Furthermore, Mr. Kowalski testified on direct examination that he was told by Ms. Smith that the home could be considered "modular" for the purposes of building code compliance. Mr. Kowalski testified that he later learned that home "is not capable of being considered modular" and was in fact what is known as a "manufactured home." I would hold that the trial court did not err in concluding that the aforementioned statements qualified as affirmative misrepresentations.

{¶24} I would further hold that the failure by Smith, Inc. to disclose that a proper final inspection never took place amounted to fraudulent concealment of a material fact. While the complaint does not specifically characterize the failure to disclose that a final inspection never occurred as fraudulent concealment, the Kowalskis presented this theory in support of their fraud claim. Civ.R. 15(B) provides, in pertinent part, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they

had been raised in the pleadings. *** Failure to amend as provided herein does not affect the result of the trial of these issues." This Court has previously considered whether parties implicitly consented to the presentation of a fraudulent inducement theory despite the fact it was not contained in the pleadings. *N. Shore Neurological Serv., Inc. v. Midwest Neuroscience, Inc*., 9th Dist. No. 08CA009372, 2009-Ohio-2429, at ¶11. Here, Mr. Kowalski testified that the parties were scheduled to close on the purchase of the home on four separate occasions. For a variety of reasons, the first three attempts at closing were cancelled. On the third attempt at closing, Mr. Kowalski testified that he was told by Ms. Smith that the parties could not go forward because a final inspection of the home had not taken place. Mr. Kowalski testified that prior to the fourth attempt at closing, he was told by Ms. Smith that "Everything's approved." Mr. Kowalski further testified that he relied on this representation.

{¶25} In their closing argument, the Kowalskis asserted that Smith, Inc. breached a duty to disclose that the house never passed final inspection. In response, Smith, Inc. emphasized that the Kowalskis never inquired prior to closing whether a final inspection had occurred and that no affirmative misrepresentation had been made. Smith, Inc. did not, however, argue that the fraudulent concealment theory fell outside the scope of the complaint. In light of the fact that the third attempt at closing was cancelled for the specific reason that a final inspection had not taken place, I would hold that failing to disclose that the house had not passed the inspection constituted fraudulent concealment of a material fact.

APPEARANCES:

TIMOTHY B. PETTORINI, Attorney at Law, for Appellants.

JASON M. STORCK, Attorney at Law, for Appellees.