[Cite as *Sharp v. Andisman*, 2010-Ohio-4452.]

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

WILLIAM J. SHARP, et al.	C. A. Nos. 24999 & 25002
Appellees	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CHERYL A. ANDISMAN, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellants	CASE No. CV 2007-09-6693

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

MOORE, Judge.

{¶1} Appellants, Cheryl Andisman and Bradford Blakeley, appeal the decision of the Summit County Court of Common Pleas. This Court affirms in part, reverses in part, and remands for proceedings consistent with this opinion.

I.

{¶2} At the end of 2006, William and Sally Sharp decided to sell their home, located at 47 South Wheaton, in Akron, Ohio. Cheryl Andisman and her boyfriend, Bradford Blakeley, toured the home and decided to place an offer on the property. On November 2, 2006, Andisman and Blakeley submitted an offer through their real estate agent. Because Blakeley was in the midst of divorce proceedings, he would not submit the offer in his name. The offer listed the buyer as "Cheryl A. Andisman and/or Nominee[.]" The offer was contingent upon Andisman obtaining conventional mortgage financing. On November 7, the Sharps signed the proposed purchase agreement. Several modifications were made to the agreement, and initialed by the

parties on November 11, 2006. Further, Andisman signed Addendum A on November 11, 2006. Addendum A, in pertinent part, reiterated the parties' acknowledgement that the agreement was subject to conventional financing. Thus, as of November 11, 2006, the parties entered into a contract to purchase the property for $1.25 million, and set the closing date for January 15, 2007.

{¶3} Notwithstanding the financing contingency, all parties were aware that Blakeley intended to pay cash for the property. In November of 2006, Andisman signed a mortgage loan application that Blakeley's friend, a mortgage broker, filled out and brought to her home. Andisman later testified that she did not read the application before signing and that it contained materially false information, including her net worth and ability to pay the mortgage. On November 22, 2006, Andisman was pre-approved for the loan, subject to conditions. On the January 15, 2007 closing date, Andisman did not close, contending that she could not obtain financing. To this end, on February 22, 2007, Andisman received a statement of credit denial, listing as grounds for denial that her credit application was incomplete.

{¶4} Although the transaction did not close on January 15, the Sharps' attorney contacted Blakeley, who assured him that he intended to close but that he needed to extend the closing date. Blakeley continued to assure the Sharps' attorney that he intended to close on the property. Accordingly, the Sharps continued to agree to postpone the closing date. In May of 2007, Blakeley sent the Sharps' attorney a proposed Addendum C, which, in relevant part, added him as a party to the purchase agreement, removed the financing contingency, and extended the closing date. The Sharps' attorney modified the document. The Sharps signed the Addendum and sent it overnight to Blakeley and Andisman. Blakeley and Andisman eventually signed the document and faxed a signed copy to the Sharps. The Sharps proceeded to prepare for closing, which was set for June 28, 2007. Once again, Andisman and Blakeley failed to close on the

property. Blakeley continued to assure the Sharps that he intended to close and pay cash for the property.

{¶5} On September 25, 2007, the Sharps filed their complaint for breach of contract, naming Andisman and Blakeley as defendants. Andisman and Blakeley filed a counterclaim seeking the return of their earnest money. On May 29, 2009, the matter proceeded to a bench trial. On August 26, 2009, the trial court issued its decision. The trial court found in favor of the Sharps and against Andisman in the amount of $150,000 for loss of bargain and $29,264 for special damages, plus interest. The trial court further found against Blakeley in the amount of $375,000 for loss of bargain and $29,264 for special damages, plus interest. Andisman and Blakeley were jointly and severally liable, with Blakeley being solely responsible for the loss of bargain damages above and beyond $150,000. Andisman and Blakeley each timely appealed from this decision. This Court consolidated their appeals. They have each raised several assignments of error, which we have rearranged and combined for ease of review.

II.

ANDISMAN'S ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT A VALID REAL ESTATE PURCHASE AGREEMENT EXISTED ON NOVEMBER 11, 2006, BASED UPON THE UNDISPUTED EVIDENCE THAT CHERYL ANDISMAN DID NOT SIGN THE REAL ESTATE PURCHASE AGREEMENT."

BLAKELEY'S ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT MR. BLAKELEY BREACHED THE REAL ESTATE PURCHASE AGREEMENT WHERE THE UNDISPUTED EVIDENCE DEMONSTRATES THAT MR. BLAKELEY WAS NOT EVEN A PARTY TO THE REAL ESTATE PURCHASE AGREEMENT DATED NOVEMBER 11, 2006."

ANDISMAN'S ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT A VALID REAL ESTATE PURCHASE AGREEMENT EXISTED ON NOVEMBER 11, 2006, BASED UPON THE UNDISPUTED EVIDENCE THAT THE BUYER LISTED ON THE DOCUMENT AS 'CHERYL ANDISMAN AND/OR NOMINEE', AND THE PURCHASE AGREEMENT WAS NOT SIGNED BY EITHER CHERYL ANDISMAN OR ANY NOMINEE."

BLAKELEY'S ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT MR. BLAKELEY BREACHED THE REAL ESTATE PURCHASE AGREEMENT WHERE THE UNDISPUTED EVIDENCE DEMONSTRATES THAT MR. BLAKELEY WAS NOT PROPERLY IDENTIFIED AS THE 'NOMINEE' UNDER THE REAL ESTATE PURCHASE AGREEMENT DATED NOVEMBER 11, 2006."

{¶6} In her first two assignments of error, Andisman contends that the trial court erred when it determined that the November 11, 2006 purchase agreement was a valid contract because it was undisputed that she did not personally sign the agreement. Similarly, in his first two assignments of error, Blakeley contends that the trial court erred when it determined he breached the November purchase agreement because he was not a party. These arguments are without merit.

{¶7} We review a trial court's interpretation of a contract de novo. *Renacci v. Evans*, 9th Dist. No. 09CA0004-M, 2009-Ohio-5154, at ¶13.

ANDISMAN

{¶8} Andisman contends that because the evidence revealed that she did not sign the purchase agreement, she was not a party to the agreement and therefore she is not bound. She further contends that the trial court's conclusion that she is bound by the agreement "flies in the face of the Statute of Frauds."

{¶9} The Statute of Frauds is codified in Chapter 1335 of the Ohio Revised Code. Pursuant to R.C. 1335.05:

> "No action shall be brought whereby to charge the defendant, *** upon a contract or sale of lands, *** unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

{¶10} We have explained that "'[t]he memorandum in writing which is required by the statute of frauds *** is not sufficient unless it contains the essential terms of the agreement, expressed with such clearness and certainty that they may be understood from the memorandum itself, or some other writing to which it refers, without the necessity of resorting to parol proof.'" *Kiser v. Williams*, 9th Dist. No. 24968, 2010-Ohio-3390, at ¶11, quoting *Kling v. Bordner* (1901), 65 Ohio St. 86, paragraph one of the syllabus. Further, "[t]he Supreme Court has permitted '[s]everal writings, though made at different times, [to] be construed together, for the purpose of ascertaining the terms of [the] contract[.]'" *Kiser*, supra, quoting *Thayer v. Luce* (1871), 22 Ohio St. 62, paragraph one of the syllabus. Moreover, the Restatement Second of Contracts, states that "[t]he memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction." Restatement 2d of Contracts, Section 132.

{¶11} In the instant case, Andisman claims that Blakeley signed her name on the original November 2, 2006 purchase agreement. She readily admits, however, that on November 11, 2006, she signed Addendum A to the agreement. While she contends that the trial court "determined that Ms. Andisman's other signatures and/or initials were forged[,]" this is in fact a misstatement of the trial court's conclusions. The trial court actually noted that Andisman *claimed* that some of her signatures were forged. The trial court did *not* determine the validity of

the claim, instead determining that because she admitted "to at least one signature on the purchase agreement, was well aware that such a contract had been entered into in her name and never disavowed the contract[,]" that she was a party to the contract. This is quite a different conclusion than agreeing with Andisman's claim that her signature was forged.

{¶12} On appeal, Andisman contends that although she admitted that she signed Addendum A, "Addendum A does not incorporate the terms of the Purchase Agreement. Rather, Addendum A simply states that 'the following provisions are a part of the Offer to Purchase real estate and Acceptance…' (Defendant's Exhibit A, p.3). In other words, although Addendum A *referred* to the terms of the underlying Purchase Agreement, Addendum A did not *incorporate* those terms." (Emphasis sic.) We do not agree.

{¶13} Andisman's contention that Addendum A fails to explicitly incorporate the terms of the original offer to purchase is without merit. Section 132 of the Restatement Second of Contracts allows the Court to review several documents together to establish a memorandum for purposes of the Statue of Frauds, as long as the documents clearly relate. To this end, comment A to this section notes that "[e]xplicit incorporation by reference is unnecessary[.]" Andisman selectively stated the language from Addendum A in her appellate brief, which fully states as follows:

> "The following provisions are part of the Offer to Purchase real estate and Acceptance between Cheryl A Andisman and/or Nominee (Buyer(s)) and William J. Sharp and Sally A. Sharp (Seller(s)) (Real Estate Purchase Contract) for property known as 47 S. Wheaton Rd, Akron, OH 44313 consisting of PID # 6824980, # 6824979, and #6824981 and dated 11-2-06."

{¶14} It is clear from this language that Addendum A relates to the November 2, 2006 proposed purchase agreement. See Restatement 2d of Contracts, section 132. Therefore Andisman's admitted signature on Addendum A satisfies the purposes of the Statue of Frauds.

Andisman has not cited this Court to any authority, nor has she developed an argument to support any contention that the trial court could not look at all the documents before it as a whole and determine that Andisman was a party. App.R. 16(A)(7). Accordingly, Andisman's first and second assignments of error are overruled.

BLAKELEY

{¶15} Blakeley's first and second assignments of error are virtually identical to Andisman's. Although the parties do not dispute that Blakeley did not sign the November 11, 2006 purchase agreement, Blakeley readily admitted that he signed Addendum C to the purchase agreement. As we explained above, the trial court could consider multiple documents to determine that Blakeley was a party to the contract. This Addendum contained language similar to the introduction to Addendum A. Further, as set forth below, the failure to close in January of 2007 did not act to terminate the contract. Therefore, the November 11, 2006 purchase agreement remained in full force and effect until otherwise terminated. See *Tiefenthaler v. Tiefenthaler*, 5th Dist. No. 02 CA 29, 2002-Ohio-6438, at ¶16. Accordingly, when Blakeley signed Addendum C in June of 2007, adding himself as a party to the purchase agreement, he agreed to all the terms of the purchase agreement. Although we will discuss Blakeley's contentions regarding the validity of Addendum C below, for purposes of his contention that he was never a party to the contract at issue, based upon the case law set forth above, his first and second assignments of error are overruled.

ANDISMAN'S ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT MS. ANDISMAN BREACHED THE PURCHASE AGREEMENT DATED NOVEMBER 11, 2006, WHEN THE FINANCING CONDITION PRECEDENT SET FORTH IN ADDENDUM A TO THE PURCHASE AGREEMENT WAS NOT MET."

BLAKELEY'S ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT MR. BLAKELEY BREACHED THE PURCHASE AGREEMENT DATED NOVEMBER 11, 2006, WHEN THE FINANCING CONDITION PRECEDENT SET FORTH IN ADDENDUM A TO THE PURCHASE AGREEMENT WAS NOT MET."

{¶16} In both Andisman and Blakeley's third assignments of error, they contend that the trial court erred when it determined that they breached the purchase agreement when the financing condition precedent set forth in Addendum A was not satisfied. We do not agree.

{¶17} Again, we review de novo the trial court's interpretation of a contract. *Renacci*, supra, at ¶13. It is undisputed that the November 2006 purchase agreement contained a financing contingency, conditioning the agreement upon Andisman obtaining traditional financing for the property. Andisman contends that "as a result of the financing contingency, the transaction did not close as planned, and the Purchase Agreement terminated by operation of law on January 15, 2007." To agree with this argument, this Court would have to ignore the testimony adduced at trial as well as the exhibits entered into evidence.

{¶18} On November 14, 2006, Andisman signed a Uniform Residential Loan Application. The application was for a $950,000 mortgage loan. The application listed Andisman's net worth as $814,838. She testified that a friend of Blakeley came to her home with the application already filled out and that she signed the application without asking any questions. She stated that if she had wanted to, she could have reviewed the document prior to signing. She testified that the application was inaccurate and that she never anticipated being able to borrow almost one million dollars. She explained that it was merely a formality as she believed Blakeley was going to pay cash for the home.

{¶19} On November 22, 2006, the mortgage broker issued Andisman pre-approval for the loan she applied for on November 14, 2006. The pre-approval was conditioned upon, among other things, verification of her assets, review of all the documentation necessary by underwriting, an appraisal, and a fully underwritten title commitment. On February 22, 2007, the mortgage broker sent Andisman a notice denying her mortgage application. The notice indicated that her application was denied because her credit application was incomplete. Thus, Andisman seeks to excuse her performance on the November 2006 purchase agreement based upon a contingency she now claims she never intended to pursue, did not believe she could satisfy, and ultimately did not attempt to do anything more than file a false loan application. We agree with the trial court's conclusion that "Andisman by her inaction caused the failure to obtain financing by abandoning the pursuit of mortgage financing without advising the Sharps. In so doing, she breached the implied duty of good faith that is in every contract, a duty that requires 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party' and that may be breached by 'inaction.' *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, [¶¶] 26-27."

{¶20} Finally, we disagree with Andisman and Blakeley's contention that the contract terminated by operation of law on January 15, 2007. First, we note that Andisman fails to support this contention with citations to case law. However, "time of performance is not of the essence in a contract unless made so by its terms, or by act of the parties." *Tiefenthaler*, at ¶15, quoting *Wardell v. Turkovich* (July 31, 1992), 5th Dist. No. 91AP070037. Further,

> "'[i]n an ordinary bilateral contract for the purchase and sale of land, the fact that a specific time is fixed for payment or for conveyance does not make 'time of the essence'-at least, it does not make performance at the specific time of the essence. Failure to pay at the time is not per se sufficient to terminate the seller's duty to convey; and the failure to convey on the exact date does not per se discharge the buyer.'" Id. at ¶16.

{¶21} In the instant case, despite the failure to close on January 15, 2007, Andisman and Blakeley continued to represent that closing would take place. There is no indication in the November 2006 purchase agreement that "time is of the essence" and Andisman and Blakeley's actions subsequent to January 15, 2007 reveals that, in fact, time was *not* of the essence. Thus, we do not agree that the November 2006 purchase agreement terminated on January 15, 2007 by operation of law.

{¶22} Even if we were to disagree with the trial court's determination that Andisman caused the failure of the condition precedent, thus not excusing her obligation pursuant to the agreement, the trial court ultimately decided that the actionable breach occurred on June 28, 2007, after the execution of Addendum C, executed by both Andisman and Blakeley. This Addendum removed the financing contingency and extended the closing date. We will further discuss Addendum C in our discussion of Andisman and Blakeley's fourth assignment of error.

{¶23} Andisman and Blakeley's third assignments of error are overruled.

ANDISMAN'S ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE LANGUAGE IN PROVISION 8 OF ADDENDUM C IS SOLELY FOR THE PROTECTION OF THE SELLERS, THAT THE SELLERS WERE ENTITLED TO WAIVE IT IF THEY CHOSE, AND THAT THE LANGUAGE DID NOT CREATE A CONDITION PRECEDENT."

BLAKELEY'S ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THE LANGUAGE IN PROVISION 8 OF ADDENDUM C IS SOLELY FOR THE PROTECTION OF THE SELLERS, THAT THE SELLERS WERE ENTITLED TO WAIVE IT IF THEY CHOSE, AND THAT THE LANGUAGE DID NOT CREATE A CONDITION PRECEDENT."

{¶24} In both Andisman and Blakeley's fourth assignment of error, they contend that the trial court erred in interpreting Addendum C. We do not agree.

{¶25} We review the trial court's interpretation of Addendum C de novo. *Renacci*, supra, at ¶13. The facts reveal that on May 21, 2007, the Sharps executed Addendum C to the November 2006 purchase agreement. Addendum C stated that

> "[t]he following provisions are changes/confirmations to the Offer to Purchase Real Estate and Acceptance between Cheryl A. Andisman and/or Nominee (Buyer(s), and William J. Sharp and Sally A. Sharp (Sellers), (Real Estate Purchase Contract dated 11-04-06) for property known as 47 S. Wheaton Rd, Akron, OH 44313 consisting of parcel numbers # 6824979, # 6824980 and #6824981."

{¶26} Addendum C, in relevant part, added Bradford W. Blakeley as a buyer, removed the financing contingency contained in the purchase agreement, and established a time line for Andisman and Blakeley to pay cash for the Sharp's property.

{¶27} Paragraph 3 of Addendum C required Andisman and Blakeley to deposit $94,500 into escrow within seven days after all parties approved/signed the addendum. Paragraph 8 stated that "[t]his Offer by the Sellers of Proposed Addendum C is withdrawn/void/cancelled by the Sellers if not accepted/signed by the Buyers, and if the additional $94,500 is not put into Escrow with the Title Company pursuant to Paragraph (3) above, all within seven (7) calendar days from the Date of Sellers' signatures as shown below." Andisman and Blakeley signed Addendum C on June 4, 2007, after the seven days provided by Paragraph 8. Despite signing Addendum C, they did not place the $94,500 in escrow within 7 days, thus not complying with Paragraphs 3 and 8. They argue that Addendum C never took effect because Paragraphs 3 and 8 created a condition precedent with which they did not comply, thus excusing their performance.

{¶28} Initially, Andisman and Blakeley contend that the trial court erred when it determined that Paragraphs 3 and 8 were not conditions precedent. Assuming without deciding that their contention is correct, "'[i]n Ohio, the general rule is that performance of a condition precedent may be waived by the party to whom the benefit of the condition runs; the waiver may

arise expressly or by implication, and the key to its application in a particular case is a showing of some performance pursuant to the terms of the contract.'" *Corey v. Big Run Indus. Park, L.L.C.*, 10th Dist. No. 09AP-176, 2009-Ohio-5129, at ¶18, quoting *Mangan v. Prima Constr., Inc.* (Apr. 9, 1987), 1st Dist. No. C-860234, citing *Ohio Farmer's Ins. Co. v. Cochran* (1922), 104 Ohio St. 427.

{¶29} The trial court determined that Paragraphs 3 and 8 were "solely for the protection of the Sellers, and the Sellers were entitled to waive it if they chose. To the extent the Defendants could benefit from such language in provision 8, they waived it by signing on June 4, 2007 and returning the fully executed Addendum C to Plaintiffs." We agree.

{¶30} Not only did Andisman and Blakeley clearly waive any right they may have had to refuse the contract by signing the document after the 7 day time frame, the Sharps clearly waived the benefit they were to receive, i.e. the assurance of payment of the $94,500 into escrow which would only then trigger their duty to perform under the terms of the contract. The record reflects that the Sharps, despite Andisman and Blakeley's failure to place any money into escrow, signed and delivered to the closing company a deed to their home and, as the trial court noted, "signed and caused to be delivered to the [closing company] a settlement statement[.]" Thus, the Sharps manifested their intent to continue with the transaction despite Andisman and Blakeley's failure to comply with Paragraphs 3 and 8.

{¶31} Accordingly, Andisman and Blakeley's fourth assignments of error are overruled.

ANDISMAN'S ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN APPLYING AN IMPROPER MEASURE OF DAMAGES BY AWARDING 'SPECIAL DAMAGES' FOR MAINTENANCE, INSURANCE, AND TAXES IN ADDITION TO THE PROPER MEASURE OF THE DIFFERENCE BETWEEN THE CONTRACT AMOUNT AND THE VALUE OF THE PROPERTY AT THE TIME OF THE BREACH."

BLAKELEY'S ASSIGNMENT OF ERROR VII

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN APPLYING AN IMPROPER MEASURE OF DAMAGES BY AWARDING 'SPECIAL DAMAGES' FOR MAINTENANCE, INSURANCE, AND TAXES IN ADDITION TO THE PROPER MEASURE OF THE DIFFERENCE BETWEEN THE CONTRACT AMOUNT AND THE VALUE OF THE PROPERTY AT THE TIME OF THE BREACH."

{¶32} In Andisman's fifth assignment of error and Blakeley's seventh assignment of error, they contend that the trial court erred in applying an improper measure of damages by awarding the Sharps special damages for maintenance, insurance, and taxes. We agree.

{¶33} Generally, "[a] reviewing court will not disturb a trial court's decision regarding its determination of damages absent an abuse of discretion." *Spalla v. Fransen*, 11th Dist. No. 2009-G-2910, 2010-Ohio-3460, at ¶36. However, in this case, Andisman and Blakeley do not challenge the amount of damages; rather, they challenge the trial court's determination that special damages were available. Whether special damages were appropriate is a question of law. See *K.R.G. Inc. v. Patel*, 9th Dist. Nos. 24083, 24190 at ¶9. Questions of law are reviewed de novo, with no deference to the trial court's determination. *Renacci*, supra, at ¶13.

{¶34} In the instant case, the trial court awarded special damages to cover the costs the Sharps expended to maintain the property after the breach. The trial court concluded that because the Sharps did not need the property as a primary residence because they moved to Florida in 2006, they would not have needed to incur the expense of maintaining the home after the breach. The trial court determined that because Andisman and Blakeley knew the home had been on the market during the eight month time period from the initial offer to the final breach, it was reasonable for the parties to presume the home would remain on the market for at least another eight months. Accordingly, the trial court determined that special damages were

available to compensate the Sharps in the amount they had expended to maintain the home during those eight months.

{¶35} The trial court correctly cited to *Peterman v. Dimoski*, 1st Dist. No. C-020016, 2002-Ohio-7337, for the propositions that the appropriate measure of damages when a buyer breaches a real estate contract is the difference between the contract price and the fair market value of the property at the time of the breach, *Peterman*, supra, at ¶4, and that "the aggrieved seller may recover special damages to the extent that the parties could have reasonably anticipated them." Id. at ¶8. The seller in *Peterman* sought, among other damages, compensation for the "cost of utilities, real estate taxes, and homeowners' association dues for the period until the home was sold." Id. at ¶11. The court determined that these expenses were incidental to homeownership and therefore not "*normally* recoverable as a proper element of additional special damages." (Emphasis added.) Id. at ¶11. The court went on to explain that in a situation where the seller "maintains occupancy following the breach and then decides to move into a new home before the old home is sold, we believe that the economic risk of that decision lies with the owner" and is not a result of the breach. Id at ¶13. In so determining, the court distinguished its previous decision in *Callahan v. Richardson* (Apr. 4, 1979), 1st Dist. No. C-780119, in which the court held special damages would include the cost of maintaining the home if "[a]t the time of the breach, sellers, in reliance on the contract, had already altered their position by entering into a lease and moving into an apartment." *Callahan*, supra, at *3; *Peterman*, supra, at ¶13. Thus, in *Callahan*, the sellers vacated the home in reliance of the purchase agreement and before the breach occurred and therefore the additional maintenance costs of the home were incurred as a result of the breach. Therefore *Peterman*, in part, stands for the proposition that when determining whether costs incurred in maintaining the property subject

to the breach can be recoverable as special damages, the time of the sellers obtaining another residence is imperative. See, e.g., *Hiatt v. Giles*, 2d Dist. No. 1662, 2005-Ohio-6536, ¶40 (concluding that award of special damages for maintenance of the subject property were not recoverable when the sellers moved prior to the relevant purchase agreement being signed.)

{¶36} In the instant case, the trial court stated that "[i]n 2006, the Sharps decided to sell their home, as they were already living most of the time in Florida, to avoid the continuing expense of that home as part of their estate planning." Further, Mr. Sharp testified at the May 29, 2009 trial, that they made Florida their primary residence approximately three years ago. Thus, the Sharps already owned, and considered their home in Florida their primary residence, prior to even putting their Akron property on the market. Thus, the logic in *Peterman* applies, in that the expenses of maintaining two homes were not incurred as a result of the breach.

{¶37} Again, the appropriate measure of damages for Andisman and Blakeley's breach of the purchase agreement is the difference between the contract price and the fair market value of the property at the time of the breach. *Peterman*, supra, at ¶4. The contract price was $1,250,000. The trial court determined that Andisman and Blakeley breached the contract on June 28, 2007. An appraisal on the home showed that as of June 28, 2007, the home was valued at $1,100,000. Therefore, the correct amount of damages for which Andisman and Blakeley are jointly and severally liable is $150,000, plus interest at the statutory rate.

{¶38} Accordingly, Andisman's fifth assignment of error and Blakeley's seventh assignment of error are sustained.

BLAKELEY'S ASSIGNMENT OF ERROR V

"THE TRIAL COURT'S FINDING THAT MR. BLAKELEY'S ALLEGED BREACH OF THE REAL ESTATE PURCHASE AGREEMENT EXTENDED TO 'EARLY 2009' IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND ERRONEOUS AS A MATTER OF LAW."

BLAKELEY'S ASSIGNMENT OF ERROR VI

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN AWARDING THE SHARPS JUDGMENT AGAINST MR. BLAKELEY IN THE AMOUNT OF $375,000.000 FOR 'LOSS OF BARGAIN' WHERE THE ALLEGED BREACH OCCURRED ON JUNE 28, 2007."

{¶39} In his fifth and sixth assignments of error, Blakeley challenges the trial court's award of damages based upon his "continuing actions." We agree.

{¶40} Blakeley challenges the trial court's method of determining damages, thus, arguing that the trial court erred as to its application of law. Again, we review questions of law de novo. *Fleischer*, supra, at ¶18. The trial court determined that on June 28, 2007, Andisman and Blakeley jointly breached their contract with the Sharps. The trial court further determined that due to Blakeley's continuing actions, his breach extended into early 2009. In order to arrive at this conclusion, it would be necessary to determine that the *purchase agreement* extended into early 2009. The trial court did not reach this conclusion. Pursuant to the terms of the contract, "Any subsequent conditions, representations, warranties or agreements shall not be valid and binding upon the parties unless reduced in writing and signed by both parties." Thus, the trial court would need to point to some sort of writing to support a conclusion that the parties agreed to postpone their closing date, thus extending the contract into 2009. We agree with Blakeley's contention that there is no evidence in the record to support such an extension.

{¶41} Further, as we have explained, the appropriate measure of damages when a buyer breaches a real estate contract is the difference between the contract price and the fair market value of the property *at the time of the breach*. *Peterman*, supra, at ¶4. The trial court provides no basis or support for its determination that Blakeley continued to breach the contract, or that this "continued breach" was actionable. In fact, the trial court did not make a determination that Blakeley breached the contract in 2009. Instead, the trial court determined Andisman and

Blakeley breached the contract "by unjustifiably failing to close the purchase on or abut [sic] June 28, 2007[.]" Thus, the date of breach relevant for a damage calculation was June 28, 2007. Accordingly, the trial court erred by determining that the breach was extended to 2009 and calculating damages from that time period. As we explained above, the correct damage amount for which Andisman and Blakeley are jointly and severally liable is $150,000, with interest at the statutory rate.

{¶42} Blakeley's fifth and sixth assignments of error are sustained.

III.

{¶43} Andisman's first, second, third, and fourth assignments of error are overruled. Her fifth assignment of error is sustained. Blakeley's first, second, third, and fourth assignments of error are overruled. His fifth, sixth, and seventh assignments of error are sustained. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
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 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 all parties equally.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

MARK W. BERNLOHR, and SARAH B. CAVANAUGH, Attorneys at Law, for Appellant.

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