

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

TIMOTHY ROBEY

C. A. No. 09CA0011

Appellant

v.

LOUIS COLVIN, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 07-CV-0482

Appellees

DECISION AND JOURNAL ENTRY

Dated: September 27, 2010

Per Curiam.

{¶1} Appellant, Timothy R. Robey, has appealed from the judgment of the Wayne County Court of Common Pleas that granted a directed verdict in favor of the Appellees, Louis and Virginia Colvin. For the reasons that follow, we affirm the trial court’s ruling.

I.

{¶2} Timothy Robey was interested in buying a home situated on a significant amount of property. He became specifically interested in an old farmhouse on 20 acres at 9337 Ruff Road, West Salem, Ohio.

{¶3} Louis and Virginia Colvin had lived in the house at 9337 Ruff Road since 1969. The original part of the house was over 100 years old, and additions had been built over the years. The Colvins had made some of the improvements to the house.

{¶4} Mr. Robey contacted the real estate agent with whom the Colvins had listed the house and scheduled a time to look at it. He visited it at least three times and decided to make an offer. The Colvins' real estate agent also represented Mr. Robey in the transaction.

{¶5} Mr. Robey and the Colvins entered into a contract for the sale of the house, subject to certain inspections. The Colvins also completed the Residential Property Disclosure form and delivered it to Mr. Robey. Mr. Robey arranged for, and was present during, a general inspection of the house. In addition, the real estate agent contacted a company to perform an inspection of the well and septic system. The Colvins approved of the septic inspector and paid for the inspection. No major problems affecting the sale were discovered during the general home inspection, and the septic inspector found the system to be "Acceptable." Mr. Robey was not present for the septic inspection, but received a copy of the report. The sale contract contained a clause that stated that the home was going to be sold "as is."

{¶6} The sale closed in mid-June 2006, and Mr. Robey moved in shortly thereafter with his then-girlfriend and her two young children. Within weeks of living there, Mr. Robey began to experience problems. First, he noticed that the floor at the base of the wall between the living room and the first-floor bathroom was significantly wet. Later, he noticed water damage on the wall in that area. He discovered that the plumbing for the shower was leaking within the wall. The dampness within the wall also caused the bathroom tiles to come off the wall in the shower area. Mr. Robey rebuilt the wall between the living room and bathroom, replaced the bathtub surround, and repapered the walls in the bathroom and living room. He spoke to Mr. Colvin about the problem, and Mr. Colvin told him that they had not used that shower in over fifteen years.

{¶7} On December 26, 2006, Robert Hempel, an inspector with the Wayne County Health Department, visited 9337 Ruff Road to inform Mr. Robey that a nuisance complaint had been filed with respect to the home's septic system. Mr. Hempel performed a test on the system to determine where the system drained. As a result of the test, he determined that raw sewage from the home was draining to the open ditch in front of the house. Mr. Hempel informed Mr. Robey that that violated the state health code and that Mr. Robey needed to remedy the problem or vacate the premises.

{¶8} Mr. Robey contacted the real estate agent, who contacted the Colvins. The Colvins reported that they had no problems with the septic system during the time that they lived in the house and believed it had been properly installed. They were not willing to contribute any money toward the repair of the system.

{¶9} According to Mr. Robey, he was unable to afford a new septic system, so he moved out of the home in September 2007. He eventually installed a completely new septic system and began renting the home to others. At the time of trial, the home was for sale.

{¶10} In July 2007, Mr. Robey filed an action against the Colvins, the real estate company that had participated in the sale, and the Wayne County Health Department. The real estate company and the Health Department were dismissed from the suit, and the action proceeded to a jury trial on Mr. Robey's claims of fraud and breach of contract against the Colvins. After the presentation of Mr. Robey's evidence, counsel for the Colvins moved for a directed verdict. The trial court determined that Mr. Robey had failed to present sufficient evidence to support his claims and granted the Colvins' motion. Mr. Robey has appealed the trial court's ruling, assigning one error for our review.

II.

Standard of Review

{¶11} Under Rule 50(A)(4) of the Ohio Rules of Civil Procedure, when a party has moved for directed verdict, the trial court must construe the evidence in favor of the nonmoving party, and must grant the motion if the only reasonable conclusion to be drawn from the evidence so construed is adverse to the nonmoving party. Additionally, “if the party opposing the motion for a directed verdict fails to produce any evidence on one or more of the essential elements of a claim, a directed verdict is appropriate.” *Broida v. McGlumphy*, 9th Dist. No. 20975, 2002-Ohio-4738, at ¶7. The trial court must deny the motion “when substantial evidence exists upon which reasonable minds may reach different conclusions.” *Northeast Ohio Elite Gymnastics Training Ctr., Inc. v. Osborne*, 138 Ohio App.3d 104, 2009-Ohio-2612, at ¶6. “A motion for a directed verdict assesses the sufficiency of the evidence, not the weight of the evidence or the credibility of the witnesses.” *Id.* The motion “does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence.” *Id.*, quoting *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, at ¶4, quoting *O’Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus. Accordingly, we review the trial court’s ruling on a motion for directed verdict using the de novo standard of review. *Martin v. Design Constr. Services, Inc.*, 9th Dist. No. 23422, 2009-Ohio-2860, at ¶12.

Claims Against the Colvins

{¶12} Despite evidence of other problems on the property, Mr. Robey specified that he sought compensation only for the leaking shower on the ground floor of the house and the septic system failing to treat sewage before it reached the road ditch. He alleged that the Colvins

fraudulently misrepresented that the plumbing and septic system were acceptable and functioning, thereby inducing him to buy the property. He argued that the Colvins knew of the home's faults and did not inform him of these problems. In a separate count, Mr. Robey alleged that the Colvins breached the contract of sale by failing to disclose material problems with the home on the Residential Property Disclosure form.

{¶13} On appeal, Mr. Robey has argued that he presented sufficient evidence through testimony and exhibits to support his claims for fraud and breach of contract. He has asserted that the directed verdict was inappropriate because questions of fact were presented at trial that required determination by the jury.

{¶14} “The doctrine of caveat emptor precludes recovery in an action by the purchaser 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.” *Layman v. Binns* (1988), 35 Ohio St.3d 176, syllabus. Additionally, when an “as is” clause is included in a real estate sales contract, the buyer may not assert a cause of action for fraudulent nondisclosure against the seller. *Loya v. Howard Hanna Smyth, Cramer Co.*, 9th Dist. No. 24378, 2009-Ohio-448, at ¶12. The buyer, however, may maintain a cause of action for fraudulent misrepresentation. *Id.* at ¶13.

“To recover for fraudulent misrepresentation, a party must show: (1) that there was a representation; or where there was a duty to disclose, concealment of a fact which is material to the transaction; (2) 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; (3) with the intent of misleading another into relying upon it; (4) justifiable reliance upon the representation or concealment; and (5) a resulting injury proximately caused by the reliance.” (Numbering added.) *Id.*, quoting *DiCillo v. Prindle*, 9th Dist. No. 21618, 2004-Ohio-2366, at ¶27.

{¶15} In order to support his claim for breach of contract, Mr. Robey was required to demonstrate that: “(1) a contract existed, (2) [Mr. Robey] fulfilled his obligations, (3) [the Colvins] failed to fulfill [their] obligations, and (4) damages resulted from this failure.” *Second Calvary Church of God in Christ v. Chomet*, 9th Dist. No. 07CA009186, 2008-Ohio-1463, at ¶9.

{¶16} The contract between Mr. Robey and the Colvins provided that “[t]he property is sold in its present ‘AS IS’ condition.” The words “as is” were underlined twice by the real estate agent. The Colvins, however, were required to complete a Residential Property Disclosure form pursuant to statute. The Property Disclosure form essentially required the Colvins to reveal any material defects actually known to them presently affecting the property or any major repairs that had been done within the five years preceding the date on which the form was completed. The Property Disclosure form further provided that it did not serve as a warranty of the property by the Colvins or as a substitute for inspections. The Colvins indicated that they were not aware of any leaks or material problems with the plumbing, water supply, or septic system. Additionally, they represented that they were not aware of any code violations or nonconforming uses on the property.

{¶17} The general home inspection of the property did not reveal any material defects with the property with respect to the plumbing or septic system. The inspector’s report indicates that the first-floor shower, with which Mr. Robey later had problems, was inspected and it was recommended that some of the grout and caulk be replaced. The report did not indicate that the shower leaked or did not operate. The inspector was not able to examine the plumbing contained within the walls.

{¶18} At trial, Mr. Robey called Mr. Colvin to testify as if on cross-examination. Mr. Colvin stated that, at least fifteen years prior to the sale, he and his wife had stopped using the

shower on the first floor. He said he had attempted to turn it on at some point after that, but it would not operate. He did not specify when this occurred. Mr. Robey testified that he used the first-floor shower until a couple of months after he moved in when he realized that the shower was leaking and causing damage to the living room wall.

{¶19} Mr. Robey failed to demonstrate that the Colvins knew that the pipes would leak, thereby causing the damage to the wall and floors in the area near the bathroom. Mr. Colvin did not testify that they stopped using the shower because of a leak or other mechanical problems. The fact that the Colvins had not used the shower in over fifteen years supports the conclusion that they did not have knowledge of any leaks. Although Mr. Colvin acknowledged that he was not able to get the shower to work on one occasion, Mr. Robey did not indicate that he had any issues with the functioning of the shower itself. Mr. Robey did not present evidence that the inoperability of the shower Mr. Colvin had experienced was in any way connected to the leaking Mr. Robey experienced. What is more, when asked on cross-examination whether he knew of any documents or statements that would demonstrate that the Colvins knew of problems with the plumbing, Mr. Robey replied that he had no such knowledge and that it was just his opinion that they knew of problems.

{¶20} The parties' real estate agent suggested a private sanitary service company to conduct an inspection of the septic system before the parties' contract was finalized. Although the company's main business involved cleaning septic tanks, it also performed inspections and system maintenance. The Colvins approved the company and paid for the inspection. Mr. Robey was not present for the inspection, but received a copy of the report. The report states in several places that the septic system drains to the ditch along the road. The report does not note any major issues with the system. In one section, the inspector marked that the system was

“Acceptable,” as opposed to “Unacceptable,” in two categories. At trial, the septic inspector testified that he was not qualified to determine if a septic system was legal or illegal.

{¶21} Mr. Colvin testified that, in the ‘70s, he hired a contractor to install leach lines on the septic system. A leach line is designed to drain liquid from the septic tank, allowing it to absorb into the ground to decontaminate the liquid. The Colvins had not made any other changes or repairs to the septic system, but had maintained it by having the septic tank cleaned once every two to three years. Mr. Colvin testified that he never saw any raw sewage in the drainage ditch and never experienced any problems with the system.

{¶22} Mr. Robey presented Wayne County Health Department inspector Robert Hempel as a witness on his behalf. During his investigation of the nuisance complaint on behalf of the Health Department, Mr. Hempel performed a test to determine the location of the septic system’s drainage. He flushed yellow dye down the toilet and ran water in the bathtub to create enough water to pass through the system. After approximately ten minutes, Mr. Hempel observed the dye in the ditch in front of the house. Based on that result and the time it took the dye to reach the ditch, Mr. Hempel determined that the home’s sewage was draining straight to the road ditch, untreated. He testified that, since at least 1974, it has been illegal for untreated sewage to drain in this manner. He opined that either there were no leach lines on the system, or they were not properly functioning. According to Mr. Hempel, a potential homebuyer can contact the Wayne County Health Department to test a home’s septic system to determine if it is functioning legally under the applicable health code.

{¶23} Mr. Robey acknowledged that he knew that the report clearly stated that the system drained to the ditch; he assumed, however, that the material was treated. He did not further investigate that assumption. He was not aware that the material was not treated until Mr.

Hempel performed the dye test. Mr. Robey testified that, prior to the arrival of Mr. Hempel in December 2006; he had never experienced any problems with the septic system and had not performed any repairs or maintenance on the system. He acknowledged that he detected an odor near the ditch, but was not sure of the source and did not look into the issue further. Although Mr. Robey relied on the report of the septic inspector hired by the Colvins, he admitted at trial that he believed that neither the inspector, nor the Colvins were qualified to determine if the septic system operated legally pursuant to the health code. He did not present evidence that he was prevented from contacting his own inspector with respect to the septic system.

{¶24} None of the testimony offered by Mr. Robey demonstrated that the Colvins were aware of any problems with the septic system. The system functioned normally while the Colvins lived in the home without leaks, backups, or other material problems and, in fact, continued to function normally for Mr. Robey. Mr. Colvin testified that his installer had told him three leach lines were installed. Thus, as far as Mr. Colvin was aware, the system complied with the applicable health code. Mr. Robey offered no evidence that the Colvins had knowledge that the septic system violated the health code.

{¶25} Without prior knowledge of the problems Mr. Robey later experienced with the shower and the septic system, it was not possible that the Colvins concealed the defects or falsely represented that the property was free of those defects. See *Loya* at ¶13, quoting *DiCillo* at ¶27 (specifying the elements of fraud). Mr. Colvin's trial testimony demonstrated that the problems Mr. Robey experienced were not problems he experienced while living in the house. Mr. Robey also claims that the Colvins breached their contractual duty to fully disclose material defects, "including but not limited to, the inoperable septic and plumbing systems." The Property Disclosure form specified that the Colvins were to reveal *known*, material defects on the

property. See, also, R.C. 5302.30(C), (D)(1). They could not reveal that which was unknown to them. Moreover, Mr. Robey's evidence did not show that the plumbing and septic systems were not operable.

{¶26} Although Mr. Robey was required to make unfortunate and costly repairs to the home shortly after gaining possession, such circumstances only present a cause of action if, inter alia, he can demonstrate that the Colvins had superior knowledge of the problems and failed to provide him with the information. See *Layman*, 35 Ohio St.3d at syllabus. At trial, Mr. Robey failed to support his claims of fraud and breach of contract with sufficient evidence as to each essential element. Thus, a directed verdict was proper. *Broida* at ¶7.

III.

{¶27} We hold that the trial court did not err in granting the Colvins' motion for directed verdict. Mr. Robey's sole assignment of error is overruled. The judgment of the Wayne 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 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 Appellants.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

BELFANCE, J.
DISSENTS, SAYING:

{¶28} I respectfully dissent. Fraud can exist by virtue of making an affirmative, false representation with knowledge of its falsity or by concealing a material fact that one is duty-bound to reveal. *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169. In this case, Mr. Robey has not identified any affirmative representation of fact made by the Colvins. Therefore, his fraud claim hinges upon whether there was a concealment of a material fact. In other words, Mr. Robey had to demonstrate that the Colvins were hiding or withholding a material fact from him. This presupposes some knowledge on the part of the Colvins because they would obviously have to know about the fact or facts they were attempting to hide.

{¶29} We have previously acknowledged that the knowledge element “is the most difficult to prove.” *Shepherd v Shea* (Oct. 25, 1995), 9th Dist. No. 17090, at *4. We have also stated that one does not have to prove knowledge with direct evidence because that would be an absurdly high burden and “would in effect insulate the defendant from liability unless he were foolish enough to admit knowledge in a deposition or in open court.” *Id.* Thus, “the plaintiff may establish knowledge through circumstantial evidence.” *Id.*

{¶30} In examining the evidence before the court, I find that this is a much closer call than is suggested by the main opinion. For example, with respect to the plumbing issue, Mr. Robey presented, among other evidence, the following: (1) the Colvins lived in the home for 37 years, thus, had intimate knowledge of the home; (2) the Colvins failed to disclose a material fact, namely, that the shower had not worked and that they had not used the shower in years; (3) when Mr. Colvin disclosed to Mr. Robey that the shower had not worked in the past, Mr. Robey asked Mr. Colvin, “don’t you think you should have told me that?” to which Mr. Colvin responded, “Well, I didn’t think about it and, you know, I guess you should have asked more questions[]”; (4) the plumbing malfunction occurred shortly after Mr. Robey moved into the home; (5) the Colvins insisted on the sale being as is and attempted to place the as is clause on the residential property disclosure form; (6) on another occasion, Mr. Colvin repeatedly warned “you think you have problems now, wait until this winter[]”; (7) the Colvins did not make a single disclosure regarding any material defect concerning the home, and; (8) Mr. Robey experienced many problems with the home shortly after moving in, including standing water in the basement, a water leak through the bedroom ceiling, and electrical problems, thereby suggesting a failure to disclose numerous problems with the home.

{¶31} It is axiomatic that consideration of a motion for directed verdict, does not involve weighing the evidence or trying the credibility of witnesses. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 67-68. Furthermore, in considering the evidence, the nonmoving party is given “the benefit of all reasonable inferences from [the] evidence.” *Id.* at 68. As such, “[t]he evidence is granted its most favorable interpretation and is considered as establishing every material fact it tends to prove.” *Id.* at 68-69. This Court has repeatedly stated that “[u]nder the ‘reasonable minds’ portion of Civ.R. 50(A)(4), the court is only required to consider whether

there exists any evidence of probative value in support of the elements of the nonmoving party's claim." *AVB Properties, LLC v. Chesler*, 9th Dist. No. 05CA008702, 2006-Ohio-4306, at ¶20. Thus, "the mere fact that the plaintiff's evidence is unimpressive and unconvincing is not controlling." *Sealy v. Davidson* (Oct. 12, 1994), 2nd Dist. No. 14346, at *4.

{¶32} Thus, the issue is whether Mr. Robey presented evidence of probative value as to whether the Colvins concealed their knowledge about the shower. Clearly, unless Mr. or Mrs. Colvin admitted that they knew about the leaky plumbing, Mr. Robey had to rely on circumstantial evidence to demonstrate the Colvins' knowledge. In my view, when giving Mr. Robey the benefit of all reasonable inferences from the evidence, there was sufficient, probative, circumstantial evidence presented to support his claim. *Ruta*, 69 Ohio St.2d at 68. In particular, Mr. Robey demonstrated that the Colvins already failed to disclose a material fact, namely, that the shower had not functioned and that they had not used the shower in many years. Thus, when viewing this fact most favorably to Mr. Robey, he demonstrated that the Colvins were dishonest about what they knew about the shower. There are reasonable inferences that can be drawn from this fact alone—the Colvins also knew that the shower had faulty plumbing and therefore they stopped using the shower for that reason. The main opinion suggests that since Mr. Colvin did not testify that he had stopped using the shower due to a leak, there was no evidence that Mr. Colvin knew about the problem. It also states that the fact that the Colvins had not used the shower for many years supports the conclusion that they did not have any knowledge of any leaks. However, these facts can just as easily support the conclusion that the Colvins stopped using the shower because they knew it leaked and that they preferred to avoid using the shower rather than to undertake repairs. Furthermore, in reaching these conclusions, the Court essentially treats Mr. Colvin's testimony as true. However, when assessing a motion for directed

verdict, the court must not weigh the evidence or assess the credibility of the witnesses. *Id.* It is possible that a jury could find that Mr. Colvin was not a credible witness. In weighing the evidence, a reasonable person could also place much weight on the Colvins' nondisclosure and the implications drawn from the nondisclosure, as well as place greater weight on some of the other facts identified above.

{¶33} It is apparent that the factfinder's conclusions to be drawn from the evidence depend upon its ultimate resolution of the credibility of the witnesses and the reasonable inferences to be drawn from the evidence in light of those credibility determinations. Although, this case presents a close question, I would reverse the judgment of the trial court.

APPEARANCES:

ROBERT C. MCCLELLAND, Attorney at Law, for Appellant.

JASON STORCK, Attorney at Law, for Appellees.