**[Cite as *Republic Bank v. Conner*, 2010-Ohio-5212.]**

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

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| REPUBLIC BANK<br><br>Appellee<br><br>v.<br><br>GARY D. CONNER, et al.<br><br>Appellant | C.A. No. 25028<br><br>APPEAL FROM JUDGMENT<br>ENTERED IN THE<br>COURT OF COMMON PLEAS<br>COUNTY OF SUMMIT, OHIO<br>CASE No. CV 2002 05 2743 |

DECISION AND JOURNAL ENTRY

Dated: October 27, 2010

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DICKINSON, Presiding Judge.

INTRODUCTION

**{¶1}** Gary and Linda Conner sold their house to Laraine Porter. In exchange for Ms. Porter's promise to assume the mortgages that they had on the house with Republic Bank and FirstMerit Bank, the Conners conveyed their deed to a trust administered by Ms. Porter's father, Lloyd Weimer. According to Mr. Conner, Mr. Weimer promised that Ms. Porter and he would make the mortgage payments and that, after six months, she would refinance the loans. Ms. Porter, however, did not obtain refinancing and, after a couple years, stopped making the Conners' mortgage payments. The banks foreclosed on their mortgages, and Republic obtained a deficiency judgment against the Conners. Mr. Conner sued Ms. Porter, but his claims were discharged in her bankruptcy. He also sued Mr. Weimer, alleging breach of contract, fraudulent inducement, fraudulent misrepresentation, unjust enrichment, and violation of trust and real estate broker laws. The trial court granted Mr. Weimer summary judgment on all of Mr.

Conner's claims. Mr. Conner has appealed, assigning as error that the trial court incorrectly granted Mr. Weimer's motion to strike, incorrectly applied the parol evidence rule, and incorrectly granted Mr. Weimer's motion for summary judgment. This Court affirms because, even though the trial court incorrectly concluded that Mr. Conner's affidavit conflicted with his deposition from another case, it correctly concluded that the parol evidence rule applied, that there are no genuine issues of material fact in dispute, and that Mr. Weimer is entitled to judgment as a matter of law.

## BACKGROUND

**{¶2}** The Conners owned a house in Green, Ohio. After they moved to a new house, they listed the house in Green for sale with a real estate agent. In April 2000, Ms. Porter approached them about buying the house. Although Ms. Porter owned two real estate companies, she intended to use the house as her residence. She told the Conners that, because she was going through a divorce, she could not get traditional financing. She offered, instead, to purchase the house by assuming the Conners' mortgages. The Conners had never been involved in that type of real estate transaction, but decided to think about it. A week later, the Conners, their real estate agent, Ms. Porter, and Mr. Weimer met to discuss a purchase agreement that Ms. Porter had drafted. During the meeting, the Conners and Ms. Porter signed the purchase agreement. The Conners' real estate agent signed it as their agent and Mr. Weimer signed it as Ms. Porter's agent. According to Mr. Conner, Mr. Weimer told him at the meeting that Ms. Porter would refinance the property within six months and that he and Ms. Porter would satisfy the existing mortgage obligations. The parties also signed an addendum to the purchase agreement regarding the agents' compensation.

**{¶3}** A week later, the Conners and Ms. Porter met to sign the closing documents. They executed a number of documents, including an addendum to the purchase agreement, "[a]ssignments" of the mortgages on the property, a compliance agreement, a power of attorney, a trust agreement, a warranty deed conveying the property to Mr. Weimer, as trustee of the trust, and an assignment of the Conners' beneficial interest in the trust. According to Mr. Conner, Mr. Weimer was at the closing and told him, again, that Ms. Porter would refinance the property and that he and Ms. Porter would satisfy the existing mortgage obligations. Mr. Weimer also told him that the assignments of the mortgage would relieve him of his obligations to Republic and FirstMerit. Although Mr. Conner understood that the mortgage loans "remained in my name on the books of the banks," he believed that they had become the obligation of Mr. Weimer and Ms. Porter.

**{¶4}** Ms. Porter did not refinance the property. When she stopped making the mortgage payments, Republic and FirstMerit foreclosed on their mortgages. They named Mr. Weimer, as trustee, as a defendant because he had or claimed to have an interest in the property. Mr. Conner filed a cross-claim against Mr. Weimer. Mr. Weimer moved for summary judgment, which Mr. Conner opposed. Mr. Weimer moved to strike an affidavit Mr. Conner submitted with his opposition brief, claiming it was inconsistent with Mr. Conner's deposition testimony in a prior case Mr. Conner had brought against his real estate agent. The trial court agreed that the affidavit was inconsistent with Mr. Conner's deposition testimony and struck parts of it. It granted summary judgment to Mr. Weimer on Mr. Conner's cross-claims. Mr. Conner has appealed, assigning four errors.

MOTION TO STRIKE

**{¶5}** Mr. Conner's first assignment of error is that the trial court incorrectly concluded that Mr. Weimer's motion to strike was unopposed. His second assignment of error is that the trial court incorrectly concluded that his affidavit contradicted his prior deposition testimony. Because these assignments of error are related, we will consider them together.

**{¶6}** Mr. Weimer moved to strike Mr. Conner's affidavit on August 19, 2009. On September 2, 2009, Mr. Conner filed his "[o]pposition to the motion to strike." In his brief, Mr. Conner attempted to explain why his affidavit and deposition testimony were consistent. The trial court did not rule on the motion to strike until September 24, 2009. In its ruling, the court wrote that "Conner has not responded to the motion [to strike]." It concluded that, because "there is no explanation of the discrepancies [between the affidavit and deposition], the court will not consider the affidavit . . . ." The trial court had, however, incorrectly overlooked the brief Mr. Conner had filed three weeks earlier.

**{¶7}** The other problem with the trial court's ruling is that the record does not contain a copy of Mr. Conner's deposition from the other case. Mr. Weimer's lawyer filed a "Notice of Filing Deposition Transcript," in which he asked the court to "take notice that the deposition transcript of [Mr.] Conner [taken in the other case] . . . was filed [in this case]." The deposition that the lawyer actually submitted, however, was the deposition of the Conners' real estate agent. It appears that neither the parties, nor the trial court, realized that Mr. Weimer's lawyer filed the wrong deposition. Because the record does not contain a copy of Mr. Conner's deposition in the prior case, however, the trial court could not have properly concluded that it conflicts with his affidavit in this case. See *In re J.C.*, 9th Dist. No. 25006, 2010-Ohio-637, at ¶14 (concluding that trial courts may not take judicial notice of proceedings in prior case). Trial courts should

refer to the source documents when determining whether an affidavit and deposition are inconsistent, not excerpts purportedly quoted by the parties in their briefs, which may not provide proper context and may be inaccurate.

PAROL EVIDENCE

**{¶8}** Mr. Conner's third assignment of error is that the trial court incorrectly applied the parol evidence rule. The court determined that, because parts of Mr. Conner's affidavit contradicted the parties' written agreement, they were inadmissible parol evidence and could not be used to establish that genuine issues of material fact exist regarding his claims.

**{¶9}** "The parol evidence rule states that 'absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.'" *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 27 (2000) (quoting 11 Williston on Contracts § 33:4 (4th ed. 1999)). "Despite its name, the parol evidence rule is not a rule of evidence, nor is it a rule of interpretation or construction." *Id*. "The parol evidence rule is a rule of substantive law which, when applicable, defines the limits of a contract." *Id*. (quoting *Charles A. Burton, Inc. v. Durkee*, 158 Ohio St. 313, paragraph one of the syllabus (1952)).

**{¶10}** "The principal purpose of the parol evidence rule is to protect the integrity of written contracts." *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 27 (2000). "Nevertheless, [it] does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement." *Id*. at 28. "[I]t was never intended that the parol evidence rule could be used as a shield to prevent the proof of fraud, or that a person could arrange to have an agreement which was obtained by him through fraud exercised upon the other contracting party reduced to writing and formally executed, and thereby deprive the courts of the power to prevent

him from reaping the benefits of his deception or chicanery." *Id*. (quoting 37 Am. Jur. 2d, Fraud and Deceit § 451 (1968)).

**{¶11}** The parol evidence rule, however, "may not be avoided 'by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing. . . . [A]n oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms.'" *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 29 (2000) (quoting *Marion Prod. Credit Ass'n v. Cochran*, 40 Ohio St.3d 265, paragraph three of the syllabus (1988)). "In other words, '[t]he Parol Evidence Rule will not exclude evidence of fraud which induced the written contract. But, a fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract. Quite to the contrary, attempts to prove such contradictory assertions is exactly what the Parol Evidence Rule was designed to prohibit.'" *Id*. (quoting Shanker, Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds (With Some Cheers and Jeers for the Ohio Supreme Court), 23 Akron L. Rev. 1, 7 (1989)). "[T]he proffered evidence of fraud must show more than a mere variation between the terms of the written and parol agreement . . . ." *Id*. "Unless the false promise is either independent of or consistent with the written instrument, evidence thereof is inadmissible." *Id*. at 30 (quoting *Alling v. Universal Mfg. Corp.*, 5 Cal. App. 4th 1412, 1436 (1992)). "A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed." *Ed Schory & Sons Inc. v. Soc'y Nat'l Bank*, 75 Ohio St. 3d 433, 441 (1996) (quoting *Dice v. Akron, Canton & Youngstown R.R. Co.*, 155 Ohio St. 185, 191 (1951)).

**{¶12}** Mr. Conner has argued that the parol evidence rule does not apply because his affidavit does not contradict the written agreements and because Mr. Weimer engaged in fraud. In his affidavit, he alleged that, "[p]rior to signing the Agreement for Purchase, Lloyd Weimer . . . told me that the Property would be refinanced within six months, that he and his daughter would satisfy the existing FirstMerit and Republic Bank mortgage obligations on the Property, and that he was trustee for my benefit because of Laraine Porter's pending divorce action." He also alleged that, "[i]n reliance on the representations made by Lloyd Weimer, I signed the Agreement for Purchase." He further alleged that, "[a]t the closing, [Lloyd] Weimer specifically told me again that he and Laraine Porter would satisfy the existing FirstMerit and Republic Bank mortgage obligations on the Property, that Laraine Porter would refinance the Property in six months to pay the mortgages in full, and that he was trustee for my benefit. He also told me that the Assignments of Mortgages operated to relieve me of my obligations under the FirstMerit and Republic Bank mortgages."

**{¶13}** A review of the alleged oral promises by Mr. Weimer establishes that they contradict the terms of Ms. Porter and the Conners' written agreement, as expressed in the various documents they signed. See *Ed Schory & Sons Inc. v. Soc'y Nat'l Bank*, 75 Ohio St. 3d 433, 440 (1996). Regarding Mr. Weimer's alleged promise that Ms. Porter would refinance the property within six months, it contradicts the "[a]ddendum to [p]urchase [a]greement" that the Conners and Ms. Porter signed regarding brokerage fees. The addendum provided that the agents would split $14,800 equally. The Conners agreed to pay their real estate agent $550 per month from June 2000 to July 2001 with a final payment of $250 in August 2001. They agreed to pay Mr. Weimer $550 per month from September 2001 until his $7400 was paid in full. The addendum provided, however, that, "[i]f refinancing of this property occurs during the next 14

months, [Mr. Weimer's] commission is payable in full." Considering that the agreement contains a provision contemplating only the mere possibility that the mortgages could be refinanced in the next 14 months, it is inconsistent with the alleged promise by Mr. Weimer that the property would be refinanced within six months.

**{¶14}** Regarding Mr. Conner's allegation that Mr. Weimer told him that he and Ms. Porter would satisfy the mortgages, it contradicts both the purchase agreement and addendum "A" to the purchase agreement, which named only Ms. Porter as the "Buyer" of the property. Addendum "A" provides that "Buyer will pay [$2002.00] directly to [FirstMerit] monthly, which includes taxes and insurance." "Buyer will pay [$896.87] directly to [Republic] monthly." "Buyer will take over Seller's 2nd Mortgage." In addition, there is no genuine issue of material fact that Mr. Weimer signed the purchase agreement solely as Ms. Porter's real estate agent and that he did not sign addendum "A" at all. Furthermore, Mr. Conner has not argued that Mr. Weimer's statement should be construed as a guarantee of Ms. Porter's performance. His only argument is that Mr. Weimer and Ms. Porter were "co-purchaser[s]" of the property.

**{¶15}** Regarding Mr. Conner's allegation that Mr. Weimer said that he was trustee for the Conners' benefit, it is true that the trust document provides that the Conners are the beneficiaries of the trust. The warranty deed also recognizes that fact. Contemporaneous with their execution of those documents, however, the Conners signed an "Assignment of Beneficial Interest in a Trust," which assigned their interest in the trust to Ms. Porter. Accordingly, Mr. Weimer's alleged statement directly contradicts the documents signed by the Conners.

**{¶16}** Finally, regarding Mr. Weimer's alleged statement that the mortgage assignments relieved the Conners of their obligations under the mortgages, it is contradicted by the terms of

addendum "A" to the purchase agreement. That addendum specifically recognized that Ms. Porter would be making her payments to the Conners' lender.

**{¶17}** Mr. Conner has also argued that the parol evidence rule does not apply because the purchase agreement did not have language stating that it is an integrated agreement. The Ohio Supreme Court, however, has held that, whether a contract is integrated "is not dependent [on] the existence of an integration clause to that effect . . . ." *Bellman v. Am. Int'l Group*, 113 Ohio St. 3d 323, 2007-Ohio-20721, at ¶11. "A contract that appears to be a complete and unambiguous statement of the parties' contractual intent is presumed to be an integrated writing." *Id.* "The presence of an integration clause makes the final written agreement no more integrated than does the act of embodying the complete terms into the writing." *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 28 (2000).

**{¶18}** According to Mr. Conner, the fact that the purchase agreement refers to addendum "A," which the parties did not sign until more than a week after they signed the purchase agreement, demonstrates that they did not intend for the purchase agreement to be a final written integration of their agreement. The parol evidence rule, however, applies to the "parties' final written integration of their agreement." *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27 (2000) (quoting 11 Williston on Contracts § 33:4 (4th ed. 1999)). Mr. Conner has not directed this Court to any authority suggesting that the agreement must be contained in a single document. The purchase agreement in this case was supplemented by two addenda, one regarding the agents' commissions and one regarding when Ms. Porter would take over the Conners' mortgage payments. The three documents "appear[ ] to be a complete and unambiguous statement of the parties' contractual intent" regarding the sale of the house to Ms. Porter. *Bellman v. Am. Int'l Group*, 113 Ohio St. 3d 323, 2007-Ohio-20721, at ¶11. The trial

court, therefore, correctly concluded that the assertions Mr. Conner made in his affidavit regarding what Mr. Weimer allegedly told him at the time he signed the purchase agreement and other document should be excluded under the parol evidence rule. Because the statements were properly excluded under the parol evidence rule, the trial court's mistakes regarding Mr. Weimer's motion to strike were harmless. See Civ. R. 61. Mr. Conner's first, second, and third assignments of error are overruled.

SUMMARY JUDGMENT

**{¶19}** Mr. Conner's fourth assignment of error is that the trial court incorrectly granted Mr. Weimer's motion for summary judgment. In reviewing a trial court's ruling on a motion for summary judgment, this Court applies the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

JOINT VENTURE

**{¶20}** Mr. Conner has argued that the trial court incorrectly concluded that Mr. Weimer and Ms. Porter were not joint venturers. "A joint venture is '. . . an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each coadventurer shall stand in the relation of principal, as well as agent, as to each of the other coadventurers . . . .'" *Al Johnson Constr. Co. v. Kosydar*, 42 Ohio St. 2d 29, paragraph one of the syllabus (1975) (quoting *Ford v. McCue*, 163 Ohio St. 498, paragraph one of the syllabus (1955)). "[If] the facts

are undisputed, . . . the issue of the relationship of the defendants to each other is ordinarily one of law for the determination of the trial court." *Ford*, 163 Ohio St. at 506.

**{¶21}** Mr. Conner submitted evidence showing that Mr. Weimer and Ms. Porter have been engaged in a number of real estate transactions together. There is no evidence that Ms. Porter's purchase of the Conners' house, however, was "a single business adventure for joint profit." *Al Johnson Constr. Co. v. Kosydar*, 42 Ohio St. 2d 29, paragraph one of the syllabus (1975) (quoting *Ford v. McCue*, 163 Ohio St. 498, paragraph one of the syllabus (1955)). Mr. Conner has not disputed that Ms. Porter bought the house for use as her residence. Accordingly, even assuming that the transaction was profitable for Mr. Weimer because he was entitled to a commission and because he received ten dollars a month for serving as trustee, there is no genuine issue that this was not a business venture. The trial court, therefore, correctly concluded that Mr. Weimer and Ms. Porter were not engaged in a joint venture.

BREACH OF CONTRACT

**{¶22}** Mr. Conner has also argued that the trial court incorrectly concluded that Mr. Weimer did not breach the purchase agreement and mortgage assignments. According to him, it is undeniable that the mortgage obligations were not paid, which resulted in a deficiency judgment against him. He has argued that Mr. Weimer is liable because he was a party to the transaction and because of the joint venture relationship between him and Ms. Porter. "[T]o prove a breach of contract claim a plaintiff must demonstrate by a preponderance of the evidence that: (1) a contract existed, (2) the plaintiff fulfilled his obligations, (3) the defendant failed to fulfill his 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 (citing *Lawrence v. Lorain County Cmty. Coll.*, 127 Ohio App. 3d 546, 548-49 (1998)).

**{¶23}** Mr. Conner's arguments fail because he did not present any evidence that Mr. Weimer failed to fulfill his obligations under the contract. The purchase agreement and addenda provided that Ms. Porter is the sole buyer of the property. Under those documents, only Ms. Porter had an obligation to pay the Conners' mortgage payments. Mr. Weimer signed the purchase agreement only as Ms. Porter's real estate agent. While the mortgage assignments name Mr. Weimer as the assignee, it is merely as "Trustee" for the trust. Furthermore, even if the assignments could be construed as an attempt to impose an obligation on Mr. Weimer personally, Mr. Weimer did not sign them, expressing his consent to be bound by them. There is no other admissible evidence indicating that he agreed to be personally liable for the mortgage payments.

FRAUD AND NEGLIGENT MISREPRESENATION CLAIMS

**{¶24}** Mr. Conner has also argued that the trial court incorrectly granted Mr. Weimer summary judgment on his fraudulent inducement and misrepresentation claims. According to Mr. Conner, Mr. Weimer's statements that he would satisfy the mortgages, that Ms. Porter would refinance the property, that the mortgage assignments relieved him and his wife of their obligations under the mortgages, and that he was trustee for the Conners' benefit were all false. He has also argued that Mr. Weimer is liable for negligent misrepresentation.

**{¶25}** "The elements of fraud are: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Burr v. Stark County Bd. of Comm'rs*, 23 Ohio St. 3d 69,

paragraph two of the syllabus (1986). To prove fraud in the inducement, Mr. Conner would have had to "prove that [Mr. Weimer] made a knowing, material misrepresentation with the intent of inducing [Mr. Conner's] reliance, and that [Mr. Conner] relied upon that misrepresentation to [his] detriment." *ABM Farms Inc. v. Woods*, 81 Ohio St. 3d 498, 502 (1998).

**{¶26}** The elements of negligent misrepresentation are similar to the elements of fraud. *Martin v. Ohio State Univ. Found.*, 139 Ohio App. 3d 89, 104 (2000). In describing liability for negligent misrepresentation, the Ohio Supreme Court has written: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Delman v. Cleveland Heights*, 41 Ohio St. 3d 1, 4 (1989) (emphasis in original) (quoting Restatement (Second) of Torts § 552(1) (1965)).

**{¶27}** The only evidence Mr. Conner offered in support of his fraud and negligent misrepresentation claims was his affidavit with attached exhibits. Under Rule 56(E) of the Ohio Rules of Civil Procedure, affidavits must be "made on personal knowledge" and must "set forth such facts as would be admissible in evidence." See *Jones v. H. & T. Enters.*, 88 Ohio App. 3d 384, 389-90 (1993). This Court has determined that the statements Mr. Conner made in his affidavit regarding Mr. Weimer's alleged misrepresentations are inadmissible parol evidence. Accordingly, they are insufficient to establish that genuine issues of material fact exist regarding his claims. The trial court correctly granted Mr. Weimer summary judgment on Mr. Conner's fraud and negligent misrepresentation claims.

UNJUST ENRICHMENT

**{¶28}** Mr. Conner has also argued that the trial court incorrectly granted Mr. Weimer summary judgment on his unjust enrichment claim. He has argued that Ms. Porter has been unjustly enriched at his expense, which Mr. Weimer is liable for as her joint venturer. Because he failed to present evidence that Mr. Weimer was in a joint venture with Ms. Porter, however, the trial court correctly granted Mr. Weimer summary judgment on that claim.

VIOLATION OF TRUST LAWS

**{¶29}** Mr. Conner has next argued that the trial court incorrectly granted Mr. Weimer summary judgment on his claim for violation of trust laws. According to him, Mr. Weimer failed to protect and conserve the trust property. He has also argued that his assignment of his interest in the trust to Ms. Porter was invalid.

**{¶30}** According to the trust document, Mr. Weimer, as trustee, "shall not be required . . . to enter into any individual contract or other individual obligation . . . nor to make himself individually liable to pay or incur the payment of any damages . . . or other sums of money whatsoever. The Trustee shall have no individual liability or obligation whatsoever arising from his ownership, as Trustee, of the legal title to the Trust Property . . . ." It also provided that Mr. Weimer "shall be liable only for his own acts and then only as a result of his own gross negligence or bad faith." Mr. Conner has argued that Mr. Weimer failed to ensure that the mortgage payments on the house were made. Mr. Weimer, however, had no obligation to use his own assets to satisfy the mortgage. Furthermore, Mr. Conner has not alleged that Mr. Weimer's acts were grossly negligent or done in bad faith. Regarding Mr. Conner's assignment of his interest in the trust, even if the assignment is invalid, Mr. Conner has not demonstrated why it

makes Mr. Weimer liable for the unpaid mortgage payments. The trial court correctly granted summary judgment to Mr. Weimer on Mr. Conner's violation of trust law claims.

VIOLATION OF REAL ESTATE LAWS

**{¶31}** Mr. Conner has next argued that the trial court incorrectly granted Mr. Weimer summary judgment on his claims for violation of real estate laws. He has argued that his fraud and negligent misrepresentation claims establish that Mr. Weimer violated Section 4735.61 of the Ohio Revised Code, which provides, regarding real estate brokers, that "[n]o licensee shall knowingly give false information to any party in a real estate transaction."

**{¶32}** As with his fraud and negligent misrepresentation claims, the only evidence Mr. Conner submitted in opposition to Mr. Weimer's motion for summary judgment regarding this claim was inadmissible parol evidence. Accordingly, the trial court properly granted Mr. Weimer summary judgment on this claim.

CIVIL CONSPIRACY

**{¶33}** Mr. Conner's next argument is that the trial court incorrectly granted Mr. Weimer summary judgment on his civil conspiracy claim. Civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St. 3d 415, 419 (1995) (quoting *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St. 3d 121, 126 (1987)). This Court has recognized that, to establish a cause of action for civil conspiracy, the plaintiff must have asserted "(1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself. . . . [T]he underlying unlawful act must be a tort." *LaSalle Bank, N.A. v. Kelly*, 9th Dist. No. 09CA0067-M, 2010-Ohio-2668, at ¶33 (internal citations omitted) (quoting

*Wright Safety Co. v. U.S. Bank, N.A.*, 9th Dist. No. 24587, 2009-Ohio-6428, at ¶32); see *Gosden v. Louis*, 116 Ohio App. 3d 195, 221-22 (1996).

**{¶34}** Mr. Weimer has not demonstrated that a genuine issue of material fact exists regarding whether Mr. Weimer committed a tort independent from the alleged conspiracy. The trial court, therefore, correctly granted Mr. Weimer summary judgment on Mr. Conner's civil conspiracy claim.

INDEMNIFICATION AND CONTRIBUTION

**{¶35}** Mr. Conner's final argument is that the trial court incorrectly granted Mr. Weimer summary judgment on his claims for indemnification and contribution. Inasmuch as Mr. Conner has failed to establish that Mr. Weimer had a personal obligation to pay the Republic and FirstMerit mortgages, he has also failed to establish that Mr. Weimer should indemnify him or contribute to the deficiency judgment rendered against him because of the default of those mortgages. The trial court correctly granted Mr. Weimer summary judgment on his indemnification and contribution claims. His fourth assignment of error is overruled.

CONCLUSION

**{¶36}** Because the parts of Mr. Conner's affidavit that were struck by the trial court were inadmissible parol evidence, the trial court's mistakes regarding Mr. Weimer's motion to strike were harmless. The trial court correctly granted Mr. Weimer's motion for summary judgment. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

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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 appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BAIRD, J.
CONCUR

(Baird, J., retired of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(c), Article IV, Constitution.)

APPEARANCES:

JOSEPH R. SPOONSTER, attorney at law, for appellant.

COLIN G. SKINNER, attorney at law, for appellee.