**[Cite as *Brown v. Scheussler*, 2010-Ohio-642.]**

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

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| DELENA BROWN | C.A. No. 25008 |
| Appellant | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| DAN SCHEUSSLER, et al. | COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO |
| Appellees | CASE No. CV 2008-08-5762 |

DECISION AND JOURNAL ENTRY

Dated: February 24, 2010

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DICKINSON, Presiding Judge.

INTRODUCTION

**{¶1}** A few months after Delena Brown bought a house from Dan and Nancy Schuessler, water began coming up through the heating vents in the floor. After a waterproofing company told her that the problem did not develop overnight and probably took a number of years to get to the state it was in, she sued the Schuesslers, alleging fraud and mutual mistake. The trial court granted summary judgment to the Schuesslers because it determined that Ms. Brown did not present any evidence that there was a water intrusion problem before she bought the house, that the Schuesslers knew about the problem, or that they concealed it from her. This Court affirms because Ms. Brown did not present any evidence that the house had the water intrusion problem before she bought it and because the parties accounted for any latent defects in their agreement.

FACTS

**{¶2}** After the Schuesslers put their house up for sale, Ms. Brown viewed it three or four times and then entered into a purchase agreement with them. The Schuesslers wrote in their Residential Property Disclosure Form that they did not "know of any previous or current water leakage, water accumulation, excess moisture or other defects to the property, including but not limited to any area below grade, basement, or crawl space[.]" They also wrote that they did not know of any material problems with the foundation, basement, or crawl space. They did tell Ms. Brown that, "during the flood of '03 water came through [the] laundry door" and damaged the floor. They also told her that, after the 2003 flood, they replaced the drain tiles around the house and the sump pump.

**{¶3}** In the purchase agreement, Ms. Brown acknowledged that she was buying the house "AS IS." The Schuesslers agreed to let Ms. Brown do several professional inspections of the house, including a general home inspection. Ms. Brown hired a home inspector and accompanied him as he inspected the house. He did not find any major flaws in the areas that he was able to view. He was not, however, able to view the space under the living quarters of the house. Ms. Brown completed her purchase of the house in September 2007.

**{¶4}** In January or February 2008, Ms. Brown began to notice that water was coming into her house through the vents in the floor whenever the furnace was running. She hired a heating and cooling specialist who told her that it was because there was water in the space under the house that was being forced up through the vents when the furnace blew down into it. To fix the problem, she hired a waterproofing company that replaced the downspouts and the footer tiles around the house. It also dug down to the footer and sealed places with plastic and tar. The

foreman of the waterproofing crew opined that the water intrusion problem "did not develop overnight and probably took a number of years to get to the point at which he found [it]."

**{¶5}** Ms. Brown sued the Schuesslers to recover the cost of the repairs, alleging that they knew about the water intrusion problem but either failed to disclose it or intentionally concealed it. She also alleged that, in the event the Schuesslers did not know about the problem, there had been a mutual mistake of fact as to whether the house had water intrusion problems. The Schuesslers moved for summary judgment, arguing that there was no evidence that they actively concealed any defects or affirmatively misrepresented the condition of the house. The trial court granted their motion, concluding that there was no evidence that there was a problem with the house before the sale, that the Schuesslers knew that there was a problem, or that they took steps to conceal it. According to the court, "[i]t simply does not follow that because there was water intrusion after the sale of the house[, that the Schuesslers] knew of a problem existing and concealed it from [Ms. Brown.]" Regarding mistake, the court concluded that "[t]here simply was no mutual mistake present in the terms reached between the parties . . . ." Ms. Brown has appealed, assigning as error that the trial court incorrectly granted the Schuesslers summary judgment.

FRAUD

**{¶6}** Ms. Brown's first argument is that it was inappropriate for the trial court to grant the Schuesslers summary judgment on her fraud claim. 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).

**{¶7}** The doctrine of caveat emptor precludes a purchaser from recovering for a structural defect in real estate if "(1) the condition complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser had the unimpeded opportunity to examine the premises, and (3) there is no fraud on the part of the vendor." *Layman v. Binns*, 35 Ohio St. 3d 176, syllabus (1988). Ms. Brown has argued that the doctrine does not apply to her because the Schuesslers fraudulently misrepresented that the house did not have any water intrusion problems. She has noted that the only water intrusion problem that the Schuesslers told her about occurred during a flood in 2003 and that they wrote that they had repaired the problem by replacing the sump pump, the drain tiles around the house, and some flooring. Ms. Brown has also argued that the Schuesslers fraudulently concealed that the house had current water intrusion problems by not describing them on the disclosure form.

**{¶8}** "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). Regarding fraudulent concealment or nondisclosure, the Ohio Supreme Court has held that "a vendor has a duty to disclose material facts which are latent, not readily observable or discoverable through a purchaser's reasonable inspection." *Layman v. Binns*, 35 Ohio St. 3d 176, 178 (1988). "Fraudulent concealment exists where a vendor fails to disclose sources of peril of which he is aware, if such a source is not discoverable by the vendee." *Bryk v. Berry*, 9th Dist. No. 07CA0045, 2008-Ohio-2389, at ¶7. "The nature of

the defect and the ability of the parties to determine through a reasonable inspection that a defect exists are key to determining whether or not the defect is latent." *Id*.

**{¶9}** Ms. Brown's argument fails because she did not present any evidence that the Schuesslers knew that the house had a water intrusion problem at the time they sold it. Although she experienced water intrusion several months after she bought the house, it does not follow that the problem existed before the sale or that the Schuesslers knew about it. While the waterproofing company foreman opined that the problems he fixed "did not develop overnight and probably took a number of years to get to the point at which he found them," he did not offer an opinion as to how long the water had been in the space under the house or whether the Schuesslers would have known it was there. Accordingly, there is no evidence that their representation that the house did not have any current water intrusion problems was "made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred." *Burr v. Stark County Bd. of Comm'rs*, 23 Ohio St. 3d 69, paragraph two of the syllabus (1986). The trial court correctly determined that the Schuesslers were entitled to summary judgment on Ms. Brown's fraud claim.

MUTUAL MISTAKE

**{¶10}** Ms. Brown has also argued that the trial court incorrectly concluded that the Schuesslers were entitled to summary judgment on her mutual mistake claim. "[Ohio] recognizes the doctrine of mutual mistake as a ground for the rescission of a contract under certain circumstances." *Reilley v. Richards*, 69 Ohio St. 3d 352, 352 (1994). "[A] buyer is entitled to rescission of a real estate purchase contract [if] there is a mutual mistake as to a material part of the contract and . . . the complaining party is not negligent in failing to discover the mistake." *Id*. at 352-53. "A mistake is material to a contract when it is 'a mistake . . . as to a

basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances.'" *Id*. at 353 (quoting Restatement (Second) of Contracts: Mistake, § 152(1) (1981)). "[T]he intention of the parties must have been frustrated by the mutual mistake." *Id*.

**{¶11}** As with her fraud claim, Ms. Brown's mutual mistake claim fails because there is no evidence that the house had a water intrusion problem at the time she bought it. She, therefore, did not show that the parties were mutually mistaken about that fact. Furthermore, in the purchase agreement, Ms. Brown agreed to accept the house "in its 'AS IS' PRESENT PHYSICAL CONDITION." She acknowledged that she understood "that all real property and improvements may contain defects and conditions that are not readily apparent and which may affect a property's use or value." The disclosure form also provided that it was "NOT A WARRANTY OF ANY KIND . . . ." Even if the house's downspouts and foundation walls had deteriorated to the point that water had entered or was about to enter the space under the house, there is no evidence that the parties were mistaken about the fact that such conditions might exist. The purchase agreement specifically recognized that there might be defects with the house that had not been discovered and assigned the risk of those problems to Ms. Brown. The trial court, therefore, properly granted summary judgment to the Schuesslers on her mutual mistake claim. Ms. Brown's assignment of error is overruled.

## CONCLUSION

**{¶12}** The trial court correctly granted summary judgment to the Schuesslers. The judgment of the Summit County Common Pleas Court 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 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

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

DANIEL S. WHITE, attorney at law, for appellant.

CYNTHIA LAMMERT, and GREGORY G. GUICE, attorneys at law, for appellees.