

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

KEVIN KESS, :
 :
 Plaintiff-Appellant, :
 : No. 112117
 v. :
 :
 ABDUL KHAN, ET AL., :
 :
 Defendants-Appellees. :
 :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 10, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-929729

Appearances:

L. Bryan Carr, *for appellant.*

Edwin V. Hargate, *for appellees.*

KATHLEEN ANN KEOUGH, P.J.:

{¶ 1} Plaintiff-appellant, Kevin Kess, appeals the trial court’s decision granting summary judgment in favor of defendants-appellees, Abdul Khan (“Abdul”) and Rubina Saleem (collectively “the Khans”). For the reasons that follow, this court affirms the trial court’s decision.

I. Factual and Procedural History

{¶ 2} On or about May 16, 2016, Kess, as buyer, executed a purchase agreement to purchase a single-family home in Highland Heights, Ohio (“the property”) from the Khans, as sellers, who had lived in the home since 2003.

{¶ 3} The purchase agreement incorporated the Ohio Residential Property Disclosure form (the “RPDF”) that the Khans had completed on April 3, 2016. In the RPDF, the Khans either did not answer certain questions about or denied knowledge of any of the following conditions with respect to the property:

(B) Sewer System — any previous or current leaks, backups, or other material problems with the sewer system;

(D) Water Intrusion — any previous or current water leakage, water accumulation or excess moisture or other defects in the property, including but not limited to any below grade basement or crawl space;

[(D) Water Intrusion] — any water or moisture-related damage to floors, walls or ceilings as a result of flooding, moisture seepage, moisture condensation; ice damming; sewer overflow/backup; or leaking pipes, plumbing fixtures, or appliances;

(E) Structural Components (Foundation, Basement/Crawl Space, Floors, Interior, and Exterior Walls) — any previous or current movement, shifting, deterioration, material cracks/settling (other than visible minor cracks or blemishes) or other material problems with the foundation, basement/crawl space, floors, or interior/exterior walls); [and]

(K) Drainage/Erosion — any previous or current flooding, drainage, settling or grading or erosion problems affecting the property.

{¶ 4} The purchase agreement stated that the property was “accepted in its ‘AS IS’ PRESENT PHYSICAL CONDITION” and was contingent upon the results of a professional general home inspection performed by an inspector of Kess’s

choosing within ten days of the execution of the purchase agreement. Kess signed the RPDF and acknowledged “that it is BUYER’S own duty to exercise reasonable care to inspect and make diligent inquiry of the SELLER or BUYER’S inspectors regarding the condition and systems of the Property.”

{¶ 5} As part of the purchase agreement, Kess and the Khans also executed “Addendum I – Walk Through” whereby the parties agreed that Kess would

be given an opportunity to walk through the Property on or about 2 day(s) prior to depositing funds in escrow for the purpose of verifying that the Property is in the same or similar condition, absent normal wear and tear, that it was at the time of the execution of the Agreement. Buyer acknowledges and agrees that no issues may be raised at the time of the walk-through with respect to any condition of the Property that was in existence at the time of Buyer’s viewing or inspection of the Property. In the event that the walk-through evidences a material adverse change in the condition of the Property, then Buyer shall promptly notify the Seller and the escrow agent in writing.

As part of this addendum, the Property was to be in “broom clean condition and free of all personal property and debris at the time of possession.”

{¶ 6} Kess hired Bona Fide Home Inspections to perform a general home inspection of the property. On May 23, 2016, Daniel Garey (“Garey” or “the inspector”), a certified home inspector, performed the inspection. Kess testified at deposition that he and his realtor were present when Garey performed the inspection. (Tr. 45.) The inspection report summarized 11 “potentially significant findings” with the property including:

Grading — Slopes toward structure: The grading around the home slopes towards the foundation in one or more places. This promotes excessive moisture and water issues in the foundation. Adding soil or

grading properly to assure that ground water is shed away from the foundation is recommended.

Deck and Porch Conditions — The rear porch steps to the sliding patio door have settled and are uneven. This is considered a safety hazard and correction is recommended.

Siding Condition — The brick veneer on the front of the home is in need of minor tuck pointing. The underside of the overhang of the first-floor structure near the back patio is in need of the weather resistant finish.

Doors — The man door to the garage on the south side of the home is deteriorated near the bottom. Further evaluation in order to assure proper repair and structural integrity is recommended.

Chimney — Tuck pointing. The structure of the chimney appears solid but is in need of tuck pointing in order to obtain structural integrity; Mortar Crown needed. The Mortar crown on the top of the chimney is deteriorating and in need of replacement. This will assure the proper shedding of storm water.

Gutter Conditions — Dirty. The gutters were found dirty. Routine maintenance and cleaning is recommended.

Foundation Conditions — Abnormal cracking present. There are cracks present in the foundation that do not appear to be from normal “settling.” It is recommended that further evaluation from a qualified engineer be performed to assure structural integrity.

[Heater] — The age of the heater is over 25 years old. The heater has passed the end of its life expectancy. You should expect to replace the unit at any moment.

Plumbing Material Conditions — Exterior faucet does not flow water. One or more of the exterior hose faucets does flow water. This may simply be due to standard winterization. Service by a qualified plumber in order to assure proper operation is recommended. The sink in the master bath is leaking at both the drain and the faucet fixture. Full evaluation and repair by a qualified plumber is recommended.

Finished Interior Door Conditions — Deteriorated hardware. The hardware on one or more doors is deteriorated and does not latch/lock properly. Damaged bathroom door for main bath.

Air conditioner — Age. Over 20 years old. The air conditioner is over 20 years old and has passed its life expectancy. Based on its age alone, you should be prepared for its failure at any moment.

In the report, the inspector included photographs of the significant areas of concern, including where the grading around the house sloped toward the house and in the basement where a horizontal crack was present in the cinder block wall foundation.

{¶ 7} During his deposition, Kess admitted that he reviewed the report and his inspector's findings. He stated, "I don't think there was anything that terribly stood out to me as a huge issue * * * [t]here was nothing glaring that we found at that current time on the condition of the home" (tr. 48-49) but he used the inspection to ask the Khans to make "a small list of items to repair," including the front brick veneer on the outside of the home and the chimney. (Tr. 32-33.)

{¶ 8} Kess testified that during his two prior walk-throughs of the house and then one with his inspector, the basement was cluttered with personal belongings. He admitted that the Khans did not impede or interfere with his opportunity to look at the basement but stated that he did not move any objects to view the obstructed areas. Kess also admitted that during the inspection he saw the crack in the foundation wall that was specifically photographed and identified, and further admitted that "it was open and obvious." (Tr. 64-65.) He testified that despite the inspector recommending that he follow up with a structural engineer, he did not and the presence of the cracking did not cause him to seek a reduction in the purchase price or back out of the purchase of the home. (Tr. 54, 56.) He stated that the condition of the foundation and the existing cracks were not a concern based on

emails sent back and forth with his inspector.¹ (Tr. 49.) Kess stated: “I was given the impression that it wasn’t — it was something that [the inspector] had to cite in there, and it was really nothing more to it.” (Tr. 55.) Accordingly, Kess admitted that he relied on his inspector’s subsequent assurances and proceeded to purchase the home. (Tr. 56, 66-67.) Kess agreed that after the inspection and the Khanses’ making the requested repairs, he removed the inspection contingency and accepted the property in its as-is present physical condition. (Tr. 33.) On July 15 2016, title on the property transferred from the Khans to Kess. (Tr. 7.)

{¶ 9} “[S]hortly after moving into the property, [Kess] began to experience severe problems related to water infiltration in the basement,” (complaint paragraph 16.) and “severe problems related to the undisclosed defects” in the property. (Complaint paragraphs 5, 16.) He specified during his deposition that he observed cracks in the basement foundation walls “four or five months [after the purchase] with the changing of the seasons.” (Tr. 39.) Kess stated that contractors he hired in 2017 opined that the issues in the basement were “preexisting.” (Tr. 37-38.)

{¶ 10} In 2018 Kess filed a lawsuit against the Khans, alleging actions for fraud, fraudulent inducement, and mutual mistake of fact.² He alleged that the Khans made false representations and concealed material facts regarding a prior

¹ These emails are not part of our record.

² Kess did not name Bona Fide Home Inspectors or Daniel Garey as defendants in the lawsuit.

sewer back up, water intrusions, and cracking in the foundation walls. Kess further contended that he relied on the Khanses' representations in the RPDF and that they were made to induce him to purchase the property. The case was voluntarily dismissed without prejudice and refiled in 2020, asserting the same allegations against the Khans.

{¶ 11} Following the exchange of discovery, the Khans moved for summary judgment, which the trial court summarily denied after Kess filed his opposition. After a settlement conference, the Khans sought reconsideration of their motion for summary judgment, contending that they had obtained “newly discovered evidence and information.” The claimed “new evidence” were documents produced by Kess that purportedly supported his amount of damages. Despite Kess opposing the motion, the trial court granted the Khans reconsideration and allowed Kess time to oppose the Khanses' “renewed” motion for summary judgment. After briefing, the trial court reconsidered its prior denial and summarily granted summary judgment in favor of the Khans.

{¶ 12} This appeal followed.

II. Summary Judgment

{¶ 13} Kess contends in his sole assignment of error that the trial court erred in reconsidering and then granting the Khanses' “renewed” motion for summary judgment. Specifically, he contends that the trial court erred in (1) granting reconsideration; (2) relying on documents produced during settlement

negotiations; and (3) granting summary judgment because the Khans fraudulently failed to disclose in the RPDF material defects with the property.

A. Standard of Review

{¶ 14} We review the trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 210 (1998).

{¶ 15} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party has the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.* Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

B. Granting Reconsideration

{¶ 16} “Interlocutory orders are subject to motions for reconsideration, whereas judgments and final orders are not.” *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St. 2d 378, 379, 423 N.E.2d 1105 (1981), fn. 1. An order denying a motion for summary judgment is interlocutory, and until a final judgment is entered, a trial court may reconsider and modify it. *Citizens Fed. Bank, F.S.B. v. Brickler*, 114 Ohio App.3d 401, 411, 683 N.E.2d 358 (2d Dist.1996); *Barrett v. Waco Internatl., Inc.*, 123 Ohio App.3d 1, 11, 702 N.E.2d 1216 (8th Dist.1997) (“[T]he trial court did not commit any error by reconsidering its order denying a motion for summary judgment.”). Accordingly, any assertion by Kess that the trial court lacked authority to reconsider its denial of summary judgment is without merit.

C. Reliance on Documentation Regarding Damages

{¶ 17} Kess asserts that the Khanses’ reliance and inclusion of documentation of Kess’s damages received as a result of settlement negotiations was improper Civ.R. 56 material and thus, the trial court should not have relied on those documents in its decision to grant the Khans reconsideration and enter judgment in their favor. We find no error.

{¶ 18} Prior to the trial court conducting a settlement conference, it requested that Kess provide documentary support of his damages. In response, Kess provided the Khans with two receipts of repairs – one dated March 2017 for repairs made to issues listed in the inspector’s report, and the other dated November 2017 from a waterproofing contractor. The Khans relied on these two documents in

support of their motion for reconsideration, contending this “new and additional evidence” demonstrated that the defects and issues Kess complained of were fully disclosed to Kess by his own professional inspector before the completion of the sale of the property.

{¶ 19} Kess summarily contends, without citation to any authority, that the documentation he provided to the Khans was a product of settlement negotiations and thus, it should have been excluded under Evid.R. 408. The record does not support his assertion.

{¶ 20} First, in his opposition to reconsideration, Kess noted that the evidence was not new because he previously provided the Khans with at least one of the receipts. Accordingly, by Kess’s own admission, if the document was provided in anticipation of a settlement conference, it was merely duplicative of what was already provided.

{¶ 21} Secondly, Kess’s proof of damages is not the type of material Evid.R. 408 is designed to exclude. Evid.R. 408 only prohibits the use of evidence regarding settlement offers or compromises to prove liability for or invalidity of the claim. Merely because the documents were provided in anticipation of a “settlement conference,” does not mean they fall under the protection of Evid.R. 408, especially when the documentation is discoverable or necessary to prove a party’s claim. In fact, Evid.R. 408 expressly provides that “[t]his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the

evidence is offered for another purpose.” Clearly, the documentation was not being offered to show “settlement” or “compromise,” but only to demonstrate that Kess knew about the alleged defects in the home.

{¶ 22} Kess next claims that the trial court could not properly consider the documents that he provided to the Khans because the documents were “unsworn and unauthenticated.” This argument is specious because Kess, himself, provided these documents to the Khans, and Kess has not made any allegation that the Khans altered the documentation.

{¶ 23} Nevertheless, a review of the record reveals that the Khans did not rely on the inclusion of the estimates or receipts in support of summary judgment. Rather, the documentation was used to support their motion for reconsideration. According to the Khans, reconsideration was warranted because Kess’s proof of damages revealed that he was on notice of the alleged defects prior to the transfer of property. But reviewing the arguments in support of summary judgment, the Khans make no reference to these documents, nor do they rely on them. In fact, Kess acknowledges that the “renewed” motion for summary judgment “was a cut-and-paste of their June 28, 2021 [motion].” Any reference to the documentation supporting Kess’s damages was made entirely in support of their motion for reconsideration.

{¶ 24} Even if this court determined that the documentation was part of and incorporated into the Khanses’ renewed motion for summary judgment, the record does not demonstrate that the trial court relied on this documentation. The trial

court's journal entry is silent as to what evidence it considered in determining whether summary judgment was appropriate. The court's judgment entry states:

Defendant Abdul Khan's motion for summary judgment, reconsidered by this court, is granted. The court, having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that defendant is entitled to judgment as a matter of law. Summary judgment is therefore entered in favor of defendant and against plaintiff.

When there is no indication that a trial court relied on the improper evidence, a reviewing court will presume that the trial court considered only the proper evidence when ruling on a summary judgment motion. *Mid-Century Ins. Co. v. Stites*, 1st Dist. Hamilton No. C-200421, 2021-Ohio-3839, ¶ 14. Accordingly, this court presumes that the trial court considered only proper Civ.R. 56(C) material.

{¶ 25} Finally, even if this court were to agree with Kess and exclude those documents from consideration, based on our de novo review, as discussed below, we find no error in the trial court's decision granting summary judgment in favor of the Khans. *See Palmer Brothers Concrete, Inc. v. Kuntry Haven Constr., LLC*, 6th Dist. Wood No. WD-11-033, 2012-Ohio-1875, ¶ 15 (whether remaining proper evidence supports trial court's decision granting summary judgment).

D. Granting of Summary Judgment

{¶ 26} Kess essentially contends that the trial court erred in entering summary judgment in favor of the Khans because the Khans knowingly made false and material representations on the RPDF with the intent to mislead him into purchasing the property. He asserts that because these representations were

fraudulent, the “as is” clause, the doctrine of caveat emptor, and the home inspection do not relieve the Khans from their fraudulent conduct.

{¶ 27} As a general rule, Ohio follows the doctrine of caveat emptor in real estate transactions. The rule precludes a purchaser from recovering for a defect 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, 519 N.E.2d 642 (1988), syllabus. A seller may still be liable to a buyer, however, if the seller fails to disclose known latent conditions. *Id.* at 178 (“[A] vendor has a duty to disclose material facts which are latent, not readily observable or discoverable through a purchaser’s reasonable inspection.”).

{¶ 28} The elements of fraud are: (a) a representation or, where there is a duty to disclose, concealment of 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 Cty. Bd. Of Commrs.*, 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986), paragraph two of the syllabus; *see also Legg v. Ryals*, 8th Dist. Cuyahoga No. 103221, 2016-Ohio-710, ¶ 9.

{¶ 29} A claim of fraud in the inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation. “The fraud relates not

to the nature or purport of the [disclosure], but to the facts inducing its execution.” *Haller v. Borrer Corp.*, 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990). In order to prove fraud in the inducement, a plaintiff must prove the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff’s reliance, and the plaintiff relied upon that misrepresentation to his detriment. *ABM Farms v. Woods*, 81 Ohio St.3d 498, 502, 692 N.E.2d 574 (1998).

{¶ 30} R.C. 5302.30(C) and (D) requires that a seller of residential property complete and deliver to a prospective purchaser a RPDF disclosing “material matters relating to the physical condition of the property” and “any material defects in the property” that are “within the actual knowledge” of the seller. *See also Hendry v. Lupica*, 8th Dist. Cuyahoga No. 105839, 2018-Ohio-291, ¶ 7. R.C. 5302.30(E)(1) provides that “[e]ach disclosure of an item of information that is required to be made in the property disclosure form * * * and each act that may be performed in making any disclosure of an item of information shall be made or performed in good faith.”

{¶ 31} If a seller fails to disclose a material fact on the disclosure form with the intention of misleading the buyer and the buyer relies on the disclosure form, the seller may be liable for a resulting injury or damages. *Wallington v. Hageman*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, ¶ 18; *Pedone v. Demarchi*, 8th Dist. Cuyahoga No. 88667, 2007-Ohio-6809, ¶ 31. However, where a party “has had the opportunity to inspect the property, he is charged with knowledge of the conditions that a reasonable inspection would have disclosed.” *Pedone* at ¶ 33, quoting *Nunez v. J.L. Sims Co., Inc.*, 1st Dist. Hamilton No. C-020599, 2003-Ohio-3386, ¶ 17.

Sellers of residential real property have no duty to inspect their property or to otherwise acquire additional knowledge regarding defects on their property. *Roberts v. McCoy*, 2017-Ohio-1329, 88 N.E.3d 422, ¶ 17 (12th Dist.). “[T]he duty to conduct a full inspection falls on the purchasers and the disclosure form does not function as a substitute for such careful inspection.” *Id.*

{¶ 32} In fact, the front of the RPDF that the Khans completed specifically provides in capitalized, bold lettering:

THIS FORM IS NOT A WARRANTY OF ANY KIND BY THE OWNER OR BY ANY AGENT OR SUBAGENT REPRESENTING THE OWNER. THIS FORM IS NOT A SUBSTITUTE FOR ANY INSPECTIONS. POTENTIAL PURCHASERS ARE ENCOURAGED TO OBTAIN THEIR OWN PROFESSIONAL INSPECTION(S).

{¶ 33} In this case, the purchase agreement provided that the property was being sold in its “as is’ present physical condition,” subject to a general home inspection. “An ‘as is’ clause in a real estate purchase agreement bars suit for passive non-disclosure, but does not protect a seller from action alleging positive misrepresentation or concealment. *Pedone* at ¶ 34, citing *Vecchio v. Kehn*, 8th Dist. Cuyahoga No. 66067, 1994 Ohio App. LEXIS 3622, 8-9 (Aug. 18, 1994). This court, sitting en banc, stated, “[W]hile an ‘as is’ clause bars a claim for nondisclosure, it does not bar a claim of affirmative fraud, such as fraudulent concealment or misrepresentation. *Northpoint Properties v. Charter One Bank*, 8th Dist. Cuyahoga No. 94020, 2011-Ohio-2512, ¶ 63, citing *Tipton v. Nuzum*, 84 Ohio App.3d 33, 39, 616 N.E.2d 265 (9th Dist.1992). This includes claims of fraudulent

misrepresentations on an RPDF. *See Brown v. Lagrange Dev. Corp.*, 6th Dist. Lucas No. L-09-1099, 2015-Ohio-133, ¶ 20.

{¶ 34} Keeping these legal principles in mind, along with the warnings, disclosures, and nondisclosures made in the RPDF, we now turn to the merits of the appeal and whether a genuine issue of material fact remains to be litigated.

{¶ 35} The Khans moved for summary judgment contending that no genuine issue of material fact exists because following a home inspection Kess removed any contingency and purchased the home “as is.” Accordingly, the Khans claimed that the doctrine of caveat emptor precluded Kess’s claims. In support, the Khans relied on the purchase agreement, the RPDF, interrogatory responses, Kess’s deposition testimony, and the inspection report.

{¶ 36} Kess opposed summary judgment contending that genuine issues of material fact existed whether the Khans knowingly made false, material misrepresentations in the RPDF to induce him into purchasing the property. Specifically, he contends that there are genuine issues of material fact regarding whether the following disclosures in the RPDF constituted material, fraudulent misrepresentations:

(B) Sewer System — any previous or current leaks, backups, or other material problems with the sewer system;

(D) Water Intrusion — any previous or current water leakage, water accumulation or excess moisture or other defects in the property, including but not limited to any below grade basement or crawl space;

[(D) Water Intrusion] — any water or moisture-related damage to floors, walls or ceilings as a result of flooding, moisture seepage,

moisture condensation; ice damming; sewer overflow/backup; or leaking pipes, plumbing fixtures, or appliances

(E) Structural Components (Foundation, Basement/Crawl Space, Floors, Interior, and Exterior Walls) — any previous or current movement, shifting, deterioration, material cracks/settling (other than visible minor cracks or blemishes) or other material problems with the foundation, basement/crawl space, floors, or interior/exterior walls); and

(K) Drainage/Erosion — any previous or current flooding, drainage, settling or grading or erosion problems affecting the property.

Kess claimed that these conditions were not open and obvious, and thus, the “as is” clause and doctrine of caveat emptor do not bar his claims.

{¶ 37} In support, Kess submitted his own affidavit in which he averred that he relied on the RPDF in making his decision to purchase the property and that the responses therein were material in his decision. Kess also supported his opposition with the RPDF, Abdul Khan’s deposition testimony and exhibits presented during deposition, the purchase agreement, the Khanses’ responses to interrogatories, a receipt from Andre Mann who painted the Khanses’ basement and garage walls in 2014, and a family photograph provided by the Khans.

1. Sewer System

{¶ 38} With respect to the Khanses’ representations regarding the sewer system, the RPDF asked whether the seller “know[s] of any previous or current leaks, backups or other material problems with the sewer system servicing the property.” If the answer is “yes,” the seller is asked to describe and indicate any repairs completed, *but not longer than the past five years*. Here, the Khans did not mark either the “yes” or “no” box and did not provide any further representations

about the sewer system. In the Khanses' interrogatory responses, they disclosed that the sewer backed up shortly after moving into the home in 2003. Abdul explained further in his deposition that the city snaked the sewer line from outside and the problem was fixed. According to Kess, the Khanses' nondisclosure on the RDPF about their sewer backup was a material and false representation, creating a genuine issue of material fact. We disagree.

{¶ 39} Abdul testified that the sewer-related problem occurred soon after he purchased the residence. *See* Interrogatory Response to Question No. 9 (“Sewer backup into basement soon after purchasing the residence. Contacted City of Highland Heights and the problem was corrected.”). It is undisputed that the Khans purchased the home in 2003. During his deposition, Abdul explained that the sewer backup occurred in the basement bathroom by the sink and toilet — “[the city] came * * * [a]nd they put that snake from outside. And, you know, the water was fixed. That problem was fixed. * * * they put like snag from the — you know, the line, sewer line, and they fixed the problem.” (Tr. 40-41.) Abdul stated that he did not hire anyone to fix the issue. When asked how he cleaned up the inside of the basement, Abdul replied, “[i]t was — nothing was there.” (Tr. 41.)

{¶ 40} Based on the foregoing, the issue regarding the sewer occurred more than five years prior to the preparation and execution of the RDPF and sale of the residence. Pursuant to the plain language of the RDPF, the Khans were not required to disclose the minor sewer issue they experienced shortly after purchasing the

property in 2003.³ As such, no genuine issue of material fact exists regarding the alleged nondisclosure of any sewer-related issues.

2. Water Intrusion and Grading

{¶ 41} With respect to the Khanses' representations regarding water intrusion, the RPDF asked whether the seller "know[s] of any water leakage, water accumulation or excess moisture or other defects in the property, including but not limited to any below grade basement or crawl space." It further asked whether the seller "[k]nows of any water or moisture-related damage to floors, walls or ceilings as a result of flooding, moisture seepage, moisture condensation; ice damming; sewer overflow/backup; or leaking pipes, plumbing fixtures, or appliances." Regarding grading and erosion, the RPDF asked whether the seller "know[s] of any previous or current flooding, drainage, settling or grading or erosion problems affecting the property." The Khans marked the "no" box for each question. Other than the preceding discussion regarding the sewer-related issue, no evidence was presented demonstrating that the property had any history with water leakage or accumulation, excess moisture, or suffered any moisture-related damages to the floors walls, or ceilings as a result of water intrusion. Nevertheless, Kess contends that the Khanses' "no" answer on the RPDF was a material and false representation, creating a genuine issue of material fact. We disagree.

³ The RPDF used in this case is the standardized form required pursuant to R.C. 5302.30 and Ohio Admin. Code 1301:5-6-10.

{¶ 42} In the Khanses' interrogatory responses dated December 13, 2020, they identified only the sewer backup when they initially purchased the residence as the only time they experienced any water intrusion issues. *See* Interrogatory Response to Questions Nos. 3, 8, 10. In response to questions about remediation of water-related issues, the Khans again responded "none" — no waterproofing work, water leakage prevention or remediation, or installation or application of DRYLOK inside the property. Specific to questions regarding the use or application of DRYLOK, the Khans denied that any application of DRYLOK was used in the basement walls — "No drylock [sic] was used, just regular paint." The Khans also referenced their prior response that in 2014 they hired Andre Mann ("Mann") to paint the basement and garage walls.

{¶ 43} During Abdul's May 5, 2021 deposition, he was again asked about the purported use of DRYLOK on the walls. (Tr. 37.) Abdul denied that the walls were painted to cover up any cracks or that Mann applied DRYLOK to the walls. He stated, "No, only regular white paint." Abdul's testimony was supported by Mann's 2014 invoice where it notes that he painted the basement and garage walls with "white paint."

{¶ 44} The inspection report substantiates the Khanses' sworn statements. The report did not contain any notation about any observation of any preexisting water intrusion concerns or evidence of water damage or intrusion. Except as specifically indicated about the appearance of abnormal cracking, the report provided that the foundation conditions "appear[ed] satisfactory. It appears to have

been constructed properly, has if any, the normal signs of cracking due to settling, normal and consistent moisture content throughout, and no signs of leaking, damage, or deterioration.” Moreover, regarding the “finished interior,” the report provided that “the interior walls and ceilings appear satisfactory. They are clean, finished, and show no signs of damage or deterioration. The interior floors appear to have been installed properly, are clean, and show no signs of damage or deterioration.” The report, however, revealed that “the grading around the home slopes towards the foundation in one or more places. This promotes excessive moisture and water issues in the foundation.” Accordingly, the home inspection found no evidence of water intrusion in the foundation, or the interior walls, ceiling, or floors, but notified Kess of grading concerns that “promote[d] excessive moisture and water issues in the foundation.”

{¶ 45} Based on the forgoing, we find that the Khans satisfied their initial burden of demonstrating that no genuine issue of material fact exists whether they made any material misrepresentations on the RPDF regarding known water intrusion issues with the property.

{¶ 46} Kess opposed summary judgment relying on his own affidavit that simply averred “subsequent to his moving into the property he discovered that DRYLOK was utilized in portions of the basement (to conceal cracks) that were not open, obvious or available during normal inspection.” His affidavit is simply insufficient to create an issue of material fact.

“A nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit that simply contradicts the evidence offered by the moving party. Permitting a nonmoving party to avoid summary judgment by asserting nothing more than ‘bald contradictions of the evidence offered by the moving party’ would render the summary judgment exercise meaningless.”

Maddox Defense, Inc. v. GeoData Sys. Mgmt., 2019-Ohio-1778, 135 N.E.3d 1212, ¶ 36 (8th Dist.), quoting *FIA Card Servs., N.A. v. Pfundstein*, 8th Dist. Cuyahoga No. 101808, 2015-Ohio-2514, ¶ 11-12. Accordingly, “[a] self-serving affidavit standing alone, without corroborating materials contemplated by Civ.R. 56, is simply insufficient to overcome a properly supported motion for summary judgment.” *Pfundstein* at ¶ 12.

{¶ 47} Kess has failed to submit any corroborating materials in support of his bare assertion that DRYLOK was used to cover any cracks in the basement foundation walls, or that the Khans had actual knowledge that DRYLOK was applied in the basement. Accordingly, Kess has failed to satisfy his reciprocal burden of presenting evidence creating a genuine issue of material fact that the Khans made any material misrepresentations on the RPDF regarding known water intrusion issues with the property.

3. Cracking in Basement Walls

{¶ 48} With respect to the Khanses’ representations regarding cracking in the foundation walls or the shift in foundation, the RPDF asked whether the seller “know[s] of any previous or current movement, shifting, deterioration, material cracks/settling (other than visible minor cracks or blemishes) or other material

problems with the foundation, basement/crawl space, floors, or interior/exterior wall.” The Khans marked the “no” box.

{¶ 49} In discovery responses dated December 13, 2020, the Khans stated:

INTERROGATORY NO. 19: Please identify when you began witnessing the basement walls cracking during the time that you owned [the property].

ANSWER: Present at the time of our purchase of the house in 2003.

{¶ 50} During his May 5, 2021 deposition, Abdul testified that “after a while when I buy the house, the cracking was there. Cracks were there.” (Tr. 16.) However, Abdul denied that the cracks expanded over time and spread — “No, not everywhere.” (Tr. 16.) He described where the cracks were in the foundation, “Basement wall, you know, beside — the right-hand side and go to the left-hand side. * * * So unfinish area, there is cracks, and the areas finish, there is also some cracks, yeah.” (Tr. 17.) When asked whether the cracking had gotten worse since he purchased the property, Abdul responded, “I don’t know.” (Tr. 27.) He admitted that personal belongings were kept in the basement and against the basement walls, but responded “I don’t know” when asked whether the placement of the items was “because of all the cracks that were on the wall.” (Tr. 29.) Later in his deposition, Abul was asked about his response to interrogatories and again stated that the appearance of the cracking “was, yeah, before. And I buy the house. That was before.” (Tr. 42.) Abdul again denied that the cracking got worse. (Tr. 42.) The following exchange then took place:

Q: Okay. And your testimony is that that basement was cracking throughout the whole time that you lived there?

A: Yeah.

Q: But you never –

A: You can see the cracks because that was the – 2004, maybe.

* * *

Q: All right. These are all photographs of the basement wall, to the best of your knowledge; is that fair?

A: Yeah.

Q: And you could see on the first five photographs that there is significant cracking going down the walls?

A: Yeah, they're the old one when I buy the house.

Q: It was just like that?

A: Yeah.

Q: And would you say that when you bought the house, the basement wall was in bad shape?

A: Yeah.

* * *

Q: I'm sorry?

A: Same like before, yeah.

Q: Okay. With all this cracking, that's how it was from 2003 to 2016?

A: Yeah.

(Tr. 46-47.)

{¶ 51} According to Kess, the Khanses' nondisclosure on the RPDF of whether they knew about the existence of material cracks in the basement or other

material problems with the foundation was a material and false representation, creating a genuine issue of material fact.

{¶ 52} The Khans asserted that no genuine issue of material fact exists on Kess's fraud and fraudulent inducement claim because the doctrine of caveat emptor and the purchase agreement's "as is" clause applies. In support, the Khans rely on evidence supporting the fact that (1) the home inspection disclosed the presence of cracks in the basement wall foundation, (2) Kess admitted that he saw at least one crack in the basement wall, which he admitted was open and obvious; and (3) Kess admitted he failed to consult with a structural engineer as recommended by his inspector. Additionally, during deposition, Kess admitted that he was not concerned with the cracks based on subsequent emails with his inspector and thus, he removed the inspection contingency, did not seek a reduction in price, and ultimately purchased the property "as is." Accordingly, we find that the Khans satisfied their initial burden of demonstrating that no genuine issue of material fact remains on Kess's claims regarding the presence of the basement cracking.

{¶ 53} Kess does not challenge any representations or warnings contained in the inspection report, but contends that issues of fact remain because the Khans acted deceptively in concealing the cracks in the basement walls and foundation by (1) placing and stacking personal items against the walls during his inspections and walk-through of the basement; (2) painting the basement and garage walls "right before" they listed the property; and (3) only producing one photograph of the basement despite Abdul testifying that they hosted parties in the basement. These

allegations do not create a genuine issue of material fact whether the Khans acted fraudulently sufficient to preclude the application of caveat emptor.

{¶ 54} Regarding the placement of personal belongings, Kess admitted during deposition that despite the presence of the personal items, he was not prohibited from moving the items or requesting that they be moved. Additionally, he admitted that the cracks he complains about became visible four or five months after moving into the property with the changing of the seasons. Accordingly, by Kess's own admission, even if the Khans had personal belongings against the wall, the cracking did not become visible until after Kess purchased the property and the Khanses' personal items were removed. The presence or absence of the Khanses' personal belongings did not prevent Kess from reasonably inspecting the area before or after purchase. Moreover, according to the Addendum I, Kess was permitted to do a walk-through of the property prior to placing any funds in escrow; any material change in the condition of the property could have been noticeable at that time.

{¶ 55} Next, Kess's allegation that the Khans painted the basement walls "right before" they listed the property, thus concealing any cracks, is a mischaracterization of the evidence and testimony in the record. Abdul unequivocally testified during deposition that the basement and garage walls were painted "with white paint" in 2014. A receipt dated July 14, 2014, from Andre Mann with A.K.M. Construction, L.L.C. supported Abdul's testimony. Accordingly, based on this uncontroverted evidence, the basement walls were painted approximately two years prior to the Khans completing the RPDF in connection with the 2016

property sale. Kess averred in his affidavit that “he discovered that dry-lock [sic] was utilized in portions of the basement (to conceal cracks) that were not open, obvious or available during a normal inspection.” Kess has not provided any competent corroborating evidence to support his assumption and conclusion that any material other than white paint was used on the basement or garage walls when Mann was hired, or that the purpose of painting the walls *two years prior* to the sale was to conceal any cracks or defects in the basement walls. *Compare Meadows v. Otto*, 5th Dist. Stark No. 2006CA00138, 2007-Ohio-4031 (inference of concealment existed when homeowner painted basement walls three to five times just prior to sale; inspection noted fresh paint but did not disclose any issues with the basement) and *Nichols v. Petroff*, 5th Dist. Stark No. 2004CA00271, 2005-Ohio-481 (inference of mold concealment existed when basement walls were freshly painted and the presence of mold was not discovered in a home inspection).

{¶ 56} Finally, Kess attempts to create a genuine issue of material fact by claiming that the Khans produced only one photograph of the basement during discovery despite Abdul’s deposition testimony that his children played in the basement and the family held parties in the basement. This court is unsure what point Kess is attempting to make with this allegation, but the lack of personal photographs does not create a genuine issue of material fact whether the Khans misrepresented cracking in the basement walls.

{¶ 57} Accordingly, we find that Kess has failed to satisfy his reciprocal burden of demonstrating a genuine issue of material fact whether the Khans acted

fraudulently in their nondisclosure of any preexisting cracks in the basement foundation and thus precluding the application of caveat emptor.

{¶ 58} Finally, even if the Khanses' responses in the RPDF about the cracking and condition of the foundation were knowingly false or a genuine issue of material fact exist as to whether their representations in the RPDF were knowingly false, no genuine issue of material fact remains on Kess's fraud and fraudulent inducement claim because Kess could have not have justifiably relied on those misrepresentations when purchasing the property.

{¶ 59} “In determining whether a party justifiably relied on a representation, courts must consider all of the relevant circumstances, including the nature of the transaction, the form and materiality of the representation, the relationship of the parties and their respective knowledge and means of knowledge.” *Mobley v. James*, 8th Dist. Cuyahoga No. 108470, 2020-Ohio-380, ¶ 39, citing *Kovacic v. All States Freight Sys.*, 8th Dist. Cuyahoga No. 69926, 1996 Ohio App. LEXIS 3474, 18 (Aug. 15, 1996). Generally, “justifiable reliance is one of fact,” but may be appropriate for summary judgment if based on the evidence, no genuine issue of material fact exists. *Mobley* at ¶ 40, citing *Mar Jul, L.L.C. v. Hurst*, 4th Dist. Washington No. 12CA6, 2013-Ohio-479, ¶ 61; *March v. Statman*, 1st Dist. Hamilton No. C-150337, 2016-Ohio-2846, ¶ 22.

{¶ 60} In this case, the inspection report unequivocally noted the presence of “abnormal cracking” in the basement foundation walls “that do not appear to be from normal ‘settling,’” and that the grading around the house “slopes toward the

foundation in one or more places,” which “promotes excessive moisture and water issues in the foundation.” The inspector recommended that Kess consult with a structural engineer.

{¶ 61} Kess testified during his deposition that despite the inspector’s recommendation that he follow up with a structural engineer, he did not do so, and the presence of the cracking did not cause him to seek a reduction in the purchase price. (Tr. 54.) He stated that the condition of the foundation and the existing cracks were not a concern “based on an email sent back and forth” with his inspector.⁴ Kess stated, “I was given the impression that it wasn’t — it was something that [the inspector] had to cite in there, and it was really nothing more to it.” (Tr. 50.)⁵ Accordingly, Kess admitted that he relied on his inspector’s subsequent reassurances. As such, Kess cannot satisfy his burden of demonstrating all of the essential elements of fraud and fraudulent inducement.

{¶ 62} Based on the foregoing, the trial court properly granted summary judgment in favor of the Khans on Kess’s claim for fraud and fraudulent inducement.

4. Mutual Mistake

{¶ 63} Summary judgment was also properly granted on Kess’s claim for mutual mistake of fact. Ohio recognizes the doctrine of mutual mistake of fact as a

⁴ Neither party submitted this email chain as evidence to support or oppose summary judgment.

⁵ Again, Kess did not name his inspector as a party to this case.

ground for rescinding a real estate contract where: (1) there is a mutual mistake as to a material fact in the contract; and (2) the complaining party is not negligent in failing to discover the mistake. *Reilley v. Richards*, 69 Ohio St.3d 352, 352-353, 632 N.E.2d 507 (1994), citing *Irwin v. Wilson*, 45 Ohio St. 426, 15 N.E. 209 (1887). “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.’ 1 Restatement of the Law 2d, Contracts (1981) 385, Mistake, Section 152(1).” *Reilley* at 353. Thus, the mutual mistake must have frustrated the intent of the parties. *Id.*

{¶ 64} Summary judgment is appropriate on a claim for mutual mistake of fact concerning basement defects where the buyer was afforded an opportunity for a general inspection and purchased the property subject to an “as is” clause. *See Wallington*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, at ¶ 27. In *Wallington*, this court held that where there is an “as is” clause in the executed purchase agreement followed by a professional inspection of the property, a buyer cannot argue that the absence of water problems in a basement was “a basic assumption under which a contract was made.” *Id.*

{¶ 65} In this case, just like in *Wallington*, Kess had actual knowledge of the cracking in the basement by virtue of the general inspection and personally observing significant cracking in the basement wall during the inspection. Nevertheless, Kess agreed to proceed with the purchase of the home “as is,” without further evaluation by a structural engineer as recommended. Because Kess was on

notice, he cannot reasonably claim that there was a mutual mistake regarding any structural concerns in the foundation or basement. Accordingly, there is no genuine issue of material fact to be litigated on Kess's mutual mistake cause of action.

III. Conclusion

{¶ 66} Based on the record before this court, the Khanses' motion for summary judgment and attached exhibits met their burden under Civ.R. 56(C) of demonstrating there were no genuine issues of material fact regarding Kess's claims and that they were entitled to summary judgment as a matter of law. Kess presented no competent evidence that the Khans acted fraudulently when completing the RPDF when the subsequent home inspection revealed the issues that Kess now complains about. Thus, Kess has failed to meet his reciprocal burden of showing there were disputed issues for trial and, accordingly, the trial court properly granted summary judgment to the Khans. The assignment of error is overruled.

{¶ 67} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27
of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., and
MICHAEL JOHN RYAN, J., CONCUR

