[Cite as *Adorno v. Delgado*, 2004-Ohio-5559.]

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

SAMUEL ADORNO Appellant v. LUZ E. DELGADO, et al. Appellees	C.A. No. 04CA008436 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 02CV132896

DECISION AND JOURNAL ENTRY

Dated: October 20, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

{¶1} Appellant, Samuel Adorno, appeals from the decision of the Lorain County Court of Common Pleas which granted summary judgment to Appellee, Bayside Title & Escrow Agency, Inc. We affirm.

{¶2} Subsequent to their divorce, Appellant and Luz Delgado ("Delgado"), entered into an agreement relating to their marital residence: Appellant agreed to quit claim his interest in the residence to Delgado in return for Delgado's payment of three marital debts. Delgado contracted with Lenders M.D., Inc. to refinance the residence, and Lenders M.D. retained the services of Appellee as escrow agent for the transaction. Following the instructions given it by Lenders M.D., Appellee

presented Appellant with a quit claim deed and, allegedly, with other documents indicating that the agreed upon three marital debts would be paid from the closing funds. After completion of the refinancing, however, one of the debts, a $5,000 account payable to Discover, remained unpaid. A check issued to Discover for that payment was voided, and a new check was issued to Delgado for the amount. Delgado, by failing to pay the debt from the closing funds, in effect violated the agreement she had with Appellant regarding the marital residence by failing to give Appellant the agreed upon consideration for his quit claim deed.

{¶3} On October 8, 2004, Appellant filed a complaint alleging breach of fiduciary duty, conversion, and fraud against Appellee, Delgado, Contimortgage Corp., Crystal Mortgage Co., and Lenders M.D. Appellant eventually dismissed Contimortgage Corp., Crystal Mortgage Corp., and Lenders M.D. without prejudice from the suit, leaving only claims against Appellee and Delgado. Following a motion for default judgment, the court awarded Appellant $5,000 in compensatory damages, and $10,000 in punitive damages against Delgado. Appellee then filed a motion for summary judgment on all outstanding claims against it, which the court granted on February 2, 2004. Appellant timely appealed, raising one assignment of error for our review.

ASSIGNMENT OF ERROR

"The trial court erred in granting summary judgment."

{¶4} In his only assignment of error, Appellant alleges that the trial court erred in granting summary judgment to Appellee on all outstanding claims against it. Appellant insists that he has presented evidence supporting his claims for breach of fiduciary duty, conversion, and fraud sufficient to withstand summary judgment. We disagree, and will address each of the claims in turn.

{¶5} Summary judgment is proper under Civ.R. 56(C) if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

This court reviews the trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Any doubt must be resolved in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶6} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and is to identify portions of the record that demonstrate absence of genuine issues of material fact as to an essential element of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The burden then shifts to the non-moving party to offer "specific facts showing that there is a genuine issue for trial." Id. See, also, Civ.R. 56(E). The non-moving party may not rest on the mere allegations and

denials in the pleadings, but must submit some evidentiary material showing a genuine dispute over the material facts. *Dresher*, 75 Ohio St.3d at 293.

A. Breach of Fiduciary Duty

{¶7} Appellant asserts that Appellee breached its fiduciary duty to him by failing to disburse closing funds to Discover in accordance with written instructions. Appellee, on the other hand, asserts that it did not contract with Appellant, and owed him no fiduciary duty in this case.

{¶8} A fiduciary is one who, due to his own undertaking, has a duty to act "primarily for the benefit of another in matters connected with his undertaking." (Emphasis omitted.) *Haluka v. Baker* (1941), 66 Ohio App.308, 312; *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216. To support a breach of fiduciary duty claim, a party must show the existence of a fiduciary relationship, failure to comply with a duty accorded that relationship, and damages proximately resulting from that failure. *Strock*, 38 Ohio St.3d at 216. A fiduciary relationship may be created either formally, by contract, or informally. *Culbertson v. Wigley Title Agency, Inc.*, 9th Dist. No. 20659, 2002-Ohio-714, at ¶29. An informal relationship, however, cannot be unilateral, and occurs only where "both parties understand that a special relationship or trust has been reposed." Id., citing *Umbaugh Pole Bldg. Co. v. Scott* (1979), 58 Ohio St.2d 282, 286.

{¶9} In the case at bar, three separate transactions transpired: (1) Appellant contracted with Delgado to quit claim his interest in the marital residence in return

for payment of certain marital debts; (2) Delgado and Lenders M.D. entered into a refinancing agreement on the marital residence; and (3) Lenders M.D. engaged Appellee to serve as escrow agent for the refinancing of the residence. Evidence before the trial court on summary judgment indicated that, while Appellant thought a fiduciary relationship existed between him and Appellee, Appellee had absolutely no intent to create such a relationship. Appellee solely served Lenders M.D. and had no contract with any other party in this matter.

{¶10} Appellant alleges that a memorandum presented to him by Appellee for his signature recognizes and memorializes the special fiduciary relationship which existed between them. Appellee denies that it created the memorandum, and indicates that Appellant has failed to authenticate the memorandum, rendering it inadmissible under Civ.R. 56(E). The memorandum itself is a plain sheet of paper, with no identifying letterhead or date, addressed "To whom it may concern[.]" No individual formally witnessed Appellant's signature on the document. Appellee's owner indicated that the document was not created by her company, and, if the memorandum was presented to Appellant, it would have been at the instruction of Lenders M.D. Further, a former independent contractor of Appellee, who closed the refinancing transaction, had no independent recollection of the memorandum. Appellant has offered no evidence tending to show that Appellee produced the document, nor that the document was intended to create a fiduciary relationship between him and Appellee.

{¶11} Appellant further contends that a check disbursed to him by Appellee for "Refund/overpayment/payoff" also supports his allegation that Appellee understood that Appellant was a party to the escrow agreement. The check alone, however, does not support a finding that Appellee intended to enter into a fiduciary relationship with Appellant. The evidence before the court on summary judgment indicated that Appellant was not a party to the refinancing or escrow contracts, thus no formal fiduciary relationship existed. Further, Appellant has failed to present the court with any evidence tending to show that Appellee intended to create a fiduciary relationship with Appellant in this matter. Accordingly, the trial court properly granted summary judgment to Appellee on Appellant's breach of fiduciary duty claim.

B. Conversion

{¶12} Appellant's second cause of action against Appellee involves conversion. Appellant asserts that Appellee converted the $5,000.00 which should have been paid to Discover by voiding the original check and issuing a new check to his ex-wife, Delgado. In order to support a claim for conversion, Appellant must show that Appellee exercised dominion or control wrongfully over Appellant's personal property in violation of, or inconsistent with, Appellant's rights in that property. See *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 412. In other words, Appellant must allege that the $5,000.00 which Appellee paid to

Delgado in contravention of the original closing instructions was actually his personal property, or that he at least had a right to that property.

{¶13} The record before us shows that the closing proceeds were originally the property of the mortgage lender, Lenders M.D. The lender, in turn, contracted with Delgado to disburse those funds in accordance with its lending requirements and Delgado's instructions in return for a mortgage on a residence which would be solely owned by Delgado. Appellee exercised control over those funds for the limited purpose of disbursing them in accordance with the instructions of Lenders M.D. Appellant had no right to those funds, either before or after disbursement. He was not a party to the mortgage transaction. He gave no consideration to Lenders M.D. or Appellee in return for a right to a single penny of those funds.

{¶14} Appellant did give consideration to Delgado in return for her promise to pay certain marital debts, including the Discover account. She, apparently, did not comply with that agreement, and Appellant currently has a judgment for $5,000.00 in compensatory damages and $10,000.00 in punitive damages against her for that failure. However, his agreement with Delgado is a separate contract which does not affect Delgado's right to possess the money generated from a distinct refinancing arrangement. As he had no right to possess or control the money from the refinancing, he has failed to show that there is a material issue of fact remaining to be litigated such that summary judgment would be improper.

C. Fraud

{¶15} In his final claim, Appellant argues that Appellee committed fraud by misrepresenting its intention to pay the $5,000.00 Discover debt from the refinancing proceeds. In order to establish a claim of fraud, Appellant must show that (1) Appellee made a representation, or concealed a fact where there was a duty to disclose; (2) the representation was material to the transaction; (3) the representation was false or made with reckless disregard as to whether it was true or false; (4) Appellee intended that Appellant rely upon the representation; (5) Appellant justifiably relied on the representation; and (6) injury proximately resulted to Appellant due to his reliance. *Trubatch v. Society Natl. Bank* (Sept. 20, 2000), 9th Dist. No. 19889, at 8, citing *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus. Where a party makes a representation that they will do some act in the future, with no intent to actually accomplish that act at the time of the representation, he may be liable for fraud. *Martin v. Ohio State Univ. Found.* (2000), 139 Ohio App.3d 89, 98. "In such case, the requisite misrepresentation of an existing fact is said to be found in the lie as to his existing mental attitude and present intent." *Tibbs v. National Homes Constr. Corp.* (1977), 52 Ohio App.2d 281, 287.

{¶16} The evidence before us shows that Appellee presented Appellant with a document which indicated that the Discover debt would be paid from the refinancing proceeds. The HUD-1 closing statement also stated that $5,000.00

would be paid to Discover. Appellee denied generating these documents or making any representations regarding those documents to Appellant. No substantive conversation ensued between Appellant and Appellee's employees throughout the closing process. They merely scheduled his appointment to sign the necessary documents, and then presented to him documents produced by Lenders M.D. for his signature. Following the closing, Appellee issued checks per the closing instructions of Lender's M.D., initially creating a check for $5,000.00 payable to Discover. That check was later voided, and a new check for those funds was disbursed to Delgado in accordance with verbal instructions from Lenders M.D.[1] The Discover debt was never paid using funds from the refinancing transaction.

{¶17} After reviewing the proper Civ.R. 56 evidence before us, this Court finds a complete lack of evidence supporting one key element of fraud: falsity. The representation that the Discover debt would be paid from the refinancing funds was not false at the time Appellee presented Appellant with the documents noting the payment. An employee of Appellee testified in deposition that she was required to follow the closing instructions of Lenders M.D. When Appellant

---

[1] Appellant emphasizes, in his recitation of the facts, that Appellee distributed the funds to Delgado based upon a verbal instruction. He further argues that the closing instructions could not be changed without written authorization. Regardless of whether the contract required written authorization for any changes, Appellant was not a party to that contract and has set forth no argument entitling him to enforce the contract.

signed the closing documents, the closing instructions obliged Appellee to disburse $5,000.00 to Discover. Appellant has offered no evidence under Civ.R. 56, beyond his mere assertions, that Appellee, at that time, did not intend to pay Discover.

{¶18} Appellee actually issued a check at closing to Discover to cover the debt, evidencing its intent to disburse the closing funds per the instructions given. Appellee had no means of knowing that Lenders M.D. would change that term, rendering the representation of payment false at some later time. Where a party makes a representation regarding a promise of future action, and believes, in good faith, in the truth of that representation at the time it was made, a claim for fraud will not lie. *Martin*, 139 Ohio App.3d at 98. Appellant has failed to show that a material issue of fact exists in regard to his fraud claim against Appellee in regard to the necessary element of falsity.

{¶19} In conclusion, Appellant has failed to offer this Court any "specific facts showing that there is a genuine issue for trial" which would render summary judgment improper under any of his claims against Appellee. See *Dresher*, 75 Ohio St.3d at 293; Civ.R. 56(E). Accordingly, we overrule Appellant's assignment of error.

{¶20} We overrule Appellant's assignment of error, and affirm the judgment of the Lorain County Court of Common Pleas.

Judgment affirmed.

The Court finds that 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 Lorain, 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.

Exceptions.

LYNN C. SLABY
FOR THE COURT

WHITMORE, P. J.
BOYLE, J.
CONCUR

APPEARANCES:

EDWARD M. GRAHAM and CHRISTOPHER R. FORTUNATO, Attorneys at Law, 13363 Madison Avenue, Lakewood, Ohio 44107, for Appellant.

THOMAS S. MAZANEC, JOHN T. MCLANDRICH, and EDWARD A. PROCTOR, Attorneys at Law, 100 Franklin's Row, 34300 Solon Road, Solon, Ohio 44139, for Appellee, Bayside Title.

LUZ E. DELGADO, 3940 Lorain Avenue, Lorain, Ohio 44055, Appellee.