[Cite as *Glenmoore Builders, Inc. v. Smith Family Trust*, 2009-Ohio-3174.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
GLENMOORE BUILDERS, INC. Appellee/Cross-Appellant v. SMITH FAMILY TRUST, et al. Appellants/Cross-Appellees	C. A. No. 24299 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2006 02 1001

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

BELFANCE, Judge.

{¶1} Defendants/Appellants/Cross-Appellees Smith Land Company, Inc. ("the Company"), Smith Family Trust ("Developer"), and Robert Smith ("Smith"), collectively referred to as "Smith Developer," appeal the judgment of the Summit County Court of Common Pleas. Plaintiff/Appellee/Cross-Appellant Glenmoore Builders, Inc. ("Glenmoore") has cross-appealed. For reasons set forth below, we affirm.

I.

{¶2} Glenmoore is an Ohio corporation that builds custom homes in northern Ohio. The Company is an Ohio corporation. Both the Company and Developer purchase and develop real estate. This complicated series of events began in July 2004 when Glenmoore entered into an agreement with the Company and Smith, as president of the Company, describing Glenmoore's rights and responsibilities concerning the marketing and sale of lots within a subdivision in the City of Hudson known as Woodland Estates. Developer initially owned all of

the lots. Pursuant to the July 2004 agreement, Glenmoore received the exclusive right to market and purchase all of the lots.

{¶3} In July 2005, Glenmoore sued Smith Developer for declaratory relief to resolve disputes arising under the July 2004 contract. Glenmoore voluntarily dismissed the action without prejudice after entering into an amended and restated exclusive purchase agreement dated August 3, 2005 ("Agreement") with Developer and the Company. It is this amended Agreement that is the subject of this appeal.

{¶4} The Agreement provides the terms and conditions whereby Glenmoore could purchase each of the nineteen lots. Part of Glenmoore's responsibilities under the Agreement are described in paragraph three, which details Glenmoore's duty to purchase a corner lot and build a model home on that lot, as well as the circumstances under which that duty would be excused. The lots closest to the corner are lots one and nineteen. Much of the dispute in this litigation turns on whether Smith Developer orally modified paragraph three to allow Glenmoore to build a model home on lot two, instead of lot one or lot nineteen.

{¶5} Pursuant to paragraph ten of the Agreement, Developer retained the privilege of drilling and operating oil wells in the subdivision.

{¶6} Glenmoore closed on lot two on December 30, 2005. On January 19, 2006, Smith sent Glenmoore a Notice of Default on behalf of Developer, and in a letter dated February 4, 2006, Smith sent Glenmoore a Notice of Termination of Contract and Notice of Breach of Contract. The Notice of Default claimed that Glenmoore was in default of the Agreement for:

1. Marking three lots as sold without paying for them.

2. Illegally occupying lot three due to the placement of excess dirt on the lot without paying for it.

> 3. Failing to purchase lot one or nineteen as required by Paragraph 3, and therefore defaulting in the payment of the cost of lot one or nineteen.

Smith further alleged in the Notice of Default that Glenmoore had breached the Agreement by beginning construction on lot two without having plans approved.

{¶7} In the Notice of Termination of Contract and Notice of Breach of Contract, Smith claimed, *inter alia*, that Glenmoore did not cure the default and remained in breach of the provisions stated in the Notice of Default.

{¶8} On February 13, 2006 Glenmoore filed a complaint in the Summit County Court of Common Pleas against Smith Developer, the City of Hudson ("City") and the Ohio Department of Natural Resources ("ODNR") seeking (1) declaratory relief regarding interpretation and application of the provisions of the Agreement, (2) declaratory relief concerning the parties' obligations under paragraph ten of the agreement, (3) declaratory relief related to Smith Developer's failure to satisfy final grade requirements for the subdivision, (4) breach of contract, (5) breach of implied contract, (6) promissory estoppel, (7) fraud and fraudulent concealment, and (8) tortious interference with business relationships/disparagement. Glenmoore filed a notice of lis pendens that same date. The City and ODNR were implicated solely in count two of the complaint.

{¶9} Smith Developer filed six counterclaims for (1) declaratory relief that Glenmoore breached the Agreement and that Smith Developer properly terminated the Agreement, (2) declaratory relief that Glenmoore's filing of lis pendens was improper, (3) slander of title, (4) libel, (5) abuse of process, and (6) malicious civil prosecution.

{¶10} Smith Developer moved for partial summary judgment on counts five and six of the complaint (breach of implied contract and promissory estoppel). The trial court denied the motion. Next, Smith Developer filed a motion for partial summary judgment on counts one and

two of its counterclaim (declaratory relief regarding the Agreement and lis pendens) and counts one, two, three, four, and seven of the complaint (declaratory relief regarding the Agreement, declaratory relief regarding the oil and gas wells, declaratory relief regarding final grading, breach of contract, and fraud/fraudulent concealment). The City also filed a motion for summary judgment as to count two of the complaint. Glenmoore subsequently filed a motion for summary judgment/partial summary judgment. ODNR also filed a motion for summary judgment as to count two of the complaint.

{¶11} Smith Developer then filed a motion for reconsideration as to its motion for summary judgment on counts five and six of the complaint (breach of implied contract and promissory estoppel). The trial court ultimately granted City's and ODNR's motions for summary judgment, thereby resolving count two of Glenmoore's complaint. Thus, the City and ODNR were dismissed from the lawsuit.

{¶12} The trial court also denied Glenmoore's and Smith Developer's remaining motions for summary judgment/partial summary judgment and denied Smith Developer's motion for reconsideration.

{¶13} A jury trial began in November 2006. Glenmoore's pending claims at the time of trial were: (1) count one, declaratory relief concerning the Agreement, (2) count three, declaratory relief concerning the grading requirements, (3) count four, breach of contract, (4) count five, breach of implied contract, (5) count six, promissory estoppel, and (6) count seven, fraud and fraudulent concealment. Smith Developer's pending counterclaims were: (1) count one, declaratory relief concerning the Agreement, (2) count five, abuse of process, and (3) count six, malicious civil prosecution. All other claims were disposed of by the trial court or were voluntarily dismissed prior to trial.

{¶14} The trial court directed a verdict in favor of Smith Developer on counts five and seven of the complaint (breach of implied contract and fraud/fraudulent concealment). Subsequently, the trial court directed a verdict in favor of Glenmoore on count five of the counterclaim for abuse of process. At the close of the case, the trial court dismissed Smith from the suit.

{¶15} In light of the directed verdict rulings, the following claims were submitted to the jury: (1) count one of the complaint, seeking declaratory relief concerning the Agreement, (2) count four of the complaint, for breach of contract, (3) count six of the complaint, for promissory estoppel, and (4) count one of the counterclaim, for declaratory relief concerning the Agreement.[1] At the conclusion of the trial, the jury returned a unanimous verdict in favor of Glenmoore. Specifically, the jury found that when Developer terminated the Agreement it was in material breach of its own obligations under the Agreement; that paragraph 3 of the Agreement was orally modified; that Developer did not properly terminate the Agreement; that Developer was in material breach of the Agreement as of February 4, 2006; that Developer breached its obligations under the Agreement by failing to satisfy the final grade requirements for lot two prior to its sale; and that Developer did not promise Glenmoore that Developer would correct the final grade of lot two after Glenmoore purchased it. Subsequently, the trial court conducted a hearing to determine the remedies.

{¶16} On January 24, 2007, Smith Developer moved for judgment notwithstanding the verdict and for a new trial. The trial court denied Smith Developer's motions.

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[1] The parties stipulated that it was the responsibility of the Developer to cause "each of the sublots of Woodland Estates and the balance of the area defined in the final plat of the Subdivision to conform with the final grade specifications * * * [,]" thus resolving count three of the complaint.

{¶17} In March 2007, Smith Developer and Glenmoore appealed to this Court. *Glenmoore Builders, Inc. v. Smith Family Trust*, 9th Dist. No. 23639 ("*Glenmoore I*"). *Glenmoore I* was dismissed for lack of a final appealable order. On August 24, 2007, the trial court issued a new order which included Civ.R. 54(B) language.

{¶18} In September 2007, Smith Developer and Glenmoore again appealed to this Court. We again dismissed the appeal for lack of a final appealable order, as the trial court's latest judgment entry did not include a disposition of Glenmoore's fraud claim. *Glenmoore Builders, Inc. v. Smith Family Trust*, 9th Dist. No. 23879, 2008-Ohio-1379 ("*Glenmoore II*").

{¶19} On June 6, 2008, the trial court issued another journal entry, which journalized the trial court's directed verdicts. Smith Developer and Glenmoore currently appeal that entry. Smith Developer has raised four assignments of error:

> "I. The trial court erred by denying Appellants' Motions for Summary Judgment on Counts 1, 2, 4, 5, 6, and 7 of the Complaint, Count 1 of the Counterclaim, and Appellant's Motion for Reconsideration of Counts 5 and 6 (Orders dated 8/14/06 and 9/21/06.)
>
> "II. The trial court erred when it held the City may regulate oil and gas wells as there was not a justiciable claim for relief before the court. (Order dated 9/13/06.)
>
> "III. The trial court erred by denying Appellants Motion for Judgment Notwithstanding the Verdict or for a New Trial. (Order dated 2/16/07.)
>
> "IV. The jury's verdict was against the manifest weight of the evidence. (Order dated 11/14/06.)"

Glenmoore has raised two assignments of error:

> "The trial court erred in directing a verdict against plaintiff on Count Seven of the complaint (fraud or fraudulent concealment).
>
> "The trial court erred when it did not provide the instructions, as requested by plaintiff, on the doctrines of 'part performance' and frustration of purpose."

{¶20} To aid our review, we have combined certain assignments of error and addressed others out of order.

II.

> "I. The trial court erred by denying Appellant's Motions for Summary Judgment on Count[] * * * 2 * * * of the Complaint * * * . (Order[] dated 8/14/06)
>
> "II. The trial court erred when it held the City may regulate oil and gas wells as there was not a justiciable claim for relief before the court. (Order dated 9/13/06.)"

{¶21} Smith Developer has argued in its second assignment of error and a portion of its first assignment of error that the trial court erred in awarding summary judgment on count two of Glenmoore's complaint to the City and ODNR. We dismiss this argument as moot.

> "'The duty of this [C]ourt, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.'" *Miner v. Witt* (1910), 82 Ohio St. 237, 238-239, quoting *Mills v. Green* (1895), 159 U.S. 651, 653.

{¶22} Under count two Glenmoore sought a declaration that either: "Chapter 1509 of the Ohio Revised Code, as amended in 2004, preempts the City's regulation of minimum setbacks for wellheads and tank batteries servicing oil and gas well operations in proximity to other structures * * * ." or that "Nothing in the 2004 amendments to Chapter 1509 of the Ohio Revised Code prevents the City from enforcing local land use regulations * * * ." Paragraph ten of the Agreement detailed the development and operation of oil and gas wells by Smith Developer within the subdivision. Glenmoore argued that the City's regulations rendered sublots nine, ten, twelve, and thirteen unbuildable and, thus, zoning certificates could not be issued for those lots. This in turn would affect Smith Developer's ability to sell Glenmoore all the lots in a buildable condition. In its complaint, Glenmoore maintained that Smith Developer took the

position that Chapter 1509 of the Ohio Revised Code preempted the City regulations. Thus, Glenmoore desired to know what law controlled the parties' Agreement.

{¶23} In its sole argument to this Court and at the trial court level, Smith Developer contends that the trial court lacked jurisdiction to determine the issue as there was no justiciable controversy between the parties and that Glenmoore failed to exhaust its administrative remedies.

{¶24} We determine this portion of the appeal to be moot. Even if Developer was correct, we determine that there is no remedy available to Developer at this juncture because the ultimate issue concerning the interpretation of the statutes was decided in subsequent litigation. Subsequent to the trial court's award of summary judgment to the City and ODNR in this matter, Developer applied for variances to the City's setback requirements for the lots in question. Developer's application was denied and it appealed the denial of the variances to this Court in a separate appeal. See *Smith Family Trust v. Hudson Bd. of Zoning & Bldg. Appeals*, 9th Dist. No 24471, 2009-Ohio-2557 ("Zoning Variance Appeal"). Developer argued in that appeal that the same portions of City's Land Development Code at issue in the instant appeal were preempted by Chapter 1509 of the Ohio Revised Code. Id. at ¶8. This Court disagreed, upheld the denial of the variances, and concluded that Developer's argument that the City's regulations were preempted was without merit. Id. at ¶¶1,12.

{¶25} Thus, Smith Developer's arguments in the instant matter do not present a live controversy. If we were to actually agree with Smith Developer's arguments here and decide either that the trial court erred in granting summary judgment because Glenmoore had not exhausted its administrative remedies or because the issue was not justiciable at the time, we cannot imagine what the trial court could now do to remedy that error. See *Miner*, 82 Ohio St. at

239. After the trial court awarded summary judgment to the City and ODNR, Developer applied to the City's Board of Zoning and Building Appeals for variances, which were denied. Thus, at the time this Court decided the Zoning Variance Appeal, the administrative remedies were exhausted and the controversy was justiciable. Moreover, the precise issue of whether the City's regulations were preempted, also at issue in the instant appeal, was addressed and determined in the Zoning Variance Appeal.

{¶26} The Supreme Court of Ohio has established only two exceptions to the mootness doctrine. "First, '[a] case is not moot if the issues are capable of repetition, yet evading review.'" *Bankers Trust Co. of California v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, at ¶9, quoting *In re Appeal of Suspension of Huffer from Circleville High School* (1989), 47 Ohio St.3d 12, paragraph one of the syllabus. "Second, a court may review a case if it 'involves a matter of public or great general interest.'" Id., quoting *In re Appeal of Suspension of Huffer*, 47 Ohio St.3d at 14. However, given the facts of this case and the resolution of the Zoning Variance Appeal, neither exception applies to the instant appeal. Accordingly, we dismiss Smith Developer's assignment of error concerning the oil and gas wells as moot.

III.

> "IV. The jury's verdict was against the manifest weight of the evidence. (Order dated 11/14/06.)"

{¶27} Smith Developer next argues that the jury's verdict was against the manifest weight of the evidence. We do not agree. Under the civil manifest weight of the evidence standard, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court * * * ." *Bryk v. Berry*, 9th Dist. No. 07CA0045, 2008-Ohio-2389, at ¶5, quoting *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

> "[W]hen reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. This presumption arises because the [jury] had an opportunity to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." (Internal citations and quotations omitted.) *Wilson* at ¶24.

{¶28} The jury in this case found in favor of Glenmoore. Specifically it found: (1) that when Smith Developer terminated the Agreement, it was in material breach; (2) that Smith, on behalf of Developer, orally modified the Agreement; (3) that Developer did not properly terminate the Agreement; (4) that Developer breached its obligations under the Agreement by failing to satisfy the final grade requirements for lot two prior to sale to Glenmoore; and (5) that Developer did not promise Glenmoore that it would correct the errors in the final grading after Glenmoore closed on lot two.

{¶29} Smith Developer's sole argument is that the jury's findings that the Agreement was orally modified and that Smith Developer, and not Glenmoore, breached the Agreement are against the manifest weight of the evidence. Smith Developer does not argue that it did not breach the Agreement at all, only that Glenmoore cannot recover under a theory of breach of contract as Glenmoore, too, breached the Agreement by not purchasing a corner lot and by "failing and refusing to comply with the [Woodland Estates] Declaration[] [of Restrictions and Covenants]"(hereinafter referred to as "the Declarations"). We first note that Smith Developer does not articulate in this assignment of error which of the provisions of the Declarations Glenmoore breached, nor does it explain what exactly Glenmoore did that was in violation of the Declarations. The Declarations consists of fourteen pages of single-spaced text with multiple provisions, any number of which could have been breached.

{¶30} It was Smith Developer's responsibility to ensure that its argument "[was] supported by citations to legal authority and facts in the record." *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3; see, also, App.R. 16(A)(7); Loc.R. 7(B)(7). "It is not the function of this [C]ourt to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Catanzarite v. Boswell*, 9th Dist. No. 24184, 2009-Ohio-1211, at ¶16, quoting *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60. Thus, as Smith Developer has failed to develop this argument, we will not address it.

{¶31} Although the jury found otherwise, Smith Developer next contends that Glenmoore breached the Agreement by failing to buy a corner lot.

{¶32} Paragraph three of the Agreement provides that:

> "Glenmoore agrees to purchase a sublot at the corner of Middleton Road and a proposed street within the Subdivision to be known as Woodland Avenue and to construct a model home on that sublot according to its customary schedules for plan approval and construction as soon as the site for such model home receives final approval from the zoning officials of the City of Hudson, Ohio, and a zoning certificate for the site becomes available, PROVIDED, however, that the parties agree that Glenmoore's obligation to construct the model home referenced in this Paragraph 3 shall be forgiven if Glenmoore (a) shall have entered into contracts for the sale of at least five (5) sublots within the Subdivision within 30 days of the date on which zoning certificates become available and (b) shall have closed those sales within 60 days of the date on which the zoning certificates shall have become available under the conditions specified in Paragraph 6 of this Agreement."

The two lots located nearest to the corner of Middleton Road and Woodland Avenue are lots one and nineteen. Glenmoore argued at trial that Smith orally modified paragraph three by allowing lot two to be purchased. It is undisputed that at the time of trial, Glenmoore had not purchased lot one or lot nineteen, and it had not built a model home on either lot. However, if there is "some competent, credible evidence" to support the jury's finding of an oral modification, then

Glenmoore did not breach paragraph three by buying lot two and building a model home on it, as doing such would have complied with the modification. See *Bryk* at ¶5.

{¶33} We have stated that "[t]he general rule is that a written contract may be orally amended if the oral amendment has the essential elements of a binding contract." *Fraher Transit, Inc. v. Aldi, Inc.*, 9th Dist. No. 24133, 2009-Ohio-336, at ¶12, quoting *Mahon-Evans Realty, Inc. v. Gunkelman*, 9th Dist. No. 07CA0013- M, 2007-Ohio-5108, at ¶ 18. In order to have a binding contract, there must be an "offer, acceptance, contractual capacity, consideration, * * * a manifestation of mutual assent and legality of object and of consideration." (Internal quotations omitted.) *Bldg. Industry Consultants, Inc. v. 3M Parkway, Inc.*, 9th Dist. No. 08CA009433, 2009-Ohio-1910, at ¶12. "[A] verbal agreement to be effectual as a waiver, variation, or change in the stipulations of a prior written contract between the parties, must rest upon some new and distinct legal consideration, or must have been so far executed or acted upon by the parties, that a refusal to carry it out would operate as a fraud upon one of the parties." (Citations and quotations omitted.) *Fraher Transit, Inc.* at ¶12.

{¶34} At trial, John Kolar, vice president of Glenmoore provided the following testimony regarding lot two and the oral modification:

> "Q. But yet you bought Sublot 2?
>
> "A. Bob Smith pressured us to buy it. Bob Smith begged us to buy the lot.
>
> "Q. How so?
>
> "A. Starting when he asked us to change --- in October he asked us to do a sales trailer. He asked us and we brought up the question about the model home, where are we going to put it. He said put it on Sublot 2. His exact words were 'What difference does a hundred feet make?'
>
> "* * *
>
> "In this case, Bob Smith wanted us to build a model on Sublot 2 and do a sales trailer on Sublot 1. We did exactly what Smith asked us to do even though it cost

> us more to buy Sublot 2. Even though it cost us a $50,000 more expensive house, we still were trying to accommodate Bob Smith.
>
> "* * *
>
> "Q. At the time that you discussed Sublot 2, did Mr. Smith make any reference to this notion that he would still want you to purchase either Sublot 1 or 19?
>
> "A. No, sir."

{¶35} Further, Scott Mackay testified at trial that in October 2005, "John Kolar came to me and said he got a call from Bob Smith saying we should build a model on Sublot 2 and also that Hudson might allow a sales trailer on Sublot 1." While Smith denies ever agreeing to an oral modification, the jury was free to find that Kolar's and Mackay's testimony was more credible. Furthermore, there is no dispute that the Agreement obligated Glenmoore to build only one model home and purchase only one lot, as confirmed by Smith's testimony:

> "Q. Have you got anything signed by Glenmoore Builders indicating that in addition to buying Sublot 2 they also would agree to buy Sublot 1 or 19?
>
> "A. They – there is nothing in writing from Glenmoore stating that they will buy additional sublots.
>
> "Q. Nor is there any obligation of Glenmoore to build more than one model home; is that correct?
>
> "A. There's an obligation to build one model home or –
>
> "Q. Not for more than one model home. The question is, do you have anything in writing obligating Glenmoore Builders to build more than one model home?
>
> "A. We don't have anything in writing to that effect."

Given all of the above, the jury could have reasonably concluded that Smith orally modified paragraph three of the contract, allowing Glenmoore to purchase lot two and build a model home on it. As paragraph three only required Glenmoore to buy one lot and build one model home, the

jury could also have reasonably concluded that Glenmoore complied with paragraph three as modified, and thus was not in breach.

{¶36} Smith Developer also contends that somehow the trial court's January 10, 2007 *post-verdict* order supports the conclusion that the jury's verdict finding an oral modification was against the manifest weight of the evidence. Smith Developer argues that paragraph nine of the order supports its argument. Paragraph nine states:

> "[Glenmoore] unilaterally decided to purchase Sublot 2 of the Woodland Estates from Smith Family Trust for construction of a residence with full knowledge that the final grade requ[ir]ements were not completed and that soil would have to be removed, and further, [Glenmoore] constructed a house on Sublot 2 with the same knowledge. [Glenmoore] expended $7,800.00 to remove excess soil from Sublot 2. No special conditions were agreed upon between the parties and the Deed of Conveyance was silent. [Glenmoore] failed to prove[] this claim, and thus [Glenmoore] cannot obtain a judgment from any Defendant for this expenditure."

{¶37} Smith Developer's argument is without merit. Smith Developer focuses in on the word "unilaterally" and thus insists this means that there was no oral modification. However, the purpose of this paragraph was to enunciate the trial court's determination that Glenmoore had not proved that it was entitled to damages it incurred in altering lot two in order to comply with grading requirements. Moreover, the purpose of the order was not to contradict the jury's findings or conclusions, but to summarize the events and findings in the case to-date, including the court's hearing on remedies. Finally, the trial court in paragraph five of its order, specifically states that "The provisions of Paragraph Three (3) in the August 3rd Agreement have been satisfied as the jury found." Paragraph three required Glenmoore to buy a corner lot and build a model home on it. Thus, the only way the trial court's statement would make sense is if the trial court was upholding the jury's finding of an oral modification, and therefore concluding that Glenmoore had satisfied paragraph three as modified by purchasing lot two and building a model home on it. We overrule Smith Developer's fourth assignment of error.

IV.

> "III. The trial court erred by denying Appellants' Motion for Judgment Notwithstanding the Verdict or for a New Trial. (Order dated 2/16/07.)"

{¶38} Smith Developer argues that the trial court erred in denying its motion for judgment notwithstanding the verdict ("JNOV") and its motion for a new trial. Civ.R. 50(B) provides in part:

> "Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; * * *. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence."

An appeal from the denial of a JNOV is reviewed *de novo*, as it presents a question of law, and we apply the same standard of review applicable to a motion for directed verdict. *Wilson v. United Fellowship Club of Barberton*, 9th Dist. No. 23241, 2007-Ohio-2089, at ¶23. "A motion for a directed verdict assesses the sufficiency of the evidence, not the weight of the evidence or the credibility of the witnesses." *Kane v. O'Day*, 9th Dist. No. 23225, 2007-Ohio-702, at ¶18. We have stated that "JNOV is proper if upon viewing the evidence in a light most favorable to the non-moving party and presuming any doubt to favor the nonmoving party reasonable minds could come to but one conclusion, that being in favor of the moving party." (Citations and internal quotations omitted.) *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶9.

{¶39} Smith Developer essentially asserts five arguments to explain why it was error for the trial court to deny its JNOV motion: (1) the statute of frauds applies, barring an oral modification and making promissory estoppel inapplicable, (2) the contract contained a provision

barring oral modifications, (3) there was insufficient evidence to support Glenmoore's promissory estoppel claim, (4) Glenmoore, not Smith Developer breached the Agreement, and (5) the Agreement was void as there was no meeting of the minds.

Statute of Frauds

{¶40} Initially we note that Smith Developer claims that the jury's finding that the Agreement had been orally modified was contrary to law because the oral agreement violates the statute of frauds and because the doctrine of promissory estoppel does not apply to a real estate transaction because it violates the statute of frauds. Statute of frauds is an affirmative defense. See *O'Bryon v. Poff*, 9th Dist. No. 02CA0061, 2003-Ohio-3405, at ¶31. "The burden of proving an affirmative defense falls on the party who asserts the defense[.]" (Citation and quotations omitted.) Id. While Smith Developer did raise the statute of frauds as an affirmative defense in its pleadings and motions, it did not attempt to raise this defense in front of the jury. Smith Developer's proposed jury instructions do not list the statute of frauds as one of its affirmative defenses, nor did Smith Developer object to the trial court's promissory estoppel instruction. In fact, Smith Developer included in its own proposed instructions a promissory estoppel instruction. As Smith Developer did not submit the statute of frauds defense to the jury, nor did it attempt to do so, we determine that the trial court properly denied Smith Developer's JNOV motion as to this perceived error.

No Oral Modification Provision

{¶41} Smith Developer also argues that the finding of an oral modification was contrary to law because the contract contained a provision barring oral modifications. However, we have stated that:

> "[d]espite principles of freedom of contract and the potential benefit of avoiding false claims, the no-oral-modification clause has not garnered favor in the law.

> Indeed, this clause, which purports to erect a kind of 'private' statute of frauds for contracting parties, has generally not been given full effect by courts. * * * Accordingly, it has been held that the clause itself can be waived by oral agreement like any other term in a contract." *Fraher Transit, Inc.* at ¶13, quoting *Fahlgren & Swink, Inc. v Impact Resources, Inc.* (Dec. 24, 1992), 10th Dist. No. 92AP-303, at *4.

Thus, the presence of a provision in the Agreement barring oral modifications does not, in and of itself, make the jury's finding of an oral modification to the Agreement contrary to law.

Promissory Estoppel

{¶42} Next, Smith Developer argues that Glenmoore did not sufficiently support its claim for promissory estoppel, concerning paragraph three of the Agreement. The trial court instructed the jury that Glenmoore claimed that the parties orally agreed that Glenmoore was to build a model home on lot two and that Smith Developer was estopped from denying the alteration. However, the jury was also provided with an interrogatory that asked: "Do you find by a preponderance of the evidence that Defendant, Robert G. Smith, on behalf of Smith Family Trust, orally modified paragraph 3 of the Amended Exclusive Purchase Agreement dated August 3, 2005 by allowing sublot 2 to be purchased?" The jury answered the interrogatory in the affirmative. The jury's finding of an oral modification, which we determined above was supported by sufficient evidence, necessarily leads to the conclusion that there was a valid modified contract. "Quasi-contract claims such as unjust enrichment and promissory estoppel apply in the absence of a contract, which was found to exist here." *Gevedon v. Gevedon*, 167 Ohio App.3d 1, 2006-Ohio-2668, at fn. 3. Thus, we determine that any argument concerning whether Glenmoore proved its claim of promissory estoppel is moot; the jury concluded the Agreement was modified and so examining the sufficiency of Glenmoore's promissory estoppel claim would be fruitless at this point.

Glenmoore's Breach

{¶43} Smith Developer next argues that there was not enough evidence that it breached the Agreement and that even if it did, Glenmoore was in breach as well. Smith Developer again argues that Glenmoore was in breach by failing to buy a corner lot and failing to build a model home on it. We have previously addressed this issue above, and again conclude that there was sufficient evidence that Smith orally modified the Agreement, and thus Glenmoore's actions in purchasing lot two and building a model home on it could not amount to a breach.

{¶44} Smith Developer also argues that Glenmoore did not prove that Smith Developer materially breached the contract by failing to satisfy the final grade requirements. To establish a claim for breach of contract, Glenmoore had to prove "the existence of a contract, performance by [Glenmoore], breach by [Simth Developer], and damage or loss to [Glenmoore]." *Elite Designer Homes, Inc. v. Landmark Partners*, 9th Dist. No. 22975, 2006-Ohio-4079, at ¶65, quoting *Kunkle v. Akron Mgt. Corp.*, 9th Dist. No. 22511, 2005-Ohio-5185, at ¶ 18, quoting *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600. The parties agreed there was a contract. The jury determined that Smith Developer failed to satisfy the final grade requirements. Paragraph six of the Agreement outlines that a zoning certificate will be deemed available when, among other things, "all contingencies, administrative or regulatory requirements, or prerequisites to the issuance of a zoning certificate by the city's zoning officials for such sublot(s) shall have been fully satisfied * * *." Further, the parties stipulated that "[t]he responsibility for causing each of the sublots of Woodland Estates * * * to conform with the final grade specifications approved by the City of Hudson, Ohio, rests entirely with the Developer."

{¶45} Smith Developer appears to argue that the trial court's post-verdict order is correct and requires us to conclude that it contradicts the jury's finding that Smith Developer

breached by failing to satisfy the final grade requirements for lot two is contrary to law. We disagree. The trial court order that Smith Developer references states that that Glenmoore expended $7,800.00 to satisfy the grade requirements on lot two, but that Glenmoore could not recover that sum as "[n]o special conditions were agreed upon between the parties and the Deed of Conveyance was silent." We do not conclude that this contradicts the jury's findings or is contrary to law. Interrogatory No. 9 asked the following:

> "Did the developer, Smith Family Trust, breach its obligations under its contract with Glenmoore Builders by failing to satisfy all final grade requirements for Sublot No. 2 of Woodland Estates prior to transferring title to that sublot to Glenmoore Builders?"

To which the jury checked, "Yes." Interrogatory No. 10 asked the following question:

> "Did the developer, Smith Family Trust, or its agent, Robert G. Smith, make one or more promises to Glenmoore Builders that errors in the final grade of Sublot No. 2 would be adjusted and/or corrected after the closing of the purchase of such sublot?"

To which the jury checked, "No." Glenmoore submitted invoices as an exhibit detailing the amount it expended in bringing lot two in compliance with the final grade requirements. Thus, although the jury found that Smith Developer was in breach of its obligation to satisfy the grade requirements prior to Glenmoore's purchase of the lot, the jury also found that Smith Developer did not have a legal obligation to remedy any errors in the final grade of lot two once title to the property had passed to Glenmoore. The trial court's order matches the jury's determinations that the Agreement was breached, however Smith Developer did not have an obligation to remedy the damage once the property had been transferred to Glenmoore. Additionally, we note that Smith Developer presented an exhibit, concerning lot two, titled "PROPERTY ACCEPTANCE," signed by Mackay and dated December 29, 2005, indicating that "I/We hereby certify that I/We have inspected the above referenced property which I/We have purchased and accept this

property in its present condition." Thus, there is no contradiction for the jury to find that Smith Developer breached its obligation to satisfy final grade requirements, and also that once the property was conveyed to Glenmoore, Smith Developer no longer had an obligation to remedy the damage. Smith Developer's argument is without merit.

No Meeting of the Minds

{¶46} Finally, Smith Developer argues that the trial court should have granted its motion for JNOV because "the contract was void as there was no meeting of the minds." Essentially Smith Developer is now attempting to argue that since the parties' understanding of the terms of the Agreement were so different, that there was no valid contract. This argument has no merit. The trial court instructed the jury for the breach of contract claim that the parties agreed that there was a contract. Smith Developer did not object to this instruction and has not specifically challenged the propriety of the instruction.

{¶47} We conclude that the trial court did not err in denying Smith Developer's motion for a JNOV.

Motion for a New Trial

{¶48} In this assignment of the error, Smith Developer has also appealed the trial court's denial of Smith Developer's motion for a new trial. However, in Smith Developer's brief, it only provides arguments concerning why the trial court erred in denying its motion for a JNOV; it provides no explanation as to why it believes the trial court erred in denying its motion for a new trial. "It is the duty of the appellant, not this [C]ourt, to demonstrate [its] assigned error through an argument that is supported by citations to legal authority and facts in the record." *Taylor*, at *3; see, also, App.R. 16(A)(7); Loc.R. 7(B)(7). "It is not the function of this [C]ourt to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the

appellate courts is a tactic which is ordinarily fatal." *Catanzarite* at ¶16, quoting *Kremer*, 114 Ohio App.3d at 60. Because Smith Developer has not developed an argument concerning this issue, it has failed to demonstrate an error on the part of the trial court. See *Taylor*, at *3.

V.

CROSS APPEAL

1. "The trial court erred in directing a verdict against plaintiff on Count Seven of the complaint (fraud or fraudulent concealment)."

{¶49} We review a trial court's decision granting or denying a directed verdict *de novo* as it presents a question of law. *Fraher Transit, Inc.* at ¶22. Civ.R. 50(A)(4) provides that:

> "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

A motion for directed verdict involves a question of the sufficiency of the evidence. *Macken v. KDR Holdings*, 9th Dist. No. 06CA009003, 2007-Ohio-4106, at ¶13. "If the party opposing the motion for a directed verdict fails to present evidence on one or more of the essential elements of a claim, a directed verdict is proper." Id. at ¶14. "Thus, the court does not determine whether one version of the facts presented is more persuasive than another; rather, it determines whether only one result can be reached under the theories of law presented in the complaint." *Clair v. First Am. Title Ins.*, 9th Dist. No. 23382, 2007-Ohio-1681, at ¶5, quoting *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28, 29.

{¶50} In its complaint, Glenmoore alleges that Smith Developer failed to disclose the recording of the Woodland Estates Declaration of Restrictions and Covenants at the time Glenmoore signed the Agreement which it had a right to approve prior to recordation.

Glenmoore also argues that Smith Developer fraudulently concealed the fact that Smith Developer intended to revoke consent for the proposed alternate use of lot one if Glenmoore did not purchase both lots one and two. Glenmoore also alleges that Smith Developer's concealment of its true intent in consenting to the alternate use of lot one fraudulently induced Glenmoore to purchase lot two. Finally Glenmoore alleges Smith Developer misrepresented its intentions with respect to the oil and gas wells.

{¶51} In its cross appeal, Glenmoore argues that it presented sufficient evidence to take the above fraudulent concealment claim to the jury. The elements of fraud are:

> "(1) a representation, or where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) 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; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance." *Baughman v. State Farm Mutual Auto. Ins. Co.*, 9th Dist. No. 22204, 2005-Ohio-6980, at ¶12, citing *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169.

"An action in fraud will only be found if all of the elements are present and 'the absence of one element is fatal to recovery.'" *Goodman Beverage Co., Inc. v. Kerr Beverage Co.*, 9th Dist. No. 02CA008142, 2003-Ohio-2845, at ¶21, quoting *Westfield Ins. Co. v. HULS Am., Inc.* (1998), 128 Ohio App.3d 270, 296.

{¶52} In its merit brief to this Court, Glenmoore does not list all of the elements of fraud. In order for this Court to conclude that the trial court erred in granting Smith Developer's motion for directed verdict, we would have to determine that Glenmoore provided sufficient evidence at trial to support each of the above listed elements. A failure to do so would require us to overrule Glenmoore's assignment of error. Glenmoore does cite to facts and evidence in the record, but does not connect the facts to the requisite elements of its claim.

{¶53} Even if we were to ignore this failure, we still cannot determine which facts in Glenmoore's brief for this assignment of error support either that its reliance was justifiable or that it was injured. This is not to say that Glenmoore could not find facts or evidence in the record to support those elements, but it is Glenmoore's responsibility to do so, not this Court's. "It is not the function of this [C]ourt to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Catanzarite* at ¶16, quoting *Kremer*, 114 Ohio App.3d at 60. We therefore, overrule Glenmoore's first assignment of error.

VI.

> "I. The trial court erred by denying Appellants' Motions for Summary Judgment on Counts 1, * * * , 4, 5, 6, and 7 of the Complaint, Count 1 of the Counterclaim, and Appellant's Motion for Reconsideration of Counts 5 and 6 (Orders dated 8/14/06 and 9/21/06.)"

{¶54} Initially we note that "[a]n appeal lies only on behalf of the party who is aggrieved by the judgment. The sole purpose of an appeal is to provide the appellant an opportunity to seek relief in the form of a correction of errors of the lower court that injuriously affected him." (Internal citations and quotations omitted.) *BFG Federal Credit Union v. CU Lease, Inc.*, 9th Dist. No. 22590, 2006-Ohio-1034, at ¶36.

{¶55} Smith Developer argues that the trial court erred in denying its motion for summary judgment on count five of the complaint concerning an implied contract, and erred in denying its motion for reconsideration on the same issue. It also asserts that the trial court erred in denying its motion for summary judgment on count seven of the complaint, Glenmoore's fraud claim. However, Smith Developer was awarded a directed verdict on both claims. And while Glenmoore has asserted that the trial court erred in granting Smith Developer a directed verdict on Glenmoore's fraud claim, we have overruled that assignment of error.

{¶56} We have stated that:

> "Although [Smith Developer] may have been aggrieved by the trial court's interlocutory order that denied [its] motion for summary judgment, [it] ultimately prevailed on the same issues raised in [its] motion for summary judgment when the trial court granted [it] a directed verdict on [the claim] * * *." Id. at ¶37.

Thus, Smith Developer cannot claim it is aggrieved by the trial court's determinations as to counts five and seven of the complaint and any error on the part of the trial court did not injure Smith Developer. Id.

{¶57} Smith Developer also challenges the trial court's denial of its motion for summary judgment concerning counts one, four, and six of the complaint, and count one of the counterclaim, and the trial court's denial of its motion for reconsideration on count six of the complaint. Count one of the complaint and counterclaim concern declaratory relief concerning the Agreement. Count four of the complaint was Glenmoore's breach of contract claim. Count six of the complaint was Glenmoore's promissory estoppel claim. Each of these issues was presented to the jury and Glenmoore prevailed on all of them.

{¶58} The Supreme Court of Ohio has held that:

> "any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made." *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156.

We determined above that the jury's verdict was not against the manifest weight of the evidence when it found in favor of Glenmoore. Smith Developer has pointed out to this Court, in its argument that the jury's verdict was against the manifest weight of the evidence, the evidence presented at trial which would support a finding for it. Given our above analysis of Smith Developer's fourth assignment of error, we conclude that there were genuine issues of material

fact at the time of trial which the jury resolved in favor of Glenmoore. Accordingly, Smith Developer's assignment of error is overruled.

VII.

CROSS APPEAL

> II. "The trial court erred when it did not provide the instructions, as requested by plaintiff, on the doctrines of 'part performance' and frustration of purpose."

{¶59} As we have not concluded that the jury's verdict was against the manifest weight of the evidence and the jury verdict found in favor of Glenmoore, Glenmoore is not an aggrieved party and any error in the jury instructions made by the trial court did not injure Glenmoore. See *BFG Federal Credit Union* at ¶36. We overrule Glenmoore's second assignment of error.

VII.

{¶60} In light of the foregoing, we affirm the judgment of the trial court.

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 Appellants/Cross-Appellees.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

KAREN EDWARDS-SMITH, Attorney at Law, for Appellants/Cross-Appellees.

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