

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

22 EXCHANGE, LLC

C.A. No. 27472

Appellant

v.

EXCHANGE STREET ASSOCIATES,
LLC, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2013-08-3748

Appellees

DECISION AND JOURNAL ENTRY

Dated: May 6, 2015

SCHAFFER, Judge.

{¶1} Plaintiff-Appellant, 22 Exchange, LLC (“22 Exchange”), appeals from the judgment of the Summit County Court of Common Pleas in favor of Defendant-Appellees, Exchange Street Associates, LLC (“Exchange Street”) and Richland Communities, LTD., Richland Development Corp., Martin J. Mehall, Brent Mehall, and Michael Weiss (collectively “the Additional Defendants”). This Court affirms.

I.

{¶2} This appeal concerns the sale of an apartment building used for student housing and located at 22 East Exchange Street in Akron (“the Property”). Prior to the instant litigation, the Property was owned by Exchange Street. On March 1, 2012, Exchange Street contracted with PEP Investment Operations, LLC (“PEP Investment”) for the sale of its interest in the Property. The two entities amended their agreement multiple times over the course of the following year and executed their final amendment (“the Eighth Amendment”) on March 21,

2013. Relevant to this appeal, the Eighth Amendment added a “Historical Leasing Velocity Report” section to the agreement in which Exchange Street vouched for the accuracy of a Historical Leasing Velocity Report (“the Velocity Report”). The Velocity Report contained a list of the student leases that Exchange Street had secured over the previous one and a half years.

{¶3} Prior to the closing date set forth in the Eighth Amendment, PEP Investment assigned its interest in the Property to 22 Exchange. On April 4, 2013, Exchange Street presented 22 Exchange with a Seller’s Closing Certificate and, on April 15, 2013, the parties closed on the Property. The following day, Exchange Street formally assigned its interest in the Property to 22 Exchange.

{¶4} In August 2013, 22 Exchange brought suit against Exchange Street for breach of contract. 22 Exchange alleged that the Velocity Report for which Exchange Street had vouched in the Eighth Amendment, and more generally in the Seller’s Closing Certificate, was inaccurate. Specifically, it contained both floorplan lease dates and unit lease dates,¹ without distinguishing between the two. 22 Exchange alleged that the inaccuracies in the Velocity Report had caused it to overestimate the projected number of leases that it had expected it would secure at the Property. It further alleged that Exchange Street knew about the inaccuracies in the Velocity Report at the time of its submission. Consequently, it argued that Exchange Street had materially breached their agreement.

{¶5} After Exchange Street answered the complaint, it filed a motion for judgment on the pleadings. Exchange Street argued that 22 Exchange’s contract claim had to fail because

¹ According to 22 Exchange, a floorplan lease date represents the date on which a student signs a lease for the building, but not for a particular unit. The student later signs a unit lease, assigning them a particular unit. According to 22 Exchange, floorplan lease dates “are the industry standard for measuring, reporting, and tracking pre-lease velocity in the student housing industry.”

neither the purchase agreement itself, nor the Eighth Amendment required it to compile the Velocity Report based strictly on floorplan lease dates. It attached to its motion copies of the purchase agreement for the Property, the Eighth Amendment, and the Velocity Report.

{¶6} Before the trial court ruled on Exchange Street's motion for judgment on the pleadings, 22 Exchange filed a motion for leave to amend its complaint. 22 Exchange alleged that it had recently uncovered numerous misrepresentations and omissions on the part of Exchange Street and/or several of its agents. Specifically, it alleged that Exchange Street and/or its agents: (1) had masked water leaks in the building with paint and had not disclosed them; and (2) had failed to disclose that it/they had enticed new tenants with free iPads. 22 Exchange sought to add the Additional Defendants to its complaint, all of whom were agents of or otherwise affiliated with Exchange Street, and four additional causes of action. The additional causes of actions were for: (1) fraud as a result of misrepresentations or omissions about the occupancy rates, the water leaks, and the iPad enticement; (2) negligent misrepresentation as a result of the occupancy rates; (3) negligent concealment as a result of the occupancy rates, the water leaks, and the iPad enticement; and (4) breach of the warranty contained in the Eighth Amendment. Exchange Street opposed the amendment to the complaint, and 22 Exchange filed a reply brief.

{¶7} On February 5, 2014, the court issued a journal entry in which it ruled on both Exchange Street's motion for judgment on the pleadings and 22 Exchange's motion for leave to amend its complaint. The court allowed the amendment to the complaint, but granted a judgment on the pleadings in favor of Exchange Street on several of the claims within the

amended complaint.² The court determined that 22 Exchange's claims for breach of contract and breach of warranty survived in their entirety. It further determined that 22 Exchange's proposed claims against Exchange Street for fraud, negligent misrepresentation, and negligent concealment were subsumed by the parties' contract, with the exception of the allegations concerning the water leaks. Consequently, the court granted judgment in favor of Exchange Street on those claims, insofar as they related to misrepresentations or omissions about the occupancy rates and the iPad enticement. The court noted that its decision did not impact any of 22 Exchange's claims against the Additional Defendants named in the amended complaint.

{¶8} 22 Exchange filed its amended complaint on February 11, 2014, but sought an additional amendment the following month. Specifically, on March 21, 2014, 22 Exchange asked to amend its complaint a second time in order to add a claim for fraudulent inducement. The proposed claim alleged that Exchange Street and three of the Additional Defendants had induced 22 Exchange to purchase the Property by misrepresenting the occupancy rates at the Property, concealing water leaks on the Property, and concealing the fact that they had enticed new tenants with iPads. Exchange Street opposed 22 Exchange's request for leave to amend, arguing that its proposed claim simply rehashed the allegations that 22 Exchange had made in its first amended complaint.

{¶9} Within several days of 22 Exchange's motion for leave, Exchange Street and the Additional Defendants also filed a motion to dismiss the first amended complaint in whole or in part. 22 Exchange responded to the motion to dismiss. On May 14, 2014, the trial court issued its ruling on both the motion to dismiss and 22 Exchange's motion for leave to file a second

² The court noted that, while Exchange Street's initial motion for judgment on the pleadings was based solely on 22 Exchange's breach of contract claim, both parties had briefed the propriety of the additional claims in response to 22 Exchange's motion for leave to amend.

amended complaint. The trial court denied 22 Exchange's motion for leave to file a second amended complaint and granted the motion to dismiss filed by Exchange Street and the Additional Defendants. The court later amended its February 5, 2014, and May 14, 2014 entries to include a Civ.R. 54(B) certification.

{¶10} 22 Exchange now appeals from the trial court's judgment and raises two assignments of error for our review. For ease of analysis, we reorder the assignments of error.

II.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT LEAVE TO FILE A SECOND AMENDED COMPLAINT TO INCLUDE A FRAUDULENT INDUCEMENT CLAIM.

{¶11} In its second assignment of error, 22 Exchange argues that the trial court abused its discretion by denying its motion for leave to file a second amended complaint. We disagree.

{¶12} "This Court reviews the denial of a motion for leave to amend a pleading for an abuse of discretion." *Jacobson-Kirsch v. Kaforey*, 9th Dist. Summit No. 26708, 2013-Ohio-5114, ¶ 12. While first amendments may be made as a matter of course if they are timely, additional amendments may be made "only with the opposing party's written consent or the court's leave." Civ.R. 15(A). "[T]he language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6 (1984). *See also* Civ.R. 15(A) ("The court shall freely give leave [to amend] when justice so requires."). Nevertheless, "[w]here a motion for leave to amend is not timely tendered and no reason is apparent to justify the delay, a trial court does not abuse its discretion in refusing to allow the amendment." *Wallner v. Thorne*, 9th Dist. Medina No. 09CA0053-M, 2010-Ohio-2146, ¶ 11,

quoting *State ex rel. Smith v. Adult Parole Auth.*, 61 Ohio St.3d 602, 603-604 (1991), quoting *Meadors v. Zaring Co.*, 38 Ohio App.3d 97, 99 (1st Dist.1987).

{¶13} 22 Exchange filed its initial complaint for breach of contract on August 2, 2013. After Exchange Street filed a motion for judgment on the pleadings, 22 Exchange sought leave to amend its complaint. The proposed amendments included the addition of the Additional Defendants and four new claims, all of which this Court outlined above. Exchange Street opposed the amendment on both procedural and substantive grounds, and 22 Exchange responded. Subsequently, the trial court allowed 22 Exchange's amendment, but partially granted Exchange Street's motion for judgment on the pleadings. The court's order, dated February 5, 2014, struck portions of 22 Exchange's claims for fraud, negligent misrepresentation, and negligent concealment because the court determined that the parties' agreement subsumed those claims.

{¶14} More than six weeks after the court struck portions of its claims, 22 Exchange again sought leave to amend its complaint in order to add a claim of fraudulent inducement. 22 Exchange argued that "[b]ecause [it] had not pleaded a fraudulent inducement claim—and such a claim [could] clearly co-exist with contract claims under Ohio law—[it] [sought] leave to add a fraudulent inducement claim, in order to complete the pleadings and bring all applicable claims in one case." It argued that the defendants would not be prejudiced by the amendment because the case was still in its initial stages. Yet, Exchange Street opposed the motion for leave, noting that it was nothing more than an attempt to circumvent the court's prior ruling and resurrect the same allegations by recasting them as a different type of fraud. The defendants also filed a motion to dismiss, arguing that 22 Exchange's first amended complaint contained claims for which relief could not be granted.

{¶15} In denying 22 Exchange’s motion for leave to file a second amended complaint, the trial court noted that “the alleged facts that form[ed] the basis for the new claim [were] identical to the facts alleged in the First Amended Complaint asserted for the other torts.” Accordingly, the court found that 22 Exchange could have asserted its fraudulent inducement claim in its first amended complaint. The court further found that a significant period of time had already elapsed since the filing of the initial complaint and that allowing the amendment would trigger the defendants’ rights to file additional dispositive motions. Consequently, the court denied the motion for leave on the basis of undue delay.

{¶16} Having reviewed the record, we cannot conclude that the trial court went so far as to abuse its discretion in denying 22 Exchange’s motion for leave to file a second amended complaint. On multiple occasions, this Court has noted that a plaintiff’s attempt to amend its complaint following the filing of a dispositive motion “raises the spectre of prejudice.” *E.g.*, *Bear v. Bear*, 9th Dist. Summit No. 26810, 2014-Ohio-2919, ¶ 10-12 (undue prejudice where plaintiff sought amendment after defendant filed motion for summary judgment); *Jacobson-Kirsch*, 2013-Ohio-5114, at ¶ 12-14 (undue prejudice where plaintiff sought amendment after defendant filed motion to dismiss). 22 Exchange only sought to add its claim of fraudulent inducement after Exchange Street sought a judgment on the pleadings and the trial court ruled in its favor on several of 22 Exchange’s claims. Moreover, the allegations that 22 Exchange sought to allege in its second amended complaint were the same allegations that it had raised in its first amended complaint. 22 Exchange did not offer any reason for not having brought a claim of fraudulent inducement in its first amended complaint. Indeed, it all but admitted that it had filed its second motion for leave in an effort to avoid the court’s unfavorable ruling on the tort claims raised in its first amended complaint. It was not unreasonable, arbitrary, or unconscionable for

the trial court to conclude that 22 Exchange had failed to offer sufficient justification for its delay in seeking to add a claim of fraudulent inducement. Accordingly, we conclude that the court did not abuse its discretion in denying 22 Exchange's motion for leave. *See Wallner*, 2010-Ohio-2146, at ¶ 10. 22 Exchange's second assignment of error is overruled.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S FRAUD CLAIM.

{¶17} In its first assignment of error, 22 Exchange argues that the trial court erred by dismissing its fraud claim against Exchange Street and the Additional Defendants. We disagree.

{¶18} This Court reviews de novo a trial court's decision to dismiss for failure to state a claim under Civ.R. 12(B)(6). *Wick v. Lorain Manor, Inc.*, 9th Dist. Lorain No. 12CA010324, 2014-Ohio-4329, ¶ 15. "In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) * * *, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought." *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 12. The court, in making its determination, must confine its review to "the facts alleged in the complaint and any material incorporated into it." *King v. Semi Valley Sound, L.L.C.*, 9th Dist. Summit No. 25655, 2011-Ohio-3567, ¶ 8. *See also* Civ.R. 10(C) ("A copy of any written instrument attached to a pleading is a part of the pleading for all purposes."). "When reviewing whether a motion to dismiss should have been granted, this Court must accept as true all factual allegations in the complaint and all reasonable inferences must be drawn in favor of the nonmoving party." *Miller v. Bennett*, 9th Dist. Lorain No. 13CA010336, 2014-Ohio-2460, ¶ 4.

{¶19} The vast majority of 22 Exchange's argument in this assignment of error is premised on a claim of fraudulent inducement, not fraud. According to 22 Exchange, the fraud

claim it brought against the defendants in its first amended complaint, while not captioned as such, actually sounded in fraudulent inducement. It therefore argues that, in construing all the allegations in the complaint in its favor, this Court should treat its fraud claim as one for fraudulent inducement. We decline its invitation to do so.

{¶20} In seeking to amend its complaint for a second time, 22 Exchange specifically asked the trial court to allow it to file a claim for fraudulent inducement because it had not done so. 22 Exchange did not argue that its first amended complaint already contained a claim for fraudulent inducement,³ and it may not do so now. In ruling on the defendants' motion to dismiss, the trial court treated 22 Exchange's claim as one alleging fraud, not fraudulent inducement. Accordingly, we only consider whether the trial court erred by dismissing 22 Exchange's stated claim of fraud.

{¶21} Initially, we note that, with regard to Exchange Street, the trial court's dismissal only pertained to the allegations that Exchange Street had failed to disclose and/or concealed "ongoing defects" on the Property that resulted in "serious water leaks." The remaining fraud allegations against Exchange Street were disposed of by way of a judgment on the pleadings. Because 22 Exchange's captioned assignment of error only pertains to the court's judgment of dismissal, we limit our review to its ruling strictly on the motion to dismiss. *See J.B. v. Harford*, 9th Dist. Summit No. 27231, 2015-Ohio-13, ¶ 36, quoting *State v. Brown*, 9th Dist. Summit No. 23637, 2008-Ohio-2670, ¶ 24 ("An appellant's 'assignment of error provides a roadmap for our review and, as such, directs our analysis of the trial court's judgment * * *.'").

³ 22 Exchange attempted to make this same argument to the trial court in a motion for reconsideration. The court rejected 22 Exchange's argument, noting that it had specifically sought leave to amend because it had *not* stated a claim for fraudulent inducement in its first amended complaint.

{¶22} There is no dispute that Exchange Street sold the Property to 22 Exchange “as is.” “A cause of action cannot be maintained against [a] seller or its agent for fraudulent nondisclosure when the property is being sold ‘as is.’” *Loya v. Howard Hanna Smyth, Cramer Co.*, 9th Dist. Summit No. 24378, 2009-Ohio-448, ¶ 12. Instead, an aggrieved buyer must be able to show that the seller or its agent engaged in fraudulent misrepresentation by making a representation or by concealing a material fact when there was a duty to disclose. *Id.* at ¶ 13, quoting *DiCillo v. Prindle*, 9th Dist. Summit No. 21618, 2004-Ohio-2366, ¶ 27. *See also Dito v. Wozniak*, 9th Dist. Lorain No. 04CA008499, 2005-Ohio-7, ¶ 13 (fraudulent misrepresentation nullifies the “as is” clause of a purchase agreement). “[A] vendor has a duty to disclose material facts which are latent, not readily observable or discoverable through a purchaser’s reasonable inspection.” *Layman v. Binns*, 35 Ohio St.3d 176, 178 (1988). If a defect could have been detected by inspection, it is not a latent defect. *Id. Accord Byrk v. Berry*, 9th Dist. Wayne No. 07CA0045, 2008-Ohio-2389, ¶ 7 (“Fraudulent concealment exists where a vendor fails to disclose sources of peril of which he is aware, if such a source is not discoverable by the vendee.”). “The nature of the defect and the ability of the parties to determine through a reasonable inspection that a defect exists are key to determining whether or not the defect is latent.” *Byrk* at ¶ 7.

{¶23} Because 22 Exchange did not allege that the defendants made any affirmative misrepresentations about the alleged water leaks at the Property, it had to show that they concealed the water leaks when they were under a duty to disclose them. *Loya* at ¶ 13. 22 Exchange specifically alleged that the defendants took measures to conceal “serious water leaks” at the Property. It did not, however, explain *how* Exchange Street and/or its agents concealed the water leaks. It also failed to allege that it had not detected the leaks after reasonable inspection.

If a reasonable inspection would have uncovered the water leaks, then the defendants were under no duty to disclose them. *Layman* at 178; *Byrk* at ¶ 7.

{¶24} “[W]hen pleading fraud * * *, the circumstances constituting fraud * * * shall be pleaded with particularity.” *Bear*, 2014-Ohio-2919, at ¶ 23, citing Civ.R. 9(B). 22 Exchange’s first amended complaint does not allege with particularity how Exchange Street and/or the Additional Defendants concealed the alleged water leaks on the Property or whether 22 Exchange failed to discover the water leaks through reasonable inspection. Accordingly, its first amended complaint failed to set forth a claim of fraud as to the water leaks. Although the trial court did not rely upon the foregoing analysis in reaching its decision, its ultimate decision in favor of the defendants was correct. *See Cook Family Invests. v. Billings*, 9th Dist. Lorain Nos. 05CA008689, 05CA008691, 2006-Ohio-764, ¶ 19 (“[A]n appellate court shall affirm a trial court’s judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such an error is not prejudicial.”). As such, as to the water leaks, we must conclude that the court did not err by granting the defendants’ motion to dismiss.

{¶25} 22 Exchange also brought a fraud claim against the Additional Defendants on the basis that they had repeatedly misrepresented the occupancy rates at the Apartment. Specifically, 22 Exchange alleged that the Additional Defendants knowingly gave it an inaccurate Velocity Report and falsely asserted that the Property’s tenants had signed their leases in the absence of an incentive, when in fact they had been offered free iPads. The trial court determined that 22 Exchange’s fraud claim against the Additional Defendants was subsumed by the agreement on the Property, which contained numerous disclaimers that protected both Exchange Street and its agents from suit.

{¶26} 22 Exchange first argues that the trial court’s ruling was premature because the court never determined whether the Additional Defendants were parties to its agreement with Exchange Street. 22 Exchange, who brought suit against the Additional Defendants for breach of contract, now asserts that the Additional Defendants may not be parties to that contract. The argument is meritless. 22 Exchange only had dealings with the Additional Defendants as a result of its contractual dealings concerning the purchase of the Property. Moreover, 22 Exchange raised this same argument in its response to the defendants’ motion to dismiss and the trial court nonetheless found that 22 Exchange’s fraud claim was subsumed by the agreement to which it bound itself. The record does not support 22 Exchange’s assertion that the trial court failed to determine whether the agreement for the Property, and any breach thereof, was applicable to the Additional Defendants.

{¶27} “In Ohio, a breach of contract does not create a tort claim.” *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151 (9th Dist.1996). When tort and contract claims are premised upon the same actions, they may coexist “only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed.” *Id.* Additionally, “an action arising out of contract which is also based upon tortious conduct must include actual damages attributable to the wrongful acts of the alleged tortfeasor which are *in addition* to those attributable to the breach of the contract.” (Emphasis sic.) *Id.* “To hold otherwise would be to convert every unfulfilled contractual promise, i.e., every alleged breach of a contract, into a tort claim.” *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. Summit Nos. 22098, 22099, 2005-Ohio-4931, ¶ 34.

{¶28} In the simplest sense, 22 Exchange alleged that the Additional Defendants committed fraud when they made false promises about the number of tenants 22 Exchange could

expect to have at the Property. 22 Exchange brought a breach of contract and breach of warranty claim against the Additional Defendants for the same reason. It never alleged any additional harm that the Additional Defendants' actions caused beyond the harm attributable to the alleged breach of contract. *See Textron Fin. Corp.* at 151. Having reviewed the pleadings and the materials attached thereto, we agree with the trial court that the agreement on the Property controls here. 22 Exchange's claims for breach of contract and breach of warranty are still pending in the court below. Its remedy, if any, lies with those claims. Thus, the trial court did not err by dismissing its fraud claim as to the Additional Defendants. Consequently, 22 Exchange's first assignment of error is overruled.

III.

{¶29} 22 Exchange's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). 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.

JULIE SCHAFER
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

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