[Cite as *Melenik v. McManamon*, 2010-Ohio-1051.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92453 and 92675

ANITA M. MELENICK

PLAINTIFF-APPELLEE

vs.

RYAN MCMANAMON, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-586767

BEFORE: Boyle, J., Kilbane, P.J., and Celebrezze, J.

RELEASED: March 18, 2010

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellee, Anita M. Melenick, brought this action against defendants-appellants, Ryan McManamon and Jeffrey Votypka, for fraudulent and negligent misrepresentation relating to the sale of their home to her. She also sought punitive damages and attorneys fees. After a bench trial, the trial court entered judgment in the amount of $53,075 against appellants McManamon and Votypka on Melenick's fraudulent misrepresentation claim.[1] The court found that Melenick was not entitled to punitive damages or attorneys fees, however, and dismissed her claims against Lighthouse Realty, Inc., the real estate agency involved in the transaction.

{¶ 2} McManamon and Votypka appeal from the trial court's judgment. They contend that the verdict was against the manifest weight of the evidence. They also contend that the trial court erred in denying their pretrial motion for summary judgment, their motion for directed verdict made during trial, and their posttrial motion for relief from judgment. We affirm.

I

[1]The negligent misrepresentation claim was therefore subsumed in the fraud claim. See *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 149, 684 N.E.2d 1261.

{¶ 3} The evidence at trial demonstrated the following. In October 2000, McManamon and Votypka purchased a single-family home in Bay Village for $67,500 for use as a rental property. They knew the home would require extensive renovation when they bought it. As early as November 2000, they began receiving notices of violations from the city of Bay Village Building Department, citing the property for multiple building code violations. The notices all contained the following warning in bold and all capital letters: "**PLEASE REMEMBER THAT PERMITS ARE REQUIRED FOR ELECTRICAL, PLUMBING, BUILDING AND DEMOLITION WORK.**"

{¶ 4} On May 19, 2001, there was a fire in a basement light fixture of the home. The Bay Village Fire Department responded and determined that the cause of the fire was faulty electrical work. The fire department made a report of the incident and informed the building department of the code violations. Appellant Votypka received a copy of the report and was informed of the violations.

{¶ 5} Subsequently, by letter dated June 1, 2001, building department inspector David Volle informed appellant McManamon that he had reinspected the property after the fire and, as a result of the inspection, the certificate of occupancy for the property was revoked, and the property was to be vacated and not reoccupied until it had been made safe. The report listed

various code violations to be remedied, including electrical, plumbing, and foundation issues. It specifically advised McManamon that "[a]ll work shall be done after obtaining permits and inspections."

{¶ 6} On June 13, 2001, Votypka responded in writing to Inspector Volle's letter and advised him that he and McManamon planned to correct the code violations. But when Volle inspected the property again on July 20, 2001, he determined that appellants had not resolved the issues, and the city's rental inspector needed to inspect the property. Rather than correct the code violations, however, appellants opted to evict their tenants. In a letter to the Bay Village Building Department dated October 19, 2001, appellant Votypka asked that the rental inspection be cancelled because "the plan of the current owners is not to occupy the house with rental tenants and to sell the property in the near future. *Any existing violations will be disclosed to prospective buyers*." (Emphasis added.)

{¶ 7} McManamon and Votypka subsequently moved into the home and proceeded to do repair work on the property on their own. They obtained permits for work done on the outside of the premises, but did not obtain permits for any of the interior work they did on the property. Further, they never asked the city to conduct inspections on any of the repairs to the interior of the home.

{¶ 8} In October 2002, McManamon and Votypka contracted with Ohio State Waterproofing to waterproof the basement of the home. The company's written contract with appellants indicates that the company advised them that the basement's "west wall has shifted off the footer," but the "Procedure" and "Install" sections of the contract indicate that Ohio State Waterproofing was not engaged to correct this problem. Appellant McManamon initialed a paragraph on page 4 of the contract that stated he had reviewed the contract and the work identified in the contract that the company would perform.

{¶ 9} McManamon and Votypka subsequently listed the property for sale through Lighthouse Realty, where McManamon worked as an agent. The advertising flier for the property, which Melenick saw prior to purchasing the home, included a list touting all of the improvements to the property.

{¶ 10} Melenick, a single mother and first-time home buyer, looked at the property with her real estate agent in September 2003 and subsequently made an offer of $138,000. On September 28, 2003, the parties entered into a purchase agreement for the property. The purchase agreement contained a clause stating that Melenick was purchasing the property in its present "as is" physical condition.

{¶ 11} The agreement also contained a provision that the agreement was subject to a home inspection, and Melenick's agent arranged for Peter Mizeres to inspect the property prior to sale. The inspection agreement

specifically excluded building and zoning code violations from the scope of the inspection.[2]

{¶ 12} Mizeres's report identified as a "major concern" "evidence of substantial bowing on the south, rear wall," and he advised Melenick to consult a structural engineer to evaluate this issue. Mizeres testified that he did not identify a problem with the west wall and did not see the west wall shifting off the footer, as that portion of the basement is finished and the foundation is not open and observable. He testified further that the Ohio State Waterproofing contract was not in the packet of information given to him by Melenick's agent during his inspection, and he did not review it.

{¶ 13} In addition to the purchase agreement, appellants provided Melenick with a residential property disclosure form regarding the condition of the property. Section D of the disclosure form related to the "Basement/Crawlspace" and asked: "Do you know of any current water leakage, water accumulation, excess dampness or other defects with the basement/crawl space?" Appellants checked the "No" box. Section D then stated: "If owner knows of any repairs, alterations, or modifications to the property or other attempts to control any water or dampness problems in the basement or crawl space since owning the property (but not longer than the

[2]Mizeres testified that code violations are excluded from inspections because it is too difficult for inspectors to know all the codes of various municipalities.

past 5 years) please describe." Appellants responded, "Ohio State Waterproofing in 2002 foundation reinforcement new interior & exterior drainage systems, sump pump & air filter."

{¶ 14} Section E of the disclosure form related to the "Structural Components (Foundation, Floors, Interior and Exterior Walls)" and asked: "Do you know of any movement, shifting, deterioration, material cracks (other than visible minor cracks or blemishes) or other material problems with the foundation, floors, or interior/exterior walls?" Appellants checked the "No" box.

{¶ 15} Section E then asked: "If you know of any repairs, alterations or modifications to control the cause or effect of any problems identified above, since owning the property (but not longer than the past 5 years) please describe." Appellants responded, "See Section D above."

{¶ 16} Section J of the disclosure form addressed "Code Violations" and asked: "Have you received any notice of any building or house code violations currently affecting the use of the property?" Appellants checked the "No" box.

{¶ 17} Two days after the home inspection, Melenick approved the inspection and finalized the sale. Immediately upon moving into the home, she began having problems with the house. Upon running the dishwasher and washing machine, she discovered water in the basement. Melenick's

ex-husband, a plumber, came over to snake the drain and told her that there were numerous code violations in the house.

{¶ 18} Melenick subsequently inspected the file on her property maintained by the Bay Village Housing Department. She discovered the numerous prior citations for code violations, but found no records of repairs to the property to bring it up to code. Consequently, Melenick asked the city's building inspector to inspect the property. After inspecting the property, Inspector Volle told Melenick that the violations were so numerous that he did not want to list them all because she would not be able to afford to fix them in a timely manner.

{¶ 19} In May 2004, Melenick hired a second inspector to make another inspection of the property. This inspection revealed the extensive foundation issues with the home and, specifically, that the west wall was off the footer.

{¶ 20} Following this inspection, Melenick obtained an estimate of $53,075 from Simmons Construction Company to complete the necessary repairs to the home. Melenick testified that, as of trial, the repairs had not been completed because she could not afford to have the work done.

{¶ 21} Around the time of the second inspection, Melenick also contacted Ohio State Waterproofing because of the repeated basement flooding. Upon obtaining a copy of the company's contract with appellants regarding the basement waterproofing, Melenick learned for the first time that appellants

had been advised in 2002 that the west wall of the basement had shifted off the footer.

II

{¶ 22} In their first assignment of error, appellants contend that the trial court's verdict finding them liable for fraud was against the manifest weight of the evidence.

{¶ 23} Decisions that are supported by competent, credible evidence will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578. Furthermore, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. In a bench trial, "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use the observations in weighing the credibility of the proffered testimony." *Seasons Coal v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 24} In Ohio, the seller of real property must disclose substantial latent defects to the purchaser.[3] *McClintock v. Fluellen*, 8th Dist. No. 82795, 2004-Ohio-58, ¶16. Further, Ohio's real property disclosure statute, R.C.

[3]A latent defect is one that is not open to observation or discoverable upon reasonable inspection. Id.

5302.30, requires sellers of real estate to disclose patent or latent defects within their actual knowledge on a residential property disclosure form. If the seller fails to disclose a material fact on the form with the intention of misleading the buyer, and the buyer relies on the form, the seller is liable for any resulting injury. *Pedone v. DeMarchi*, 8th Dist. No. 88667, 2007-Ohio-6809, ¶31.

{¶ 25} To prove her fraudulent misrepresentation against appellants, Melenick had to establish: (1) a representation, or where there was a duty to disclose, concealment of a fact, (2) that was material to her purchase, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it was true or false that knowledge may be inferred, (4) with the intent of misleading her into relying on it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Cardi v. Gump* (1997), 121 Ohio App.3d 16, 22, 698 N.E.2d 1018.

{¶ 26} The trial court found that Melenick established these elements of fraud as to McManamon and Votypka. Specifically, it found that appellants knowingly stated that there were no code violations on the property, despite their awareness that Bay Village had cited the property for numerous violations that were never remedied, and knowingly failed to disclose the structural problem with the west wall foundation on the disclosure form.

{¶ 27} Appellants contend, however, that Melenick failed to establish that their misrepresentations were material to the transaction and that she justifiably relied on them. They assert that "appellee was provided information to call into question and inquire into the veracity of [their] representation" about the foundation. In short, appellants contend that despite their misrepresentations, because Melenick's home inspector told her she should consult a structural engineer, she was on notice of foundational issues and, therefore, her failure to consult an engineer before buying the home indicates her lack of reliance on the representations and their lack of materiality to the transaction. Appellants further contend that the disclosure form is not a substitute for a buyer's inspection, and because Melenick had a home inspection done, she could not reasonably rely on any of their representations.

{¶ 28} With respect to whether appellants' misrepresentations were material to the transaction, the trial court accepted Melenick's testimony that she would not have bought the house had she been aware of the multiple code violations and the west wall foundation problem. It is axiomatic that the finder of fact is free to believe some, all, or none of a witness's testimony. *State v. Ghaster*, 8th Dist. No. 91576, 2009-Ohio-2134, ¶46.

{¶ 29} Regarding whether Melenick's reliance on appellants' representations was justified, this court has held that "[o]nce alerted to a

possible defect, a purchaser may not simply sit back and then raise his lack of expertise when a problem arises. Aware of a possible problem, the buyer has a duty to either (1) make further inquiry of the owner, who is under a duty not to engage in fraud, or (2) seek the advice of someone with sufficient knowledge to appraise the defect." *Duman v. Campbell*, 8th Dist. No. 79858, 2002-Ohio-2253, ¶22, citing *Tipton v. Nuzum* (1992), 84 Ohio App.3d 33, 616 N.E.2d 265. Nevertheless, in this case, Melenick was not sufficiently alerted to a possible defect with the west wall footer so as to require further inquiry.

{¶ 30} First, although appellants contend that the Ohio State Waterproofing report was left at the home for prospective buyers to review, Melenick testified that she never saw the report prior to purchasing the home. Likewise, Melenick's inspector, Peter Mizeres, testified that the report was not among the documents given to him by the realtor during his inspection and that he never read the report. The trial court was free to believe this testimony, instead of appellants, as credibility determinations are for the trier of fact. *Seasons Coal*, supra.

{¶ 31} Second, although Mizeres documented a concern with the foundation after his inspection, his concern related only to the *south* wall, which he said exhibited substantial bowing. He advised Melenick to consult a structural engineer with respect to this wall only. Mizeres never notified Melenick as to any problem with the west wall foundation; further, he

testified at trial that he did not see that the west wall was off the footer, presumably because that part of the basement is finished and the foundation is concealed from view. A buyer is charged with knowledge of the conditions that a *reasonable* inspection would have disclosed. *Pedone*, 2007-Ohio-6809, at ¶33. Appellants presented no evidence that Mizeres's inspection was not reasonable; hence, if Melenick's own inspector was unable to see the problem, we fail to see how she could be expected to be aware of it.

{¶ 32} And third, "the law of Ohio imposes a duty to make a full disclosure in * * * circumstances where such disclosure is necessary to dispel misleading impressions created by a partial revelation of the facts." *Klasa v. Rogers*, 8th Dist. No. 83374, 2004-Ohio-4490, ¶25. Here, appellants created a false impression regarding the condition of the foundation by touting all of the foundational improvements to the property, but then not disclosing that the west wall had shifted off its footer. Appellants' misleading statements in the property disclosure form conveyed a false impression regarding the condition of the foundation that Melenick was entitled to rely on.

{¶ 33} With respect to the code violations, appellants contend that Melenick produced no evidence demonstrating that they knew of any code violations at the time of sale and, therefore, failed to prove that they knowingly made any misrepresentations on the disclosure form. We disagree. The evidence demonstrated that appellants were placed on notice

of multiple code violations by the city of Bay Village through citations and revocation of their certificate of occupancy for the property. The notices of code violations informed appellants that "**PERMITS ARE REQUIRED FOR ELECTRICAL, PLUMBING, BUILDING AND DEMOLITION WORK**." Inspector Volle likewise sent a letter to appellants advising them of the code violations to be remedied and that "all work shall be done after obtaining permits and inspections." Appellants then informed the city building department that they planned to sell the property and "any existing violations w[ould] be disclosed to prospective buyers."

{¶ 34} In light of this evidence, we agree with the trial court's finding that appellants' testimony at trial that they thought they had remedied the code violations themselves prior to sale was not credible. The evidence showed that appellants knew that the code violations could only be remedied by getting permits for the work and having inspections of the work done by the city. Significantly, appellants obtained permits for work done on the exterior of the house, but not for the interior. Thus, appellants could not have reasonably believed that the code violations for the interior of the house were resolved. Contrary to appellants' argument otherwise, it is apparent that they knowingly misrepresented on Section J of the disclosure form that there were no known code violations on the property.

{¶ 35} We likewise find appellants' testimony that they thought Ohio State Waterproofing had fixed the problem with the west wall to be not credible in light of the other evidence presented at trial. Appellants clearly knew the wall had not been fixed: the Ohio State Waterproofing contract did not list the west wall as one of the problems to be repaired, and appellant Votypka initialed the contract stating he understood the scope of work to be performed. Furthermore, the marketing flier for the property created by appellants listed all of the improvements to the foundation identified on the Ohio State Waterproofing contract, but specifically omitted any mention of any repair to the west wall footer. Had appellants truly believed the west wall had been fixed, as they testified, they should have answered "Yes" to the question "Do you know of any movement, shifting * * * or other material problems with the foundation, floors, or interior/exterior walls * * *?" in Section E of the disclosure form and then listed the alleged repair. As the trial court found, the evidence demonstrated that appellants knowingly did not disclose the structural problem with the west wall on the disclosure form.

{¶ 36} Lastly, appellants argue that the verdict was against the manifest weight of the evidence because the trial court should have applied either the doctrine of caveat emptor or the "as is" clause of the purchase agreement to relieve them of liability.

{¶ 37} The doctrine of caveat emptor governs real property sales transactions in Ohio and relieves a vendor of the obligation to reveal every imperfection that might exist in a residential property. *Layman v. Binns* (1988), 35 Ohio St.3d 176,177, 519 N.E.2d 642. It "precludes recovery in an action by the purchaser for a structural defect in real estate where (1) the condition complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser had the full and unimpeded opportunity to examine the premises, and (3) there is no fraud on the part of the vendor." *McClintock,* supra, 2004-Ohio-58, ¶17, citing *Layman*, supra. Likewise, an "as is" clause in a real estate contract relieves the seller of any duty to disclose and places the risk of the existence of any defects upon the purchaser. *McClintock*, ¶18. However, the doctrine of caveat emptor cannot be used to protect a vendor if the buyer can prove fraud, and an "as is" clause cannot be relied upon to bar a claim for fraudulent misrepresentation or fraudulent concealment. Id., ¶18, 20. Because the evidence in this case demonstrated that appellants knowingly made false representations and concealed facts about the condition of the property, the trial court did not err in concluding that neither the doctrine of caveat emptor nor the "as is" clause in the purchase agreement shielded them from liability.

{¶ 38} The trial court's judgment was supported by competent, credible evidence and was not against the manifest weight of the evidence. Appellants' first assignment of error is therefore overruled.

{¶ 39} In light of our holding that the judgment in favor of Melenick was not against the manifest weight of the evidence, appellants' second and third assignments of error, which assert that the trial court erred in denying their motions for summary judgment and directed verdict, are overruled as moot. See App.R. 12(A)(1)(c).

III

{¶ 40} In their fourth assignment of error, appellants contend that the trial court erred in denying their Civ.R. 60(B) motion for relief from judgment. They argue that the award of damages to Melenick is moot because the bank subsequently foreclosed on the property, rendering her repair of the home impossible. Appellants contend that it is "unjust" for the court to award damages based on repair estimates when the repairs will not be made. Appellants further contend that Melenick committed a fraud on the court by asking for compensatory damages for repairs to the home, even though the bank had already filed a notice of foreclosure on the property. Appellants' argument is specious.

{¶ 41} Civ.R. 60(B) allows a court to relieve a party from a final judgment for reasons such as mistake, newly discovered evidence, fraud, or a

satisfied judgment. A trial court's decision regarding a Civ.R. 60(B) motion will not be reversed on appeal absent a showing of abuse of discretion. *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 11, 371 N.E.2d 214. A court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 42} In a tort action, the measure of damages is that which will compensate and make the plaintiff whole. *Pryor v. Webber*, 23 Ohio St.2d 104, 107, 263 N.E.2d 235. "Compensatory damages are intended to make whole the plaintiff for wrong done to him or her by the defendant. * * * Compensatory damages are defined as those which measure the actual loss, and are allowed as amends therefor." *Fantozzi v. Sandusky Cement Prod.* (1992), 64 Ohio St.3d 601, 612, 597 N.E.2d 474. Generally, a party injured by fraud can receive damages "naturally and proximately resulting from the fraud." *Brewster v. Brothers* (1992), 82 Ohio App.3d 148, 154, 611 N.E.2d 492.

{¶ 43} When fraud induces the purchase of real estate, the cost of repair or replacement of a defect is an appropriate measure of damages in cases such as this one where there is insufficient evidence regarding the value of the property with and without the defect. *Padgett v. Sanders* (1998), 130 Ohio App.3d 117, 122, 719 N.E.2d 636. Melenick proved it would cost

$53,075 to repair the code violations and foundation issues with the home. There is no requirement that she use her damages award to actually make the repairs; the only requirement is that she prove the amount of her actual damages, which she did.

{¶ 44} We likewise find no merit to appellants' claim that Melenick committed a fraud on the court. As the cost of repair was a proper measure of damages, Melenick properly requested compensatory damages for repair, despite the bank's filing of a notice of foreclosure.

{¶ 45} Appellants' fourth assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR