[Cite as *Wolk v. Paino*, 2010-Ohio-1755.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93095

KATHERINE WOLK, ET AL.

PLAINTIFFS-APPELLANTS

vs.

FRANKIE PAINO, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-676102

BEFORE: Gallagher, A.J., Blackmon, J., and Boyle, J.

RELEASED: April 22, 2010

JOURNALIZED:
ATTORNEY FOR APPELLANTS

Mark M. George
5005 Rockside Road
Crown Centre, Suite 600
Independence, Ohio 44131

ATTORNEYS FOR APPELLEES

For Frankie Paino, et al.
Jonathan L. Stark
Brouse McDowell, LPA
600 Superior Avenue East, Suite 1600
Cleveland, Ohio 44114

For Beverly Lacy
Frances F. Allington
21300 Lorain Road
Fairview Park, Ohio 44126

For Realty One, Inc.
Karl H. Schneider
250 Civic Center Drive, Suite 500
Columbus, Ohio 43215

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).
SEAN C. GALLAGHER, A.J.:

{¶ 1} Plaintiffs-appellants, Katherine Wolk, et al. (collectively "the Wolks"),[1] appeal the decision of the Cuyahoga County Court of Common Pleas that granted judgment on the complaint in favor of defendants-appellees, Frankie and Geralyn Paino ("the Painos").[2] For the reasons stated herein, we affirm.

{¶ 2} In 2005, the Wolks purchased a home, located at 9007 Westlawn, Olmsted Falls, Ohio, from the Painos. The Painos completed a residential property disclosure form that stated they did not know of any material adverse conditions except for settling cracks and a planned sanitary sewer extension. The disclosure form did not indicate knowledge of any water, moisture, or mold problems in the home.

{¶ 3} The Painos had purchased the home in 2000. During their ownership, the Painos hired contractors to perform remodeling work including, among other things, installing a tub surround in a bathroom, replacing the kitchen countertops, and hanging wallpaper. The Painos added a new air conditioner, vent ductwork, and a Beckett Pump condensation unit. They also fully replaced the roof, which was nearing the end of its useful life. According to Geralyn Paino, the old roof did not match the color they were painting the house. Although scented products were used in the home, Geralyn Paino stated she placed them in the linen closets because she liked the way it made the sheets and towels smell.

---

[1] The plaintiffs-appellants in this matter include Katherine Wolk; Katherine Wolk and Todd Besch, Trustees for the Amie M. Campbell Living Trust; and The Amie M. Campbell Living Trust.

[2] Beverly Lacy and Realty One, Inc., are also defendants in the action. However, they are not parties to this appeal.

{¶ 4} Denny Wolf, the contractor who performed many of the projects in the Painos' home, including installation of the tub surround, never saw any evidence of mold, water intrusion, or water damage in the home. The Painos denied that anyone ever said anything to them about mold or moisture problems in the home and denied any prior knowledge of such problems.

{¶ 5} When the Wolks purchased the home from the Painos, they waived a professional inspection. The home was purchased for Amie M. Campbell, who was to live there with her daughter, Amie L. Campbell, and Todd Besch, a caregiver and handyman. The home was purchased in its "as is" condition.

{¶ 6} Besch stated in an affidavit that he walked through the property with two construction friends and detected an odd odor in the lower hall. Besch, who visited the home multiple times, stated he inquired of the Painos about the odor, as well as their use of scented products. However, no mold or moisture problems were disclosed.

{¶ 7} Shortly after taking possession, the Wolks began some remodeling work on the home. Besch indicated that he found substantial mold and water intrusion within the walls of both bathrooms, the ceiling, the attic, and under the air conditioning unit. He stated, "[t]hese latent defects were first discovered within the wall, during remodeling upgrades to the home and tearing through walls." Thereafter, he found other latent defects relating to mold and moisture problems in the home. He stated that within six months of acquiring the home, he found mold growth on the walls and closet of the northeast office that, he had alleged, had been freshly painted by the Painos.

{¶ 8} Marko Vovk, a professional home inspector, prepared an inspection report for the home in 2000 and in 2008. These reports were stricken by the trial court, along with other exhibits that were not properly authenticated for summary judgment purposes.

{¶ 9} The Wolks filed a complaint on November 12, 2008. The claims against the Painos included fraudulent misrepresentation, fraudulent concealment, unjust enrichment, failure of contract, and civil conspiracy. The Wolks asserted that the Painos failed to disclose or actively concealed known latent defects relating to mold and moisture problems with the house. They further asserted that their real estate agent acted in conspiracy with the Painos in the sale of the property to the Wolks.

{¶ 10} In addition to suing the Painos, the Wolks also sued their agent, Beverly Lacy, and her employer, Realty One, Inc. The claims against these defendants are not before us in this appeal.

{¶ 11} The Painos filed a motion for summary judgment with supporting affidavits and exhibits. The Wolks filed a motion to compel discovery that was denied by the trial court. In opposing summary judgment, the Wolks submitted various exhibits without proper authenticating affidavits. The Painos filed a motion to strike these exhibits. Although the Wolks filed supplemental affidavits, the trial court found the challenged exhibits remained unauthenticated and struck them from the record.

{¶ 12} The trial court granted the Painos' motion for summary judgment and entered judgment on the complaint in favor of the Painos. The trial court found that the Painos established they "lacked the requisite knowledge element" and that the Wolks failed to establish issues of material fact to refute the Painos' evidentiary submissions.

{¶ 13} Although the court considered the affidavits of Marko Vovk and Michael Moir that were submitted by the Wolks, the court found that they "do not suffice to create a genuine issue of material fact" and "do not contradict defendants' undisputed evidence." The court further determined that even if it were to accept the documents that Moir and Vovk attempted to authenticate, those documents "merely state that the mold and moisture problems existed after plaintiffs purchased the home" and do not "impute actual knowledge of or a reckless disregard for the truth as to the latent defects." The court further found that "the 2000 Vovk report, if admitted, would merely bolster [the Painos'] argument, as it does not contain any statements creating a genuine issue of material fact."

{¶ 14} While claims remained against the defendants, the trial court entered a final judgment for the Painos and included Civ.R. 54(B) "no just cause for delay" language. The Wolks timely appealed.

{¶ 15} The Wolks raise five assignments of error for our review. For ease of discussion, we will address them out of order and together where appropriate.

{¶ 16} The Wolks' second and third assignments of error provide as follows:

{¶ 17} "[2.] The trial court improperly granted the defendant's motion to strike the plaintiffs' affidavits and exhibits from the plaintiffs' opposition [to] summary judgment[,] contrary to Civil Rule 56."

{¶ 18} "[3.] The trial court abused its discretion in not allowing the affidavits, reports and granting [sic] the motion to compel."

{¶ 19} A trial court's determination of a motion to strike is reviewed for an abuse of discretion. *Squire v. Geer*, 117 Ohio St.3d 506, 508, 2008-Ohio-1432, 885 N.E.2d 213.

This standard is also applied to a trial court's judgment on discovery issues. *State ex rel. The V Cos. v. Marshall,* 81 Ohio St.3d 467, 469, 1998-Ohio-329,692 N.E.2d 198. Therefore, we also review the trial court's ruling on the motion to compel for an abuse of discretion. *DeMeo v. Provident Bank,* Cuyahoga App. No. 89442, 2008-Ohio-2936. In order for a court to abuse its discretion, it must be "more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 20} We begin by addressing the motion to compel. Through their motion, the Wolks sought to obtain certain discovery requested in an earlier action that was voluntarily dismissed. The original case was voluntarily dismissed by the Wolks in August 2008, and thereafter, they refiled the instant action. There is no indication in the record of any discovery requests having been made in the refiled action.

{¶ 21} Because a dismissal without prejudice relieves the court of jurisdiction over the matter, and the action is treated as though it had never been commenced, the earlier proceedings cannot be used to support the Wolks' argument. See *Hooks v. Ciccolini*, Summit App. No. 20745, 2002-Ohio-2322, citing *Zimmie v. Zimmie* (1984), 11 Ohio St.3d 94, 95, 464 N.E.2d 142. Moreover, any discovery requests from the previously dismissed litigation could not serve as a basis for a motion to compel. See *Sabitov v. Graines*, 177 Ohio App.3d 451, 464, 2008-Ohio-3795, 894 N.E.2d 1310.

{¶ 22} Notwithstanding the above, we recognize the Painos' original discovery responses provided information on the contractors who performed repairs or made improvements to the property, indicated that requested receipts were left in kitchen

drawers at the property and were not in their possession, and represented that they did not retain credit card statements or cancelled checks. Also, the Wolks were able to obtain a copy of the 2000 Vovk report.

{¶ 23} Nonetheless, the Wolks argue that they were deprived of completing discovery and that the trial court's ruling was prejudicial to their ability to respond to summary judgment. However, the Wolks had the opportunity to contact the contractors that were disclosed, and they fail to demonstrate how further discovery proceedings would aid in establishing or negating facts at issue in this case. "It is not an abuse of discretion for the trial court to grant a motion for summary judgment in spite of an outstanding discovery request when the discovery proceedings would not aid in establishing or negating the facts at issue." (Citations omitted.) *Hooks*, supra.

{¶ 24} Upon our review, we find the trial court did not abuse its discretion in denying the motion to compel discovery or in proceeding to rule on the summary judgment motion.

{¶ 25} We next consider the motion to strike. In opposing summary judgment, the Wolks submitted certain exhibits that the trial court determined were not properly authenticated. The Wolks attached to their opposition brief various letters and reports that were submitted without any authenticating affidavits. Although the affidavit of Marko Vovk referenced his 2000 and 2008 reports, those reports were not attached to his affidavit or authenticated therein. After the Painos filed their motion to strike, the Wolks filed supplemental affidavits of Marko Vovk and Michael Moir that purported to authenticate reports "attached hereto." However, no reports were attached to the supplemental

affidavits. The trial court determined that the challenged exhibits remained unauthenticated and struck the following exhibits from the record: "the 2000 and 2008 Vovk reports, the two Moir Home Inspection letters, mold analysis report, and the invoice from J&B roofing[.]"

{¶ 26} Civ.R. 56(C) provides, in relevant part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *No evidence or stipulation may be considered except as stated in this rule.*" (Emphasis added.)

{¶ 27} Civ.R. 56(E) provides, in relevant part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. *Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.* The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits." (Emphasis added.)

{¶ 28} This court has previously recognized that "[u]nder Civ.R. 56(E), the proper procedure for introducing evidentiary matters not specifically authorized by Civ.R. 56(C) is to incorporate them by reference in a properly framed affidavit. *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220. 'Documents submitted in opposition to a motion for summary judgment which are not sworn, certified, or authenticated by

affidavit have no evidentiary value and may not be considered by the court in deciding whether a genuine issue of material fact remains for trial.' *Green v. B.F. Goodrich Co.* (1993), 85 Ohio App.3d 223, 228." *Lotarski v. Szczepanski* (Dec. 20, 1995), Cuyahoga App. No. 68088. While a court, in its discretion, may consider other documents than those specified in Civ.R. 56(C) if there is no objection, there is no requirement that a court do so. *Biskupich*, supra at 222.

{¶ 29} In this case, the Wolks submitted various documents that were not incorporated into a properly framed affidavit. The Painos moved to strike these exhibits. Although the Wolks attempted to correct the problem through supplemental affidavits that were filed out of rule and without leave of court, those affidavits referenced documents "attached hereto" without actually attaching the documents they purported to authenticate.

{¶ 30} We find no merit to the Wolks' argument that the 2000 Vovk report was attached to the reply brief and should be considered as properly "served with" the affidavit. The supplemental affidavits referenced documents "attached hereto," and did reference the earlier-filed exhibits. Further, there is nothing in the record before us to establish that the documents were authenticated by deposition. Therefore, the documents were not properly authenticated within the meaning of Civ.R. 56(E).

{¶ 31} We recognize that the Wolks attempted to correct errors in the submission of these exhibits and that striking them from the record is a harsh result. However, because the Wolks failed to properly authenticate them in accordance with Civ.R. 56(E), the exhibits were not properly before the court for consideration on summary judgment and we cannot say that the trial court abused its discretion in striking them.

{¶ 32} The Wolks' second and third assignments of error are overruled.

{¶ 33} The Wolks' first, fourth, and fifth assignments of error provide as follows:

{¶ 34} "[1.] The trial court abused its discretion in granting the defendants' motion for summary judgment contrary to the experts affidavits and experts reports."

{¶ 35} "[4.] The trial court erred in denying plaintiffs due process against weight of the evidence when credible independent evidence raises genuine issues a jury should review."

{¶ 36} "[5.] Defendants failed to meet the burden that no genuine issues exist, and summary judgment should be denied."

{¶ 37} Under these assignments of error, the Wolks challenge the trial court's decision to grant the Painos' motion for summary judgment. Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 286, 2009-Ohio-2136, 912 N.E.2d 637. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826

N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 38} In the absence of evidence of fraudulent representation or fraudulent concealment, an "as is" clause in a real estate contract and the principle of caveat emptor preclude a buyer from recovery for claims arising from latent defects. See *Scafe v. Property Restorations, Ltd.*, Cuyahoga App. No. 84447, 2004-Ohio-6296, ¶ 14; *Yahner v. Kerlin*, Cuyahoga App. No. 82447, 2003-Ohio-3967, ¶ 20. A claim of fraudulent representation or concealment requires proof of the following elements: "(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Groob v. KeyBank*, 108 Ohio St.3d 348, 357, 2006-Ohio-1189, 843 N.E.2d 1170, quoting *Gaines v. Preterm-Cleveland Inc.* (1987), 33 Ohio St.3d 54, 55, 514 N.E.2d 709.

{¶ 39} In moving for summary judgment, the Painos submitted evidence showing that they lacked any knowledge as to mold or moisture problems within the home. Although renovations were made during their ownership, they denied that any contractor informed them of mold or moisture problems. Dennis Wolf, a contractor who performed renovations at the home, stated he never saw any evidence of mold, water intrusion, or water damage in the home.

{¶ 40} The Wolks argue that there are genuine issues of material fact as to whether the Painos engaged in fraud during the sale of the property. However, there is no evidence in the record to establish that the Painos were aware of any moisture- or mold-related problems. Besch indicated that the problems were first discovered "within the walls, during remodeling upgrades to the home and tearing through walls." Although Besch claimed a wall was freshly painted and the paint was left in the garage cupboard, he did not offer any foundation to establish his personal knowledge of when the room was painted. Also, the affidavits of Moir and Vovk, which contain statements of opinion, do not create a genuine issue of material fact concerning knowledge of the problems by the Painos.

{¶ 41} In *Dunn-Halpern v. MAC Home Inspectors, Inc.*, Cuyahoga App. No. 88337, 2007-Ohio-1853, we found an absence of fraud where the sellers denied knowledge of mold and the evidence reflected that the mold was discovered "in discrete and inaccessible areas." Likewise, the evidence presented by the Wolks reflects that the mold and moisture problems were discovered within walls and other discrete areas, and fails to establish that the Painos had any prior knowledge of or a reckless disregard for these latent defects. Accordingly, we find that the trial court properly granted summary judgment in favor of the Painos.

{¶ 42} The Wolks' first, fourth, and fifth assignments of error are overruled.

Judgment affirmed.

It is ordered that appellees 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON, J., and
MARY J. BOYLE, J., CONCUR