[Cite as *Frazier v. Rodgers Builders*, 2010-Ohio-3058.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91987

EDWARD FRAZIER

PLAINTIFF-APPELLANT

vs.

RODGERS BUILDERS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-572864

BEFORE: Dyke, J., McMonagle, P.J., and Celebrezze, J.

RELEASED: July 1, 2010

JOURNALIZED:

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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).

ANN DYKE, J.:

{¶ 1} Plaintiff Edward Frazier appeals from the order of the trial court that directed a verdict in favor of defendants Buckeye Home Builders and Nick Onyshko in plaintiff's action for breach of contract and other claims. For the reasons set forth below, we reverse and remand the judgment as to the breach of contract and Consumer Sales Practices Act ("CSPA") claims, and affirm the judgment in all other respects.

{¶ 2} On September 20, 2005, plaintiff filed this action against Buckeye Home Builders, Nick Onyshko, Rodgers Builders, Moclanail Rodgers, and Kulwinder Gill. In relevant part, plaintiff alleged that, on October 21, 2004, he entered into an agreement with Buckeye Home Builders, Rodgers Builders, and individuals Onyshko and Rodgers, for the construction of a single family home on Sub lot 4 of Buckthorn Road in Bedford. In connection with this agreement, plaintiff transferred title to property located at E. 66th Street[1] to Rodgers and Onyshko, and these defendants were to transfer title to the Buckthorn lot to plaintiff. Plaintiff further alleged that defendants did not construct the Buckthorn residence, refused to reconvey title to the E. 66th Street property to him, and conveyed the Buckthorn lot to Gill. Plaintiff set forth claims for breach of contract, unjust enrichment, fraud, civil conspiracy, breach of the Corrupt Activities Act, R.C. Chapter 2923, breach of good faith and fair dealing, and breach of the CSPA.

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[1]This parcel was also referred to as the "Gibb Road Property" throughout the lower court proceedings.

{¶ 3} Buckeye Home Builders and Nick Onyshko denied liability and asserted cross-claims for contribution and indemnification against Rodgers Builders, Rodgers, and Gill. Rodgers and Rodgers Builders likewise denied liability and filed cross-claims for indemnification and contribution against Buckeye Home Builders, Onyshko, and Gill. Gill denied liability and asserted cross-claims for indemnification and contribution against Buckeye Home Builders and Onyshko.

{¶ 4} Plaintiff moved for summary judgment against Onyshko and Buckeye Home Builders. The trial court denied this motion, but on reconsideration, granted it, identifying the judgment as "partial," in light of the other unresolved claims. Onyshko appealed to this court in Appeal No. 91030, but the appeal was dismissed sua sponte.

{¶ 5} The matter proceeded to trial on July 21, 2008. Plaintiff was the sole witness and neither Onyshko nor any other representative of Buckeye Home Builders appeared for trial. The evidence demonstrated that plaintiff responded to Buckeye Home Builders' advertisement to "trade in equity for a new home." He met with Onyshko of Buckeye Home Builders and viewed various houses. Onyshko subsequently showed plaintiff the floor plan for a two-story residence, plus a basement.

{¶ 6} Onyshko then arranged for Rodgers to appraise plaintiff's E. 66th Street house. Thereafter, plaintiff entered into a purchase agreement with

Buckeye Home Builders and Rodgers Builders, which provided in relevant part as follows:

{¶ 7} "1. Seller agrees to sell and buyer agrees to buy a house to be constructed by seller to be erected on sub lot no. 4 of Buckthorn * * *.

{¶ 8} "2. Purchaser agrees to pay for said property the sum of $220,000, Two Hundred Twenty Thousand Dollars.

{¶ 9} "Payable as follows:

{¶ 10} "A. Earnest money to be paid to seller upon acceptance of this offer and applied to purchase price[:] $35,000.

{¶ 11} "* * *

{¶ 12} "C. Buyer is trading property [located on E. 66th Street in Cleveland] in as is condition free and clear for down payment of this contract.

{¶ 13} "* * *

{¶ 14} "3. This offer is contingent upon seller obtaining title to the lot and building permits.

{¶ 15} "* * *

{¶ 16} "6. This contract is contingent upon buyer obtaining a conventional mortgage. If a conventional mortgage can't obtain financing, seller will refund buyer's deposit within 35 days and buyer will deed lot back to seller.

{¶ 17} "* * *

{¶ 18} "8. Once sellers take title to [plaintiff's E.66th Street property] if a refund is to be made to buyer it will be no more than $35,000, Thirty-five Thousand [Dollars].

{¶ 19} "9. Down payment is secured by buyer having ownership of lot to be built upon. In event buyer defaults, seller will be returned to lot ownership."

{¶ 20} Thereafter, Rodgers and Rodgers Builders gave plaintiff an undated addendum, described by plaintiff as a liquidated damages provision to the agreement that provided that "if builders default on contract with Edward Frazier[,]" then plaintiff would receive $35,000 plus lost rent in the amount of $900 per month from the date of the transfer of plaintiff's property to the builder. Neither Onyshko, Buckeye Home Builders, nor plaintiff signed the addendum. In addition, Rodgers also signed an undated document that indicated that, if plaintiff could not obtain conventional financing, then "builder will land contract property to buyer for a term of one year."

{¶ 21} Rodgers and plaintiff also executed an undated agreement that provided that plaintiff would quit-claim his East 66th Street property "to builder for a credit of Thirty-Five Thousand Dollars ($35,000) as the down payment of a home to be constructed by builder for buyer." Plaintiff also warranted that there were no loans, liens, or debts on the parcel.

{¶ 22} On October 22, 2004, plaintiff, as President of Kingdom International Enterprises, LLC, conveyed the E. 66th Street parcel, which it owned, to Affordable Real Estate Solutions, a business owned by Rodgers.

{¶ 23} The evidence further indicated that the defendants did not obtain title to the Buckthorn property, so this parcel was not conveyed to plaintiff. By December 2004, Rodgers informed plaintiff that he and Onyshko were no longer partners and that Gill was now involved in the transaction. According to plaintiff, Gill bought the E. 66th Street property in order to generate funds for building the Buckthorn property. Gill also obtained title to a lot on Buckthorn.

{¶ 24} By April 2005, however, building of the Buckthorn property had not been started, so plaintiff filed a complaint with the Ohio Attorney General, seeking the return of his earnest money, and also filed a complaint with the Cleveland Police Department. Rodgers and Gill offered to enter into a new agreement with plaintiff, but plaintiff continued to seek compensation under the terms of the original purchase agreement. According to plaintiff, he ultimately incurred an additional $25,000 in connection with the purchase of a different residence, incurred additional living expenses of $4,000 from the building delay, and lost approximately $44,000 in rents that he would have had from the E. 66th Street property.

{¶ 25} On cross-examination, plaintiff admitted, with regard to the issue of liability, that the contingency regarding the seller obtaining title to the lot and building permits was not met. In addition, the E. 66th Street parcel was conveyed by Kingdom International Enterprises, LLC, to Affordable Real Estate Solutions, and neither of these entities were parties to the purchase agreement. This parcel was not "free of encumbrances" as required under the contract due to

unpaid tax, water and sewer bills. As to the addenda, plaintiff admitted that there was no consideration in support of these documents, and they were not signed by Onyshko or Buckeye Home Builders

{¶ 26} With regard to Gill's liability, plaintiff admitted that the Buckthorn lot that Gill purchased was actually not Sub lot 4, the lot on which plaintiff's home was to be built. In addition, plaintiff admitted that Gill was not a party to any of the agreements.

{¶ 27} With regard to the issue of damages, plaintiff admitted that the purchase agreement states that "if a refund is to be made, it will be no more than $35,000." Plaintiff further acknowledged that Rodgers has already paid him $5,000 of this amount. Plaintiff additionally acknowledged that Rodgers offered to convey the E. 66th Street property back to him in March 2005, but plaintiff refused to accept it and threatened a lawsuit. As to plaintiff's claim for lost rentals from this property, he admitted that the E. 66th Street parcel had been unoccupied in the months preceding the signing of the purchase agreement. He also admitted that Rodgers incurred approximately $20,000 to make the units habitable.

{¶ 28} Following plaintiff's cross-examination, Rodgers and Rodgers Builders entered into settlement agreement with plaintiff. Plaintiff subsequently dismissed his claims against these defendants with prejudice, and dismissed his claims against Gill without prejudice.

{¶ 29} With regard to remaining defendants Buckeye Home Builders and Nick Onyshko, plaintiff asked the trial court to instruct the jury on the issues of breach of contract, fraud, and violations of the CSPA, thus apparently abandoning the remaining causes of action. Cf. *Conroy v. Beck* (June 6, 1996), Cuyahoga App. No. 69525. The trial court denied the requested instructions and entered judgment in favor of Onyshko. The trial court additionally awarded Rodgers and Rodgers Builders $50,000 on their cross-claim against Onyshko. Plaintiff appealed to this court in Appeal No. 91987. The appeal was dismissed for lack of a final appealable order. Thereafter, on January 6, 2010, the trial court issued a journal entry that dismissed plaintiff's claims against Buckeye Home Builders with prejudice, and dismissed the cross-claims of Rodgers and Rodgers Builders with prejudice. The remaining cross-claims were dismissed or rendered moot. Plaintiff indicates that there is a final appealable order as all claims have been resolved or rendered moot.[2] Plaintiff assigns four errors for our review. For the sake of clarity, we shall address the assignments of error out of their predesignated order.

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[2] The record indicates that plaintiff's claims against Onyshko and Buckeye Home Builders have been dismissed with prejudice; his claims against Rodgers and Rodgers Home Builders have been settled and dismissed; plaintiff's claims against Gill have been dismissed; and the cross-claims of Rodgers and Rodgers Builders have been dismissed with prejudice. The remaining cross-claims for indemnification and contribution asserted by Onyshko, Buckeye Home Builders and Gill have been rendered moot. See *Wise v. Gursky* (1981), 66 Ohio St.2d 241, 421 N.E.2d 150. We therefore have jurisdiction to decide this matter.

{¶ 30} For his fourth assignment of error, plaintiff asserts that the trial court erred in failing to instruct the jury on the claims of breach of contract, fraud, civil conspiracy, and violation of the CSPA.

{¶ 31} We employ a de novo review in evaluating a trial court's ruling on a motion for directed verdict. *Hardy v. Gen. Motors Corp*. (1998), 126 Ohio App.3d 455, 710 N.E.2d 764, citing *Howell v. Dayton Power & Light Co.* (1995), 102 Ohio App.3d 6, 656 N.E.2d 957.

{¶ 32} Civ.R. 50(A)(4) provides:

{¶ 33} "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."

{¶ 34} A motion for directed verdict tests whether the evidence is sufficient to present an issue to the jury. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 430 N.E.2d 935. The trial court may direct a verdict when reasonable minds can come to only one conclusion. Civ.R. 50(A)(4). The trial court must construe the evidence most strongly in favor of the nonmoving party and deny the motion if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim. Id.; *Steppe v. Kmart Stores* (1999), 136 Ohio App.3d 454, 737 N.E.2d 58.

{¶ 35} In this matter, the evidence demonstrated, and plaintiff admitted, with regard to the issue of liability for breach of contract, that the contingency regarding the seller obtaining title to the lot and building permits was not met. The evidence further demonstrated that plaintiff conveyed a parcel from Kingdom International Enterprises, LLC to Affordable Real Estate Solutions as earnest money for the transaction. It was not "free of encumbrances" and Gill later obtained title to this parcel. It is undisputed, however, that sellers Onyshko, Buckeye Home Builders, Moclanail Rodgers, and Rodgers Builders did not return the earnest money and did not make the contractually required $35,000 refund to plaintiff. Accordingly, the trial court clearly erred in directing a verdict for defendants on the breach of contract claim against Onyshko and Buckeye Home Builders.

{¶ 36} As to the plaintiff's recovery, it is undisputed that the contract provides that "if a refund is to be made to buyer it will be no more than $35,000, Thirty-five Thousand [Dollars]." Plaintiff received $5,000 from Rodgers and Rodgers Builders and also entered into a settlement agreement with these parties whereby plaintiff would receive an additional $35,000. As this provision set forth an agreed upon amount of money to be paid in lieu of actual damages in the event of a breach of contract, it is clearly a liquidated damages provision. *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 613 N.E.2d 183; *Connour v. Steel,* Montgomery App. No. 19632, 2004-Ohio-1162. As such, any recovery from Rodgers and Rodgers Builders will bar plaintiff from receiving duplicate

damages from Onyshko and Buckeye Home Builders for the breach of the same contract and the same pecuniary injury. *Titanium Industries v. S.E.A., Inc.* (1997), 118 Ohio App.3d 39, 691 N.E.2d 1087; *Mentor Lagoons, Inc. v. Laity* (May 24, 1985), Lake App. No. 10-184 (liquidated damages are a pre-determined amount of what the actual damages will be in case of a breach that becomes the measure of recovery and no further recovery may be had by the complaining party); 30 Ohio Jurisprudence 3d (1981), Damages, Section 146.

{¶ 37} Here, plaintiff has received $5,000. He entered into a settlement agreement with Rodgers and Rodgers Builders for an additional $35,000. It is unclear how much plaintiff has actually recovered at this point, but under the liquidated damages provision, he may recover no more than $35,000.

{¶ 38} With regard to the addenda, plaintiff admitted that there was no consideration in support of the addenda to the purchase agreements and that these documents were not signed by Onyshko or Buckeye Home Builders. The breach of contract claim was therefore not established as a matter of law with regard to these documents and the trial court properly entered judgment for Onyshko and Buckeye Home Builders. Cf. *Kostelnik v. Helper,* 96 Ohio St.3d 1, 2002-Ohio-2985,770 N.E.2d 58 (essential elements of a contract include offer, acceptance, contractual capacity, consideration, a manifestation of mutual assent and legality of object and of consideration).

{¶ 39} With regard to the fraud claim, plaintiff failed to establish that Onyshko made a false representation that was material to the transaction, with

the intent of misleading plaintiff into relying upon it, and that plaintiff did in fact justifiably rely upon such representation. The record demonstrates that once Buckeye Home Builders was unable to gain title to the Buckthorn property, plaintiff entered into various undated agreements that Onyshko and Buckeye Home Builders did not sign. The fraud claim therefore fails as a matter of law. Cf. *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471, 700 N.E.2d 859.

{¶ 40} With regard to the claim for breach of the CSPA, the record demonstrates that the parties initially contracted for the construction of a residence. The CSPA is "applicable to the personal property or services portion of a mixed transaction involving both the transfer of personal property or services and the transfer of real property." *Brown v. Liberty Clubs, Inc.* (1989), 45 Ohio St.3d 191, 193, 543 N.E.2d 783. In this regard, Ohio Adm. Code 109:4-3-01(C)(2) provides that "[s]ervices include, but are in no way limited to, the construction of a single-family dwelling unit by a supplier on the real property of a consumer." Accord *Morrison v. Skestos,* Franklin App. No. 04AP-244, 2004-Ohio-6985, citing Ohio Adm. Code 109:4-3-01(C)(2).

{¶ 41} The *Brown* Court further noted, however, that where the consumer transaction portion and the real estate transaction portion of the parties' interaction are "inextricably intertwined, we find that the Consumer Act must be applied, even though the major portion of the instant transaction was the sale of real estate." The Court explained:

{¶ 42} “In our view, a contrary finding would manifestly lead to undesirable results. In essence, an affirmance of the court of appeals in this context would encourage real estate developers to use unfair, misleading and deceptive solicitation methods to entice potential purchasers to the developers’ properties and to then cloak themselves with complete immunity from the Consumer Act. Clearly, such a result was not intended by the General Assembly in its passage of the Consumer Act, and this is precisely why the appellants herein must be permitted to recover thereunder.” Id., 45 Ohio St.3d at 194, 543 N.E.2d at 786-787.

{¶ 43} In this matter, the essence of the parties’ agreement involved the construction of a residence. Onyshko and Buckeye Home Builders failed to obtain title to the lot, however. Upon the failure of this contingency, Frazier sought the reimbursement of the earnest money and the return of his lot. Although these portions are “pure real estate transactions,” the evidence demonstrates that the consumer transaction and real estate transaction portions of the parties’ interaction are inextricably intertwined in this matter. Accordingly, we find that the Consumer Act must be applied to this entire transaction. *Brown v. Liberty Clubs, Inc.,* supra. Thus, the trial court erroneously entered judgment for Onyshko and Buckeye Home Builders on plaintiff’s CSPA claim.

{¶ 44} With regard to the conspiracy claim, we note that plaintiff did not request an instruction as to conspiracy and therefore abandoned this claim. *Conroy v. Beck,* supra. In any event, the Ohio Supreme Court has defined civil

conspiracy as a malicious combination of two or more persons acting to injure another in person or property, in a way not competent for one person acting alone, which results in actual damages. *Williams v. Aetna Fin. Co.*, supra. In this matter, there was no evidence of a common plan or malicious design to commit a tortious act against plaintiff. In accordance with the foregoing, Onyshko and Buckeye Home Builders were entitled to judgment as a matter of law on this claim for relief.

{¶ 45} The fourth assignment of error is well-taken with regard to the breach of contract (but not the addenda) and CSPA claims, but otherwise without merit.

{¶ 46} For his first assignment of error, plaintiff asserts that the trial court deprived him of his constitutional right to trial by jury and the right to trial by jury set forth in Civ.R. 38, when it directed a verdict in favor of Onyshko and Buckeye Home Builders.

{¶ 47} With regard to the constitutional right to trial by jury, it is well-settled that the dismissal of a complaint that fails to state a claim does not deprive a litigant of a right to jury trial, precisely because the complaint does not raise any cognizable issue for a jury. *Ringel v. Adrine* (Dec. 26, 1996), Cuyahoga App. No. 70759.

{¶ 48} As explained in *Baltimore & Carolina Line v. Redman* (1935), 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636,

{¶ 49} "The aim of the [Seventh] [A]mendment [right of trial by jury], as this Court has held, is to preserve the substance of the common-law right of trial by

jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."

{¶ 50} Similarly, in *Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co.* (1934), 127 Ohio St. 469, 189 N.E. 246, the Ohio Supreme Court held as follows:

{¶ 51} "To permit the court to direct a verdict in every case where he would set aside a contrary verdict would, in our opinion, be an unwarranted invasion of the jury's province. That the weight of the evidence is at least primarily a question for the jury has long been recognized in Ohio both by the courts and by the Legislature.

{¶ 52} "But to say that the court must send the case to the jury whenever there is any evidence, no matter how slight, which tends to support a party's claim, is, in extreme cases, to permit the jury to play with shadowy and elusive inferences which the logical mind rejects. Before the judge is required to send the case to the jury, there should be in evidence something substantial from which a reasonable mind can draw a logical deduction. If reasonable minds may draw different inferences, or reach different conclusions, a jury question is presented. But, if reasonable minds can reach only one conclusion, the jury should not be allowed to speculate upon the matter. To do so is to allow them the opportunity of returning a wholly unreasonable verdict.

{¶ 53} "* * *

{¶ 54} "* * * Before a verdict may be directed against a party, the evidence must be given the most favorable interpretation in his favor. If, after such interpretation, the court finds that upon any material issue only an adverse conclusion can reasonably be drawn, it should direct a verdict against him.

{¶ 55} "This rule, in our opinion, violates no constitutional provision. Nor does it withhold from the jury any case which should be submitted to it."

{¶ 56} Similarly, under the Ohio Rules of Civil Procedure, although Civ.R. 38 provides for the right to a trial by jury, this rule is limited by Civ.R. 50(A)(4), which provides:

{¶ 57} "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."

{¶ 58} In this matter, the trial court properly entered a verdict in favor of Onyshko and Buckeye Home Builders, pursuant to Civ.R. 50 on the claims for unjust enrichment, fraud, and civil conspiracy. Construing the evidence most strongly in favor of the plaintiff, the trial court properly found, and this court agrees that, on the issue of the liability of Onyshko and Buckeye Home Builders on these claims, reasonable minds could come to but one conclusion upon the

evidence submitted and that conclusion is adverse to the plaintiff. The right to jury trial was therefore not violated. Further, we have reversed and remanded as to the breach of contract and CSPA claims. The first assignment of error is accordingly without merit.

{¶ 59} In his second assignment of error, plaintiff complains that the trial court violated the law of the case by entering judgment for Onyshko and Buckeye Home Builders because the trial court initially awarded plaintiff summary judgment as to these parties, and this court dismissed their appeal. Plaintiff also asserts that the trial court erred by entering this judgment sua sponte and by "advocating" for Onyshko and Buckeye Home Builders.

{¶ 60} We review de novo the issue of whether the law of the case doctrine applies in a particular situation. *Nationwide Ins. Co. v. Davey Tree Expert Co.,* 166 Ohio App.3d 268, 2006-Ohio-2018, 850 N.E.2d 127.

{¶ 61} The law of the case was explained in *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410, as follows:

{¶ 62} "[T]he decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. * * *

{¶ 63} "The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results."

{¶ 64} The law of the case applies only to final orders and not to interlocutory orders that are subject to the trial court's reconsideration. *Schultz v. Duffy,* Cuyahoga App. No. 93215, 2010-Ohio-1750. Therefore, the doctrine of the law of the case has not been applied where the trial court awarded summary judgment to a party in a journal entry that is not a final, appealable order. See *DeAscentis v. Margello,* Franklin App. No. 08AP-522, 2008-Ohio-6821. The court stated:

{¶ 65} "The legal question resolved in the earlier appeal was whether partial summary judgment in favor of appellees was a final appealable order. We held it was not final because none of the claims had been entirely resolved. *DeAscentis I,* at ¶21. DeAscentis, however, claims that on remand the trial court refused to follow the law of the case by ruling that the earlier grant of summary judgment was, in effect, the law of the case, that it decided all claims, and that it contained a proper declaratory judgment, all in direct contravention of the court of appeals decision.

{¶ 66} "Contrary to DeAscentis' argument, the earlier appeal did not reverse the grant of summary judgment. The remaining claims or legal theories were to be tried or otherwise disposed of, and then DeAscentis would have an opportunity to appeal the partial summary judgment in favor of appellees. *DeAscentis I* should not be interpreted as more than a determination of whether we lacked jurisdiction for lack of a final appealable order. Once this court determined there was no final appealable order, to address the merits of the

case, would have been outside of this court's jurisdiction. Section 3(B)(2), Article IV, Ohio Constitution."

{¶ 67} In accordance with the foregoing, the trial court's award of summary judgment to plaintiff was interlocutory and was subject to reconsideration. Because that entry was not a final order, it is not the "law of the case" and the trial court did not violate the doctrine of the law of case when it ultimately entered judgment in favor of Onyshko and Buckeye Home Builders.

{¶ 68} Plaintiff complains, however, that the trial court improperly invoked Civ.R. 50(A)(4) and acted as an advocate by directing the verdict on its own during discussions about the jury instructions. We note that:

{¶ 69} "While Civ.R. 50(A) is silent as to the power of the court to grant a directed verdict sua sponte, several courts of appeals have held that if a court determines that reasonable minds could come to but one conclusion, on the evidence submitted, the court should be able to remove [that] issue from the jury upon its own motion. E.g., *Gibbons v. Price* (1986), 33 Ohio App.3d 4, 11, 514 N.E.2d 127; *Graham v. Cedar Point, Inc.* (1997), 124 Ohio App.3d 730, 733, 707 N.E.2d 554." *Miller v. Miller & Miller Accountants, Inc.* (Mar. 6, 2000), Richland App. No. 99CA18-2. Similarly, this court has held that a trial court has the inherent power to grant a directed verdict sua sponte. *Pincura v. Estate of Forbes* (April 5, 1990), Cuyahoga App. No. 56854. The trial court acted properly herein and did not act as an advocate.

{¶ 70} The second assignment of error is without merit.

{¶ 71} In his third assignment of error, plaintiff maintains that the trial court erred insofar as it determined that this transaction does not come within the protections of the CSPA.

{¶ 72} In light of our disposition of the fourth assignment of error, this claim is moot. App.R. 12(A)(1).

{¶ 73} Affirmed as to the claims for unjust enrichment, fraud, and civil conspiracy, and reversed and remanded as to the claims for breach of contract and violations of the CSPA.

It is ordered that appellees and appellant share the 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.

ANN DYKE, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
FRANK D. CELEBREZZE, JR., CONCUR