

[Cite as *Williams v. Clarke*, 2010-Ohio-3318.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93973

PHILANA F. WILLIAMS

PLAINTIFF-APPELLANT

vs.

DOUGLAS CLARKE, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-641634

BEFORE: Sweeney, J., Stewart, P.J., and Jones, J.

RELEASED: July 15, 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).

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, Philana F. Williams (“plaintiff”), appeals the court’s granting summary judgment to defendants-appellees, Douglas Clarke and Sue Sutkus (“defendants”), in this case involving the purchase of residential property. After reviewing the facts of the case and pertinent law, we reverse and remand.

{¶ 2} In June 2006, plaintiff entered into an agreement to purchase a house located at 285 East 194th Street, in Euclid, from defendants, who had owned and resided in the home since 1997. The Residential Property Disclosure Form that defendants filled out in conjunction with the sale of the house denied any knowledge of water problems. On June 22, 2006, plaintiff had the home inspected by a professional, whose report stated, in part, that “[a]ll outside walls have excessive moisture. Water visible on floor in front room. Poor drainage noted along most of the foundation. Consult a water proofing contractor for repair.”

{¶ 3} Plaintiff questioned defendants about this, and defendants responded by repeating that there were no known water problems. However, defendants stated that they were told by the previous homeowner to run a dehumidifier in the basement. Defendants followed this advice and suggested that plaintiff do the same.

{¶ 4} On June 26, 2006, both parties signed an Amendment to Purchase Agreement and Removal of Concurrency/Contingencies, in which the general home inspection contingency was removed, subject to “no problems per

disclosure.” Plaintiff did not consult a waterproofing contractor, nor did she take any other action in relation to water intrusion at the house.

{¶ 5} Within one month of plaintiff moving into the home, “serious water intrusion problems” developed in the basement. In August 2007, plaintiff had the basement waterproofed. On November 14, 2007, plaintiff filed a complaint against defendants, alleging fraud and mutual mistake of fact, in that defendants failed to disclose and/or concealed property defects relating to water problems.

{¶ 6} On August 27, 2009, the court granted defendants’ summary judgment motion. It is from this order that plaintiff appeals raising one assignment of error for our review.

{¶ 7} “1. The trial court’s decision to grant the defendants’ motion for summary judgment constitutes reversible error.”

{¶ 8} Appellate review of granting summary judgment is de novo. Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that (1) there is no genuine issue of material fact; (2) they are entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

{¶ 9} The doctrine of caveat emptor precludes claims related to property defects in real estate transactions when the following conditions apply: “(1) the defect must be open to observation or discoverable on reasonable inspection, (2) the purchaser must have an unimpeded opportunity to examine the property and

(3) the vendor may not engage in fraud.” *Layman v. Binns* (1988), 35 Ohio St.3d 176, 177, 519 N.E.2d 642.

{¶ 10} The *Layman* Court additionally held that a residential property seller “has a duty to disclose material facts which are latent [and] not readily observable or discoverable through a purchaser’s reasonable inspection.” *Id.* at 178. When a defect is patent, or obvious, “the purchasers must show an affirmative misrepresentation or a misstatement of material fact in order to demonstrate fraud and thereby preclude application of the doctrine of *caveat emptor*.” *Id.*

{¶ 11} The elements of a fraud claim are as follows: (1) a representation, failure to disclose, or concealment of a material fact; (2) made falsely, with knowledge of, or a reckless attitude toward, its falsity; (3) with the intent of misleading another to rely on it; (4) actual and justifiable reliance; and (5) resulting injury caused by the reliance. See *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 514 N.E.2d 709.

{¶ 12} In the instant case, plaintiff argues that the water problems were “hidden, latent defects, which were not ascertainable by her prior to [the purchase].” However, the record shows that when plaintiff looked at the house before purchasing it, there was a dehumidifier and a fan running in the basement.

This prompted her to get a home inspection, which revealed the following: “Moisture noted at all outside walls, tested with a moisture meter. Rec room floor is also damp, visible water, consult a water proofing contractor for type of repair needed. * * * Poor drainage along the back of the foundation. This may

cause a damp basement wall.” Plaintiff chose to “[r]emove the inspection contingency and accept the property in its ‘AS IS’ PRESENT PHYSICAL CONDITION.”

{¶ 13} Accordingly, we first conclude that the water problems were patent defects that were not only discoverable upon inspection, they were actually discovered. Given this, we turn to the doctrine of caveat emptor, which operates to preclude plaintiff’s claim unless there is a genuine issue of material fact regarding whether defendants engaged in fraud.

{¶ 14} In applying the elements of fraud to the instant case, we find the following: (1) defendants represented that they experienced no water issues in the basement; (2) defendants represented that they ran a dehumidifier and fan around the clock; (3) the contractor that waterproofed the basement stated in an affidavit that “the water infiltration problems * * * did not develop overnight and probably took a number of years to get to the point at which he found them”; (4) plaintiff stated in an affidavit that defendants intentionally concealed the water issue; and (5) plaintiff relied on defendants’ assertions that there were no water or moisture problems with the house. See *Yahner v. Kerlin* (July 23, 2003), Cuyahoga App. No. 82447, at ¶30 (holding that “[a] finding of fraud requires proof that defendant had actual knowledge of the alleged defect and purposely misrepresented or concealed it”).

{¶ 15} In reviewing this evidence in a light most favorable to plaintiff, which we must, we find that there are disputed issues of material fact regarding the

allegation of fraud. Specifically, reasonable minds could come to more than one conclusion regarding whether defendants' disclosure of experiencing no water problems in the house is false; whether defendants knew it was false; whether defendants intended to mislead plaintiff; and whether plaintiff's reliance on this disclosure was reasonable or justifiable.

{¶ 16} Plaintiff next argues that the court erred by granting summary judgment to defendants on her "mutual mistake of fact" claim. A careful review of Ohio law shows that "mutual mistake of fact" is not a claim in and of itself; rather, it can be a reason to make an otherwise valid contract voidable in a rescission action. As plaintiff does not request rescission of the contract as a remedy, "mutual mistake of fact" is inapplicable to the case-at-hand.

{¶ 17} Accordingly, the court did not err in granting defendants' summary judgment motion on plaintiff's claim for mutual mistake of fact. However, the court erred in granting defendants' summary judgment motion on plaintiff's fraud claim.

{¶ 18} Defendants' sole assignment of error is sustained.

Judgment reversed and case remanded.

It is ordered that appellant recover from appellees her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
LARRY A. JONES, J., CONCUR