[Cite as *Militiev v. McGee*, 2010-Ohio-6481.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94779

GINA MILITIEV

PLAINTIFF-APPELLANT

vs.

DENNIS MCGEE, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-631707

BEFORE: Sweeney, J., Gallagher, A.J. and Cannon, J.*

RELEASED AND JOURNALIZED: December 30, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant Gina Militiev[1] appeals from the trial court's decision that granted defendants-appellees, Dennis McGee and Judith Patti's, motion for summary judgment and dismissed her claims arising from a purchase agreement for commercial real estate entered into among them. For the reasons that follow, we affirm.

{¶ 2} Appellees made a written offer to purchase Militiev's commercial real estate described as 5484 Broadway, Cleveland, Ohio. However, it was

[1]We note that upon Militiev's motion Cirsta Militiev (the co-seller/owner of the subject commercial property) was joined as a party defendant in this action in November of 2007 and plaintiff attempted to voluntarily dismiss him in February of 2008 and again in March of 2008 based upon a settlement between these parties.

Militiev's real estate agent who drafted the terms on his real estate brokerage's pre-printed purchase agreement form.[2] Militiev and her then husband accepted the offer that included a conditional provision for financing indicating the "funds from 1031 exchange Sellers agree to participate in 1031 exchange with buyer." The closing date for the transfer was also conditional on the sale of other property and specifically provided:

{¶ 3} "Title shall be transferred on or about within two weeks from receiving funds from FLA property receiving proceeds from FLA property" (hereafter referred to as "contingency provision").

{¶ 4} The parties ultimately stipulated to the fact of the two aforementioned conditions. R. 73, ¶¶7 and 8)[3] The purchase agreement also contained a handwritten notation as follows: "Pine Key/Hancock Creek Parkway Cape Coral FLA."

{¶ 5} In August of 2007, Militiev commenced this action against appellees, various other financial entities, and John Doe defendants. She

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[2]Militiev filed claims against the real estate agent and brokerage relating to this transaction in a separate action captioned *Militiev v. Realty One*, Cuyahoga County Court of Common Pleas Case No. CV-634498, which has been settled.

[3]"7. That the agreement called for [appellees] to use the proceeds of the sale of property or properties in Florida (hereinafter collectively 'Florida property(s)' or 'Florida condominium' (or 'condominiums')) to purchase the Broadway building."

"8. The purchase agreement calls for the deposit of said funds 'within two weeks of receipt of the proceeds from the sale of the Florida property(s).'"

asserted a multitude of claims including breach of contract, fraud, and negligent misrepresentation. In January of 2008, appellees moved for summary judgment and in support attached affidavits from Dennis McGee and Judith Patti.[4] Therein, appellees averred that they disclosed to Sellers' real estate agent, inter alia: "the status of the properties in Florida," that appellees "were under contract to buy properties in Florida that were under construction," that Seller's real estate agent was "aware of the status of the properties in Florida via emails" and "was made aware that [appellees] planned to sell the property in Florida to purchase the Broadway property," "the offer to purchase the Broadway property contained a contingency that [appellees] sell [their] properties in Florida to fund the purchase" and that Appellees made no representations as to the sale price or completion date of the Florida properties other than to forward emails concerning the status of the construction. Appellees averred that Militiev's agent "prepared all paperwork for the purchase agreement as agent for the seller." Appellees "had the properties in Florida up for sale since [they] received ownership" but were "unable to sell the properties in Florida." Appellees also submitted into evidence copies of the emails that they forwarded to Seller's agent regarding the status of the Florida properties.

[4]In October of 2009, appellees moved for summary judgment on Militiev's amended complaint and attached similar affidavits.

{¶ 6} Militiev opposed appellees' motion for summary judgment on the bases of ambiguity in the terms of the contract and contingency, that she had received no assurances from Appellees of intent to perform[5] and that appellees breached a duty of good faith by not satisfying the sale contingency. In opposing summary judgment on her fraud and negligent misrepresentation claims, Militiev relied on the allegations of her complaint. Militiev proposed that there was no evidence to substantiate that the representations appellees made about the status of the Florida properties "was true or untrue." She, however, offered no evidence to indicate or suggest that any representations made by appellees regarding the transaction were false.

{¶ 7} On March 20, 2008, Militiev moved to transfer the case to the docket of another common pleas court judge. This was over a year after the case had been assigned and four days before the scheduled trial date of March 24, 2008. On March 28, 2008, the trial court denied the motion to transfer,

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[5] Militiev referred to appellees response to the following interrogatory in support of her anticipatory repudiation claim: "[Q:] Do you still (expect/intend/wish) for the purchase to close (and if so, when)? [A:] No - if we were to have it now I'm sure due to their financial situation it has not been properly maintained" A subpart to that interrogatory posited "what is the basis for such belief or expectation (or lack thereof)?" To which, appellees responded, "The foreclosure. Inability to inspect property." Appellees did file a counterclaim for damages based on Militiev's alleged failure to maintain the property, but the counterclaim was rendered moot by the trial court's summary judgment order. In appellee's response to a separate interrogatory, they responded "yes" when asked if they would "be ready or able to purchase the Broadway property at any future point."

granted appellees' motion for summary judgment and dismissed the appellees' counterclaim without prejudice.

{¶ 8} Militiev appealed but the matter was sua sponte dismissed for lack of a final, appealable order due to there being only a partial summary judgment order, remaining claims against John Doe defendants, and the absence of Civ.R. 54(B) language. *Militiev v. McGee*, Cuyahoga App. No. 91356, 2009-Ohio-142.

{¶ 9} The case returned to the trial court's active docket where Militiev filed an amended complaint that designated four claims against appellees: negligent misrepresentation, breach of contract, anticipatory repudiation, and promissory estoppel.[6]

{¶ 10} On October 20, 2009, appellees filed a motion for summary judgment on all of the claims that were designated in the amended complaint.[7] Again Appellees submitted affidavits in support of their motion as well as correspondence concerning the status of property in Florida. Militiev was granted additional time to oppose appellees' motion for summary judgment. The trial court granted appellees' motion for summary judgment that forms the basis of this appeal.

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[6] There does not appear to be any claims asserted against John Doe defendants in the amended complaint.

[7] Therein, appellees construed Militiev's "promissory estoppel/detrimental reliance" claim as in actuality being a fraud claim as pled.

{¶ 11} Militiev designates eleven assignments of error for our review, ten of which contest the trial court's summary judgment order and the remaining assignment challenges the trial court's denial of her motion to transfer the case. The assignments of error that are interrelated will be addressed together.

A. Motion to Transfer

{¶ 12} Militiev relies upon Rule 36(D) of the Ohio Rules of Superintendence to support her claim that the trial court erred by not transferring the case to the docket of Judge Peter Corrigan.

{¶ 13} Sup.R. 36(D) provides: "In any instance where a previously filed and dismissed case is refiled, that case shall be reassigned to the judge originally assigned by lot to hear it unless, for good cause shown, that judge is precluded from hearing the case."

{¶ 14} Militiev contends that she advanced third-party claims against appellees in a foreclosure action filed against her in 2005 that had been assigned to Judge Peter Corrigan. The foreclosure action was consolidated with another action on a cognovit note against Militiev in 2006 and Judge Janet Burnside presided over the consolidated matters. Judge Burnside reportedly dismissed Militiev's third party claims without prejudice in 2007. Militiev subsequently commenced this action. Militiev's case designation sheet indicated this was a refiled action, cited the case numbers of the

consolidated cognovit/foreclosure matters, and identified Judges Corrigan and Burnside as the presiding judge(s). However, this case was assigned to Judge Sutula in August of 2007.

{¶ 15} Militiev did not object to the assignment to Judge Sutula until four days prior to trial in March of 2008. In fact, prior to that, Militiev had unsuccessfully moved to consolidate this action with another civil action she had filed against her real estate brokerage and agent, which was pending before Judge Matia.

{¶ 16} Loc.R. 15(I) of the Cuyahoga County Rules of The Court of Common Pleas, General Division states, "[a]n order transferring a previously filed case or a related case to another judge must be entered within one hundred and twenty (120) calendar days from the date of the filing of the new complaint in the new case."

{¶ 17} Loc.R. 15(I) does not conflict with, but supplements, Sup.R. 36(D) and it is possible to afford both provisions meaning. Accordingly, the trial court did not err when it denied Militiev's motion to transfer that was filed four days before the scheduled trial date and outside the time limits of Loc.R. 15(I).

{¶ 18} Additionally, "if a party fails to assert in a timely manner the impropriety of any procedural irregularities associated with the transfer of a case, the party waives the issue for appeal." *Werden v. The Children's Hosp.*

Med. Ctr., Hamilton App. No. C-040889, 2006-Ohio-4600, ¶15, citing *Berger v. Berger* (1983), 3 Ohio App.3d 125, 131, 443 N.E.2d 1375, overruled on other grounds in *Brickman & Sons, Inc. v. Natl. City Bank*, 106 Ohio St.3d 30, 2005-Ohio-3449, 830 N.E.2d 1151. The objection to any reassignment (or by corollary any alleged failure to reassign) must be raised by objection at the earliest opportunity. Id. Because Militiev waited over six months to raise this issue in the trial court and did so just days prior to the scheduled trial date, her request to transfer was not timely asserted and she waived any alleged impropriety in the perceived procedural irregularity. The first assignment of error is overruled.

B. Summary Judgment

{¶ 19} In her remaining assignments of error, Militiev contends that the trial court abused its discretion by granting appellees' motion for summary judgment. The applicable standard provides no deference for the trial court's determination because we are required to employ a de novo review in determining whether summary judgment was warranted. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105; 671 N.E.2d 241, *Zemcik v. La Pine Truck Sales & Equipment* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860.

{¶ 20} Summary judgment is appropriate where: "(1) there is no genuine issue of material fact, (2) the moving party is 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 nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264, 273-274." *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-70, 1998-Ohio-389, 696 N.E.2d 201.

{¶ 21} "Requiring that the moving party provide specific reasons and evidence gives rise to a reciprocal burden of specificity for the non-moving party. Civ.R. 56(E) provides in part: 'When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Unless the nonmovant sets forth specific facts showing there is a genuine issue of material fact for trial, summary judgment will be granted to the movant.

{¶ 22} Appellees moved for summary judgment on all of Militiev's claims, namely breach of contract, anticipatory repudiation, promissory estoppel, and negligent misrepresentation.

(1) Breach of Contract.

{¶ 23} To succeed on a breach of contract claim, a party must prove the existence of a contract, that party's performance under the contract, the opposing party's breach, and resulting damage. See *On Line Logistics, Inc. v. Amerisource Corp.*, Cuyahoga App. No. 82056, 2003-Ohio-5381, at ¶39. To prove the existence of a contract, a plaintiff must show that both parties consented to the terms of the contract, that there was a "meeting of the minds" of both parties, and that the terms of the contract are definite and certain. *Nilavar v. Osborn* (2000), 137 Ohio App.3d 469, 738 N.E.2d 1271, citing *McSweeney v. Jackson* (1996), 117 Ohio App.3d 623, 631, 691 N.E.2d 303.

{¶ 24} "'A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract. They must have expressed their intentions in a manner that is capable of being understood. It is not even enough that they had actually agreed, if their expressions, when interpreted in the light of accompanying factors and circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty

as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.'" *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376, 683 N.E.2d 337, quoting, 1 Corbin on Contracts (Rev. Ed.1993) 525, Section 4.1.

{¶ 25} Militiev predicated her breach of contract claim upon the purchase agreement entered between the parties in May of 2006. The averments relative to this count in her complaint asserted that the purchase agreement required appellees to use proceeds from the sale of Florida property "purportedly owned by" and "purportedly being marketed for sale" by appellees. However, it was alleged that appellees took title to the Florida property on or about April 16, 2007.

{¶ 26} Appellees moved for summary judgment on this claim asserting a failure of condition precedent (sale of Florida property); and that the purchase agreement is unenforceable under the statute of frauds because it failed to set forth essential terms of the contract with reasonable certainty.

{¶ 27} "[A] condition precedent is one that is to be performed before the agreement becomes effective. It calls for the happening of some event, or the performance of some act, after the terms of the contract have been agreed on, before the contract shall be binding on the parties." *Mumaw v. W. & S. Life Ins. Co.* (1917), 97 Ohio St. 1, 11, 119 N.E. 132. Pursuant to the purchase agreement, the sale of the Florida property was a condition precedent to

trigger both the financing and the closing of the transaction. Accordingly, this was an essential term of the agreement.

{¶ 28} The primary objective in contract interpretation is to give effect to the intent of the parties as expressed in the language they chose to employ in their agreement. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920. The basic tenets of contract law require us to give the common words that appear in the agreement their ordinary meaning while construing the agreement as a whole. *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus; *Foster Wheeler Enviresponse v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 678 N.E.2d 519.

{¶ 29} A contract with clear and unambiguous terms leaves no issue of fact and must be interpreted as a matter of law. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271. Where ambiguity exists, however, we must strictly construe those terms against the party who drafted the terms. *Faruque v. Provident Life & Acc. Ins. Co.* (1987), 31 Ohio St.3d 34, 31 OBR 83, 508 N.E.2d 949, syllabus.

{¶ 30} A contract is ambiguous if its terms cannot be clearly determined from a reading of the entire contract or if its terms are susceptible to more than one reasonable interpretation. *United States Fidelity & Guar. Co. v. St.*

Elizabeth Med. Ctr. (1998), 129 Ohio App.3d 45, 716 N.E.2d 1201. If the terms of the contract are determined to be ambiguous, the meaning of the words becomes a question of fact, and a trial court's interpretation will not be overturned on appeal absent a showing of an abuse of discretion. *Ohio Historical Society v. General Maintenance & Eng. Co.* (1989), 65 Ohio App.3d 139, 147, 583 N.E.2d 340.

{¶ 31} The contingency provisions of the contract provided: (a) as to financing that "funds from 1031 exchange Sellers agree to participate in 1031 exchange with buyer," and (2) as to closing, that "title shall be transferred on or about within two weeks from receiving funds from FLA property receiving proceeds from FLA property."

{¶ 32} Militiev herself consistently maintained that the contingency conditions were "unclear and ambiguous."

{¶ 33} The contingency is not only ambiguous but also indefinite, thereby rendering the contract unenforceable. For example, it does not specifically identify the subject property nor does it contain any other terms of how or when the sale of the Florida property was to be completed, i.e., list prices, closing dates, etc. To the extent Militiev argues that appellees had an implied covenant of good faith to satisfy the contingency, there was no evidence offered from which a reasonable person could conclude that appellees acted with anything other than good faith in attempting

performance. While it may be Militiev's opinion that appellees did not do enough to market the Florida property for sale, the fact remains that appellees did list property that they owned in Florida for sale and the contract contains no other obligation upon the appellees in how or on what terms to market the property for sale. This contract was drafted by Militiev's agent and any ambiguity must therefore be strictly construed in favor of appellees.

{¶ 34} The sale of lands falls within the statute of frauds, which under R.C. 1335.05 requires "some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized." It is well settled that "[t]he memorandum in writing which is required by the statute of frauds * * * is a memorandum of the agreement between parties, and it is not sufficient unless it contains the essential terms of the agreement, expressed with such clearness and certainty that they may be understood from the memorandum itself, or some other writing to which it refers, without the necessity of resorting to parol proof." *Kling v. Bordner* (1901), 65 Ohio St. 86, 61 N.E. 148, paragraph 1 of the syllabus.[8] Thus, the statute of fraud bars the

[8] To the extent Militiev maintains that the trial court misapplied certain case law concerning the application of the statute of frauds, the indefiniteness of essential terms in the subject purchase agreement rendered the contract unenforceable regardless. That case law is not necessary to substantiate that appellees were entitled to summary judgment on the breach of contract claim. See

consideration of parol evidence as to essential terms of the purchase agreement.

{¶ 35} Because the sale of the Florida property was a condition precedent to appellees' performance, it was an essential term in this agreement. These provisions were not ancillary to the agreement because they controlled not only the terms on which the purchase would be financed, but also when it would close. Therefore, the lack of specificity in, and the indefiniteness of, the contingency provisions rendered the contract unenforceable. Id.

{¶ 36} Summary judgment was properly entered on this claim.

(2) Anticipatory Repudiation.

{¶ 37} "An anticipatory breach of contract by a promisor is a repudiation of the promisor's contractual duty before the time fixed for performance has arrived." *McDonald v. Bedford Datsun* (1989), 59 Ohio App.3d 38, 40, 570 N.E.2d 299, 301, citing *Smith v. Sloss Marblehead Lime Co.* (1898), 57 Ohio St. 518, 49 N.E. 695.

{¶ 38} Because the contract forming the basis for the anticipatory repudiation claim was unenforceable, this claim necessarily fails as a matter of law. Even assuming there had been a valid contract, when the evidence

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Schmidt v. Weston (1948), 150 Ohio St. 293, 82 N.E.2d 284; *Bailen v. Haders* (Dec. 11, 1986), Cuyahoga App. No. 51356; *McGee v. Tobin*, Mahoning App. No. 04 MA 98, 2005-Ohio-2119.

is construed in a light most favorable to Militiev, appellees would be entitled to judgment on this claim. There is no evidence that appellees refused to perform the purchase agreement. At best the evidence merely established that appellees had been unsuccessful in their attempts to satisfy the condition precedent, that being the sale of Florida property. The trial court did not err by granting summary judgment on this claim.

(3) Promissory Estoppel.

{¶ 39} "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Talley v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local No. 377* (1976), 48 Ohio St.2d 142, 146, 357 N.E.2d 44. "[I]n order to state a claim for promissory estoppel, the plaintiff 'must establish the following elements: 1) a clear and unambiguous promise, 2) reliance on the promise, 3) that the reliance is reasonable and foreseeable, and 4) that he was injured by his reliance.'" *Stern v. Shainker*, Cuyahoga App. No. 92301, 2009-Ohio-2731, ¶9.

{¶ 40} The amended complaint alleges that appellees "made representations of intended timely performance and ongoing subsequent representations of performance"; that Militiev justifiably relied on them by removing "the property(s) from the market, marketed it as a pending or

secondarily available property and/or modified her marketing efforts." Additionally, Militiev alleged she detrimentally relied on the alleged representations of "timely performance" by borrowing money among other things.

{¶ 41} The evidence in the record reflects that appellees did intend to perform the agreement but had been unsuccessful in their efforts to sell the Florida property. It was understood and agreed by the parties that appellees would sell the Florida property in order to finance and close the purchase of Militiev's property. Militiev does not claim that appellees agreed to sell the Florida property on any specific terms or within any set time period. Under these circumstances, it was not reasonable or foreseeable for Militiev to detrimentally rely on the appellees' intention to perform. Neither the appellees nor Militiev could possibly or realistically know if, or when, a third party would purchase the Florida property, particularly in the absence of any definitive details concerning the prospective sale such as listing price, market conditions, etc. For these reasons, Militiev's promissory estoppel claim fails as a matter of law.

(4) Negligent Misrepresentation.

{¶ 42} In order to state a claim of negligent misrepresentation, a plaintiff must produce evidence of the following elements:

{¶ 43} "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." 3 Restatement of the Law 2d, Torts (1965) 126-127, Section 552(1), applied by the Supreme Court of Ohio in *Gutter v. Dow Jones, Inc.* (1986), 22 Ohio St.3d 286, 22 OBR 457, 490 N.E.2d 898. Justifiable reliance is a prima facie element of negligent misrepresentation. *Sindel v. Toledo Edison Co.* (1993), 87 Ohio App.3d 525, 531, 622 N.E.2d 706.

{¶ 44} In moving for summary judgment, appellees asserted that they had not made any false statements and that Militiev's complaint was not pled with specificity as required to sustain a fraud claim. Appellees submitted their affidavits in support.

{¶ 45} Under the summary judgment standard, once the moving party presents evidence in support of their motion, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. In opposing summary judgment, Militiev contended that appellees did not prove that "their communciations were truthful, accurate and/or free of falsities and/or negligent omissions." This statement, however,

does not constitute evidence under Civ.R. 56 nor does it create a genuine issue of fact on this claim. Without any evidence that appellees supplied false information for the guidance of Militiev in this business transaction, the negligent misrepresentation claim fails as a matter of law.

{¶ 46} The trial court properly granted summary judgment in favor of appellees and the second through eleventh assignments of error are overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant 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.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
*TIMOTHY P. CANNON, J., CONCUR

*(Sitting by Assignment: Judge Timothy P. Cannon of the Eleventh District Court of Appeal