[Cite as *Doyle v. Scarberry*, 2009-Ohio-4977.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

TIMOTHY DOYLE, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 08CA3261
vs.	:	
LINDA SCARBERRY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Stephen C. Rodeheffer, Rodeheffer and Miller, Ltd. 630 Sixth Street, Portsmouth, Ohio 45662

COUNSEL FOR APPELLEES: Stanley C. Bender, P.O. Box 950, 707 Sixth Street, Portsmouth, Ohio 45662

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-11-09

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court summary judgment in favor of Timothy and Susan Doyle, plaintiffs below and appellees herein, on their claim against Linda Scarberry, defendant below and appellant herein.

{¶ 2} Appellant assigns the following error for review:[1]

[1] Appellant did not include in her brief a statement of the assignment of errors. See App.R. 16(A)(3). Thus, we take her assignments of error from the table of contents.

"THE TRIAL COURT ERRED IN SUSTAINING THE APPELLEES' MOTION FOR SUMMARY JUDGMENT IN THAT THERE WERE GENUINE ISSUES OF FACT WITH RESPECT TO THE PARTIES' INTENT REGARDING THE SUBJECT MATTER OF THEIR PURCHASE AGREEMENT."

{¶ 3} The parties own real estate on Ken-Lee Lane in Portsmouth. Most of appellant's land lies on the east side of Ken-Lee Lane, but a portion also lies on the north and west side and is contiguous to appellees' land. On September 18, 2005, the parties entered into a written contract calling for appellees to purchase 1707 Ken-Lee Lane from appellant for $148,000.[2] For one reason or another, the transaction never closed.

{¶ 4} Appellees commenced the instant action for breach of the sales contract and requested specific performance. Appellant denied liability. Twice during the course of these proceedings, appellees filed motions for summary judgment. Each time, the court denied those motions.

{¶ 5} On October 17, 2008, the trial court sua sponte reconsidered

{¶ 6} its previous decision, entered summary judgment for appellees and ordered appellant to convey the property.[3] This appeal followed.

---

[2] The record contains two separate sales contracts for this real estate – one appellant prepared and the other appellees ostensibly prepared. Given that all reasonable inferences must be made in favor of the non-moving party on a motion for summary judgment, we confine our analysis to the contract appellant prepared.

[3] An order that denied summary judgment is neither final, nor appealable, and trial courts may sua sponte reconsider previous interlocutory orders at any time prior to the entry of a final order. See Rockstroh v. Perkins (Dec. 15, 1996), Mahoning App. No. 95 CA 198; Allums v. Gillenwater (Apr. 25, 1996), Cuyahoga App. Nos. 68870 & 68871.

I

{¶ 7} Before we turn to the merits of the assigned error, we address the standard of review. Appellate courts review summary judgments de novo. Broadnax v. Greene Credit Service (1997), 118 Ohio App.3d 881, 887, 694 N.E.2d 167; Coventry Twp. v. Ecker (1995), 101 Ohio App.3d 38, 41, 654 N.E.2d 1327. In other words, appellate courts afford no deference whatsoever to trial court decisions, Hicks v. Leffler (1997), 119 Ohio App.3d 424, 427, 695 N.E.2d 777; Dillon v. Med. Ctr. Hosp. (1993), 98 Ohio App.3d 510, 514-515, 648 N.E.2d 1375; and conduct an independent review to determine if summary judgment is appropriate. Woods v. Dutta (1997), 119 Ohio App.3d 228, 233-234, 695 N.E.2d 18; Phillips v. Rayburn (1996), 113 Ohio App.3d 374, 377, 680 N.E.2d 1279.

{¶ 8} Summary judgment under Civ. R. 56(C) is appropriate when a movant shows that (1) no genuine issues of material fact exist, (2) the movant is entitled to judgment as a matter of law and (3) after the evidence is construed most strongly in favor of the non-movant, reasonable minds can come to one conclusion and that conclusion is adverse to the non-moving party. Zivich v. Mentor Soccer Club, Inc. (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201; Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. The moving party bears the initial burden to establish that no genuine issues of material facts exist and that the movant is entitled to judgment as a matter of law. Vahila v. Hall (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164; Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. If that burden is satisfied, the onus shifts to the non-moving party to provide rebuttal evidentiary materials. See Trout v. Parker (1991), 72 Ohio App.3d 720, 723, 595

N.E.2d 1015; Campco Distributors, Inc. v. Fries (1987), 42 Ohio App.3d 200, 201, 537 N.E.2d 661. With these principles in mind, we turn our attention to the case sub judice.

II

{¶ 9} After our review of the evidentiary materials, we agree with the trial court's conclusion that the appellees carried their initial burden. Appellant conceded at her deposition that she prepared the sales contract and the transaction never closed. During her deposition, appellant claimed that the sale was meant to be contingent on her buying another property (which also did not close), but that contingency appears nowhere in the contract that she, herself, drafted.

{¶ 10} Paragraph fourteen of appellant's contract specifies that the written contract constitutes the "entire agreement" and there were "no [oral] representations" that had not been incorporated in the agreement. We thus agree with the trial court that the appellees carried their burden to show the existence of an enforceable sales contract.

{¶ 11} The burden then shifted to appellant to prove the existence of genuine issues of material fact to defeat the motion. Appellant does not challenge the existence of the sales contract, or its breach, but rather argues that genuine issues of material fact remain as to (1) the parties intent as to what property was actually being sold, and (2) whether a mutual or unilateral mistake existed as to the precise size of the real estate to be sold. These arguments are based on appellant's claim that she did not intend to sell all of her property situated on Ken-Lee Lane. The explicit language of her contract calls for the sale of 1707 Ken-Lee Lane. Appellant maintains that this language includes only the land east of Ken-Lee Lane, and does not include the parcel on the west side of

Ken-Lee Lane adjacent to appellees' property.

{¶ 12} First, it is well-settled that the intent of parties to a contract is presumed to reside in the language used in that contract. See Kelly v. Medical Life Ins. Co. (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, at paragraph one of the syllabus; Evans v. Evans, Scioto App. No. 02CA2869, 2003-Ohio-4674, at ¶10. The explicit language of the contract at issue reveals that appellant intended to sell the property designated as 1707 Ken-Lee Lane. As to the question of whether 1707 Ken-Lee Lane includes both tracts, we agree with the trial court's conclusion that it does. Prior to 2006, the acreage was part of a larger 5.3221 acre parcel designated by Scioto County Property Records as 1707 Ken-Lee Lane. A copy of that record is included in appellees' motion for summary judgment. That record also shows a tax parcel number of 05-0424. The legal description in the survey for the parcel states it is a "split" from that parcel number. Appellant admitted at her deposition that after the sales contract was executed, she hired a surveyor to split the parcels. Whatever appellant's reasons for the split, the fact remains that the acreage was part of 1707 Ken-Lee Lane at the time the contract was executed and, thus, part of the real estate covered by the sales contract.

{¶ 13} We also find no merit to appellant's contention of mutual or unilateral mistake. Appellees testified in their depositions that they intended to buy the entire parcel appellant owned on Ken-Lee Lane. Appellant offered nothing to rebut that evidence, which means that she did not carry her burden to show a mutual mistake.

{¶ 14} Regarding appellant's claim of a unilateral mistake, such mistakes do not generally impede the formation of a contract, but can form the basis for rescission. Rylee Ltd. v. Izzard Family Partnership, 178 Ohio App.3d 172, 897 N.E.2d 208,

2008-Ohio-4506, at ¶12. Appellant cites Rylee as an analogous case and points out that the contract was rescinded when it included property that the seller had no intention to sell. Rylee is distinguishable, however, because its discussion of the "unilateral" mistake is dicta in view of the fact that the trial court rescinded the contract on the basis of a mutual mistake as to the quantum property being sold. Id. at ¶¶11 & 13. Furthermore, this Court has ruled that a contract may be voidable on grounds of unilateral mistake only if, inter alia, "(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake." Selvage v. Emnett, Scioto App. No. 08CA3239, 2009-Ohio-940, at ¶14; Southern Ohio Med. Ctr. v. Trinidad, Scioto App. No. 03CA2870, 2003-Ohio- 4416, at ¶26. In the instant case, appellant did not satisfy either requirement. Thus, like the trial court, we find no genuine issue of material fact as to unilateral mistake.

{¶ 15} For these reasons, we find no merit in the assignment of error and it is hereby overruled. Accordingly, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellant 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 Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of

the Rules of Appellate Procedure.

Kline, P.J. & Harsha, J.: Concur in Judgment & Opinion
For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.