[Cite as *Lanning v. Stanford-Black*, 2009-Ohio-6022.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

EARL LANNING, et al. Appellants v. SADIE STANFORD BLACK, et al. Appellees	C. A. No. 09CA009561 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CV156716

DECISION AND JOURNAL ENTRY

Dated: November 16, 2009

MOORE, Presiding Judge.

{¶1} Appellants, Earl Lanning and Jennifer Dillon, appeal from the judgment of the Lorain County Court of Common Pleas. We affirm.

I.

{¶2} Earl Lanning and Jennifer Dillon ("buyers") entered into a contract to purchase a condominium from appellees, Sadie Stanford Black and Sadie R. Black, executrix, ("sellers"). Shortly after they moved into the condo, the buyers experienced severe problems that required extensive repair work. The buyers filed a lawsuit seeking damages and rescission or cancellation of the contract on the basis of a mutual mistake of fact. The trial court granted a motion to dismiss the suit under Civ.R. 12(B)(6). The buyers appealed from the order dismissing their complaint.

{¶3} The contract at issue, executed on February 18, 2006, involved the sale of property located at 4617 Palm Avenue in Lorain, Ohio. With regard to the condition of the

property, the contract stated that "SELLER does not warrant the property or any of its systems or appliances beyond transfer of title to PURCHASER and PURCHASER accepts property in an 'AS IS' condition." (Emphasis sic). A separate document entitled Residential Property Disclosure Form did not include any disclosure, rather it stated that the property was "AS-IS [sic], Estate Sale." It was signed, but otherwise left blank by the seller.

{¶4} The buyers' complaint filed against the sellers generally referenced problems with water accumulation in the basement or crawl space; moisture damage to floors, walls or ceilings; and, "material problems with the foundation, basement/crawl space, floors, or interior/exterior walls." The complaint further alleged that the sellers mistakenly failed to disclose these problems. The complaint alleged that the sellers also mistakenly failed to indicate their knowledge of repairs aimed at solving those problems; current flooding or drainage issues; and, repairs made in response to the flooding or drainage issues. The buyers then alleged that they were induced to purchase the condo based upon their own mistaken belief that none of those defects existed.

{¶5} In response to the complaint, sellers filed a motion to dismiss pursuant to Civ.R. 12(B)(6). The motion argued that the complaint failed to state a claim upon which relief could be granted on the basis that the "as is" provision in the Real Estate Purchase Agreement removed any duty of the sellers to disclose defects in the property.

{¶6} The buyers filed a brief in opposition to the motion to dismiss, as well as a motion for leave to file an amended complaint instanter. The sellers filed a brief in opposition to the motion for leave to file an amended complaint and filed a reply brief to the buyers' brief in opposition to the motion to dismiss. The trial court granted the sellers' motion to dismiss and denied the buyers' motion for leave to file an amended complaint. The trial court reasoned that

because the proposed amended complaint would not cure the original defect, dismissal was appropriate.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT'S DECISION TO GRANT THE DISPOSITIVE MOTION CONSTITUTES REVERSIBLE ERROR."

{¶7} In their single assignment of error, the buyers contend that the trial court committed reversible error when it granted the sellers' motion to dismiss. In their arguments, the buyers suggest that the proffered amended complaint would have clarified the mutual mistake of fact and that the "as is" language from the contract does not allocate risk to them. We do not agree.

{¶8} "This court reviews a trial court's decision to grant a motion to dismiss de novo. Under the de novo standard of review, we give no deference to the trial court's legal conclusions." (Internal citations omitted.) *State v. Zimmerman*, 9th Dist. No. 23089, 2006-Ohio-6004, at ¶5.

> "Further, we look to determine 'whether any cause of action cognizable by the forum has been raised in the complaint.' *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. Dismissal is appropriately granted once all the factual allegations of the complaint are presumed true and all reasonable inferences are made in favor of the nonmoving party, and it appears beyond doubt that the nonmoving party cannot prove any set of facts entitling him to the requested relief. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548." *Natl. Check Bur. v. Buerger*, 9th Dist. No. 06CA008882, 2006-Ohio-6673, at ¶8.

{¶9} We elect to consider the complaint as if the motion for leave to file the amended complaint instanter had been granted because it is dispositive of all issues raised by the buyers. We note that when the proposed amendments to a complaint would not cure its defects a court

need not grant a motion to amend. *Moore v. Householder*, 5th Dist. No. 2005-CA-20, 2006-Ohio-5682, at ¶17.

{¶10} The proposed amended complaint is identical to the original complaint except for paragraphs 5 and 11. Paragraph 5 originally stated: "Shortly after moving into the property, the Plaintiffs began to experience severe problems related to undisclosed defects within the home." Paragraph 5 as amended stated: "Shortly after moving into the property, the Plaintiffs began to experience severe problems *of which they had no prior knowledge* related to undisclosed defects within the home." (Emphasis added.) Paragraph 11 originally stated: "The Plaintiffs were thereby induced to purchase the real property. To that end, the Plaintiff [sic] signed a Real Estate Purchase Agreement, a copy of which is attached hereto and incorporated herein as Exhibit A." Paragraph 11 as amended states: "The Plaintiffs were thereby induced to purchase the real property *based on their mistaken belief that it contained none of the defects listed above*. To that end, the Plaintiff [sic] signed a Real Estate Purchase Agreement, a copy of which is attached hereto and incorporated herein as Exhibit A." (Emphasis added.)

{¶11} Rather than add a new cause of action or additional relevant facts, the proposed amendments serve to specifically allege that the buyers were mistaken as to the condition of the property. The issue is whether an action was properly pleaded for mutual mistake of fact upon which the buyers could potentially recover. This question is not resolved by the proposed amendment.

{¶12} A mutual mistake of material fact can form the basis for rescission of a contract. *Reilley v. Richards* (1994), 69 Ohio St.3d 352, 352. A mistaken fact is material to a contract if "it is 'a mistake *** as to a basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances.'" Id. at 353, quoting 1 Restatement of

the Law 2d, Contracts (1981) 385, Mistake, Section 152(1). *Reilley* involved a sale of land, wherein the plaintiff intended to purchase the tract to build a home. Id. at 353. Sometime after the sale it was discovered that much of the land lay in a floodplain on which a home could not be built. Id. Prior to entering the contract, neither party was aware of this fact. Id. The court found that to be a mutual mistake of material fact and allowed rescission of the contract. Id. at 354. In this case, the buyers have not identified a mutual mistake with regard to an issue of material fact.

{¶13} In the instant complaint, the buyers allege that they were unaware of the problems with the condo. The buyers allege that the sellers were aware of these problems. The buyers later allege that the sellers mistakenly represented to the buyers that the sellers had no knowledge of the defects. These allegations do not demonstrate a mutual mistake of fact. For the mistake to be mutual, both parties would have to believe no defects existed. Those facts are not alleged in either the original or the amended complaint. The buyers' action instead appears to suggest, without actually claiming, the tort of fraud. However, we note that the buyers' counsel specifically disclaimed at oral argument any intent or desire to set forth a cause of action sounding in fraud. Accordingly, the buyers have not set forth a basis for rescission of the contract based on mutual mistake of fact because they have alleged no mutual mistake.

{¶14} Therefore, the buyers have failed to state a claim upon which relief can be granted. Civ. R. 12(B)(6). The buyers' single assignment of error is overruled.

III.

{¶15} The buyers' single assignment of error is overruled. The judgment of the Lorain County Court of Common pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

CARLA MOORE
FOR THE COURT

DICKINSON, J.
BELFANCE, J.
CONCUR

APPEARANCES:

DANIEL S. WHITE, Attorney at Law, for Appellants.

JOHN L. KEYSE-WALKER, Attorney at Law, for Appellees.