

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

FRANCIS R. SMITH ET AL.,

Plaintiffs-Appellants,

v.

CHARLES WILEY ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 16 BE 0061

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 14 CV 41

BEFORE:

Gene Donofrio, Carol Ann Robb, Kathleen Bartlett, Judges.

JUDGMENT:

Affirmed

Atty. W. Lewis, Law Office of W. Blair Lewis LLC, 400 Andover Drive, Powell, Ohio 43065, for Plaintiffs-Appellants, and

Atty. Michael Shaheen, Shaheen Law Group, 128 South Marietta Street, P.O. Box 579, St. Clairsville, Ohio 43950, for Defendants-Appellees.

Dated:
December 24, 2018

Donofrio, J.

{¶1} Plaintiff-appellant, Francis Smith, appeals from a Belmont County Common Pleas Court judgment granting a directed verdict in favor of defendant-appellee, Anita Wiley, and against Smith on his fraud claim.

{¶2} This case centers on a dispute between parties regarding a real estate transaction. On February 6, 2014, Smith and his wife Vicki filed a complaint against Wiley, her husband, PNC Bank National Association, the realty company and one of its realtors, and a John Doe defendant, alleging multiple causes of action including fraud and breach of contract.

{¶3} Before trial, all defendants and causes of action were dismissed except for Smith's fraud claim against Wiley. Prior to testimony, Wiley's counsel also moved to dismiss without prejudice any claims by Smith's wife, which the trial court sustained. Thus, the matter proceeded to a bench trial concerning Smith's sole remaining count of fraud against Wiley. Smith alleged that Wiley committed fraud by: (1) failing to disclose that the property at issue was in foreclosure; and (2) misrepresenting to Smith that three cash payments he made to Wiley would be applied towards the purchase price of that property.

{¶4} Smith and Wiley had been friends since they were children. In July 2011, Wiley and her husband acquired real property located at 4355 Grand Avenue in Shadyside (the Grand Avenue Property), via quit claim deed from their son. Not long thereafter, the Wileys listed the property with Harvey Goodman Realtors. Smith approached Wiley about purchasing the property at some point in late 2011. Wiley testified that the bank had instituted foreclosure proceedings and thus she and her husband were trying to sell it by way of a short sale. (Tr. 93). The parties entered into a real estate purchase agreement for the property in January 2012. Pursuant to the purchase agreement, the Smiths agreed to pay \$66,000 cash for the property. The Smiths paid a \$500 deposit as earnest money on January 24, 2012. Smith testified he paid the \$500 to Harvey Goodman Realtors. (Tr. 74).

{¶15} Attorney Thomas Ryncarz performed a title examination for the Smiths for the property through January 26, 2012. Atty. Ryncarz testified that after learning, via the title examination, that the property was in foreclosure, he contacted Smith by telephone to discuss the same. (Tr. 19). Ryncarz's February 22, 2012 letter to Smith, corroborated this.

{¶16} The Smiths agreed to extend the real estate purchase agreement for the property five times after its initial execution, each time delaying the closing date but not adding any additional contract terms. (Tr. 56, 63; Def. Ex. 1). Smith also wanted to perform some work on the property prior to closing and thus the parties entered into a lease agreement on February 11, 2012. (Tr. 59; Def. Ex. 5). Ultimately, the deal did not close and Smith bought the property at sheriff's sale.

{¶17} Atty. Ryncarz testified that Smith would have been aware of the foreclosure issue prior to February 8, 2012, when Smith signed the first of the five extensions to the purchase contract. (Tr. 32-33). Smith first testified he could not recall when he found out about the foreclosure. (Tr. 68). Smith later admitted he would have known about the foreclosure when he received Atty. Ryncarz's February 22, 2012 letter explaining the results of the title exam. (Tr. 69). Wiley testified that she disclosed the foreclosure issue to Smith when he first approached her about purchasing the property. (Tr.93).

{¶18} Smith made two check payments to Wiley: one for \$10,000, and a second for \$9,500. (Tr. 46-47, 49, 97, 102). Smith also made a check payment to Ohio Valley Community Credit Union for \$7,000. (Tr. 47-48). Smith testified it was understood that these check payments would be applied towards the purchase price of the property. (Tr. 46-50). Wiley, however, maintained that these payments were actually intended to go towards the purchase of two vacant lots and a vehicle that Wiley owned. (Tr. 103-105).

{¶19} Wiley testified that the vacant lot properties had a lien for \$7,000 on them and Smith's \$7,000 payment to Ohio Valley Community Credit Union was to clear that lien. (Tr. 101). Further, admitted into evidence was a handwritten letter from Wiley to Smith, dated October 31, 2012, asking Smith for \$2,500, which would "leave just a \$1000 left from the [sale] of the lots." (Pl. Ex. 16). Wiley clarified during her testimony

that her math calculation in that letter was incorrect and that a payment of \$2,500 would have satisfied their agreement regarding the vacant lots/car transaction.¹

{¶10} Wiley testified that Smith agreed to pay \$29,000 for the vacant lots and the vehicle. She acknowledged receiving from Smith \$26,500 towards the purchase of the lots and car: the \$10,000 check, the \$9,500 check, and \$7,000 paid to Ohio Valley Community Credit Union to release the lien on the lots. (Tr. 97, 102-105). The Wileys conveyed the vacant lots to the Smiths via general warranty deed with survivorship rights on April 23, 2012. (Def. Ex. 3).

{¶11} Smith testified he also made three cash payments of \$9,999 to Wiley and that Wiley told him these payments would be applied towards the purchase price of the Grand Avenue Property. (Tr. 44-45, 50, 79). Wiley denied receiving these cash payments, despite signing (in the presence of notary at the bank) three documents prepared by Smith which evidenced Wiley's receipt of those funds. (Tr. 97-98; Plaintiff's Ex. 3-5). Wiley admitted she signed the documents, but claimed she simply did not read them. (Tr. 96-97). Notably, however, the documents, which were drafted by Smith indicate that the three \$9,999 payments were loans to Wiley. (Tr. 59, 75; Plaintiff's Ex. 3-5, attached).

{¶12} After Smith rested his case, Wiley moved the trial court for a directed verdict. The court sustained the motion and dismissed the fraud claim. From that judgment, Smith timely appealed. Smith now raises a single assignment of error.

{¶13} Smith's sole assignment of error states:

THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEES'
MOTION FOR A DIRECTED VERDICT.

{¶14} A trial court's decision granting a motion for directed verdict presents a question of law, which an appellate court reviews de novo. *Carter v. R & B Pizza Co., Inc.*, 7th Dist. No. 09JE34, 2010-Ohio-5937, ¶ 15. The applicable standard of review for a directed verdict is set forth in Civ.R. 50(A)(4):

¹ Payments of \$10,000, \$9,500, and \$7,000 total \$26,500. This would leave a balance of \$2,500 if the purchase price was \$29,000.

When granted on the evidence. 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.

{¶15} A motion for directed verdict tests the sufficiency of the evidence at trial, not the weight of such evidence or the credibility of witnesses. *Sayavich v. Creatore*, 7th Dist. No. 07-MA-217, 2009-Ohio-5270, ¶ 44. "[T]he court is confronted solely with a question of law: Was there sufficient material evidence presented at trial on this issue to create a factual question for the [factfinder]?" *One Step Further Physical Therapy, Inc. v. CTW Dev. Corp.*, 7th Dist. No. 11 MA 66, 2012-Ohio-6137, ¶ 35. "When the party opposing the motion has failed to produce any evidence on one or more of the essential elements of a claim, a directed verdict is appropriate." *Scanlon v. Pfaller*, 12th Dist. No. CA2005-05-110, 2006-Ohio-2022, ¶ 19.

{¶16} The elements of fraud are: (1) a representation or a concealment of a fact where there is a duty to disclose; (2) that is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance; and (6) a resulting injury proximately caused by the reliance. *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 47, citing *Gaines v. Preterm-Cleveland Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).

{¶17} Smith's fraud allegation has two components. We will address each in turn.

{¶18} First, Smith asserts that Wiley committed fraud by failing to disclose to him that the Grand Avenue Property was in foreclosure.

{¶19} A fraud action may be based on a party's failure to fully disclose facts of a material nature where there exists a duty to speak. *Layman v. Binns*, 35 Ohio St.3d 176, 178, 519 N.E.2d 642, 644 (1988). A seller has a duty to disclose material facts

that are latent or not readily observable or discoverable through a purchaser's reasonable inspection. *Id.* Nonetheless, the duty does not extend to defects that can be discovered upon inspection. *Id.*

{¶20} Here, the foreclosure proceedings were a matter of public record at the time the parties entered into their purchase agreement. (See Belmont County Case No. 11-CV-001). Smith therefore had the ability to discover the foreclosure proceedings through due diligence prior to entering into the contract. See *Lone Star Equities, Inc. v. Dimitrouleas*, 2d Dist. No. 26321, 2015-Ohio-2294, ¶¶ 60-68 (misrepresentations by vendor regarding pending tax appeal proceedings concerning the property could not form the basis of a fraud claim because tax appeal proceedings were matter of public record).

{¶21} Moreover, although Smith initially testified he was not certain when exactly he learned of the foreclosure, he later admitted he would have known about the foreclosure when he received Atty. Ryncarz's February 22, 2012 letter explaining the results of the title exam. (Tr. 68-69; Plaintiff's Ex. 9).

{¶22} And according to Atty. Ryncarz, Smith was aware of the foreclosure on February 8, 2012, at the latest. (Tr. 32-33). Further, the uncontroverted evidence shows that beginning on February 8, 2012, Smith entered into five successive addendums to the purchase agreement in which he agreed to extend the closing date without adding additional contract terms. (Defendant's Ex. 1). Thus, Smith cannot demonstrate justifiable reliance on any failure by Wiley to notify him sooner about the foreclosure. Smith continued to agree to extend the closing even after receiving a title examination noting the foreclosure proceedings. Accordingly, the foreclosure issue cannot form the basis of Smith's fraud claim against Wiley.

{¶23} Second, Smith asserts Wiley committed fraud by misrepresenting that three \$9,999 cash payments he made to her would be applied towards the purchase price of the property. Smith testified that Wiley told him that those cash payments would be applied towards the purchase price of the property. (Tr. 44-50). Although at first blush, this would seem to be enough to survive a directed verdict, Smith's testimony is contradicted by documents *he himself prepared*, which demonstrate that those three payments were intended as loans. (Plaintiff's Ex. 3-5).

{¶24} Specifically they provide: "Charles Chuck Wiley & Anita I. [sic.] Wiley, husband and wife acknowledge receipt of nine thousand, nine hundred ninety-nine dollars (\$9,999.00) from F.R. Smith *for a loan* using as collateral property identified as theirs listed below." (Emphasis added). The document goes on to identify three properties as collateral: the Grand Avenue Property, the two vacant lots, and 3785 Lincoln Avenue, Shadyside. The documents further provide that the loans are due to be repaid within 60 days of closing of the sale of the Grand Avenue Property. When questioned about one of the documents at trial, Smith described it as "a receipt for a loan that was a collateral property [sic]." (Tr. 44).

{¶25} To the extent that the language in those documents could be considered ambiguous, those ambiguities must be construed against Smith as the drafter. See *generally Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996). Thus, even when viewing the evidence in light most favorable to Smith, those three \$9,999 cash payments were loans to Wiley, using Wiley's property as collateral. Thus, no rational fact-finder could find in favor of Smith on his fraud claim against Wiley.

{¶26} Accordingly, Smith's sole assignment of error is without merit and is overruled.

{¶27} For the reasons stated above, the trial court's judgment is hereby affirmed.

Robb, P. J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.