

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brian Helwig,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 10AP-739
	:	(C.P.C. No. 09CVH-06-8392)
Connie Anzuini,	:	
	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 22, 2011

David A. Goldstein Co., L.P.A., and David A. Goldstein, for appellant.

James A. Zitesman, Attorney At Law, and James A. Zitesman, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Brian Helwig is appealing from the judgment entered against him based solely upon the complaint and amended complaint filed on his behalf. He assigns a single error for our consideration:

The Trial Court Erred As a Matter Of Law When It Dismissed Appellant's Amended Complaint.

{¶2} Counsel for Helwig filed his initial complaint on June 4, 2009. The complaint alleged liability based upon negligence and liability based upon fraud due to concealment of material facts.

{¶3} After service of process, counsel for Connie Anzuini filed an answer and followed it with a motion for judgment on the pleadings.

{¶4} The trial court granted the motion for judgment on the pleadings, but granted leave for the filing of an amended complaint. Such amended complaint was filed on February 8, 2010.

{¶5} Counsel for Anzuini did not file an answer to the amended complaint, but filed a motion to strike the amended complaint. The trial court treated the motion as a second motion for judgment on the pleadings. The trial court did not convert the motion to a motion for summary judgment, so the trial court was limited to considering the allegations in the second complaint and barred from considering facts or allegations outside the four corners of the amended complaint.

{¶6} Motions for judgment on the pleadings are primarily to be addressed as motions which raise issues of law, not fact. See *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565. The trial court must construe the material allegations as being true, with all reasonable inferences being construed in favor of the plaintiff. See *Whaley v. Franklin Cty. Bd. of Commrs.* (2001), 92 Ohio St.3d 574.

{¶7} Turning to the allegations in the amended complaint, two claims are listed by heading, negligence and fraud.

{¶8} The first claim is in negligence. The duty of care listed in the claim is a duty based upon a statute. R.C. 4735.67. Anzuini is alleged to be a real estate agent and the listing agent for 2983 Honeysuckle Lane in Hilliard, Ohio. Helwig purchased the property and then became displeased with it.

{¶9} The Honeysuckle Lane property was almost sold to a previous buyer, but that previous buyer refused to proceed after receiving a report of a home inspection which itemized various defects in the property.

{¶10} Anzuini was aware of the report of the home inspector and urged the seller to hire a Dick Phillips to make repairs to the property. Phillips was hired and did a number of repairs.

{¶11} Helwig later made his own offer to purchase the property. He was not aware at the time of the prior home inspection and the work of Phillips to make repairs. Helwig claimed also to be unaware that the roof to the Honeysuckle property had recently been replaced.

{¶12} Looking to the four corners of the complaint, there is no mention of any subsequent inspection of the property. Specifically, since no answer was filed with respect to the amended complaint, the only pleading before the court was the amended complaint. There is mention in the record before us of a subsequent home inspection paid for by Helwig which did not reveal the defects alleged in the original home inspection report. Had this case been decided following a motion for summary judgment and had a subsequent affidavit qualifying such a report for consideration been provided, the trial court could have considered it. Since the trial court granted judgment on the pleadings and granted that judgment in an entry which makes extended reference to the subsequent inspection report and even appears to rely upon that report in deciding the case, the trial court erred with respect to the negligence claim.

{¶13} The same problem affects the trial court's granting judgment as to the fraud claim. The amended complaint alleges that defects remained after the repair work. The amended complaint alleges specifically which defects remained; that Anzuini, as seller's agent, was aware of the defects; and that Anzuini concealed the significant defects from the buyer. Fraud can be either based upon affirmative action or upon a concealment of material facts which should be revealed. Such material facts are alleged in the amended complaint.

{¶14} Since the trial court considered documents and allegations outside of the four corners of the amended complaint, we sustain the assignment of error. We vacate the judgment of the trial court and remand the case for further appropriate proceedings.

Judgment vacated and remanded for further proceedings.

BRYANT, P.J., and SADLER, J., concur.
