[Cite as *Snider-Cannata Interests, L.L.C. v. Ruper,* 2010-Ohio-1927.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93401

SNIDER-CANNATA INTERESTS, LLC

PLAINTIFF-APPELLANT

vs.

JOHN A. RUPER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-622267

BEFORE: McMonagle, J., Rocco, P.J., and Boyle, J.

RELEASED: April 29, 2010
JOURNALIZED:

ATTORNEY FOR APPELLANT

Gerald W. Phillips
Cannata Phillips LPA, LLC
9555 Vista Way Suite 200
Garfield Heights, OH 44125

ATTORNEYS FOR APPELLEES

Mark R. Jacobs
Brian E. Ambrosia
Michael H. Diamant
Taft, Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Plaintiff-appellant, Snider-Cannata Interests, LLC, appeals the trial court's judgment granting summary judgment in favor of defendants-appellees, John and Barbara Ruper. We affirm in part and reverse and remand in part.

I

{¶ 2} The Rupers were the owners of property located at 8757 Brecksville Road, Brecksville, Ohio, which they operated as a motel (Pilgrim Inn). On February 1, 2006, the Rupers and Snider-Cannata entered into a contract, whereby the Rupers were to sell the property to Snider-Cannata for $1.7 million. The sale between the parties did not take place, however.

{¶ 3} In April 2007, Snider-Cannata filed this action against the Rupers, seeking a declaratory judgment, and asserting claims for breach of contract, fraud, and misrepresentation. The Rupers counterclaimed for breach of contract, and were granted leave to file a third-party complaint. During discovery, Snider-Cannata sought to obtain John Ruper's medical records and to have him submit to an examination, but the trial court denied its requests.

{¶ 4} The Rupers filed a motion for summary judgment; the court granted the motion and awarded judgment in favor of the Rupers and against

Snider-Cannata in the amount of $744,433.04, plus pre- and postjudgment interest. Snider-Cannata appeals the trial court's judgments granting the Rupers' summary judgment motion and denying discovery as to John Ruper's mental or physical capacity.

II

{¶ 5} Although not raised by the parties, we address the issue of jurisdiction because it appears uncertain. See *Kohout v. Church of St. Rocco Corp.*, Cuyahoga App. No. 88969, 2008-Ohio-1819, ¶4. As mentioned, Snider-Cannata sought a declaratory judgment. In particular, the company sought "a declaration that the Contract is null and void, void and voidable, cancelled, and the Plaintiff is entitled to recession of the Contract and the return of any and all earnest money and deposits paid upon said Contract[.]" The judgment that granted the Rupers' summary judgment motion reads in relevant part: "court grants summary judgment in defendants' favor and awards defendants judgment against plaintiff in the amount of $744,433.04 plus prejudgment and postjudgment interest at the statutory rate, and costs of this action."

{¶ 6} This court remanded the case to the trial court for clarification of: (1) the disposition of Snider-Cannata's claims against the Rupers, and (2) the disposition of the Rupers' claims against the third-party defendants. On remand, the trial court issued a judgment stating that "all of

[Snider-Cannata's] claims against [the Rupers] were disposed of pursuant to this court's granting of [the Rupers'] motion for summary judgment[.]" The entry further stated that although the court granted the Rupers leave to file a third-party complaint, no such complaint was ever filed and, therefore, there were no claims pending against third-party defendants.

{¶ 7} This court has held that "when a trial court enters a judgment in a declaratory judgment action, the order must declare all of the parties' rights and obligations in order to constitute a final, appealable order." *Stiggers v. Erie Ins. Group*, Cuyahoga App. No. 85418, 2005-Ohio-3434, ¶5; *Klocker v. Zeiger*, Cuyahoga App. No. 92044, 2009-Ohio-3102, ¶13. "As a general rule, a trial court does not fulfill its function in a declaratory judgment action when it fails to construe the documents at issue. Hence the entry of a judgment in favor of one party or the other, without further explanation, is jurisdictionally insufficient; it does not qualify as a final order." *Highland Business Park, LLC v. Grubb & Ellis* Co., Cuyahoga App. No. 85225, 2005-Ohio-3139, ¶23; *Klocker*, at ¶13.

{¶ 8} Here, the trial court's judgment rendered a judgment in favor of the Rupers without further explanation and, therefore, on its face, is jurisdictionally insufficient. However, the trial court could not have rendered a judgment in favor of the Rupers on its breach of contract claim if it had found that the contract was "null and void, void and voidable, cancelled,

and the Plaintiff [was] entitled to recession of the Contract and the return of any and all earnest money and deposits paid upon said Contract[,]" as sought by Snider-Cannata's request for declaratory judgment. Therefore, we read the trial court's entry as impliedly denying Snider-Cannata's request for declaratory relief, especially in light of the fact that this case has already been returned to the trial court once.[1]

III

{¶ 9} Under the contract, the Rupers were required to: (1) convey the property by warranty deed and provide a standard owner's title insurance policy showing good and marketable title, and (2) deliver to the escrow agent all instruments necessary to complete the contract. If title to the property was defective, the Rupers had 30 days from the date of notice of the defect to perfect same. If the defect could not be cured within the time limit, Snider-Cannata could cancel the contract or elect to accept the defective title. The parties agreed that Snider-Cannata's "ability to cancel this agreement

[1]This court reached a similar result in *Westlake v. Mascot Petroleum Co., Inc.* (Apr. 19, 1990), Cuyahoga App. No. 57508. There, the trial court did not rule on the applicability of the city's zoning ordinance under the defendant's counterclaim for declaratory relief. Nonetheless, this court held that there was a final appealable order because "the trial court could not render judgment against [the defendant] unless it found that the minimart was a service station as defined in the zoning ordinance. That determination was a necessary predicate for rendering judgment, for if the minimart was not a 'service station' as defined in the ordinance, the trial court's order would have no basis whatsoever." Id. at fn. 1.

under this provision shall expire 120 days after the execution date of this agreement[,]" or June 1, 2006.

{¶ 10} The contract also provided that the Rupers "represent that as of the Closing Date (a) there will be no liens, or security interests against the Property which will not be satisfied out of the sales proceeds unless securing payment of any loans assumed by [Snider-Cannata] and (b) assumed loans will not be in default. * * * During the Closing period and any extension thereof, [the Rupers] agree not to [ ] enter into and/or permit any liens, easements or leases as they may affect the subject real estate[.]"

{¶ 11} Further, the contract provided that Snider-Cannata inspected the property, and that "as a result of said inspection and not upon any representation made by the [Rupers], or any selling agent, or any agent for the [Rupers] * * * [Snider-Cannata] hereby expressly waives any and all claims for damages occasioned by any representation made by any person whomsoever * * * and the [Rupers] or their agent shall not be responsible or liable for any inducement, promise, representation, agreement, condition or stipulation not specifically set forth herein."

{¶ 12} A final relevant provision of the contract provided that Snider-Cannata's obligation to close the transaction was contingent upon successful rezoning of the property so that it would allow for senior housing. The contract contemplated that rezoning would require a rezoning petition on

the November 2006 general election ballot; if the petition was not placed on the ballot, or the voters rejected the rezoning, Snider-Cannata would have no further obligations under the contract. The issue was placed on the ballot and the voters approved it; the city and its planning commission, however, did not approve Snider-Cannata's plans.

IV

{¶ 13} Appellate review of summary judgments is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Zemcik v. La Pine Truck Sales & Equip.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court enunciated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-70, 696 N.E.2d 201, as follows:

{¶ 14} "Pursuant to Civ.R. 56, summary judgment is appropriate when (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."

{¶ 15} 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* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264. Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the

party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197; Civ.R. 56(E). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-59, 604 N.E.2d 138.

V

{¶ 16} The first four assignments of error relate to interpretation of the contract. In construing a contract, a court is to ascertain the intent of the parties. *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶18. Where the contract is clear and unambiguous, then its interpretation is a matter of law. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 1994-Ohio-172, 628 N.E.2d 1377. A contract is unambiguous as a matter of law if it can be given a definite legal meaning. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶7.

{¶ 17} For its first assigned error, Snider-Cannata contends that a genuine issue existed about the rezoning of the property. Snider-Cannata's argument is based on the fact that, under the Codified Ordinances of the City of Brecksville, the rezoning was conditional — it would be null and void if the city and its planning commission did not approve its plans.

{¶ 18} Relative to the zoning issue, the contract here clearly and unambiguously provided that it would be void if one of the following occurred: (1) the rezoning petition was not placed on the ballot, or (2) the voters rejected the rezoning. The issue was placed on the ballot and the voters approved it. Thus, under the plain language of the contract, the condition relative to rezoning was satisfied.

{¶ 19} Further evidence that the rezoning condition was satisfied can be gleaned from the fact that the contract contemplated a closing date within 14 days of the Cuyahoga County Board of Elections' Certification of the rezoning of the property, while the city's ordinances provided that "[t]he change in zoning" would be void if development plans were not submitted or approved within one year from the "approval of the change of zoning." The clear language of the contract provided that if the voters approved rezoning, the sale would be consummated upon that condition; approval by the city and its planning commission of Snider-Cannata's development plans was not a condition of the sale. Moreover, the language of the city's ordinances ("the change in zoning") indicates that, in fact, the zoning had changed. Accordingly, the first assignment of error is overruled.

{¶ 20} In its second assignment of error, Snider-Cannata contends that a genuine issue existed as to whether the Rupers breached the contract by placing further encumbrances and liens on the property.

{¶ 21} The plain terms of the contract provided that if title to the property was defective, the Rupers would have 30 days from the date of notice of the defect to perfect same. If the defect could not be cured within the time limit, Snider-Cannata could cancel the contract or elect to accept the title with the defective title. The parties agreed that Snider-Cannata's "ability to cancel this agreement under this provision shall expire 120 days after the execution date of this agreement[,]" or June 1, 2006.

{¶ 22} In support of its contention, Snider-Cannata cites notification it gave to the Rupers in March 2007, that there were "various title issues." That notice, however, was outside of the 120-day time period for cancellation by Snider-Cannata clearly set forth in the contract. Moreover, we are not persuaded by the company's argument that the 120-day limit was tolled by the two amendments to the initial February 1, 2006 contract. Both amendments set forth substantive additions or modifications (none of which relate to further encumbrances and liens on the property) and provide that "[b]oth Parties agree that all other covenants previously agreed upon to in the February 1, 2006 Real Estate Offer and Acceptance Contract apply." Thus, under the clear terms of the contract, the company had until June 1, 2006 to notify the Rupers of defects in the title, and failed to do so. The second assignment of error is therefore overruled.

{¶ 23} In its third assignment of error, the company contends that a genuine issue existed regarding marketable title to the property. First, it contends that the Rupers failed to provide an insurance policy showing good and marketable title. The policy, however, was not to be delivered to Snider-Cannata until a deed from the Rupers to Snider-Cannata was recorded. Because the contract was not completed, no deed was recorded, and the policy therefore was not delivered.

{¶ 24} Second, Snider-Cannata contends that because it was concerned about good and marketable title, it obtained preliminary title commitments on its own and discovered encumbrances beyond those allowed under the contract. It cites in particular to a May 2006 foreclosure action filed by Adelphia of the Midwest and a September 2006 mortgage filed by Keith A. Somer.

{¶ 25} Under the contract, the Rupers agreed "that as of the Closing Date (a) there will be no liens, or security interests against the Property which will not be satisfied out of the sales proceeds unless securing payment of any loans assumed by [Snider-Cannata] and (b) assumed loans will not be in default. * * * During the Closing period and any extension thereof, [the Rupers] agree not to [ ] enter into and/or permit any liens, easements or leases as they may affect the subject real estate[.]"

{¶ 26} The parties originally contemplated that the sale would close 14 days after the Cuyahoga County Board of Elections certified the rezoning of the property.[2] The encumbrances that Snider-Cannata complains of occurred well before the 14-day closing period set forth under the original agreement — in fact, they occurred even before the rezoning issue was placed on the November 2006 ballot. As such, the Rupers did not violate the terms of the contract prohibiting liens and encumbrances on the property during the closing period.

{¶ 27} Third, Snider-Cannata contends that the Rupers could not have provided marketable title to the property because "[d]efendant John Ruper's capacity and authority to contract comes into dispute * * *." The company relies on three documents in contesting John Ruper's capacity: (1) a letter from Barbara Ruper to the state fire marshal, (2) a court order obtained by Barbara Ruper during her divorce from John Ruper, and (3) a durable power of attorney executed by John Ruper.

{¶ 28} In the letter, written sometime in 2005, Barbara stated that she had to take over the day-to-day operations of the motel because John's "bipolar condition and increasing dementia were causing him to neglect the property." The letter further stated that "[t]he City was well aware of John's

[2]Under the second amendment to the contract, however, Snider-Cannata had an option to extend the closing, which it exercised three times, extending the closing until March 15, 2007.

mental problem. They themselves had taken him to the hospital when he had been probated by the court for mental evaluation * * *." The record is devoid, however, of any evidence that John was adjudicated incompetent. "[A] party who has not been adjudicated as mentally incompetent in a court of law is presumed to be competent." *Davis v. Marshall* (Aug. 9, 1994), Franklin App. No. 94APE02-158. Thus, the letter does not establish that John was incompetent.

{¶ 29} Likewise, the power of attorney and court order do not demonstrate that John was incompetent. The power of attorney gave John's two children, as attorneys-in-fact, authority to perform specific acts on his behalf. See *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 164, 542 N.E.2d 654. John's ability to transfer his interest in the property was not limited under the document. "[I]t is completely inconsistent with the fundamental principles of agency law to assert that an otherwise competent principal loses the capacity to enter into his own transactions simply because he has executed a durable power of attorney." *Smith v. Flaggs* (Oct. 29, 1998), Cuyahoga App. No. 74414, citing Restatement of the Law 2d, Agency Section 119.

{¶ 30} The court order did not demonstrate that John was incompetent. It was obtained by Barbara during her divorce from John and, in relevant part, provided that Barbara "shall be in charge of the day-to-day operations of

the business[,]" and that John was "restrained and enjoined from participating and/or interfering with the day-to-day operations of the [business.]"

{¶ 31} A party seeking to void a contract because of lack of capacity has the burden of proof by clear and convincing evidence. *DiPietro v. DiPietro* (1983), 10 Ohio App.3d 44, 46, 460 N.E.2d 657. Clear and convincing evidence is the measure or degree of proof that "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus. The documents relied on by Snider-Cannata do not clearly and convincingly demonstrate that John Ruper was incompetent when he executed the contract; at most, they demonstrate that he was not able to handle the day-to-day operations of the business.

{¶ 32} In light of the above, the third assignment of error is overruled.

{¶ 33} For its fourth assigned error, Snider-Cannata contends that genuine issues existed regarding its claims of fraud and misrepresentation. It relies on Barbara's letter to the fire marshal, wherein she addressed her efforts to comply with a number of building code violations, and cites R.C. 5301.253(A) which provides that: "[t]he owner of any property who has received written notice that the property is in violation of any building and housing code shall give the purchaser or grantee of the property written

notice of the code violations prior to entering into an agreement for the transfer of title to the property."

{¶ 34} "The elements of fraud are: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101, paragraph two of the syllabus.

{¶ 35} Regarding fraudulent concealment or nondisclosure, the Supreme Court of Ohio has held that "a vendor has a duty to disclose material facts which are latent, not readily observable or discoverable through a purchaser's reasonable inspection." *Layman v. Binns* (1988), 35 Ohio St.3d 176, 178, 519 N.E.2d 642. "Fraudulent concealment exists where a vendor fails to disclose sources of peril of which he is aware, if such a source is not discoverable by the vendee." *Bryk v. Berry*, Wayne App. No. 07CA0045, 2008-Ohio-2389, ¶ 7. "The nature of the defect and the ability of the parties to determine through a reasonable inspection that a defect exists are key to determining whether or not the defect is latent." Id.

{¶ 36} A representative of Snider-Cannata testified at deposition that he had never seen or heard of Barbara's letter and could not say whether the letter influenced the company's decision not to purchase the property. Thus, by the company's own testimony, there was no justifiable reliance, a necessary element for a fraud claim. Further, the company agreed that it had inspected the property, and that "as a result of said inspection and not upon any representation made by the [Rupers], or any selling agent, or any agent for the [Rupers] * * * [Snider-Cannata] hereby expressly waives any and all claims for damages occasioned by any representation made by any person whomsoever * * * and the [Rupers] or their agent shall not be responsible or liable for any inducement, promise, representation, agreement, condition or stipulation not specifically set forth herein." Thus, under the clear and unambiguous terms of the contract, Snider-Cannata assumed the duty of inspection of the property and waived any claims based on its condition. Accordingly, the fourth assignment of error is overruled.

{¶ 37} The fifth, sixth, and seventh assignments of error relate to John Ruper's capacity to contract. In the fifth assignment, Snider-Cannata contends that there were genuine issues about John's capacity to contract. The company relies on the three documents previously discussed, i.e., Barbara Ruper's letter to the fire marshal, the power of attorney, and the court order. We reiterate our previous finding regarding these documents:

they do not clearly and convincingly demonstrate that John Ruper was incompetent when he executed the contract; at most, they demonstrate that he was not able to handle the day-to-day operations of the business. The fifth assignment of error is therefore overruled.

{¶ 38} In the sixth assignment of error, the company contends that the Rupers fraudulently misrepresented or concealed John's mental capacity. Because there was no evidence demonstrating that John did not have the capacity to enter into the contract, the claim must necessarily also fail. The sixth assignment of error is overruled.

{¶ 39} For its seventh assigned error, Snider-Cannata contends that the trial court improperly denied its motion to compel John's mental health records and his submission for evaluation.

{¶ 40} A trial court is vested with discretion in rendering decisions on discovery matters. *Dandrew v. Silver*, Cuyahoga App. No. 86089, 2005-Ohio-6355, ¶35, citing *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 592, 1996-Ohio-265, 664 N.E.2d 1272. To show an abuse of discretion, the complaining party must show that the judge's actions were "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 41} Before a court may order a physical or mental examination, the physical or mental condition of a party must be in controversy, and there

must be good cause shown by a moving party. See Civ.R. 35(A). The 1970 Staff Notes to Civ.R. 35 state that "[t]he determination of 'in controversy' and 'good cause' is a case by case determination." As recognized by the Tenth Appellate District in *Shoff v. Shoff* (July 27, 1995), Franklin App. No. 95APF01-8, reversed on other grounds 181 Ohio App.3d 584, 2009-Ohio-1324, 910 N.E.2d 30, the United States Supreme Court, in *Schlagenhauf v. Holder* (1964), 379 U.S. 104, 118, 85 S.Ct. 234, 13 L.Ed.2d 152, stated that the "good cause" and "in controversy" requirements of Fed.R.Civ.P. 35, "are not met by mere conclusory allegations of the pleadings — nor by mere relevance to the case — but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." Furthermore, the Tenth Appellate District stated that "absent waiver, the 'good cause' requirement cannot be established merely by argument of counsel." *In re Guardianship of Johnson* (1987), 35 Ohio App.3d 41, 44, 519 N.E.2d 655.

{¶ 42} Snider-Cannata relies on the same three documents previously discussed in support of its argument that it had "good cause" for the sought-after discovery and that John's mental capacity was "in controversy." For the same reasons already discussed, we are not persuaded and find that

the trial court did not abuse its discretion by denying the company's motion to compel. The seventh assignment of error is therefore overruled.

{¶ 43} Finally, Snider-Cannata contends that the trial court calculated the Rupers' damages incorrectly. We agree.

{¶ 44} The Rupers submitted Barbara's affidavit and the expert report of W. Farley Helms, a senior vice president at Colliers Ostendorf-Morris, in support of their damage claim. Snider-Cannata did not contest the accuracy of the information in those documents, or present any contradictory evidence.

{¶ 45} The proper measure of damages for a buyer's breach of contract for the sale of real property is the difference between the original contract price and the fair market value of the property at the time of the breach. *Roesch v. Bray* (1988), 46 Ohio App.3d 49, 50, 545 N.E.2d 1301. In Helms's opinion, the fair market value of the property "was slightly under $800,000." Courts however have recognized that, in some circumstances, the subsequent sale price of the real property is sufficient evidence of its fair market value. Id. In considering whether to accept a subsequent resale as the fair market value at the time of the breach, the court must consider the following factors: (1) the length of time between the breach and resale; (2) the terms of the original contract and resale; and (3) any evidence as to the stability of the real estate market during the months between the breach and resale. Id.

{¶ 46} Barbara averred in her affidavit that after Snider-Cannata refused to purchase the property, she immediately marketed it to other potential buyers. She had some initial potential buyers, but agreements with them did not come to fruition. The Rupers eventually sold the property for $1,150,000 in August 2008. Using the subsequent resale amount for the fair market value ($1,700,000 – $1,150,000 = $550,000), and considering the $66,000 in commission expenses and an additional $128,433.94 in real estate taxes incurred by the Rupers, the trial court awarded $744,433.94 to the Rupers ($550,000 + $66,000 + $128,433.94 = $744,433.94).

{¶ 47} Snider-Cannata concedes that using the subsequent resale amount for the fair market value and adding the commission expenses was proper, but contests the award for the real estate taxes.

{¶ 48} Ohio courts have held that "a seller is not entitled to damages to compensate for additional property taxes, interest, utilities, and home maintenance expenses following a buyer's breach of a real estate contract." *Hiatt v. Giles*, Darke App. No. 1662, 2005-Ohio-6536, ¶41, citing *Hussey v. Daum* (May 3, 1996), Montgomery App. No. 15434; *Kauder v. Thompson* (May 9, 1986), Montgomery App. No. 9265. As explained in *Kauder*, the argument "that after the breach and an award of the difference in value [between the contract price and the eventual sale price], the vendor is as a matter of law also entitled to recover maintenance and other expenses for his own property

until such time as he is able to dispose of the property is not supported by * * * any authority * * * [and] is not the law of this state. Such future expenses are incidental to resulting ownership and not caused by the breach of contract."

{¶ 49} "'The inconvenience and expense of managing or disposing of one's own property after a prepared sale is breached or otherwise terminated is not a proper element of special damages against the defaulting purchaser.'" *Hiatt*, at ¶41, quoting *Hussey*. See, also, *Peterman v. Dimoski*, Hamilton App. No. C-020116, 2002-Ohio-7337, ¶11 (the cost of utilities, real estate taxes, and homeowners' association dues for the period until the home was sold were generally incidental to continued ownership and management of the property, and not recoverable as a proper element of additional special damages); *Roesch*, supra, at 51 (maintenance, utilities, and resale expenses are incidental to ownership).

{¶ 50} In light of the above, the eighth assignment of error is well taken. The damages award is affirmed as to the $550,000 and $66,000 amounts and the award of pre- and postjudgment interests and costs, but reversed as to the $128,433.94 amount.

{¶ 51} Judgment affirmed in part, and reversed and remanded in part for the trial court to issue an amended judgment consistent with this opinion.

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.

CHRISTINE T. McMONAGLE, JUDGE

MARY J. BOYLE, J., CONCURS;
KENNETH A. ROCCO, P.J., DISSENTS WITH SEPARATE OPINION

KENNETH A. ROCCO, P.J., DISSENTING:

{¶ 52} I disagree with the majority's determination that the trial court judgment in favor of the Rupers impliedly denied Snider-Cannata's claim for declaratory relief. To be sure, the common pleas court had the discretion to decline to rule on Snider-Cannata's request for a declaratory judgment,[3] but in

[3]Thus, for example, "where there is no real justiciable controversy between the parties, or where a declaratory judgment will not resolve the uncertainty or controversy," the court may dismiss the claim for a declaratory judgment. *Gator Dev. Corp. v. VHH, Ltd*., Hamilton App. No. C-080193, 2009-Ohio-1802, ¶42. Claims that do not fit within the scope of the Declaratory Judgment Act must also be dismissed. *Galloway v. Horkulic*, Jefferson App. No. 02JE52, 2003-Ohio-5145, ¶25. I express no opinion on the question whether the court properly could have exercised its discretion to dismiss the claim for a declaratory judgment in this case.

my opinion, the exercise of this discretion required the court to take affirmative action, that is, to make an express ruling.

{¶ 53} A complaint for a declaratory judgment asks the court to declare the parties' rights and obligations. While the complainant may ask for a declaration favorable to him or her, the declaration ultimately entered by the court may favor either party. Consequently, it is not fair to conclude that the judgment for the Rupers here impliedly declined to address Snider-Cannata's request for a declaratory judgment. The two are not corollaries of one another: the court could have granted judgment for the Rupers *and* entered a declaratory judgment construing the parties' contract and determining its validity. For this reason, intent to deny a claim for declaratory judgment cannot be inferred from a judgment favorable to the opposing party.

{¶ 54} I would hold that the common pleas court's judgment is not final and appealable because the court did not declare the parties' rights and obligations. In my opinion, the majority has effectively usurped the trial court's function by construing the contract terms and determining that the contract was valid and enforceable. Accordingly, I dissent.