[Cite as *Gutbrod v. Schuler*, 2010-Ohio-3731.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94228

JEFFREY J. GUTBROD

PLAINTIFF-APPELLANT

vs.

ROBERT L. SCHULER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-670815

BEFORE: Stewart, J., Rocco, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: August 12, 2010

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MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Jeffrey Gutbrod, appeals the judgment of the Cuyahoga County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Robert Schuler and Jeffrey Goebel, on appellant's breach of contract and tort claims. For the reasons stated below, we reverse.

{¶ 2} Appellant filed suit against Schuler and Goebel seeking return of the $50,000 investment he lost in a residential real estate venture arranged by appellees. The complaint sought recovery on claims of breach of contract, breach of fiduciary duty, conversion, fraudulent misrepresentation, ill will/ conscious disregard of rights, unjust enrichment, and breach of the implied

covenant of good faith and fair dealing. The trial court granted summary judgment to appellees on all claims. Appellant timely appeals this judgment raising a single error for our review.

{¶ 3} "I. The trial court erred in granting summary judgment to defendant/ appellee Robert Schuler, et al., and in failing to grant summary judgment to plaintiff/appellant Jeffrey J. Gutbrod."

{¶ 4} Appellees jointly moved for summary judgment on the grounds that the purchase agreement signed by appellant on April 12, 2006 was a valid and binding contract. Appellees contend that the language of the agreement is plain and unambiguous and manifests the full agreement between the parties. Appellees also argue that appellant's tort claims must fail as a matter of law because appellant's claims are based upon an alleged breach of a written contract and a breach of contract does not create a tort claim.

{¶ 5} Appellant argues that the purchase agreement is not valid or enforceable. He claims that after all of the terms of the real estate venture had been worked out between the parties, Schuler unilaterally changed the way the deal was structured and substituted a different agreement, one that materially changed the terms of the agreement, without informing the parties. Appellant argues that because there was no meeting of the minds between the parties, there is no enforceable contract. Appellant also argues

that, in addition to concealing the substitution of the documents, Schuler and Goebel concealed the fact that Goebel did not make the $50,000 investment in the project as agreed.

{¶ 6} Summary judgment is appropriate when, looking at the evidence as a whole: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 686-687, 1995-Ohio-286, 653 N.E.2d 1196. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, 604 N.E.2d 138. Our review of the trial court's judgment is de novo using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

{¶ 7} "It is imperative to remember that the purpose of summary judgment is not to try issues of fact, but rather to determine whether triable issues of fact exist." *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgmt., Inc.* (1993), 87 Ohio App.3d 613, 619, 622 N.E.2d 1093, quoting *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 14-15, 467 N.E.2d 1378.

{¶ 8} The following facts are gleaned from the deposition testimony and other evidence contained in the record. Most of the facts are not in dispute. In late 2005 or early 2006, Goebel approached appellant and Michael Schuessler,[1] about a possible investment opportunity in a residential real estate venture. He told them that a business associate of his, Robert Schuler, was putting together a business deal with Ryan Homes to develop residential properties in the Brunswick area. Schuler and Goebel were already engaged in a similar enterprise with Ryan Homes in Strongsville. Goebel explained that each of the three of them would put up $50,000 to invest in the project with Schuler.

{¶ 9} Schuler met with appellant and gave him information on the venture, including financial information, spreadsheets, and a project layout. Schuler later circulated a draft operating agreement among the parties. The draft agreement showed the formation of a multi-member limited liability company called EAS CARPENTER, LLC. Schuler, Goebel, Schuessler, and appellant were designated as original members of the company. Under the terms of the deal, appellant, Goebel, and Schuessler were to each make a $50,000 initial contribution to capital in return for 250 of the company's 1000 original shares. Schuler was to receive the remaining 250 shares and was

[1]Michael Schuessler, another party to the venture, joined in the complaint but voluntarily dismissed all of his claims prior to judgment.

named as manager to run the company. This agreement was drafted by Schuler's attorney, Todd Schrader. Schuessler's attorney, Keith Vanderburg, reviewed the draft agreement and negotiated changes to the agreement through Schrader. Appellant was not represented by counsel.

{¶ 10} Over the course of weeks, the parties corresponded via telephone and email to finalize the terms of the agreement. It appears from an April 5, 2006 email from Schuler that the parties had finalized the deal, subject to the signing of the operating agreement and the payment of the money.

{¶ 11} However, according to Schrader's deposition testimony and billing documents filed in the action, on April 6, 2006, Schuler unilaterally decided to restructure the deal. Under the new deal, EAS CARPENTER, LLC was formed as a single member company with Schuler as the original member. Schuler obtained all 1000 of the company's shares in return for a $100 equity contribution. Goebel, Schuessler, and appellant were each given the opportunity to buy into the company by purchasing 250 shares or "voting units" from Schuler for $50,000. As a result of the restructuring of the deal, instead of becoming original members of the company and contributing $50,000 to equity, the investors paid their money directly to Schuler and bought a share of his existing company.

{¶ 12} Schuler did not circulate the new agreement prior to the deal's closing date. In their depositions, both appellant and Schuessler stated that

they were not advised of any change in terms and did not see any document except the draft operating agreement prior to the signing date.

{¶ 13} On April 12, 2006, the parties met to sign the contract. Instead of the previously reviewed operating agreement, Schuler gave appellant a different document to sign. This document was captioned "Agreement For Purchase Of Membership Rights." Attached to the document was a copy of an operating agreement and bylaws for EAS CARPENTER, LLC signed by Schuler and showing him as the sole original member of the company effective March 22, 2006. Schuessler and Goebel were presented with separate purchase agreements made out in their respective names. Appellant admits he signed the purchase agreement without carefully reading it or the documents attached. He stated that he did not think he had to read them because all of the terms had been settled and agreed to prior to the meeting.

{¶ 14} Within a matter of days after signing, appellant and Schuessler paid their $50,000 directly to Schuler. On August 28, 2006, Ryan Homes decided not to go through with the project. Schuler tried to salvage the deal and looked for financing from other sources. Finally, he informed the parties that the deal was dead.

{¶ 15} Schuler refused appellant's and Schuessler's demands for an accounting of the company's finances. He also refused to return their money.

In his deposition, Schuler stated that he considered the money as his own and not company money. He said he had deposited it into the checking account of one of his other businesses, Schuler Car Wash. He told appellant that since the money was his, he had spent it all. He also stated that he did not open a bank account for EAS CARPENTER, LLC.

{¶ 16} The record is unclear as to whether Goebel ever paid Schuler the money for his 250 shares. In his deposition, Goebel stated that he paid $10,000 in April 2006, and another $15,000 in June 2006. These payments were made to EAS Construction, one of the other companies in which Schuler and Goebel were involved. Goebel also stated that he made a $25,000 payment in March 2008, well after the deal had fallen through.

{¶ 17} A meeting of the minds is an essential element of a contract. "The law is clear that to constitute a valid contract, there must be a meeting of the minds of the parties, and there must be an offer on the one side and an acceptance on the other. See 17 Ohio Jurisprudence 3d Contracts 445-446, Section 17." *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 442 N.E.2d 1302. Whether a meeting of the minds has occurred is a question of fact to be determined from all the relevant facts and circumstances. *Garrison v. Daytonian Hotel* (1995), 105 Ohio App.3d 322, 325, 663 N.E.2d 1316.

{¶ 18} In this case, a review of the emails and deposition testimony in the record, construed most strongly in appellant's favor, reveals that there

are genuine issues of material fact still in dispute as to whether a meeting of the minds occurred between Schuler and appellant on April 12, 2006. In his deposition, Schrader stated that as of March 23, 2006 there had been no execution of an operating agreement for EAS CARPENTER, LLC, that there was only a draft operating agreement. In an email to attorney Vanderburg dated April 6, 2006, Schrader discusses making changes to the wording of the operating agreement and states, "once we receive your client's blessing, we will proceed to finalization of OA." Yet, the operating agreement for EAS CARPENTER, LLC, attached to the purchase agreement appellant was given to sign on April 12, 2006, states the effective date of the operating agreement as March 22, 2006. The final page of the operating agreement states, "the Members have executed this Agreement as of the date designated opposite each Member's signature below." Below that is Schuler's signature and the date of March 22, 2006. Records from the Ohio Secretary of State's office show the documents to register EAS CARPENTER, LLC were signed by Schuler on March 21, 2006 and filed by Schrader's law firm on March 24, 2006. Therefore, we find questions of fact remain as to the intent and understanding of the parties relative to the agreed terms of the business venture, the formation of EAS CARPENTER, LLC, and the nature of appellant's investment.

{¶ 19} Because there remain triable issues of fact challenging an essential element of the formation of a contract, summary judgment was not appropriate. Accordingly, we sustain appellant's single assignment of error, reverse the judgment of the trial court, and remand the case for further proceedings.

{¶ 20} Judgment is reversed and the case is remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellant recover of appellees his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

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MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR