**[Cite as *Williams v. Kondziela*, 2004-Ohio-2077.]**

**THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

| | | |
|---|---|---|
| RUSH D. WILLIAMS, EXECUTOR OF THE ESTATE OF RUSH D. WILLIAMS,<br><br>Plaintiff-Appellee,<br><br>- vs -<br><br>JOSEPH KONDZIELA,<br><br>Defendant-Appellant. | : | **O P I N I O N**<br><br>**CASE NO. 2002-L-190** |

Civil Appeal from the Court of Common Pleas, Case No. 00 CV 001907.

Judgment: Affirmed.

*Gerald R. Walker*, 174 North St. Clair Street, Painesville, OH 44077 (For Plaintiff-Appellee).

*James S. Callender, Jr.,* 8440 Station Street, Mentor, OH 44060 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

**{¶1}** This appeal challenges the damages awarded by the trial court to appellee, Rush D. Williams, after appellant Joseph Kondziela breached a contract to purchase certain real estate belonging to the estate of appellee's deceased father.

**{¶2}** On September 24, 1999, at a public auction, appellant was the successful bidder on a parcel of property located in Leroy, Ohio for $78,500. On the same day,

appellant executed a purchase agreement which provided that the entire transaction would be completed on or before November 8, 1999. When the purchase agreement was signed, appellant made an $11,775 down payment via check which was returned "unpaid" by the bank.

**{¶3}** Ultimately, appellant procured the entire purchase price amount by cashing in his 401K account. Appellant deposited the entire purchase price into escrow. However, appellant did not sign the final documents necessary for closing the transaction. The closing date came and went but the transaction remained open.

**{¶4}** In interest of closing the deal, Kiko Auctioneers, the auctioneering company handling the transaction, placed numerous phone calls to appellant. Appellant failed to respond. Similarly, appellee's counsel sent appellant several letters that went unanswered. At trial, Joe Gorden, an agent of Kiko Auctioneers, testified that due to appellant's failure to respond, his company contacted the police in February of 2000 to determine whether appellant was still alive. Appellant was still alive, but simply difficult to reach. At trial, it was uncontroverted that each party had appellant's correct phone number and address.

**{¶5}** At trial, appellant testified that, since September 1999, he had been working eighteen hour days; consequently, when he was home, appellant stated, he was likely sleeping. Further, despite checking his mail approximately once a week, appellant testified that he never received any of the letters that were purportedly sent to his residence. Appellant stated that even though the closing date had passed, he thought the deal was still "on." Appellant indicated that he intended to close the transaction as soon as appellee delivered the keys to the property. Notwithstanding this

demand, the purchase agreement contained no specific contingencies or conditions precedent that authorized appellant to thwart closing in this fashion.[1]

**{¶6}** Although his attorney advised appellee that he was not obligated to accede to appellant's request, appellee testified that he personally delivered a set of keys to appellant, i.e., appellee stated he left the keys in appellant's mailbox in a sealed envelope on or about May 5, 2000. Like the various letters, appellant denies receiving the keys.

**{¶7}** By August of 2000, appellant had still failed to close the deal. Appellee testified that estate taxes, inter alia, had been accumulating and required payment. Appellee needed the funds from the sale of the property to make said payments. Therefore, on August 7, 2000, some ten months after the original closing date, appellee authorized the private sale of the property to a third party, who incidentally was the second highest bidder on the original sale, in the amount of $58,000.

**{¶8}** Appellee filed a complaint for breach of contract seeking compensatory and punitive damages. Appellant filed a counterclaim seeking, among other things, specific performance, reimbursement for items purchased and not received, reimbursement for labor he performed on the property, as well as reimbursement for payment of the electric bill for the property. The lower court awarded appellee $20,299.78 in compensatory damages (after subtracting $261, the amount of the items purchased by appellant as well as the amount of the electric bill paid by appellant), $10 in punitive damages, and $2,608.69 in attorney fees.

**{¶9}** Appellant now appeals alleging the following assignments of error:

1. In fact, Bill Mott, an escrow agent at Chicago Title, testified that keys are normally delivered at the time of closing and not before.

**{¶10}** "[1.] The trial court erred in failing to apply the liquidated damages cause [sic] of the sales contract.

**{¶11}** "[2.] The trial court erred in failing to take into account the failure of plaintiff to mitigate damages."

**{¶12}** Appellant premises his first assignment of error on the liquidated damages provision within the sales contract into which he entered on September 24, 1999. In particular, appellant argues that the purchase contract expressly provided for liquidated damages. Appellant contends that, in the event of default, the liquidated damages provision would automatically activate. As such, appellant concludes, the trial court erred by failing to apply this provision when it computed appellee's damages.

**{¶13}** The liquidated damages provision provides:

**{¶14}** "Buyer represents that he is ready, willing and able to carry out the terms, provisions, and conditions herein contained. If Buyer refuses to perform the requirements herein contained on his part to be performed, Seller may, in lieu of other remedies available to him, declare this Agreement null and void as to Buyer, and, at his option, all monies paid on account hereof not in excess of 15% of the agreed purchase price herein shall be forfeited to Seller as fixed, stipulated and liquidated damages without proof of loss; however, Broker shall hold said monies in its trust account pending an agreement by the parties or court order."

**{¶15}** Appellant suggests that the above provision specifically sets forth a mandatory cap on the amount of damages in the event of a default. In appellant's estimation, therefore, the appropriate damages would be $11,775, or fifteen percent of $78,500. We disagree.

**{¶16}** The liquidated damages provision in question states that the seller *may, in lieu of other remedies available*, accept damages for default in an amount not exceeding fifteen percent of the agreed purchase price. The term "may" implies the exercise of discretion. Consequently, the seller is not required to accept 15% of the agreed purchase price as damages in the event of default. Rather, a seller may use the liquidated damages provision as a mechanism for compensation in the event that he or she does not want to pursue other remedies. The provision does not foreclose the possibility of the seller pursuing alternate remedies.

**{¶17}** In the current case, appellant failed to close the transaction. After waiting for approximately ten months after the established date of closing, appellee, in his discretion, filed a complaint for breach of contract. Appellee did so in lieu of utilizing the liquidated damages provision in the purchase agreement. The liquidated damages provision did not preclude appellee from moving forward with his complaint for breach of contract. Rather, the liquidated damages provision was merely a stipulated remedy available to the seller at his option that, if utilized, would preclude alternate remedies. Pursuant to the plain language of the contract, appellee was not manacled to liquidated damages in the event of default. Thus, appellant's first assignment of error is not well taken.

**{¶18}** In his second assignment of error, appellant contends that the trial court erred in failing to take into account appellee's failure to sufficiently mitigate the damages. Specifically, appellant points out that the property was sold privately. As such, appellant argues that appellee did not obtain the greatest possible value for the

property. Thus, appellant concludes, appellee failed to meet his obligation to mitigate damages he sustained as a result of appellant's breach.

**{¶19}** As a foundational matter, a reviewing court will not disturb a trial court's decision regarding its determination of damages absent an abuse of discretion. *Roberts v. United States Fid. & Guar. Co.* (1996), 75 Ohio St.3d 630, 634. "The term discretion itself involves the idea of choice, of an exercise of will, of a determination made between competing considerations." *Roth v. Habansky*, 8th Dist. No. 82027, 2003-Ohio-5378, at ¶18, citing *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 256-257. An abuse of that discretion implies that the court exhibited an unreasonable, arbitrary, or unconscionable attitude in rendering its judgment. See, *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219.

**{¶20}** It is well established that the proper measure of damages for a breach of a real estate contract is the difference between the original contract price and the fair market value of the property at the time of the breach. *Roth,* supra, at ¶26. That said, a party seeking to recover damages must not only present evidence of the resale price, but must also present sufficient evidence that the resale price was the true indicator of the fair market value at the time of the breach. *Peterman v. Dimoski*, 1st Dist. No. C-020116, 2002-Ohio-7337, at ¶4.[2] Generally, it is improper for a court merely to award the difference between the original contract price and the resale price upon the assumption that the resale price constitutes the fair market value of the property at the time of the breach. Id.

2. Fair market value "is generally defined as that price which would be agreed upon between a willing seller and a willing buyer in a voluntary sale on the open market." *Loft v. Sibcy-Cline Realtors* (Dec. 13, 1989), 1st Dist. No. C-880446, 1989 Ohio App. LEXIS 4593, at 9. Thus, although a second auction may have been preferable to the manner in which the property was ultimately sold, such was unnecessary.

**{¶21}** These principles must be observed in light of the aggrieved party's duty to mitigate damages. To wit, there is no doubt that, whatever a breaching party's wrong may be, a plaintiff has a duty to minimize damages. This duty, also known as the doctrine of avoidable consequences, applies to those damages that the aggrieved party could have avoided with reasonable effort and without undue risk or expense. *Tokai Financial Services, Inc. v. Mathews, Gallovic, Granito & Co.* (Nov. 24, 1995), 11th Dist. No. 95-L-098, 1995 Ohio App. LEXIS 5163, at 7. The doctrine of avoidable consequences is a principle "arising from the cardinal principle that the damage award should put the injured party in as good a position had the contract not been breached at the least cost to the defaulting party." *F. Enterprises, Inc. v. Kentucky Fried Chicken Corp.* (1976), 47 Ohio St.2d 154, 159-160. However, mitigation requires only reasonable, practical care and diligence, not extraordinary measures to avoid excessive damages. *Tokai Financial Services*, supra, at 7.

**{¶22}** However, mitigation of damages is an affirmative defense. *Oliver v. C.M.H.A., Section 8,* 8th Dist. Nos. 80138, and 80347, 2002-Ohio-5830, ¶11. Moreover, if the breaching party desires to utilize the affirmative defense of mitigation of damages, it must do so in its responsive pleading. See *Austin v. Reliable Truck Parts, Inc.* (Apr. 10, 1984), 10th Dist. No. 83AP-904, 1984 Ohio App. LEXIS 9575, at 8. The failure to raise an affirmative defense waives that defense. *Oliver,* supra.

**{¶23}** In the case at bar, appellant neither raised this issue in his answer nor hiss amended answer and counterclaim. Furthermore, appellant does not contend that the issue was raised during trial. Although there is some suggestion that appellant's counsel took issue with appellee's failure to obtain more than $58,000 from the private

sale, the issue arose in the context of whether appellee had truly defaulted on the original contract. As such, there was no evidence adduced directly upon the issue of mitigation. Having not raised the affirmative defense of failure to mitigate by answer, and having not adduced evidence indicating the issue to be tried by consent of the parties in accordance with Civ.R. 15(B),[3] we find no error in the trial court's decision not to address the issue in its calculation of damages. In sum, while there was some evidence suggesting that the issue of failure to mitigate could have been raised, it was not properly raised nor was the evidence of such a nature as to indicate the issue was tried by the implied consent of the parties. Therefore, appellant's second assignment of error is without merit.

**{¶24}** For the above stated reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

Judgment affirmed.

WILLIAM M. O'NEILL and DIANE V. GRENDELL, JJ., concur.

3. Civ.R. 15(B) states, in relevant part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. ***Failure to amend as provided herein does not affect the result of the trial and these issues."