[Cite as *Spalla v. Fransen*, 2010-Ohio-3461.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

FRANK SPALLA, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-G-2912**
- vs -	:	
DR. PAULETTE KOHLER FRANSEN, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 07 M 000720.

Judgment: Affirmed.

Kevin J. M. Senich, Kevin J. M. Senich, L.L.C., 4438 Pearl Road, Cleveland, OH 44109-4225 (For Plaintiffs-Appellants).

Dr. Paulette Kohler Fransen, pro se, 12243 Presilla Road, Camarillo, CA 93012 (For Defendants-Appellees Dr. Paulette Kohler Fransen and Stonebridge Farm Trust).

Todd M. Jacket, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115-1093 (For Appellees Christopher Zuzolo, Esq. and Zuzolo, Zuzolo & Zuzolo).

MARY JANE TRAPP, P.J.

{¶1} Frank Spalla and Anne Buck appeal from several judgments of the Geauga County Court of Common Pleas in favor of Christopher Zuzolo and the law firm Zuzolo, Zuzolo, & Zuzolo. The appellants were sellers in a real estate transaction, where the buyer failed to close the sale pursuant to a purchase agreement. They filed a lawsuit not only against the buyer for breach of contract, but also against the title company and an attorney associated with the title company, as well his law firm,

alleging breach of fiduciary duty, third-party legal malpractice, fraud, and civil conspiracy. The sellers then settled their claim with the title company. The court granted summary judgment in favor of the attorney and the law firm regarding the third-party malpractice, fraud, and civil conspiracy claims, and limited the sellers' damage for the breach of fiduciary duty claim. The sellers now appeal from these judgments. For the following reasons, we affirm.[1]

{¶2} **Substantive Facts and Procedural History**

{¶3} The circumstances surrounding the failed real estate transaction were recited in Appeal No. 2009-G-2910, which we repeat below, adding additional facts as pertinent to this appeal.

{¶4} Dr. Paulette Kohler Fransen entered into a purchase agreement with Mr. Spaller and his ex-wife, Anne Buck (collectively as "Mr. Spalla" hereafter) to buy their house located at 15054 Hemlock Point Road, Russell Township, for the price of $695,000. The "Purchase Agreement Offer, Receipt and Seller's Acceptance" is apparently a form contract for residential properties used by the realtor, Coldwell Banker. It called for $10,000 of earnest money to be paid to "American Title Service, Chris Zuzolo, Attorney" within ten days of the seller's acceptance of an offer. It required the buyer to apply for financing within five days, and, if the loan was denied within 45 days, the buyer could waive the financing condition in writing. The agreement called for the proceeds of any mortgage loan to be obtained and the closing to occur within 90 days of the acceptance.

1. The sellers' breach of contract claim against the buyer was tried to the court. The court found the buyer in breach and awarded damages in the amount of $144,500 to the sellers. In a separate appeal, *Spalla v. Dr. Fransen*, 11th Dist. No. 2009-G-2910, we affirmed the court's judgment.

{¶5} A review of the purchase agreement indicates Mr. Spalla accepted Dr. Paulette Kohler Fransen's offer of $695,000 on July 20, 2004. Paragraph 13 of the document states: "Upon written acceptance, this offer *** shall become a legally binding agreement ***."

{¶6} The purchase agreement was then modified half a dozen times, extending the closing date eventually to December 31, 2004. Dr. Fransen never obtained financing for the house and ultimately did not go through with the transaction. The check for $10,000 for the earnest money was tendered but not paid because of insufficient funds, but Mr. Spalla only learned of that fact from Mr. Zuzolo a few days before the scheduled closing date. Mr. Spalla relisted the house in the spring of 2005, and, in December of that year, filed an action for specific performance.

{¶7} The complaint named not only Dr. Fransen but also American Title Services, Inc. ("ATS"), the title company named in the purchase agreement, Attorney Christopher Zuzolo, and his law firm Zuzolo, Zuzolo, & Zuzolo. Mr. Spalla later amended his complaint seeking money damages instead of specific performance after he sold the property for $555,000 to new buyers in June 2006.

{¶8} The complaint alleged a breach of contract by Dr. Fransen; a breach of fiduciary duty by ATS, Mr. Zuzolo, and the law firm; and a breach of contract to administer the escrow by ATS. In addition, it asserted a third-party malpractice claim against Mr. Zuzolo and the law firm, and fraud and civil conspiracy claims against all the defendants.

{¶9} Mr. Spalla then settled with ATS for $28,500 for the claim against ATS. Mr. Zuzolo and the Zuzolo law firm filed a motion for summary judgment. They

maintained they were not the escrow agent in the real estate transaction. The court granted summary judgment in their favor regarding the third-party malpractice, fraud, and civil conspiracy claims. The court, however, found Mr. Zuzolo breached his duty regarding the earnest money by failing to disclose to Mr. Spalla that there were insufficient funds to cover the earnest money check. For the breach, the court limited Mr. Spalla's damages to $10,000, the amount of the earnest money.

{¶10} Mr. Zuzolo and the law firm then filed a motion for reconsideration, contending they were entitled to a setoff of the settlement Mr. Spalla received from ATS. The court granted the motion, on the ground that Mr. Spalla had been fully compensated for the claim regarding the earnest money and therefore should not be entitled to any additional compensation.

{¶11} The only remaining claim tried to the court concerned the breach of contract claim against Dr. Fransen. The court found Dr. Fransen in breach and awarded Mr. Spalla damages of $140,000, which represented the difference between the original contract price of $695,000 and the proceeds he eventually received from the new buyers, $555,000. Dr. Fransen appealed that judgment, and we affirmed the trial court in a companion case, Case No. 2009-G-2010.

{¶12} **Additional Facts Pertinent to the Instant Appeal**

{¶13} As is pertinent to this appeal, the record reflects that Mr. Zuzolo is an employee of Zuzolo, Zuzolo, & Zuzolo. His practice consists mostly of providing legal services to American Title Services, Inc., a title company founded by his father in the 1970's. At one point during the pendency of the sale, instead of communicating through his real estate agent, Mr. Spalla began to communicate directly with Mr. Zuzolo

regarding the sale. Mr. Zuzolo would send Mr. Spalla correspondences on the law firm's letterhead. When Mr. Spalla inquired about the earnest money, Mr. Zuzolo assured him of its existence by sending him a copy of Dr. Fransen's check.

{¶14} Mr. Spalla did not learn that the check had been drawn against insufficient funds until December 28, 2004. Mr. Spalla alleged that had he known Dr. Fransen had not paid the earnest money, he would have tried to sell it to another buyer "more aggressively." Instead, he claims he relied on Mr. Zuzolo's representation that Dr. Fransen was a qualified buyer. Mr. Spalla alleged that during the pendency of the sale, he was approached twice by individuals who drove by the property and were interested in the house, but they were told a sale of the house was pending. He further alleged the property's value and marketability diminished by being off the market for a significant time.

{¶15} Regarding Mr. Spalla's breach of fiduciary claims against Mr. Zuzolo and the law firm, the trial court observed that the only reference in the purchase agreement relating to Mr. Zuzolo's obligations was in the earnest money provision of the agreement, which required the earnest money to be paid to "American Title Service, Chris Zuzolo, Attorney" and be deposited in a trust account.

{¶16} The court noted that, regarding the escrow, the contract provided "[a]ll documents and funds necessary to the completion of this transaction shall be deposited by the appropriate party in escrow with any lending institution or mutually agreeable escrow agent [within] 90 days of acceptance." The court stated that pursuant to the escrow provision in the purchase agreement, the escrow agent *was a matter for the parties to agree upon.* The court reasoned that the provision regarding the depositing of

the earnest money did *not* imply that the party who held that earnest money was to serve as escrow agent. The purchase agreement did not specify any duties of ATS or Mr. Zuzolo, other than to deposit the earnest money in a trust account.

{¶17} The court found that ATS and Mr. Zuzolo *did* owe a fiduciary duty to timely inform Mr. Spalla in the event the check could not be honored due to insufficient funds.

{¶18} For the breach of this duty, the court limited the damages to $10,000, the amount of the earnest money. Mr. Zuzolo and the Zuzolo law firm thereafter filed a motion for reconsideration/setoff, and the trial court granted a setoff for the settlement money Mr. Spalla had already received from ATS.

{¶19} The trial court also granted summary judgment in favor of Mr. Zuzolo and the law firm regarding the third-party legal malpractice, civil conspiracy, and fraud claim, in judgments dated December 10, 2008 and April 28, 2009.

{¶20} Mr. Spalla now appeals, asserting two assignments of error:

{¶21} "[1.] The trial court erred in granting in awarding [sic] summary judgment to Defendants Christopher Zuzolo, Zuzolo, Zuzolo & Zuzolo, LLC, Dr. Paulette Kohler Fransen, and Stonebridge Farm Trust in its Orders of December 10, 2008 and April 28, 2009.

{¶22} "[2.] The trial court erred in granting the Motion for Reconsideration/Setoff of Defendants Christopher Zuzolo and Zuzolo, Zuzolo & Zuzolo, LLC on March 20, 2009."

{¶23} **Standard of Review**

{¶24} We review de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v.*

Am. Industries and Resources Corp. (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id. citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶25} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence *** that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor."

{¶26} **Breach of Fiduciary Claim**

{¶27} Mr. Spalla's main claim in this dispute is that Mr. Zuzolo breached his fiduciary duty as the escrow agent in failing to timely inform him that the buyer's earnest money check was drawn against insufficient funds.

{¶28} A "fiduciary" is defined as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." *Hurst v. Enter. Title Agency*, 157 Ohio App.3d 133, 2004-Ohio-2307, ¶39, quoting *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216. In *Hurst*, this court further explained that "[a] breach of a fiduciary duty claim essentially is a negligence claim involving a higher standard of care. Thus, the party asserting such breach must

establish the existence of a fiduciary duty, a breach of that duty, and an injury proximately therefrom." Id. at ¶39 (citation omitted).

{¶29} To succeed on a claim of breach of a fiduciary duty, the plaintiff must prove the existence of a duty arising out of a fiduciary relationship, failure to observe that duty, and injury resulting proximately therefrom. *Culbertson v. Wigley Title Agency*, 9th Dist. No. 20659, 2002-Ohio-714, ¶24, citing *Strock*, 216.

{¶30} An escrow is described by the Supreme Court of Ohio as follows:

{¶31} "An escrow in Ohio, as between grantor and grantee of real estate, is witnessed by a written instrument known as an escrow agreement, delivered by mutual consent of both parties to a third party denominated the depositary or escrow agent, in which instrument certain conditions are imposed by both grantor and grantee, which conditions the depositary or escrow agent, by the acceptance and retention of the escrow agreement, agrees to observe and obey." *Squire v. Branciforti* (1936), 131 Ohio St. 344, paragraph one of the syllabus.

{¶32} "An escrow is a matter of agreement, usually evidenced by a writing placed with a third-party depository, providing certain terms and conditions the parties intend to be fulfilled prior to the termination of the escrow." *Pippin v. Kern-Ward Bldg. Co.* (1982), 8 Ohio App.3d 196, 198. See, also, *Waffen v. Summers*, 6th Dist. No. OT-08-034, 2009-Ohio-2940, ¶29; *Janca v. First Fed. S. & L. Assn. of Cleveland* (1985), 21 Ohio App.3d 211, 213. "Escrow is controlled by the escrow agreement, placing the deposit beyond the control of the depositor and earmarking the funds to be held in a trust-like arrangement." *Pippin* at paragraph two of the syllabus. The escrow agent owes the parties a duty to carry out the terms of the agreement as intended by the

parties. *Hurst* at ¶40, citing *Pippin*. "[I]f an escrow agent neglects to carry out the instructions of a party to the escrow agreement, liability will result for the damages induced thereby." *Pippin* at 198, citing 20 Ohio Jurisprudence 2d 215, Escrows, Section 8.

{¶33} We recognize some courts have implied that an escrow does not necessarily have to be evidenced by writing. See, e.g., *Pippin* at 198 (an escrow is a matter of agreement, "usually" evidenced by a writing); see, also, *Waffen*. However, there is no precedent from this court holding that an escrow does not have to be in writing. Therefore, we follow the rule established by the Supreme Court of Ohio in *Squire* which requires an escrow to be evidenced by writing. See *Lu Ru Co. v. Westminster Fin. Group* (Jan. 31, 1986), 6th Dist. No. WD-85-29, 1986 Ohio App. LEXIS 5449 (no escrow contract existed and therefore the title company owed no fiduciary duty to the seller).

{¶34} Therefore, as it is undisputed that there was no separate written escrow agreement in the subject real estate transaction, we look only to the purchase agreement for the duties owed by Mr. Zuzolo. That agreement provided only for the earnest money of $10,000 to be paid to "American Title Service, Chris Zuzolo, attorney" within ten days of acceptance and for the fund to be deposited in a trust account.

{¶35} Thus, the trial court was correct in determining that the only fiduciary duty owed by Mr. Zuzolo as a representative of ATS to Mr. Spalla was to timely inform him of a nonpayment of the earnest money due to insufficient funds.

{¶36} **Damages**

{¶37} Had Mr. Zuzolo timely disclosed to Mr. Spalla a lack of payment of earnest money by the buyer, Mr. Spalla could have declared the buyer in breach of the purchase agreement and made immediate efforts to collect the amount of $10,000 from her. Therefore, the court properly decided the case can proceed against Mr. Zuzolo as to the $10,000 earnest money for the breach of fiduciary duty claim.

{¶38} Mr. Spalla did not present evidence to demonstrate the non-disclosure caused damages *beyond* the earnest money. Mr. Spalla maintains that if he had known of the insufficient funds, he would have withdrawn from the purchase agreement and returned the house to the market earlier. However, he failed to present any evidence to demonstrate that if he had relisted the property sooner, he would have sold the property for more than the contract price of $695,000. The record reflects the property received only two offers during the two years it was listed – one from Dr. Fransen and one from the eventual buyers. In fact, as the trial court found, Mr. Spalla admitted he had presented no evidence to show the property would have actually sold at all if it was returned to the market during the pendency of the Fransen transaction.

{¶39} Additionally, the contract permitted Mr. Spalla to consider other offers if presented, and the buyer would then have the right to "waive the financing condition and proceed."

{¶40} **Other Claims**

{¶41} Mr. Spalla cannot recover under his claims of third-party legal malpractice, fraud, and civil conspiracy for the same reason. Regardless of whether he could successfully establish the essential elements of these claims, he failed to present any evidence of *damages* caused by Mr. Zuzolo's failure to disclose. Under these

circumstances, the trial court properly granted summary judgment in favor of the defendants regarding these claims.[2]

{¶42} Because no genuine issue of material fact remains for trial, the court properly granted summary judgment in favor of the defendants regarding the third-party malpractice, fraud, and civil fraud claims and limited Mr. Spalla's damages regarding the breach of fiduciary duty claim to $10,000.

{¶43} **Setoff**

{¶44} The trial court also found that the title company, ATS, was jointly liable for the breach of fiduciary claim. Because the settlement of $28,500 ATS paid to Mr. Spalla exceeded his damages of $10,000 for the breach of fiduciary claim, Mr. Spalla had been fully compensated for the claim and a setoff would be proper.

{¶45} Pursuant to R.C. 2307.28(A), a release reduces the claim against the other tortfeasors by the amount of the consideration paid in exchange for the release. A person is liable in tort when he or she acted tortiously and thereby caused harm; the determination may be a jury finding, a judicial adjudication, stipulations of the parties, or the release language itself. *Fidelholtz v. Peller*, 81 Ohio St.3d 197, 203. Here, Mr. Spalla asserted a breach of fiduciary duty claim against both ATS and the Zuzolo entities. As the court found them jointly liable, a setoff is proper.

{¶46} Moreover, in light of our affirmance of the trial court's award of damages to Mr. Spalla in Case No. 2009-G-2910, Mr. Spalla is fully compensated for the benefit of

2. We note additionally that when the legal malpractice claim cannot be successfully maintained against Mr. Zuzolo, it cannot be maintained against his law firm. See *Nat'l Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601 (a law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice).

his bargain in this real estate matter and should not be entitled to a windfall. The trial court properly limited his recovery.

{¶47} For the foregoing reasons, we overrule Mr. Spalla's first and second assignments of error. The judgment of the Geauga County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, J., concurs in judgment only with Concurring Opinion.

TIMOTHY P. CANNON, J., concurring in judgment only.

{¶48} I respectfully concur in the ultimate judgment of the majority, affirming the summary judgment entered by the trial court. However, I write separately with regard to one aspect of the analysis.

{¶49} The trial court originally found that appellees were not entitled to summary judgment on appellants' breach of fiduciary duty claim. However, the trial court "reconsidered" its prior entry and entered summary judgment in favor of appellees on all counts. Specifically, the trial court concluded that, as a result of appellants' settlement with American Title Services, they were not entitled to any additional compensation from appellees on their breach of fiduciary claim. I agree with the trial court.

{¶50} Appellants have not set forth any evidence that they are entitled to more than the $28,500 they have already received in relation to their breach of fiduciary claim. Thus, appellees are entitled to judgment as a matter of law, and the trial court

properly granted summary judgment to appellees on all issues. The majority's analysis as to whether appellees may have owed a fiduciary duty to appellants is extraneous, because those who may have owed a "fiduciary" duty to appellants, i.e. the title company and officers, are no longer parties to the case. The only parties remaining are the attorney and the law firm, who did not owe a "fiduciary" duty to appellants at any time.