[Cite as *Huegel v. Scott,* 2015-Ohio-3554.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

JOHN E. HUEGEL,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2015-T-0014**
- vs -	:	
CAROL J. SCOTT, TRUSTEE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2014 CV 0398.

Judgment: Affirmed.

Daniel S. White, Daniel S. White, Esq., 34 Parmelee Drive, Hudson, OH 44067 (For Plaintiff-Appellant).

James R. Scher, Burkey, Burkey & Scher, Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} John E. Huegel appeals from the grant of summary judgment to Carol J. Scott by the Trumbull County Court of Common Pleas in his action for fraudulent inducement, fraud, and mutual mistake regarding the purchase of a house in the City of Warren, Ohio. Finding no error, we affirm.

{¶2} Ms. Scott owned and lived at a house located at 412 Kenmore S.E. in Warren from 1985 until 2009. In 2009, she moved to another house, and used the

Kenmore house as a rental property. In early December 2012, Ms. Scott entered into a purchase agreement with Mr. Huegel for the 412 Kenmore house. In relation to this agreement, Ms. Scott executed a residential property disclosure form, as mandated by R.C. 5302.30. The form contains various clauses requiring a seller to disclose problems relating to water intrusion and/or damage to a property. Ms. Scott indicated there were no such problems in her answers to each of these questions.

{¶3} The purchase agreement provided for a series of potential inspections. Mr. Huegel waived most of these, and only had a general home inspection done. The report indicates no problems relating to water intrusion or damage at the house. Thereafter, the parties executed an amendment to the purchase agreement, removing any contingencies subject to certain conditions. Pursuant to the purchase agreement, this meant Mr. Huegel accepted the house in "as is" condition.

{¶4} Mr. Huegel moved into the house in May 2013. He noticed water on the basement floor in July 2013. He also found water seeping from cracks in the basement walls. The basement continued to be wet throughout the summer and fall of 2013. The same cycle of wetness occurred in 2014.

{¶5} Mr. Huegel filed his complaint in February 2014. Ms. Scott answered, and discovery ensued. October 28, 2014, Ms. Scott moved for summary judgment. The purchase agreement, amendment, and Mr. Huegel's inspection report were attached as exhibits. Also attached were her answers to Mr. Huegel's interrogatories. In relevant part, these disclosed the basement floor was last painted in 1994, and the walls in 2009; and that she had used the basement as a utility room, and for storage of clothes, tools and craft supplies. Ms. Scott further submitted her own affidavit; that of her ex-

husband, Walter, and those of her two brothers. Ms. Scott averred she had never had any problem with water in the basement. Her ex-husband and one brother averred they helped her move out in 2009, and there was no water in the basement, nor any signs of water damage, or water damage to any of the belongings they removed from the basement. Her other brother averred he made minor repairs to the house, and never saw any sign of water damage.

{¶6} Mr. Huegel opposed the summary judgment motion. In his affidavit, he averred the basement had been painted recently, since he found paint cans there. He averred there were retaining tracks on the basement floor along the walls, designed to direct water to a specific location. He averred the paint on the walls of the basement had peeled, revealing mold. He averred he had relied on Ms. Scott's property disclosure form, stating there were no water problems with the house.

{¶7} The trial court filed its decision, granting Ms. Scott summary judgment, January 21, 2015. This appeal timely followed, Mr. Huegel assigning a single error: "The trial court's decision to grant the defendant's motion for summary judgment constitutes reversible error."

{¶8} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc*., 66 Ohio St.3d 64, 66, * * *(1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant 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, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. *See e.g.* Civ.R. 56(C).

{¶9} "When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 121, * * * (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, * * * (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp.*, 11th Dist. No. 2002-A-0061, 2003 Ohio 6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-252, * * * (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, * * * (1996)." (Parallel citations omitted.) *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6.

{¶10} Mr. Huegel advances two arguments in support of his assignment of error. The first is that fraudulent inducement, or fraud, by Ms. Scott, negates the purchase agreement.

{¶11} Mr. Huegel purchased the house "as is." Thus, the doctrine of caveat emptor applies.

{¶12} "The doctrine of *caveat emptor* precludes recovery in an action by the purchaser for a structural defect in real estate where (1) the condition complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser had the unimpeded opportunity to examine the premises, and (3) there is no fraud on the

part of the vendor." (Emphasis sic.) *Layman v. Binns*, 35 Ohio St.3d 176, at the syllabus (1988).

{¶13} "'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, * * *, paragraph two of the syllabus. Regarding fraudulent concealment or nondisclosure, the Ohio Supreme Court 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* [*supra*, at] 178." (Parallel citations omitted.) *Wallington v. Hageman*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, ¶15.

{¶14} The elements of fraudulent inducement are substantially the same as those of fraud. *See, e.g. Ownerland Realty, Inc. v. Zhang*, 12th Dist. Warren Nos. CA2013-09-077 and CA2013-10-097, 2014-Ohio-2585, ¶19.

{¶15} In this case, Mr. Huegel contends Ms. Scott concealed there was a longstanding problem with water in the basement. He cites to his own affidavit stating the basement had been recently painted, contrary to Ms. Scott's assertions, as evidence by the presence of paint cans in the basement. He also notes the fact there are retaining tracks along the basement walls for the direction of water.

{¶16} We respectfully agree with the trial court that these points raised by Mr. Huegel are insufficient to create a genuine issue of material fact as to whether Ms. Scott made any false representation, or concealed anything. The presence of paint cans in a basement used for storage purposes does not necessarily indicate they were used recently to paint that basement. The existence of retaining tracks for directing moisture does not necessarily indicate they did, in fact, direct moisture. They could very well have been installed at the time of construction as a precaution. Further, Mr. Huegel had an unimpeded opportunity to inspect the basement: the presence of the paint cans and the retaining tracks were discoverable at that time. Thus, caveat emptor applies. *Layman*, *supra*, at the syllabus.

{¶17} Mr. Huegel also argues the doctrine of mutual mistake applies.

{¶18} "In *Reilley v. Richards*, 69 Ohio St.3d 352, 352-353, * * *, the Ohio Supreme Court held that a mutual mistake as to a material fact in a real estate transaction is grounds to rescind such transaction absent the failure to exercise ordinary care to discover the mistake on the part of the party seeking the rescission.

{¶19} "'A mistake is material to a contract when it is "a mistake (* * *) as to a basic assumption on which the contract was made (that) has a material effect on the agreed exchange of performances." 1 Restatement of the Law 2d, Contracts (1981) 385, Mistake, Section 152(1). Thus, the intention of the parties must have been frustrated by the mutual mistake.' *Id.* at 353.

{¶20} "In *Reilley,* the supreme court reversed the appellate court's decision and affirmed the trial court's finding of a mutual mistake and rescission of a real estate contract. *Id.* The court held that 'the lack of knowledge that a significant portion of the

lot is located in a floodway is a mistake of fact of both parties that goes to the character of the property such that it severely frustrates the appellant's ability to build a home on the property. Thus, it is a mutual mistake of fact that is material to the subject matter of the contract.' *Id.*" (Parallel citation omitted.) *Wallington*, *supra*, at ¶24-26.

{¶21} Mr. Huegel argues the water damage the house has sustained since his purchase indicate a pre-existing condition, which would have caused him not to enter the agreement, and which amounts, at the least, to a mutual mistake of fact if Ms. Scott was unaware of the problem. However, this argument presupposes a water problem did exist prior to his purchase. There is simply nothing in the record to show this.

{¶22} The assignment of error lacks merit.

{¶23} The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON P.J.,

THOMAS R. WRIGHT, J.,

concur.