[Cite as *Helfrich v. Strickland*, 2009-Ohio-4828.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES HELFRICH

Plaintiff-Appellant

-vs-

CAROL STRICKLAND, et al.

Defendants-Appellees

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 008 CA 101

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 05 CV 120
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 11, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
JAMES HELFRICH PRO SE Post Office Box 921 Pataskala, Ohio 43062	KRISTIN E. ROSAN TIMOTHY G. MADISON DARCY A. BURDETTE 1031 East Broad Street Columbus, Ohio 43205

Wise, J.

{¶1} Plaintiff-Appellant James Helfrich appeals the decision of the Licking County Court of Common Pleas granting Defendants-Appellees' motion for summary judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts are as follows:

{¶3} On November 3, 2003, Appellant contacted Appellee Carole Strickland, as listing agent with Coldwell Banker, and submitted a bid for One Hundred Fifteen Thousand Dollars ($115,000.00) for the purchase of the real property known as 185 Isaac Tharp Street, Pataskala. On that same day, Appellee Strickland notified Appellant that his offer had been rejected and that the seller had accepted another offer.

{¶4} On or about November 14, 2003, Appellee Strickland called Appellant and informed him that the property was back on the market. The following day, Appellee David Garner, another listing agent with Coldwell Banker, and Appellant walked through the property. While walking through the property, Appellee Garner informed Appellant there was a problem with the water line to the ice maker. (See Garner Affidavit). Appellee Garner also informed Appellant that the property was being sold "as is" and cautioned Appellant to have the property inspected. Id. Appellee Garner states that Appellant responded by saying that he "just did the inspection." Id. Appellant proceeded to execute a purchase agreement the same day and ultimately purchase the property for $120,000.00

{¶5} On or about November 26, 2003, Appellant executed an "AS IS" Addendum to the Real Estate Purchase Contract, which states, in part:

{¶6} “Buyer is aware that Seller acquired the property which is the subject of this transaction by way of foreclosure or deed in lieu and that Seller is selling and Buyer is purchasing the property in its present "AS IS" CONDITION WITHOUT REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE.

{¶7} “Buyer acknowledges for Buyer and Buyer's successors, heirs and assignees, that Buyer has been given a reasonable opportunity to inspect and investigate the property and all improvements thereon, either independently or through agents of Buyer's choosing, and that in purchasing the property Buyer is not relying on seller, or its agents, as to the condition or safety of the property and/or any improvements thereon ...

{¶8} “Buyer(s) further states that they are relying solely upon their own inspection of subject property and not upon any representation made to them by any person whomsoever, and is purchasing subject property in the condition in which it now is, without any obligation on the part of the Seller to make any changes, alterations, or repair thereto.

{¶9} Upon taking possession of the property, Appellant claims that he "turned on the city water in the home and later returned to a house that was flooded, due to hidden plumbing defects within the home." (Appellant's Brief at 2). As a result of this alleged hidden defect, Appellant claims that he has sustained damages ranging from Five Thousand Dollars ($5,000.00) to Twenty Seven Thousand Dollars ($27,000.00).

{¶10} On or about January 27, 2005, Appellant James Helfrich filed a pro se Complaint against Appellees Carole Strickland, David Garner, and NRT Columbus, LLC

d/b/a Coldwell Banker King Thompson f/k/a NRT Columbus, Inc. Appellant's claims include fraud, breach of fiduciary duty, and violation of R.C. Chapter 4735.

{¶11} Discovery proceeded with Appellees taking the deposition of Appellant and inspecting the property which is the subject of this action.

{¶12} A Magistrate's Decision dated January 24, 2007, ordered Appellant to disclose any documents that he intended to introduce into evidence to prove repair expenses or other damages to Appellees no later than February 13, 2007 at 9:00 a.m.

{¶13} On or about March 13, 2007, the trial court judge adopted the January 24, 2007, Magistrate's Decision in its entirety pursuant to Civ.R. 53.

{¶14} On April 17, 2007, Appellees filed a Motion for Summary Judgment as to all of Appellant's claims. On April 30, 2007, Appellant filed his brief in opposition, with Appellees filing their reply on May 15, 2007.

{¶15} On July 18, 2008, the trial court issued a Judgment Entry granting Appellees' Motion for Summary Judgment. In support of its decision, the trial court cited to the case *Brewer v. Brothers* (1992), 82 Ohio App.3d 148, for the proposition that one measure of damages is the difference between the value of the property as it was represented to be and its actual value at the time of purchase. The trial court further found that Appellant failed to provide any evidence to support his claimed damages.

{¶16} Appellant now appeals this decision, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶17} "I. THE TRIAL COURT ERRED IN ITS JUDGMENT ENTRY WHEN IT RULED THAT THE APPELLANT IS MANDATED TO DEMONSTRATE THAT THE

PROPER MEASURE OF DAMAGES IS THE DIFFERENCE BETWEEN THE VALUE OF THE PROPERTY AS IT WAS REPRESENTED TO BE, AND ITS ACTUAL VALUE AT THE TIME OF PURCHASE BENEFIT OF BARGAIN RULE.

{¶18} "II. THE TRIAL COURT ERRED WHEN IT DISMISSED THE APPELLANT'S COMPLAINT WITHOUT CONSIDERING BREACH OF FIDUCIARY DUTIES, VIOLATIONS OF OHIO REVISED CODE 4735, WHICH WERE RAISED BY THE APPELLANT IN HIS COMPLAINT.

{¶19} "III. THE TRIAL COURT ERRED WHEN IT CONSIDERED EVIDENCE NOT IN THE RECORD.

{¶20} "IV. THE TRIAL COURT ERRED IN NOT RULING ON MOTIONS, WHICH VIOLATES APPELLANT'S DUE PROCESS RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THEREFORE PREJUDICING HIS RESPONSE TO THE APPELLEES' MOTION FOR SUMMARY JUDGMENT. APPELLANT IS ARGUING THE TRIAL COURT HAS NOT RULED ON PENDING MOTIONS.

{¶21} "V. THE TRIAL COURT ERRED IN NOT CONSIDERING APPELLANT'S MOTION TO SUPPLEMENT HIS REPLY TO THE APPELLEES' MOTION FOR SUMMARY JUDGMENT.

{¶22} "VI. THE TRIAL COURT ERRED WHEN THEY RELIED ON A MAGISTRATE'S ORDER THAT HAS BEEN CHALLENGED. FURTHERMORE, THE TRIAL COURT PLACED THE BURDEN OF PROOF ON THE NON-MOVING PARTY, AND GRANTED APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE

APPELLANT HAD PROVIDED NO EVIDENCE OF THE COST OF REPAIRS HE HAD UNDERTAKEN.

{¶23} "VII. THE TRIAL COURT ERRED WHEN THEY CONSIDERED AN ACTION BROUGHT AGAINST APPELLEES IN MUNICIPAL COURT."

Summary Judgment Standard

{¶24} In each of his assignments of error, Appellant argues that the trial court erred in granting summary judgment in favor of Appellee.

{¶25} Civ.R. 56(C) states in pertinent part:

{¶26} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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 or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶27} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the

undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St.2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301.

{¶28} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶29} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St.3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732.

I.

{¶30} In his first assignment of error, Appellant argues that the trial court applied the wrong measure of damages. We disagree.

{¶31} Appellant argues that the trial court incorrectly applied the “benefit of the bargain” rule in the instant case and that the true measure of damages should be the

reasonable cost of restoration plus the reasonable value of loss of use of the property between the time of injury and restoration.

{¶32} The trial court, in its Judgment Entry cited the case of *Brewer v. Brothers* (1992), 82 Ohio App.3d 148, which holds:

{¶33} "Where there is fraud inducing the purchase or exchange of real estate, Ohio courts have held that the proper measure of damages is the difference between the value of the property as it was represented to be and its actual value at the time of purchase or exchange. This is known as the "benefit of the bargain" rule. *Molnar v. Beriswell* (1930), 122 Ohio St. 348, 171 N.E. 593, paragraph one of the syllabus; *Starinki v. Pace* (1987), 41 Ohio App.3d 200, 202, 535 N.E.2d 328, 330. Courts have also held that the cost of repair or replacement is a fair representation of damages under the benefit of the bargain rule and is a proper method for measuring damages. *Lyons v. Orange* (May 4, 1982), Montgomery App. No. CA 7566, unreported; *Burgio v. Looks* (Sept. 19, 1980), Erie App. No. E-79-481, unreported. Given the practical difficulties of establishing the value of the property with and without the defects in these types of cases, we accept the proposition that repair or replacement cost is an adequate measure of damages, particularly given that the goal is to compensate the owner for the loss sustained.

{¶34} "***

{¶35} ""Where pecuniary damage does exist, evidence of the exact amount of the difference in value is not necessarily required. *Starinki, supra,* at 202, 535 N.E.2d at 330. Where the existence of damage is established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability."

{¶36} This Court, in *Jebelean v. Maronda Homes, Inc*., 5th Dist. App. No. 04 CA 33, 2004-Ohio-6966, reviewed the Brewer decision, finding:

{¶37} "The *Brewer* case involved the misrepresentation of the condition of an electrical system in a residential property. In determining how to measure damages, the court of appeals first discussed the "benefit of the bargain" rule and cited the Ohio Supreme Court's decision in *Molnar v. Beriswell* (1930), 122 Ohio St. 348. The Court, in *Molnar,* explained that, "[w]here there is fraud inducing the purchase or exchange of real estate, Ohio courts have held that the proper measure of damages is the difference between the value of the property as it was represented to be and its actual value at the time of purchase or exchange." *Brewer* at 154, citing *Molnar* at paragraph one of the syllabus.

{¶38} "However, the *Brewer* court declined to apply the "benefit of the bargain" rule and instead held that because of the practical difficulties in establishing the value of the property with and without the defects, the proper measure of damages would be the cost of repair or replacement. *Brewer* at 154."

{¶39} Based on our review of the *Brewer* decision, this Court found that the cost of repair or replacement cost is a proper measure of damages only when it is difficult to establish the value of the property with and without the defects. Id.

{¶40} In the matter currently under consideration, it is not difficult to establish the value of the property with and without the plumbing defects. Thus, the trial court properly applied the "benefit of the bargain" rule.

{¶41} However, even assuming arguendo that the proper measure of damages was the cost of repair and/or replacement, Appellant still failed to put forth any evidence

of damages. Accordingly, Appellant has failed to demonstrate the existence of a genuine issue of material fact as to an essential element of his claims of fraud and breach of fiduciary duty. Summary judgment on these claims therefore was appropriate.

{¶42} Accordingly, Appellant's first assignment of error is overruled.

II.

{¶43} In his second assignment of error, Appellant argues that the trial court erred in denying Appellant's entire Complaint. We disagree.

{¶44} Upon review of Appellant's Complaint, we find that all of the claims, with the possible exception of the alleged violation of R.C. Chapter 4735, require evidence of damages which the trial court found Appellant failed to prove.

{¶45} As to his claim based on a violation of R.C. Code 4735, Appellant averred in his Complaint:

{¶46} "c. Violated Ohio Revised Code 4735

{¶47} "O.R.C. requires all licensed Real Estate Agents to, if asked about defects, disclose all knowledge of defects."

{¶48} In his appellate brief, Appellant states that his Complaint sets forth violations of R.C. 4745. We will assume Appellant meant R.C. 4735 as that is what is set forth in the Complaint. However, Appellant fails to cite what section of Chapter 4735 Appellees are alleged to have violated and what damages resulted from same.

{¶49} Accordingly, Appellant's second assignment of error is overruled.

III.

{¶50} In his third assignment of error, Appellant argues that the trial court considered evidence outside of the record. We disagree.

{¶51} Upon review, we fail to find that the trial considered matters *de hors* of the record in granting summary judgment in the case sub judice. A review of said Entry shows that the trial court's judgment was based on Appellant's failure to present any evidence of damages to present his claims.

{¶52} Accordingly, Appellant's third assignment of error is overruled.

IV.

{¶53} In his fourth assignment of error, Appellant argues that the trial court erred in not ruling on pending motions. We disagree.

{¶54} Upon review of the docket and case file, we find that Appellant herein filed numerous motions to compel, motions for sanctions, motions for protective orders, motions for emergency status conferences, motion to award his claims of relief, motions to support affidavits, motions for reconsideration, motions for clarification, etc. Appellant also filed various "supplements" to his response and "sur-replies" to Appellee's motion for Summary Judgment.

{¶55} The trial court on more than one occasion set an oral hearing to address all pending motions with the decisions on such motions being memorialized in a Magistrate's Decision listing the rulings on the various motions.

{¶56} While the trial court may have failed to rule on some of Appellant's motions, when a trial court disposes of a case, motions that have not been ruled upon are presumed to have been denied. *Pentaflex v. Express Serv., Inc.* (1998), 130 Ohio App.3d 209, 217. We will therefore treat the trial court's failure to rule on said motion as a denial of same.

{¶57} Initially, we find that while Appellant states that the trial court did not rule on his discovery motions, a review of the docket shows that these motions were in fact ruled upon.

{¶58} As to the remainder of these motions, the issues contained in these motions were either addressed in other rulings or were not relevant to the outcome in this matter.

{¶59} Accordingly, Appellant's fourth assignment of error is overruled.

V.

{¶60} In his fifth assignment of error, Appellant argues that the trial court erred in not considering his Motion to Supplement his reply to Appellee's Motion for Summary Judgment. We disagree.

{¶61} While we do not find that it would have been error for the trial court to not consider a supplement in this matter, we find upon review, that in its Judgment Entry granting Appellee's motion for summary judgment, it stated that it considered Appellant's memorandum contra along with "various replies and supplements to the motions and memoranda."

{¶62} We therefore find Appellant's argument to be without merit.

{¶63} Accordingly, Appellant's fifth assignment of error is overruled.

VI.

{¶64} In his sixth assignment of error, Appellant argues that the trial court improperly relied on the magistrates order and further improperly placed the burden of proof on the non-moving party. We disagree.

{¶65} The January 24, 2007, Magistrate Order in this case stated that Appellant was to "disclose any documents he intends to introduce into evidence to prove repair expenses or other damages; …no later than February 13, 2007 at 9:00 a.m. Any documents not turned over by that time shall NOT be admitted into evidence in the trial in this matter."

{¶66} Appellant filed objections to this Order and on March 13, 2007, the trial court filed a Judgment Entry wherein it stated that it independently reviewed these matters and adopted the magistrate's decision in whole.

{¶67} We find no error in the trial court's reference to or reliance on the Magistrate's decision as such was adopted by the trial court.

{¶68} Accordingly, Appellant's sixth assignment of error is overruled.

VII.

{¶69} In his seventh and final assignment of error, Appellant argues that the trial court erred in considering an action brought against Appellees in Municipal Court. We disagree.

{¶70} Appellant argues that the trial court erred in considering the municipal court case which dealt with the same cause of action as that in the case sub judice.

{¶71} Upon review, we find that the trial court merely recites in its Entry that a municipal court case had been filed and dismissed in this matter as part of the procedural history. We do not find any error in this recitation.

{¶72} Regardless, we find that Appellant himself stated in his Complaint in this matter that he had filed an action in the Licking County Municipal Court.

{¶73} Accordingly, Appellant's seventh assignment of error is overruled.

{¶74} For the foregoing reasons, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Edwards, J., concur.

_____

_____

_____

JUDGES

JWW/d 824

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES HELFRICH	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
CAROL STRICKLAND, et al.	:	
Defendants-Appellees	:	Case No. 008 CA 101

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

Costs assessed to Appellant.

_____

_____

_____

JUDGES