[Cite as *Monea v. Lanci*, 2009-Ohio-6446.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
PAUL M. MONEA, ET AL	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Patricia A. Delaney, J.
Plaintiffs-Appellants	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0083
KENNETH A. LANCI, ET AL	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2008CV02100
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	December 7, 2009
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
JACK MORRISON, JR. THOMAS R. HOULIHAN 159 S. Main Street Suite 1100, Key Building Akron, OH 44308	MICHAEL J. CONNICK Northpoint Tower, Suite 1720 1001 Lakeside Avenue Cleveland, OH 44114-1800

Gwin, P.J.

{¶1} Plaintiff-appellants Paul M. Monea, Blake Monea, Brooks Monea and the Monea Family Trust appeal the Stark County Court of Common Pleas' Judgment Entry filed March 23, 2009 that granted appellees Kenneth A. Lanci and Linda J. Lanci, motion for summary judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} This case involves the ownership and occupation of the premises located at 9440 Portage Street NW, Massillon, Ohio (¨the Premises¨). The appellees, Kenneth A. Lanci and Linda J. Lanci, were the recorded owners of said premises until March 22, 2007, when they sold the premises to Richard and Sheryl Roush (collectively referred to as "Roush") for $2,650,000.00. Appellants have filed the instant action as a result of the sale of the premises and the contents therein to Roush, claiming breach of contract, bailment, unjust enrichment, and conversion.

{¶3} Appellant claimed that appellees orally agreed to sell the premises to him in October 1999 for $2,800,000. Appellant transferred $1,000,000 to the appellees as a down payment, and paid $25,000 a month for 36 months, totaling $900,000. Appellant, Paul M. Monea, with his children Brooke Monea and Blake Monea, occupied the residence from 1999 until 2005. During this time period, appellant paid for substantial improvements to the property, including the addition of a master bedroom and bathroom suite.

{¶4} Appellant Paul M. Monea was incarcerated, and was unable to continue the $25,000 per month payments. At the time of his failure to pay, $1,900,000 had been paid to the appellees, or two-thirds of the $2,800,000 purchase price.

{¶5} Appellee filed a Complaint for Forcible Entry and Detainer in the Massillon Municipal Court. See, *Kenneth A. Lanci, et al. v. Brooke Monea, et al.,* Massillon Municipal Court Case No. 2005-CVG-1384. In that case, appellee represented that the transaction was an oral month-to-month lease. The appellant had many valuable items of personal property, including original Peter Max artwork, and other rare and expensive art, furniture and collectibles. The appellees took possession of these items, and sold some of them to the Roushs, along with the Premises, on March 22, 2007.

{¶6} The appellants filed claims of breach of contract, bailment, conversion and unjust enrichment regarding the sale of the Premises. Appellees counterclaimed claiming unpaid rent.

{¶7} On January 22, 2009, the appellees filed a Motion for Summary Judgment. The appellants filed their Brief in Opposition to Defendants' Motion for Summary Judgment on March 9, 2009. The Trial Court granted appellees' Motion for Summary Judgment on March 23, 2009.

{¶8} It is from the trial court's March 23, 2009, Judgment Entry granting the appellees' motion for summary judgment that appellants have timely appealed raising the following assignment of error:

{¶9} "I. THE COURT OF COMMON PLEAS ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS/APPELLEES."

I.

{¶10} This matter reaches us upon a grant of summary judgment. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding*

Party, Inc. (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C).

{¶11} Civ.R. 56(C) states that 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." Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

{¶12} Accordingly, summary judgment is appropriate only where: (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) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46.

{¶13} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt (*1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The moving party may not fulfill its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Id.

Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C), which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. Id. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. Id. However, once the moving party satisfies its initial burden, the nonmoving party bears the burden of offering specific facts showing that there is a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings, but, instead, must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Civ.R. 56(E); *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

{¶14} In deciding whether there exists a genuine issue of fact, the evidence must be viewed in the nonmovant's favor. Civ.R. 56(C). Even the inferences to be drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123, 1127.

{¶15} Appellate review of summary judgments is *de novo*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, 641 N.E.2d 265; *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8, 536 N.E.2d 411. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court is found to support it, even if the trial court failed to consider

those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42, 654 N.E.2d 1327.

{¶16} Appellants' sole assignment of error relates to the propriety of the trial court's granting of summary judgment in favor of the appellees. Subsumed within this generalized objection are three challenges to the trial court ruling.

{¶17} (1.) Breach of Contract.

{¶18} Appellants first argue that an issue of fact exists concerning whether there was either a land contract for the sale of the property or an oral or written rental agreement. We reverse the trial court's judgment on this issue because we conclude (1) there is a genuine issue of material fact as to whether the $1,000,000 paid by appellant to Lanci in 1999 was a down payment for the purchase of the premises; and (2) there is a genuine issue of material fact as to whether Landis was obligated to foreclose upon appellant's interest in the property pursuant to R.C. Chapter 5313 in order to remove appellant from the subject premises.

{¶19} In its Judgment Entry the trial court conceded that, "Clearly, there is a genuine issue of material fact concerning whether or not a written lease agreement was ever entered into between the parties." (Judgment Entry, filed March 23, 2009 at 4). Further, the parties agreed that appellant paid Lanci $1,000,000 in 1999.

{¶20} In granting summary judgment, the trial court relied upon two checks where appellant wrote "rent" and "lease" in the memo line. The trial court interpreted these words as a demonstration that appellant did not detrimentally rely upon an oral promise by the appellees for sale of the Premises, and that the statute of frauds did apply. (Judgment Entry, filed March 23, 2009 at 5-6). However, we find that there was

also evidence presented to the contrary. Appellant presented two checks where he wrote “contract” or “loan repayment” on the monthly checks. (See Monea Affidavit at ¶8, and Exhibit “B”). Thus, we find that genuine issues of material fact exist concerning whether there was an oral land contract for the sale of the property or an oral or written rental agreement.

{¶21} Ohio courts have recognized that the equitable doctrines of partial performance and promissory estoppel can remove an agreement covering an interest in real property from the operation of the statute of frauds. *Saydell v. Geppetto's Pizza & Ribs Franchise Sys., Inc.* (1994), 100 Ohio App.3d 111, 121, 652 N.E.2d 218; *Brown v. Brown*, Knox App. No. 04CA000018, 2005-Ohio-1838 at ¶28. Ohio courts generally consider the following factors to be relevant in determining the applicability of the part performance doctrine: (1) evidence of a change in possession; (2) payment of all or part of the consideration for the land; and, (3) improvements, alterations or repairs upon the land by the possessor. Id. at ¶ 29. Neither mere possession of the real property, nor payment of consideration is by itself sufficient to avoid the applicability of the statute of frauds. *Tier v. Singrey* (1951), 154 Ohio St. 521, 526, 97 N.E.2d 20; *Snyder v. Warde* (1949), 151 Ohio St.3d 426, 434 (1949); *Crabill v. Marsh* (1882), 38 Ohio St. 331, 338.

{¶22} R.C. 5313.07, governing land contracts, provides:

{¶23} “If the vendee of a land installment contract has paid in accordance with the terms of the contract for a period of five years or more from the date of the first payment or has paid toward the purchase price a total sum equal to or in excess of twenty percent thereof, the vendor may recover possession of his property only by use of a proceeding fo r foreclosure and judicial sale of the foreclosed property.”

{¶24} In the case at bar, appellant occupied the premises from 1999 to 2005. (Judgment Entry, filed March 23, 2009 at 1). Appellant has consistently described the matter as an oral agreement to purchase of the Premises for $2,800,000 dollars, for which he paid $1,000,000 down. Further it was uncontested that appellant made improvements to the property. (Judgment Entry, filed March 23, 2009 at 9). Finally, evidence was submitted that appellant had made a total of $1,900,000.00 in payments. Thus, there was evidence submitted, which, if believed, would establish that appellant paid a "sum in excess of twenty percent" toward the purchase price for purposes of R.C. 5313.07.

{¶25} Thus, we find that genuine issues of material fact exist concerning whether part performance required appellees to foreclose upon appellants' interest in the property pursuant to R.C. Chapter 5313 in order to remove appellant from the subject premises.

{¶26} (2.) & (3.) Bailment and Conversion.

{¶27} Because we find the issues raised in appellant's second, and third sub-sections of his sole assignment of error are closely related, for ease of discussion we shall address the subsections together.

{¶28} In granting summary judgment upon appellant's claims for bailment and conversion the trial court relied upon Mr. Lanci's affidavit where he stated that he afforded appellant and his agents the opportunity to remove appellant's personal belongings from the subject premises. (Judgment Entry, filed March 23, 2009 at 8; 10-11). However, we find that there was also evidence presented to the contrary. Appellant presented his own affidavit and the letter that his attorney sent seeking access to the

personal property. In reality, both affidavits can be said to be self-serving. Lanci did not support his affidavit with corroborating materials; appellant presented the aforementioned letter from his counsel. The trial court chose to accept Lanci's affidavit without acknowledging appellant's own affidavit to the contrary.

{¶29} In deciding whether there exists a genuine issue of fact, the evidence must be viewed in the nonmovant's favor. Civ.R. 56(C). Even the inferences to be drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion. *Turner v. Turner* (1993), 67 Ohio St. 3d 337, 341, 617 N.E.2d 1123, 1127.

{¶30} When the evidence is construed most strongly in favor of appellant as mandated by Civ.R. 56(C), we find that reasonable minds could reach different conclusions on the issue whether Lanci afforded appellant and his agents the opportunity to remove appellant's personal belongings from the subject premises.

{¶31} (4.) Unjust enrichment.

{¶32} In his fourth sub-section of his sole assignment of error, appellant contends that the trial court erred in granting summary judgment with respect to appellant's claim for unjust enrichment. We agree.

{¶33} In granting summary judgment upon appellant's claims for unjust enrichment, the trial court relied on the affirmative defense doctrine of "unclean hands." The court stated that, while the improvements made by the appellants were not contested, the affidavit of Kenneth Lanci established that the Premises were left in an unacceptable condition. The trial court concluded, "it is unjust for Monea to claim unjust

enrichment in light of the unrebutted destructive nature in which he left the premises." (Judgment Entry, filed March 23, 2009 at 10).

{¶34} In order to recover on a claim of unjust enrichment, the party asserting the claim must demonstrate that (1) a benefit was conferred upon the recipient, (2) the recipient had knowledge of that benefit, and (3) circumstances render it unjust or inequitable to permit the recipient to retain the benefit without compensating the party who conferred the benefit. *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 465 N.E.2d 1298.

{¶35} A party who is seeking the equitable remedy of unjust enrichment must come to the court with clean hands. *Parmatown Spinal & Rehabilitation Center, Inc. v. Lewis*, Cuyahoga App. No. 81996, 2003-Ohio-5069 at ¶ 12. (Citations omitted). However, "this does not mean that courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is possibly guilty of transgressing the law in the transactions involved." *Johnson v. Yellow Cab Transit Co.* (1944), 321 U.S. 383, 387, 64 S.Ct. 622, 624-625. Rather, "the maxim, 'He who seeks equity must come with clean hands,' requires only that the party must not be guilty of reprehensible conduct with respect to the subject matter of his suit." *Basil v. Vincello* (1990), 50 Ohio St.3d 185, 190, 553 N.E.2d 602.

{¶36} In the case at bar, a question of fact remains. It is for the trier of fact to determine whether appellant's actions with respect to the condition of the subject premises were done in bad faith and rise to such a level of reprehensible conduct which would defeat appellant's claim for unjust enrichment.

{¶37} Accordingly, appellant's sole assignment of error is sustained.

{¶38} The judgment of the Stark County Court of Common Pleas is reversed and this matter is remanded for proceedings in accordance with our opinion and the law.

By Gwin, P. J.,

Edwards, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

_____

HON. JULIE A. EDWARDS

_____

HON. PATRICIA A. DELANEY

[Cite as *Monea v. Lanci*, 2009-Ohio-6446.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

PAUL M. MONEA, ET AL	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
KENNETH A. LANCI, ET AL	:	
Defendants-Appellees	:	CASE NO. 2009-CA-0083

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is reversed and this matter is remanded for proceedings in accordance with our opinion and the law. Costs to appellees.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

_____
HON. PATRICIA A. DELANEY