

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

RUSSELL PAINTIFF, et al.

C.A. No. 3226-M

Appellants

v.

TRAMMEL-O'DONNELL &
ASSOC., et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 98 CIV 0700

Appellees

DECISION AND JOURNAL ENTRY

Dated: May 8, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellants, Russell and Kathleen Paintiff, appeal the decision of the Medina County Court of Common Pleas, which granted summary judgment in favor of appellees, Trammell-O-Donnell & Associates and Janet O'Donnell. This Court reverses.

{¶2} Appellants entered into an agency agreement with appellees, whereby appellees were to sell a certain parcel of land of behalf of appellants. At

the time the parties entered into an agency agreement, appellants informed appellees that they desired to retain an exclusive use easement on part of the property. The property was sold to Kathleen Stetz and Carol Koogler. The purchase agreement signed by the parties contained an addendum indicating a deed restriction on the northwest side of the property. Russell Paintiff drafted an easement evidencing this restriction, and all parties signed the easement. However, the easement was not an exclusive use easement as appellants originally requested.

{¶3} Appellants filed an action against appellees in the Medina County Court of Common Pleas alleging breach of fiduciary duty, fraud, and breach of contract. Appellees filed a motion for summary judgment on all counts. The trial court granted summary judgment in favor of appellees.

{¶4} Appellants timely appealed and have set forth three assignments of error for review.

{¶5} FIRST ASSIGNMENT OF ERROR

{¶6} THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON COUNT ONE OF PLAINTIFF'S COMPLAINT WHERE AN ISSUE OF FACT EXISTS REGARDING WHETHER OR NOT DEFENDANTS BREACHED THEIR FIDUCIARY DUTY TO THE PLAINTIFFS.

{¶7} SECOND ASSIGNMENT OF ERROR

{¶8} THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON COUNT ONE OF PLAINTIFF'S COMPLAINT WHERE

AN ISSUE OF FACT EXISTS REGARDING WHETHER OR NOT DEFENDANTS FAILED TO DISCLOSE MATERIAL FACTS TO PLAINTIFFS THAT CAUSED THE PLAINTIFFS TO SUFFER DAMAGE.

{¶9} THIRD ASSIGNMENT OF ERROR

{¶10} THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON COUNT ONE OF PLAINTIFF'S COMPLAINT WHERE AN ISSUE OF FACT EXISTS REGARDING WHETHER OR NOT DEFENDANTS BREACHED THEIR AGENCY CONTRACT WITH THE PLAINTIFFS.

{¶11} The assignments of error will be discussed together for ease of discussion.

{¶12} All three of appellants' assignments of error focus on the relationship between O'Donnell, appellant, and Kathy Stetz, the buyer in the transaction at issue ("Buyer"). Appellants have asserted that the trial court improperly granted summary judgment to appellees because a genuine issue of material fact exists as to whether appellees breached their fiduciary duty to them. Appellants have argued that appellees failed to disclose the fact that Janet O'Donnell ("O'Donnell") was also representing the buyer, and that this nondisclosure caused them to suffer damages. In their final assignment of error, appellants have alleged that appellees breached their agency contract with appellants.

{¶13} Pursuant to Civ.R. 56(C), summary judgment is appropriate when:

{¶14} (1) No genuine issue as to any material fact remains 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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327.

{¶15} 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. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id.* Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *Klingshirn v. Westview Concrete Corp.* (1996), 113 Ohio App.3d 178, 180.

{¶16} Therefore, this Court must determine if appellees established the absence of a genuine issue of material fact and, if so, whether appellants have responded with evidence that such an issue does exist.

{¶17} Dual agency in a real estate transaction is defined by R.C. 4735.70(A) to include a "licensee who represents both the purchaser and seller as clients in the same real estate transaction." R.C. 4735.62 makes the real estate agent a fiduciary of both parties once a dual agency is created. R.C. 4735.62 mandates that the real estate agent thereafter acts in the interest of both clients, not

just one client. In the case sub judice, appellants have argued that appellees failed to act in their best interest.

{¶18} Appellees moved for summary judgment, asserting that appellants could not establish that they failed to disclose information material to the transaction because the evidence was undisputed that appellants knew when they signed the deed that they were not getting an exclusive use easement. Appellees acknowledged that they were the agents for both the buyer and the sellers in the transaction at issue. The agency agreement between appellants and appellees is part of the record. However, there is no evidence in the record that appellees ever notified appellants of the fact that they were also representing the buyer. In their memorandum in support of summary judgment, appellees did not address the extent of appellants' knowledge of the relationship between appellees and buyer. Therefore, this Court finds that appellees failed to meet their *Dresher* burden in showing that there was no genuine issue of material fact, and that they were entitled to judgment as a matter of law.

{¶19} The judgment of the trial court is reversed and the cause remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellees.

Exceptions.

DONNA J. CARR
FOR THE COURT

BAIRD, J.
CONCURS IN JUDGMENT ONLY

SLABY, P. J.
DISSENTS

APPEARANCES:

JENNIFER L. HENSAL, Attorney at Law, 39 Public Square, P.O. Box 220, Medina, Ohio 44258-0220, for appellants.

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