[Cite as *N. Shore Neurological Servs. Inc. v. Midwest Neuroscience Inc.*, 2009-Ohio-2429.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

NORTH SHORE NEUROLOGICAL SERVICE, INC. Appellee v. MIDWEST NEUROSCIENCE, INC. Appellant	C.A. No. 08CA009373 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 06CV146871

DECISION AND JOURNAL ENTRY

Dated: May 26, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Thomas H. Swanson, M.D., apparently relied on his assumptions about his deal to purchase a neurology practice, rather than including essential details in the contract. Later, when the business was not sufficiently profitable and things he believed to be part of the deal did not materialize, Dr. Swanson's company, Midwest Neuroscience Inc., stopped making its installment payments. The Seller sued on the contract, and Midwest counterclaimed. The trial court held that Midwest had breached the contract and that the Seller had neither breached the contract nor had it fraudulently induced Midwest to enter it. Midwest has appealed, arguing that the trial court's finding that the Seller did not fraudulently induce Midwest into the contract was against the manifest weight of the evidence and that the trial court incorrectly determined that the Seller

had not breached the contract by failing to fulfill an oral promise made prior to the execution of the contract. This Court affirms because the verdict was not against the manifest weight of the evidence and the trial court properly excluded parol evidence in considering the breach of contract claim.

BACKGROUND

{¶2} Ray Romero, M.D., practiced neurology in Elyria at North Shore Neurological Services Inc. for several years before being offered a chance to practice in Hawaii. In an effort to sell his practice, Dr. Romero, as the sole shareholder, entered into negotiations with Dr. Swanson, a fellow neurologist and the sole owner of Midwest Neuroscience Inc. Dr. Romero made contact with Dr. Swanson through Dr. Romero's former employee, Mark Bej, M.D., a neurologist who was then an employee of Midwest.

{¶3} In March 2004, North Shore sent Midwest a letter describing the practice, including its income and receipts for the previous year. In an effort to agree on a purchase price, the companies decided to have an independent accounting firm evaluate the business. The accounting firm elicited North Shore's financial information for 2002 and 2003. According to Dr. Romero, the accountants did not ask for anything more recent. The face of the report indicated that it represented the value of the business "as of March 31, 2004." There was no evidence that the report included a projected value.

{¶4} In early July 2004, Drs. Romero and Swanson received the report from the accounting firm, valuing the business in the range of $100,900 to $122,200. The parties agreed to a purchase price of $120,000, executing the contract on September 13, 2004. According to the contract, in addition to transferring most of the assets of the practice, North Shore promised to inform its patients of the sale and encourage them to seek care from Midwest. Dr. Romero also

promised not to compete with Midwest within a thirty-mile radius for five years. Midwest agreed to pay 24 monthly installments of $5,000 each, plus $250 for any installment not paid within ten days of its due date.

{¶5} Norman Sese, M.D., was also practicing neurology as an employee at North Shore when Dr. Romero decided to sell. For the most part, he and Dr. Romero provided the same services for patients, with the exception of electrodiagnostic studies, which were offered only by Dr. Romero. There was evidence that Dr. Sese's work accounted for 40 percent of the production at North Shore in 2002 and 2003. In May 2004, Dr. Sese left North Shore and opened a new practice in Lorain. Either Dr. Sese or North Shore notified some of Dr. Sese's patients that he would be leaving North Shore and gave them Dr. Sese's new contact information. When North Shore, and later Midwest, received releases from patients requesting that their medical records be forwarded to Dr. Sese's new practice, the staff would copy the file and send either the copy or the original to Dr. Sese while retaining the other.

{¶6} Midwest stopped making payments to North Shore in April 2006. North Shore sued Midwest for breach of contract, claiming the unpaid balance of the purchase price, contractual fees, and attorney's fees. Midwest counterclaimed, alleging that North Shore had breached the contract by failing to fulfill an oral promise by Dr. Romero to personally introduce Midwest's doctors to North Shore's base of referring physicians, and by failing to encourage all former patients to seek Midwest's care. Midwest also alleged that North Shore had breached the contract by delivering a practice and assets that were not as valuable as North Shore had represented.

{¶7} Following a bench trial, the court entered judgment for North Shore in the amount of $31,500, plus interest, representing six months of outstanding payments and $1500 in

contractual fees for missed payments. The court also awarded North Shore $18,880 as attorney's fees. The trial court found for North Shore and against Midwest on the counterclaim as well. Following a request by Midwest, the trial court issued findings of fact and conclusions of law.

{¶8} The trial court found that the contract did not require personal introductions of Midwest's doctors to North Shore's local referring physicians. It also held that Dr. Romero's alleged oral promise to do so was not enforceable in light of contract language providing that any agreements or representations respecting the property or its sale to Buyer not expressly set forth in the contract were null and void. The trial court determined that "North Shore [had] performed all of its obligations required by the Contract, including . . . the obligation[to encourage its patients to seek treatment from Midwest]." The trial court also found that, prior to the execution of the contract, Midwest knew that Dr. Sese had left the practice and it had done nothing to try to entice him to stay. The trial court held that North Shore had not breached the contract and had not fraudulently induced Midwest to enter into it.

STANDARD OF REVIEW

{¶9} In *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶26, the Ohio Supreme Court held that the test for whether a judgment is against the weight of the evidence in civil cases is different from the test applicable in criminal cases. According to the Supreme Court in *Wilson*, the standard applicable in civil cases "was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279." *Id*. at ¶24. The "explanation" in *C.E. Morris* was that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Id*. (quoting *C.E. Morris Co.*, 54 Ohio St. 2d at 279); but see *Carsey v. Walker*, 9th Dist. No. 24281, 2009-Ohio-1210, at ¶18 (Dickinson, J., concurring) (citing *Huntington Nat'l*

Bank v. Chappell, 9th Dist. No. 06CA008979, 2007-Ohio-4344, at ¶17-75) (Dickinson, J., concurring)).

MANIFEST WEIGHT - FRAUDULENT INDUCEMENT

{¶10} Midwest's first assignment of error is that the trial court's finding that North Shore did not fraudulently induce Midwest to enter the contract was against the manifest weight of the evidence. Midwest has specifically argued that North Shore had copied and delivered to Dr. Sese his patients' charts before the contract was signed and fraudulently failed to inform the accountant that Dr. Sese had left the practice. Midwest has essentially argued to this Court that, without Dr. Sese and his patients, the practice could not generate the amount of revenue reflected in the accountant's evaluation. In response, North Shore has argued that Midwest could not have justifiably relied on the profits reflected in the financial statements supplied to the accountant because it knew, prior to signing the contract, that Dr. Sese was no longer practicing with North Shore.

{¶11} This Court cannot find any indication in the record that Midwest ever pleaded, or even argued, a fraudulent inducement theory to the trial court, either as an affirmative defense or a counterclaim. Midwest presented all of its arguments about the value of the business in terms of breach of contract. In spite of this, the evidence offered by both parties at trial focused in large measure on the question of whether Dr. Romero knew Dr. Sese had taken patients with him when he left North Shore and had concealed that fact from Midwest until the contract was signed. More importantly, the trial court held that "North Shore did not fraudulently induce Midwest to enter into the Contract." Because the trial court had discretion to allow amendment of the pleadings to conform to the evidence at trial and neither party has objected to this issue being considered without having been specifically pleaded or argued, this Court will consider the

assignment of error. See Civ. R. 15(B); Cf. *Moody v. Blower*, 4th Dist. No. 98CA28, 1999 WL 250135 at *2-3 (Apr. 19, 1999) (considering similar issue, over objection, where parties argued fraud in summation and post-trial briefs and complaint contained allegation of seller's actual knowledge of the fact at issue).

{¶12} To support a claim of fraudulent inducement, Midwest would have had to prove each of the following elements: "(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." *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common Pleas*, 97 Ohio St. 3d 69, 2002-Ohio-5312, at ¶24 (quoting *Russ v. TRW Inc.*, 59 Ohio St. 3d 42, 49 (1991)).

{¶13} It is not clear that Midwest met its burden to prove that North Shore had "a duty to disclose" either that Dr. Sese had left the practice or that some of his patients had left with him. *Id*. (quoting *Russ*, 59 Ohio St. 3d at 49). Assuming, without deciding, that it did, however, Midwest has failed to prove that it justifiably relied on North Shore's "concealment" of those facts. *Id*. (quoting *Russ*, 59 Ohio St. 3d at 49). A person cannot claim to have justifiably relied on something he knew to be false. Cf. *Herman v. Templitz*, 113 Ohio St. 164, 168 (1925) (reversible error for court to refuse jury charge indicating that if the buyer had inspected the lot himself and knew the size, he could not recover for having relied on seller's alleged misrepresentation as to size).

{¶14} In this case, there was evidence that Midwest knew, before it signed the contract, that Dr. Sese had left the North Shore neurology practice. Dr. Romero testified that he told Drs. Swanson and Bej "from the beginning" that Dr. Sese planned to leave the practice. The trier of fact was free to believe that testimony despite Dr. Romero's subsequent confusion about the timing of the negotiations.

{¶15} Dr. Romero also testified that, in anticipation of the transfer, Drs. Swanson and Bej were given permission to see patients in the North Shore office beginning in August 2004, before the contract was signed. Dr. Bej admitted that he was seeing patients in the North Shore office, on behalf of Midwest, for "[m]ore or less" six weeks before the contract was signed. He even did some wiring work during that time in order to get the patient rooms ready for computer installation. Dr. Bej also testified that he knew Drs. Romero and Sese prior to these negotiations because he had worked with them at that location for about eight years, starting sometime in the 1990s. Although Dr. Bej did not say that he actually knew Dr. Sese had left the practice before the contract was signed, he also could not say that he had ever seen Dr. Sese examining patients during the six-week period he spent in the North Shore offices. Dr. Bej did testify, however, that once during that time he saw Dr. Sese "sitting at his desk."

{¶16} The North Shore office manager testified that Dr. Sese had removed his diplomas and vacated his office long before Dr. Bej arrived. In fact, she testified that Dr. Bej moved into the same office vacated by Dr. Sese. The uncontroverted evidence revealed that Midwest had at least one doctor with free access and the opportunity to inspect the offices over the course of six weeks prior to Midwest signing the contract to purchase the practice. It would have been reasonable for the trial court to have believed that Dr. Bej could not have failed to notice Dr.

Sese's absence, especially in light of the fact that Dr. Bej had formerly been employed at North Shore.

{¶17} There was some evidence that, prior to the execution of the contract, Midwest had financial information indicating that, although Dr. Sese's business had once accounted for 40 percent of North Shore's income, in 2004 it accounted for only 25 percent. This evidence, although controverted, may have helped convince the trier of fact that Midwest did not justifiably rely on the "concealment" of the fact that Dr. Sese had left. Furthermore, there was evidence that Dr. Swanson, the owner of Midwest, had actual knowledge, months before he signed the contract, that Dr. Sese had not only left North Shore, but had also rented office space on Oak Point Road in Lorain. Dr. Swanson denied this, but the trial court was not required to believe him.

{¶18} Additionally, although Midwest complained that Dr. Sese apparently took some patient files with him, Midwest did not negotiate for any commitments from Dr. Sese to either work for Midwest or, at a minimum, not compete with it. Dr. Swanson testified that he knew early in the negotiation process that Dr. Sese was an employee of North Shore and had no ownership interest in it. The contract did not include a conveyance of North Shore's employees, and Dr. Swanson understood that. Prior to signing the contract, Dr. Swanson negotiated with North Shore's office manager and another staff person to work for Midwest following the transfer. Dr. Swanson did not approach Dr. Sese, however, until after the contract had been signed. The contract also failed to require North Shore to prohibit Dr. Sese from informing patients about his new office location.

{¶19} The evidence did not support Midwest's argument that it justifiably relied on the assumption that Dr. Sese and his patients would be with North Shore after the transfer. In fact,

there was competent, credible evidence that Midwest knew, before signing the contract, that Dr. Sese had left the practice – making it just as fair to assume, in the absence of contract terms to the contrary, that he had taken some patients with him.

{¶20} Midwest also argued that it relied on the accountant's valuation of the business. It has argued that, because neither Midwest nor the accountant knew that Dr. Sese had left the practice, they did not know that North Shore could not "generate the amount of revenue, which was shown in [its] financials, without Dr. Sese actively working in the practice." Midwest failed to offer any argument as to how such reliance might be justified. The evidence revealed that the accountant's valuation was not projected into the future. The valuation was limited to March 31, 2004. There was no allegation or evidence that the report was flawed in any way. The report purported to be based only on North Shore's 2002 and 2003 financial statements. If Midwest wished to update that evaluation before the September 2004 closing, it should have done so.

{¶21} The trial court's holding that North Shore did not fraudulently induce Midwest to enter the contract was not against the manifest weight of the evidence. Midwest's first assignment of error is overruled.

ORAL PROMISE – BREACH OF CONTRACT

{¶22} Midwest's second assignment of error is that the trial court incorrectly held that "an oral promise made as an inducement for a party to enter into a contract cannot be enforced by that party." Midwest has, however, acknowledged in its argument to this Court that what the trial court actually held was that North Shore had not breached the contract by failing to personally introduce the Midwest doctors to North Shore's referring physicians. Although Midwest has intertwined the two concepts on appeal, the only argument Midwest made to the trial court regarding the promise of personal introductions was made in terms of breach of

contract, not fraudulent inducement. Midwest never alleged, nor did it ever argue to the trial court, that North Shore fraudulently induced Midwest to enter the contract by promising personal introductions to referring physicians. Therefore, Midwest has forfeited the opportunity to make this argument on appeal. *Holman v. Grandview Hosp. & Med. Ctr.*, 37 Ohio App. 3d 151, 157 (1987) ("Issues not raised and tried in the trial court cannot be raised for the first time on appeal.").

{¶23} Regarding the personal introductions, the trial court held that the written contract "did not require Dr. Romero to personally introduce either Dr. Mark Bej or Dr. Tom Swanson to North Shore's core group of referring physicians." It further held that an integration clause in the contract nullified any representations or agreements relating to the sale that were not included in the written contract. Additionally, the court determined that Dr. Romero "attempted to schedule an afternoon with Dr. Bej, an employee of Midwest, for the purpose of introducing Dr. Bej to referring physicians[, but] [t]he meeting was canceled by Dr. Bej and never rescheduled."

{¶24} Midwest has argued that Dr. Romero promised to personally introduce Drs. Swanson and Bej to North Shore's referring physicians and that Dr. Romero breached the contract by failing to do so. Midwest has admitted that this obligation does not appear in the contract, but has argued that the prior oral promise must be enforced. It has conceded that the integration clause in the contract "coupled with the parol evidence rule might have precluded [Midwest] from raising this claim upon proper objection," but because testimony regarding an oral promise was admitted without objection at trial, the promise must be enforced. Midwest has not cited any authority for this proposition.

{¶25} The parol evidence rule is not a rule of evidence, the application of which may be forfeited without a properly-timed objection. The rule is one of substantive law. *Ed Schory &*

Sons Inc. v. Soc'y Nat'l Bank, 75 Ohio St. 3d 433, 440 (1996). Whether North Shore objected to evidence regarding the claimed oral promise, therefore, is irrelevant.

{¶26} "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Id*. (quoting 3 Arthur L. Corbin, Corbin on Contracts § 573, at 357 (1960)). The rule "assumes that the formal writing reflects the parties' minds at a point of maximum resolution and, hence, that duties and restrictions that do not appear in the written document . . . were not intended by the parties to survive." *Bellman v. Am. Int'l Group*, 113 Ohio St. 3d 323, 2007-Ohio-2071, at ¶7 (quoting Black's Law Dictionary 1150 (8th ed. 2004)). "A contract that appears to be a complete and unambiguous statement of the parties' contractual intent is presumed to be an integrated writing." *Id*. at ¶11.

{¶27} The trial court relied on the fact that the parties included an integration clause in the subsequent written agreement. That language provided that "[t]his Contract constitutes the sole and only agreement between Buyer and Seller respecting Seller's practice and property or the sale and purchase described in this Contract and correctly sets forth the obligations of Buyer and Seller to each other as of its date." The contract language specifically indicated that "[a]ny agreements or representations respecting the property or its sale to Buyer not expressly set forth in this Contract are null and void." The Ohio Supreme Court has, however, held that "[t]he presence of an integration clause makes the final written agreement no more integrated than does the act of embodying the complete terms into the writing." *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 28 (2000).

{¶28} In this case, the contract appears to be a fully integrated and unambiguous statement of the parties' intent. Additionally, the written agreement and the alleged oral promise pertain to the same subject matter, that is, the sale of North Shore. Therefore, the parol evidence rule applies to forbid Midwest from contradicting the terms of the written contract with evidence that Dr. Romero also promised to do something that was not mentioned in the contract. The trial court correctly determined that, regardless of what oral promises were made, the sales agreement included only the terms of the written contract and that contract made no mention of personal introductions to referring physicians. Therefore, Midwest's second assignment of error is overruled.

CONCLUSION

{¶29} The trial court correctly held that North Shore neither breached the contract nor fraudulently induced Midwest to enter into it. The judgment of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

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 Lorain, 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 appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶30} I concur that the trial court's determination that North Shore did not fraudulently induce Midwest to enter into the contract was not erroneous and against the manifest weight of the evidence. However, I reach that conclusion for a different reason.

{¶31} In order for Midwest to succeed on its fraudulent inducement claim, Midwest had to prove the existence of the following:

> "(1) a false representation concerning a fact or, in the face of a duty to disclose, concealment of a fact, material to the transaction; (2) knowledge of the falsity of the representation or utter disregard for its truthfulness; (3) intent to induce reliance on the representation; (4) justifiable reliance upon the representation under circumstances manifesting a right to rely; and (5) injury proximately caused by the reliance." *Lepera v. Fuson* (1992), 83 Ohio App.3d 17, 23.

The trial court found that North Shore never advised Skoda & Minotti that Dr. Sese had left the practice and that some of North Shore's patient files had been removed and sent to Dr. Sese's new office. The trial court also found that Dr. Sese's work accounted for approximately 40% of

North Shore's income in 2002 and 2003. It further found that as a result of Dr. Sese leaving, income received by North Shore for Dr. Sese's work decreased substantially.

{¶32} In evaluating Midwest's fraudulent inducement claim, it is first necessary to determine whether there was an affirmative false statement or whether there was a concealment of fact in the face of a duty to disclose. With respect to that issue, there was much emphasis placed upon the alleged failure of North Shore to disclose that Dr. Sese had left the practice. The trial court found that prior to the execution of the contract, Midwest was aware that Dr. Sese was not part of the practice, a finding that was not against the manifest weight of the evidence. However, even with knowledge that Dr. Sese was absent, the more critical nondisclosure concerned the taking of North Shore's files by Dr. Sese.

{¶33} In order to maintain a cause of action for fraudulent inducement, Midwest had to show that there was "a false representation concerning a fact, or in the face of a duty to disclose, concealment of a fact, material to the transaction." *Lepera*, 83 Ohio App.3d at 23. "[A] party is under a duty to speak, and therefore liable for non-disclosure, if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading." *Miles v. Perpetual S. & L. Co.* (1979), 58 Ohio St.2d 97, 100.

{¶34} In the instant matter, the testimony offered by North Shore revealed that after the initial meeting with Dr. Swanson and Dr. Bej, Dr. Sese not only left North Shore, he took boxes of client files belonging to North Shore. At trial, Dr. Romero testified that he did not tell Midwest that Dr. Sese had taken North Shore's files. Thus, while Midwest may have been apprised that Dr. Sese had left North Shore (and Midwest knew that in any event, it was likely

that Dr. Sese would leave the practice given that it had not proceeded to employ him), what Midwest could not know was that as a result of Dr. Sese leaving, boxes of North Shore's patient files were permanently removed. The fact that Dr. Sese's removal of the files was significant and inappropriate was highlighted by Dr. Lynne Romero's testimony.

{¶35} In addition, I do not believe that Midwest's claim fails for lack of justifiable reliance. Reliance is justifiable "if the representation does not appear unreasonable on its face, and if, under the circumstances, [there is] no apparent reason to doubt the veracity of the representation." (Internal citation omitted.) *Lepera*, 83 Ohio App.3d at 26. I agree that a person may not rely on something he knew to be false. Thus, under the circumstances of this case, it would not have been reasonable for Midwest to rely on Dr. Sese's continued presence in the practice on a going forward basis as it was clear that Dr. Sese would no longer be employed by North Shore upon consummating the transaction and Midwest had not proceeded to employ Dr. Sese. The trial court also found that Midwest was provided with updated 2004 financial data prior to executing the contract. Arguably, the updated financial data also served as notice that Dr. Sese had already left the practice and thus Midwest could not rely on Dr. Sese's productivity as an indicator of its potential future revenues. However, it would not be reasonable to conclude from the raw data that boxes of North Shore files were taken upon Dr. Sese's departure. Dr. Sese was an employee and not a principal of North Shore. Therefore, it would be reasonable to believe that upon Dr. Sese's departure, the active client files at North Shore would remain at North Shore, subject to some attrition that might occur as a result of Dr. Sese's departure.

{¶36} Notwithstanding the above, I concur that it is appropriate to affirm the trial court's judgment. In my view, Midwest's fraudulent inducement claim fails because the evidence did not establish that a resulting injury was proximately caused by Midwest's reliance. Although

Midwest could demonstrate that its revenues did not approach the historical revenues of North Shore, it did not establish that the lower revenues were proximately caused by the loss of the Sese files. Based upon the evidence before it, the trial court could have concluded that the lower revenues were attributable to many factors: the poor transition upon Dr. Romero's departure, the fact that neither Dr. Swanson or Dr. Bej were at the North Shore location full time, and the fact that some patients simply did not wish to remain with Midwest. Thus, while Midwest may have demonstrated nondisclosure of a material fact, it did not succeed in demonstrating that its reliance was a proximate cause of any alleged damage. For that reason, I agree that the trial court did not commit any reversible error.

APPEARANCES:

ANTHONY B. GIARDINI, attorney at law, for appellant.

MARK E. STEPHENSON, attorney at law, for appellee.