

[Cite as *Tabatabai v. Thompson*, 2017-Ohio-361.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

VAHID TABATABAI

Appellant

v.

MIKE THOMPSON, et al.

Appellees

C.A. No. 16CA0044-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08CIV1798

DECISION AND JOURNAL ENTRY

Dated: January 31, 2017

SCHAFFER, Judge.

{¶1} Plaintiff-Appellant, Vahid Tabatabai, appeals the judgment of the Medina County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees, Cliff Bellar and M.C. Real Estate, on his claim for negligent misrepresentation. For the reasons set forth below, we affirm.

I.

{¶2} Michael Thompson was the owner of a bar and restaurant known as the “T-Bar & Grille,” which was located in Wadsworth, Ohio. In 2007, Thompson decided to sell the business and listed the business and its real property with a broker known as M.C. Real Estate. Around this time, Tabatabai was interested in purchasing the T-Bar & Grille. As such, in early 2007, Tabatabai contacted Cliff Bellar, who was the M.C. Real Estate agent who handled the listing. The parties began negotiations for the sale of the business in January of 2008. Because Bellar

acted as Thompson's agent, Tabatabai strictly communicated with Bellar during the course of the parties' negotiations.

{¶3} Throughout the course of their negotiations, the parties entered into three separate agreements. The first agreement, entitled "Purchase Agreement. Sale of Business," was entered into on January 7, 2008. This agreement contained provisions regarding the sale of the business and inventory. Specifically, this agreement provided that Tabatabai would pay \$50,000.00 for the business, with \$5,000.00 paid as earnest money and the remaining \$45,000.00 paid at closing. However, paragraph 11 of this agreement provided that the sale of the business was contingent upon the sale of the business' real estate.

{¶4} The second agreement, entered into on February 11, 2008, provided for the sale of the business and the real estate for the total sum of \$150,000.00, with \$50,000.00 being for the business and \$100,000.00 being for the real estate. This agreement contained the following language: "This [agreement] is all contingent on approval by Larry Whitney of full contract." Larry Whitney was Thompson's attorney at that time. Tabatabai testified in his deposition that on February 14, 2008, Bellar notified him that "everyone," including Larry Whitney, had reviewed the second agreement. Tabatabai testified that Bellar then informed him that the sale of the business and real estate could proceed to escrow. As such, on the very same day that Tabatabai spoke with Bellar, Tabatabai and Thompson both signed the third agreement, which was the contract of sale of real estate that the first two agreements had contemplated.

{¶5} This third agreement set forth the terms of the sale of the business' real estate for \$100,000.00. Relevant to this appeal, paragraph 9 of this agreement provided that if any building on the business' property were "damaged or destroyed from any cause whatsoever" prior to the deed being recorded, Tabatabai would have the right to either: (a) terminate this

agreement and recover all funds already deposited in escrow; or (b) “proceed under this agreement with no abatement or reduction in the purchase price, in which event [Tabatabai] shall receive all proceeds of insurance payable as a result of said damage or destruction. Moreover, paragraph 15 of this agreement provided that this agreement was not subject to any contingencies. Upon signing the third agreement, the parties mutually agreed to change certain provisions of the third agreement and those amendments attached to the third agreement. Those amendments are not relevant to this appeal.

{¶6} On February 23, 2008, a fire destroyed the T-Bar & Grille. As a result of the damage from the fire, the commercial building had to be completely torn down. On March 18, 2008, Tabatabai informed Thompson in writing of his intention to exercise his option under paragraph 9 of the third agreement and proceed under the agreement despite the fire damage. Thompson, however, refused to proceed with the sale and contended that there was never a deal since his attorney never approved the second agreement, contrary to Bellar’s representation to Tabatabai. As such, Thompson received the insurance proceeds for the loss of the commercial building and business from his insurance company. Moreover, Tabatabai testified in his deposition that during the course of his negotiations with Bellar, he was actively looking at other potential business opportunities, including a bar located in Lodi, Ohio. However, Tabatabai testified that he forwent these other opportunities once he believed that a deal had been made to purchase the T-Bar & Grille based upon Bellar’s representations.

{¶7} On September 30, 2008, Tabatabai filed suit against Thompson, Bellar, and M.C. Real Estate in the Medina County Court of Common Pleas. In his complaint, Tabatabai pleaded one count of breach of contract against Thompson and one count of negligent misrepresentation against Bellar and M.C. Real Estate. The defendants denied the allegations set forth in

Tabatabai's complaint. On March 30, 2010, Tabatabai filed an amended complaint pursuant to Civ.R. 15(A) in order to add T-Bar & Grille, Inc. as a defendant to the lawsuit. All named defendants thereafter filed separate answers, wherein they denied the allegations set forth in Tabatabai's amended complaint.

{¶8} On August 17, 2012, defendants Cliff Bellar and M.C. Real Estate filed a motion for summary judgment, to which Tabatabai filed a brief in opposition. On September 26, 2012, the trial court granted summary judgment in favor of Bellar and M.C. Real Estate. Tabatabai subsequently filed a "motion for reconsideration or alternatively, motion to add Civ.R. 54(B) language to the September 26, 2012 order." The trial court summarily denied Tabatabai's motion. On May 3, 2016, the trial court entered an agreed judgment entry that fully disposed of Tabatabai's remaining claims against Thompson and T-Bar & Grille, Inc.

{¶9} On May 23, 2016, Tabatabai filed a timely notice of appeal, appealing from the trial court's September 26, 2012 judgment entry granting summary judgment in favor of Bellar and M.C. Real Estate. On appeal, Tabatabai raises one assignment of error for this Court's review. Bellar and M.C. Real Estate did not file a brief in this matter, and thus, we "may accept [Tabatabai's] statement of facts and issues as correct and reverse judgment if [Tabatabai's] brief reasonably appears to sustain such action." App.R. 18(C).

II.

Assignment of Error

The trial court abused its discretion by granting Defendants-Appellees' motion for summary judgment.

{¶10} In his sole assignment of error, Tabatabai argues that the trial court erred by granting summary judgment in favor of Bellar and M.C. Real Estate on his negligent misrepresentation claim. Specifically, Tabatabai contends that the trial court erred by concluding

that damages in a negligent misrepresentation action do not extend to potential lost earnings from forewent business opportunities, but rather are strictly limited to the plaintiff's "out of pocket" expenses incurred as a result of relying upon the defendant's misrepresentation.

{¶11} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Summary judgment is only appropriate where (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C). Before making such a contrary finding, however, a court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992).

{¶12} Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶13} Here, Bellar and M.C. Real Estate moved for summary judgment with respect to Tabatabai's negligent misrepresentation claim. The elements of negligent misrepresentation are

similar to the elements of fraud. *Martin v. Ohio State Univ. Found.*, 139 Ohio App.3d 89, 104 (2000). The elements of negligent misrepresentation are:

(1) one who, in the course of his or her business, profession, or employment, or in any other transaction in which he or she has a pecuniary interest; (2) supplies false information for the guidance of others in their business transactions; (3) is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information; and (4) if he or she fails to exercise reasonable care or competence in obtaining or communicating the information.

Id. at 103-104, citing *Delman v. Cleveland Hts.*, 41 Ohio St.3d 1, 4 (1989).

{¶14} In its judgment entry, the trial court determined that as a real estate agent, Bellar “is a person whose business it is to give out information.” The trial court further determined that both Bellar and M.C. Real Estate “were potentially going to benefit in a pecuniary manner from the commissions that they would have received had the transaction gone forward.” The trial court assumed for purposes of its decision that Bellar falsely represented to Tabatabai that Attorney Larry Whitney had approved the second agreement providing for the sale of the business and the property for the sum of \$150,000.00. The trial court also assumed that Tabatabai “justifiably relied on such false information in deciding to sign the agreements of February 14, 2008.” Despite these findings, the trial court concluded that Bellar and M.C. Real Estate were both entitled to judgment as a matter of law on Tabatabai’s negligent misrepresentation claim since Tabatabai failed to show that there was a genuine issue of material fact regarding damages. Specifically, the trial court concluded that, as a matter of law, a plaintiff in a negligent misrepresentation action is unable to recover “potential profits from opportunities not pursued” since such damages are “too speculative.” Lastly, the trial court concluded that even if “potential profits from opportunities not pursued” were recoverable, Tabatabai failed to show that he incurred such damages since he never testified that he would have purchased the bar in Lodi, Ohio but for the agreement to purchase the T-Bar & Grille.

{¶15} Tabatabai's sole contention on appeal is that the trial court erred by concluding that he is not entitled to recover potential profits for lost business opportunities. However, as noted above, the trial court's decision to grant summary judgment in favor of Bellar and M.C. Real Estate was two-fold. First, the trial court determined that Tabatabai's damages were strictly limited to his out-of-pocket expenses incurred as a result of Bellar's negligent misrepresentation. And second, the trial court alternatively determined that even if Tabatabai's damages were not limited to his out-of-pocket expenses, Tabatabai still failed to demonstrate in his brief in opposition that he incurred damages attributable to lost business opportunities since he failed to show that he would have purchased the bar in Lodi, Ohio but for the agreement to purchase the T-Bar & Grille. However, a careful reading of Tabatabai's appellate brief indicates that Tabatabai only contests the trial court's first rationale, omitting any discussion or argument on whether he satisfied his reciprocal burden on summary judgment with respect to the issue of damages. Thus, even assuming, without deciding, that the trial court did err as a matter of law by concluding that damages in a negligent misrepresentation action are strictly limited to the plaintiff's out-of-pocket expenses, Tabatabai has still failed to demonstrate that the trial court erred by granting summary judgment in favor of Bellar and M.C. Real Estate provided its alternative basis for doing so. *See State v. Peterson*, 9th Dist. Summit No. 27582, 2015-Ohio-3019, ¶ 19 (Carr, J., concurring in judgment only) (affirming the trial court's judgment ordering the humane destruction of a dog where appellant failed to contest the trial court's second basis for finding that the dog posed a continuing threat of harm to the public), citing *In re P.T.*, 9th Dist. Summit No. 24207, 2008-Ohio-4690, ¶ 15 (declining to address an argument regarding the first prong of the permanent custody test where the trial court made an alternative finding satisfying that prong and which fully resolved the issue).

{¶16} Accordingly, Tabatabai's assignment of error is overruled.

III.

{¶17} With Tabatabai's sole assignment of error having been overruled, the judgment of the Medina County Court of Common Pleas 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 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(C). 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.

JULIE A. SCHAFER
FOR THE COURT

WHITMORE, P. J.
CONCURS.

HENSAL, J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

GINO PULITO, Attorney at Law, for Appellant.

ANDREW A. KABAT, Attorney at Law, for Appellee.