[Cite as *Donaldson Johannsen v. Ward*, 2010-Ohio-4203.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Jane Donaldson Johannsen, et al.	Court of Appeals No. H-09-028
Appellants	Trial Court No. CVH 20080978
v.	
Dorothy L. Ward, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: August 13, 2010

* * * * *

Robert P. DeSanto, for appellants.

Michael B. Jackson, for appellee Dorothy L. Ward.

Bradley P. Toman, for appellees Frank and Rebecca Van Dresser.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Plaintiffs-appellants, Jane Donaldson Johannsen, Mary Donaldson O'Reilly, and Chris Donaldson Bond, appeal the October 28, 2009 judgment of the Huron County Court of Common Pleas, which granted summary judgment in favor of defendants-appellees, Dorothy L. Ward and Frank and Rebecca Van Dresser. Because we agree that no genuine issues of fact remain, we affirm the trial court's judgment.

{¶ 2} The facts of this case are as follows. Plaintiffs-appellants (hereinafter referred to as "appellants" or the "Donaldson children") are siblings and the children of John Ransom Donaldson.[1] In 1953, Mr. Donaldson and his wife, Elizabeth Donaldson, purchased what is known as the "Ransom Homestead," consisting of approximately 389 acres in Hartland Township, Huron County, Ohio, from the estate of Mr. Donaldson's aunt, Mary Ransom. In 1966, Mrs. Donaldson passed away. In 1968, Mr. Donaldson married appellee, the Donaldson children's stepmother, Dorothy Ward. Mr. Donaldson and Ward were divorced and remarried twice, their final marriage occurred in 1986.

{¶ 3} In 1987, Mr. Donaldson deeded the real property to Ward. Donaldson also transferred personal property, including stocks, bonds, and antiques to Ward. On July 7, 1990, Mr. Donaldson died.

{¶ 4} In September 1990, Mr. Donaldson's will was read at the office of attorney Beverly White. The children were made aware that Donaldson had deeded the farm to Ward. At this time, Ward stated that she would alter her will and leave some antiques and the property on the west side of Fitchville River Road to appellants. This statement was memorialized in two letters from appellee's attorney to appellants. The letters, dated October 17, 1990, and October 26, 1992, respectively, stated in relevant part, as follows:

{¶ 5} "Mrs. Dorothy Donaldson has asked me to advise you that she has made a change in her will which gives all of the family heirloom antiques and the farm land on the west side of Fitchville River Road to John's four children in equal shares. There is a

[1]Plaintiff John H. Donaldson is not a party to this appeal.

clause in this bequest which states, that if one of the children of John Donaldson take any action against his estate, the bequest would be void.

{¶ 6} "My client had authorized me earlier to advise the four children that she was leaving the house and contiguous farm land to them. There is a provision in her Will that should any one of the children institute litigation against her in this matter, none of them would inherit the property."

{¶ 7} Predating the above representations, though not reviewed by appellants prior to this action, appellee executed several codicils to her 1987 will. The first codicil, executed after Mr. Donaldson deeded her the real property, provided that her son would receive the property to the east of Fitchville River Road and that the property to the west of Fitchville River Road would go to Mr. Donaldson's children John and Martha Donaldson.

{¶ 8} Appellee's second codicil, dated April 19, 1988, added a paragraph stating that if any of the stepchildren take any action to set aside the will or the gifts of property from Mr. Donaldson, the child was to get no share of appellee's estate. On April 20, 1990, appellee added a third codicil which added the caveat "if I still own the property at the date of my death" to the gift of the subject property.

{¶ 9} Appellee's July 16, 1990 fourth codicil was executed following the death of Mr. Donaldson and provided:

{¶ 10} "I give the remainder of the real estate conveyed to me in Deed recorded in Volume 371, page 529, located on the West side of Fitchville River Road (if I still own

said property at the date of my death to) the children of my deceased husband, John R. Donaldson * * *, in equal shares, per stirpes. * * *. If any of said persons shall bring any action to set aside the Will of John R. Donaldson or to set aside any gift of real or personal property made by him to me, the gift in this paragraph shall be void as to all the children of John R. Donaldson, and in that event, I give said property to my son, John R. Hooker."

{¶ 11} On July 3, 2008, appellees, Frank and Rebecca Van Dresser, purchased the subject property for $200,000. Prior to purchasing the property, appellees obtained a title report which revealed no recorded interest in the property.

{¶ 12} On September 17, 2008, the Donaldson children commenced the instant action against Ward and the Van Dressers. The complaint alleged breach of contract, anticipatory breach of contract, oral trust, unjust enrichment, constructive or resulting trust, promissory estoppel, equitable estoppel, and misrepresentation.

{¶ 13} In her answer, Ward asserted, inter alia, the arguments that the claims were barred by the statute of frauds doctrine, the laws of contract, and by appellants' own inaction. Ward asserted a counterclaim alleging that the complaint was frivolous. In their answer, the Van Dressers stated that they were bona fide purchasers of the property, for value, and have a free and clear interest in the property. The Van Dressers based their assertion on their belief that there was no contract or enforceable agreement between Ward and appellants. Further, the Van Dressers raised a cross-claim against Ward and a counterclaim alleging slander of title.

{¶ 14} On May 19, 2009, the Van Dressers filed a motion for summary judgment. In their motion, the Van Dressers argued that the alleged promise between Ward and appellants did not create an interest in the property. Alternatively, even assuming that the promise did create some interest in the property, the Van Dressers stressed that they had no knowledge of the interest and, thus, received clear title to the property.

{¶ 15} Appellee Ward filed her motion for summary judgment on July 9, 2009. Ward argued that if her comments could be construed as a promise to make a will, under R.C. 2107.04, it was required to be in writing. Ward further asserted that the alleged contract was too vague; thus, no meeting of the minds occurred. Alternatively, Ward argues that, under the Statute of Frauds (R.C. 1335.05), the letters sent by Ward's attorney were required to be in writing as any alleged transfer would not occur within one year and any transfers of real estate were required to be in writing. Regarding the promissory estoppel claim, Ward argued that the promise, if any, did not meet the clear and unambiguous requirement.

{¶ 16} On July 23, 2009, appellants filed a motion for leave to amend their complaint. Appellants asserted that, due to newly discovered evidence "concealed" by Ward, they wished to amend the fraudulent misrepresentation claim. On the same date, appellants also filed a motion for a continuance to respond to the Van Dressers' motion for summary judgment. Appellants argued that the request was necessitated by Ward's failure to timely respond to discovery requests. Appellants filed an opposition to Ward's motion for summary judgment; they also filed a request for an oral hearing.

{¶ 17} On October 28, 2009, the trial court granted summary judgment in favor of Ward. The court further stated that its judgment disposed of all pending motions and terminated the case as to all parties. In its decision, the court concluded that no agreement, promise, or contract existed between Ward and appellants. The court further stated that even if the parties had agreed to make a will, R.C. 2107.04 required that such agreement be in writing. The court stated that the promissory estoppel claim lacked merit because Ward "did not promise to do anything" and that Ward merely expressed her desire to gift the property upon her death. This appeal followed.

{¶ 18} On appeal, appellants raise the following eight assignment of error for our review:

{¶ 19} "First Assignment of Error: The trial court erred to the prejudice of appellants in concluding that there was no agreement, promise or contract between the parties but that if the court somehow found an agreement between the parties, it was an agreement to make a will (which must be in writing per R.C. 2107.04) instead of a contract not to contest a will and certain inter vivos conveyances of real and personal property (which is not subject to R.C. 2107.04).

{¶ 20} "Second Assignment of Error: The trial court erred to the prejudice of appellants in concluding that their action was prohibited by the statute of frauds.

{¶ 21} "Third Assignment of Error: The trial court erred to the prejudice of appellants in concluding that the Plaintiffs 'could have chosen a different path' and 'challenged the Will of Mr. Donaldson' and 'tried some action to set aside the 1987

transfer of property' and that they were required to present evidence to 'the court to indicate that the [1987] transfer of property by Mr. Donaldson to his wife was in any way suspect.'

{¶ 22} "Fourth Assignment of Error: The trial court erred to the prejudice of appellants in concluding that no genuine issue of material fact could be established from the evidence and that summary judgment should be granted to defendants on each of the eight counts pled in the plaintiffs' complaint.

{¶ 23} "Fifth Assignment of Error: The trial court erred to the prejudice of appellants when it failed to grant plaintiffs' motion to continue the summary judgment process where the record demonstrates an abuse of the discovery process by at least one of the defendants.

{¶ 24} "Sixth Assignment of Error: The trial court erred to the prejudice of appellants when it denied plaintiffs' motion to amend their complaint based upon information that had been in the possession of one of the defendants and her attorney for years but which was not timely disclosed to plaintiffs until on or about the cutoff date for filing summary judgment motions.

{¶ 25} "Seventh Assignment of Error: The trial court erred to the prejudice of appellants when it failed to grant plaintiffs' motion for an oral hearing before ruling on defendants' summary judgment motions because the contract between plaintiffs-appellants and defendant-appellee Ward was a 'settlement agreement' under Ohio law.

{¶ 26} "Eighth Assignment of Error: The trial court's findings or conclusions are unsupported by the evidence or are contrary to the weight of the evidence when construed most strongly in favor of the nonmoving party."

{¶ 27} Appellants' first and second assignments of error relate to the trial court's finding in its judgment entry granting summary judgment that there was no enforceable agreement or contract between the parties. Further, if an agreement was found, it was an agreement to make a will which must be in writing under R.C. 2107.04. Along this vein, the court also concluded that appellants' action was prohibited by the statute of frauds.

{¶ 28} At the outset we note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment**.** *Dresher v. Burt* (1996), 75 Ohio St.3d 280. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by

affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 29} Appellants first argue that the trial court erred in finding that, assuming there was an agreement, it was an agreement to make a will which is required to be in writing. The relevant statute, R.C. 2107.04 provides:

{¶ 30} "No agreement to make a will or to make a devise or bequest by will shall be enforceable unless it is in writing. Such agreement must be signed by the maker or by some other person at such maker's express direction. If signed by a person other than such maker, the instrument must be subscribed by two or more competent witnesses who heard such maker acknowledge that it was signed at his direction."

{¶ 31} Appellants assert that the agreement between the parties was akin to an agreement not to contest a will, or a settlement agreement. Alternatively, appellants argue that if the agreement were to fall under R.C. 2107.04, there were sufficient facts to find that the agreement was in writing.

{¶ 32} At its most basic, in order to prove the existence of a contract, a plaintiff must allege facts showing: an offer and an acceptance and a meeting of the minds, which is supported by consideration. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 16. The consideration for a contract can be the mutual exchange of a "* * * promise to perform given in exchange for the promise of the other to perform." *Union Sav. Bank v. White Family Cos., Inc.*, 183 Ohio App.3d 174, 2009-Ohio-2075, ¶ 19.

{¶ 33} In *LaPoint v. Templeton*, 6th Dist. No. F-07-014, 2008-Ohio-1792, appellants, the stepchildren of Bonita LaPoint, brought an action against the executor of her estate, Woodrow Templeton, for breach of contract, fraudulent misrepresentations, and conversion. Id. at ¶ 1.

{¶ 34} The causes of action were based on the following facts. Bonita LaPoint and the appellants' father, Rudolph LaPoint, executed reciprocal wills, each will devising the entire estate to the spouse. Id. at ¶ 2. Appellants' father died in 1998. At the will reading, LaPoint handed out "written waivers" requesting that the stepchildren waive their right to contest their father's will. Id. at ¶ 4. LaPoint stated "in exchange, that they would still share equally in Rudolph's and her assets." Id. The signed waivers were apparently collected by Bonita and never seen again. Id. at ¶ 6.

{¶ 35} Within a year of Rudolph's death, and upon executing a new will, Bonita transferred the entire business interest to her four natural children. Id. at ¶ 8. Following a business dispute, in 2003, Bonita again changed her will to gift any remaining business interest to one of her natural children and the remaining assets to various charitable organizations. Id. at ¶ 9. Bonita died in 2006.

{¶ 36} Appellants did not challenge Bonita's will but made a claim against the estate. The estate was granted summary judgment. Specifically, the court concluded that if Bonita's alleged oral promise could be considered a promise to make a will, R.C. 2107.04 required that it be in writing. Id. at ¶ 11.

{¶ 37} On appeal, this court noted that the parties agreed that appellants' consideration was their promise to refrain from contesting Rudolph's will. The issue was whether Bonita intended to transfer the property through inter vivos or through testamentary means. If the transfer was intended to be testamentary, then the promise was unenforceable under R.C. 2107.04. Id. at ¶ 33.

{¶ 38} Based on the facts presented, we determined that the only reasonable interpretation was that the promise was to be effectuated only upon death. Thus, the alleged contract was required to be in writing. Id. at ¶ 38. We further noted that because the promise to make a will was unenforceable, appellants' claim of fraudulent misrepresentation and equitable arguments must also fail. Finally, we observed that "[a]lthough appellants argue persuasively that Bonita did not deal fairly with her stepchildren, the alleged oral contract to make will is unenforceable." Id. at ¶ 42.

{¶ 39} Appellants dismiss the *LaPoint* holding as being factually distinguishable and because "it was not based on a consideration of all the causes of action pled in this case." We disagree. As stated above, *LaPoint* examined whether the alleged promise at issue was a contract to make a will which required a writing. What is clear from *LaPoint* is that where a promise involves a testamentary transfer, R.C. 2107.04 requires that it be in writing.

{¶ 40} In the present case, we agree that the agreement at issue was not a settlement agreement but, as in *LaPoint*, an agreement to make a will which must comply with R.C. 2107.04.

{¶ 41} Appellants alternatively argue that the writings by Ward did, in fact, comply with the writing requirement. Appellants contend that the letters written by Ward's attorney, combined with the four codicils, was sufficient. As noted by appellees, appellants do not dispute that they did not know of the codicils prior to the commencement of this action thus, they had no bearing on their intent at the time of the alleged contract. The codicils were drafted prior to Ward expressing her intent to gift appellants property in her will.

{¶ 42} As set forth above in the two letters from Ward's attorney, the gifts from Ward to appellants was described as "all the family heirloom antiques" and "farm land on the west side of Fitchville River Road." As stated by the trial court, in order to have a contract, there must be a meeting of the minds as to all the essential terms. *LaPoint*, supra, at ¶ 34, citing *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 16. In *LaPoint*, we further stated that the "appellants were never aware of the definite terms in the offer or promise which they were accepting." Id. at ¶ 37.

{¶ 43} In the present case, following the two letters sent by Ward's attorney, appellants' attorney sent a letter to Ward's attorney stating:

{¶ 44} "I confirm my interpretation of your client's representation that she is bequeathing the homestead and contiguous farm land to the four children which includes that land now in Dorothy's name as appears on the auditor's grant list card. If the meaning of your letter is otherwise, please notify."

{¶ 45} Ward's attorney responded: "I have sent a copy of your letter to my client. However, I will be out of state until January 4, 1993. As soon as I have discussed this matter with her upon my return, I will contact you." Ward never responded.

{¶ 46} Based upon the foregoing, we find that the writings at issue were not sufficient to make a will. In addition to the meeting of the minds requirement, R.C. 2107.04 requires that the writing be witnessed by two or more "competent" witnesses who "heard such maker acknowledge that it was signed at his direction."

{¶ 47} In addition to R.C. 2107.04, the statute of frauds, R.C. 1335.05, requires that transfer of real estate must be in writing. A writing complies with the statute of frauds if it "'(1) identifies the subject matter of the transaction, (2) establishes that a contract has been reached, (3) states the essential terms of the agreement.'" *Clements v. Mayhew*, 2d Dist. No. 2006 CA 126, 2007-Ohio-3700, ¶ 49, quoting *Lacy v. Adair* (Nov. 22, 1989), 2d Dist. No. 89 CA 0018. Upon review, we agree with appellees that the letters sent by Ward's attorney do not satisfy the statute of frauds.

{¶ 48} Based on the foregoing, we find that appellants' first and second assignments of error are not well-taken.

{¶ 49} In appellants' third assignment of error, they take issue with some of the trial court's comments in its judgment entry awarding summary judgment. Specifically, the court's statements that appellants "could have chosen a different path" and "challenged the will of Mr. Donaldson" or "tried some action to set aside the 1987 transfer of property." Appellants further question the court's comment that appellants

were required to present evidence that "the [1987] transfer of property by Mr. Donaldson to his wife was in any way suspect."

{¶ 50} Upon review, we find that this claim has no legal basis. In addition, the court did not base its findings upon these observations; thus, appellants cannot demonstrate prejudice. Appellants' third assignment of error is not well-taken.

{¶ 51} Appellants' fourth assignment of error disputes the trial court's finding that no genuine issue of fact existed as to any of appellants' claims. Appellants specifically list the claims of breach of contract and anticipatory breach of contract, promissory estoppel, equitable estoppel, oral trust, constructive or resulting trust, fraudulent misrepresentation, and unjust enrichment. Appellants' contract arguments were discussed and rejected above; thus, we will address only the estoppel, oral or constructive trust, fraudulent misrepresentation, and unjust enrichment arguments.

{¶ 52} Appellants contend that they were harmed by their reasonable reliance on Ward's promise to gift them the family heirloom antiques and the property on the west side of Fitchville River Road. The elements of promissory estoppel include: "(1) a clear and unambiguous promise; (2) reliance by the party to whom the promise is made; (3) reliance is reasonable and foreseeable; and (4) injury resulting from reliance." *Casillas v. Stinchcomb*, 6th Dist. No. E-04-041, 2005-Ohio-4019, ¶ 18. As set forth above, the oral promise and the letters drafted by Ward's attorney were ambiguous; thus, the first element of promissory estoppel was not satisfied.

{¶ 53} Appellants also argue that issues of fact remain regarding the availability of the doctrine of equitable estoppel. Appellants quote the Supreme Court of Ohio case *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, which distinguishes the two by stating that equitable estoppel arises not from a promise but, rather, a "misstatement of fact." Id. at ¶ 24. Specifically, equitable estoppel, the precursor to promissory estoppel, prevented the denial of facts contrary to the party's representations. Id. at ¶ 20.

{¶ 54} Ward made an alleged promise to leave the stepchildren the heirloom antiques and the subject property if they did not contest Mr. Donaldson's will. Ward's will had been changed in accordance with the statement. The fact that the codicil conditioned that gift on Ward's continued ownership of the property does not equate with a misstatement of fact. This gift was clearly revocable.

{¶ 55} Regarding the trust arguments, appellants first argue that, relying on parol evidence, an express oral trust was created. Even if the court were to assume that Ward's will and codicils acted to create an express trust, the trust was clearly revocable. Further, Ward intended to retain full use of the property.

{¶ 56} Appellants next argue the equitable remedy of a constructive or resulting trust. "A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Bilovocki v. Marimberga* (1979), 62 Ohio App.2d 169, 171. A constructive trust operates to prevent unjust enrichment. Id. A

constructive trust may not be impressed simply because there has been a moral wrong or abuse of a business or other relationship; rather, it requires a showing of a wrongful acquisition or retention of property. *Croston v. Croston* (1969), 18 Ohio App.2d 159, 163. However, "[a] constructive trust will not attach to property acquired by a bona fide purchaser- one who acquires title to property for value." *Rodgers v. Pahoundis*, 178 Ohio App.3d 229, 2008-Ohio-4468, ¶ 38.

{¶ 57} Upon review, we cannot say that appellees wrongfully acquired or retained the property at issue and, thus, were unjustly enriched. Ward sold the property to the Van Dressers for value. Although appellants may feel that a "moral wrong" was committed, it does not merit equitable relief.

{¶ 58} Finally, appellants contend that the representations made by Ward that she was gifting the property, while concealing the condition that she still own the property, were false and made with knowledge of their falsity. The elements of fraudulent misrepresentation include:

{¶ 59} "'(a) a representation, or where there is a duty to disclose, concealment of a fact,

{¶ 60} "'(b) which is material to the transaction at hand,

{¶ 61} "'(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,

{¶ 62} "'(d) with the intent of misleading another into relying on it,

{¶ 63} "'(e) justifiable reliance upon the representation or concealment, and

{¶ 64} "'(f) a resulting injury proximately caused by the reliance.'" *Majoy v. Hord*, 6th Dist. No. E-03-037, 2004-Ohio-2049, ¶ 20-26, quoting *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus.

{¶ 65} In *LaPoint v. Templeton*, discussed supra, the stepchildren also raised a fraudulent misrepresentation claim. The stepchildren argued that "when Bonita made her oral promises, she knew they were false, and appellants relied in the false representation to their detriment." Id. at ¶ 39. We dismissed the fraudulent misrepresentation claim stating that "[a]ppellants cannot accomplish through a claim of fraudulent misrepresentation what they were unable to accomplish with an unenforceable contract." Id. at ¶ 40.

{¶ 66} Based on the foregoing, we find that appellants failed to present evidence sufficient to create an issue of fact as to their claims and that the trial court did not err in granting summary judgment to appellees. Appellants' fourth assignment of error is not well-taken.

{¶ 67} In appellants' fifth assignment of error, they contend that the trial court erred by failing to grant appellants' motion to continue the summary judgment process, as to the Van Dressers, to allow for additional discovery. Appellants assert that the discovery needed had a direct bearing on the Van Dressers' defense that they were "bona fide purchasers without knowledge and for value" and that Ward committed an abuse of the discovery process by not providing the requested documents.

{¶ 68} Civ.R. 56(F) provides:

{¶ 69} "Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

{¶ 70} A court's decision regarding a Civ.R. 56(F) motion for a continuance is reviewed under an abuse of discretion standard. Under Civ.R. 56(F),

{¶ 71} "'[a] party who seeks a continuance for further discovery is not required to specify what facts he hopes to discover, especially where the facts are in the control of the party moving for summary judgment.' *Doriott v. MVHE, Inc*., 2d Dist. No. 20040, 2004-Ohio-867, at ¶ 41. 'However, the court must be convinced that there is a likelihood of discovering some such facts.' Id. Lack of diligence in pursuing discovery by the party moving under Civ.R. 56(F) militates against grant of a delay. Id. Generally, however, the trial court should exercise its discretion in favor of a party seeking further time for discovery under Civ.R. 56(F). *Zell*, 11th Dist. No. 97-T-0186, at ¶ 3." *Drake Constr. Co. v. Kemper House Mentor, Inc.*, 170 Ohio App.3d 19, 2007-Ohio-120, ¶ 29.

{¶ 72} In the present case, the Van Dressers filed their motion for summary judgment on May 19, 2009. On June 23, 2009, appellants requested a 14 day extension to file their response; the trial court gave appellants until July 16, 2009, to file their brief. In the interim, on July 7, 2009, appellants filed a motion to dismiss the Van Dressers,

with prejudice, in the event that further discovery would establish a claim against them. Thereafter, on July 23, 2009, the same day they filed their opposition to Ward's motion for summary judgment, appellants filed their second motion for a continuance seeking an additional 90 days to respond. The Van Dressers opposed the motion. Appellants never filed a memorandum in opposition prior to the court's October 28, 2009 judgment.

{¶ 73} Upon review, we find that the trial court did not abuse its discretion when it denied appellants' motion for a continuance. From the affidavits and materials presented in support of their motion, it was reasonable for the court to conclude that there was little likelihood that additional discovery could have provided relevant information. Appellants' fifth assignment of error is not well-taken.

{¶ 74} In their sixth assignment of error, appellants argue that the trial court erred when it failed to grant their motion to amend their complaint, particularly their fraudulent misrepresentation claim, based upon appellee Ward's failure to timely provide discovery.

{¶ 75} Civ.R. 15(A) provides:

{¶ 76} "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires."

{¶ 77} A trial court's denial of a Civ.R. 15(A) motion to amend will not be disturbed absent an abuse of discretion. *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720. As stated by Ward, the information that appellants wished to add to their amended claim did not form the basis of the alleged agreement between the parties. Whether Ward had "secretly" added the caveat to the fourth codicil, that she must still own the property, had no bearing, as set forth supra, as to whether or not appellants relied on her oral promise or subsequent letters regarding the gift of the property and antiques.

{¶ 78} Further, appellants complained in their motion to amend that the reason for the tardy motion was Ward's refusal to timely provide discovery. Appellants had procedural mechanisms, including a motion to compel, to address discovery disputes. Accordingly, appellants' sixth assignment of error is not well-taken.

{¶ 79} Appellants' seventh assignment of error contends that the trial court erred by denying appellants' motion for an oral hearing on the summary judgment motions. Appellants, citing *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, argue that because the contract between the parties was a "settlement agreement" though its terms and existence were disputed, an evidentiary hearing was required to be held prior to entering judgment. Appellees assert that appellants failed to raise the settlement agreement argument during the summary judgment proceedings; thus, it cannot be raised for the first time in this court. Further, appellees note that conducting an oral hearing on a summary judgment motion is purely discretionary.

{¶ 80} Appellants' July 27, 2009 motion for an oral hearing was a simple, one-line request. Further, the purpose of an evidentiary hearing is to clear up any ambiguity with regard to the terms or existence of a settlement agreement. This is so because "[w]here parties dispute the meaning or existence of a settlement agreement, a court may not force an agreement upon the parties." *Rulli v. Fan Co.* at 377.

{¶ 81} Unlike *Rulli*, this case did not involve a trial court's enforcement of an uncertain settlement agreement. The issues were fully briefed by the parties and ripe for a Civ.R. 56 determination. Further, we cannot say that the trial court abused its discretion when it ruled on the summary judgment motions prior to conducting a hearing. Appellants' seventh assignment of error is not well-taken.

{¶ 82} In appellants' eighth and final assignment of error, they argue that the trial court's findings are unsupported by the evidence or are contrary to the weight of the evidence when the facts are construed in favor of the nonmoving party. Appellants first assert that the court's finding that the parties agree that they never entered into a written contract "drawn or executed for the purpose of creating an enforceable transfer of property," was incorrect. Appellants contend that the letters and codicils, in particular the fourth codicil, was a "written contract."

{¶ 83} Upon review of the court's judgment, it appears that the court was merely stating that there was no single contract which provided "I, Dorothy Ward, grant the Donaldson children the property west of Fitchville River Road." The court was not suggesting that appellants agreed that there was no enforceable contract.

{¶ 84} Appellants also dispute the suggestion that Ward was gifting the property out of the "kindness" of her heart. We cannot say that the court's statement was in error. The majority of Mr. Donaldson's property had been gifted to Ward prior to his death; very little remained in the estate. It is quite possible that she felt badly for the children because they had been left out of the will. Regardless of her motivations, the court's decision was not based on why she stated an intention to gift the property but that the intention, without more, was not sufficient to create an enforceable contract.

{¶ 85} Based on our review of the record, we find that the trial court's judgment was not against the weight of the evidence. Appellants' eighth assignment of error is not well-taken.

{¶ 86} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Huron County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.
CONCUR.

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JUDGE