[Cite as *Horning v. Fletcher*, 2005-Ohio-7078.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

PAULA HORNUNG, et al.,	)	
	)	
PLAINTIFFS-APPELLANTS,	)	
	)	
- VS -	)	CASE NO. 05 MA 7
	)	
TEANA L. FLETCHER, et al.,	)	OPINION
	)	
DEFENDANTS-APPELLEES.	)	
	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 02 CV 1927.

JUDGMENT: Affirmed.

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: December 22, 2005

APPEARANCES:

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DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Plaintiffs-Appellants, Paula and Jack Hornung, appeal the decision of the Mahoning County Court of Common Pleas granting summary judgment to Defendants-Appellees, Eranco Business Brokers, Frances Ollila, and Ronald Polansky, on the Hornungs' claims of breach of fiduciary duty and negligence. Specifically, the Hornungs contend that Appellees owed them a fiduciary duty and that they did not obtain a proper release from liability. However, these issues are moot since the Hornungs failed to present any evidence supporting their argument that Appellees acted improperly.

Facts

{¶2} In March 2000, Paula and Jack Hornung hired Appellees to sell their business, the Taste-N-Tell Bakery. A year later, Appellees found a group of Buyers, Teana L. Fletcher, Kenneth Fletcher, Amanda G. Johnson, and John Johnson, who

made an offer on the bakery. In May 2001, the Hornungs agreed to sell the bakery to the Buyers for $75,000.00. The purchase agreement required a $10,000.00 down payment and a bank loan from National City Bank in the amount of $40,000.00. The remainder of the purchase price was to be paid in monthly installments with a balloon payment due after the thirty-seventh payment.

{¶3} National City Bank approved the Buyers for the loan and the closing was scheduled to take place on June 30, 2001. However, prior to the closing, the bank informed the Hornungs that although it approved the loan before the closing date, the paperwork for the loan could not be signed until July 2 or 3, 2001. Despite the delay in financing, the Hornungs and the Buyers agreed to go forward with the closing on the scheduled date. After taking possession of the property, the Buyers failed to sign the financing agreement and subsequently abandoned the property and their obligations under the purchase agreement, claiming that the purpose of the transaction had become frustrated.

{¶4} Subsequently, the Hornungs brought suit against the Buyers, for breach of contract, and Appellees, for breach of fiduciary duty and negligence. Appellees then moved for summary judgment and the trial court granted their motion.

Standard of Review

{¶5} In their sole assignment of error, the Hornungs argue:

{¶6} "The trial court erred by granting summary judgment in favor of Eranco Business Brokers, Frances Ollila, and Ronald Polinsky."

{¶7} When ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 535, 1994-Ohio-0531. The party seeking summary judgment has the initial burden of informing the court of the motion's basis and identifying those portions of the record tending to show that there are no genuine issues of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The movant must be able to point to some evidence of the type listed in Civ.R. 56(C) that affirmatively

demonstrates that the nonmoving party has no evidence to support his or her claim. Id. "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." Civ. R. 56(C). If this initial burden is met, the nonmoving party has a reciprocal burden to "set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not respond, summary judgment, if appropriate, shall be granted." Id.

{¶8} An appellate court reviews a decision granting summary judgment on a de novo basis. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-0336. Summary judgment is properly granted when: 1) there is no genuine issue as to any material fact; 2) the moving party is entitled to judgment as a matter of law; and ,3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co*. (1976), 54 Ohio St.2d 64, 66.

Breach of Fiduciary Duty

{¶9} The Hornungs argue that Eranco acted as a real estate broker throughout their transaction with Buyers, that Eranco's actions as their real estate broker created a fiduciary relationship, and that Eranco breached their fiduciary duties by negligently misrepresenting the nature of the purchase agreement to the Buyers. Specifically, the Hornungs claim that Appellees advised the Buyers that they were not obligated to perform the contract after the "dry closing."

{¶10} In this case, Appellees owed a fiduciary duty to the Hornungs since they were real estate brokers, as that phrase is defined by R.C. 4735.01. That statute defines any of the following, among other things, as a real estate broker: 1) someone who sells, exchanges, purchases, rents, or leases, or negotiates the sale, exchange, purchase, rental, or leasing of any real estate; 2) someone who offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of any real estate;

and, 3) someone who directs or assists in the procuring of prospects or the negotiation of any transaction, other than mortgage financing, which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate. R.C. 4735.01(A)(1), (2), and (7).

{¶11} In this case, the Hornungs hired Appellees to procure buyers to purchase the Hornungs' business and the Hornungs and the Buyers executed a purchase agreement pursuant to Appellees' efforts. As part of the purchase agreement, the Buyers signed a lease agreement for a term of 3½ years. Furthermore, paragraph one of the purchase agreement states that the agreement is for the purchase and sale of, among other things, the lease. These facts establish that Appellees were acting as real estate agents as defined by R.C. 4735.01(A).

{¶12} Real estate agents owe their clients fiduciary duties. "In representing any client in an agency or subagency relationship, the [real estate broker] shall be a fiduciary of the client and shall use [their] best efforts to further the interest of the client." R.C. 4735.62. "A fiduciary has been defined as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216. "Real estate brokers have statutory and common law fiduciary duties of disclosure, good faith, and loyalty." *Whaley v. Zyndorf/Serchuk, Inc.*, 6th Dist. No. L 01 1295, 2002-Ohio-2640 at ¶8. "A breach-of-fiduciary-duty claim essentially is a negligence claim involving a higher standard of care." *Hurst v. Enterprise Title Agency, Inc.*, 157 Ohio App.3d 133, 144, 2004-Ohio-2307. "Thus, the party asserting such a breach must establish the existence of a fiduciary duty, a breach of that duty, and an injury proximately resulting therefrom." Id. at 144-145.

{¶13} In this case, the Hornungs have failed to produce any evidence that would show that Appellees breached their fiduciary duties toward the Hornungs. The Hornungs alleged that Appellees breached their fiduciary duty by negligently misrepresenting the nature of the dry closing, and that as a result of that breach, the Hornungs' deal with the Buyers failed. Appellees produced evidence showing that this

did not happen. First, Appellees point to the listing agreement which states that it agreed to procure a ready, willing, and able purchaser. Second, Appellees produced Ollila's affidavit, where she stated that she fully disclosed all information to and acted in good faith towards the Hornungs as required by law.

{¶14} In response, the only evidence in the record which the Hornungs could rely upon to create a genuine issue of material fact is a response from the Buyers to an interrogatory which stated that Ollila told them that the paperwork was part of a dry closing in furtherance of the SBA loan application and contingent upon transfer of a turn key operation. Appellees deny that they ever told the Buyers that there were any contingencies.

{¶15} While these statements appear to conflict, they do not create a genuine issue of material fact. The Buyers' statement indicates that Olilla informed them that the sale was contingent, but is silent on whether Ollila informed the Hornungs of this fact; the record is silent on whether the sale was for a "turn key operation" since that phrase is somewhat ambiguous; and Ollila averred that she told the Hornungs all relevant information. Without evidence that Ollila negligently misrepresented something, the Hornungs cannot prove a necessary element of their claim. Accordingly, the trial court properly granted summary judgment to Appellees. The Hornungs' sole assignment of error is meritless and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Vukovich, J., concurs. See concurring opinion.

Vukovich, J., concurring in separate concurring opinion.

{¶16} I concur in the decision and analysis reached by my colleagues. However, I write separately to address the reasoning the trial court relied on when granting summary judgment for appellees.

{¶17} The trial court in granting summary judgment stated, "Defendant's, Eranco Business Brokers Frances Ollila and Ronald Polinsky, motion for summary judgment against both Plaintiff and Defendant, Teana L. Fletcher, in the above captioned case is hereby granted as Eranco's waiver was validly executed and precludes the instant claims against them by all parties to this suit." 12/13/04 J.E.

{¶18} In my opinion this was not a proper reason for granting summary judgment. The liability release in question did not express Eranco's intent in clear and unequivocal terms.

{¶19} The liability release in question stated the following: "The parties jointly and severally hereby expressly release and waive any and all claims, demands, and causes of action against Eranco, Inc., dba Eranco Business Brokers and against Eranco Associates Real Estate and its agents arising out of the sale of the business purchased herein."

{¶20} Eranco had both parties sign this release form.

{¶21} The Ohio Supreme Court has held "indemnity agreements purporting to release a party from the consequences of his negligence and failing to express that intent in 'clear and unequivocal' terms to be unenforceable." *Bowman v. Davis* (1976), 48 Ohio St.2d 41, 44, citing *Kay v. Pennsylvania Rd. Co.* (1952), 156 Ohio St. 503.

{¶22} In *Bowman*, the Ohio Supreme Court was considering a case involving a hospital consent form. It was the observation of the Supreme Court that, although the consent form was not an indemnity agreement, it appeared to have been designed to release the hospital and attending physicians from the consequences of their negligence. The form however, did not specifically mention release from liability for negligence. The Ohio Supreme Court set the agreement aside because the intent of the indemnitee was not set out in "clear and unequivocal" terms. Id. at 44.

{¶23} In the matter at hand, the release is similar to the one in *Bowman* in that the release appears to have been designed to release Eranco from liability for the consequences of their actions. Also similar to *Bowman*, is the fact that the form does not specifically mention release from liability for negligence.

{¶24} Thus, the release was not valid. While, Eranco argues two things to suggest that it is valid, I find these arguments unpersuasive.

{¶25} First, Eranco argues that the Hornungs may not raise the issue of intent on appeal when they did not raise it in the trial court. However, this is an incorrect assertion. Eranco raised the issue of liability release as an affirmative defense. In Hornungs' response to the motion for summary judgment, the Hornungs responded to this defense by raising the issues of clear and unequivocal terms, and intent. Thus, the issue is properly before the court on appeal.

{¶26} The next argument of Eranco is based upon *Glaspell v. Ohio Edison Co.* (1987), 29 Ohio St.3d 44. At issue in *Glaspell* was a liability release form that did not specifically release the intended indemnitee from negligence. The Ohio Supreme Court held that the indemnification clause was not to be strictly construed against the drafter so as to exclude claims arising from the drafters own alleged negligence. Id. at 48. This holding however appears to have been based on the fact that both parties were large commercial enterprises each possessing a high degree of sophistication in the matters of contract. Moreover, the record in *Glaspell* showed that the two parties discussed the terms of the contract and understood the liability issues.

{¶27} Here, Eranco's release form is intended to release them from liability for negligence, but not specifically state that intention. Unlike the parties in *Glaspell*, nothing in the record here suggests that the parties are large commercial enterprises or that they are sophisticated in the matters of contract. In fact, the record suggests the exact opposite. The Hornungs appear to be individuals attempting to sell their small company. Likewise, Eranco appears to be a small real estate/business brokerage consisting of only a few partners. Furthermore, it is not clear form the record that the parties understood the liability issues surrounding the release

document.

{¶28} As such, I would find that the release was not valid. However, this fact does not necessitate a reversal of the judgment of the trial court as there are alternative grounds to support said judgment as heretofore set forth in the opinion to this Court.

{¶29} Even considering all the above, I agree with my colleagues that summary judgment is appropriate for the reasons expressed in that opinion. An appellate court's review of the grant or denial of summary judgment is not confined to the trial court's reasons for granting or denying the motion. A trial court's judgment must be affirmed if any valid grounds are found on review to support it. *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96. Thus, "a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof." *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 222.

{¶30} Consequently, while I believe that the trial court's reason to grant summary judgment for appellees is incorrect, I agree with the majority that summary judgment was appropriately granted for appellees for the reasons expressed in the majority opinion.