

[Cite as *Manns v. Wright*, 2010-Ohio-4281.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROOSEVELT MANNS, ET AL.	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
GAIL WRIGHT	:	Case No. 09CA133
	:	
Defendant-Appellee	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 2008CV1023H

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 3, 2010

APPEARANCES:

For Plaintiffs-Appellants

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For Defendant-Appellee

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Farmer, J.

{¶1} On May 14, 2008, appellants, Roosevelt Manns and Vanessa Chapman, filed a complaint against appellee, Gail Wright, and others who were subsequently dismissed, alleging fraud in the sale of her real estate property. Appellants claimed appellee failed to disclose water intrusion issues on the Real Property Disclosure form.

{¶2} A bench trial commenced on July 24, 2009. By decision on bench trial filed October 14, 2009, the trial court found in favor of appellee.

{¶3} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT'S DECISION IN FAVOR OF THE APPELLEE GAIL WRIGHT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONSTITUTES REVERSABLE (SIC) ERROR."

I

{¶5} Appellants claim the trial court's decision was against the manifest weight of the evidence, as the trial court's conclusion that appellee was not guilty of fraud was error. Appellants also argue the trial court erred in not finding there was a mutual mistake of fact and they were entitled to rescission. We disagree.

{¶6} A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent

and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9.

{¶7} In its decision on bench trial filed October 14, 2009, the trial court specifically addressed the facts on the issue of fraud as follows:

{¶8} "The burden of proof is on the plaintiff buyer to establish the defendant's actual knowledge of the defect. In the case at bar, no evidence exists to prove to the satisfaction of this court that the defendant had actual knowledge of the defects that caused the water intrusion into the basement, and there is at least some evidence to the contrary. Defendant testified that she had no knowledge of the defects in the property. No evidence was presented that was sufficient to refute her testimony. The testimony of plaintiffs' witnesses Marie Davis, and Johnny Gheen is probative only of the condition of the property after it passed into the plaintiff's possession, not of its condition during the defendant's period of possession, because neither of them had ever entered the property while it was owned by the defendant. Defendant's testimony that she had no actual knowledge of the defects is supported by her testimony that she furnished the basement and used as living space on a regular basis.

{¶9} "No evidence was presented that proved that any work performed during defendant's ownership, including the 2003 visit by Roto Rooter was related to water intrusion into the basement or the loss suffered by the plaintiffs. Upon cross-examination, defendant Gail Wright testified that Roto Rooter had come out to the property in 2003 and that she had not disclosed this visit to plaintiffs. This testimony failed to establish what the purpose of Roto Rooter's visit was, and fails to connect that visit with water intrusion into the basement. Therefore, plaintiffs have failed to prove

that defendant Gail Wright had actual knowledge of the defects that caused the water intrusion damage to the house."

{¶10} During oral argument, appellants as much conceded this issue.

{¶11} In *Burr v. Stark County Board of Commissioners* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus, the Supreme Court of Ohio found the elements of fraud to be as follows:

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

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

{¶14} "(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,

{¶15} "(d) with the intent of misleading another into relying upon it,

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

{¶17} "(f) a resulting injury proximately caused by the reliance. (*Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, [10 OBR 500], 462 N.E.2d 407, followed.)"

{¶18} The elements of fraud must be established by clear and convincing evidence. Clear and convincing evidence is that measure or degree of proof that will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. *Cross v. Ledford* (1954), 161 Ohio St. 469. The burden to prove fraud rests upon the party alleging the fraud. *First Discount Corp. v. Daken* (1944), 75 Ohio App. 33, paragraph seven of the syllabus.

{¶19} Upon review of the record, we find the trial court's findings of fact to be supported by the record:

{¶20} "8. Defendant's answers on the Residential Property Disclosure Form are supported by the report of the property inspector and by the undisputed fact that the defendant used the basement as living space without any problem. [T. at 93-94, 172-173, 178, 217.]

{¶21} "9. Prior to the December 2006 home sale, the plaintiffs, Roosevelt Manns and Vanessa Chatman, viewed and inspected the home, first in the company of the defendant, and at other times accompanied by the realtor. The plaintiffs had the unimpeded opportunity to view and inspect the home. [T. at 52-54, 62, 181-182.]

{¶22} "10. Before the sale closed, the defendant made minor repairs as requested by the plaintiffs through the realtor. [T. at 60, 182.]

{¶23} "11. Prior to the December 2006 home sale, the plaintiffs had a home inspection performed by F. Michael Demeter of National Property Inspections. He testified that he spent over three hours in the property, and he didn't see the damage of which plaintiff is complaining. He went inside the crawl space and it was not wet and moldy at the time of his inspection. He saw no evidence of flowing water, but some slight moisture may have been in the basement. The defendant would not have been aware this was true as there was no wet carpet, or other obvious indications. Had the water been obvious, it would have been mentioned in his report. There was no damp odor, nor evidence of recent moisture. His inspection was focused on the visible aspects of the property. The interior floor was acceptable, the walls marginal (less than acceptable). [T. at 192-194, 202-203, 208, 212, 217, 219.]

{¶24} "12. His report (Defendant's Exhibit C) stated that 'there is no evidence of moisture intrusion in the basement.' The inspection report indicated potential problem

areas that might contribute to future water incursion into the home: 1) the grading of the earth around the foundation to direct water away from the foundation; 2) the walk had settled and sloped toward the foundation, creating an area where water, snow and ice could pond; 3) the gutters and downspouts were filled with debris and needed cleaning; and 4) the window wells had surface drains that needed to be monitored and kept free of debris to prevent groundwater from running into the basement of the house. [T. at 200-201; Defendant's Exhibit C.]

{¶25} "13. The plaintiffs were aware of the contents of the inspector's report before closing the purchase of the home. They proceeded to purchase the subject property after receiving the inspection report. [T. at 53, 56.]

{¶26} "14. Plaintiffs inspected the property on more than one occasion before they bought it, commissioned and reviewed the inspector's report, and were sufficiently satisfied with the condition of the premises to go through with the sale." [T. at 27, 46, 49, 51, 159.]

{¶27} We find the trial court did not err in finding no fraud by appellee in her Real Property Disclosure form answers or in her actions.

{¶28} Secondly, appellants argue the trial court did not specifically address the mutual mistake argument, and because neither party knew of the defects, mutual mistake would permit rescission or cancellation of the contract. The trial court summarily concluded that mutual mistake was not appropriate, and the findings of fact support the decision. Appellants argue the doctrine of mutual mistake is appropriate in this case.

{¶29} As explained by the Supreme Court of Ohio in *Reilley v. Richards*, 69 Ohio St.3d 352, 352-353, 1994-Ohio-528:

{¶30} "The issue presented to this court is whether rescission of a real estate purchase contract is proper when there was a mutual mistake as to the character of the real estate that was material to the contract and where the complaining party was not negligent in failing to discover the mistake. For the following reasons, we answer 'yes' and, accordingly, reverse the judgment of the court of appeals.

{¶31} "This court recognizes the doctrine of mutual mistake as a ground for the rescission of a contract under certain circumstances. In *Irwin v. Wilson* (1887), 45 Ohio St. 426, 15 N.E. 209, we held that a buyer is entitled to rescission of a real estate purchase contract where there is a mutual mistake as to a material part of the contract and where the complaining party is not negligent in failing to discover the mistake. A mistake is material to a contract when it is 'a mistake***as to a basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances.' 1 Restatement of the Law 2d, Contracts (1981) 385, Mistake, Section 152(1). Thus, the intention of the parties must have been frustrated by the mutual mistake."

{¶32} For the following reasons, we find the holding of *Reilley* not to be appropriate sub judice. First, the contract for the sale of the property was an "as is" contract. As the evidence substantiated, defects in the property as to water intrusion issues as raised by the inspector's report were not material to the completion of the contract. Appellants had knowledge of the issues and rejected their importance for the completion of the sale. Appellants had access and some knowledge of potential defects and by their own actions, rejected any alternative to completion of the sale. As Defendant's Exhibit C states, the conditions of grading and drainage, walks and slopes,

and gutters/downspouts were marginal. This evidence impugns negligence on behalf of appellants and negates mutual mistake.

{¶33} The sole assignment of error is denied.

{¶34} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William B. Hoffman

JUDGES

SGF/sg 818

