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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

FILED

JASON A. GRILLO
Plaintiff

Case No: CV-19-924616

2021 AUG 24 P 4: 05

Judge: SHANNON M GALLAGHER
CLERK OF COURTS
CUYAHOGA COUNTY

JAMES O. BAUER, JR. ET AL.
Defendant

JOURNAL ENTRY

83 DISP.COURT TRIAL - FINAL

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT ENTRY IN FAVOR OF DEFENDANTS. O.S.J.
COURT COST ASSESSED TO THE PLAINTIFF(S).
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER
PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL
PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature

Date

II. FINDINGS OF FACTS

On or about May 11, 2018, plaintiff Jason Grillo entered into a purchase agreement to purchase a single-family home at 2053 Lincoln Ave. in Lakewood, Ohio ("Property") from defendants James and Wanda Bauer. Mr. Grillo paid \$179,200 for the Property. (Exhibit C). Mr. Grillo testified that he was very interested in the Property when it went on the market and offered \$30,000 over the asking price in order to be competitive.

On May 10, 2018, prior to the sale, defendants completed the Ohio Residential Property Disclosure Form. (Exhibit D). In Section B of the Disclosure Form, defendants were asked, "Do you know of any previous or current leaks, backups, or other material problems with the sewer system servicing the property? . . . If "Yes," please describe and indicate any repairs completed (but not longer than the past 5 years. Defendants answered "no," and included no description of any problems. *Id.*

In Section D of the Disclosure Form, defendants were asked, "Do you know of any previous or current water leakage, water accumulation, excess moisture or other defects to the property, including but not limited to any area below grade, basement, or crawl space? If "Yes," please describe and indicate any repairs completed." Defendants answered "no," and included no description. *Id.*

On May 14, 2018, Mr. Grillo hired Keith Sandy of Inspection Tech to complete a Home Inspection Report. (Exhibit E). The inspection report noted the presence of surface mold/mildew in the basement and recommended additional testing and remediation. *Id.* p. 40. The inspection report also noted the presence of efflorescence/high moisture readings at exterior basement walls and the potential for mold. *Id.* at 45. The inspection report recommended exterior water control repairs and remediation and noted that the basement did not have a waterproofing system. *Id.*

On or about June 13, 2018, the Property transferred to Mr. Grillo. (Exhibit A). Mr. Grillo testified that after he took possession of the Property he put down carpet in one of the rooms in the basement. (Exhibit G). He intended to use that room as a finished basement. (Grillo testimony). About nine months after he moved in he experienced water intrusion in the basement. *Id.* He first noticed a wet spot on the basement carpeting. *Id.* He then observed water running to the sewer drain in the room adjacent to the room with the carpeting. *Id.*

After he noticed the significant water intrusion, Mr. Grillo began demolishing the room with the paneling, and peeled back the paneling with a pry bar. (Grillo testimony). He noted that the foam behind the paneling had water damage. (Exhibit F, Grillo testimony). He observed water damage, mold, and dry rot on the wood behind the paneling. (Exhibits H, S, T, and U). He also observed an electrical outlet covered in rust that was about three to four feet above the ground. (Exhibits Q and R).

Mr. Grillo experienced a second water infiltration a couple months later and observed water seeping into the basement through several locations along the basement wall. (Grillo testimony, Exhibit W). Mr. Grillo testified that he would not have purchased the home had he known of the water damage.

Mr. Grillo hired Ohio State Waterproofing to conduct repairs and waterproof the basement. (Grillo testimony, Exhibit J). Mr. Grillo spent \$16,000 to waterproof the basement. (Exhibit K). He also spent \$1,480 for mold remediation, \$899.37 for flooring, \$2,448.55 for supplies from the Home Depot, as well as a significant amount of his own time. The waterproofing fixed the water infiltration issue and he now has a fully waterproofed, finished basement. (Grillo testimony).

Lee Lambert of Ohio State Waterproofing testified that the water damage to the basement walls occurred from years of water intrusion and could not have occurred from a one-time sewer

backup. Mr. Lambert further testified that the electrical outlet in the wall of the basement could only have become that rusted after years of moisture intrusion. (Exhibits Q and R). Mr. Lambert noted that someone had previously put black sealant on the wall to keep the water from coming in. However, he was unable to say how old the black sealant was. (Lambert testimony, Exhibits S, T, and U).

Jeff Bischel provided testimony regarding the work he was hired to do for Mr. Bauer prior to the Property being put on the market for sale. Mr. Bauer hired Mr. Bischel to do a full demolition and remodel of the upstairs bathroom, to paint the interior, to sand and re-finish the hardwood floors, to patch the ceiling in the kitchen where there had been a prior leak, and to replace the old paneling in the basement and paint the basement floor. (Bischel testimony). When Mr. Bischel was hired, Mr. Bauer and his family had already moved out of the Property. *Id.*

Mr. Bischel noted that there was water damage on the old paneling in the basement and on some of the insulation behind the paneling. (Bischel testimony). He observed that some of the wood behind the paneling had dry rot, but did not recall any mold or mildew. *Id.* He replaced some of the wood framing beams that came off when he removed the paneling, but did not replace all the beams because that was not within his quote. *Id.* Mr. Bischel was unable to recall any evidence of severe water issues, and testified that he was not qualified to recognize the signs of severe water intrusion. *Id.* He did not at any time advise Mr. Bauer of any severe water intrusion. *Id.* Mr. Bischel testified that Mr. Bayer told him the water damage was from a sewer backup, and Mr. Bischel thought that was a reasonable explanation. *Id.* Mr. Bischel was not aware of any ongoing water issues. *Id.*

Mr. Bauer testified that he purchased the Property in 2001 and was not aware of any ongoing water infiltration issues in the basement of the Property. He experienced two sewer

backups in 2001 and 2003, but these issues were resolved when the City of Lakewood repaired the main sewer line. (Bauer testimony). He did not include these sewer backups in the disclosure forms because they had occurred so long ago and did not involve a defect in the Property. *Id.*

Prior to putting the Property on the market, Mr. Bauer made improvements of close to \$50,000. (Exhibit 1). Mr. Bauer wanted to make the Property look nice. (Bauer testimony). He replaced the paneling in the basement because it was ugly and repainted the basement floor because it was scratched. *Id.*

Mr. Bauer testified that he had no idea as to the extent of the water intrusion in the basement, and never experienced water running across the floor. He seemed genuinely shocked and dismayed at the rusted condition of the wall outlet in the basement. (Bauer testimony, Exhibit R). He stated that the waterproof paint was already there when he purchased the Property. (Bauer testimony).

Mr. Bauer testified that Mr. Bischel did not inform him of any water damage. He also testified that had the plaintiff brought the water issues from the inspection report to his attention, that he would have negotiated the sale price, similar to how he gave plaintiff \$1,500 off the sale price due to the age of the furnace.

III. CONCLUSIONS OF LAW

A. Fraudulent Non-Disclosure

Plaintiff Grillo alleges in his complaint that defendants had a duty to disclose on the Property Disclosure Form that Jeff Bischel discovered water-damaged boards and wet panels in the basement, and that defendants' failure to disclose constitutes fraud.

In order to prove a claim for fraud, plaintiff must show (1) a representation, or where there is a duty to disclose, concealment of fact, (2) which is material to the transaction at hand, (3) 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, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) resulting injury proximately caused by the reliance. *Wallington v. Hageman*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, P15.

Under Ohio law, the doctrine of caveat emptor precludes a purchaser from recovering for a structural defect in real estate if the defect is open and observable, or discoverable upon reasonable inspection, the purchaser has opportunity to conduct an inspection, and there is no fraud on the part of the seller. *Id.* at P15.

However, R.C. 5302.30 requires a seller to disclose latent defects that are within their actual knowledge on the Ohio Residential Property Disclosure Form. *Id.* at P17. If a seller fails to disclose a material defect, with the intention of misleading the buyer and the buyer relies on the form, the seller is liable for any resulting injury. *Id.* at P18, citing *Pedone v. Demarchi*, 8th Dist. Cuyahoga No. 88667, 2007-Ohio-6809, at P31.

Plaintiff failed to prove by a preponderance of the evidence that Mr. Bauer had actual knowledge that the basement experienced water infiltration due to some defect and intentionally failed to disclose the defect in order to mislead plaintiff into buying the Property. Mr. Bauer testified that he had no knowledge of the water seepage and flooding in the basement at the Property, other than two sewer back-ups that occurred in 2001 and 2003. Mr. Bauer was not required to disclose the sewer back-ups because they were not caused by a defect in the Property, but rather by a problem with the main city line. Mr. Bischel testified that he did not warn Mr. Bauer that the condition of the basement constituted severe water intrusion, and also testified that he was not qualified to give an opinion on water intrusion.

Additionally, the doctrine of caveat emptor precludes Mr. Grillo from recovering in this case. Mr. Grillo could not have relied upon the disclosure forms because his own inspector noted in the inspection report that the basement had water issues that should be further investigated. (Exhibit I). Yet, Mr. Grillo was not deterred from purchasing the Property, nor did he attempt to renegotiate the contract price.

Plaintiff's claim for fraudulent non-disclosure fails as a matter of law.

B. Fraudulent Concealment

Plaintiff alleges that defendants are liable for fraudulent concealment because they took active steps to conceal prior water damage, which prevented plaintiff from discovering the true extent of the water infiltration.

The elements of fraudulent concealment are the same as the elements discussed above for fraudulent non-disclosure. If a seller takes active steps to conceal damage, preventing the buyer from discovering the damage, then the seller's knowledge of the defect may be inferred. *Felty v. Kwitkowski*, 8th Dist. Cuyahoga No. 68530, 1995 Ohio App. LEXIS 4834 (Nov. 2, 1995). The seller's knowledge of later-discovered water seepage or flooding may be inferred from a freshly-painted basement floor and new basement paneling installed just prior to sale. *Vitanza v. Bertovich*, 8th Dist. Cuyahoga No. 64699, 1993 Ohio App. LEXIS 5730 (Dec. 2, 1993).

As discussed above, plaintiff failed to prove by a preponderance of the evidence that defendants had actual knowledge of the water intrusion issues in the basement of the Property. Mr. Bauer credibly testified that he was shocked at the rusted condition of the outlet in the basement, and had never experienced the type of water intrusion experienced by the plaintiff. Mr. Bauer also credibly testified that he intended to improve the look of the basement by replacing

paneling and repainting the floor, and did not intend to prevent Mr. Grillo from discovering any defects related to water intrusion.

The improvements defendants made to the Property did not prevent plaintiff's inspector from discovering the presence of efflorescence/high moisture and potential mold/mildew in the basement. (Exhibit I). Plaintiff testified that he reviewed this report and had an opportunity to inspect the basement himself.

Plaintiff's claim for fraudulent concealment fails as a matter of law.

C. Civil Conspiracy

Civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St. 3d 415, 419, 650 N.E.2d 863 (1995).

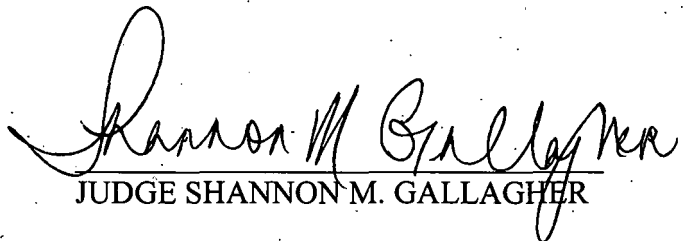
Civil conspiracy cannot survive without an underlying tort action. *Gosden v. Louis*, 116 Ohio App. 3d 195, 221 (9th Dist 1996). As discussed above, plaintiff's fraud claims fail as a matter of law. Therefore, plaintiff's claim for civil conspiracy also fails as a matter of law.

IV. JUDGMENT

The court finds that upon its review of the testimony and evidence at trial, plaintiff's claims against defendants James and Wanda Bauer for fraudulent non-disclosure, fraudulent concealment, and civil conspiracy fail as a matter of law and are dismissed with prejudice. Judgment is entered in favor of defendants. Court costs assessed to plaintiff.

IT IS SO ORDERED.

Date:


JUDGE SHANNON M. GALLAGHER