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NO. 51331-5-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

JAMES N. FOTINOS, A SINGLE INDIVIDUAL

APPELLANT

vs.

CRAIG J. KALICH AND JULIET D. KALICH,
HUSBAND AND WIFE;
COLDWELL BANKER KLINE AND ASSOCIATES,
A WASHINGTON CORPORATION; AND
LOREN HOWARD, AN INDIVIDUAL

RESPONDENTS.

APPEAL FROM LEWIS COUNTY SUPERIOR COURT

BRIEF OF RESPONDENTS CRAIG AND JULIET KALICH

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I. ISSUES

- A. Did the Court abuse its discretion when it did not consider Plaintiff's responsive materials that were unfiled prior to the hearing?
- B. Did the Court err in its denial of Plaintiff's motion for reconsideration?
- C. Did the Court err in dismissing Plaintiff's claims against Defendant Kalich?

II. STATEMENT OF THE CASE

Plaintiff James Fotinos filed a Complaint for Fraudulent Misrepresentation, Breach of Contract, Violations of Consumer Protection Act, and Negligence on November 30, 2016 (CP 3-15). Plaintiff's claims against Defendants Craig and Julie Kalich (hereafter "Kalich") included claims for fraudulent misrepresentation and breach of contract stemming from the Kalichs' sale of real property to Plaintiff in June of 2015 (CP 3-15).

After several months discovery, Kalich and the remaining Defendants filed motions for summary judgment in July of 2017 (CP 127, 300). Defendant Kalich filed its motion for summary judgment and accompanying affidavits on July 27, 2017 noting a hearing for the motion on Friday, August 25, 2017 in accordance with Civil Rule 56.

Defendant Kalich's motion for summary judgment emphasized the Plaintiff's lack of due diligence and justifiable reliance necessary to support his claims against Kalich. (CP 300-314). Kalich's motion and accompanying declarations made clear that Plaintiff knew or could have known of the alleged defects with due diligence (CP 300-314). Defendant Kalich's materials demonstrated Plaintiff's inability to satisfy the necessary due diligence and reliance components of his claim (CP 307-314).

Plaintiff's counsel was first notified of the summary judgment hearing in mid-June, more than a month prior to Defendants filing their motions for summary judgment, in a letter sent to all parties by counsel for Defendant Coldwell Banker Kline (CP 433). With Defendant Coldwell's docket notice filed on June 23, 2017, Plaintiff's counsel had more than sixty (60) days' advance notice of the summary judgment hearing (CP 31, 433).

Under Civil Rule 56(e), Plaintiff's responsive affidavits, memoranda, or documents were due to be filed and served eleven (11) days prior to the hearing (CR 56(e)). Hence, Plaintiff's response in this case was due Monday, August 14, 2017. However, the deadline for Plaintiff's response passed without any responsive filings or motions being filed by Plaintiff's counsel.

On August 16, 2017, Plaintiff's Counsel sent an email to Defendants requesting an extension of time for filing responsive materials to Friday,

August 18 (CP 440). Plaintiff's counsel then filed a motion to continue the summary judgment hearing on Friday, August 18, 2018, with a hearing noted for that same day (CP 444).

The Court denied Plaintiff's motion to continue the summary judgment hearing (RP 8-18-2017 at 11). The discussion then turned to an extended deadline for Plaintiff to file his responsive materials (RP 8-18-2017 at 13-14). Defendant Coldwell Banker Klein offered to accept a late brief if Plaintiff filed and served it by Monday, August 21 or Tuesday, August 22 (RP 8-18-2017 at 13-14). Plaintiff's counsel indicated that if the parties would accept Plaintiff's materials by email on Tuesday, he could meet that deadline (RP 8-18-2017 at 13-14). The Defendants agreed.

Despite the agreed extension of time for Plaintiff to file his materials, Plaintiff's counsel did not file any materials by the newly created deadline.

The hearing on Defendants' motions for summary judgment was held as scheduled the following Friday, August 25, 2017 (RP 8-25-2017). At the outset of summary judgment hearing, Judge Lawler acknowledged the prior hearing that took place the week prior on August 18 and the extension for time provided by Judge Toyne and agreed upon by Defendants (RP 8-25-2017 at 1-2). As Judge Lawler summarized:

“There was a hearing in front of Judge Toynbee to hear Plaintiff’s request for a continuance of this hearing. He denied that but did give plaintiff an extension of the deadline to file and placed that deadline as this Tuesday, three days ago, on August 22nd.” RP 8-25-2017 at 2-3.

After indicating that he did not see that a response was filed, Judge Lawler inquired of Plaintiff’s counsel whether any response was filed (RP 8-25-2017 at 2-3). Plaintiff’s counsel indicated that nothing had been filed (RP 8-25-2017 at 2-3).

The Court then received oral argument from the three defense attorneys summarizing their arguments on their motions for summary judgment (RP 8-25-2017). Plaintiff’s counsel then offered explanation as to why the responses were not filed prior to the hearing (RP 8-25-2017 at 13).

With nothing filed in response and no opposing facts to consider, Judge Lawler granted Defendants’ motions (RP 8-25-2017). In granting the motions, Judge Lawler indicated that “the rules are very clear; and despite those rules, you were given additional time and still did not give any response” (RP 8-25-2017 at 15-16). Responding to Plaintiff Counsel’s explanation of the difficulty to respond timely, Judge Lawler further noted that “whether it was difficult or no matter how hard you tried, what I’m left with is a case where there are motions for summary judgment and there’s no response to any of them” (RP 8-25-17 at 15-16). During the hearing,

Plaintiff's counsel handed materials to the Court in an attempt to file them (RP 8-25-2017 at 16).

Eleven days after the hearing, Plaintiff filed a motion for reconsideration. On September 11, 2017, the Court entered an Order denying plaintiff's Motion for Reconsideration.

IV. ARGUMENT

I. **THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO CONSIDER PLAINTIFF'S UNFILED RESPONSIVE MATERIALS.**

A. **Applicable standard of review.**

A trial court's decision on whether to accept or reject untimely filed affidavits is reviewed for an abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 499, 183 P.3d 283 (2008).

B. **It was not an abuse of discretion for the Court not to consider the Plaintiff's unfiled response.**

Plaintiff had every opportunity to provide responsive materials in accordance with CR 56 and failed to do so. The Court properly decided the motion based on the materials received at the time of the summary judgment hearing. The Court's refusal to consider Plaintiff's briefing that was handed to the Court at the time of the hearing was not an abuse of discretion.

Plaintiff was provided more than sixty days' notice of the summary judgment hearing (CP 440, 444). At the time of Defendant Coldwell

Banker's letter and noting of the hearing in mid-June, Plaintiff did not offer any objection or require any additional time. Over a month later, when Defendants served and filed their motions and supporting materials, Plaintiff still did not object to the date of the hearing or offer any additional time.

Defendants and Defendants' counsel are mindful and sympathetic that family emergencies do occur and often necessitate delay of court proceedings. In this case, however, plaintiff had more than sixty days' notice of the hearing day and failed to take any action to request a continuance until after his deadline for responding.

In addition to the ample notice provided to Plaintiff, the Court still extended the time for Plaintiff to file its brief even after their responsive deadline had passed (RP 8-18-2017 at 11). Plaintiff's counsel confirmed the extended deadline and indicated plaintiff could have materials submitted by that date (RP 8-182017 at 13-14). But Plaintiff then failed to provide any materials by the Court-ordered extension and failed to file any materials before the summary judgment hearing.

While trial courts may accept affidavits and materials "anytime *prior to* issuing its final order on summary judgment", the decision as to whether to accept or reject untimely filed materials is vested with the trial

court's discretion. *Brown v. Park Place Homes Realty*, 43 Wn. App. 554, 558-59, 739 P.2d 1188(1987).

But in this case, citation to cases authorizing late or untimely filing of responsive materials fails to properly account for the delay in this case. This is not a case where a brief or responsive materials were merely *untimely* or late. In this case, despite the court ordered extension of time granted the week prior, Plaintiff's materials were not filed at all *prior to* the hearing. Plaintiff handed his materials to the Court *during the hearing*. In *Brown*, the Court upheld the trial court's decision not to accept materials filed late as the decision was within the trial Court's discretion. *Id.* at 560-61. It being within the discretion of the trial court as to whether late materials should be accepted, it is certainly within the trial court's discretion to refuse consideration of materials that are not filed at all prior to the hearing. This is especially the case after an extension of time to file a brief has already been provided.

Although Plaintiff now contends that Judge Lawler accepted the brief, this is an inaccurate reflection of the record. Although the materials were submitted during the hearing, a reasonable reading of the record reveals Judge Lawler's indication that nothing had been filed prior to the hearing and therefore, no materials could be considered in response.

Judge Lawler properly considered the Defendants' materials that were filed prior to the hearing. Judge Lawler's ruling on the matter based on the filed materials was not an abuse of discretion. The Court can only review and consider those materials which are filed. Judge Lawler's ruling was squarely within the rules and was not an abuse of discretion.

This was not an instance of excusable neglect. As Judge Lawler noted, at the time of the hearing the Court had already provided Plaintiff with an extension of additional time to file his materials. The first extension was already beyond the time afforded under the Court rules. At the time of the hearing, Plaintiff had not only failed to provide responsive materials timely under rule 56, but also again failed to provide materials by the Court ordered extension of time. The Court's ruling was proper and should be affirmed.

II. THE COURT'S DENIAL OF PLAINTIFF'S MOTION FOR RECONSIDERATION WAS PROPER.

A. Standard of Review.

The standard of review for a decision on a motion for reconsideration is manifest abuse of discretion. *Wilco v. Lexington Eye Inst.*, 130 Wn. App. 234, 2451, 122 P. 3d 729 (2005).

B. The Court did not abuse its discretion when it denied Plaintiff's Motion for Reconsideration.

Plaintiff's motion for reconsideration was not timely filed. Lewis County Local Civil Rule 7(5) requires that a motion for reconsideration be filed and served within ten (10) days of entry of the judgment or order. *LCR 7(5)*. In this case, Plaintiff filed a motion for consideration on September 5, 2017, eleven days after the hearing on summary judgment and granting of summary judgment.

But beyond the procedural shortcoming of Plaintiff's motion, there is no evidence that Judge Lawler's denial of the motion was a manifest abuse of discretion. The Court afforded Plaintiff an extension of time to submit responsive materials to Defendant's summary judgment materials. Plaintiff did not meet the extension or file any materials prior to the summary judgment hearing. The uncontroverted motions for summary judgment demonstrated that there was no genuine issue of material fact. With no response filed, Judge Lawler's dismissal of the motion for reconsideration was proper and should be upheld.

III. THE COURT PROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS AGAINST DEFENDANT KALICH

Defendant Kalich's Motion for Summary Judgment demonstrates that Plaintiff's fraud claim fails because Plaintiff cannot prove justifiable reliance, which is a necessary component of his fraud claim. Justifiable reliance is often referred to as the "right to rely" element of fraud. As cited

in Defendant Kalichs' brief and as explained repeatedly by Washington Courts, the "right to rely" element of fraud "is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations." *Alejandra v. Bull*, 159 Wn. 2d. 674, 688, 153, P. 3d. 864 (2007).

Defendant Kalichs' summary judgment materials demonstrate the variety of methods by which plaintiff was put on notice of the alleged defects but failed to take any further actions to complete any justifiable reliance or due diligence (CP 307-314). For example, prior to purchasing the property, Mr. Fotinos hired and paid for a home inspection to be conducted on the property (CP 307-314). The home inspection was completed and provided an overview of the condition of the premises and the alleged areas of damage in question in Mr. Fotinos's Complaint (CP 302-314). Mr. Fotinos admitted in deposition that he knew of the report's existence, had a right to review it, but completed the transaction without reading the inspection report he requested and paid for (CP 304-306). In addition, also prior to closing, Mr. Fotinos hired a fencing contractor to construct a fence on the property so it would be ready when he moved onto the property after closing (CP 304-307). While the fence was being constructed, Mr. Fotinos alleges that he learned of materials discovered underground while digging as a part of construction. (CP 304-307). But

despite his concern over the alleged items, Mr. Fotinos went on to complete the transaction without asking any questions to the Seller regarding the alleged material of taking any further steps to investigate (CP 304-307). Kalich's materials were uncontroverted.

Kalich's motion also set forth legal authorities to convey the legal significance and effect of Plaintiff's lack of justifiable reliance and due diligence and the importance of the "right to rely" element. In doing so, Defendant Kalich referred to cases and authorities involving fraudulent concealment and misrepresentation and discussed both concepts.

On appeal, Plaintiff mistakenly points to Defendant's discussion of fraudulent concealment to contend that Defendant somehow argued the wrong *type* of fraud. But Plaintiff misunderstands Defendant Kalich's argument. Plaintiff's claim that Kalich's brief does not set forth a legal and factual basis regarding his claims is completely without merit.

As stated in Defendant Kalich's motion, when a person is provided information which would put them on notice of a condition of the property, they cannot claim fraud if they fail to exercise due diligence after receiving the disclosure. *See Austin v. Ettl*, 171 Wn. App. 82., 286 P.3d 85 (2012). Again, the "right to rely" element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations. *See Alejandra*, 159 Wn. App. at 286;

Williams v. Joslin, 65 Wash.2d 696-697, 399 P.2d 308 (1965); *Puget Sound National Bank v. McMahon*, 53 Wash. 2d 51, 54, 330 P.2d 559 (1958). Both concealment and misrepresentation claims require reasonable inquiry and due diligence. Not surprisingly, cases such as *Alejandra v. Bull*, 159 Wn. 2d. 674, 688, 153, P. 3d. 864 (2007), often involve related claims for misrepresentation and concealment.

In *Alejandres*, for example, the seller had answered “no” on the seller’s disclosure statement to the inquiry of whether there were defects in the operation of the septic system. *See Alejandres*, Wn. 159 Wn. 2d at 689-690. During the inspection period, the buyer received a report from the company who inspected the system indicating that although there were no obvious problems, the baffle could not be inspected and was not inspected. *Id.* at 689-90. The buyers signed acceptance of the report without taking further action. *Id.* After closing the purchase and moving onto the property, the buyers noticed the defects with the baffle of the septic system. *Id.*

In addition to the fraudulent concealment claim, the Court also addressed the claims for alleged fraudulent representations and stated that due to the plaintiff’s lack of diligence, plaintiffs “had failed to present sufficient evidence as to the right to rely on the allegedly fraudulent condition of the septic service.” *Id.* at 690. As the Court explained, “having failed to exercise the diligence required, they were unable to present

sufficient evidence of a right to rely on the allegedly fraudulent representations.” *Id* at 690-691.

Defendant Kalich’s materials demonstrate the variety of methods by which he was put on notice of the alleged defects and failed to take any further actions to complete and justifiable reliance (CP 300-314). For purposes of fraudulent concealment or fraudulent misrepresentation, Kalich’s motion demonstrated to the judge that Plaintiff’s lack of due diligence prevented his claims and warranted summary judgment. (CP 308-317). Kalich’s citation to cases from both species of fraud to illustrate the importance and legal effect of Plaintiff’s failure to exercise reasonable diligence for purposes of justifiable reliance does not nullify or weaken Defendant’s brief. Defendant failed to exercise justifiable reliance necessary to support a misrepresentation claim.

Plaintiff’s fraud claim requires proof of all elements by clear, cogent, and convincing evidence. *Ross v. Kirner*, 162 Wn. 2d. 493, 499, 172 P.3d 701 (2007); *Stiley v. Block*, 130 Wn.2d 486, 505, 905 P.2d 194 (1996); *Stieneke v. Russi*, 145 Wn. App. 561, 190 P.3d 60 (2008). Defendant Kalich’s motion for summary judgment responded to the claims alleged in the Mr. Fotinos’s complaint. Plaintiff’s complaint alleged that Defendant Kalich made false representations and disclosures regarding the condition of the property and alleged that he had the right to rely on Defendants’

disclosures (Paragraphs 4.6 and 4.7 of Plaintiff's Complaint, CP 9-10). In Defendant Kalich's motion for summary judgment, Kalich set forth proof that Plaintiff had readily available information disclosing the existence of the alleged defects and that Plaintiff did not perform any acts to show due diligence or justifiable reliance (CP 300-314).

With Defendant's motion for summary judgment submitted, Plaintiff then had the obligation to submit responsive materials showing the existence of specific facts showing that a genuine issue for trial exists on his claim to avoid summary judgment. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). But the Plaintiff did not submit anything in response and Defendant Kalich's proof was uncontroverted. Moreover, Plaintiff does not make any showing or provide any evidence that Defendant Kalich had any knowledge of the alleged defects.

Regardless of what title Plaintiff assigned to this claim, Defendant Kalich responded to the claims in its motion for summary judgment showing that there was no genuine issue of material fact as to the allegations. Defendant's response was uncontroverted and Judge Lawler appropriately granted summary judgment.

IV. PLAINTIFF'S REQUEST FOR ATTORNEYS FEES SHOULD BE DENIED.

Although the purchase and sale agreement entered into between Plaintiff and Kalich contained an attorney fee provision awarding attorney's fees to the prevailing of any dispute arising from the contract, Plaintiff is not the prevailing party on the judgment and decision rendered below. Plaintiff brings this current appeal from the grant of summary judgment dismissing Plaintiff's claims and ruling in Defendant's favor. Hence, an award of attorney's fees for Plaintiff is not appropriate.

V. CONCLUSION

The Order granting Defendant Kalich's Motion for Summary Judgment should be upheld. Plaintiff was given ample notice and opportunity to submit responsive materials to Defendant's motion but failed to do so. Judge Lawler's granting of Defendant's motion for summary judgment was not an abuse of discretion. Likewise, Defendant's motion for reconsideration was untimely and Plaintiff does not set forth any evidence showing a manifest abuse of discretion on the part of the trial court judge. Defendant's motion for summary judgment demonstrated that Plaintiff's claim for misrepresentation failed due to Plaintiff's failure to exercise due diligence and justifiable reliance. That Defendant cites to authorities discussing fraudulent concealment and fraudulent misrepresentation is

inapposite. The legal authorities and facts submitted show that Plaintiff failed to satisfy the necessary element of justifiable reliance. With no response to Defendant's materials, Defendant's evidence remained uncontroverted and Judge Lawler's granting of summary judgment was appropriate. The Trial Court's order should be affirmed.

DATED this 15 day of March, 2018



Allen C. Unzelman, WSBA 44348
Of attorneys for Respondents

CERTIFICATE OF SERVICE

I, Allen C. Unzelman, do hereby certify that on this 15 day of March, 2018, I deposited in the U.S. Mail an envelope, containing a copy of this Brief of Respondent to: Ryan Jacobsen, 2018 Caton Way, Ste 106, Olympia, WA 98502, Lee Smart, PS, 1800 One Convention Place, Seattle, WA 98101, and Kevin Nelson, PO Box 59, Centralia, WA 98531.



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