

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

SATYADEV MUSTI	:	APPEAL NO. C-070798
	:	TRIAL NO. A-0605462
and	:	
	:	<i>JUDGMENT ENTRY.</i>
GITANJLI CHANNAN,	:	
Plaintiffs-Appellees,	:	
vs.	:	
TONG WANG	:	
and	:	
DEREN SHAO,	:	
Defendants-Appellants,	:	
and	:	
UNLIMITED REAL ESTATE SERVICES, INC.,	:	
Defendant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendants-appellants Tong Wang and Deren Shao (collectively, “Wang”) appeal the trial court’s entry of summary judgment in favor of plaintiffs-appellees Satyadev Musti and Gitanjali Channan (collectively, “Musti”) on their breach-of-contract claim. For the following reasons, we affirm the judgment as modified.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Wang, in contemplation of accepting an offer of employment from the University of Cincinnati Medical Center, traveled to Cincinnati in July 2005 to purchase a home. David McDonald, a realtor with Unlimited Real Estate Services, Inc., showed Wang over 40 homes during the week she was in town. Eventually, on July 12, 2005, Wang entered into a contract to purchase Musti's home ("the property") for \$568,500, with a closing date of September 30, 2005. Under the contract, Wang agreed to pay earnest money of \$7,500. On August 16, 2005, Wang obtained a loan commitment from Fifth Third Bank to finance the purchase. But the next day Wang withdrew her loan application. On August 18, 2005, she emailed McDonald and told him that she was not going to purchase Musti's home; she had decided to stay with her current employer, Yale University, and would not be moving to Cincinnati.

Musti put his home back on the market immediately. He rejected an offer of \$440,000 on April 4, 2006, and eventually sold his home on April 25, 2006, for \$520,000. In June 2006, Musti sued Wang and Unlimited for breach of contract.² Musti moved for summary judgment, seeking damages in the amount of \$68,779.02. Of the damages he was seeking, \$48,500 was for the difference between the original contract price and the price for which the property was sold. The remaining incidental damages were computed by Musti as follows: \$2340.10 to upgrade the property prior to relisting it; \$4845.38 of mortgage interest on the property from October 1, 2005, until the closing date in April 2006 ("the prorated period"); \$3489.68 in real estate taxes on the property during the prorated period; \$609 for homeowners' insurance on the property during the prorated period; \$1815.49 for

² Unlimited was ultimately dismissed from the case after it had deposited the earnest money with the court.

utilities, homeowners' association dues, and lawn care during the prorated period; and \$7379.37 for the interest accrued on a loan Musti used to finance the construction of his new home.

In support of his motion, Musti submitted his affidavit stating that he had attached true and accurate copies of the bills documenting the foregoing damages. He also stated in his affidavit that it was his opinion, after taking into consideration the downward trend in the real estate market and comparable sales of other properties in the area, that the fair market value of his home in August 2005, the time of the breach of the contract, was \$520,000. Musti also attached the deposition testimony of McDonald, who opined that the real estate market in Cincinnati had begun to decline in August or September of 2005.

In her response, Wang conceded liability but argued that genuine issues of material fact remained concerning the damages that Musti had incurred as a result of the breach. First, Wang argued that there was a question of fact concerning the fair market value of the property at the time of the breach. In support of this argument, Wang attached an unauthenticated real estate appraisal prepared for Musti in January 2007, which indicated that Musti's property had a value of \$570,000 in July 2005. Next, Wang argued that there was a question of fact concerning whether Musti had mitigated his damages. Wang maintained that Musti did not sell the property for its fair market value in April 2006. Wang attached an unauthenticated appraisal conducted for the eventual buyers of the property, which set the value of the property at \$540,000 in April 2006. Finally, Wang contended that Musti had entered into the construction contract to build his new home and secured financing for that construction three months after Wang had breached the real estate contract.

In response, Musti filed a second affidavit stating that he had committed to the terms of the construction of his new house with the architect and builder on August 17, 2005, before he learned of Wang's breach. He attached an authenticated copy of the terms of that commitment. Musti also stated in his affidavit that he was forced to finance the construction of his new home as a result of Wang's breach of the contract, and that he had deferred financing on his new home until the builder deadline of November 2005 in an effort to his mitigate damages, hoping that the property would have sold by then.

The motion for summary judgment was referred to a magistrate. The parties agree that there was a hearing, but the transcript is not in the record for us to review. Following this hearing, the magistrate awarded damages to Musti in the amount that he had requested: \$68,799.02.

Wang filed objections to the magistrate's decision, which were overruled by the trial court. On appeal, she now brings forth three assignments of error.

In the first assignment of error, Wang argues that the trial court erred by granting summary judgment on the damages sought by Musti. We find Wang's argument persuasive in part.

Our standard of review is *de novo*.³ Summary judgment is appropriate if (1) no genuine issue of material fact remains; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.⁴ Civ.R. 56(E) provides that "[w]hen a motion for summary judgment is made and

³ *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

⁴ Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E. 2d 267.

supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of its pleadings, but its response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”

This court has previously held that “the proper measure of damages for a buyer’s breach of a contract for the sale of real property is the difference between the original contract price and the fair market value of the property at the time of the breach.”⁵ A property owner is competent to testify about the value of his property,⁶ and Ohio courts have held that such “testimony alone is sufficient to establish the value of the owner’s property.”⁷

Here, Musti presented evidence of the fair market value of the property at the time of the breach of contract in August 2005. First, he attached the testimony of McDonald, a realtor who opined that the Cincinnati real estate market had begun to experience a decline in August and September 2005, which, Musti said, demonstrated why he could not sell the property for the original contract price after August 17, 2005. Second, Musti opined in his affidavit, after talking with realtors and looking at comparable sales, that the fair market value of the property at the time of the breach was \$520,000. None of this evidence was rebutted by Wang with any material of proper evidentiary quality. The two appraisals were not properly made a part of the record as required by Civ.R. 56.⁸ “The proper procedure for introducing evidentiary matter not specifically authorized by Civ.R. 56(C) is to

⁵ *E.K. Investments v. Kleckner* (Nov. 27, 1991), 1st Dist. Nos. C-900364, C-900427, and C-900461.

⁶ See *Smith v. Padgett* (1987), 32 Ohio St.3d 344, 347, 513 N.E.2d 737.

⁷ *Gaskins v. Young*, 2nd Dist. No. 20148, 2004-Ohio-2731, at ¶46, citing *Leppla v. Sprintcom Inc.*, 156 Ohio App.3d 498, 2004-Ohio-1309, 806 N.E.2d 1019, at ¶25.

⁸ Although the January 2007 appraisal was not properly authenticated, we note that even if it had been, it referred to the fair market value of the property prior to the breach, not to the fair market value of the property at the time of the breach.

incorporate it by reference in a properly framed affidavit pursuant to Civ.R. 56(E). “Documents which are not sworn, certified, or authenticated by way of affidavit have no evidentiary value and may not be considered by the trial court.”⁹

Accordingly, because the only evidence in the record demonstrating the fair market value at the time of the breach was the property owner’s testimony, we hold that the trial court did not err by using a damage calculation that based the value of the property at \$520,000 on the date the contract was breached.

With respect to the “incidental damages,” this court has previously noted that “the cost of utilities, real estate taxes, and homeowners’ association dues for the period until the home was sold, [are] expenses generally incidental to the [sellers’] continued ownership and management of the property. Accordingly, we do not consider such expenses normally recoverable as a proper element of additional special damages. * * * To allow the recovery of such expenses would be analogous to allowing a car owner to recoup from a defaulting buyer the costs of maintenance, gasoline, and automobile club membership dues until the vehicle is sold. Such a result, in our view, goes far beyond the reach of recoverable contract damages.”¹⁰ An exception to this rule is where a seller has already moved out of the home and into a leased apartment at the time of the breach.¹¹ Although Musti stated in his second affidavit that, prior to the breach, he had relocated his family from the property into an apartment that he “had agreed to lease for the period of one year while awaiting the completion of the construction of our new home,” a copy of that lease was not attached to the affidavit and it is unclear whether Musti had actually entered into a

⁹ *Mitchell v. Ross* (1984), 14 Ohio App.3d 75, 470 N.E.2d 245.

¹⁰ *Peterman v. Dimoski*, 1st Dist. No. C-020116, 2002-Ohio-7737 at ¶11.

¹¹ See *Callahan v. Richardson* (Apr. 4, 1979), 1st Dist. No. C-780119.

lease agreement. Accordingly, we hold that the trial court erred by awarding Musti damages for utilities, homeowners' insurance, real estate taxes, mortgage interest, and lawn-care services during the prorated period.

Finally, we hold that the trial court properly awarded damages to Musti for costs to upgrade the property by installing new windows and repainting the interior so that the property could be resold as quickly as possible. These costs could have reasonably been anticipated as a result of a breach of the contract. Next, we hold that the trial court properly awarded damages to Musti for the interest on his construction loan. Although Wang contends that Musti did not enter into the contract to build his new home until after the breach, there was no evidence properly admitted under Civ.R. 56(C) to support this allegation. Given that Musti stated in his affidavit that he was compelled to obtain financing for his new home because he had been deprived of the proceeds from the sale when Wang breached the contract and because Musti attached evidence demonstrating that he had agreed to the construction of the new home prior to the breach, we conclude that the costs Musti incurred to finance his new home were an "expense akin to the closing costs of the second sale, in other words, a direct economic consequence of the breach."¹²

Accordingly, we hold that, as a matter of law, the trial court properly awarded Musti damages, in the following respects: \$48,500 for the difference between the original contract price and the fair market value of the property at the time of the breach, and \$7379.37 for the finance costs of Musti's construction loan, for a total of \$55,879.37. We hold that the trial court erred, as a matter of law, by granting

¹² *Peterman*, supra, at ¶15.

summary judgment for Musti for his incidental damages. Therefore, the first assignment of error is sustained in part.

In the second assignment of error, Wang contends that the magistrate's decision exceeded the scope of his authority. In the third and final assignment of error, she argues that the trial court erred by concluding that consideration of her objections required her to obtain a transcript of the hearing before the magistrate. We address these assignments together and find them meritless.

Wang argues that the magistrate impermissibly weighed the evidentiary material, and that the trial court, in adopting the magistrate's decision, incorrectly concluded that she should have provided a transcript of the hearing before the magistrate to assist it in ruling on the objections. Both assignments fail because our de novo review convinces us that Musti was entitled, subject to our modifications, to judgment as a matter of law. The second and third assignments of error are overruled.

Accordingly, we affirm the judgment of the trial court, with the damage award modified to \$55,879.37.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, J.J.

To the Clerk:

Enter upon the Journal of the Court on October 29, 2008
per order of the Court _____.
Presiding Judge