

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

DAVID L. KENNEDY	:	APPEAL NO. C-100228
	:	TRIAL NO. A-0807688
and	:	
SANDRA L. KENNEDY,	:	<i>JUDGMENT ENTRY.</i>
Plaintiffs-Appellants,	:	
vs.	:	
JOHN PELZER,	:	
CATHY PELZER,	:	
and	:	
SUSAN LEMON LEHR,	:	
Defendants-Appellees.	:	

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

Plaintiffs-appellants, David L. Kennedy and Sandra L. Kennedy, appeal the summary judgment entered by the Hamilton County Court of Common Pleas in favor of defendants-appellees, John Pelzer, Cathy Pelzer, and Susan Lemon Lehr, in a dispute over the sale of a home.

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

This case involves the presence of mold in a house that the Kennedys purchased from the Pelzers. Lehr was the Pelzers' real estate agent in the transaction.

The Kennedys and the Pelzers entered into a contract for the sale of the house in August 2006. The disclosure form executed by the Pelzers indicated that there had been a leak repaired in the basement wall, but it indicated no other defects. The Kennedys had a whole-house inspection performed on the house, and the parties closed on the sale in January 2007.

In early 2008, the Kennedys began renovating a second-floor hall bathroom. When they removed a portion of the tile floor, they discovered the presence of mold. Professional testing later revealed significant levels of mold throughout the house. The Kennedys left the home after receiving the test results.

The Kennedys sued the Pelzers and Lehr, asserting breach of contract and breach of warranty as well as several other claims for fraud and negligence.

In their depositions, the Kennedys acknowledged that their damages arose from the presence of the mold and the necessity of remediating the mold condition to render the house habitable. They conceded that, but for the presence of the mold, they would have remained in the house.

The Kennedys presented no evidence that the Pelzers had been aware of the mold in the hall bathroom. Nonetheless, they contended that the Pelzers had actual knowledge of certain conditions that they had failed to disclose. Among these conditions were the presence of a treated termite tunnel near the foundation of the house, the presence of a crack in the basement behind a paneled wall, and a leak in the master bathroom that had been repaired.

The trial court entered summary judgment in favor the Pelzers and Lehr, holding that they there was no evidence that they had known about the mold and holding that none of the undisclosed conditions had proximately caused the mold

condition in the house. The court overruled the Kennedys' motion for relief from the summary judgment.

In their first assignment of error, the Kennedys now argue that the trial court erred in entering summary judgment in favor of the Pelzers and Lehr.

Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and 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.² This court reviews the granting of summary judgment de novo.³

R.C. 5302.30 requires the seller of real estate to disclose any information that he possesses concerning a material defect in the premises.⁴ This duty applies only to those conditions that are within the actual knowledge of the seller.⁵ And even where there is a breach of the duty, the buyer bears the burden of demonstrating that an act or omission on the part of the seller proximately caused damages.⁶

In this case, the Kennedys failed to demonstrate that the Pelzers had actual knowledge of the conditions that led to their damages. The Kennedys produced no evidence that the Pelzers had been aware of the mold in the hall bathroom, and the Kennedys themselves had lived in the house for approximately one year before they discovered the condition.

Nonetheless, the Kennedys argue that the Pelzers' knowledge of the undisclosed conditions rendered summary judgment inappropriate.

² See *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.

³ *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, ¶6.

⁴ See *Riggins v. Bechtold*, 1st Dist. No. C-010541, 2002-Ohio-3291, ¶7.

⁵ *Id.*

⁶ *Niermeyer v. Cook's Termite & Pest Control, Inc.*, 10th Dist. No. 05AP-21, 2006-Ohio-640, ¶38.

We find no merit in this argument. The Kennedys failed to produce evidence that the undisclosed conditions had been the proximate cause of the mold condition. Although they offered evidence that moisture in general can engender mold, they did not produce evidence that the repaired leak in the master bedroom or the leak in the paneled room had given rise to the mold problem in this specific case. And they offered no evidence to link the previous termite infestation to the presence of mold.

The trial court was therefore correct in concluding that the absence of proximate cause was fatal to the Kennedys' claims. For these same reasons, the trial court properly entered summary judgment in favor of Lehr.

In their second and final assignment of error, the Kennedys contend that the trial court erred in overruling their motion for relief from judgment.

To prevail on a motion under Civ.R. 60(B), the moving party must demonstrate that (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B); and (3) the motion is made within a reasonable time, and, where the grounds for relief are under Civ.R. 60(B)(1), (2), or (3), not more than one year after the entry of the judgment from which relief is sought.⁷ A trial court's ruling on a Civ.R. 60(B) motion will not be reversed absent an abuse of discretion.⁸

Here, we find no abuse of discretion. The Kennedys assert that there had been "mistake or inadvertence" on the part of the trial court under Civ.R. 60(B)(1) in failing to consider all of the evidence before it. We are not persuaded.

First, it is evident from its context that Civ.R. 60(B)(1) relates to mistake, inadvertence or excusable neglect on the part of the movant, not on the part of the

⁷ *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

⁸ *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶7.

OHIO FIRST DISTRICT COURT OF APPEALS

trial court. Second, the Kennedys have not met their burden of showing any dereliction by the trial court in the case at bar.

Civ.R. 56(C) requires a trial court to examine and consider all depositions to determine their contents.⁹ But in this case, the Kennedys have failed to demonstrate that the trial court disregarded any material that was filed with the motion for summary judgment or with the Civ.R. 60(B) motion for relief from judgment. Moreover, the Kennedys have not alleged that the trial court failed to review any material relevant to the pivotal issue of proximate causation. And in any event, our de novo review of the record convinces us that summary judgment was appropriate.

Accordingly, we overrule the second assignment of error and affirm the judgment of the trial court.

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., HENDON and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on January 28, 2011
per order of the Court _____.
Presiding Judge

⁹ See, e.g., *Moravec v. Hobeika* (Dec. 24, 1998), 1st Dist. No. C-980136.