# LORAIN COUNTY COURT OF COMMON PLEAS
## LORAIN COUNTY, OHIO
## JOURNAL ENTRY
## Hon. D. Chris Cook, Judge

Date June 12, 2017 Case No. 16CV189314

CHARLES NORTHCUTT, III, *et al.*
Plaintiff

Gino Pulito
Plaintiff's Attorney

VS

ORCHARD TRAIL DEV. GROUP, *et al.*
Defendant

Jared Klaus – Jon Clark
Defendant's Attorney

This matter is before the Court on Defendants NVR, Inc., Motion For Partial Summary Judgment, filed April 12, 2017; Plaintiffs Response; and Defendant's Reply Brief. For good-cause shown, the Motion is well-taken and hereby GRANTED.

See Judgment Entry.

IT IS SO ORDERED. No Record.

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**JUDGE D. Chris Cook**

cc: Pulito, Esq.
Klaus, Esq.
Clark, Esq.

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## INTRODUCTION

This matter is before the Court on Defendants', NVR, Inc. and Susan Hirz' Motion For Partial Summary Judgment, filed April 12, 2017; Plaintiffs' Response to Defendants' Motion For Partial Summary Judgment, filed May 19, 2017; and Defendants' Reply Brief in Support of Defendants', NVR, Inc. and Susan Hirz' Motion For Partial Summary Judgment, filed June 7, 2017.

## PERTINENT FACTS

On December 30, 2009 Plaintiffs entered into a written contract with separate Defendant, NVR, Inc. dba Ryan Homes ("Ryan") for the construction and purchase of a home located at 3122 Wheaton Drive, City of Avon, County of Lorain, State of Ohio ("The Property").

When the parties executed the contract, an "Ohio Purchase Agreement" ("The Agreement"), the lot adjacent to The Property was unimproved open space referred to by Plaintiffs as "community green space" ("The Lot.") (¶ 7 Plaintiffs' Complaint.)

According to Plaintiffs, Ryan's sales agent, Defendant Susan Hirz ("Hirz") represented to Plaintiffs that The Lot would remain unimproved "green space" which induced them to purchase The Property. Thereafter, sometime in 2013, Defendant Orchard Trail Development Group, LLC ("Orchard Trail") took over the development and in 2014 revised the original plat to change the designation on The Lot from open space to

residential. In July, 2016, The Lot was sold to residential purchasers and ground was broken to build a home.

According to Defendants, Hirz has no recollection of making such a representation to Plaintiffs and her general practice was to ". . . never make future guarantees regarding plans for the development." (Aff. Of Susan Hirz, ¶ 5.) Moreover, Defendants argue that at the time Plaintiffs purchased The Premises, Hirz had no knowledge or information regarding the future use of The Lot (*Id.* at ¶ 5) and that the Plaintiffs were not charged the customary premium to reside next to a ". . . lot adjacent to open space . . ." *Id.* at ¶ 6.

In addition, Defendants argue that the representation is barred by consideration under The Agreement because 1) it is barred by the parol evidence rule; 2) The Agreement contains an integration clause and repeatedly states that no representations regarding the location of other homes or the use of land adjacent to Plaintiffs' were made; 3) fraud cannot be predicated upon a representation concerning the possibility of a future event; and, 4) the representations are barred by the statute of frauds.

## LEGAL ANALYSIS

The facts at hand posit a textbook example of statements allegedly made outside of the four-corners of a written contract upon which the recipient of the alleged statement detrimentally relied. Because the contract involves real estate, in addition to other defenses, the statute of frauds is implicated.

### STANDARD OF REVIEW – SUMMARY JUDGMENT

The standard of review for summary judgment in Ohio is well-settled. In *Slinger v. Phillips,* 2015-Ohio-357, at ¶9, the Ninth District stated, "This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party."" Citing, *Garner v. Robart,* 9th Dist. Summit No. 25427, 2011–Ohio–1519, ¶ 8.

Pursuant to Civ.R. 56(C), summary judgment is appropriate when: (1) No genuine issue as to any material fact remains to be litigated; (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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317,


327, (1977). To succeed on a summary judgment motion, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt,* 75 Ohio St.3d 280, 292, (1996). If the movant satisfies this burden, the nonmoving party "'must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 293, quoting Civ.R. 56(E).

THE PAROL EVIDENCE RULE

The seminal case in Ohio jurisprudence on the parol evidence rule is *Galmish v. Cicchini*, 2000-Ohio-7, 90 Ohio St. 3d 22, 27–30. The Supreme Court stated, "The parol evidence rule states that "absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." 11 Williston on Contracts (4 Ed.1999) 569–570, Section 33:4." *Id.* at ¶ 2.

"The principal purpose of the parol evidence rule is to protect the integrity of written contracts . . . [b]y prohibiting evidence of parol agreements, the rule seeks to ensure the stability, predictability, and enforceability of finalized written instruments. It reflects and implements the legal preference, if not the talismanic legal primacy, historically given to writings. It effectuates a presumption that a subsequent written contract is of a higher nature than earlier statements, negotiations, or oral agreements by deeming those earlier expressions *28 to be merged into or superseded by the written document." *Id.*at ¶ 6.

That said, the parol evidence rule may not be avoided "by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing. Accordingly, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms." *Id.* at ¶12.

"The parol evidence rule does apply "to such promissory fraud if the evidence in question is offered to show a promise which contradicts an integrated written agreement. Unless the false promise is either independent of or consistent with the written instrument, evidence thereof is inadmissible." *Id.* at ¶14.

In the case at bar, The Agreement is silent as to The Lot. There are no provisions that it would, or that it would not, remain "green space" or undeveloped. In fact, The Agreement *does* specify that Defendant made no representations regarding ". . . other homes to be built in this subdivision . . . in the vicinity of the Property." (The Agreement at ¶ 1(c).)


Further, The Agreement provides that Defendant made ". . . no representations as to the proposed or approved land uses for land adjacent to [The Property] or the subdivision which contains [The Property]." *Id.* at ¶ 9.

Finally, The Agreement contains a specific provision wherein the parties acknowledge that oral statements or promises must be "written into this Agreement . . ." otherwise they are "unenforceable." *Id.* at ¶ 18.

Because Plaintiffs wish to introduce an oral statement that contradicts their written agreement, it is barred by the parol evidence rule.

THE INTEGRATION CLAUSE

When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the for the purpose of varying or contradicting the writing. *Layne v. Progressive Preferred Ins. Co.*, 2004-Ohio-6597, ¶11, 104 Ohio St. 3d 509, 511.

Where parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, the parol evidence rule excludes from consideration evidence as to other oral promises resulting from such negotiations. *Charles A. Burton, Inc. v. Durkee*, 158 Ohio St. 313, 313, (1952), head note 2.

In addition to the above, The Agreement contains an integration clause that confirms that the written document " . . . constitute[s] the entire and final Agreement" and that ". . . no other prior . . . representations, promises or terms . . . are part of this Agreement . . ." *Id.* at ¶ 27.

Moreover, The Agreement provided Plaintiffs an opportunity to add the alleged representation made by Hirz by interlineating it after paragraph 18. In the four lines under this section, interestingly captioned, **"Oral Statements or Promises"** it reads, "NONE." (Emphasis added.)

Plaintiffs urge that the parol evidence rule is not a bar in this case to the admission of Hirz' alleged parol statement because of the "fraudulent inducement" exception.

This argument is inapposite. As noted, *supra,* the parol evidence rule may not be avoided by a fraudulent inducement claim where the alleged oral promise "directly contradicts" the signed writing. *Galmish, supra,* at ¶ 12.


Plaintiffs allege that Hirz orally promised them that The Lot would remain unimproved but this representation directly contradicts the terms of The Agreement in numerous provisions.

Because Hirz' alleged statement is neither independent of nor consistent with the integrated terms of The Agreement, evidence thereof is inadmissible. *Galmish, supra,* at ¶ 14 and the alleged statement by Hirz is barred.

FRAUD AND THE FUTURE

In *Deems v. Ecowater Sys.,* 9th Dist. Summit No. 27645, 2016-Ohio-5022 at ¶ 20, the court stated, "In order to establish a fraud claim, it must be shown that there existed: (1) a representation (or concealment of a fact when there is a duty to disclose) (2) that 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, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance, and (6) resulting injury proximately caused by the reliance. *Universal Real Estate Solutions, Inc. v. Snowden,* 9th Dist. No. 27171, 2014-Ohio-5813, ¶ 12, citing *Volbers–Klarich v. Middletown Mgt., Inc.,* 125 Ohio St.3d 494, 929 N.E.2d 434, 2010-Ohio-2057, ¶ 27, citing *Burr v. Stark Cty. Bd. of Commrs.,* 23 Ohio St.3d 69, (1986)."

Generally "fraud cannot be predicated upon promises or representations relating to future actions or conduct." *Crase v. Shasta Beverages, Inc.,* 10th Dist. Franklin No. 11AP–519, 2012-Ohio-326, ¶ 42; see also: *Block v. Block,* 165 Ohio St. 365, (1956).

In addition, "[o]ne who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." ' *Snowden* at ¶ 12, quoting *State v. Warner,* 55 Ohio St.3d 31, quoting *Chiarella v. United States,* 445 U.S. 222, 228, (1980).


Plaintiffs allege that Hirz specifically told them that The Lot would ". . . remain a community green space next to an adjoining lake." Complaint, ¶ 7. Apparently, this representation was to last into perpetuity? Regardless of the fact that this representation is wholly contradicted by the terms of The Agreement, it involves some future action or conduct that Hirz would have had no way of knowing. Moreover, it cannot be argued that Hirz had a duty to disclose information that she did not possess.

Put another way, even if Hirz actually made the statement and Plaintiffs relied upon it to their later detriment, at the time it was made by Hirz it was not necessarily false. Since there is no evidence that anyone, including Hirz, knew what would ultimately happen to The Lot, it was just as likely that it would remain undeveloped. Either way, Hirz could not have known when she made the statement that it was false, which is a necessary element to sustain a fraud claim.

Because the alleged representation dealt with a future possibility and was not demonstrably false when made, Plaintiffs' fraud claim cannot proceed.

THE STATUTE OF FRAUDS

The Ohio Supreme Court discussed the statute of frauds in the case of *Olympic Holding Co. v. Ace Limited, et al.* 122 Ohio St 3d 89 (2009), at ¶ 30. "R.C. 1335.05, Ohio's codification of the statute of frauds, provides:
{¶ 31} "No action shall be brought whereby to charge * * * a person upon an agreement * * * that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in *writing* and *signed* by the party to be charged therewith * * *."

And, agreements ". . . upon a contract or sale of lands . . ." must be in writing. R.C. 1335.05. Agreements that do not comply with the statute of frauds are unenforceable. *Hummel v. Hummel* (1938), 133 Ohio St. 520, paragraph one of the syllabus.

The purpose of the statute of frauds is to prevent "frauds and perjuries." *Wilber v. Paine* (1824), 1 Ohio 251, 255. The statute does so by informing the public and judges of what is needed to form a contract and by encouraging parties to follow these requirements by nullifying those agreements that do not comply. "[T]he statute of frauds is supposed both to make people take notice of the legal consequences of a writing and to reduce the occasions on which judges enforce non-existent contracts because of perjured evidence." Kennedy, Form and Substance in Private Law Adjudication (1976), 89 Harv.L.Rev. 1685, 1691. "In every case, the formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored. The reason for ignoring them, for applying the sanction of nullity, is to force them to be self conscious and to express themselves clearly * * *." Id. at 1692.

Courts have long recognized that a signed contract constitutes a party's final expression of its agreement. See *Fillinger Constr. Inc. v. Coon* (Sept. 28, 1993), Greene App. No. 93–CA–0002, 1993 WL 386320, *3 ("contract signed by Coon constituted the *final* expression of the agreement of the parties;" *Breed, Elliott & Harrison v. Lima* (1920), 12 Ohio App. 485, 1920 WL 711, *3, quoting *Bunday v. Huntington* (C.A.8, 1915), 224 F. 847, 853 (executed contract "is presumed to express the *final* agreement of the parties.")

Thus, the statute of frauds is necessary because a "signed writing provides greater assurance that the parties and the public can reliably know when such a transaction occurs." *Seale v. Citizens S. & L. Assn.* (C.A.6, 1986), 806 F.2d 99, 104, *Olympic Holding Co. v. ACE Ltd.*, 2009-Ohio-2057, ¶¶ 30-34, 122 Ohio St. 3d 89, 94–95.

In the case at bar, the parties executed a signed contract for the sale of lands, to wit: The Agreement. According to Plaintiffs, however, The Agreement did not contain all of the necessary provisions and/or promises between them thus, the *entire* contract was not reduced to a writing.

Moreover, the disputed representation, that The Lot would remain green space, was apparently made in perpetuity. As such, this provision of The Agreement could not be (and in fact was not) performed within one year. As such, to be enforceable against Defendants, the alleged representation by Hirz had to be reduced to a writing and incorporated into The Agreement.

Accordingly, the alleged oral statement by Hirz regarding The Lot is violative of the statute of frauds and inadmissible to vary the parties' written contract.

CONCLUSION

For the foregoing reasons and for good-cause shown, Defendant NVR, Inc., dba Ryan Homes and Susan Hirz are hereby granted summary judgment as a matter of law on Counts One, Two, and Three of Plaintiffs' complaint.

IT IS SO ORDERED. No Record.

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**JUDGE D. Chris Cook**