

**88-LW-2196 (10th)**

Harry BEALE, Plaintiff-Appellant,

v.

C. William O'NEILL, Esq., Vorys, Sater, Seymour & Pease, Richard C. Graham, Esq., and Isaac, Brant, Ledman & Becker, Defendants-Appellees.

No: 87AP-803.  
10th District Court of Appeals of Ohio, Franklin County.  
Decided on June 21, 1988.

On Application for Reconsideration.

Harry Beale, pro se.

Vorys, Sater, Seymour & Pease, and Duke W. Thomas, for appellees C. William O'Neill, and Vorys, Sater, Seymour & Pease.

Lane, Alton & Horst, John M. Alton and Robert D. Erney, for appellees Richard C. Graham, and Isaac, Brant, Ledman & Becker.

DECISION

REILLY, Judge.

Plaintiff has filed an application for reconsideration of this court's opinion in Beale v. O'Neill et al. (May 17, 1988), No. 87AP-803, unreported (1988 Opinions 1804). Counsel for defendants responded with a memorandum in opposition to plaintiff's application on June 8, 1987.

In his application for reconsideration, plaintiff alleges that this court ruled on matters over which it had no jurisdiction, *i.e.*, claims against C. William O'Neill (O'Neill) and Vorys, Sater, Seymour & Pease (Vorys). Plaintiff also alleges this court erred in affirming a motion for summary judgment as to Richard C. Graham (Graham) and Isaac, Brant, Ledman & Becker (Isaac), where plaintiff was basing his claim on fraud.

It is noted that, in the opinion, we quoted verbatim from the trial court's entry:

"Upon Motion of Defendants, Richard C. Graham and Isaac, Brant, Ledman & Becker, and for good cause shown, it is hereby ordered that discovery herein be, and hereby is, stayed pending resolution of the Motion for Summary Judgment filed by Defendants Graham and Isaac. Furthermore, Plaintiff's subpoena duces tecum, filed contemporaneously with the Notice of deposition, is hereby quashed." Id. at 1807.

Thus, upon reconsideration, this court specifically recognizes that this appeal only applies to defendants Graham and Isaac. The court further quoted the summary judgment and cited two cases stating the requirements for summary judgment.

To the extent the opinion of this court, rendered on May 17, 1988, makes any reference to O'Neill and Vorys, such reference is dicta only and does not affect the judgment rendered as to Graham and Isaac. Specifically, as to Graham and Isaac, this court held:

" \* \* \* Plaintiff's allegations against Graham and Isaac do not raise an issue of material. \* \* \*  
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"In sum, the record does not disclose, construing the evidence most strongly in plaintiff's favor, that there were any

material issues of fact or abuse of discretion in this case. Thus, the trial court's determination in granting the protective order and sustaining the motion for summary judgment was not error." Id. at 1808-1809.

To avoid any misunderstanding, the references to defendants O'Neill and Vorys are herewith deleted. It is explicitly determined that they are not parties to this appeal. The judgment applies only to defendants Graham and Isaac.

Moreover, plaintiff maintains that the court did not address the primary question presented in his second assignment of error. That assignment of error is: "The trial court acted in ready contravention to prior rulings of the Ohio Courts of Appeals and the United States Supreme Court." Then, in his brief, plaintiff considered some of the aspects of fraud. However, in order to maintain an action for fraud, five elements must exist: (1) a false representation; (2) knowledge of falsity on the part of the person making the representation; (3) intent to mislead others in relying upon the representation; (4) reliance with a right to do so, upon the misrepresentation by the party claiming injury; and (5) injury from that reliance.

Civ.R. 56(E), in pertinent part, provides:

" \* \* \* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Hence, as the foregoing rule provides, a nonmoving party may not only rely upon allegations in the pleadings. There is a requirement to provide evidentiary data showing there is a genuine issue for trial. Discussion of an issue in an appellate brief does not affect this rule.

Civ.R. 9(B) provides that any averment of fraud must be "stated with particularity." Upon a review of plaintiff's complaint and amended complaint for purposes of ruling on this motion for reconsideration, this court finds, as it did in ruling upon plaintiff's appeal, there are no facts, let alone facts stated with particularity, that could form a basis of a claim of fraud against Graham or Isaac. At best, plaintiff alleges claims of larceny, breach of contract, conspiracy and "breach of the United States Constitution" as to these two parties and not fraud. After a careful consideration of the record, this court reiterates that plaintiff's allegations do not present an issue of material fact against Graham and Isaac.

Plaintiff also states in his application that the judges involved in this action should disqualify themselves. The members of this panel are not under injunctive restraint and are not aware of any other reason for disqualification to proceed with this appeal.

Therefore, the judgment is reconsidered, and upon reconsideration, as indicated above, the judgment is affirmed.

Application for reconsideration granted; judgment affirmed.

BOWMAN and YOUNG, JJ., concur.