IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

RAINY DAY RENTALS, INC.,

Plaintiff-Appellant,

v.

NEXT GEN. PROPERTIES, Inc. et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0096

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2016 CV 00665

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Bruce M. Broyles, 1379 Standing Stone Way, Lancaster, Ohio 43130 for Plaintiff-Appellant and

Atty. Christopher Sammarone, 535 North Broad Street, Suite 4, Canfield, Ohio 44406 for Defendants-Appellees.

Dated: September 30, 2022

Robb, J.

{¶1} Appellant, Rainy Day Rentals, Inc., appeals the September 22, 2021 judgment rendered in favor of Appellees, Next Gen. Properties, Inc., Saroj Singh, and Prestige Enterprise, Inc., after a bench trial. The trial court found Appellant's claims for fraud in the inducement and declaratory judgment lacked merit and rescission of the parties' real estate purchase agreement was not warranted.

{¶2} Appellant's single assignment of error challenges the declaratory judgment aspect of the court's decision. Appellant contends the trial court erred by not concluding the parties' contract was void. For the following reasons, we affirm.

Facts and Procedural History

{¶3} On July 28, 2015, Appellant entered a real estate purchase contract to purchase property located on Bryson Street in Youngstown, Ohio. Next Gen. Properties, Inc. (Next Gen.) was listed as the seller and Saroj Singh (Singh) signed the contract as Next Gen.'s agent. A handwritten note on the contract indicates the property is owned by the listing agent's family. Also handwritten on the contract are the words "selling as-is condition, no warranties, no guarantees." (Tr. Plaintiff's Ex. 1.) After the purchase was complete, Appellant learned the property was subject to an existing "Notice to Repair or Raze Structure" issued by the City of Youngstown and the sellers Next Gen. and Singh were aware of the notice, had repeatedly appealed it to the city, but did not disclose it to Appellant before selling the property.

{¶4} Appellant filed suit on March 1, 2016 against Next Gen. and Singh, asserting they fraudulently induced Appellant to enter the purchase agreement by failing to inform Appellant the structure on the property was subject to this raze or repair order before executing the agreement. Singh was served with the order in October of 2014, which Appellees appealed to the city before selling the property to Appellant. (March 1, 2016 Complaint.)

{¶5} Appellant acknowledges purchasing the property as-is and further acknowledges the structure on the property was in disrepair and in need of numerous updates. However, Appellant claims it was not aware of the raze or repair order before entering the purchase agreement and Appellees intentionally failed to disclose the structure was subject to a demolition order when they agreed to sell. Appellant contended

this nondisclosure was designed to fraudulently induce Appellant into purchasing the property. Appellant sought the trial court to rescind the purchase agreement.

{¶6} Appellant filed its second amended complaint on January 6, 2020 naming the original defendants as well as Prestige Enterprise, Inc. and the City of Youngstown. Appellant claimed after its lawsuit was filed, Appellees transferred certain real estate to another corporation, Prestige Enterprise, Inc., which used the same assets, operated the same business, and also had Singh as its statutory agent. Appellant sought recission based on the alleged fraud, successor liability, declaratory judgment, and money damages for wrongful demolition of the structure situated on the real estate.

{¶7} As for the declaratory judgment claim, Appellant asked the court to determine the impact of the October 28, 2014 raze or repair order and Appellees' violation of the City of Youngstown's Property Maintenance Code Section 546.07, which dictates how a seller of real property subject to a city compliance order or notice of violation must proceed before transferring or selling the property to another. After purchasing the property, Appellant claimed it was threatened with liability for the city's costs associated with razing the structure. (January 6, 2020, Second Amended Complaint.)

{¶8} Appellant also filed a third amended complaint seeking to add an additional claim for relief and separately moved to add the city as a necessary party defendant relative to the declaratory judgment claim. The city moved to dismiss. The trial court denied the motion for leave to file the third amended complaint and granted the city's motion to dismiss without prejudice, noting "[s]aid dismissal is without prejudice to enable the remaining party or parties to subsequently address any possible issues as a result of the tear down by the city." (Feb. 5, 2020 Judgment Entry.)

{¶9} Appellant moved for summary judgment and sought the court to find rescission of the parties' contract was required since it was void ab initio. Appellant claimed the purchase agreement was illegal and entered in contravention to Youngstown City Ordinance 546.07, which prohibits the transfer or sale of real estate subject to an existing raze or repair order without the owner/seller submitting a notarized statement to the city verifying the buyer knows about the existing code violations and repair order and that the buyer assumes responsibility for complying with it. Appellant urged the court to find the contract was illegal, in violation of public policy, and subject to rescission in light of Appellees' failure to satisfy the affidavit requirement set forth in the ordinance.

Appellees opposed the motion, and Appellant renewed their request for summary judgment, which the trial court ultimately overruled. (Feb. 5, 2020 Judgment Entry.)

{¶10} A bench trial was held on July 9, 2020, and the parties submitted proposed findings of fact and conclusions of law. The court subsequently entered judgment in Appellees' favor holding in part:

> This was not plaintiff's first venture into the rehab business. Plaintiff knew the condition of the property and had every opportunity to check on any demolition orders. The ordinance prohibiting transfer without an assumption of liability did not void the agreement between the parties.
>
> Accordingly, the plaintiff has failed to prove its case for rescission and judgment is rendered in favor of the defendants. Costs to plaintiff.

(September 22, 2021 Judgment Entry.)

{¶11} Appellant's sole assignment of error on appeal contends the court erred by not finding the purchase agreement void. Appellant does not raise any arguments arising from its fraud in the inducement claim, and thus, we do not address the court's resolution of this claim. App.R. 12(A)(1)(b).

Assignment of Error: Is the Contract Void?

{¶12} Appellant's assignment of error states:

"The trial court erred in failing to rescind the contract for the sale of real property that violated City of Youngstown Ordinance 546, which prohibits the transfer of real property which is the subject of the compliance order or notice of violation unless certain conditions are met."

{¶13} Appellant urges us to find Appellees' violation of Youngstown Ordinance 546.07 renders the purchase agreement void as a matter of law—not because one of the traditional elements of contract formation failed—but because it is in direct contravention to the city ordinance. Appellant contends the contract is void because it is illegal and violates public policy.

{¶14} The construction of written contracts and statutory construction in declaratory judgment actions present legal issues, which we review de novo. *Graham v. Drydock Coal Co.,* 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996), quoting *Alexander v. Buckeye Pipe Line Co.,* 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus; *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 13-14.

{¶15} Appellant contends because the transfer of the property from Appellees violates Section 546.07, the purchase agreement and sale are void ab initio and thus rescission is required. Section 546.07, *Transfer of Ownership,* is in the Youngstown Property Maintenance Code and states:

> Transfer of ownership. *It shall be unlawful* for the owner of any dwelling unit or structure who has received a compliance order or upon whom a notice of violation has been served *to sell, transfer, mortgage, lease or otherwise dispose of such dwelling unit or structure to another* until the provisions of the compliance order or notice of violation have been complied with, or *until such owner shall first* furnish the grantee, transferee, mortgagee or lessee a true copy of any compliance order or notice of violation issued by the Code Official *and shall furnish to the Code Official a signed and notarized statement from the grantee*, transferee, mortgagee or lessee, acknowledging the receipt of such compliance order or notice of violation *and fully accepting the responsibility without condition for making the corrections or repairs* required by such compliance order or notice of violation. (Ord. 16-119. Passed 4-6-16.)

(Emphasis added.)

{¶16} As alleged, Youngstown City Ordinance 546.07, *Transfer of Ownership,* requires any seller of real estate who is subject to a repair or raze order to provide the buyer with the notice of violation and the city with a signed and notarized statement from the buyer indicating the buyer accepts responsibility for making the corrections or repairs required by the compliance order or notice of violation. Alternatively, the seller must make all the necessary repairs and improvements to ensure compliance with the repair order or notice of violation before transferring the property. *Id.*

{¶17} Section 546.03, *Enforcement*, empowers the appointed Code Official with the power to enforce the Youngstown Property Maintenance Code provisions, and Section 546.05 provides, “the owner is liable for all violations of this Code.” Section 546.96, titled *Administrative Penalties*, authorizes the imposition of financial penalties after certain procedural requirements are satisfied.

Section 546.98, titled *Criminal Penalties*, provides in pertinent part:

> (a) Any person in control who violates or fails to comply with any provision of Chapter 546 of the Youngstown Codified Ordinances, or any order issued

> by the Code Official or his or her designee, after notice pursuant to 546.06, shall be guilty of a misdemeanor of the third degree and shall be fined not more than $500.00 or imprisoned more than 60 days or both. Completion of any administrative appeals process is not a prerequisite to criminal prosecution.
>
> (b) The provisions of this Code are specifically intended to impose strict liability. (Ord. 16-228. Passed 7-13-16.)

{¶18} At trial, Abigail Beniston testified she was the Youngstown City Code Enforcement and Blight Remediation Superintendent in 2014. She recalls handing a notice to repair or raze the structure on Bryson Street to Singh in October of 2014. (Plaintiff's Ex. 2.) Singh met with Beniston in her office where she gave Singh a copy of the three-page notice and had Singh sign the first page. It states in part on the first page: "YOU ARE HEREBY ORDERED TO REPAIR OR RAZE THE ABOVE-MENTIONED STRUCTURE(S) WITHIN THIRTY (30) DAYS." The second page of the notice sets forth the right to appeal and the prohibition on transferring ownership unless the buyer acknowledges and accepts compliance with the order. It quotes Youngstown Ordinance 546.07 in full. (Plaintiff's Ex. 2.) Beniston testified she notified Singh about the violations and the city's transfer of ownership stipulation. Singh appealed the order the same date to the Property Maintenance Appeals Board for additional time to comply. (Tr. 13-17.)

{¶19} Appellees were granted several appeals and extensions of time and initially were working with the city to satisfy the violations identified in the raze or repair order. But in May of 2015, Appellees did not appear or call to secure an additional extension of time to comply, and thus, their appeal and extension was denied. According to Beniston, Appellees did not provide the notarized statement to Appellant accepting responsibility for compliance with the violations at the Bryson Street property. The city likewise was not notified that the property was in compliance before it was transferred to Appellant. After Appellant acquired the property, the city sent Appellant a notice to repair or raze the structure in February of 2016. (Tr. 17-21.)

{¶20} Beniston verified that Appellees did not satisfy the notarized statement requirement when they sold the property to Appellant. (Tr. 21-22.) Beniston also confirmed the city could charge someone with a third-degree misdemeanor for the failure to comply with Youngstown Ordinance 546.07. (Tr. 40-41.) As far as Beniston knew, no

one was charged with a criminal offense as a result of the transfer of this property to Appellant and Appellees' failure to comply with Ordinance 546.07. (Tr. 41.)

{¶21} Beniston agreed anyone who drove by the property would be aware of its dilapidated condition and would believe the structure was in violation of "numerous codes and ordinances." (Tr. 30.) Beniston had never worked with Appellant before. (Tr. 32.)

{¶22} One of Appellant's owners and representative, Allan Bittner, testified he lived out of state and knew the building located on Bryson Street was in need of substantial improvements when his company purchased it. Appellant intended to spend approximately two years renovating it. Appellant was not, however, aware of the raze or repair order at the time of purchasing the property. Bittner testified his company learned about the raze or repair order months after purchasing it. They had no experience with raze or repair orders. Appellant knew the purchase agreement contained an as-is clause. (Tr. 55-59.)

{¶23} Singh testified her company also purchased the Bryson Street property while it was subject to an existing raze or repair order. She worked with city officials to make the necessary repairs to rehabilitate the structure, but her company was unable to secure the requisite loans or funding. Thus, Appellees did not make any improvements to the structure and did not remedy the property code violations before selling it to Appellant. (Tr. 144-148.)

{¶24} In its decision rendering judgment in Appellees' favor, the trial court found in part that Appellant had the opportunity to learn about the demolition order and did not do so. Appellant does not challenge this finding and instead argues that notwithstanding Appellant's ability to learn about the raze or repair order, Appellees' unambiguous violation of the city's ordinance rendered the purchase agreement illegal and void ab initio.

{¶25} "[I]t is the policy of the law to encourage freedom of contract, and that the courts should not interfere with this right unless it clearly appears that the execution of the contract will prejudice the public interest.'" *Gross v. Campbell*, 26 Ohio App. 460, 471, 160 N.E. 511 (7th Dist.1927), *aff'd,* 118 Ohio St. 285, 160 N.E. 852 (1928). "'The power of courts to declare a contract void as being against public policy is a delicate and undefined one, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' *Richmond v. Dubuque & S. C. R. Co.*, 26 Iowa, 191, at page 202." *Id.*

{¶26} A “void contract” is a “contract that is of no legal effect, so that there is really no contract in existence at all.” Contract, *Black's Law Dictionary* (11th ed. 2019). Contracts found void as in violation of law and contrary to public policy are void because the law disapproves of the purpose of the contract, consideration contemplated, or the terms of the agreement by which the parties seek to achieve their contractual purpose. Courts have voided certain agreements when the substance of the contract or the consideration is malum in se, meaning wrong in its very nature because the matter or thing contracted for violates the natural or moral norms of society. *See Warren People's Mkt. Co. v. Corbett & Sons*, 114 Ohio St. 126, 138, 151 N.E. 51, 54, 4 Ohio Law Abs. 89, 24 Ohio Law Rep. 183 (1926) (explaining courts will not find a contract void when in violation of a statute or law unless “the act prohibited is detrimental to the welfare or morals of the public” not just violative of a statute designed to raise revenue or regulate trade); *Hughes v. Ohio Div. of Real Estate*, 86 Ohio App.3d 757, 761, 621 N.E.2d 1249 (2nd Dist.1993) (“Conduct that is inherently wrong in and of itself or that is illegal from the very nature of the transaction is said to be malum in se.”).

{¶27} “Malum in se” means “a crime or an act that is inherently immoral, such as murder, arson, or rape.” Malum in se, *Black's Law Dictionary* (11th ed. 2019).

{¶28} In *Gross v. Campbell*, *supra*, this court considered the legality of a contract between a company and a private investigator hired to secure evidence to aid the company in a lawsuit. The defendant company claimed the contract was unenforceable in part because it was void as against public policy since the terms of the agreement provided that payment was contingent upon the result of the lawsuit in which the evidence was to be used. *Id*. at 470. While emphasizing the importance of freedom of contract, we held because it was abundantly clear the contract was for the investigator “to procure and furnish evidence of a particular kind to produce a certain result in a suit of law[,]” it was void since it was within the “prohibited class” and prejudicial to the public interest. *Id*. at 471-474. This court reached this decision only after highlighting it is acceptable to contract for an investigator to secure evidence to aid in litigation so long as the agreed compensation does not hinge on “the character of the testimony procured to be used in a suit to accomplish a particular result.” *Id*. at 470.

{¶29} In *Marchetti v. Blankenburg*, 12th Dist. Butler No. CA2010-09-232, 2011-Ohio-2212, the Twelfth District Court of Appeals affirmed the trial court’s decision refusing to enforce an agreement for the payment of money in exchange for the plaintiff not to

inform the applicable legal authorities that the defendant had sexually abused the plaintiff as a child. The victim filed suit seeking the payment of money from his alleged abuser, who allegedly agreed to pay the plaintiff in exchange for his silence. The trial court granted the defendant's motion to dismiss finding no legal contract to enforce since it was illegal, immoral, and against public policy. The appellate court agreed the subject matter of the contract was to prohibit the reporting of a felony offense and contrary to public policy. *Id.* at ¶ 13-14.

{¶30} In *McCullough Transfer Co. v. Virginia Sur. Co.*, 213 F.2d 440, 441 (6th Cir.1954), the plaintiff urged the court to find an insurance contract case was void because it was not in compliance with an applicable Ohio statute requiring an endorsement to be approved by Ohio's Superintendent of Insurance. The Sixth Circuit disagreed explaining, "[a] contract is not void as against public policy unless it is injurious to the public or contravenes some established interest of society." *Id.* at 443, citing *Gugle v. Loeser*, 143 Ohio St. 362, 367, 55 N.E.2d 580 (1944). "The insurance contract involved in this case, under which appellant has had the benefit of full performance by the appellee, is clearly not of that nature." *Id.*

{¶31} In reaching this decision, *McCullough* emphasized courts must also examine the statute as a whole to determine whether the legislature intended to make contracts entered in violation of the statute void based on the prohibited act. *McCullough* found although insurance contract regulation is a business regulated by the state, the failure to comply with the regulatory provision at issue did not render the contract of insurance void. In support, the Sixth Circuit emphasized the applicable statute, which had been violated, did not indicate a contract entered in violation of it rendered the contract void. Instead, the statute provided a $500 fine for the failure to comply. *Id.* at 442. The legislature's inclusion of the penalty provision and the absence of an indication that contracts entered in violation of the provision will be held void demonstrates the legislature's purpose was not to void contracts not in compliance. *Id.* citing *Warren People's Market Co. v. Corbett & Sons*, 114 Ohio St. 126, 151 N.E. 51, paragraph one of the syllabus ("'the court must examine the entire act to determine whether or not it was the purpose of the Legislature, in addition to imposing express penalties for the violation of the law, to render void any contract based on the prohibited act.'").

{¶32} Consistent with *McCullough*, we must examine the statute violated as a whole to ascertain the intent of the drafters and whether a violation should render

contracts entered in violation of it void. Here, the city was empowered to impose administrative and criminal sanctions for violations against the property owner. Nothing in this section or in the city's Property Maintenance Code indicates the drafters intended to make a contract entered in contravention to the provisions void.

{¶33} Thus, notwithstanding Appellees' noncompliance with Section 546.07, the law does not support the contention that the parties' purchase agreement is void due to Appellees' violation. "Where a statute prohibits an act or annexes a penalty to its commission, it is true that the act is made unlawful, but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it." *Fischer-Liemann Const. Co. v. Haase*, 64 Ohio App. 473, 476, 29 N.E.2d 46 (1st Dist.1940), quoting *Harris v. Runnels*, 53 U.S. 79, 12 How. 79.

{¶34} Moreover, like the contract in *McCullough*, the underlying purpose of the agreement of providing insurance is not one that violates public policy. Like selling and providing insurance, the sale of real estate is not something that is malum in se and contrary to public policy. Thus, we do not find the contract here violates public policy or societal norms warranting a finding the contract is void for this reason. Consequently, Appellant's sole assigned error lacks merit.

Conclusion

{¶35} Because the substance of the parties' agreement is not a contract which contravenes an established interest of society or norm, we find it is not void as against public policy. Further, because the Youngstown Property Maintenance Code provides criminal and administrative penalties for violations and does not indicate a contract entered in violation of these provisions should be void, the parties' purchase agreement is not void for this reason as well. Appellant's sole assignment of error is overruled, and the trial court's decision is affirmed.

Donofrio, P J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

[Cite as **Banks v. Shark Auto Sales, L.L.C.**, 2022-Ohio-3489.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY

MARY BANKS, Plaintiff-Appellee, - vs - SHARK AUTO SALES LLC, Defendant-Appellant.	**CASE NO. 2022-T-0018** Civil Appeal from the Warren Municipal Court Trial Court No. 2021 CVI 001381

O P I N I O N

Decided: September 30, 2022
Judgment: Reversed and remanded

Mary Banks, pro se, 90 Kings Drive, S.W., Warren, OH 44481 (Plaintiff-Appellee).

James J. Crisan, Martin F. White Co., LPA, 156 Park Avenue, N.E., P.O. Box 1150, Warren, OH 44482 (For Defendant-Appellant).

MATT LYNCH, J.

{¶1} Defendant-appellant, Shark Auto Sales, LLC, appeals the judgment of the Warren Municipal Court, awarding damages in the amount of $1,600 in favor of plaintiff-appellee, Mary Banks. For the following reasons, we reverse the judgment of the court below and remand for further proceedings consistent with this opinion.

{¶2} On September 1, 2021, Banks filed a Small Claims Complaint against Shark Auto Sales for a "faulty car." The matter was tried before a magistrate.

{¶3} On December 14, 2021, the magistrate issued Findings of Fact and Conclusions of Law. The magistrate made the following relevant findings of fact:

> Plaintiff purchased a 2001 Mitsubishi Galant with 140,088 miles from

the Defendant on 8/19/21 for the total price of $1470.00. With the additional charges of sales tax and other fees, the total was $1600.24. A copy of the purchase agreement was submitted which included a warranty disclaimer, and a specific "as is- No dealer warranty" document signed by the Plaintiff.

In a separate page is listed the following:

"Here is a list of some major defects that may occur in used vehicles. **Frame-cracks, corrective welds, or rusted through".**

Plaintiff admits she did test drive the vehicle and was advised she could take the vehicle anywhere she wanted to be inspected. Plaintiff chose not to have the vehicle inspected.

Plaintiff states she understood she was not paying a great deal of money for the vehicle, and that she might have to put some money into it for repairs, but when she took the vehicle into the repair shop to get struts, she was told by the shop that the vehicle was unsafe, and they would not work on the vehicle as the frame was bad and could not be fixed.

Plaintiff['s] exhibit 2 is from Champion Auto Center and states: **"REAR FRAME IS ROTTED OUT".**

Plaintiff states that when she asked about the vehicle, the salesman stated it was safe and probably needed some new brakes.

Defendant [sic], Nick Minarcik, stated he does work for the Defendant and did sell this vehicle to Plaintiff.

Defendant states he is not a mechanic and did not state he was. The vehicle was purchased from the auction, and neither he nor the dealership did any further inspection of the vehicle except to test drive it (No one looked underneath).

Defendant states he was unaware the frame had any issues, and was not advised of any.

Defendant again re[iterates] that this is an older car, 20 years old,

> with over 140,000 miles on it. It was purchased “AS IS” and Plaintiff was given every opportunity to inspect it.

{¶4} The magistrate found against Shark Auto Sales for the amount of $1,600 plus statutory interest and court costs. The magistrate concluded, under Ohio law, “that a dealer has a duty to exercise reasonable care in making an examination [of a used vehicle] to discover defects therein which would make them dangerous to users. Defendant cannot simply fail to do any examination, and say I was not aware of any major defects. In the instant matter if an inspection was done, the Defendant would have discovered the frame was damaged and unsafe. I find that the damage to the frame substantially impaired the value of the vehicle. I therefore find the Plaintiff may revoke acceptance of the vehicle.”

{¶5} Shark Auto Sales filed Objections to the Magistrate’s Decision which the municipal court overruled on February 8, 2022.

{¶6} On March 10, 2022, Shark Auto Sales filed its Notice of Appeal. On appeal, it raises the following assignment of error: “The trial court abused its discretion by denying the Defendant-Appellant’s Objections and affirming the Magistrate’s Decision.”

{¶7} The decision to adopt a magistrate’s decision is typically reviewed under an abuse of discretion standard. However, when questions of law, such as the interpretation of a contract, are presented, the court of appeals will review the lower court’s judgment de novo. *Lucas v. Lucas*, 11th Dist. Lake No. 2007-L-058, 2007-Ohio-5607, ¶ 10; *Southwestern Obstetrics & Gynecology, Inc. v. Mehta*, 10th Dist. Franklin No. 13AP-624, 2014-Ohio-2904, ¶ 9; *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶ 38 (“[c]ontract interpretation is a matter of law, and questions of law are subject to de novo review on appeal”).

{¶8} On appeal, Shark Auto Sales argues the municipal court erred by holding that Banks could rescind the sale of the vehicle as a result of its breach of the duty to inspect the vehicle for defects making it dangerous to users. We agree.

{¶9} A used motor vehicle constitutes "goods" for the purposes of R.C. Chapter 1302 (Ohio's codification of the Uniform Commercial Code) and, therefore, the sale of a used motor vehicle is governed by the provisions of that Chapter. R.C. 1302.01(A)(8) ("'Goods' means all things * * * which are movable at the time of identification to the contract for sale"); *Sellers v. Marrow Auto Sales*, 124 Ohio App.3d 543, 545-546, 706 N.E.2d 837 (12th Dist.1997).

{¶10} The sale of goods in Ohio may entail both express and implied warranties, including the implied warranty that the goods "are fit for the ordinary purposes for which such goods are used." R.C. 1302.27(B)(3); *Raze Internatl., Inc. v. Southeastern Equip. Co., Inc.*, 2016-Ohio-5700, 69 N.E.3d 1274, ¶ 26 (7th Dist.). "[U]nless the circumstances indicate otherwise all implied warranties are excluded by expressions like 'as is', 'with all faults', or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." R.C. 1302.29(C)(1). Additionally, "when the buyer before entering into the contract has examined the goods * * * as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him." R.C. 1302.29(C)(2).

{¶11} "The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it: (1) on the reasonable assumption that its non-conformity would be cured and it has not been

seasonably cured; or (2) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances." R.C. 1302.66(A).

{¶12} As its basis for allowing Banks to revoke her acceptance, the municipal court held that Shark Auto Sales violated a duty to examine the vehicle before sale for defects rendering its use dangerous. In support of this holding, the magistrate cited the following cases: *Thrash v. U-Drive-It Co.*, 158 Ohio St. 465, 110 N.E.2d 419 (1953); *Stamper v. Parr-Ruckman Home Town Motor Sales, Inc.*, 25 Ohio St.2d 1, 265 N.E.2d 785 (1971); and *Cannon v. Neal Walker Leasing, Inc.*, 9th Dist. Summit No. 16846, 1995 WL 404961.

{¶13} *Thrash* was a negligence action brought on behalf of a minor who was allegedly injured by a defective vehicle purchased by his father from the defendant, a dealer in used motor vehicles. The dealer was "charged with negligence in failing to inspect the truck for defects before resale, in failing to warn plaintiff's father of the misfitted and insecure lock ring, in representing to the purchaser that the truck was in good operating condition, and in placing on the market and selling for use a truck containing a latent and dangerous defect. *Thrash* at 468. Judgment was entered for the dealer on the pleadings. The Ohio Supreme Court held to the contrary that the negligence charge stated a claim: "Although a dealer in used motor vehicles is not an insurer of the safety of the vehicles he sells, he is generally under a duty to exercise reasonable care in making an examination thereof to discover defects therein which would make them dangerous to users or to those who might come in contact with them, and upon discovery to correct those defects or at least give warning to the purchaser. Such rule is of particular

significance where the sale of such a vehicle is accompanied by representations or warranties as to its fitness for use." *Id.* at paragraph four of the syllabus.

{¶14} *Stamper* was also a negligence action brought by persons injured by a defective automobile who were not its purchasers. Although the Supreme Court upheld judgment in favor of the seller of the vehicle, it reaffirmed the holding of *Thrash* and noted that the duty to examine for dangerous defects existed even when a vehicle is sold "as is": "Where a used car dealer sells a vehicle 'as is' he is under a duty to use ordinary care to warn the purchaser of defects of which he has, or by the exercise of reasonable care should have, knowledge; but he is not an insurer, and hence is not liable for injuries to a third party as a result of latent defects in the vehicle." *Stamper* at syllabus.

{¶15} We find the reliance on *Thrash* and *Stamper* misplaced, inasmuch as these cases unquestionably involved tort rather than contract law. These cases recognized that automobile dealers have a duty to exercise reasonable care to examine the used vehicles they sell for defects rendering them dangerous. This duty exists as a matter of law and did not derive from the sales contracts. *See Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989) ("[t]he existence of a duty in a negligence action is a question of law for the court to determine"). As the Supreme Court emphasized, the dealer is not an insurer and so the duty imposed should not be treated as some sort of implied warranty. If it were, then it could be excluded in the manner of other implied warranties as described above. Moreover, the breach of the duty in *Thrash* and *Stamper* resulted in physical injuries proximately caused by the breach. The breach of the duty by Shark Auto Sales did not cause such injury.

{¶16} We acknowledge that in at least one case, *Watkins v. Alwishah*, 7th Dist.

Columbiana No. 20 CO 0018, 2021-Ohio-3589, the "as is" sale of a used vehicle was revoked after it was discovered the frame had rusted to the point of rendering it unsafe to operate. The applicability of *Thrash* was not challenged in *Watkins*, however, inasmuch as the automobile dealer (Alwishah) "acknowledged in his testimony that he was required to have the vehicle inspected prior to placing it for sale, and that he was required to perform repairs to correct any and all dangerous conditions found during the inspection." *Id.* at ¶ 18[1]. We find *Watkins* to be neither controlling nor persuasive. The court recognized that *Thrash* was a negligence case requiring evidence "of a duty on the part of the one sued, failure to perform the duty, and that an injury resulted from this failure." *Id.* at ¶ 23. But the court made no attempt to explain how these elements applied to the revocation of the retail installment contract at issue. Conversely, there is authority holding that, "when a buyer contractually agrees to accept property 'as is,' the seller is relieved of any duty to disclose." *Kaye v. Buehrle*, 8 Ohio App.3d 381, 383, 457 N.E.2d 373 (9th Dist.1983).

{¶17} The third case relied on by the magistrate, *Cannon v. Neal Walker Leasing, Inc.*, 1995 WL 404961, did not involve the dealer's duty to inspect the vehicle before sale. Rather, in *Cannon*, the court of appeals affirmed the revocation of a sales contract for an automobile on the grounds of non-conformity which substantially impaired the value of the vehicle to the buyer. Significantly, the vehicle at issue in *Cannon* was not sold "as is" but under a thirty-day limited warranty during which time implied warranties were not disclaimed. The court concluded that, because the limited warranty was inadequate to

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1. We note, without comment, that, although Alwishah could acknowledge his duties under the *Thrash* decision, he was "apparently a native Arabic speaker" who claimed "he is unable to understand the English language and is classified as Limited English Proficient." *Id.* at ¶ 9.

cure the defects in the vehicle without cost to the buyer, its value was substantially impaired: “In a revocation action, once it is established that an item is non-conforming, the issue becomes whether that non-conformity substantially impaired its value to the buyer. Warranty remedies can be indirectly relevant to that determination. If, pursuant to available warranty remedies, the non-conformity can be completely cured and the value to the buyer restored, revocation would be inappropriate. Available warranty remedies, along with any offers of cure by the seller beyond available warranty remedies, therefore, would be relevant to the question of whether the non-conformity substantially impaired the item’s value to the buyer.” *Id.* at *3. Since the limited warranty in *Cannon* effected less than a complete cure of the non-conformity, the sale could be revoked: “The fact that the Plaintiffs herein were assured by the seller’s salesperson of the reliability of the vehicle, a breakdown of the vehicle within two days of purchase, accompanied with the $400 plus possible cost to repair the vehicle that was initially purchased for $1,500, clearly indicates to this Court that this buyer may take advantage of R.C. 1302.66.” *Id.* at *4.

{¶18} In situations like the present one, where there has been a repudiation of warranties, revocation based on non-conformity has not been allowed. In *Schneider v. Miller*, 73 Ohio App.3d 335, 597 N.E.2d 175 (3d Dist.1991), the plaintiff attempted to revoke his acceptance after discovering that the vehicle he purchased “as is” had an irreparably rusted frame. The court found in favor of the dealer. The plaintiff’s claims based on breach of warranty were rejected “because the car was sold ‘as is’ without any warranty.” *Id.* at 337. The claim for revocation was rejected because the dealer “made no assurances or guarantees that the vehicle was in any certain condition.” *Id.* It was further noted that “[a]t no time did appellant testify that he could not have had this vehicle

inspected by a mechanic or other knowledgeable person for defects." *Id.* Finally, revocation was precluded because "[a]ppellant has not shown that he accepted this vehicle on the reasonable assumption that its alleged nonconformity would be cured, nor has he shown that such nonconformity was induced by the difficulty of discovery before acceptance or by appellee's assurances." *Id.* at 338. *Also Gallagher v. WMK Inc.*, 9th Dist. Summit No. 23564, 2007-Ohio-6615, ¶ 22 ("[a]s this vehicle carried no warranties, either express or implied, it had no 'non-conformity' for purposes of Section 1302.66 of the Ohio Revised Code").

{¶19} In sum, we conclude that Banks was not entitled to revoke the sale. The duty breached by Shark Auto Sales under *Thrash* and *Stamper* applied to negligence claims which were not raised by Banks in the present case. Shark Auto Sales effectively disclaimed any warranties by selling the vehicle "as is" and Banks was given a full opportunity to inspect it for defects. Sold "as is," the vehicle could not be found non-conforming. Accordingly, there were not valid grounds identified by the trial court that would justify the revocation of Banks' acceptance.

{¶20} The sole assignment of error is with merit.

{¶21} For the foregoing reasons, the judgment of the Warren Municipal Court is reversed and this matter is remanded for further proceedings consistent with this opinion. Costs to be taxed against the appellee.

CYNTHIA WESTCOTT RICE, J.,

JOHN J. EKLUND, J.,

concur.

[Cite as *Hamilton v. Barth*, 2022-Ohio-3451.]

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

FRED B. HAMILTON,	:	APPEAL NO. C-210605 TRIAL NO. A-1805754
Plaintiff-Appellant,	:	
vs.	:	*O P I N I O N.*
DOROTHY M. BARTH, the Executrix of the Estate of Louis E. Barth,	:	
and	:	
DOROTHY F. BARTH,	:	
Defendants-Appellees.[1]	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 30, 2022

Nieberding & Nieberding Co. LPA and *James L. Nieberding*, for Plaintiff-Appellant,

Donald J. Meyer, Jr., Co. LPA and *Donald J. Meyer, Jr.*, for Defendants-Appellees.

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[1] We note that the difference in middle initial for Dorothy Barth is in accordance with the record. *See* fn. 2.

ZAYAS, Presiding Judge.

{¶1} Plaintiff-appellant Fred B. Hamilton brings this appeal to challenge the trial court's grant of summary judgment on the claims in his complaint in favor of defendants-appellees Dorothy M. Barth, the executrix of the estate of Louis E. Barth, and Dorothy F. Barth ("defendants"). For the following reasons, we affirm the judgment of the trial court.

I. Procedural History

{¶2} Hamilton filed this action for breach of contract, specific performance, and a declaratory judgment on October 23, 2018, regarding an alleged land installment contract.[2] On November 21, 2018, defendants filed an answer and a counterclaim against Hamilton for slander of title based on an affidavit filed by Hamilton in the county recorder's office asserting that Hamilton had an interest in the subject property by virtue of the alleged land contract.

{¶3} On September 18, 2019, defendants moved for summary judgment on Hamilton's claims, arguing that the purported contract was unenforceable as it failed to meet the minimum requirements for a land installment contract under R.C. 5313.02. Hamilton opposed summary judgment, asserting that genuine issues of material fact remained as to whether the contract was enforceable as it substantially complied with the requirements of R.C. 5313.02. The trial court ultimately granted defendants' motion for summary judgment on December 27, 2019, after finding that all parties had acknowledged that the document was never notarized as required by R.C. 5301.01(A). Hamilton appealed the trial court's grant of summary judgment.

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[2] The defendants listed at the time of the complaint were Louis E. Barth and Dorothy "F." Barth ("The Barths"). Subsequently, Andrew L. Barth, the guardian of Louis E. Barth, was substituted for Louis E. Barth on November 14, 2018, after Louis Barth was declared incompetent by the probate court, and then Dorothy "M." Barth, the Executrix of the Estate of Louis E. Barth, was substituted for Andrew L. Barth on May 6, 2021, after the death of Louis Barth.

This court dismissed the appeal for lack of a final, appealable order as the trial court's entry did not dispose of the defendants' counterclaim and did not contain the requisite language under Civ.R. 54(B). *See Hamilton v. Barth*, 1st Dist. Hamilton No. C-200027, 2021-Ohio-601.

{¶4} On remand, defendants filed a motion for summary judgment on the counterclaim. After responsive briefing, the trial court granted defendants' request for summary judgment on the counterclaim. Hamilton timely appealed. He now raises a sole assignment of error that the trial court erred in granting summary judgment in favor of defendants on the claims in his complaint. He does not present any argument that the trial court erred in granting summary judgment in favor of defendants on their counterclaim.

II. Factual Background

{¶5} This dispute centers around two parcels of land owned by the Barths in Hamilton County and collectively valued by the Hamilton County Auditor at over $450,000. In April 2018, Hamilton approached the Barths about purchasing the land, although they did not have any land for sale at the time. After some discussion about the terms of the sale, Hamilton had an attorney draft a land contract for the property. The Barths did not participate in the preparation of this document.

{¶6} Hamilton approached the Barths with the contract in early May. The contract, entitled "LAND CONTRACT," listed a purchase price of $55,000. The terms of payment were: (1) a down payment of $500 upon execution of the contract, (2) $500 monthly installment payments beginning on June 7, 2018, and continuing until May 7, 2025, and (3) a final payment of the unpaid balance of $13,000 on May 7, 2025. The contract listed a rate of zero percent interest per annum.

{¶7} The Barths and Hamilton signed the contract, but it was never acknowledged or recorded and, significantly, it was never dated. All lines in the contract regarding witnesses, notaries, and dates were left blank. Hamilton presented the Barths with a check for $500 on the day of signing. The receipt for this payment indicated that the payment was for “land.” The receipt was signed by Louis Barth and was dated May 5, 2018.

{¶8} On May 13, 2018, Dorothy Barth had a conversation with her son, Andrew Barth, about the contract. Andrew asked why she would consider selling the property at such a low price and she responded that she was not yet obligated to sell the land as she had not gone to the bank to have the contract notarized as the contract required. She decided at this point not to sell the land and called Hamilton the next day to tell him that she did not want to sell the land as they were being cheated. Hamilton came to the Barths’ home and accepted a $500 check for the return of his payment on May 18, 2018.

{¶9} Subsequently, in June 2018, the parties, through their attorneys, disputed whether the contract was enforceable, without resolution. During these discussions, Hamilton attempted to tender a second payment to the Barths under the contract on June 15, 2018, but the check was returned to Hamilton. Hamilton did not attempt to tender any additional payments under the contract. On July 9, 2018, Hamilton filed an affidavit in the county recorder’s office titled “Affidavit of Facts relating to Title to Real Property,” asserting that he was establishing and preserving his interest in the property pursuant to the purported land contract.

III. Law and Analysis

A. Standard of Review

{¶10} We review the trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) when viewing the evidence in favor of the nonmoving party, reasonable minds can only reach one conclusion and that conclusion is adverse to the nonmoving party. *Id.*

B. Land Installment Contracts and R.C. 5313.02

{¶11} A land installment contract is "an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligations." R.C. 5313.01. The minimum provisions and requirements for a land installment contract are set forth in R.C. 5313.02. The statute lists 16 minimum provisions that a land installment contract must contain, requires the vendor to record the land installment contract within 20 days of the contract being signed, and requires that every land installment contract must conform to the same formalities required by law for the execution of deeds and mortgages. R.C. 5313.02(A), (C) and (D). One such formality is that the vendor's signing of a land installment contract must be acknowledged by the vendor before a judge or clerk of a court of record, or a county auditor, county engineer, notary public, or mayor. *See* R.C. 5301.01(A).

{¶12} It is undisputed in this case that the contract at issue was never acknowledged as required by R.C. 5313.02(D) and 5301.01(A). The trial court found this fact to be determinative and granted summary judgment in favor of the defendants on Hamilton's complaint. Hamilton now challenges the trial court's judgment and argues that genuine issues of material fact remained as to whether a contract existed between the parties, despite no acknowledgment, as the contract complied with the statute of frauds and substantially complied with R.C. 5313.02(A).

{¶13} "If a formality is strictly required by law for the execution or content of an instrument, the failure to adhere to that requirement renders the instrument unenforceable at law irrespective of the intent of the parties." *Bank of N.Y. Mellon v. Rhiel*, 155 Ohio St.3d 558, 2018-Ohio-5087, 122 N.E.3d 1219, ¶ 14, citing *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St.2d 282, 285-286, 209 N.E.2d 194 (1965). The express requirements for a land contract under R.C. 5313.02 and the requirement under R.C. 5301.01—the statute of conveyances—that a land installment contract be acknowledged are clearly formalities required by law to create a valid land installment contract. *See* R.C. 5313.02; *Delfino* at 284; *Lovejoy v. Diel*, 12th Dist. Butler No. CA2020-06-067, 2021-Ohio-1124, ¶ 33. Additionally, as a land installment contract is an agreement for the sale of land, it must also comply with R.C. 1335.05—the statute of frauds—which requires that the agreement be in writing and signed by the party to be charged.

{¶14} However, the Ohio Supreme Court has said that, in certain circumstances, the equitable doctrine of part performance may remove an instrument from the operation of the statute of conveyances or the statute of frauds. *Delfino* at 286-287. The doctrine is applied "in situations where it would be inequitable to permit the statute to operate and where the acts done sufficiently establish the alleged

agreement to provide a safeguard against fraud in lieu of the statutory requirements." *Id.* For an agreement to be removed from the operation of the statute of conveyances, the part performance "must consist of unequivocal acts by the party relying upon the agreement, which are exclusively referable to the agreement and which have changed his [or her] position to his [or her] detriment and make it impossible or impractical to place the parties *in statu quo*." *Id.* at 287; *see Loveland Properties v. Ten Jays, Inc.*, 57 Ohio App.3d 79, 82-83, 567 N.E.2d 270 (1st Dist.1988). "If the performance can reasonably be accounted for in any other manner or if the plaintiff has not altered his position in reliance on the agreement, the case remains within the operation of the statute." *Id.*

{¶15} In the context of land installment contracts, courts have held that an agreement which is invalid under R.C. 5313.02 may still be equitably enforced as between the parties thereto where there is substantial compliance with R.C. 5313.02 *and* where both parties performed under the contract in such a manner that it sufficiently evidenced an intent to enter into a final binding agreement. *See, e.g., Shimko v. Marks*, 91 Ohio App.3d 458, 632 N.E.2d 990 (5th Dist.1993); *Real Flo Properties v. Kelly*, 6th Dist. Lucas No. L-99-1099, 1999 Ohio App. LEXIS 6030 (Dec. 17, 1999); *Gollihue v. Russo*, 152 Ohio App.3d 710, 2003-Ohio-2663, 789 N.E.2d 1151 (10th Dist.); *Phillips v. May*, 11th Dist. Geauga No. 2003-G-2520, 2004-Ohio-5942; *Merivale Invests. v. Tuggle*, 6th Dist. Lucas No. L-08-1439, 2009-Ohio-6502; *Elkins v. Colburn*, 4th Dist. Pike No. 18CA893, 2019-Ohio-2681; *compare, e.g., Clagg v. Cooke*, 4th Dist. Pickaway No. 88 CA 23, 1989 Ohio App. LEXIS 3280 (Aug. 18, 1989) (finding an agreement unenforceable where the agreement failed to comply with the requirements of R.C. 5313.02 and the performance was insufficient to invoke the doctrine of partial performance); *Standard Fed. v. Asencio*, 9th Dist. Lorain No.

98CA007011, 1999 Ohio App. LEXIS 398 (Feb. 9, 1999) (finding that material omissions of the requirements of R.C. 5313.02 to the detriment of the vendee renders the agreement voidable).

{¶16} Notably, the facts of each case involved, at a minimum, the vendee being in possession of the premises and making payments under the agreement. However, possession and monthly payments, alone, are usually insufficient to constitute part performance. *See 6610 Cummings Court, L.L.C. v. Scott*, 2018-Ohio-4870, 125 N.E.3d 362, ¶ 42 (8th Dist.). The idea behind these cases is that, although the agreement may have been defectively executed and thus unenforceable in an action at law, the parties did enter into a final agreement and perform under the agreement in such a manner that it is clear what the agreement was between the parties and that the parties intended to be bound by such an agreement, and therefore the contract should be equitably enforced as between the parties thereto.

B. Lack of Sufficient Performance

{¶17} Unlike the cases mentioned above, the case before us is not a case in which, despite no notarization, we have a fully executed contract under which the parties performed in conformance with the terms of the contract as if there was a binding agreement, and now one party is attempting to escape liability under the contract by relying on the notarization requirement. Here, the Barths did not perform any of their duties under the contract, most notably never delivering possession of the land to Hamilton. Additionally, there was no evidence of any performance by Hamilton—the party attempting to enforce the contract—sufficient to show that he had changed his position to his detriment in reliance on the contract. Further, Hamilton does not dispute that the initial deposit was returned to him, thereby placing him in statu quo.

C. Incomplete Execution of the Contract

{¶18} Further and significantly, the contract in this case was never fully executed, which is distinguishable from a contract which was merely defectively executed. First, the date upon which the contract was entered was never completed. Next, the contract had two areas to include witness signatures, none of which were completed. Further, the contract had two areas which required the signature of a notary, one acknowledging the vendors' signatures and one acknowledging the vendee's signature. Neither of these areas were completed. Beyond that, the contract expressly required that possession be given to Hamilton *on the date of execution* and Hamilton was never given possession of the property. These facts, taken together with the fact that Ms. Barth told her son that she was not yet obligated to sell the land because she had not gone to the bank to have the contract notarized *as required by the contract*, show that the parties' intent was for the contract to be binding only upon full execution of the contract, which included notarization and the transferring of the property to Hamilton. As this never occurred, it is apparent that there was never a binding contract in this case. Because the contract was never fully executed, let alone performed, we hold that the contract was invalid and unenforceable as a matter of law. Therefore, we overrule the assignment of error.

IV. Conclusion

{¶19} Having overruled the sole assignment of error, we affirm the judgment of the trial court.

Judgment affirmed.

BERGERON and **CROUSE, JJ.,** concur.

Please note:

The court has recorded its own entry this date.