

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

U.S. BANK, NATIONAL	:	
ASSOCIATION SUCCESSOR BY	:	
MERGER TO U.S. BANK NATIONAL	:	Appellate Case No. 27984
ASSOCIATION ND	:	
	:	Trial Court Case No. 2017-CV-1351
Plaintiff-Appellee	:	
	:	(Civil Appeal from
v.	:	Common Pleas Court)
	:	
KATHERINE MITCHELL, et al.	:	
	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 7th day of December, 2018.

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DONOVAN, J.

{¶ 1} Defendant-appellant Katherine Mitchell appeals a judgment of the Montgomery County Court of Common Pleas, granting the motion for summary judgment of plaintiff-appellee U.S. Bank National Association, Successor by Merger to U.S. Bank National Association ND (hereinafter referred to as “U.S. Bank”). Mitchell filed a timely notice of appeal with this Court on May 3, 2018.

{¶ 2} The record establishes that on July 23, 2007, Jill Long executed a promissory note in favor of U.S. Bank in the amount of \$40,000, plus interest at the rate of 7.69 percent per year. The promissory note provided that a payment of \$306.71 was due on the 22nd of each month and that, upon default, U.S. Bank was entitled to accelerate the due date of the unpaid principal balance, plus accrued interest and charges. The note was secured by a mortgage encumbering real property located at 35 Illinois Avenue in Dayton, Ohio. The mortgage was recorded with the Montgomery County Recorder on August 21, 2007, as Instrument No. 2007-00071187, and is available for viewing at the Recorder’s Office and online.

{¶ 3} Long stopped making payments toward the note in April 2014. Thereafter, on October 8, 2014, Long conveyed the property to Mitchell by quit claim deed, which was recorded in Montgomery County and given Instrument No. 2014-00053922. Mitchell alleges that she paid \$30,000 for the property and that, shortly after purchasing the property, she called the Montgomery County Recorder, who informed her that there were no existing mortgages or other liens on the property. However, Mitchell acknowledges that she did not personally examine the public records as they related to the property, nor did she hire a title company to check the records *before* purchasing the

property. Mitchell also alleges that after taking possession of the property, she immediately began making repairs and improvements. Mitchell claims that the repairs were not completed until some point in late 2015, at a cost of over \$30,000.

{¶ 4} The record establishes that U.S. Bank became aware of the conveyance of the property from Long to Mitchell by quit claim deed on December 2, 2014. On February 25, 2015, U.S. Bank contacted Long's daughter, who informed the bank that Long had passed away during the previous month, on January 19, 2015. On November 16, 2016, U.S. Bank sent a letter to the now-deceased Long at 2285 Crew Circle in Dayton, Ohio, indicating that she was in default with respect to the property located at 35 Illinois Avenue, and that, absent payment, the bank would accelerate the amount due on the promissory note. Thereafter, U.S. Bank sent another letter to the deceased Long at the Crew Circle address, advising her that it was initiating foreclosure proceedings. We note that during this time period, the record establishes that U.S. Bank did not call or otherwise contact Mitchell regarding the property located at 35 Illinois Avenue or the promissory note encumbering the property.

{¶ 5} On March 17, 2017, U.S. Bank filed a foreclosure complaint against Mitchell, Mitchell's Unknown Spouse, if any, and the Montgomery County Treasurer. On May 10, 2017, Mitchell filed an answer and a counterclaim, asserting unjust enrichment. On September 26, 2017, Mitchell amended her counterclaim. U.S. Bank filed a reply to the amended counterclaim on October 5, 2017. Thereafter, on October 18, 2017, U.S. Bank filed an amended complaint, attaching a Lost Note affidavit. On October 30, 2017, Mitchell filed an answer to the amended complaint.

{¶ 6} On January 30, 2018, U.S. Bank filed a motion for summary judgment against

Mitchell. Mitchell filed a memorandum in opposition to U.S. Bank's summary judgment motion on February 28, 2018. On March 6, 2018, U.S. Bank filed a reply memorandum in support of its motion for summary judgment. After considering the parties' arguments, the trial court issued a decision on April 9, 2018, granting U.S. Bank's motion for summary judgment.

{¶ 7} It is from this judgment that Mitchell now appeals.

{¶ 8} Because they are interrelated, Mitchell's first and second assignments of error will be discussed together as follows:

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE BANK ON MS. MITCHELL'S LACHES AND ESTOPPEL DEFENSES.

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE BANK ON MS. MITCHELL'S UNJUST ENRICHMENT COUNTERCLAIM.

{¶ 9} In her first assignment, Mitchell contends that the trial court erroneously granted U.S. Bank's summary judgment motion with respect to her affirmative defenses of laches and estoppel. In her second assignment, Mitchell argues that the trial court erred when it granted U.S. Bank summary judgment regarding her counterclaim of unjust enrichment.

{¶ 10} This Court reviews the grant of summary judgment de novo, or without deference to the trial court's determination of the legal issues involved. Summary judgment, pursuant to Civ.R. 56, is appropriate when a trial court correctly finds the following:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

Harless v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 11} A party who moves for summary judgment bears the initial burden of informing the trial court of the basis of its motion and “identifying those portions of the record that demonstrate the genuine absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. * * * [If] the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Doriott v. MVHE, Inc.*, 2d Dist. Montgomery No. 20040, 2004-Ohio-867, ¶ 37.

Laches

{¶ 12} Initially, we note that in granting summary judgment with respect to Mitchell's affirmative defense of laches, the trial court addressed the elements of laches as set forth in *Smith v. Smith*, 168 Ohio St. 447, 455, 156 N.E.2d 113 (1950), and *Stevens v. Natl. City Bank*, 45 Ohio St.3d 276, 285-286, 544 N.E.2d 612 (1989). The elements of laches, as set forth in *Smith* and *Stevens*, are as follows:

(1) conduct on the part of the defendant * * * giving rise to the situation of which complaint is made and for which the complainant seeks a remedy

* * *,

(2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of defendant's conduct and having been afforded an opportunity to institute a suit;

(3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and

(4) injury or prejudice to the defendant in the event relief is accorded to the complainant.

Smith at 455; *Stevens* at 285. Laches is an “acquiescence in the assertion of adverse rights and undue delay on complainant's part in asserting his own, to the prejudice of the adverse party.” *Smith* at 456, citing 30 C.J.S. Equity § 112, p. 521. Further, the party asserting the defense must demonstrate that the prejudice is material to the claim, and it “may not be inferred from a mere lapse of time.” *Gordon v. Reid*, 2d Dist. Montgomery No. 26117, 2014-Ohio-4708, ¶ 15, citing *Atwater v. King*, 2d Dist. Greene No. 02CA45, 2003-Ohio-53, ¶ 19.

{¶ 13} “Whether laches should bar an action is a fact-sensitive determination. Accordingly, we review the trial court's application of the doctrine of laches for an abuse of discretion. An abuse of discretion means ‘that the court's attitude is unreasonable, arbitrary or unconscionable.’ ” (Citations omitted.) *Gordon* at ¶ 17; see also *Reid v. Wallaby's Inc.*, 2d Dist. Greene No. 2011-CA-36, 2012-Ohio-1437, ¶ 34 (reviewing the trial court's application of laches for an abuse of discretion). We addressed the elements of laches as set forth in *Smith* and *Stevens* recently in *In re Estate of Rife*, 2d Dist. Montgomery No. 26072, 2014-Ohio-3644; there, we held that where the children of

decedent's predeceased son lacked actual or constructive knowledge of injury or wrong, the doctrine of laches did not bar the children's action. Neither *Smith* nor *Stevens* has been overruled.

{¶ 14} Mitchell argues that it was error for the trial court to utilize the elements of laches set forth in *Smith* and *Stevens*. Rather, Mitchell contends that the trial court should have considered the elements of laches as set forth in *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 2011-Ohio-4189, 54 N.E.2d 104 (2011). In that case, the Ohio Supreme Court listed the elements of laches as: “(1) an unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury involved, and (4) prejudice to the other party.” *Id.* at ¶ 45, citing *State ex rel. Cater v. N. Olmsted*, 69 Ohio St.3d 315, 325, 631 N.E.2d 1048 (1994). In *Martin Marietta*, the Ohio Supreme Court held that appellants' claims were not barred by laches because appellees failed to establish that there was unreasonable or prejudicial delay, when only four months elapsed between termination of the parties' contracts and the initiation of litigation.

{¶ 15} Upon review, we conclude that under the elements of laches set forth in either *Smith* or *Martin Marietta*, U.S. Bank's foreclosure claim was not barred. First, we note that Mitchell's laches argument is premised, in part, upon her claim that she was unaware of the existing mortgage securing the property when she took possession from Long pursuant to a quit claim deed. Specifically, Mitchell argues that she would not have purchased the property if she had known of the existing mortgage with U.S. Bank, and that she would not have made improvements to the property. Mitchell alleges that U.S. Bank had a duty, which it ignored, to inform her of the existence of the mortgage.

Mitchell's argument in this regard is undermined by the record. Notwithstanding the difference in the wording of the elements of laches found in *Smith* and *Martin Marietta*, U.S. Bank's complaint is not barred by laches; Mitchell had constructive notice of the mortgage because it had been properly recorded.

{¶ 16} In *Sky Bank-Ohio Bank Region v. Sabbagh*, 161 Ohio App.3d 133, 2005-Ohio-2517, 829 N.E.2d 743 (2d Dist.), we stated the following:

Persons who acquire a possessory interest in real property take with constructive notice of instruments of title that are recorded. *Mellon Natl. Mtge. Co. v. Jones*, 54 Ohio App.2d 45, * * * 374 N.E.2d 666. To constitute constructive notice of its provisions, the instrument must be one that by law may be recorded. *Underwood v. Lapp* (App.1939), 29 Ohio Law Abs. 582. County recorders are charged to maintain a record of mortgages. R.C. 317.08(B); R.C. 5302.15. Those records may be summarized in indexes, written or electronic. R.C. 5302.15.

Id. at ¶ 15.

{¶ 17} It is the object and purpose of recording an encumbrance on a parcel of real property to furnish notice to the world of the existence of the instrument. *Brown v. Kirkman*, 1 Ohio St. 116, 1853 WL 3 (1853). Thus, those who acquire a possessory interest in real property take with constructive notice of instruments of title that are recorded. *Sky Bank-Ohio Bank Region* at ¶ 15.

{¶ 18} In the instant case, the record establishes that U.S. Bank recorded the mortgage on the property with the Montgomery County Recorder on August 21, 2007, as Instrument No. 2007-00071187. Therefore, Mitchell was put on constructive notice that

the property was encumbered by an existing mortgage held by U.S. Bank. Furthermore, Mitchell took possession of the encumbered property in 2014 by quitclaim deed. “A quitclaim deed conveys no more than whatever title the grantor held at the time of granting the deed.” *Welsh v. Estate of Cavin*, 10th Dist. Franklin No. 02AP-1328, 2004-Ohio-62, ¶ 30; *Jonke v. Rubin*, 170 Ohio St. 41, 162 N.E.2d 116 (1959), paragraph one of the syllabus (the rights of a grantee under a quitclaim deed are no higher than those of his grantor at the time of the conveyance). Additionally, as the trial court found, at the time Mitchell took title to the property in 2014, the mortgage, which was recorded in August 2007, had been recorded in the official records of the Recorder's Office for approximately seven years. Thus, the record affirmatively establishes that Mitchell had constructive notice of the mortgage encumbering the property when she executed the quitclaim deed and took possession of the property from Long. This knowledge is clearly relevant under *Smith*, and we cannot say it is wholly irrelevant under *Martin Marietta*. We also note that Mitchell argues that, rather than sending notice of its intent to foreclose on the property to her, U.S. Bank improperly sent the foreclosure notices to the 2285 Crew Circle address, thereby depriving her of notice. Since the original mortgage had been duly recorded, however, Mitchell had constructive notice that the property was encumbered.

{¶ 19} As previously stated, U.S. Bank learned that Long had conveyed the property to Mitchell by quitclaim deed on December 2, 2014. Thereafter, on February 24, 2015, U.S. Bank learned that Long had passed away. On March 17, 2017, approximately two years and three months after becoming aware of the transfer of the property from Long to Mitchell, U.S. Bank initiated foreclosure proceedings against Mitchell.

{¶ 20} For purposes of the doctrine of laches, prejudice exists when the plaintiff's delay causes the loss of evidence helpful to the defendant's case or when the person against whom the claim is asserted has changed his position in reasonable reliance on the words or conduct of the party who would enforce the claim. *Reid*, 2d Dist. Greene No. 2011-CA-36, 2012-Ohio-1437, ¶ 36, citing *State ex rel. Donovan v. Zajac*, 125 Ohio App.3d 245, 250, 708 N.E.2d 254 (11th Dist.1998). The prejudice must be material, and it may not be inferred from a mere lapse of time. *Gordon*, 2d Dist. Montgomery No. 25507, 2013-Ohio-3649, ¶ 15. The accumulation of interest and the absence of a timely demand for payment does not constitute material prejudice where the terms of the debt are set forth in the contract. *Thirty-Four Corp. v. Sixty-Seven Corp.*, 15 Ohio St.3d 350, 353, 474 N.E.2d 295 (1984).

{¶ 21} In the instant case, Mitchell failed to adduce any facts establishing that she was materially prejudiced as a result of U.S. Bank's two-year, three month delay in filing its complaint. "Material prejudice" consists of "two types of material prejudice, either of which necessitate the application of laches: (1) the loss of evidence helpful to the defendant's case, and (2) a change in the defendant's position that would not have occurred had the plaintiff not delayed in asserting her rights." *Reid* at ¶ 36, citing *Zajac*, at 250.

{¶ 22} Here, Mitchell argues that she was materially prejudiced because, absent the delay, she would have "worked out some resolution while [Long] was still alive" by seeking "to reverse the sale." Mitchell, however, fails to identify any grounds upon which she would have been able to reverse the sale of the property. Moreover, assuming that Mitchell's loss of the opportunity to "work out some resolution" while Long was still alive

constituted material prejudice, such prejudice resulted from Long's death approximately 48 days after U.S. Bank learned of the conveyance, not from the two year, three month delay in filing the complaint. Any suggestion Mitchell could work out a resolution with U.S. Bank is highly speculative.

{¶ 23} Additionally, Mitchell argues that she was materially prejudiced because she would not have made repairs to the property but for the delay in U.S. Bank filing the complaint. Mitchell claims that she began repairing the property immediately after taking possession on October 14, 2014, and she did not complete the repairs until "well into 2015." Mitchell also stated that the repairs cost in excess of \$30,000. Accordingly, Mitchell acknowledges that she completed the repairs less than twelve months after U.S. Bank learned of the property conveyance from Long. Assuming Mitchell's completion of the repairs constituted material prejudice, such prejudice resulted from a delay of less than 12 months.

{¶ 24} Significantly, in support of her claims, Mitchell has presented no evidence, other than her uncorroborated affidavit, that she made any improvements or repairs to the property. Specifically, Mitchell did not provide the trial court with any invoices or receipts for labor or materials in order to substantiate her claims. Moreover, other than her uncorroborated affidavit, Mitchell failed to provide the trial court with any evidence that she actually paid \$30,000, or any sum, for the property. Self-serving affidavits made by the non-moving party normally cannot be used to survive summary judgment. *Han v. Univ. of Dayton*, 28 N.E.3d. 547, 2015-Ohio-346, ¶ 41 (2d Dist.). Even if we were to accept Mitchell's argument regarding the two year, three month delay, much longer periods of time have been held not to justify the application of laches. See *Reid*, 2d Dist.

Greene No. 2011 CA 36, 2012-Ohio-1437; see also *Gordon*, 2d Dist. Montgomery No. 25507, 2013-Ohio-3649. In light of the foregoing, we find that the trial court did not err when it held that Mitchell failed to establish the existence of a genuine issue of material fact regarding her argument that laches precluded enforcement of the mortgage against her.

Estoppel

{¶ 25} The defense of equitable estoppel applies when a party prosecuting a claim for relief has induced the adverse party to believe that certain facts exist and the adverse party changed his position in reasonable reliance thereon, to his detriment. *Sky Bank-Ohio Bank Region*, 161 Ohio App.3d 133, 2005-Ohio-2517, 829 N.E.2d 743, at ¶ 10. In order to prevail on a claim of equitable estoppel, a defendant must show (1) that the plaintiff made a factual representation, (2) that the representation was misleading, (3) that defendant acted in good faith reliance on that misrepresentation, and (4) that his reliance had a detrimental result. *Id.*, citing *Gullatte v. Rion*, 145 Ohio App.3d 620, 627, 763 N.E.2d 1215 (2d Dist.2000).

{¶ 26} As previously stated, Mitchell's main argument on appeal is premised upon her claim that she was unaware of the existing mortgage securing the property when she took possession from Long pursuant to a quitclaim deed. Specifically, Mitchell argues that she would not have purchased the property if she had known of the existing mortgage with U.S. Bank, nor would she have made improvements to the property. Mitchell alleges that U.S. Bank had a duty, which it ignored, to inform her of the existence the mortgage.

{¶ 27} In the instant case, Mitchell fails to point to any facts establishing that U.S.

Bank made a false and/or misleading statement of fact regarding the existence of the mortgage. Rather, Mitchell contends that U.S. Bank's failure to contact her constituted "silence when [U.S. Bank] ought to speak out." However, U.S. Bank was "silent" regarding the existence of the mortgage because the mortgage had been duly recorded. See *Sky Bank-Ohio Bank Region* at ¶ 15. Moreover, because the mortgage had been properly recorded, Mitchell could not rely on the representation of an employee at the Recorder's office who allegedly told her that the property was unencumbered. Finally, as previously stated, Mitchell took possession of the property pursuant to a quitclaim deed, which served as notice that there may have been other equitable interests in the property or potential title defects. Accordingly, we find that the trial court did not err when it held that no genuine issue existed with respect to Mitchell's estoppel argument.

Unjust Enrichment

{¶ 28} Mitchell's final argument is that she should be permitted to recover on her counterclaim under a theory of unjust enrichment. "In Ohio, unjust enrichment is a claim under quasi-contract law against a person in receipt of benefits that he is not justly and equitably entitled to retain." *Crawford v. Hawes*, 2013-Ohio-3173, 995 N.E.2d 966, ¶ 34 (2d Dist.), citing *Hummel v. Hummel*, 133 Ohio St. 520, 527, 14 N.E.2d 923 (1938). "A quasi contract is not the result of a meeting of the minds but is implied and imposed [sic] by law without the consent of the obligor to prevent the obligor from enjoying benefits which in equity and good conscience he is not entitled to retain." *Hughes v. Oberholtzer*, 162 Ohio St. 330, 123 N.E.2d 393 (1955), paragraph one of the syllabus.

{¶ 29} "The elements of an unjust enrichment claim are as follows: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit;

and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (i.e., the ‘unjust enrichment’ element).” *Crawford* at ¶ 24, citing *L & H Leasing Co. v. Dutton*, 82 Ohio App.3d 528, 534, 612 N.E.2d 787 (3d Dist.1992).

{¶ 30} In the instant case, Mitchell argues that her repair of the property conferred a benefit on U.S. Bank, that U.S. Bank knew of the repairs, and that U.S. Bank’s retention of the property would be unjust without payment to her. As previously stated, Mitchell claims that the value of the repairs was in excess of \$30,000, which she paid for personally. However, other than her uncorroborated statement, she provided no additional evidentiary materials in that regard that would create a genuine issue of material fact sufficient to overcome summary judgment. We also note that Mitchell produced no evidence, other than her uncorroborated statement, that U.S. Bank was aware that she had made improvements to the property. No benefit to U.S. Bank was established on this record. Therefore, we find that the trial court did not err when it held that no genuine issue existed with respect to Mitchell’s unjust enrichment argument.

{¶ 31} Mitchell’s first and second assignments of error are overruled.

{¶ 32} Both of Mitchell’s assignments of error having been overruled, the judgment of trial court is affirmed.

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FROELICH, J., concurring:

{¶ 33} Almost all affidavits are self-serving and in many circumstances (generally not when contradicting previous sworn statements) may be a legitimate method of presenting facts on summary judgment. See, e.g., *Widmar v. Sun Chemical Co.*, 722 F.3d

457 (7th Cir.2014).

{¶ 34} However, even if the trial court considered Mitchell's affidavit that she expended certain funds for repair, this would not create a genuine issue of material fact that she was materially prejudiced because of anything the bank did or do not do. I concur.

TUCKER, J., concurring:

{¶ 35} I concur in Judge Donovan's opinion and in Judge Froelich's concurring opinion.

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