[Cite as *Woodward Const., Inc. v. For 1031 Summit Woods, L.L.C.*, 2015-Ohio-975.]

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

WOODWARD CONSTRUCTION, INC.,	:	APPEAL NOS. C-140145
		C-140358
Plaintiff,	:	C-140359
		TRIAL NO. A-0908749
vs.	:	
		O P I N I O N.
FOR 1031 SUMMIT WOODS I, LLC,	:	
Defendant,	:	
and	:	
JOHN C. AND SHIRLEE J. WILCOX, TRUSTEES OF THE WILCOX FAMILY 1997 REVOCABLE TRUST,	:	
LOUIS G. AND VIRGINIA R. STEWART, TRUSTEES OF THE STEWART FAMILY LIVING TRUST,	:	
FRED J. AND CAROLYN B. ROEDER, TRUSTEES OF THE ROEDER FAMILY TRUST,	:	
GERALD B. AND JILL McKEEVER,	:	
RENEE M. McHUGH, TRUSTEE OF THE JOHN W. McHUGH and RENEE M. McHUGH 1996 TRUST,	:	
NOELL MARBLE, TRUSTEE OF THE NOELL MARBLE FAMILY REVOCABLE TRUST,	:	
WILLIAM M. AND MARTHA A. MARVEL, TRUSTEES OF THE MARVEL REVOCABLE FAMILY TRUST,	:	
JUDITH MABEL,	:	

ERICH P. AND ZOILA Y. KELLNER, TRUSTEES OF THE KELLNER FAMILY LIVING TRUST, :

ROBERT D. AND KIMBERLY A. GUBALA, :

ROBERT C. ESTES, :

JOHN P. AND REBECCA S. DOODY, TRUSTEES OF THE DOODY FAMILY TRUST, :

BHUPENDRA P. AND MRUDULABEN B. PATEL, TRUSTEES OF THE B.P. MUDHU TRUST, :

JAMES W. AND BARBARA S. BLACK, :

DAVID P. AND INA BAXTER, TRUSTEES OF THE THE DAVID P. AND INA BAXTER FAMILY TRUST, :

BRADLEY L. BACKENBERG, :

ROBERT PANGBURN, :

and :

LOIS H. PETERSON, TRUSTEE OF THE PETERSON FAMILY LIVING TRUST, :

Defendants-Appellants/Cross-Appellees, :

and :

EQUITY GROUP TWO, LLC, :

Defendant-Appellee/Cross-Appellant, :

and :

MIDLAND LIFE INSURANCE COMPANY, :

Defendant, :

and :

CHARLES J. KUBICKI, :

and :

FRED SKUROW, :

Third-party Defendants-
Appellees/Cross-Appellants. :

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Judgment Entered for Cross-Appellants

Date of Judgment Entry on Appeal: March 18, 2015

Cohen Todd Kite and Stanford, LLC, Michael R. Schmidt, *Taylor English Duma LLP*, *Henry M. Quillian III* and *Natalie N. Mark*, for Appellants/Cross-Appellees,

Schroeder, Maundrell, Barbiere & Powers, *John W. Hust*, *Lawrence Barbiere*, *Finney Law Firm*, *LLC*, *Christopher P. Finney*, *Justin C. Walker* and *Curt C. Hartman*, for Appellees/Cross-Appellants Equity Group Two, LLC, and Charles J. Kubicki,

Markovits, Stock & DeMarco, LLC, *Paul M. DeMarco* and *W.B. Markovits*, for Appellee/Cross-Appellant Fred Skurow.

Please note: this case has been removed from the accelerated calendar.

DEWINE, Judge.

{¶1} These consolidated appeals arise out of a multi-layer transaction involving the sale of investment interests in an office building. When the deal went bad, the investors pursued claims in the trial court against several defendants who they claimed had engaged in a civil conspiracy to defraud them. Following a six-week trial, a jury returned a verdict in favor of the investors, finding that the defendants had participated in a civil conspiracy to conceal the existence of a secret mortgage on the office building. The trial court, however, partially set aside the verdict on the basis of inconsistencies between the general verdict and the jury interrogatories.

{¶2} There are a number of issues raised on appeal, including the trial court's decision to grant a new trial based on the inconsistencies with the verdict. But we conclude that the matter should not have been presented to the jury at all. Because there was no evidence that any of the appealing defendants were part of a malicious combination to perpetrate a wrongful act, the trial court should have granted a directed verdict. We therefore reverse the judgment of the trial court and enter judgment for the defendants.

I. Background

{¶3} This dispute centers on a commercial real estate deal involving an office building that is referred to as Summit Woods I ("the Property"). At issue are transactions involving three layers of participants, whereby the developer of the office building (EG2) sold the Property to a company (FOR 1031) that in turn marketed and sold ownership interests in the Property to tenants-in-common investors. For ease of reference, we define at the outset the various parties involved at each layer:

- *Equity Group Two* ("EG2"): Appellee/Cross-Appellant EG2 is a joint venture that is owned and controlled by Appellees/Cross-Appellants *Fred Skurow* and *Charles Kubicki* through their respective companies.

- *DBSI/FOR 1031:* DBSI Housing, Inc., ("DBSI") is the party that contracted to purchase the Property from EG2. DBSI then assigned its interests to a related company, FOR 1031 Summit Woods I, LLC, ("FOR 1031"). FOR 1031 closed on the purchase contract and marketed interests in the Property to investors.
- *The Tenants in Common* ("TIC Owners"): Appellants/Cross-Appellees TIC Owners are the investors who purchased undivided interests in the Property as tenants in common from FOR 1031.[1]

A. The Sale by EG2

{¶4} In 2004, EG2 was looking to sell the Property. It found a buyer in DBSI, an entity that was in the business of selling tenants-in-common interests in commercial real estate through various related entities. DBSI created FOR 1031 to complete the deal with EG2 and to sell the tenants-in-common shares.

{¶5} EG2 owned the Property subject to a mortgage with the Midland Life Insurance Company ("Midland").[2] The mortgage secured a promissory note that had been entered into to finance the development of the Property. The mortgage provided that it could not be transferred without the consent of Midland, and the note provided for a prepayment penalty if it were paid off early

{¶6} The parties to the transaction tried, but failed, to secure Midland's consent to the transfer of the Property and the assumption of the underlying promissory note. In order to get around the lack of consent, a plan was developed to leave in place the Midland mortgage and sell the property without disclosing the sale to Midland. To accomplish this, FOR 1031 executed an all-inclusive mortgage and note in favor of EG2 that contained the same basic finance terms as the Midland mortgage. Under the terms

[1] There were initially 19 TIC Owners, but two dismissed their claims prior to the trial.
[2] Midland Life Insurance Company is a successor in interest to Clarica Life Insurance Company, which executed the mortgage with EG2 in 2001.

of the all-inclusive mortgage/note, FOR 1031 would make mortgage payments to EG2. EG2 would then forward payment for its mortgage to Midland. This arrangement carried the risk that Midland would find out about the transfer and demand immediate payment on the note. To protect against this risk, FOR 1031 agreed to escrow half of the prepayment penalty, and EG2 agreed to escrow the other half.

B. The Sale to the TIC Owners

{¶7} As it was working with EG2 on the purchase of the office building, FOR 1031 began to market and sell shares in the Property. FOR 1031 executed agreements with the individual TIC Owners to purchase undivided fractional interests as tenants in common. Under the agreements between FOR 1031 and the TIC Owners, the TIC Owners collectively would take an approximate 98 percent interest in the Property. FOR 1031 would obtain a loan for the purchase of the Property, and each TIC Owner would pay for its interest and assume a portion of the loan equal to its interest. FOR 1031 would retain the remaining interest in the Property, act as the lessee of the entire building and sublease to tenants. The TIC Owners would receive an initial return of 7 percent on their investment; this amount would escalate by 3 percent annually over a 20-year period so that at the end of the period, they would be receiving an annual return of 12.27 percent. In addition, the TIC Owners would receive tax advantages under 26 U.S.C. 1031.

{¶8} The Midland mortgage was disclosed in the purchase agreements executed between FOR 1031 and each TIC owner. During the trial, the TIC Owners consistently testified that they were aware of the Midland mortgage and of the need for Midland's consent to any transfer of the Property. The TIC Owners never received any documentation indicating that consent had been obtained.

{¶9} Attorney Michael Fletcher handled the title work on both closings. Although Mr. Fletcher had represented Kubicki and his companies in the past, he

testified at trial that he represented the title companies in the closings, not any of the parties.

{¶10} In connection with the first closing, Mr. Fletcher received information regarding the all-inclusive mortgage and listed the mortgage as an exception to title coverage on the FOR 1031 title insurance policy. In the deal with the TIC Owners, Mr. Fletcher issued title commitments to the TIC Owners that listed the assumption of the Midland mortgage as a condition that needed to be satisfied before a title insurance policy would be issued. Despite the fact that the condition of the assumption of the Midland mortgage had not been fulfilled, the title company issued title policies to the TIC Owners. These title policies did not except from coverage the all-inclusive mortgage, and Mr. Fletcher did not tell the TIC Owners about the all-inclusive mortgage. At trial, Mr. Fletcher testified that it was a mistake to issue the title policies when the title commitment had not been fulfilled. He denied, however, that his actions were designed to hide the existence of the second mortgage from the TIC Owners.

{¶11} The sale of Summit Woods to FOR 1031 closed on Friday, September 24. The all-inclusive mortgage was recorded at the Hamilton County Recorder's Office on the following Monday, September 27. Two days later, the TIC Owners' deals with FOR 1031 closed.

C. Things Go Bad

{¶12} For several years, there was no problem with the arrangement. The TIC Owners collected their promised returns, and FOR 1031 made payments to EG2, which then made mortgage payments to Midland. Everything changed, however, in November 2008, when DBSI declared bankruptcy. The TIC Owners hired their own property manager for Summit Woods and, until April 2009, continued to make payments to EG2, which in turn made payments to Midland. Ultimately, however, the TIC Owners decided to put the rent money they received into an escrow account, rather than make

payments to EG2.

{¶13} Midland eventually foreclosed on the property, citing as events of default EG2's failure to make mortgage payments and the transfer of the property without its consent.

II. The Lawsuit

{¶14} Not surprisingly, all this led to litigation. Proceedings kicked off when Woodward Construction, Inc., filed a complaint for foreclosure of a mechanic's lien against FOR 1031, the TIC Owners, Midland, EG2, and the Hamilton County Treasurer and Auditor. Cross-claims were later filed between the parties, and Kubicki and Skurow were added as third-party defendants.

{¶15} After a good deal of procedural wrangling, the matter proceeded to trial. By the time of trial, what were left were claims by the TIC Owners against FOR 1031, EG2, Kubicki and Skurow for fraud and civil conspiracy and a cross-claim by EG2 for unjust enrichment. FOR 1031 did not appear in the trial.

{¶16} The gist of the TIC Owners' theory at trial was that EG2, Kubicki and Skurow had fraudulently concealed Midland's lack of consent to the transaction from the TIC Owners and had engaged in a conspiracy with FOR 1031 to hide the lack of consent. In its cross-claim, EG2 alleged that the TIC Owners had been unjustly enriched because the TIC Owners had retained rents paid by Summit Woods's tenants in the escrow account rather than using the funds to make the mortgage payments to EG2.

{¶17} After the TIC Owners presented their case, EG2, Kubicki and Skurow moved for directed verdicts on the TIC Owners' claims for fraud and civil conspiracy. The court granted directed verdicts as to the fraud claims but not the civil-conspiracy claims. EG2, Kubicki and Skurow chose not to present any evidence, and the court granted a motion for a directed verdict in favor of the TIC Owners on the unjust-enrichment claims. Further, default judgment was entered against FOR 1031 on both

the fraud and civil-conspiracy claims. The case was presented to the jury.

{¶18} The jury returned a general verdict in favor of the TIC Owners and against EG2, Kubicki and Skurow on the civil-conspiracy charge. Upon review of the verdict and interrogatories, however, the court realized that the six jurors who had signed interrogatories indicating that Kubicki and Skurow had participated in a civil conspiracy were not the same six jurors who had signed the general verdict against EG2, Kubicki and Skurow. Concluding that the general verdict and interrogatories were inconsistent as to Kubicki and Skurow, the trial court "returned the jury for further consideration of its answers and verdict." *See* Civ.R. 49(B). The jury's further deliberation did not resolve the issue, so the court declared a mistrial as to Kubicki and Skurow. The verdict against EG2 stood, and the court moved to a punitive-damages trial against EG2 alone. At the conclusion of that testimony, the jury declined to award punitive damages.

{¶19} Following the entry of the punitive-damages verdict in favor of EG2, the TIC Owners moved for prejudgment interest against EG2 and for judgment notwithstanding the jury's verdict. EG2, Kubicki and Skurow moved for judgments notwithstanding the verdict. All of the motions were denied by the court. Both sides appealed.

II. The TIC Owners Did Not Present Sufficient Evidence of Civil Conspiracy

{¶20} We start with a threshold question that is, as it turns out, dispositive of this appeal: was sufficient evidence of civil conspiracy presented to get to a jury at all? In their first three assignments, EG2, Kubicki and Skurow each contend that the trial court erred in failing to grant their motions for a directed verdict on the civil-conspiracy claim.

{¶21} To prevail on their civil-conspiracy claim, the TIC Owners were required to show (1) a malicious combination, (2) of two or more persons, (3) that caused injury

to a person or property, and (4) the existence of an underlying wrongful act that is independent of the conspiracy. *See Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998); *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 650 N.E.2d 863 (1995). EG2, Kubicki and Skurow contend that the TIC Owners failed to establish a malicious combination: there was no evidence, they argue, that they reached any agreement with FOR 1031 to mislead the TIC Owners, or that they were even aware of any misrepresentations made by FOR 1031 to the TIC Owners. EG2, Kubicki and Skurow also say that there was no underlying wrongful act. Because the all-inclusive mortgage was recorded just before the TIC Owners' closing, they maintain that the TIC Owners had constructive notice of the mortgage and could not have been defrauded by FOR 1031's failure to disclose Midland's lack of consent. We need not deal with the constructive-notice argument, because we find that the TIC Owners failed to present sufficient evidence of a malicious combination.

{¶22} While a party need not prove an express agreement to establish the malicious combination necessary for a civil conspiracy, it must at least show "a common understanding or design, even if tacit, to commit an unlawful act." *Gosden v. Louis*, 116 Ohio App.3d 195, 219, 687 N.E.2d 481 (9th Dist.1996). The TIC Owners' theory at trial was that EG2, Kubicki and Skurow were engaged in a scheme with FOR 1031 to mislead the TIC Owners about the Midland mortgage. But the evidence presented fell short of demonstrating any type of agreement, common understanding or design involving EG2, Kubicki or Skurow about the concealment of information from the TIC Owners.

{¶23} The change in ownership of Summit Woods can be divided into two transactions. In the first part, EG2 sold the property to FOR 1031. The parties to this transaction—EG2, through its principals Skurow and Kubicki, and FOR 1031—were all fully aware of Midland's lack of consent. Indeed, the decision to go through with the

deal without Midland's consent was a calculated business risk for which the parties made specific provision by escrowing the prepayment penalty.

{¶24} The second transaction was between FOR 1031 and the TIC Owners. It seems fairly clear that FOR 1031 failed to disclose to the TIC Owners the fact that Midland had not consented to the transfer, and that the TIC Owners were taking the Property subject to the Midland mortgage. But there was simply no evidence presented that EG2, Kubicki or Skurow knew about this concealment. No proof was presented of any common understanding—express or tacit—involving EG2, Kubicki or Skurow about how FOR 1031 would sell the interests. Presumably, FOR 1031 could have disclosed the lack of consent to potential buyers, who may have still purchased the interests knowing that new financing would be necessary if Midland found out and accelerated the mortgage. FOR 1031 had purchased the Property faced with the same prospect.

{¶25} The TIC Owners point to language in the all-inclusive mortgage that indicates that FOR 1031 was permitted to transfer the property to tenants in common as suggestive of EG2's, Kubicki's and Skurow's involvement in the subsequent sale and the accompanying subterfuge. But knowledge of the parties to whom FOR 1031 would transfer the property does not, without more, equate to knowledge of what the TIC Owners were told or promised by FOR 1031. There was no evidence that EG2, Kubicki or Skurow had any knowledge of how the interests were being marketed.

{¶26} The TIC Owners also point to Mr. Fletcher's actions as evidence of EG2's, Kubicki's and Skurow's participation in the conspiracy. They stress that Mr. Fletcher had long done work for Mr. Kubicki, and that he had even helped orchestrate the instant lawsuit in an effort to protect his interests. According to the TIC Owners, Mr. Fletcher knew that Midland's consent was a condition of closing the deals between FOR 1031 and the TIC Owners, and that Midland had not consented. They suggest that Mr.

Fletcher's attempt to hide the all-inclusive mortgage was demonstrated by the issuance of the title policies to the TIC Owners in violation of the title commitments and by the failure to list the all-inclusive mortgage as an exclusion to the title policies. But even if Mr. Fletcher opened himself or the title company to claims based on concealment of the all-inclusive mortgage, there was no evidence that he did so at the direction of EG2, Kubicki or Skurow. Supposition alone, absent evidence that EG2, Kubicki or Skurow directed, solicited or knew of Fletcher's actions that concealed Midland's lack of consent, is not sufficient to make a case for civil conspiracy. *See FV 1 Inc. v. Goodspeed*, 7th Dist. Mahoning No. 10 MA 170, 2012-Ohio-3001, ¶ 67. Indeed, the evidence at trial was that the involvement of Mr. Fletcher in the transaction with the TIC Owners came at the behest of the closing agent chosen by FOR 1031.

{¶27} A directed verdict is proper if "after construing the evidence most strongly in favor the party against whom the motion is directed, [the trial court] finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that evidence is adverse to such party[.]" Civ.R. 50(A)(4). The motion "tests the sufficiency of the evidence, not the weight of the evidence or the credibility of witnesses." *Kimble Mixer Co. v. Hall*, 5th Dist. Tuscarawas No. 2003 AP 01 0003, 2005-Ohio-794, ¶ 27, citing *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119-120, 671 N.E.2d 252 (1996).

{¶28} Thus to take the case to the jury, the TIC Owners needed to present legally sufficient evidence of a malicious combination—that is, of some common understanding or design on the part of EG2, Kubicki or Skurow to hide Midland's lack of consent from the TIC Owners. What the TIC Owners presented might have led one to speculate that EG2, Kubicki and Skurow must have known what FOR 1031 was up to, or that Mr. Fletcher was acting at their behest. But there was no real evidence of such. Put simply, the speculation and conjecture offered by the TIC Owners was insufficient as a

matter of law to establish a malicious combination.

{¶29} Because there was insufficient evidence of a malicious combination, the trial court erred when it denied the motions of EG2, Kubicki and Skurow for directed verdicts. We sustain their first three assignments of error.

III. Our Decision That There Was No Civil Conspiracy Makes Most Everything Else Moot

{¶30} Our decision that the TIC Owners failed to present sufficient evidence of a civil conspiracy to get to a jury renders most of the other assignments of error moot. The TIC Owners raise assignments of error contending that the court erred in declaring a mistrial based on the inconsistent verdicts, that the court should have rendered judgment in their favor under Civ.R. 50(B) and that they should have been awarded prejudgment interest. Kubicki, Skurow and EG2 raise cross-assignments of error relating to the weight of the evidence against them and the TIC Owners' failure to mitigate damages. But because we conclude that the trial court should have granted directed verdicts on the civil-conspiracy claims, these assignments are all moot.

IV. We Overrule EG2's Final Assignment of Error

{¶31} In the only remaining assignment of error, EG2 asserts that the trial court erred when it concluded EG2 did not have an interest in the escrow fund established by the TIC Owners. EG2 argues that the issue of its interest in the escrow account was not properly before the court and instead should be the subject of an interpleader action. We are not persuaded.

{¶32} EG2 pled one claim for affirmative relief against the TIC Owners: its claim for unjust enrichment. In its complaint, EG2 alleged that the TIC Owners had collected rent and other income from the tenants of the Property and had failed to use the funds to make mortgage payments. The cross-claim further alleged that the funds were being held "in an undisclosed account under the control of an unknown third-party." The trial court in its final judgment entry granted the TIC Owners' motion for a

directed verdict on EG2's unjust-enrichment claim and held that EG2 "shall have no interest in the account maintained at Wells Fargo, N.A"—that is, in the account referenced in EG2's complaint.

{¶33} EG2 does not assign as error the trial court's entry of a directed verdict on the unjust-enrichment claim. Rather, it argues that the court should not have decided the claim at all because the escrow agent holding the funds was not included as a party to the action. But having asked the trial court to adjudicate its entitlement to the funds in the escrow account, EG2 cannot now complain that the court has done so. EG2's final assignment of error is overruled.

VI. Conclusion

{¶34} The trial court's judgment against EG2, Kubicki and Skurow on the civil-conspiracy claim is reversed, and judgment is entered in their favor.

Judgment accordingly.

FISCHER, P.J., and **MOCK, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.