[Cite as *Orders v. Thirty-Seven Corp.*, 2012-Ohio-282.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Frank Orders,	:	
Plaintiff-Appellant,	:	
		No. 11AP-435
v.	:	(C.P.C. No. 10CVH-04-6623)
[The Huntington National Bank,	:	(REGULAR CALENDAR)
Defendant],	:	
Thirty-Seven Corporation,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 26, 2012

Steven E. Hillman, for appellant.

Jody Michelle Oster, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Plaintiff-appellant, Frank Orders ("appellant"), appeals from the April 19, 2011 order of the Franklin County Court of Common Pleas granting defendant-appellee, Thirty-Seven Corporation's ("appellee") motion to dismiss counterclaim and the March 22, 2011 decision and entry granting appellee's motion for summary judgment. For the following reasons, we affirm.

{¶2} This appeal stems from a dispute over the purchase of real property known as 413 Blackgum Way, Westerville, Ohio 43081 ("413 Blackgum Way" or "the property").

On February 17, 2010, appellee entered into a contract with Ohio Real Estate Auctions, LLC ("OREA") to sell ten[1] of its properties, including 413 Blackgum Way. In an e-mail dated March 31, 2010, Steven Hillman ("Hillman"), appellant's attorney, contacted Jody Oster ("Oster"), appellee's attorney, regarding the purchase of 413 Blackgum Way. (*See* Exhibit B-1 attached to Motion for Summary Judgment.) In his e-mail, Hillman indicated that appellant authorized him to offer $140,000 for the purchase of the property. (*See* Exhibit B-1.) On April 1, 2010, Oster responded to appellant's offer in an e-mail stating "[a]ssuming all other material terms are agreed to (financing, closing date, etc.), [appellee] would be willing to accept the sum of $190,000 for the property. The closing would have to take place prior to or very soon after the auction date. [Appellee] would want to take the property to auction unless there is certainty prior to the auction date that the transaction will close." (*See* Exhibit B-2 attached to Motion for Summary Judgment.) That same day, Hillman and Oster exchanged several e-mails back and forth, negotiating the price of the property. (*See* Exhibit B-2.) We note that, during these negotiations, appellant's daughter and son-in-law were tenants at 413 Blackgum Way and owed money in past-due rent.

{¶3} On April 5, 2010, Oster e-mailed Hillman stating that appellee would accept $175,000 for the sale of the property. (*See* Exhibit B-3 attached to Motion for Summary Judgment.) Further, in her e-mail, Oster stated that, if the parties agreed upon that price, and appellant was able to close within an acceptable time frame, appellee would forgive all past-due rent owed on the property, including April's rent. (*See* Exhibit B-3.) Oster

[1] The contract with OREA lists ten properties for auction, the Montalbano affidavit, as well as appellee's motion for summary judgment, references 11 properties.

also indicated that: (1) appellant would be responsible for pursuing the tenants for any past-due rent and/or deposits; (2) taxes would be prorated to the date of closing; and (3) title would be conveyed by limited warranty deed. Oster also stated that the offer would be contingent on the closing taking place within an acceptable time frame. (*See* Exhibit B-3.) That same day, Oster sent Hillman another e-mail informing him that her client would need (1) a $5,000 down payment, (2) an executed purchase contract, and (3) a commitment letter from appellant's lender immediately, or evidence of application for the special financing immediately with approval to follow within five days. (*See* Exhibit B-3.) Oster also clarified that "[appellee] will not cancel the auction or showings/open houses until it is certain there are no contingencies and the sale will occur, that is, assuming the purchase price is agreeable and close occurs within [a] time frame acceptable to [appellee]." (*See* Exhibit B-3.)

{¶4} On April 12, 2010, Oster sent Hillman the following e-mail, stating, in relevant part: "Inasmuch as no agreement has been reached for purchase of the property by your client, [appellee] hereby demands that the rents be paid current (as previously demanded). If the rents are not received in full by close of business [Wednesday], [appellee] will begin eviction proceedings." (*See* Exhibit B-4 attached to Motion for Summary Judgment.)

{¶5} On April 13, 2010, Oster sent a follow-up e-mail with an updated ledger reflecting a balance owed for rent in the amount of $2,942.98. (*See* Exhibit B-5 attached to Motion for Summary Judgment.) Oster stated that the amount of $2,942.98 reflected all payments received to date, and that Hillman's clients must pay this amount by the next day's close of business. In an e-mail, also dated April 13, 2010, Hillman wrote "I thought

you said that if they purchased for 175,000 [there] would be no requirement to catch up back rent. Am I right or have I misinterpreted our negotiation." (*See* Exhibit B-6 attached to Motion for Summary Judgment.) That same day, Oster responded:

> I was not aware that your client and Huntington had reached an agreement. Is your client offering to purchase the property for $175,000? No requirement that the current tenants catch up the back rent and your client agrees Bank has no obligation to turn over any rents or deposits.
>
> If that's the case, please confirm and let me know when your client proposes to close. As I've stated previously, the auction is on the 22nd and if we can't close prior to the 22nd, then we need to have a firm commitment letter and a date not too much past the 22nd to close. Let me know.

(*See* Exhibit B-5 attached to Motion for Summary Judgment.)

{¶6} Further, on April 21, 2010, Oster sent an e-mail to Hillman stating:

> The mortgage company is telling me that it needs a signed purchase agreement in order to move forward. Please send over the written contract (there's a form purchase contract available on the CBA website) ASAP.
>
> Also, I need to know when the mortgage company will be finished with the appraisal and when it will be ready to close assuming all goes well. We will also need a separate agreement, which permits the Bank to put a hold on the account in which the deposit was placed in and provides that in the event the sale does not close, the Bank will pay itself X amount from the account and return the remainder of the deposit to Mr. Orders. I will work on this part.
>
> I do not yet have the go ahead from my client to accept $10,000 instead of the full $17,500. I expect to know something this morning.
>
> Please find out about the timing on the appraisal.

(*See* Exhibit B-6.)

Additionally, on April 21, 2010, Oster sent a follow-up e-mail to Hillman stating "[w]e need to wrap this up, if at all, by end of day today, 5PM. The Bank will not pull the home from the auction unless we have a signed agreement (including the agreement to pay the $10,000 in the event of a no close)." (*See* Exhibit B-7 attached to Motion for Summary Judgment.)

{¶7} Hillman, on behalf of appellant, faxed Oster a real estate purchase contract dated April 21, 2010, regarding 413 Blackgum Way. (*See* Exhibit C attached to Motion for Summary Judgment.) Pursuant to Section 1.1, appellant offered to purchase 413 Blackgum Way for $175,000, with the following stipulations: (1) seller to keep deposit, and (2) buyer to get all uncollected rents. (*See* Exhibit C.) Further, pursuant to Section 1.3, appellant proposed to secure conventional financing within 60 days. (*See* Exhibit C.) In Section 1.5, appellant proposed the following additional terms and conditions: "Buyer assigns $10,000 of the funds currently held by Huntington bank for the expenses incurred should this purchase not be consummated due to acts of Buyer." (*See* Exhibit C.) Finally, in Section 6.1, appellant proposed that the seller shall convey marketable title in fee simple by transferable and recordable general warranty deed. (*See* Exhibit C.) Appellant signed and dated the real estate purchase contract, but appellee did not sign or date the contract. (*See* Exhibit C.)

{¶8} On April 22, 2010, Oster e-mailed Hillman regarding appellant's proposed real estate purchase contract, stating "[t]his e-mail will confirm that the Bank has rejected [appellant's] offer to purchase the referenced property. I would suggest that [appellant] attend the auction if he remains interested in attempting to purchase the property. The

terms of auction have been advertised and he would have to comply with those terms." (*See* Exhibit B-8 attached to Motion for Summary Judgment.)

{¶9} On April 30, 2010, appellant filed a complaint against The Huntington National Bank aka Thirty-Seven Corporation ("Huntington National Bank") alleging breach of contract and seeking specific performance. (*See* Complaint, 1-2.) In its complaint, appellant demanded that Huntington National Bank be ordered to complete the sale of 413 Blackgum Way pursuant to the terms of the parties' agreement, or in the alternative, that a judgment be issued in favor of appellant and against Huntington National Bank in the amount of $39,000, plus all costs. (*See* Complaint, 2-3.) On May 28, 2010, Huntington National Bank filed an answer.

{¶10} Further, on September 1, 2010, Huntington National Bank filed a Civ.R. 21 motion to add appellee as the party-defendant and to drop Huntington National Bank from the lawsuit. In its motion, Huntington National Bank stated that it is not the real party in interest and that appellant named the wrong party. (*See* Civ.R. 21 motion, 2.) On September 9, 2010, appellant filed a memorandum contra to Huntington National Bank's motion. Later that same day, the trial court journalized an order granting Huntington National Bank's motion to add Thirty-Seven Corporation as the party-defendant and to dismiss Huntington National Bank from the lawsuit.

{¶11} On September 28, 2010, appellee filed an answer and counterclaim. In its counterclaim, appellee alleged tortuous interference with contract, stating that: (1) prior to April 22, 2010, the parties negotiated for appellant's purchase of 413 Blackgum Way; (2) the negotiations did not result in a contract between the parties; (3) on April 22, 2010, appellee advised appellant that his offer to purchase the property was rejected; (4) on

April 22, 2010, a third-party successfully bid on the property at a public auction and entered into a written contract with appellee for the sum of $167,200; (5) after the conclusion of the April 22, 2010 auction, but not later than April 26, 2010, appellant became aware that appellee entered into a written contract with a third party for the sale of 413 Blackgum Way; (6) on April 26, 2010, appellant informed appellee that he believed a contract existed between them for the purchase of 413 Blackgum Way; (7) appellant had notice and knowledge that appellee entered into a contract to sell the property to a third party; (8) prior to filing this action, appellant threatened appellee that this action would constitute a cloud on the title to the property and prohibit its sale to a third party; (9) this action created a cloud on the title to the property and appellee could not perform under the terms of its contract with the third-party purchaser; and (10) no contract ever existed between appellant and appellee for sale of the property. (*See* Counterclaim, 4-5.)

{¶12} Based upon the foregoing, appellee demanded judgment against appellant in the amount of $167,200, plus interest, costs, fees, and expenses that continue to accrue, costs to appellant and additional compensatory damages, and all other relief, both legal and equitable, to which appellee is entitled. (*See* Counterclaim, 6-7.) Further, on October 13, 2010, appellant filed an answer to appellee's counterclaim.

{¶13} On December 22, 2010, appellee filed a motion for summary judgment on the claims raised in appellant's complaint but not on the claims raised in its counterclaim. (*See* Motion for Summary Judgment, 2.) In addition, on January 18, 2011, appellant filed a memorandum contra, and on February 4, 2011, appellee filed a reply.

{¶14} On March 22, 2011, the trial court journalized a decision granting appellee's motion for summary judgment. (*See generally* Mar. 22, 2011 Decision and Entry.) In its decision, the trial court stated:

> [T]he motions clearly demonstrate negotiations were undertaken through multiple e-mails, etc., but clearly there was never a contract. To submit these matters to a jury would be inviting the jury to speculate on the terms of any imagined contract.
>
> There is simply no contract here.

{¶15} On April 13, 2011, appellee filed a motion to dismiss its counterclaim, without prejudice, "in order to avoid further time and expense in litigating this matter and to bring this matter to a final conclusion." (*See* Motion to Dismiss Counterclaim.) Further, on April 19, 2011, the trial court journalized an order dismissing appellee's counterclaim and terminating the case.

{¶16} On May 11, 2011, appellant filed a timely notice of appeal, setting forth the following assignments of error for our consideration:

> [1.] The Trial Court Erred in substituting Thirty Seven Corporation as the Defendant for Huntington National Bank.
>
> [2.] The Trial Court erred in granting a Summary Judgment.

{¶17} We now address appellant's argument regarding the trial court's alleged error in substituting appellee for Huntington National Bank as the party-defendant. "Appellate courts review a decision to drop a party pursuant to Civ.R. 21 under the abuse-of-discretion standard." *Kormanik v. Cooper*, 10th Dist. No. 11AP-74, 2011-Ohio-5617, 2011 WL 5191018, ¶32. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or

unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d. 1140 (1983).

{¶18} In his first assignment of error, appellant argues that the trial court erred in substituting appellee as the defendant for Huntington National Bank. In support of this argument, appellant states that: (1) Huntington National Bank's Civ.R. 21 motion was premature because Huntington National Bank failed to answer appellant's outstanding interrogatories; and (2) the trial court decided Huntington National Bank's motion in seven days, ignoring the rights of appellant to oppose the motion, and, pursuant to Loc.R. 21 of the Tenth District Court of Appeals, appellant should have had 14 days to submit his memorandum contra. (*See* appellant's brief, 6.) In response to appellant's argument, appellee contends that: (1) appellant failed to raise this issue below and cannot raise it now on appeal; (2) pursuant to Civ.R. 21, the decision to add or drop a party is within the discretion of the trial court; and (3) pursuant to Civ.R. 45 and/or Civ.R. 56(F), appellant could have, but never attempted to, obtain discovery from Huntington National Bank. (*See* appellee's brief, 17-19.)

{¶19} Notwithstanding the fact that appellant did not specifically raise this issue below, we note that, throughout this litigation, appellant continued referring to "The Huntington National Bank aka Thirty-Seven Corporation," as the party-defendant. Further, in his memorandum contra to appellee's motion for summary judgment, appellant continued arguing that all negotiations for the purchase of the property were with Oster, Vice President and Senior Counsel for the Huntington National Bank, and that appellee is "a wholly owned subsidiary of Huntington." (*See* Memorandum Contra, 5, 7.) Therefore, we will address appellant's first assignment of error.

{¶20} Civ.R. 21 states, in relevant part, that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Here, Huntington National Bank filed its motion to add appellee as the party-defendant and to dismiss Huntington National Bank from the lawsuit on September 1, 2010. In support of its motion, Huntington National Bank attached (1) the affidavit of Tony Montalbano ("Montalbano"), (2) a copy of the limited warranty deed conveying the property to appellee, and (3) a copy of appellee's Certificate of Incorporation and Articles of Incorporation.

{¶21} In his affidavit, Montalbano stated that he is appellee's senior vice president and that he is responsible for liquidating or disposing of real estate owned by appellee. (*See* Montalbano affidavit, attached as Exhibit A to Civ.R. 21 Motion.) Further, Montalbano stated that "[appellee] is the fee simple owner of the real property commonly known as 413 Blackgum Way, Westerville, Ohio 43081." (*See* Montalbano affidavit.) Montalbano also stated that, on November 26, 2008, Eric J. Schottenstein ("Schottenstein") deeded 413 Blackgum Way to appellee. (*See* Montalbano affidavit.) As proof of this conveyance, Huntington National Bank attached a copy of the limited warranty deed transferring ownership of 413 Blackgum Way from Schottenstein to appellee. Further, Montalbano stated that appellee is an Ohio Corporation. (*See* Montalbano affidavit.) Montalbano's statement is supported by evidence of appellee's Certificate of Incorporation and Articles of Incorporation, wherein appellee is deemed a corporation for profit pursuant to R.C. Chapter 1701. (*See* Certificate of Incorporation and Articles of Incorporation attached as Exhibit B to Civ.R. 21 Motion.)

{¶22} On September 9, 2010, appellant filed a memorandum contra, alleging that: (1) Huntington National Bank's motion was premature due to outstanding discovery; (2) Huntington National Bank must remain a party because it is the mortgagee of the property; and (3) Huntington National Bank is an alter ego of Thirty-Seven Corporation. (*See* Memorandum Contra, 1.) Further, appellant stated that he had no objection if Huntington National Bank wished to join Thirty-Seven Corporation as an additional defendant. (*See* Memorandum Contra, 1.) We note that appellant did not provide any evidence regarding his claims about outstanding discovery or Huntington National Bank being appellee's alter ego. (*See generally* Memorandum Contra.)

{¶23} Later on September 9, 2010, the trial court journalized an order granting appellee's motion. The order stated that "[f]rom date of entry of this Order, the case caption shall reflect that Thirty-Seven Corporation is the defendant and that Huntington is no longer a party to this action." (*See* Sept. 9, 2010 Order.)

{¶24} First, we address appellant's argument regarding alleged outstanding discovery to Huntington National Bank. We find that the record is void of any evidence that appellant ever served Huntington National Bank with discovery. In addition, the record indicates that appellant did not file a motion to compel discovery, pursuant to Civ.R. 37(A), or serve a subpoena upon Huntington National Bank, pursuant to Civ.R. 45. Further, appellant's argument regarding outstanding discovery does not negate appellee's evidence that: (1) Thirty-Seven Corporation is an Ohio Corporation; and (2) Thirty-Seven Corporation is the fee simple owner of 413 Blackgum Way. Therefore, for the foregoing reasons, appellant's argument that the trial court erred by substituting appellee for Huntington National Bank due to outstanding discovery is without merit.

{¶25} Second, we address appellant's argument that the trial court decided Huntington National Bank's motion in seven days, ignoring the rights of appellant to oppose the motion. (*See* appellant's brief, 6.) Loc.R. 21.01 states, in relevant part, that:

> All motions shall be accompanied by a brief stating the grounds and citing the authorities relied upon. The opposing counsel or a party shall serve any answer brief on or before the 14th day after the date of service as set forth on the certificate of service attached to the served copy of the motion. The moving party shall serve any reply brief on or before the 7th day after the date of service as set forth on the certificate of service attached to the served copy of the answer brief. On the 28th day after the motion is filed, the motion shall be deemed submitted to the Trial Judge.

In the present matter, per the certificate of service, Huntington National Bank served its motion upon appellant's attorney on September 1, 2010. Further, on September 9, 2010, at 3:46 p.m., appellant filed his memorandum contra with the trial court. That same day, at 4:23 p.m., the trial court journalized an order granting Huntington National Bank's motion. The time stamps on both the memorandum contra and the order indicate that the trial court journalized the order subsequent to appellant's memorandum contra being filed. Further, there is no evidence in the record that, in granting Huntington National Bank's motion, the trial court ignored the rights of appellant to oppose the motion.

{¶26} Finally, as stated above, Huntington National Bank's evidence regarding appellee's incorporation and ownership of 413 Blackgum Way clearly indicates that the trial court did not abuse its discretion in granting Huntington National Bank's motion to substitute parties. The Limited Warranty Deed lists 413 Blackgum Way as Parcel 3 on Exhibit A, attached to the deed. Further, we note that the deed conveys the property to Thirty-Seven Corporation, an Ohio corporation, but lists its tax mailing address as c/o The

Huntington National Bank, 2361 Morse Road, Columbus, Ohio 43229. We do not, however, agree with appellant's assertion that the above language in the Limited Warranty Deed alone evinces an "alter ego" between Thirty-Seven Corporation and Huntington National Bank. Therefore, for the foregoing reasons, appellant's argument that the trial court ignored appellant's rights by granting Huntington National Bank's motion prior to 14 days is without merit.

{¶27} Appellant's first assignment of error is overruled.

{¶28} In his second assignment of error, appellant argues that the trial court erred in granting appellee's motion for summary judgment. We review a grant of summary judgment *de novo*. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588, 641 N.E.2d 265 (8th Dist. 1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist. 1993). When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103, 107, 614 N.E.2d 765 (10th Dist. 1992); *Brown* at 711.

{¶29} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and

(3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 604 N.E.2d 138 (1992), citing *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2, 433 N.E.2d 615 (1982).

{¶30} Here, appellant argues that the trial court erred in granting appellee's motion for summary judgment because the existence of a contract itself is generally a question of fact to be resolved by the trier of fact. (*See* appellant's brief, 12.) Further, appellant argues that appellee's attempted use of the parties' "compromise efforts" is inadmissible and, as such, cannot be considered in a motion for summary judgment. (*See* appellant's brief, 14.) In response to appellant's arguments, appellee contends that the uncontroverted evidence establishes that no contract was formed between the parties because appellant's April 21, 2010 proposed purchase contract constituted a counteroffer. (*See* appellee's brief, 5, 8.) Appellee further contends that the April 21, 2010 proposed purchase contract contained three terms and conditions which differed from what the parties previously discussed in their e-mails: (1) timing of the closing, (2) financing contingency, and (3) manner of conveyance of title. (*See* appellee's brief, 8.) Finally, appellee contends that the trial court did not err if it considered the post-filing e-mails as evidence in deciding the motion for summary judgment because (1) the discussions were not in the nature of compromise or settlement, but, rather, an offer of

specific performance; and (2) the e-mails exchanged between the parties, post-filing, show that a contract never existed. (*See* appellee's brief, 16.)

{¶31} In support of the proposition that the existence of a contract itself is generally a question of fact, appellant cites several nonbinding cases from other districts, the Supreme Court of Ohio's decision in *Oglebay Norton Co. v. Armco, Inc.*, 52 Ohio St.3d 232, 556 N.E.2d 515 (1990), and our decision in *Farmer's Market Drive-In Shopping Ctrs., Inc. v. Magana*, 10th Dist. No. 06AP-532, 2007-Ohio-2653. We note, however, that both *Oglebay* and *Farmer's Market* are distinguishable from the present matter because neither case specifically addresses whether a "meeting of the minds" existed between the parties to form a contract, and neither case achieves resolution through a motion for summary judgment.

{¶32} As such, we now look to our decision in *Bhavnani v. I.D. Voldness*, 10th Dist No. 95AP-284, 1995 WL 578124 (Sept. 28, 1995), for guidance in the present matter. The purported "agreement," in *Bhavnani*, involved the appellant's employment as manager at two locations of the Ohio State Barber College, an alleged option to purchase both the schools, along with the real estate upon which one of the schools was located. *Id*. at *1. In *Bhavnani*, at *4, we stated that:

> [T]he parties had a vastly different understanding of several key terms of [the] agreement, including the length of [the] appellant's employment, the length of the purported option to purchase the schools, the specifics of financing the purchase and the specifics of how a down payment, if needed, would be handled. The parties do not even agree if this agreement was an employment agreement, a purchase option on the schools, a purchase option on the realty involved, or a purchase agreement.

{¶33} Further, we affirmed the trial court's decision granting the appellees' motion for summary judgment because "[c]learly there was no meeting of the minds in this case, thus, the agreement is not binding." *Id.* In affirming the trial court's decision, we stated that, "[i]n order to constitute a valid contract, there must be a 'meeting of the minds' of the parties which is achieved by both an offer and acceptance of the contract's provisions." *Id.* at *3.

{¶34} In the present matter, even in viewing the evidence in a light most favorable to appellant, we find that no genuine issues of material fact exist as to whether the parties came to a meeting of the minds regarding the purchase of 413 Blackgum Way. First, the evidence attached to appellant's memorandum contra (affidavit, checking/savings withdrawal ticket, and copies of e-mails dated April 13 and 21, 2010) proves that the parties did not reach an agreement with respect to the terms of this real estate transaction. Appellant's affidavit alone highlights several uncertainties with regard to the purchase of 413 Blackgum Way, including: (1) whether appellant would have to pay an auctioneer; (2) the date of the sale; (3) whether Huntington National Bank required a commitment letter; (4) the type of deed that would be used in the conveyance of the property; and (5) whether a real estate commission was involved in the sale. (*See* affidavit of Frank Orders attached to Memorandum Contra.)

{¶35} Further, although appellant claims that he deposited $17,510 with Huntington National Bank in compliance with the financing terms, the checking/savings withdrawal ticket, attached to his memorandum contra, only proves that, on April 19, 2010, appellant withdrew $17,510 from his PNC Bank account. However, appellant provides no additional proof that he then deposited $17,510 with Huntington National

Bank. (*See* affidavit of Frank Orders; *see also* Exhibit 1 attached to Memorandum Contra.)

{¶36} Finally, the e-mails between Oster and Hillman dated April 13 and 21, 2010, do not demonstrate that the parties reached a meeting of the minds regarding the terms of the purchase contract. Oster's e-mail, dated April 13, 2010, indicates that, because the parties did not reach an agreement regarding the purchase of 413 Blackgum Way, appellee now demands $2,942.98 in past-due rent. Further, Hillman's e-mail, also dated April 13, 2010, characterizes the parties' discussions regarding the purchase price of 413 Blackgum Way and the past-due rent as a "negotiation." (*See* Exhibit 2 attached to Memorandum Contra.) Additionally, Oster's e-mails dated April 21, 2010, reinforce that the parties had not reached any agreement because: (1) appellee had not yet agreed to accept $10,000 instead of the full $17,500 for a down payment; (2) neither party signed a purchase agreement; and (3) the property remained on the auction list. (*See* Exhibit 2 attached to Memorandum Contra.)

{¶37} In addition, a review of the parties' e-mail correspondence, in relation to appellant's April 21, 2010 proposed real estate purchase contract, suggests that the parties had very different understandings regarding several key components necessary to form an agreement.

{¶38} First, the parties did not come to a meeting of the minds with regard to (1) the closing date or (2) the financing contingency. In an e-mail dated April 1, 2010, Oster stated that in order for appellee to remove 413 Blackgum Way from the auction, "[t]he closing would have to take place prior to or very soon after the auction date." (*See* Exhibit B-9 attached to Motion for Summary Judgment.) Further, in an e-mail dated

April 13, 2010, Oster wrote "[a]s I've stated previously, the auction is on the 22nd and if we can't close prior to the 22nd, then we need to have a firm commitment letter and a date not too much past the 22nd to close." (*See* Exhibit B-5 attached to Motion for Summary Judgment.) However, in Section 1.3 of the April 21, 2010 proposed real estate purchase contract, appellant indicated that he would need 60 days in order to obtain conventional financing. (*See* Exhibit C attached to Motion for Summary Judgment.) Throughout their negotiations, the parties never agreed to allotting 60 days for appellant to obtain financing, which, arguably, would delay the closing date well past April 22, 2010.

{¶39} Second, the parties did not come to a meeting of the minds with regard to the conveyance of title. In an e-mail dated April 5, 2010, Oster stated that "[t]he title would be conveyed by limited warranty deed." (*See* Exhibit B-2 attached to Motion for Summary Judgment.) However, in Section 6.1 of the proposed real estate purchase contract, appellant indicated that "[t]he Seller shall convey to the Buyer marketable title in fee simple by transferable and recordable general warranty deed." (*See* Exhibit C, attached to Motion for Summary Judgment.) Again, the parties never agreed to convey title through a general warranty deed.

{¶40} Even in viewing this evidence in a light most favorable to appellant, we cannot find that a meeting of the minds occurred and that a contract existed between the parties regarding the purchase of 413 Blackgum Way. Therefore, we find that the trial court did not err in finding that "[t]here is simply no contract here," and in granting appellee's motion for summary judgment. (*See* Mar. 22, 2011 Decision and Entry, 1.)

{¶41} Finally, we address appellant's argument that, pursuant to Evid.R. 408, appellee's use of "compromise efforts" is inadmissible and, therefore, cannot be considered in a motion for summary judgment. Evid.R. 408 states that:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

{¶42} We note that, in his brief, appellant does not explain or specify which, if any, "compromise efforts" between the parties should be deemed inadmissible before the trial court. However, in reviewing the evidence attached to appellee's motion for summary judgment, we have identified three e-mails exchanged between Oster and Hillman subsequent to appellant filing his complaint. The e-mails, dated August 13 and 16, 2010, indicate that the parties continued negotiating, in the same manner as before the complaint was filed in order to reach an agreement regarding the purchase of 413 Blackgum Way. (*See* Exhibit B-10 attached to Motion for Summary Judgment.) Based upon the totality of evidence before the trial court, we believe that, even if these three e-mails were stricken from evidence, the trial court still could have properly reached the same conclusion that: "[t]here is simply no contract here." (*See* Mar. 22, 2011 Decision and Entry.)

{¶43} Appellant's second assignment of error is overruled.

{¶44} For the foregoing reasons, both of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

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