[Cite as *Countrywide Home Loans, Inc. v. Huff*, 2010-Ohio-1164.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

COUNTRYWIDE HOME LOANS, INC., et al.,	:	**O P I N I O N**
	:	**CASE NO. 2009-T-0044**
Plaintiffs,	:	
- vs -	:	
REGGIE D. HUFF, et al.,	:	
Defendants/Third Party Plaintiffs-Appellants,	:	
- vs -	:	
COMMONWEALTH SUBURBAN TITLE AGENCY, INC.,	:	
Third Party Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2005 CV 276.

Judgment: Affirmed.

William P. McGuire, William P. McGuire Co., L.P.A., 106 East Market Street, #705, P.O. Box 1243, Warren, OH 44482-1243 (For Defendants/Third Party Plaintiffs-Appellants).

Stuart A. Strasfeld, Roth, Blair, Roberts, Strasfeld & Lodge, 100 Federal Plaza East, #600, Youngstown, OH 44503-1893 (Third Party Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Reggie D. Huff and Lisa G. Huff, appeal from the March 25, 2009 judgment entry of the Trumbull County Court of Common Pleas, granting the

motion for summary of judgment of appellee, Commonwealth Suburban Title Agency, Inc. ("Commonwealth"), as well as the April 21, 2009 judgment entry, denying appellant Reggie Huff's pro se motion to vacate and recuse the magistrate.

{¶2} The following procedural history and factual background were taken from appellants' first appeal, *Countrywide Home Loans, Inc. v. Huff*, 11th Dist. No. 2007-T-0121, 2008-Ohio-4974.

{¶3} On January 28, 2005, Countrywide and Mortgage Systems filed a complaint in foreclosure based upon a note secured by a mortgage on property located at 566 Butler Road, N.E., Warren, Trumbull County, Ohio, 44483, owned by appellant Reggie Huff, a married man.[1] The complaint requested judgment in the amount of $125,991.57 plus interest at the rate of 7.25 percent per year from September 1, 2004, plus costs, and a judgment in foreclosure on the property. Appellants did not file an answer.

{¶4} On June 30, 2005, Countrywide and Mortgage Systems filed a motion for default judgment. On that same date, the trial court entered a judgment and decree in foreclosure.

{¶5} On January 11, 2006, Countrywide and Mortgage Systems filed a motion to partially vacate judgment as to appellant Reggie Huff, which was granted by the trial court on February 2, 2006.

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1. At the time the deed was recorded in November 2002, a lien in favor of Mahoning Fund, although previously satisfied, remained of record. Appellant Reggie Huff made payments under the note for less than two years before defaulting.

{¶6} On February 13, 2006, Countrywide and Mortgage Systems filed a motion for default judgment.

{¶7} On February 23, 2006, appellants filed separate motions for leave to file answers as well as memoranda opposing in part the motion for default judgment of Countrywide and Mortgage Systems. On March 16, 2006, Countrywide and Mortgage Systems filed an opposition to appellants' leave to plead and in support of motion for default. On March 21, 2006, Countrywide and Mortgage Systems filed a memorandum in support of motion for default judgment and reply in opposition.

{¶8} On July 24, 2006, Countrywide and Mortgage Systems filed a motion for summary judgment. On September 8, 2006, Countrywide and Mortgage Systems filed an amended motion for default judgment. On September 8, 2006, appellants filed a memorandum in opposition to the motion for summary judgment. On September 18, 2006, Countrywide and Mortgage Systems filed a reply.

{¶9} On December 1, 2006, appellants, without leave, filed an amended answer and third party complaint. On December 29, 2006, Countrywide and Mortgage Systems filed a motion to strike appellants' answer and third party complaint, as well as a motion for default judgment.

{¶10} On February 12, 2007, appellants filed an amended third party complaint, joining the Trust (the seller of the property), Fidelity (the underwriter of Reggie Huff's Owner's Policy of Title Insurance), and Commonwealth (the settlement agent that closed the sale of the property).[2] The complaint alleged that the third party defendants

2. Fidelity is not a named party to the instant appeal.

breached their duty under the general warranty deed recorded as Instrument No. 200211190044296, conveying the property to appellants, and sought rescission of the deed. With respect to Commonwealth, appellants alleged that it conducted the closing without clearing the subject property's title; breached its express or implied duty to provide good and marketable title to the subject property; and/or breached its express or implied duty of due diligence in failing to discover the Mahoning Fund mortgage, and is therefore liable for any and all damages resulting from said acts or omissions. The Trust filed an answer and counterclaim on March 13, 2007. On March 14, 2007, Fidelity filed an answer and Countrywide and Mortgage Systems filed a reply. Commonwealth filed an answer on April 17, 2007.

{¶11} On April 23, 2007, Fidelity filed a motion for summary judgment. Countrywide and Mortgage Systems filed a motion for summary judgment on April 24, 2007. Appellants filed oppositions on July 6, 2007. The Trust filed a motion for judgment on the pleadings on September 27, 2007.

{¶12} Pursuant to its November 6, 2007 judgment entry, the trial court granted the motions for summary judgment of Countrywide, Mortgage Systems, and Fidelity; dismissed with prejudice appellants' counterclaims and their prayer for rescission; granted the motion to dismiss of Mahoning Fund; and granted the motion for judgment on the pleadings of the Trust and dismissed it as a party. The trial court ordered Countrywide and Mortgage Systems to prepare an entry of foreclosure, which was stayed pending appeal. It is from that judgment that appellants filed their first appeal with this court, Case No. 2007-T-0121, which we affirmed. *Countrywide Home Loans, Inc. v. Huff*, 11th Dist. No. 2007-T-0121, 2008-Ohio-4974.

{¶13} While that appeal was pending, the trial court issued an "Entry Granting Summary Judgment and Decree in Foreclosure" on December 10, 2007.

{¶14} On June 9, 2008, Commonwealth filed a motion for summary judgment. Appellants filed a brief in opposition on August 25, 2008. Commonwealth filed a response to appellants' opposition on September 4, 2008.

{¶15} A sheriff's sale was set for November 13, 2008 at 9:00 a.m.

{¶16} On December 4, 2008, appellant Reggie Huff filed a pro se motion for summary judgment. Commonwealth filed an opposition on December 12, 2008.

{¶17} On December 15, 2008, the trial court issued a "Journal Entry Confirming Sale [to Countrywide and Mortgage Systems for $100,000], Ordering Deed and Distributing Sale Proceeds."

{¶18} On December 17, 2008, appellant Reggie Huff filed a pro se reply to Commonwealth's opposition to his pro se motion for summary judgment.

{¶19} Pursuant to its March 25, 2009 judgment entry, the trial court granted the motion for summary judgment of Commonwealth.

{¶20} On April 3, 2009, appellant Reggie Huff filed a pro se "Motion to Recuse Magistrate and Vacate Judgment with Supporting Affidavit." Commonwealth filed a response on April 15, 2009.

{¶21} Pursuant to its April 21, 2009 judgment entry, the trial court denied appellant Reggie Huff's pro se motion to vacate and recuse the magistrate.

{¶22} It is from the foregoing March 25, 2009 and April 21, 2009 judgment entries that appellants filed the present appeal, asserting the following assignments of error for our review:

{¶23} "[1.] THE TRIAL COURT ERRED IN ITS FINDING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO THE CLAIM OF APPELLANT AGAINST APPELLEE ON THE ISSUE OF EXISTENCE OR NON-EXISTENCE OF TITLE POLICY.

{¶24} "[2.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS IN ITS HOLDING HAVING FOUND A CAUSE OF ACTION AGAINST THE TITLE AGENT BASED UPON NO TITLE POLICY BEING CONTEMPORANEOUSLY ISSUED AND/OR BREACH OF ITS DUTIES AS TO CLOSING, HOWEVER FINDING THAT AS A MATTER OF LAW NO DAMAGES COULD BE MAINTAINED AGAINST THE TITLE COMPANY.

{¶25} "[3.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN ITS FINDING ON THE DEFINITION OF DAMAGES AND SUCH DETERMINATION OF DAMGES (SIC) IS AN ISSUE FOR THE JURY, AND REQUIRED THE APPELLANT TO OBTAIN A PURCHASE CONTRACT ON THE SUBJECT PROPERTY THAT WAS NOT MARKETABLE TO QUANTIFY DAMAGES.

{¶26} "[4.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN ITS FINDING A REQUIREMENT TO OBTAIN A SALES CONTRACT AS TO DEFINE ACTUAL DAMAGES THAT SUCH REQUIREMENT WAS A USELESS ACT AST (SIC) HE (SIC) TITLE WAS UNMARKETABLE AND THE DETERMINATION OF DAMAGES IS AN ISSUE FOR THE JURY.

{¶27} "[5.] THE SPOUSE OF THE PROPERTY OWNER WAS A NECESSARY PARTY TO WHOM A PORTION OF THE AWARD WOULD BE ALLOCATED."

{¶28} Preliminarily, we note that "[t]his court reviews de novo a trial court's order granting summary judgment." *Hudspath v. Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, at ¶8, citing *Hagood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, at ¶13. "'A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.'" Id.

{¶29} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280, 296,] the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate

shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112 ***." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40. (Parallel citation omitted.)

{¶30} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108 ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff.* (Emphasis added.)" Id. at ¶41.

{¶31} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, "and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. Id. at 276. (Emphasis added.)" Id. at ¶42.

{¶32} In their first assignment of error, appellants argue that the trial court erred by finding that no genuine issue of material fact existed regarding the issue of existence or non-existence of a title policy. They maintain that the DEMO policy raises genuine issues of material fact.

{¶33} In their second assignment of error, appellants contend that the trial court erred by finding a cause of action against the title agent based upon no title policy being

contemporaneously issued and/or breach of its duties as to closing and finding that as a matter of law no damages could be maintained against the title company.

{¶34} Because appellants' first and second assignments of error are interrelated, we will address them in a consolidated fashion.

{¶35} "In order to recover damages, the injury and resulting damage must be shown with certainty and not be left to conjecture and speculation." *Zeiger v. Shons*, (May 3, 2001), 8th Dist. Nos. 78150 and 78218, 2001 Ohio App. LEXIS 1991, at 14, citing *State, ex rel. Martinelli v. Corrigan* (1991), 71 Ohio App.3d 243, 248.

{¶36} In the case at bar, the trial court stated the following in its March 25, 2009 judgment entry:

{¶37} "[Appellants] also allege that [Commonwealth] is liable in tort for not providing title insurance in this matter. Said claim would assume a duty to both [appellants] above and beyond the contract with [Commonwealth]. Although the Court has found that title insurance was available to [appellants], the Court notes said finding is immaterial in this case for the following reasons: First, [appellants] have advanced no authority under Ohio law to suggest that title insurance is mandated in real estate transactions whereupon this Court could consider whether or not the same should arise by operation of law in cases where it is not provided. Second, without said mandate, the Court cannot impose a duty upon [Commonwealth] above and beyond that within their contract with [appellants]. Third, if this Court assumes, *arguendo*, that title insurance from Fidelity was <u>not</u> provided and that said failure constitutes a breach of contract, the title insurance at issue clearly excludes coverage in cases where discovered liens result in <u>no damage</u> to the claimant. *** Fidelity denied coverage to Mr.

Huff on this basis alone and at no time asserted that there was no title policy in effect. Fidelity is no longer a party in this case as they were dismissed by this Court from this litigation, and said dismissal was affirmed by the Eleventh District Court of Appeals. Simply put, there is no theoretical damage for failing to provide title insurance that wouldn't have covered Mr. Huff in the first place under this set of facts because there is no damage." (Emphasis sic.)

{¶38} Here, appellants are unable to point to any direct legal authority to support their arguments regarding the existence or non-existence of title insurance. The trial court correctly indicated that appellants' claims against Fidelity (the title insurance company) were dismissed by the trial court, which we later affirmed in *Huff*, supra. We note again here that Fidelity is not a named party to the instant appeal. Our review of the record supports the conclusion by the trial court that Commonwealth was entitled to judgment in its favor as a matter of law.

{¶39} In addition, attached to appellant Reggie Huff's motion for summary judgment was a copy of a letter from Fidelity, dated October 24, 2008, noting the following:

{¶40} "The only title defect alleged by your claim was the fact that the Prior Mortgage, was still of record when the foreclosure complaint was filed. Any theoretical title defect cause[d] by the Prior Mortgage was cured by the recording of its release on May 18, 2006 by instrument 200605170014091. Therefore you did not suffer any loss covered by the policy.

{¶41} "In view of the foregoing facts and the terms of the Policy, I must conclude that there is no coverage for your claim under the Policy. Accordingly, [Fidelity] must respectfully deny this claim."

{¶42} Our review of the record establishes that the trial court did not err by holding that appellants suffered no damages as a result of the existence or non-existence of title insurance. Again, with respect to the issue of damages, it does not matter whether title insurance existed or not since appellants' claims against Fidelity, the underwriter of Reggie Huff's Owner's Policy of Title Insurance, were dismissed by the trial court and later affirmed by this court in *Huff*, supra, and Fidelity is not a named party to the instant appeal.

{¶43} Appellants' first and second assignments of error are without merit.

{¶44} In their third assignment of error, appellants maintain that the trial court erred regarding the issue of damages, requiring appellant to obtain a purchase contract on the subject property that was not marketable to quantify damages.

{¶45} In their fourth assignment of error, appellants contend that the trial court erred by finding a requirement to obtain a sales contract to define actual damages.

{¶46} Because appellants' third and fourth assignments of error are interrelated, we will address them together.

{¶47} A plaintiff bears the burden on proving the nature and extent of damages whether an action sounds in tort or contract. *Cleveland Builders Supply Co. v. Farmers Ins. Group of Cos*., (1995), 102 Ohio App.3d 708, 714. "It is uncertainty as to the existence of damages, not uncertainty as to the amount, which precludes recovery." Id., citing *Pietz v. Toledo Trust Co.* (1989), 63 Ohio App.3d 17, 22.

{¶48} In the instant case, our review of the record establishes that appellants suffered no damages as a result of the acts or omissions of Commonwealth. The mortgage to Mahoning Fund was released of record prior to appellants' attempt to sell the subject property. According to appellant Reggie Huff's deposition, he did not even know of the existence of this mortgage until many months after the foreclosure action was filed. He did not list the property for sale with a realtor until after the Mahoning Fund mortgage was released. Thus, appellants' opportunity to sell the property was not adversely impacted by the existence of the foregoing mortgage, since they knew nothing about it until after they defaulted on their obligation to Countrywide. Appellants' default on their obligation to Countrywide led to the foreclosure, not the existence of the subordinate mortgage to the Mahoning Fund.

{¶49} The trial court did not err by holding that appellants failed to establish that they suffered any damages as a result of the acts or omissions of Commonwealth.

{¶50} Appellants' third and fourth assignments of error are without merit.

{¶51} In their fifth assignment of error, appellants allege that appellant Lisa Huff was a necessary party.

{¶52} "The Ohio Supreme Court long ago set forth the controlling law with respect to an abstractor's liability for mistakes in conducting a title examination:

{¶53} "'An action against an abstracter to recover damages for negligence in making or certifying an abstract of title does not sound in tort, but must be founded on contract; and the general rule is that an abstracter can be held liable for such negligence only to the person who employed him.' *Thomas v. Guarantee Title & Trust Co.* (1910), 81 Ohio St. 432, ***, paragraph one of the syllabus." *Cedar Dev., Inc. v.*

Exchange Place Title Agency, Inc., 149 Ohio App.3d 588, 2002-Ohio-5545, at ¶13-14. (Parallel citation omitted.)

{¶54} "*** [P]rivity must exist for liability to be found." *Davis v. Montenery*, 173 Ohio App.3d 740, 2007-Ohio-6221, at ¶28, citing *Thomas*, supra.

{¶55} "'Standing' is defined at its most basic as '(a) party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, at ¶27, quoting Black's Law Dictionary (8th Ed.2004) 1442.

{¶56} Here, the record reveals that the title insurance policy was not issued to appellant Lisa Huff. Thus, she was not a named insured. In addition, appellant Lisa Huff released her dower interest in the subject property, and did not execute the settlement statement and note.

{¶57} The trial court did not err by concluding that appellant Lisa Huff lacked privity and standing to bring a complaint against Commonwealth.

{¶58} Appellants' fifth assignment of error is without merit.

{¶59} For the foregoing reasons, appellants' assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed. It is ordered that appellants are assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.