[Cite as *Tabor Revocable Trust v. WDR Properties, Inc.*, 2010-Ohio-2049.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JOE ANN TABOR REVOCABLE TRUST,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-118**
- vs -	:	
WDR PROPERTIES, INC., et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 07 CF 003665.

Judgment: Affirmed.

Robert S. Rosplock, Rosplock & Perez, Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094 (For Plaintiff-Appellee).

Glenn E. Forbes, Cooper & Forbes, 166 Main Street, Painesville, OH 44077 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, WDR Properties, Inc., appeals from the September 8, 2009 judgment entry of the Lake County Court of Common Pleas, granting the motion for summary judgment of appellee, Joe Ann Tabor Revocable Trust.

{¶2} In September of 2003, appellant purchased from appellee a 20.7 acre parcel consisting of a residence, barn, and outbuilding located at 6717 Williams Road,

Concord, Lake County, Ohio, for $425,000. Appellant made initial payments totaling $50,000 and financed the remaining $375,000 by executing a promissory note to appellee. The note specified an interest rate of 5 percent per annum, to be secured by a mortgage, and was to be paid in full by September 30, 2013.

{¶3} On November 29, 2007, appellee filed a complaint for foreclosure against appellant and defendants, John D. Oil and Gas Company, Ohio Secretary of State, and John S. Crocker, Lake County Treasurer.[1] According to the complaint, on or about September 29, 2003, appellant executed a promissory note payable to appellee in the amount of $375,000. Appellant, to secure payment, executed and delivered a mortgage deed conveying to appellee an interest in property subject to the action. Appellee alleged that the mortgage was conditioned upon the payment of the promissory note and the condition of the note and mortgage deed were broken by the failure of appellant to pay the principal and interest due. Appellee indicated that under the terms and conditions of the mortgage deed, appellant was obligated to keep all taxes and assessments against the property fully paid and to keep the improvements on the real estate insured in the amount of $375,000 for the benefit of appellee. Appellee alleged that appellant failed to pay the taxes and assessments owed for the property subject to this action from and after December 31, 2005, and did not have the insurance in place required under the terms of the mortgage deed. Appellee prayed for judgment against appellant in the amount of $249,907.52, plus interest at the rate of 5 percent from October 1, 2007.

{¶4} On January 11, 2008, appellant filed an answer and counterclaim against

1. Defendants are not named parties to the instant appeal.

appellee. Appellant alleged that on or about August 18, 2003, Candace Paskan ("Paskan"), on behalf of appellant, entered into an agreement to purchase property as described in appellee's complaint. On or about September 20, 2003, appellant executed a mortgage in favor of appellee. According to appellant, neither the agreement nor the mortgage provided that appellee would have to approve the sale of a portion of the property. Appellant indicated that in August of 2007, it secured a purchaser for a portion of the property. Appellant alleged that it was prepared to pay appellee the funds due from the sale pursuant to the mortgage and to pay any taxes due, however, appellee refused to sign the partial release of mortgage necessary to complete the transaction. Appellant set forth three causes of action in its counterclaim, including tortious interference with contract; breach of contract; and breach of covenant of good faith and fair dealing.

{¶5} Appellee filed a reply to appellant's counterclaim on January 15, 2008.

{¶6} On September 4, 2008, the parties filed a "Joint Stipulations of Fact and Legal Issue to be Resolved," which indicated the following with respect to the facts: on or about sometime prior to October 1, 2003, appellee and Paskan entered into a contract for the sale of the real property at issue for $425,000; Paskan executed a promissory note and a mortgage deed in favor of appellee in the amount of $375,000; prior to the closing of the sale, Paskan assigned performance of the contract to appellant; on June 24, 2004, all rights under the promissory note and mortgage deed were conveyed to appellee; the mortgage remains not cancelled of record and is a valid and subsisting lien on the premises; the note and mortgage contained a clause permitting partial sale of the land, requiring that if such a sale should occur, appellant

would pay to appellee 65 percent of the net proceeds; the mortgage instruments obligated appellant to pay real estate taxes when due and to maintain insurance on the property in the amount of $375,000; in August of 2007, appellant proposed to appellee a sale of a portion of the premises subject to the mortgage and requested appellee execute a partial release of the mortgage as to the portion being sold; at the time the request was made upon appellee to grant the release, appellant was in default of the payment of real estate taxes and was not maintaining insurance on the property subject to the mortgage; appellee refused to execute a partial release of the mortgage; had appellee executed the partial release and had the proposed sale transaction closed, the then due and owing real estate taxes would have been paid through escrow and appellee would have received the approximate sum of $86,870; because appellee refused to sign the partial release, the proposed buyers requested a release of their obligations under the proposed contract of sale; appellant has failed to make any payment toward the principal of the mortgage note since September of 2007; appellant has not paid any of the real estate taxes since 2005; and appellant has not maintained any insurance on the property since prior to August of 2007.

{¶7} In addition, the parties indicated that the legal issue to be determined by the trial court was whether appellee was privileged to refuse to release part of the property from the operation of the mortgage when requested to do so by appellant.

{¶8} On April 6, 2009, appellee filed a motion for summary judgment pursuant to Civ.R. 56. Appellant filed a response on April 20, 2009.

{¶9} Pursuant to its September 8, 2009 judgment entry, the trial court granted appellee's motion for summary judgment. The trial court awarded judgment for appellee

and against appellant in the amount of $249,907.52 plus interest at the rate of 5 percent from October 1, 2007. It is from that judgment that appellant filed a timely appeal, asserting the following assignment of error for our review:

{¶10} "The trial court erred in granting summary judgment to [appellee.]"

{¶11} In its sole assignment of error, appellant argues that the trial court erred by granting appellee's motion for summary judgment.

{¶12} "This 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.

{¶13} "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.)

{¶14} "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. (Parallel citation omitted.)

{¶15} "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.

{¶16} In the case at bar, the promissory note contained the following provisions:

{¶17} "Default in the payment of any installment under this note, providing said default continues for fifteen (15) days after due, or immediately upon default in the performance of any other of the terms or conditions of this note or of the mortgage given as security for it, shall render the unpaid balance due and payable at once at the option of the payee or holder, ***.

{¶18} "***

{¶19} "In the event that Maker sells any part of the premises by which this note is secured at any time after the effective date of this note, the Payee shall exercise a Partial Mortgage Release for the property being sold in consideration of the Maker paying to Payee a sum equal to sixty-five (65%) percent of the net proceeds of said sale (net proceeds being defined as proceeds of sale after subtracting ordinary costs of sale and real estate commission, if any)[.] In the event that Maker sells all of the premises by which this note is secured at any time after the effective date of this note, then the full balance due and owing to Payee under the terms of this note shall be payable immediately."

{¶20} In addition, the mortgage deed contained similar provisions, including the following:

{¶21} "In the event that Grantor sells any part of the premises secured by this mortgage at anytime after the effective date of this mortgage and the aforesaid promissory note, the Grantee shall execute a Partial Mortgage Release for the property being sold in consideration of Grantor paying to Grantee a sum equal to sixty-five (65%) percent of the net proceeds of said sale (net proceeds being defined as proceeds of sale after subtracting ordinary costs of sale and real estate commission, if any)[.] In the

event that Grantor sells all of the premises secured by this mortgage at anytime after the effective date of this mortgage and the aforementioned promissory note, then the full balance due and owing to Grantee shall be payable immediately[.]

{¶22} "***

{¶23} "It is one of the conditions of this deed, that the Grantor hereof, its successors, heirs, executors or administrators, shall keep all taxes and assessments against said property fully paid, and also keep the improvements on said real estate insured to the amount of $375,000.00 for the benefit of the said Grantee, her heirs and assigns, as additional security, in companies which shall be satisfactory to the said Grantee, her heirs and assigns, during the existence of said debt, and to deliver to said Grantee, her heirs and assigns, all policies and renewal receipts relating to said insurance, to be held until said principal note and interest are fully paid. ***

{¶24} "*** But in case of the non-payment of any sum of money (either principal, interest, insurance premium, taxes or assessments) at the time or times when the same shall become due agreeable to the terms and conditions of this mortgage or of the aforesaid promissory note or any part thereof, then in such case the whole amount of said principal sum shall, at the option of the said Joe Ann Tabor, her heirs or assigns, be deemed to have become due and payable without any notice whatsoever to WDR Properties, Inc (such notice being expressly waived by WDR Properties, Inc)[.]"

{¶25} Here, appellant alleges that the trial court erred by concluding that appellant's failure to pay taxes excused appellee's performance of the remaining terms of the note and mortgage between the parties. According to appellant, where a note and mortgage contain a clause permitting partial sale of the mortgaged land, and no

foreclosure has been commenced, a mortgagee is not privileged to refuse to consent to sale, even if there has been a prior breach of the note and mortgage by reason of non-payment. Appellant asserts that it did not abandon the property and that there was no evidence that its breach was material. We disagree.

{¶26} The record establishes, and the parties stipulated, that appellant had not paid any of the real estate taxes since the taxes due and payable for the second half of the tax year of 2005. The parties also stipulated that appellant had not maintained any insurance on the property since prior to requesting appellee to grant a partial release from the mortgage in August of 2007. Again, appellee refused to do so, since the value of the remaining property would not be sufficient to secure the remaining balance of the promissory note and it had no reason to believe there would not be a future default, thereby making the remaining property inadequate to secure the balance of the amount owed. Thus, the sale did not go through. The parties stipulated that appellant made no further payments on the promissory note since September of 2007, and has continued to not pay real estate taxes or insurance for the property, which led to the filing of appellee's November 29, 2007 complaint for foreclosure. Appellant filed a counterclaim on January 11, 2008.

{¶27} Regarding count one (tortious interference with contract) of its counterclaim, we note that "'[a] claim for tortious interference with a contract must satisfy the following elements: "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages."'" *Snyder v. Morgan*, 11th Dist. No. 2006-P-0065, 2007-Ohio-4630, at ¶27, quoting *A Way of Life, Inc. v. Schulda,*

11th Dist. No. 2004-P-0032, 2005-Ohio-6288, at ¶36, quoting *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, paragraph one of the syllabus.

{¶28} Clearly, appellant fails to meet all of the elements of its claim for tortious interference with contract, as appellee had justification for its conduct. There is no genuine issue of material fact that appellant was in breach of the note and mortgage. Also, there is no dispute of material fact that appellee had an interest in ensuring that the value of the remaining property would be sufficient to secure the remaining balance of the promissory note. We note that based on appellant's past performance, appellee's concerns of a future default were justified.

{¶29} With respect to counts two (breach of contract) and three (breach of covenant of good faith and fair dealing) of appellant's counterclaim, we note that "*** the covenant of good faith is part of a contract claim, and does not stand alone as a separate cause of action from a breach of contract claim." *Westwinds Dev. Corp. v. Outcalt*, 11th Dist. No. 2008-G-2863, 2009-Ohio-2948, at ¶89, citing *Lakota Loc. School Dist. Bd. of Edn. v. Brickner* (1996), 108 Ohio App.3d 637, 646.

{¶30} In the case sub judice, again, there is no genuine issue of material fact that appellant's failure to pay real estate taxes or maintain insurance on the property, as specifically required in the mortgage deed, constitutes a material breach of the mortgage. Also, there is no genuine issue of material fact that appellee was justified, pursuant to the promissory note and the mortgage deed, in refusing to issue a partial release of the mortgage and to demand the balance due and owing in full, as evidenced by the complaint for foreclosure.

{¶31} Based on the facts of this case, it is illogical to maintain that the initiation of foreclosure proceedings must have been commenced in order for appellee to have refused to grant a partial release after a clear and admitted default by appellant in the performance of its obligations under the terms of the promissory note and mortgage deed.

{¶32} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.