[Cite as *Huntington v. Antrobius*, 2012-Ohio-5936.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

THE HUNTINGTON NATIONAL BANK,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2012-P-0036
- vs -	:	
ROBERT A. ANTROBIUS, et al.,	:	
Defendants-Appellants,	:	
PORTAGE COUNTY TREASURER,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2010 CV 01018.

Judgment: Affirmed.

Joel K. Dayton, Robert B. Preston, III, and *Randolph L. Snow,* Black, McCuskey, Souers & Arbaugh, 220 Market Avenue South, Suite 1000, Canton, OH 44702 (For Plaintiff-Appellee).

Brian Skidmore, One Cascade Plaza, 12th Floor, PNC Center, Akron, OH 44308 (For Defendants-Appellants).

Victor V. Vigluicci, Portage County Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Robert A. Antrobius, et al., appeal from the judgment of the Portage County Court of Common Pleas, entering summary judgment in favor of

appellee, Huntington National Bank ("Huntington"), on its complaint for foreclosure. We affirm.

{¶2} Appellants Robert A. Antrobius, Sandra R. Antrobius ("Antrobiuses") Ryan E. Wagner, and Carrie L. Wagner ("Wagners") are principals of R.R. Wellington, Inc., ("Wellington") an Ohio corporation. With financing from Huntington's predecessor, Falls Bank, Wellington acquired certain real property intending to construct a condominium development.[1] The final development was planned to result from four separate construction phases. Wellington, the Antrobiuses, and the Wagners obtained financing for Phase I from Falls; and, during the construction of Phase I, the loans were refinanced after Falls was acquired by Sky Bank, Huntington's predecessor.

{¶3} On August 23 2006, Wellington executed and delivered to Sky Bank, now Huntington, a promissory note in an original principal amount for $350,000, plus interest at a variable rate ("Note 1"), for a business development loan to Wellington. On the same date, Wellington executed and delivered a second promissory note to Sky Bank in an original principal amount of $1,261,856, plus interest at a variable rate ("Note 2"), also for a business development loan to Wellington. Note 2 was a successor note to two prior notes executed by Wellington, the Antrobiuses, and the Wagners in April of 2004 in the amounts of $1,043,000 and $409,000, respectively.

{¶4} Also in August 2006, Robert A. Antrobius, Sandra R. Antrobius, Ryan E. Wagner, and Carrie L. Wagner each, in their individual capacities, executed and delivered to Huntington's predecessor their unconditional, individual guarantees on all of Wellington's liabilities, obligations, debts, and indebtedness to Huntington, including, without limitation, the indebtedness under Note 1 and Note 2. The record indicates that

1 Huntington's status as the real party in interest to this case is not an issue on appeal.

Wellington ultimately defaulted on its payment obligations to Huntington under Note 1 and Note 2. And the record further indicates that the Antrobiuses and the Wagners also defaulted on their payment in their joint and several capacities.

{¶5} As a result, on February 23, 2009, Huntington obtained a cognovit judgment on both notes against Wellington, the Antrobiuses, and the Wagners, holding them liable jointly and severally for the balance on the loan. The judgment covered all unpaid monies, including interest, owed by the parties as a result of the notes and respective guarantees on which they were obligated. This judgment was neither appealed nor did Wellington, the Antrobiuses, or the Wagners seek relief from the same. In April 2010, a certificate of judgment for lien for transfer pertaining to the Summit County judgment was filed with the Portage County Court of Common Pleas.

{¶6} In June 2010, Huntington commenced the underlying foreclosure action based upon the Summit County judgment entry and a duly recorded open-end mortgage that the Antrobiuses and the Wagners executed and delivered to secure the April 2004 predecessor notes to Note 2. Huntington simultaneously commenced a foreclosure action against Wellington relating to a separate mortgage it signed with Huntington's predecessor.

{¶7} Appellants filed an answer and counterclaims for breach of contract, promissory estoppel, part performance, intentional interference with business relations, breach of duty of good faith and fair dealing, and unjust enrichment. As a basis for their counterclaims, appellants asserted that prior to 2007, they were in negotiations with Huntington's predecessor, Sky Bank, to finance Phase II of the development. And,

appellants claimed that Sky Bank had authorized a loan disbursement to begin construction of infrastructure and other improvements for Phase II of the development.

{¶8} According to appellants, between September 2007, when Huntington acquired Sky, and March 2008 appellants were negotiating with Huntington to extend the existing loan to continue construction of the development. Appellants asserted, however, that two months before the existing loan matured, Huntington offered to renew the financing relative to Phase I of the development with different conditions. Huntington also requested Robert A. Antrobius to pledge additional collateral to extend the loan. When Mr. Antrobius declined, Huntington refused to finance the continued construction of Phase II. Appellants eventually defaulted on their obligations on November 29, 2008.

{¶9} According to appellants, however, in January 2009, plans were made to finish construction of two units to complete Phase I. Appellants asserted they spoke with Huntington regarding a promotion to attract buyers of the remaining units to facilitate paying down their loan obligation and create interest in buyers for Phase II units. According to appellants, Huntington "encouraged and agreed to the idea." Despite appellants' plans, appellants claimed that Huntington withdrew a loan approval to a potential buyer of one of the last units in Phase I. Appellants theorized the cancellation caused another buyer to cancel a separate contract to purchase a unit due to fear that the development would be adversely affected by the previous withdrawal. Finally, appellants alleged that, at Huntington's request and approval, Wellington convinced subcontractors to complete work on a separate unit. Huntington, however,

refused to pay the invoices of the subcontractors in violation of appellants' and Huntington's previous alleged agreements.

{¶10} In December 2011, Huntington filed a motion for summary judgment, arguing the Summit County judgment entry, entered in February of 2009, post-dated the purported agreement into which Wellington, the Antrobiuses, and the Wagners allegedly entered with Huntington or its predecessors. And, because neither a Civ.R. 60(B) motion nor an appeal was filed on the Summit County judgment, any argument relating to any alleged agreements or actions of Huntington or its predecessors in dealing with the financing of Phase I or Phase II are barred by res judicata. Further, Huntington noted that none of the purported agreements it allegedly breached were in writing, a requirement of the existing loan agreements into which the parties entered. Thus, Huntington concluded, it was entitled to summary judgment on all appellants' claims as well as a judgment of foreclosure on the property securing the valid mortgage.

{¶11} In response, appellants argued that because a counterclaim cannot be used as a defense in a cognovit judgment action, it must necessarily be raised separately. Thus, appellants concluded, the doctrine of res judicata cannot be used to prevent the assertion of their claims. Moreover, appellants asserted that, even though the underlying contracts included a non-oral modification clause, conduct contrary to the provision, e.g., partial performance, may be used to waive such a clause. Appellants observed that the actions of Huntington and its predecessors led them to believe that the bank(s) would finance Phase II and finance the completion of construction on Phase I. Hence, appellants argued, there are genuine issues of fact as to whether the non-

oral modification clause was waived and whether Huntington is liable on their counterclaims.

{¶12} On March 8, 2012, the trial court entered summary judgment in Huntington's favor, concluding it was entitled to foreclose on the mortgage because the doctrine of res judicata and Ohio's statute of frauds and the doctrine of res judicata operate to bar appellants' counterclaims. This appeal follows.

{¶13} Appellants assert three assignments of error for our review. As they are interrelated, we shall address them together. They provide:

{¶14} "[1.] The trial court committed prejudicial error in granting summary judgment in favor of Appellee, Huntington Bank and finding that Appellants' counterclaims were barred by the doctrine of res judicata.

{¶15} "[2.] The trial court committed prejudicial error in granting summary judgment in favor of Appellee, Huntington Bank and finding that Appellants' counterclaims were barred by the Statute of Frauds when part performance of the agreement forming the basis of Appellants' claims removed them from the Statute of Frauds or Huntington was otherwise stopped to deny them.

{¶16} "[3.] The trial court committed prejudicial error in granting summary judgment in favor of Appellee Huntington Bank on Count V of Appellants counterclaim for Huntington's breach of its duty of good faith and fair dealing."

{¶17} Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc*., 66 Ohio St.3d 64, 66 (1993). Keeping this in mind, an award of summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is

entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. *See e.g*. Civ.R. 56(C).

{¶18} When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co*., 64 Ohio St.2d 116, 121 (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 (1992). In effect, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp*., 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105 (1996).

{¶19} Appellants first assert their counterclaims are separate actions from cognovit judgment proceedings and cannot be barred by the doctrine of res judicata.

{¶20} Because a counterclaim is a setoff, it is not a valid defense to a cognovit judgment action; a judgment debtor, therefore, "retains the right to prosecute a counterclaim in a separate action." *See e.g. Shuford v. Owens*, 10th Dist. No. 07AP-1068, 2008-Ohio-6220, ¶20; *see also Bulkley v. Greene*, 98 Ohio St. 55, 60 (1918) (a counterclaim does not seek to vacate the cognovit note and therefore can be "reserved for an independent suit.") These observations imply that true counterclaims may not be barred by the doctrine of res judicata where a previous action which might otherwise preclude the claim sought and obtained a cognovit judgment. We must consequently consider whether appellants' claims are defenses or counterclaims.

{¶21} In *Bulkley*, the Ohio Supreme Court set forth the difference between a defense and a counterclaim. In that case, the defendant had confessed judgment through a cognovit note. He subsequently filed a motion to vacate the judgment asserting that (1) there had been no consideration on the note; (2) there was a separate contract affecting forfeiture of payments; and (3) the plaintiff had made false and fraudulent representations to induce his agreement. The Supreme Court of Ohio held that a counterclaim is not available as a defense to vacate a cognovit judgment. *Id*. at 59-60. It further stated "[a] counterclaim is not a defense. It assumes the existence of the plaintiff's claim and seeks relief by cross demand."

{¶22} In *Herbert v. The Huntington National Bank*, 9th Dist. No. 25604, 2011-Ohio-3663, ¶13, the Ninth District provided further guidance on the distinction between a counterclaim and a defense. The *Herbert* court observed that, "[i]n order to demonstrate that a claim is in fact a counterclaim, the plaintiff must demonstrate that he does not deny the debt or the validity of the proceedings under which the judgment was taken." *Id.*, citing *Sapp v. Azar*, 53 Ohio App.2d 277, 280 (9th Dist.1977). Alternatively, a defense "is one that goes to the integrity and validity of the creation of the debt or note, the state of the underlying debt at the time of confession of judgment, or the procedure utilized in the confession of judgment on the note." *First Natl. Bank of Pandora v. Freed*, 3d Dist. No. 5-03-36, 2004-Ohio-3554, ¶10; accord *Herbert*, *supra.*

{¶23} In this case, appellants do not deny the validity of the notes upon which the cognovit judgment was taken. And, although their claims arise from their relationship between Huntington and/or its predecessors, the allegations are not rooted in the specific contractual liability they have that resulted from the notes. Rather,

appellants are attempting to offset the amount owed based upon Huntington's and/or its predecessor's conduct vis-à-vis alleged business interactions that were separate from the dealings that led to the cognovit action. We consequently conclude appellants claims are proper counterclaims to which the doctrine of res judicata, under these circumstances, does not apply. As the trial court had an additional ground for awarding Huntington summary judgment on the counterclaims, however, our analysis does not end with this conclusion.

{¶24} Appellants next argue the trial court erred in granting summary judgment on all counterclaims based upon the statute of frauds because Huntington's immediate predecessor, Sky Bank, disbursed loan proceeds for appellants to commence construction of Phase II of the development. Appellants appear to argue this initial distribution, which they were bound to repay under the loan agreements to which Huntington later obtained an interest, was conduct that gave rise to an expectation that the entirety of Phase II would be financed. Appellants maintain the initial disbursement by Sky constituted part performance of an otherwise binding agreement, which takes an oral contract outside the statute of frauds. Because, in appellants' view, Huntington's predecessor was bound to finance the remainder of Phase II construction, Huntington, as successor to Sky, was likewise bound to honor the obligation.

{¶25} Preliminarily, we note it is dubious that the alleged oral agreement that purportedly modified the nature of the written contract, was enforceable. A valid and enforceable contract requires an offer, an acceptance, and a meeting of the minds. *See e.g. Huffman v. Kazak Bros., Inc.,* 11th Dist. No. 2000-L-152, 2002-Ohio-1683, 2002 Ohio App. LEXIS 1660, *11 (Apr. 12, 2002). In addition to a meeting of the minds, an

enforceable contract must be definite regarding its essential terms, e.g., identity of the parties, the subject matter of the contract, and consideration. *Id.* at *13. Terms of a contract are adequate if they provide a foundation for determining whether a breach occurred and for establishing an appropriate remedy. *Id.* at *13-*14.

{¶26} In this case, appellants merely assert they would not have accepted Sky Bank's initial distribution had there not been an agreement to provide the remainder of the financing. Nowhere do appellants assert the amount Sky Bank or Huntington, as its successor, would loan appellants to finance Phase II of the Development. And any further agreement to finance would have required appellants to provide new and distinct consideration. "A promise to do what the promisor is already bound to do cannot be a consideration, for, if a person gets nothing in return for his promise but that to which he is already legally entitled, 'the consideration is unreal.'" *Wells Fargo Bank, NA v. Baldwin*, 12th Dist. No. CA2011-12-227, 2012-Ohio-3424, ¶16, citing *Shannon v. Universal Mortgage & Disc. Co.*, 116 Ohio St. 609, 621 (1927).

{¶27} Even if appellants had discussed the above formalities with Sky Bank such that each party had the intention to move forward with the full financing of Phase II, the record is devoid of any indication that the essential terms were actually finalized. The alleged oral agreement appellants claim they entered into lacks essential terms and thus, even assuming the parties entered a contract, it is unenforceable.

{¶28} Assuming, however, an otherwise enforceable oral agreement existed, Ohio's statute of frauds would have barred its enforcement as a matter of law. The statute of frauds in Ohio is an evidentiary safeguard that requires certain specific agreements to be in writing. *Stonecreek Properties, Ltd. v. Ravenna Savings Bank*,

11th Dist. No. 2002-P-0129, 2004-Ohio-3679, ¶32. R.C. 1335.02(B) provides that "[no] party to a loan agreement may bring an action on a loan agreement unless the agreement is in writing and is signed by the party against whom the action is brought or by the authorized representative of the party against whom the action is brought." R.C. 1335.02(C) further states:

> **{¶29}** The terms of a loan agreement subject to this section, including the rights and obligations of the parties to the loan agreement, shall be determined solely from the written loan agreement, and shall not be varied by any oral agreements that are made or discussions that occur before or contemporaneously with the execution of the loan agreement. Any prior oral agreements between the parties are superseded by the loan agreement.

{¶30} Appellants assert that because Huntington's predecessor provided an initial disbursement, the doctrine of partial performance removes the alleged oral agreement from the statute of frauds. The doctrine of partial performance, however, only takes a contract out of the statute of frauds in cases involving the sale or leasing of land in which a delivery of the real estate in question has occurred, and in settlements made in consideration of marriage. *Hodges v. Ettinger*, 127 Ohio St. 460 (1934), syllabus; *see also Roth v. National City Bank*, 1st Dist. No. C-100216, 2010-Ohio-5812, ¶14. As neither of these exceptions is applicable to this case, the alleged oral contract to finance the remainder of Phase II had to be in writing. Because it was not, appellants are precluded from bringing an action by R.C. 1335.02.

{¶31} Notwithstanding this conclusion, appellants claim they are entitled to relief by operation of promissory estoppel. A claim for promissory estoppels arises where there is "(1) a clear and unambiguous promise; (2) reliance upon the promise by the person to whom the promise is made; (3) reliance is reasonable and foreseeable; and (4) the party seeking to enforce the agreement is injured as a result of its reliance." *Stonecreek Properties Ltd.*, *supra*, at ¶48.

{¶32} Courts have permitted the promissory estoppel doctrine to be an exception to the statute of frauds. In general, however, the promissory estoppel exception to the statute of frauds defense is permitted "only in narrow circumstances." *Beaverpark Associates v. Larry Stein Realty Co.*, 2d Dist. No. 14950, 1995 Ohio App. LEXIS 3778 (Aug. 30, 1995). First, courts typically apply the exception only if the party asserting it pleaded it as a separate cause of action. *Beaverpark,* citing *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.*, 87 Ohio App.3d 613 (1993). Here, appellants did independently plead promissory estoppel.

{¶33} Further, courts have determined that the promissory estoppel exception applies only where "either a misrepresentation that the statute of fraud's requirements have been complied with or a promise to make a memorandum of the agreement." *Beaverpark*, *13, citing *McCarthy, supra,* at 627; see also *Roth*, *supra*, at ¶15. Appellants do not allege either of these situations occurred in the instant matter. As a result, we hold appellants' promissory estoppel claim cannot supersede the operation of the statute of frauds.

{¶34} Appellants next assert Huntington breached an oral contract entered with appellants in January of 2009, when it agreed that Wellington should finish construction

on Phase I. According to appellants, Huntington requested they enlist subcontractors to complete construction of the units, but later refused to provide them financing to pay for the construction.

{¶35} Assuming the parties negotiated and Huntington urged appellants to act in the manner they did, there is still nothing in the record supporting the conclusion that an enforceable contract was created. To wit, there is no indication that the parties reached an agreement on a specific amount that Huntington would lend and no evidence appellants provided any consideration. Although Huntington may have encouraged appellants to proceed with their project in order to pay down their defaulted loan, such encouragement is not tantamount to a promise, let alone an enforceable contract.

{¶36} Moreover, even if an agreement existed and Huntington orally promised to loan appellants money to complete construction of Phase I units, as discussed above, the agreement would be unenforceable by operation of R.C. 1335.02. Appellants' arguments to the contrary are unavailing.

{¶37} We therefore hold that there is no genuine issue of material fact to be litigated regarding Huntington's liability on appellants' counterclaims for breach of contract, part performance, or promissory estoppel.

{¶38} Appellants next assert the trial court erred in granting summary judgment on their counterclaim for breach of the duty of good faith and fair dealing when Huntington took 10 months to decide not to extend financing for Phase II.

{¶39} Parties to a contract are bound by standards of good faith and fair dealing. *McWreath v. Cortland Bank,* 11th Dist. No. 2010-T-0023, 2012-Ohio-3013, ¶27. The record in this case demonstrates that between September 2007 and March 2008,

appellants and Huntington were in negotiations to refinance the existing loan and attempting to reach an agreement on additional financing for the Phase II development. In July of 2008, Huntington offered to refinance the existing loans but required additional collateral. When Robert A. Antrobius declined to provide the collateral, Huntington refused to refinance the existing loans, and further refused to finance the continued construction of the Phase II project.

{¶40} Appellants assert Huntington's delay breached standards of good faith and fair dealing because it deprived them of the ability to refinance at a separate institution. There is no evidence suggesting that Huntington was being purposefully dilatory or dishonest in taking the time it did to make appellants an offer. And appellants did not specifically assert Huntington was attempting to undermine the parties' common contractual goals by waiting until July to make an offer. Furthermore, while appellants may have preferred to refinance with Huntington, there is nothing to suggest they were unable to solicit financing offers from separate institutions while Huntington was evaluating refinancing scenarios. We therefore hold that reasonable minds can come to but one conclusion and that conclusion is Huntington's actions were not in violation of standards of good faith and fair dealing.

{¶41} We therefore hold that, viewing the evidence in appellants' favor, there is no genuine issue of material fact to be litigated on appellants' counterclaims. Appellants' three assignments of error are therefore not well taken.

{¶42} For the reasons discussed in this opinion, the judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.