[Cite as *LaSalle Bank Natl. Assn. v. Belle Meadows Suites L.P.*, 2010-Ohio-3773.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

LASALLE BANK NATIONAL ASSOCIATION	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 23766**
vs.	**:**	**T.C. CASE NOS. 06CV4867 07CV1628**
BELLE MEADOWS SUITES LP, et al.	**:**	**(Civil Appeal from Common Pleas Court)**
Defendants-Appellants	**:**	

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O P I N I O N

Rendered on the 13th day of August, 2010.

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GRADY, J.:

{¶ 1} This is an appeal from a final judgment of the court of common pleas that granted summary judgment to the plaintiff on its claim for relief against the defendant guarantors of a promissory note.

{¶ 2} On November 26, 2003, Belle Meadows Suites, LP ("Belle Meadows"), borrowed $6,250,000 from Greenwich Capital Financial Products, Inc. ("Greenwich"). In consideration of the loan it received, Belle Meadows, through its general partner, Polaris Management Co. Of Ohio ("Polaris"), executed a promissory note in that amount, payable to Greenwich. To secure the obligation, Belle Meadows also executed and delivered to Greenwich an Open-End Mortgage, an Assignment of Rents, and a Security Agreement on property in Trotwood, Ohio, owned by Belle Meadows.

{¶ 3} Polaris is owned and operated by Paul Rogers, Daniel J. Brennan, and David J. Leeds, as general partners. The Open-End mortgage provides that Polaris and its partners would not be liable should Belle Meadows default on the note. However, in consideration of the loan that Belle Meadows received, Polaris, Rogers, Brennan, and Leeds executed a separate agreement as guarantors, in which they agreed to be obligated on Belle Meadows' promissory note should Belle Meadows fail to comply with Section 26 of the mortgage, which prohibits an "uncured default" of Belle Meadows' obligations under Sections 16 and/or 29 of the mortgage.

{¶ 4} "Section 16 of the Mortgage Provides:

{¶ 5} "SECTION 16. FURTHER ENCUMBRANCES. Except only for the liens and security interests in favor of Lender under this Instrument and the other Loan Documents, without Lender's prior

written consent, which Lender may withhold in its sole discretion, Borrower shall not execute, cause, allow or suffer any mortgage, deed of trust, deed to secure debt, assignment of leases or rents, statutory lien or other lien, irrespective of its priority, to encumber all or any portion of the Property or the leases, rents or profits thereof, or any interest in any of the foregoing." (Emphasis supplied).

{¶ 6} "Section 29 of the Mortgage provides, in part:

{¶ 7} "SECTION 29. COVENANTS WITH RESPECT TO SINGLE PURPOSE, INDEBTEDNESS, OPERATIONS, FUNDAMENTAL CHANGES OF BORROWER.

{¶ 8} "(a) PERTAINING TO BORROWER PARTIES. Borrower represents, warrants and covenants as of the date of hereof and until such time as the indebtedness secured hereby is paid in full, that each of Borrower and Polaris Management Co. Of Ohio (this latter may be referred to as "Managing Entity," and both Borrower and Managing entity may be referred to as "Borrower parties"):

{¶ 9} * *

{¶ 10} "(iv) has not incurred and will not incur any debt, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than (i) the obligations secured by this instrument, and (ii) trade payables or accrued expenses incurred in the ordinary course of business of operating the Property." (Emphasis supplied).

{¶ 11} On December 13, 2003, Greenwich assigned Belle Meadows' note and mortgage to Spring Meadow Drive, LLC ("Spring Meadow"). Thereafter, four events occurred.

{¶ 12} On May 25, 2005, Polaris and the three Defendants executed a promissory note in the amount of $145,000, payable to Bryn Mawr Trust Company ("Bryn Mawr"). The note was secured by a Commercial Security Agreement permitting Bryn Mawr to encumber the personal property of Belle Meadows.

{¶ 13} On August 18, 2005, Richard W. Forness filed for record a mechanics lien in the amount of $3,321.20 against the real property owned by Belle Meadows and secured by its Open-End mortgage. The obligation on which the lien was filed was for maintenance work Forness performed on a swimming pool on Belle Meadows' property.

{¶ 14} On March 21, 2006, a certificate of judgment was filed in the Common Pleas court of Montgomery County in favor of Hye Kyung Park against Belle Meadows in the amount of $175,000, plus interest at the rate of six percent per annum.

{¶ 15} On July 13, 2006, Joe Schmitt and Sons Plumbing and Heating LLC ("Schmitt") filed for record a mechanics lien in the amount of $2,526.00 against the property owned by Belle Meadows and secured by its Open-End mortgage. The obligation underlying the lien was for plumbing improvements on Belle Meadows' property.

{¶ 16} Belle Meadows defaulted on its promissory note, now owned by Spring Meadow, in March of 2006. Spring Meadow obtained a judgment in foreclosure and an order of sale against Belle Meadows. A deficiency remained on the amount of the judgment after the sale proceeds were applied to the balance due.

{¶ 17} Spring Meadow commenced an action against Polaris, Rogers, Brennan and Leeds as guarantors of Belle Meadows' promissory note. That action was consolidated with the foreclosure action against Belle Meadows. After Defendants filed responsive pleadings, Spring Meadow moved for summary judgment on its claims for relief. The trial court granted the motion. Rogers, Brennan, and Leeds appeal.

ASSIGNMENT OF ERROR

{¶ 18} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF SPRING MEADOW AND AGAINST APPELLANTS BRENNAN, ROGERS AND LEEDS ON THE ISSUE OF LIABILITY FOR THE DEFICIENCY ON THE MORTGAGE NOTE."

{¶ 19} Summary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law. Civ.R. 56. The burden of showing that no genuine issue of material fact exists is on the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d

64. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First National Bank & Trust Co.* (1970), 21 Ohio St.2d 25. In reviewing a trial court's grant of summary judgment, an appellate court must view the facts in a light most favorable to the party who opposed the motion. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326. Further, the issues of law involved are reviewed de novo. *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1.

{¶ 20} The trial court found that the mechanics liens filed by Forness and Schmitt, the promissory note executed in favor of Bryn Mawr, and the certificate of judgment filed by Park, were all events that triggered the liability of Defendants Rogers, Brennan, and Leeds under Section 26 of the mortgage, because those events are breaches of the obligations imposed on Belle Meadows in Sections 16 and/or 29 of the mortgage. Defendants argue that genuine issues of material fact remain for determination concerning their liability.

{¶ 21} Unlike a surety, who is primarily liable along with his principal on the principal's obligation, a guarantor's liability is contingent on a default by his principal, in which event the guarantor becomes absolutely liable on the principal's obligation when the guarantor is notified of the default. *Galloway v.*

Barnesville Loan, Inc. (1943), 74 Ohio App. 23.

{¶ 22} "A guarantor, like a surety, is bound only by the precise words of his contract. Other words cannot be added by construction or implication, but the meaning of the words actually used is to be ascertained in the same manner as the meaning of similar words used in other contracts. They are to be understood in their plain and ordinary sense, when read in the light of the surrounding circumstances and of the object intended to be accomplished. The rule that a guarantor is held only by the express words of his promise does not entitle him to demand an unfair and strained interpretation of those words, in order that he may be released from the obligation which he has assumed."

{¶ 23} *G.F. Business Equipment, Inc. v. Liston* (1982), 7 Ohio App.3d 223, 224, quoting *Morgan v. Boyer* (1883), 39 Ohio St.324, 326.

The Mechanics Liens

{¶ 24} The Forness and Schmitt mechanics liens were filed on claims for work performed on the property owned by Belle Meadows and secured by the mortgage. Section 16 provides that Belle Meadows "shall not . . . allow or suffer any statutory lien or other lien, irrespective of its priority, to encumber all or any portion of the property . . . ." A lien for work performed on real property is a statutory lien. R.C. 1311.02.

{¶ 25} Defendants argue that neither the Forness nor Schmitt mechanics liens are "uncured defaults" for purposes of Section 26 of the mortgage that trigger Defendant's liability on their guaranty because the obligations of Belle Meadow that underlie both liens, repairs or improvements of the mortgaged property, constitute a "trade payable." Section 29(a)(iv) prohibits incurring debts, but excludes debts for "trade payables or accrued expenses incurred in the ordinary course of business of operating the Property" from that prohibition. The exception in Section 29(a)(iv) regarding future debts for trade payables is separate from, and has no application to, the prohibition in Section 16 against "allow(ing) or suffer(ing) any statutory lien or other lien . . . to encumber all or any portion of the Property . . ." arising out of unpaid debts for trade payables. Defendants also argue that they cannot be liable on account of the Forness and Schmitt mechanics liens because neither is an "uncured default" on the part of Belle Meadows. Defendants point out that both obligations on which the liens were filed have been paid. Defendants argue that neither they nor Belle Meadows had prior notice of the Forness lien when it was filed, and that Belle Meadows was prevented from paying Schmitt because a receiver was appointed to manage Belle Meadows' property after Spring Meadow filed its foreclosure action.

{¶ 26} Section 4 of the mortgage provides that the borrower shall promptly discharge any lien within ten days after the borrower receives notice of the lien, but that the borrower is not required to discharge a lien founded on an obligation that the borrower "contests in good faith . . . by an appropriate legal proceeding" when prior to the date on which the obligation becomes delinquent, the borrower gives notice to the lender of its intention to contest the obligation.

{¶ 27} Section 4 sets out the procedures necessary to take the two mechanics liens out of the "uncured default" exception to the guarantor's liability in Section 26. There is no evidence Belle Meadows took any of the steps concerning the two mechanics liens for which Section 4 provides. Instead, by failing to contest the two mechanics liens, Belle Meadows allowed or suffered the two liens to exist, in violation of Section 16.

{¶ 28} Defendants rely on the affidavit of Daniel J. Brennan (Dkt. 114) in support of their contention that neither they nor Belle Meadows had notice of either of the liens when the liens were filed. We agree with the trial court that the averments in the affidavit offer no support for that contention.

{¶ 29} Defendants contend that Belle Meadows was prevented from discharging the Schmitt lien because Belle Meadows property was in the hands of a receiver. That fact would not prevent Belle

Meadow from curing the breach involved pursuant to Section 4 of the mortgage.

The Bryn Mawr Loan and Lien

{¶ 30} On May 25, 2005, Defendants Rogers, Brennan, and Leeds, along with Polaris, executed a promissory note in the amount of $145,000 in favor of Bryn Mawr. Defendants and Polaris contributed the proceeds of the loan to Belle Meadows. Defendants executed a security agreement on behalf of Belle Meadows permitting Bryn Mawr to encumber Belle Meadows' personal property. Defendants and Polaris each executed a guaranty of Belle Meadows' obligation on the note. On July 18, 2008, Defendants executed a Loan Modification to extend the maturity date of the note.

{¶ 31} Following a default on its promissory note, Bryn Mawr filed a lien against Belle Meadows' property. On February 23, 2007, Bryn Mawr commenced an action against the guarantors. Bryn Mawr's lien was released on June 12, 2008.

{¶ 32} Defendant's argue that Belle Meadows, not being an obligor on the promissory note, had no liability to Bryn Mawr, pointing out that Bryn Mawr released its lien against Belle Meadows' property when it realized its error. Defendants also point out that the obligation to Bryn Mawr has been paid. Therefore, Defendants argue, neither the existence of the Bryn Mawr lien nor the default constitutes a breach on the part of Belle Meadows that

triggers the Defendants' obligations under Section 26.

{¶ 33} As a general rule, a lien can be created by a contract with the owner of the property or by someone authorized to act on his or her behalf. Liens have been implied when from the nature of the transaction, the owner of the property was assumed to have intended to create them, or when it can fairly be inferred from the circumstances that it was the understanding of the parties that a lien should exist. 66 Ohio Jurisprudence 3d, Liens, Section 5.

{¶ 34} Defendants Rogers, Brennan, and Leeds are general partners in Polaris, and Polaris is a general partner of Belle Meadows. The monies that Polaris and Defendants borrowed from Bryn Mawr were contributed by them to Belle Meadow, and they guaranteed Belle Meadows' obligation on the promissory note they executed in favor of Bryn Mawr. Bryn Mawr could reasonably believe from their conduct that Defendants and Polaris had apparent authority to act on behalf of Belle Meadows, and that Belle Meadows ratified that authority when it accepted the proceeds of the loan from Bryn Mawr.

{¶ 35} Whether Bryn Mawr was justified in arriving at those conclusions is not determinative of the motion for summary judgment that Spring Meadow filed, because it is not an issue of fact or law determinative of Defendants' liability to Spring Meadow.

Their liability is instead determined by whether reasonable minds could find that Belle Meadows breached Section 16 of the mortgage when it failed to cure the lien that Bryn Mawr filed, triggering Defendant's obligations under Section 26.

{¶ 36} Spring Meadow's action against Defendants and Polaris is predicated on the lien that Bryn Mawr filed on February 23, 2007. Bryn Mawr's lien was not released until June 12, 2008. During the interim, Belle Meadows allowed and suffered the lien encumbering its property to remain in effect, in violation of Section 16 of the mortgage, and took no steps pursuant to Section 4 to cure the resulting default. Belle Meadows' failure violated Section 26. Reasonable minds could only find that Belle Meadows' breach triggered Defendant's liability on the guarantees.

The Park Judgment

{¶ 37} Defendants argue that because Belle Meadows incurred its obligation to Park in 1999, prior to executing the 2003 note and mortgage that was later acquired by Spring Meadow, Spring Meadow is estopped from relying on the certificate of judgment Park obtained following Belle Meadows' default on its obligation to Park. Defendants argue that when Spring Meadow acquired the note and mortgage it was charged with constructive knowledge of Belle Meadows' prior obligation to Park.

{¶ 38} Belle Meadows' obligation to Park preceded its execution

of the note and mortgage, but Belle Meadows' default on that obligation and the resulting judgment that Park obtained and certificate of judgment that Park filed were subsequent to Belle Meadows' execution of the note and mortgage. As to those subsequent events, estoppel cannot apply.

{¶ 39} Section 16 of the mortgage provides that Belle Meadow "shall not . . . allow or suffer any . . . statutory lien or other lien . . . to encumber all or any portion of the property or the leases, rents, or profits thereof, or any interest in any of the foregoing." R.C. 2329.02 provides that a judgment "shall be a lien upon lands and tenements of each judgment debtor within any county of this state from the time there is filed on the office of the clerk of the court of common pleas of such county a certificate of judgment" setting forth particulars concerning the judgment and the amount of relief ordered.

{¶ 40} Park's certificate of judgment is a statutory lien. After Park executed on Belle Meadows' bank account, Belle Meadows paid Park $37,000 to obtain a release of the lien. In the interim, Belle Meadows allowed or suffered Park's statutory lien to apply to Belle Meadows' property, in violation of Section 16, and Belle Meadows took no steps pursuant to Section 4 to cure the resulting default. Belle Meadows' failure violated Section 26 of the mortgage. That triggered Defendants' liability on their

guarantees.

{¶ 41} Finally, Defendants argue that none of Belle Meadows' conduct with respect to the two mechanics liens, the Bryn Mawr. note, or the Park certificate of judgment, were material breaches, because none caused any loss to Spring Meadow. Defendants rely on *Kersh v. Montgomery Developmental Center* (1987), 35 Ohio App.3d 61.

{¶ 42} In *Kersh*, a public agency refused to compensate a professional employee who had resigned her position for her unused compensatory time. The employee commenced an action for breach of contract. The Court of Claims entered judgment for the agency, finding that the employee's failure to be at work for ten hours per week, for which her contract provided, barred her claim for breach of contract.

{¶ 43} On review, the Court of Appeals of Franklin County reversed, holding that employee's breach, though it occurred, was not sufficiently material so as to relieve the agency of its duty to compensate the employee for her unused compensatory time. The appellate court found that the ten-hour provision was not as essential to the purpose of the employment agreement, which was instead to have the employee available, on-call, twenty-four hours per day, seven days each week, a requirement the employee had substantially performed.

{¶ 44} In finding the employee's breach was not material, the appellate court relied on a five-prong test set out in the Restatement of the Law 2d, Contracts (1981), 237, Section 241, to determine whether a breach is material.

{¶ 45} *Kersh* has no application to the present case. The issue in *Kersh* was whether a promisee's partial default would bar the promisee's breach of contract action against the promisor. The issue in the present case is not whether any breach on the part of the promisees, Spring Meadow or its predecessor, Greenwich, bars an action brought by the promisors, the Defendants. Rather, the issue is whether the promisors, the Defendants, are obligated on their promises to the promisee, Spring Meadow, to pay the balance due Spring Meadow on Belle Meadows' promissory note following Belle Meadows' default on that obligation. Defendant's promise to pay was essential to their agreement with Greenwich. The materiality of that promise is not determined by any loss that Spring Meadow suffered as a result of Belle Meadows' failure to perform its obligations under Section 26 of the mortgage, which Defendants agreed are merely instrumental to trigger the promises Defendants made to pay Spring Meadow in the event of Belle Meadows' default on the promissory note.

{¶ 46} In *Software Clearing House, Inc. v. Intrak, Inc.* (1990), 66 Ohio App.3d 163, 170-171, the First District wrote:

{¶ 47} "A breach of a portion of the terms of a contract does not discharge the obligations of the parties to the contract, unless performance of those terms is essential to the purpose of the agreement. *Kersh v. Montgomery Developmental Ctr.* (1987), 35 Ohio App.3d 61, 519 N.E.2d 665; *Boehl v. Maidens* (1956), 102 Ohio App. 211, 2 O.O.2d 204, 139 N.E.2d 645. As noted in *Kersh,* the Restatement of the Law 2d, Contracts sets forth five factors to be used to determine the materiality of a breach, including the extent to which the injured party will be deprived of the expected benefit, the extent to which the injured party can be adequately compensated for the lost benefit, the extent to which the breaching party will suffer a forfeiture, the likelihood that the breaching party will cure its breach under the circumstances, and the extent to which the breaching party has acted with good faith and dealt fairly with the injured party. *Kersh, supra,* 35 Ohio App.3d at 62-63, 519 N.E.2d at 668, quoting Restatement of the Law 2d, Contracts (1981) 237, Section 241."

{¶ 48} The purpose of the prohibitions in Sections 16 and 29 of the mortgage was to avoid burdens on Belle Meadows' ability to repay the $6,250,000 it had borrowed from Spring Meadow's predecessor, Greenwich. The protections afforded the lender by those provisions were wholly anticipatory. The materiality of Defendants' failure to perform on their guarantees is not

determined by the losses to Spring Meadow that in fact resulted from those breaches by Belle Meadows. The materiality of Defendants' failure is instead measured in relation to the deficiency in the judgment of foreclosure Spring Meadows obtained against Belle Meadows after the mortgaged property was sold, following foreclosure. Unless the guarantees of the Defendants on which Spring Meadow could rely when it acquired the note and mortgage are enforced, Spring Meadow will be deprived of a benefit, and that deprivation cannot otherwise be cured.

{¶ 49} The assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J., And BROGAN J., concur.

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