[Cite as *Lone Star Equities, Inc. v. Dimitrouleas,* 2015-Ohio-2294.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

LONE STAR EQUITIES, INC., et al.	:	
	:	
Plaintiffs-Appellants	:	Appellate Case No. 26321
	:	
v.	:	Trial Court Case No. 2013-CV-2670
	:	
GEORGE DIMITROULEAS, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the 12th day of June, 2015.

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WELBAUM, J.

{¶ 1} In this case, Plaintiffs-Appellants, Louis Wiener and Lone Star Equities, Inc., appeal from summary judgments granted to Defendants-Appellees, George Dimitrouleas, First American Title Insurance Company ("First American"), and National Title Company ("National"). In support of their appeal, Appellants contend that although there are no factual issues, the trial court erred in sustaining the summary judgment motions of each Appellee.

{¶ 2} We conclude that the trial court did not err in rendering summary judgment in favor of all Appellees in connection with property that Dimitrouleas sold to Appellants. Concerning the contractual claims against Dimitrouleas, his purchase agreement with Appellants merged with the general warranty deed. To the extent that the purchase agreement excepted certain representations from merging, the statements that Dimitrouleas made were not actionable representations. Furthermore, additional taxes assessed against the property following a decision of the Board of Tax Appeals 18 months after the closing also did not violate the general warranty deed by constituting an encumbrance or lien on the property at the time of the closing. Moreover, even if one assumes that Dimitrouleas falsely or recklessly misrepresented facts about the pendency of valuation proceedings, Appellants could not have justifiably relied on these representations, because valuation proceedings are matters of public record. Appellants had the ability to inquire into the status of any such proceedings.

{¶ 3} As an additional matter, the undisputed facts indicate that National did not deviate from accepted standards of care when examining the title, and it is not liable for the failure to discover the pending action before the Board of Tax Appeals. The

remaining claims against First American in connection with its policy of title insurance also fail, because the policy excludes coverage for taxes and assessments that are not due and payable at the time of closing. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 4} The facts in this case are undisputed. In 1998, Defendant-Appellee, George Dimitrouleas purchased a commercial warehouse located at 1927-1945 Needmore Road in Dayton, Ohio. For the tax year 2008, the Montgomery County Auditor appraised the property at a value of $1,849,250. In March 2009, Dimitrouleas filed a complaint with the Montgomery County Board of Revision ("BOR"), requesting that the property value be reduced. After Dimitrouleas attended a BOR hearing, the value was reduced to $1,516,560 on November 6, 2009, and the tax duplicates were adjusted.

{¶ 5} Subsequently, the Northridge Local Schools Board of Education ("Northridge") appealed the BOR decision to the Board of Tax Appeals ("BTA"). Dimitrouleas also appealed to the BTA on November 30, 2009, asking that the BOR valuation be further reduced, from $1,516,560 to $980,000.

{¶ 6} On March 17, 2010, Dimitrouleas signed a purchase agreement, agreeing to sell the Needmore property to Plaintiff-Appellant, Lone Star Equities, Inc. ("Lone Star"), for a purchase price of $1,900,000. Lone Star was a Subchapter S corporation owned by Plaintiff-Appellant, Louis Wiener. Dimitrouleas also signed amendments to the contract in 2010, as well as a warranty deed for the property on January 24, 2011.

{¶ 7} The Purchase Agreement provided for various conditions precedent to the

purchaser's obligation to purchase the property, including evidence of title. In this regard, the agreement stated that:

> Evidence of Title: Purchaser may, at any time prior to the end of the Inspection Period and at its own expense, purchase an abstract of title and title insurance for the Property ("Title Commitment") in the amount of the Purchase Price. * * *
>
> In the event Purchaser takes issue with any title exceptions, Purchaser shall have a period of ten (10) days from receipt of said Title Commitment in order to object in writing to Seller as to any matters contained therein. If objections to the Commitment are not resolved within ten (10) days of objection by Purchaser, then either party shall have the right, upon written notice to the other party, to terminate this Purchase Agreement.
>
> Title exceptions, unless deleted herefrom, that would be not be deemed to materially interfere with purchaser's use and enjoyment of the Real Estate are as follows:
>
> 1) Taxes not delinquent * * *.

Ex. 4, p. 2, attached to the Affidavit of George Dimitrouleas, which, in turn, is attached as Exhibit A to Defendant's Motion for Summary Judgment, Doc. # 18 (March 17, 2010 Purchase Agreement, hereafter referred to as "Ex. 4.").

{¶ 8} The Purchase Agreement further stated that Dimitrouleas would give Lone Star reasonable written documentation within 10 days after accepting the offer to purchase, including the most recent year's property tax information, if any, and an existing title report, if such information were available. Ex. 4, p. 3. With respect to

taxes, the agreement additionally stated that:

> 10. Taxes: All installments of real estate taxes, and any other assessments against the Property, that are due and owing prior to Closing shall be paid by Seller regardless if the tenant reimburses Seller for same. The taxes and any other assessments assessed for the current year shall be prorated between Seller and Purchaser on a calendar year basis as of the closing date.

Ex.. 4, p. 5.

{¶ 9} Section 16 of the agreement also provided, in pertinent part, as follows:

> 16. Representations and Warranties: Purchaser acknowledges that neither the Seller, any affiliate of the Seller, nor any of their respective shareholders, partners, members, officers, directors, employees, contractors, agents, attorneys, or other representatives (collectively "Seller Related Parties") have made any verbal or written representations, warranties, promises, or guarantees whatsoever to Purchaser, except as herein specifically set forth.
>
> * * *
>
> (c) Except for the agreements of Seller and Purchaser set forth in the Closing documents or otherwise entered into at or prior to the Closing, Purchaser agrees that Purchaser's acceptance of the Deed shall be an agreement by Purchaser that Seller has fully performed, discharged and complied with all of Seller's obligations, covenants, and agreements hereunder and that Seller has no further

liability with respect thereto, with the exception of any claim for fraud or misrepresentation on the part of Seller arising out of any written statements or representations made by Seller.

* * *

(e) The provisions of this Section shall survive the Closing or any termination of this Agreement.

Ex. 4, pp. 5-6.

{¶ 10} Finally, the agreement contained the following additional terms:

19. Additional Terms: The parties further agree as follows, to wit:

* * *

(c) As a material inducement to Purchaser for entering into this Purchase Agreement, Seller hereby covenants, warrants and represents to Purchaser that to the best of Seller's knowledge, Seller has not received any notice of, nor does it have any actual knowledge of:

* * *

(ii) Any existing or threatened condemnation or other legal action of any kind affecting the Property.

* * *

(d) As a material inducement to Purchaser for entry into this Purchase Agreement, Seller further hereby covenants, warrants and represents that:

(i) Seller owns good, marketable and indefeasible fee

> simple title of the Property, subject only to the lien of current, non-delinquent real estate taxes and subject to no easements or other encumbrances that would interfere with the use of the Property for Purchaser's use * * *.

Ex. 4, p. 8.

{¶ 11} On January 24, 2011, Dimitrouleas also signed an affidavit in anticipation of closing, which stated that:

> The undersigned seller * * * deposes and makes the following statements for the express purposes of inducing Louis Wiener * * * to purchase the following property ("the Premises") * * *
>
> 1927, 1933, 1939 & 1945 Needmore Road, Dayton Ohio 45414
>
> 1. All taxes, assessments or other charges now a lien against the Premises are shown on the Treasurer's duplicate, and no improvements (site or area) have been installed by public authority, the costs of which may be assessed against the Premises. Seller has not been notified within the period of two years immediately preceding the date hereof of contemplated improvements (site or area) to the premises by public authority, the costs of which are to be assessed against the Premises in the future nor has any Seller any notice of condemnation or other exercise of the power of eminent domain. Seller represents that all bills for water and sewer charges issued prior to the date hereof for water and sewer services to the Premises have been fully paid.
>
> * * *

> 3. Seller has no knowledge of any encumbrances on title to the Premises (other than those set forth on the evidence of title provided to Buyer), nor does Seller have any knowledge of off-record or undisclosed legal or equitable interests in the Premises owned or claimed by any other person or entity, except the rights of tenants, if any, which have been fully disclosed to Buyer and to any title insurance company issuing title insurance in reliance thereon.

Ex. E attached to Notice of Filing of Defendant's Responses to Plaintiffs' Second Request for Admissions, Doc. #37.

{¶ 12} On January 24, 2011, Dimitrouleas also signed a General Warranty Deed conveying the property to Louis Wiener, "[s]ubject to all restrictions and easements of record affecting such premises, which are now in force. Excepting the June 2011 installment of taxes and assessments and all taxes and assessments thereafter, which grantee(s) herein assume and agree(s) to pay as part of the consideration hereof." Ex. 6, p. 2, attached to the Affidavit of George Dimitrouleas, which, in turn, is attached as Exhibit A to Defendant's Motion for Summary Judgment, Doc. # 18.

{¶ 13} The closing occurred on February 16, 2011. At that time, the Settlement Statement identified the property tax delinquency as $60,798.41. This was the delinquency reflected on the last tax duplicate, which showed the BOR decision in favor of Dimitrouleas, but did not show the appeal that had been taken to the BTA. At the closing, all the delinquent taxes were paid from the funds made available by the sale.

{¶ 14} Lone Star paid Defendant-Appellee, National, to provide a title abstract, and the results of the abstract, which did not show the pending appeal with the BTA, were

reflected in the closing statement. In addition, Lone Star paid Defendant-Appellee, First American, $5,872.50 for owner's coverage title insurance.

{¶ 15} Dimitrouleas never notified Lone Star or Wiener of the BTA appeal. The BTA held a hearing on the appeal in March 2012, more than a year after the closing on the property. Dimitrouleas did not attend the hearing. In late August 2012, the BTA issued a decision increasing the value of the property to the amount previously determined by the auditor, i.e., $1,849,250. The BTA concluded that Dimitrouleas had failed to meet his burden to prove his right to a reduction at the BOR hearing. Specifically, the BTA noted that although Dimitrouleas presented income and expense information at the BOR hearing, there was no comparison of the property's income and expenses to other properties in the market.

{¶ 16} After the BTA decision, the tax records for the property were adjusted, and an additional $33,947.65 in real estate taxes were due for time periods prior to the closing. After paying the taxes, Lone Star and Weiner filed a complaint against Dimitrouleas in May 2013, alleging breach of contract, breach of warranty, and fraud. The complaint sought $52,290.08 for the alleged delinquent property taxes.

{¶ 17} Dimitrouleas filed a motion for summary judgment on August 20, 2013. Shortly thereafter, Appellants filed an amended complaint, adding National and First American as parties, and adding claims of unjust enrichment (against Dimitrouleas), negligence (against National in connection with the title examination), and declaratory judgment (in connection with the title policy issued by First American).

{¶ 18} After Dimitrouleas filed an amended motion for summary judgment, the trial court granted judgment in his favor on December 19, 2013. Subsequently, Appellants

and the remaining parties filed cross-motions for summary judgment. In June 2014, the trial court granted National's and First American's motions for summary judgment and overruled Appellants' motions for summary judgment. After the trial court filed a final judgment entry in July 2014, this appeal followed.

II. Summary Judgment in Favor of Dimitrouleas

{¶ 19} Appellants' First Assignment of Error states that:

> The Trial Court Erred in Overruling Plaintiff-Appellants' Summary Judgment Motion and in Sustaining Defendant-Appellee George Dimitrouleas' Summary Judgment Motion.

{¶ 20} Under this assignment of error, Appellants make separate points about the breach of contract, breach of warranty, fraud, and unjust enrichment claims. We will address these matters separately.

A. Breach of Contract

{¶ 21} In connection with the alleged breach of contract, Appellants contend that $33,947.65 in taxes were due and owing prior to the closing by operation of law, and that Dimitrouleas breached the Purchase Agreement by failing to pay this amount. They also argue that his failure to do so violated an implied covenant of good faith and fair dealing.

{¶ 22} Before addressing this issue, we note that Dimitrouleas contends in his brief that we lack jurisdiction to hear this appeal. His argument is based on Appellants' failure to appeal from the trial court's December 19, 2013 summary judgment decision, which included a Civ.R. 54(B) certification. We previously overruled Dimitrouleas' motion to

dismiss, which was based on the same argument. *See Lone Star Equities, Inc. v. Dimitrouleas*, 2d Dist. Montgomery No. 26321 (Nov. 24, 2014). Dimitrouleas has asked us to revisit the issue.

{¶ 23} In the case before us, the trial court first inserted Civ.R. 54(B) language in its December 19, 2013 entry. The court then attempted to modify the order more than a month later, by filing an order striking the final appealable order language. Our prior decision concluded that the December 19, 2013 order was final, and that the trial court lacked jurisdiction to modify it. *Id.* at pp. 3-4. However, we also concluded that the appeal was timely because the entry lacked the required endorsement from the trial court directing the clerk to serve the parties with the judgment. *Id.* at p. 6.

{¶ 24} In addition, the record failed to reflect that the clerk had served the parties and had entered a notation on the docket. *Id.* at p. 6. We therefore, held that service was not complete and that the appeal time never began to run. *Id.* We also rejected Dimitrouleas' argument that the clerk had served the parties by email based on a notification that was automatically generated by the court's autonotification system. *Id.* In this regard, we stressed that the clerk failed to make a notation on the docket regarding service on any party. *Id.*

{¶ 25} As was noted, Dimitrouleas has asked us to revisit this issue, contending that the purpose of directing the clerk to make a notation of service on the docket is to provide evidence of service. Dimitrouleas contends that there is no dispute that actual service was completed within the three-day period in Civ.R. 58(B), and argues that this case is like *State ex rel. Hughes v. Celeste*, 67 Ohio St.3d 429, 619 N.E.2d 412 (1993), in which the Supreme Court of Ohio held that actual notice sufficed to start the Ohio

governor's appeal time due to the fact that a copy of a judgment had been delivered to the Ohio attorney general, who was counsel for the governor. *Id.* at 431. The court reached this conclusion, even though the clerk failed to serve notice of the judgment. *Id.* at 429.

{¶ 26} After we denied Dimitrouleas' motion to dismiss, the Supreme Court of Ohio overruled *Hughes*, and held that "[t]he 30–day time period to file a notice of appeal begins upon service of notice of the judgment and notation of service on the docket by the clerk of courts regardless of actual knowledge of the judgment by the parties." *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, syllabus. In view of this decision by the Supreme Court of Ohio, there would be no basis upon which to reconsider our prior decision, and we decline to do so.

{¶ 27} Turning now to the argument on the merits, the trial court held that the delivery and acceptance of the deed without qualification merged the purchase agreement with the deed, eliminated a separate cause of action on the contract, and limited Appellants to the express covenants in the deed. In view of this holding, the trial court also held that it could not consider Appellants' contractual bad faith claim.

{¶ 28} Regarding summary judgment, "[a] trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." (Citation omitted.) *Smith v. Five Rivers MetroParks*, 134 Ohio App.3d 754, 760, 732 N.E.2d 422 (2d Dist.1999). "We review decisions granting summary judgment de

novo, which means that we apply the same standards as the trial court." (Citations omitted.) *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 2007-Ohio-2722, 873 N.E.2d 345, ¶ 16 (2d Dist.).

{¶ 29} In *37 Robinwood Assoc. v. Health Industries, Inc.*, 47 Ohio App.3d 156, 547 N.E.2d 1019 (10th Dist.1988), the Tenth District Court of Appeals noted that:

> The doctrine of "merger by deed" holds that whenever a deed is delivered and accepted "without qualification" pursuant to a sales contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exists. The purchaser is limited to the express covenants of the deed only. *See*, generally, 80 Ohio Jurisprudence 3d (1988) 91, 93, Real Property Sales and Exchanges, Sections 58-59; *Brumbaugh v. Chapman* (1887), 45 Ohio St. 368, 13 N.E. 584; *Fuller v. Drenberg* (1965), 3 Ohio St.2d 109, 32 O.O.2d 91, 209 N.E.2d 417, paragraph one of the syllabus. Cf. *Dillahunty v. Keystone Savings Assn*. (1973), 36 Ohio App.2d 135, 65 O.O.2d 157, 303 N.E.2d 750. The doctrine has been applied to disputes over the allocation of real estate taxes as a result of a purchase and sale. *Wolfe v. Eckert* (1909), 9 Ohio N.P. (N.S.) 109, 21 Ohio Dec. 753.

Id. at 157-158.

{¶ 30} In *Robinwood*, a conflict existed between the parties' option agreement, which called for proration of relevant property taxes, and the warranty deed, which "conveyed the property '[s]ubject to taxes * * * now a lien * * *.' " *Id.* at 158. The court of appeals concluded that this language was clear and unambiguous, and that once

accepted, the deed obligated the purchaser to pay the taxes. *Id.*

{¶ 31} As was noted above, the General Warranty Deed conveyed the property to Louis Wiener, "[s]ubject to all restrictions and easements of record affecting such premises, which are now in force. Excepting the June 2011 installment of taxes and assessments and all taxes and assessments thereafter, which grantee(s) herein assume and agree(s) to pay as part of the consideration hereof." Ex. 6, p. 2, attached to the Affidavit of George Dimitrouleas, which, in turn, is attached as Exhibit A to Defendant's Motion for Summary Judgment, Doc. # 18.

{¶ 32} Based on the above authority, the Purchase Agreement would have merged with the deed, and Wiener would have been obligated to pay any taxes payable after the closing. The Purchase Agreement, however, provided in Section 16(e) that the provisions of Section 16 would survive the closing.

{¶ 33} Section 16 states that the Seller had not made any verbal or written representations to the Seller, other than those that would be specifically set forth. Among the representations set forth are those in Section 16(c), which states that:

> Except for the agreements of Seller and Purchaser set forth in the Closing documents or otherwise entered into at or prior to the Closing, Purchaser agrees that Purchaser's acceptance of the Deed shall be an agreement by Purchaser that Seller has fully performed, discharged and complied with all of Seller's obligations, covenants, and agreements hereunder and that Seller has no further liability with respect thereto, with the exception of any claim for fraud or misrepresentation on the part of Seller arising out of any written statements or representations made by

Seller.

Ex. 4, p. 6.

{¶ 34} Appellants argue that in view of this provision, Dimitrouleas could be held responsible for agreements in the HUD-1 Settlement Statement, statements in his January 24, 2011 affidavit, and statements in the General Warranty Deed. Appellants do not argue that Dimitrouleas could be held responsible for the provisions in paragraph 19 of the deed, relating to the existence of pending "legal actions," nor could they properly make this argument, since the purchase agreement specifically states that the only representations that survive the closing are those in paragraph 16 – not paragraph 19.

{¶ 35} In this regard, Appellants first argue that the HUD statement listed only $60,798.41 as the property tax delinquency, when Dimitrouleas knew that this amount was not final. They also argue that Dimitrouleas stated in his affidavit that no off-record or undisclosed legal or equitable interests in the property existed, when he had knowledge of an off-record, undisclosed, and existing legal action by the county treasurer and school board. And finally, Appellants contend that Dimitrouleas made an untrue statement when he stated in the General Warranty Deed that the property was free from all encumbrances other than the June 11, 2011 taxes and assessments, and all taxes and assessments thereafter.

{¶ 36} In response, Dimitrouleas points out that when the pertinent documents were signed, the additional taxes ultimately assessed in 2012 were not "due and owing," nor were there any encumbrances on the property. Specifically, at that time, the decision of the BOR was in effect, and auditors are only required to make changes in their tax lists when a valuation decision eventually becomes final. In the case before us, that

did not occur until after the BTA decision in August 2012.

{¶ 37} The trial court did not address this issue when it ruled on the contract claim. However, in discussing the breach of warranty claim, the trial court concluded that the remaining amounts due for taxes did not become due until after the property was sold, and that no lien had previously attached.

{¶ 38} As a preliminary matter, we reject the contention that the closing statement constituted a "representation" by Dimitrouleas. The closing statement was prepared by National, and Dimitrouleas did not participate in its preparation, nor did he give National information about the taxable amount due on the property.

{¶ 39} Furthermore, we reject Appellants' conflation of the terms "legal action" and "legal interest." In this regard, the January 24, 2011 affidavit states that "Seller does not have any knowledge of off-record or undisclosed *legal or equitable interests* in the Premises owned or claimed by any other person or entity * * *." (Emphasis added). Ex. E attached to Notice of Filing of Defendant's Responses to Plaintiffs' Second Request for Admissions, Doc. #37. However, a legal "interest" is not the same thing as a legal "action."

{¶ 40} In this regard, we note that R.C. 5715.19(A) permits complaints against valuation to be filed by persons owning taxable real property in the county. Under R.C. 5715.19(B), the auditor is to give notice of the complaint to each board of education whose school district may be affected. The board of education may then file a complaint in support of or objecting to the amount of the valuation, and will be made a party to the proceedings. *Id.* In addition, school districts may file actions with a board of revision, asking for an increase in property values to correspond with their opinion of the fair

market value of a property. *See, e.g*., *Dublin City School Dist. v. Franklin Cty. Bd. of Revision*, 79 Ohio App.3d 781, 607 N.E.2d 1170 (10th Dist.1992).

{¶ 41} However, the fact that a board of education may be a party to an action before the BOR or BTA does not mean that the board has a legal or equitable interest in the property. A "legal" interest in property is held by the person who holds title to the property. *Victoria Plaza Liab. Co. v. Cuyahoga Cty. Bd. of Revision*, 86 Ohio St.3d 181, 183, 712 N.E.2d 751 (1999). Further, an equitable or "beneficial" interest in property would include " 'the interest of one who is in possession of all characteristics of ownership other than legal title of the taxable property.' " *Id.* at 183, quoting *Refreshment Serv. Co. v. Lindley*, 67 Ohio St.2d 400, 403, 423 N.E.2d 1119 (1981). *Accord Gilman v. Hamilton Cty. Bd. of Revision*, 127 Ohio St.3d 154, 2010-Ohio-4992, 937 N.E.2d 109, ¶ 16.

{¶ 42} The idea of a legal or equitable interest does not include the status of a school board, which has no cognizable interest in the premises, even if the board, like many other governmental entities, may indirectly benefit from tax revenue that the property generates. Thus, the fact that Northridge was a party to the BOR and BTA actions does not mean that the school board had a legal or equitable interest in the premises involved in this case.

{¶ 43} However, even if we assume that the Board had a legal interest, any such representations would not be actionable on the basis of fraud, for reasons that will be discussed below, i.e., Appellants' lack of justifiable reliance.

{¶ 44} Finally, with respect to Appellants' contention that the taxes were an encumbrance, despite the fact that the warranty deed conveyed the property free of encumbrances, we note that Dimitrouleas conveyed the property subject to the

restrictions and easements of record, excepting the "June 2011 installment of taxes and assessments and all taxes and assessments thereafter," which the grantee, Louis Wiener, agreed to pay. Ex. 6, p. 2, attached to the Affidavit of George Dimitrouleas, which, in turn, is attached as Exhibit A to Defendant's Motion for Summary Judgment, Doc. # 18.

{¶ 45} "A covenant against encumbrances is breached as soon as [it is] made if an encumbrance in fact exists." *Stockman v. Yanesh*, 68 Ohio St.2d 63, 428 N.E.2d 417 (1981), syllabus. An encumbrance has been defined as:

> "Any right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee by conveyance. *Knudson v. Weeks*, D.C.Okl., 394 F.Supp. 963, 976. A claim, lien, charge, or liability attached to and binding real property; *e.g.* a mortgage; judgment lien; mechanics' lien; lease; security interest; easement or right of way; accrued and unpaid taxes. If the liability relates to a particular asset, the asset is encumbered."

Liddy v. Studio, 11th Dist. Geauga No. 96-G-2009, 1997 WL 184763, *3 (Apr. 11, 1997), quoting Black's Law Dictionary 527 (6th Ed.1991).

{¶ 46} As an example of such an encumbrance, the Eighth District Court of Appeals held that "an assessment not yet levied but merely proposed by way of a resolution of necessity does not become a lien at the time the resolution is passed, * * * and therefore would not violate a covenant of warranty against encumbrances made in a subsequent conveyance." (Citation omitted.) *Wells v. DuRoss*, 54 Ohio App.2d 50, 55, 374 N.E.2d 662 (8th Dist.1977).

{¶ 47} In the case before us, the trial court concluded that the taxes in question were not binding and did not attach as a lien at the time the property was sold. Therefore, the trial court held that the taxes were not an encumbrance when the property was sold. We agree with the trial court.

{¶ 48} Regarding tax liens, R.C. 323.11 provides that:

> The lien of the state for taxes levied for all purposes on the real and public utility tax list and duplicate for each year shall attach to all real property subject to such taxes on the first day of January, annually, or as provided in section 5727.06 of the Revised Code, and continue until such taxes, including any penalties, interest, or other charges accruing thereon, are paid.

{¶ 49} When a taxpayer has filed a complaint for valuation, the taxpayer is allowed to remit only the taxes that would be due based on the taxpayer's assessment of value in the complaint. R.C. 5715.19(D). Specifically, "[t]he treasurer shall accept any amount tendered as taxes or recoupment charge upon property concerning which a complaint is then pending, computed upon the claimed valuation as set forth in the complaint." *Id.* Once the BOR has reached a decision on valuation, it certifies the decision to the county auditor, who then corrects the tax list and duplicate "according to the deductions and additions ordered by the board * * * ." R.C. 5715.14.

{¶ 50} This is the procedure that occurred in the case before us, and the property taxes due as a result of the November 6, 2009 BOR decision were added to the tax duplicate when the BOR rendered its decision. The taxes, if any due, "attached" at that time as an encumbrance on the property, and would have been among the taxes that

were paid at the closing in February 2011.

{¶ 51} Appeals from the BOR may be taken to the BTA, as was done in this case. R.C. 5717.01. Once the BTA renders a decision, it is sent to the parties, as well as the county auditor of the county in which the property is located. R.C. 5717.03(B). Further appeal would then lie with the Supreme Court of Ohio, the court of appeals for the county where the property is situated, or the county in which the owner resides. R.C. 5717.04. No further appeal was taken in this case from the decision of the BTA, and it became final when the time for further appeal had lapsed, or 30 days after the August 2012 BTA decision. *Id. See, also*, R.C. 5703.02(A) and (C). As was noted, the decision of the BTA restored the original valuation of the property and resulted in a tax increase.

{¶ 52} Under R.C. 5715.19(D):

> The determination of any such [valuation] complaint shall relate back to the date when the lien for taxes or recoupment charges for the current year attached or the date as of which liability for such year was determined. Liability for taxes and recoupment charges for such year and each succeeding year until the complaint is finally determined and for any penalty and interest for nonpayment thereof within the time required by law shall be based upon the determination, valuation, or assessment as finally determined.

R.C. 5715.19(D).

{¶ 53} Thus, when valuation was finally determined in August 2012, the decision related back to the taxable year and the taxes based on the final decision were then payable. The trial court concluded, however, that this "relation back" concept in R.C.

5715.19(D) does not mean that the taxes would have attached as a lien prior to the closing. We agree. The idea that taxes do not become an encumbrance or lien until valuation is finally decided and the taxes are entered on the tax duplicate is consistent with the view expressed in *Mason City School Dist. Bd. of Edn. v. Warren Cty. Bd. of Revision*, 138 Ohio St.3d 153, 2014-Ohio-104, 4 N.E.3d 1027.

{¶ 54} In *Mason*, the current owner of property appealed to the Supreme Court of Ohio from a BTA decision, but failed to serve the former property owner with its notice of appeal. *Id.* at ¶ 9-11. The Supreme Court of Ohio concluded that this was not a jurisdictional failure because the current owner had "the primary and substantial interest in the valuation proceeding." *Id.* at ¶ 23 In this regard, the court stressed that "[i]t is the current owner's interest in the property that is subject to the tax lien imposed by R.C. 323.11. To protect its title against foreclosure of the lien, [the new owner] will necessarily have to cover any additional taxes that accrue as a result of the BTA's reversing the BOR. Moreover, if [the new owner's] allegation that the county actually gave [the former owner] a refund based on the BOR decision is true, it is likely that [the new owner] may be held responsible for that amount if the BTA's decision is sustained." (Emphasis added.) *Id*. at ¶ 23.

{¶ 55} Accordingly, it is clear that the tax lien does not attach and become an encumbrance on property until the time that a final determination of valuation is made, and the current property owner, not the former owner, will be responsible for the taxes that have attached.

{¶ 56} Based on the above discussion, we conclude that the trial court did not err in rendering summary judgment in favor of Dimitrouleas on the contract claims. The

purchase agreement merged with the deed, and to the extent that the purchase agreement excepted certain representations from merger, the statements in question are not actionable representations. Further, the taxes assessed in August 2012 did not constitute encumbrances on the property at the time of the closing, and, therefore, did not violate the representation that the property was free of encumbrances.

B. Breach of Warranty

{¶ 57} In connection with this issue, Appellants contend that the General Warranty Deed promised that the premises were unencumbered by any tax lien, and that the tax liability at issue accrued before the closing. We have previously considered this point in detail in connection with our discussion of the breach of contract claims, and find Appellants' position without merit.

C. Fraud

{¶ 58} Appellants' next argument concerning the summary judgment granted to Dimitrouleas is that Dimitrouleas committed fraud by failing to disclose the existence of the pending BTA appeal.

{¶ 59} A claim for fraud has the following elements:

> (1) a representation (or concealment of a fact when there is a duty to disclose) (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance, and (6)

resulting injury proximately caused by the reliance.

Volbers-Klarich v. Middletown Mgt., Inc., 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 27, citing *Burr v. Stark Cty. Bd. of Commrs*., 23 Ohio St.3d 69, 73, 491 N.E.2d 1101 (1986).

{¶ 60} In arguing that Dimitrouleas committed fraud, Appellants point to his statement in paragraph 19 of the purchase agreement that he knew of no pending legal action affecting the property, and his concealment of the fact that he knew of a pending tax appeal and had an obligation to disclose it. The trial court concluded that summary judgment was warranted on the fraud claim because Appellants had the duty to research public records, and had no right to rely on any representations by Dimitrouleas.

{¶ 61} "An action for fraud may be grounded upon failure to fully disclose facts of a material nature where there exists a duty to speak." (Citation omitted.) *Layman v. Binns*, 35 Ohio St.3d 176, 178, 519 N.E.2d 642, 644 (1988). Thus, "a vendor has a duty to disclose material facts which are latent, not readily observable or discoverable through a purchaser's reasonable inspection." (Citations omitted.) *Id.* The duty does not extend, however, to defects that can be discovered upon inspection. *Id.*

{¶ 62} We noted in *LaSalle Bank Natl. Assn. v. Brown*, 2014-Ohio-3261, 17 N.E.3d 81 (2d Dist.), that:

> Although * * * [caveat emptor] is typically applied to physical conditions of a property, courts have also held that a party has no right to rely on alleged oral misrepresentations regarding the status of a property's title, where the title to the property is of public record. *See Finomore v. Epstein*, 18 Ohio App.3d 88, 91, 481 N.E.2d 1193 (8th Dist.1984) (holding

> that "[s]ince all of the adversities regarding title to the properties were of public record and therefore easily discoverable, appellee had no right to rely upon any alleged oral misrepresentations").

Id. at ¶ 45.

{¶ 63} The *Mason* case involves facts somewhat similar to those of the case before us. In *Mason*, a property owner had obtained a reduction in valuation at the BOR, but did not appear at a subsequent BTA hearing because he had surrendered title to the property in lieu of foreclosure. *Mason*, 138 Ohio St.3d 153, 2014-Ohio-104, 4 N.E.3d 1027, at ¶ 4-5. After the BTA hearing, but before the BTA had rendered its decision, another party, Squire Hill, acquired the property. *Id.* at ¶ 8.

{¶ 64} When the BTA increased the value of the property to the amount that the appealing party, a school board, had requested, the new owner, Squire Hill, then entered the case and appealed to the Supreme Court of Ohio. *Id.* at ¶ 7-8. As was previously noted, the Supreme Court of Ohio rejected the school board's argument that the appeal should be dismissed because Squire Hill failed to serve the notice of appeal on the former owner. *Id.* at ¶ 12-15.

{¶ 65} However, the Supreme Court of Ohio also rejected two arguments being made by the new owner. First, the court concluded that the BTA had no statutory duty to give Squire Hill notice of its proceedings. *Id*. at ¶ 33-37. In addition, the court concluded that Squire Hill had waived its constitutional due process claim. In this regard, the court stressed that:

> Squire Hill alludes to, but does not develop, an argument that constitutional due process required that it receive notice from the BTA.

> Squire Hill cites absolutely no authority to support that theory – as indicated, the cases cited involve statutory due process, and no statute requires what Squire Hill demands. The absence of authority and argumentation based on constitutional case law constitutes, all by itself, grounds for rejecting the due-process argument. * * * .
>
> It was particularly important to present a developed argument in this case, given that Squire Hill held no interest in the property at the time the BTA held its hearing. *Any injury Squire Hill has suffered would have arisen from its own lack of diligence as a purchaser to inquire into the status of tax proceedings. The BOR and BTA proceedings are matters of public record, and Squire Hill could have entered an appearance and even intervened at the BTA had it inquired into the status of the case and elected to make such a filing.*

(Emphasis added). *Mason* at ¶ 38 -39.

{¶ 66} Similarly, in the case before us, any injury that Appellants suffered was caused by their lack of diligence. Even if we assumed that Dimitrouleas falsely or recklessly misrepresented facts about the existence of a pending legal action, Appellants could not have justifiably relied on his representations, because the BOR and BTA proceedings are matters of public record. Appellants had the ability, therefore, to discover the status of any tax proceedings, but failed to do so.

{¶ 67} Furthermore, as will be discussed below, Appellants could not justifiably rely on these representations, even though they hired National to conduct a title examination. As we will discuss below, National presented affidavits from title

examiners indicating that the existence of BTA proceedings is not within the purview of what is done in connection with title abstracts. Appellants could have presented affidavits below to controvert this statement, but failed to do so. Moreover, while the end result may seem inequitable, it is no more inequitable than the result in *Mason* may have seemed to the aggrieved party. In this regard, we stress that Appellants could have checked the public records of the BTA, either on their own or through legal counsel, particularly since they did have notice of the prior decision of the BOR, and BTA proceedings are available to the public.

{¶ 68} Accordingly, the trial court did not err in rendering summary judgment in favor of Dimitrouleas on the fraud claim.

D. Unjust Enrichment

{¶ 69} Appellants' final argument is that they should be permitted to recover under a theory of unjust enrichment. "In Ohio, unjust enrichment is a claim under quasi-contract law against a person in receipt of benefits that he is not justly and equitably entitled to retain." *Crawford v. Hawes*, 2013-Ohio-3173, 995 N.E.2d 966, ¶ 34 (2d Dist.), citing *Hummel v. Hummel*, 133 Ohio St. 520, 527, 14 N.E.2d 923 (1938). "A quasi contract is not the result of a meeting of the minds but is implied and imponed [sic] by law without the consent of the obligor to prevent the obligor from enjoying benefits which in equity and good conscience he is not entitled to retain." *Hughes v. Oberholtzer*, 162 Ohio St. 330, 123 N.E.2d 393, paragraph one of the syllabus.

{¶ 70} "The elements of an unjust enrichment claim are as follows: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit;

and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (i.e., the 'unjust enrichment' element)." *Crawford* at ¶ 24, citing *L & H Leasing Co. v. Dutton*, 82 Ohio App.3d 528, 534, 612 N.E.2d 787 (3d Dist.1992). (Other citation omitted.)

{¶ 71} As a general rule, an express agreement and an implied contract, such as one which would be raised under a quasi-contract/unjust enrichment theory, cannot exist in connection with the same thing at the same time. *Hughes* at 335. (Citations omitted.) An exception can apply, however, where fraud, bad faith, or illegality exists. *See, e.g., CosmetiCredit, L.L.C. v. World Fin. Network Natl. Bank,* 2014-Ohio-5301 24 N.E.3d 762, ¶ 42 (10th Dist.); *Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 176 Ohio App.3d 54, 2008-Ohio-1490, 889 N.E.2d 1066, ¶ 27 (3d Dist.); and *Acquisition Servs., Inc. v. Zeller*, 2d Dist. Montgomery No. 25486, 2013-Ohio-3455, ¶ 33.

{¶ 72} In the case before us, an express agreement existed, and Appellants would not be able to recover under quasi-contract or unjust enrichment. To the extent that Appellants have asserted fraud, Appellants cannot rely on that theory, because they had the ability to search the public records of the BTA, but failed to do so. As a result, the trial court did not err in rejecting Appellants' unjust enrichment claims.

{¶ 73} Based on the preceding discussion, the trial court did not err in rendering summary judgment in favor of Dimitrouleas. Accordingly, the First Assignment of Error is overruled.

III. Summary Judgment in Favor of National

{¶ 74} Appellants' Second Assignment of Error states that:

> The Trial Court Erred in Overruling Plaintiff-Appellants' Summary Judgment Motion and in Sustaining Defendant-Appellee National Title Company's Summary Judgment Motion.

{¶ 75} Under this assignment of error, Appellants contend that National was negligent in examining the public records pertaining to the property and should be liable for damages caused by the tax increase. Again, the same summary judgment standards apply to the claims against National.

{¶ 76} " '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.' " *Cedar Dev., Inc. v. Exchange Place Title Agency, Inc.*, 149 Ohio App.3d 588, 2002-Ohio-5545, 778 N.E.2d 136, ¶ 14 (9th Dist.), quoting *Thomas v. Guarantee Title & Trust Co*., 81 Ohio St. 432, 91 N.E. 183 (1910), paragraph one of the syllabus.

{¶ 77} In the case before us, Appellants hired National to perform a title examination, and were therefore, entitled to assert negligence claims against National. " '[T]here [arises] a duty recognized in every contract that each party will fulfill his obligations with care, skill, and faithfulness.' " *Thompson v. Germantown Cemetery*, 188 Ohio App.3d 132, 2010-Ohio-1920, 934 N.E.2d 956, ¶ 10 (2d Dist.), quoting *Wagenheim v. Alexander Grant & Co*., 19 Ohio App.3d 7, 14, 482 N.E.2d 955 (10th Dist.1983). "For a breach of that duty, a person injured as a proximate result has a right of action based on the contractor's failure to exercise due care in the performance of his assumed

obligation." (Citation omitted.) *Hubbell v. Xenia*, 175 Ohio App.3d 99, 2008-Ohio-490, 885 N.E.2d 290, ¶ 25 (2d Dist.).

{¶ 78} Section 4(a) of the purchase agreement conditioned Appellants' obligation to pay upon evidence of title. It also permitted Appellants to purchase an abstract and title insurance in the amount of the purchase price, and to object in writing within 10 days to any title exceptions. If the objections were unresolved within 10 days, either side could terminate the agreement.

{¶ 79} Under the exceptions not deemed material were taxes that were not delinquent. The trial court concluded that any taxes that did not appear on the tax duplicate as unpaid would not be delinquent. Furthermore, although there were delinquent taxes, all such certified delinquent taxes were paid at the time of closing.

{¶ 80} For the reasons previously discussed, we agree with the trial court. The later taxes that resulted from the BTA appeal were not delinquent at the time of the abstract or closing, and would not have been proper title exceptions when National examined the title.

{¶ 81} The trial court also concluded that even though Appellants had a duty to check the public records with regard to the property they were buying, that did not mean that National violated the acceptable standards of a title search. In this regard, the trial court focused on the fact that the purchase agreement did not dictate what title standards should be used. The court also stressed that Appellants failed to refute the fact that National's actions complied with the Ohio State Bar Association Title Standards. After examining the record, we agree with the trial court.

{¶ 82} As an initial matter, there is no dispute that National was aware, before

closing, of the BOR decision on valuation in favor of Dimitrouleas. There is also no dispute that when National examined the title, the records of the Montgomery County Treasurer and the Montgomery County Auditor failed to contain any information about the further appeal that had been made to the BTA.

{¶ 83} Affidavits submitted to the trial court by National indicate that title examiners have a duty to report the current status of real estate taxes and assessments as they appear on the most recent tax duplicate of the office of the county treasurer. However, Ohio State Bar Association Title Standards except special taxes and assessments not shown on the county treasurer's public access records. In addition, the undisputed evidence indicates that although matters set forth in BOR and BTA proceedings are considered public records, they are not considered public records for purposes of performing title examinations and reporting the status of title. *See* Doc. #63, Affidavit of Arthur Millonig, ¶ 5-8, and Doc. #64, Affidavit of James Hedrick, ¶ 5-8.

{¶ 84} As was noted, Appellants failed to submit evidence challenging the above facts. Appellants could have submitted evidence indicating that the title examiner was negligent by failing to check the BTA records. However, they failed to do so. As a result, we conclude that the trial court properly rendered summary judgment on behalf of National. Based on the undisputed evidence, National did not deviate from accepted standards of care when examining the title, and it is not liable for any failure to discover the pending action before the BTA.

{¶ 85} Accordingly, the Second Assignment of Error is overruled.

IV. Summary Judgment in Favor of First American

{¶ 86} Appellants' Third Assignment of Error states that:

> The Trial Court Erred in Overruling Plaintiff-Appellants' Summary Judgment Motion and in Sustaining Defendant-Appellee First American Title Insurance Company's Summary Judgment Motion.

{¶ 87} Under this assignment of error, Appellants contend that the $33,947.65 tax delinquency is a covered risk under First American's policy because it is both a lien and an encumbrance.

{¶ 88} In responding to this assignment of error, First American initially contends that we lack jurisdiction over the appeal because Appellants failed to appeal within 30 days from the June 4, 2014 trial court entry granting summary judgment. Instead, Appellants filed a notice of appeal on July 22, 2014. This was within 30 days after the trial court's final judgment entry, which was filed on July 18, 2014.

{¶ 89} According to First American, the trial court's grant of summary judgment to both National and First American mooted their pending cross-claims against Dimitrouleas, and resolved all pending claims, given the summary judgment that had already been entered in favor of Dimitrouleas on Appellants' claims. First American, therefore, argues that Appellants should have appealed from the trial court's initial entry on June 4, 2014.

{¶ 90} We will consider this issue prior to ruling on the assignment of error, because subject matter jurisdiction may be challenged at any time. *Brown*, 2014-Ohio-3261, 17 N.E.3d 81, at ¶ 62 (2d Dist.), citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11-12.

{¶ 91} With respect to trial court judgments, Civ.R. 58(A)(1) provides that:

> Subject to the provisions of Rule 54(B), * * * upon a decision announced, * * * the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it upon the journal. A judgment is effective only when entered by the clerk upon the journal.

{¶ 92} Civ. R. 54(B) states that where there are multiple claims or multiple parties, the trial court "may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay."

{¶ 93} Consistent with these rules, the trial court first filed its decision and then filed a judgment entry that contained a Civ.R. 54(B) certification, which was not included in the first decision. Whether or not the first entry may have mooted the remaining claims in the case, a Civ.R.54(B) determination is necessary so the court of appeals can "be assured it is correctly and completely informed of the trial court's judgment or other order from which an appeal is being taken." *Brackmann Communications, Inc. v. Ritter*, 38 Ohio App.3d 107, 109, 526 N.E.2d 823 (12th Dist.1987). *See, also, Reid v. Wallaby's Inc*., 2d Dist. Greene No. 2011-CA-36, 2012-Ohio-1437, ¶ 23, and *McKay v. Promex Midwest Corp*., 2d Dist. Montgomery No. 20112, 2004-Ohio-3576, ¶ 20 (both noting the appropriate requirements for final orders). Accordingly, First American's argument about our lack of jurisdiction is without merit.

{¶ 94} Turning now to the merits, we note that First American issued an Owner's Policy of Title Insurance to Louis Wiener, with an effective date of February 25, 2011. Among the covered risks under the policy are:

> (2) Any defect in lien or encumbrance on the Title. This covered

risk includes but is not limited to insurance against loss from

* * *

(b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority, due or payable, but unpaid.

First American Title Insurance Company, Inc.'s Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, Doc. #60, Ex. A, p.1.

{¶ 95} Schedule B of the First American policy also contains exceptions from coverage, which include "[t]he lien of real estate taxes or assessments imposed on the title by a governmental authority that are not shown as existing liens in the records of any taxing authority that levies taxes or assessments on real property or in the public records." *Id.* at p. 9 (Schedule B, Part I, No. 5).

{¶ 96} "A title insurance policy is a contract between the insured and insurer." (Citations omitted.) *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Quaranta*, 7th Dist. Mahoning No. 01 CA 60, 2002-Ohio-1540, ¶ 30. "Construction of a title insurance policy is a matter of law. * * * Therefore, a court must look at the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Id.*, citing *Chicago Title Ins. Co. v. Huntington Natl. Bank*, 87 Ohio St.3d 270, 273, 719 N.E.2d 955 (1999). (Other citation omitted.)

{¶ 97} In the case before us, the language in the insurance policy is plain. Appellants' argument for coverage is that the later-assessed taxes attached as a lien or encumbrance as of the time the property was sold, and would have been covered under the policy. For the reasons previously discussed, we reject Appellants' position. When

the title insurance policy became effective, there were no unpaid taxes due and owing, and there were no liens that were not shown as existing liens in the records of the Montgomery County taxing authorities.

{¶ 98} Accordingly, the Third Assignment of Error is without merit and is overruled.

V. Conclusion

{¶ 99} All of Appellants' assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

HALL, J., concurs.

FROELICH, P.J., concurring in part and dissenting in part:

{¶ 100} I dissent from the majority's conclusion that summary judgment on the fraud claim should be sustained. There is at least a genuine issue of material fact that Dimitrouleas affirmatively misrepresented his knowledge of the pending "legal action" with the BTA; likewise, there is a genuine issue of material fact as to whether Appellant could have justifiably relied on these representations despite that this misrepresentation could have been determined by researching the BOR and BTA proceedings.

{¶ 101} This is indirectly underscored by National Title's position that BOR and BTA proceedings are not considered public records for performing title examinations and

reporting the status of title; i.e., we are seemingly holding that Appellant should have known, but not the insurance company paid to research the title.

{¶ 102} At the same time, based on Civ.R. 56, I agree with sustaining the summary judgment in favor of National Title. It submitted evidentiary material tending to show that it had no duty to search or discover the BOR and BTA proceedings. This shifted the burden to the buyer to respond with evidentiary materials or to give the trial court no choice but to accept the movant's, National Title's, position.

{¶ 103} I also agree that the trial court did not err in granting the summary judgment motion of First American.

. . . . . .

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