[Cite as *First Fed. Bank of the Midwest v. Laskey*, 2011-Ohio-1395.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

First Federal Bank of the Midwest	Court of Appeals Nos. WD-10-028 WD-10-046
Appellee	WD-10-055
v.	Trial Court No. 2008 CV 0817
John A. Laskey, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: March 25, 2011

* * * * *

J. Mark Trimble and David C. Bruhl, for appellee.

Marvin A. Robon and Larry E. Yunker, III, for appellants.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from a judgment of the Wood County Court of Common Pleas. The facts salient to our determination of this appeal are as follows[1].

[1]There were other parties in this case at the trial court level; however, these entities are not parties to this appeal. We shall, therefore, not set forth the facts relevant to those parties or address any issues raised by those parties in the court below.

{¶ 2} Beginning in 2004, appellants, John A. Laskey, Thomas R. Taylor, and their company, Old Granite Development Limited ("Old Granite"), engaged in the development of three housing subdivisions. One of these subdivisions, known as Rocky Ridge, is located in Lucas County, Ohio. The other two subdivisions, Birch Hollow and Cambridge, are in Wood County, Ohio. In order to finance the development of these projects, appellants executed a series of promissory notes, commercial guarantees, and change in term agreements with appellee, First Federal Bank of the Midwest. Each of these financial agreements contained cognovit note terms, which read:

{¶ 3} "**WARNING-BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.**"

{¶ 4} In addition, each promissory note contains a confession of judgment, explaining the rights that Old Granite was surrendering due to the execution of those notes. Furthermore, each commercial guarantee executed by John A. Laskey and Thomas Taylor contains the same confession of judgment. The promissory notes and guarantees were secured by mortgages on the subject properties. Appellants subsequently defaulted on all of the promissory notes and guarantees.

{¶ 5} On February 8, 2008, appellants and appellee entered into a settlement agreement. Under the terms of this agreement, appellants were to transfer good title of all unsold lots in the Birch Hollow and Rocky Ridge subdivisions to appellee. In return, the bank promised that, upon receipt of all clear title deeds to all of said lots, it would release appellants from their loan obligations. As of February 6, 2008, appellants owed appellee almost $3,000,000.

{¶ 6} Two months later the Treasurer of Wood County instituted separate tax foreclosure actions on fifteen of the lots that served as collateral for appellants' original loans. Even though over $30,000 in mechanic's liens were placed on properties in the Birch Hollow subdivision, appellee did agree to accept title to these properties. Mechanic's liens were also placed upon the properties in the Rocky Ridge subdivision. It is undisputed that appellants failed to provide clear title deeds of all of the unsold lots in the two subdivisions to appellee.

{¶ 7} On August 22, 2008, appellee commenced the present action, asserting that appellants failed to pay on the promissory notes and guarantees. Therefore, the bank sought damages in the amount of $2,285,999, plus $322,857 in accrued interest and fees, costs, and expenses. The bank's complaint also requested foreclosure on the mortgaged properties in the Cambridge and Birch Hollow subdivisions. Appellants filed a timely answer and asserted a number of counterclaims including a claim for unjust enrichment, which was dismissed by the trial judge, and, subsequently, a supplemental counterclaim based upon detrimental reliance.

{¶ 8} On December 15, 2009, appellee filed a motion for confession of judgments on the promissory notes, commercial guarantees and mortgages that were the subject of its complaint in foreclosure. Appellants filed a memorandum in opposition. On February 9, 2010, the trial court entered a judgment in favor of appellee ordering appellants to pay the amounts owed on the promissory notes, commercial guarantees, and mortgages that were the subject of the bank's foreclosure action, plus costs, within three days of its decision. If payment was not made within this time period, the court held that the properties that were the subject of the foreclosure action would be sold.

{¶ 9} On May 7, 2010, the common pleas court granted the bank's motion for summary judgment on appellants' supplemental counterclaims. A sheriff's sale of the property was held on June 17, 2010. Although appellants received notice of the sheriff's sale from a third party defendant/judgment creditor, Bank of New York Mellon,[2] which foreclosed on John Laskey's residential property, it is undisputed that the only notice provided to appellants of the sheriff's sale of the property obtained by the foreclosure proceeding instituted by appellee was by means of publication. On June 17, 2010, Laskey asked the trial court to deny the "confirmation of sheriff's sale of his residence on River Road." On August 9, 2010, the trial court confirmed the sale of Laskey's residence and distributed those funds received as a result of the sale. Appellants appeal from three judgments entered by the trial court. They set forth the following "issues for review:"

[2]Bank of New York Mellon subsequently assigned its interest in Laskey's property to Fifth Third Mortgage Company.

{¶ 10} "1. Whether the court below erred when it concluded that the Settlement Agreement between Plaintiff bank and Defendant [sic] failed as a matter of law as an affirmative defense because performance of the terms of the Settlement Agreement had not yet been completely performed.

{¶ 11} "2. Whether the court erred when, presented with contradicting affidavits and evidence regarding the Settlement Agreement, the court decided the factual issues of whether a Settlement Agreement was breached and who breached the Settlement Agreement without holding a hearing.

{¶ 12} "3. Whether the court below erred when it accepted a confession of judgment entered by Plaintiff's agent in favor of Plaintiff bank even though performance had been suspended by an executory accord.

{¶ 13} "4. Whether the court below erred when it accepted a confession of judgment entered by Plaintiff's agent in favor of Plaintiff bank more than a year after the commencement of a lawsuit in which an Answer containing affirmative defenses along with a counterclaim had been filed and the same subject matter was being litigated.

{¶ 14} "5. Whether the court below erred when it entirely discounted the Defendants' detrimental reliance upon the lending commitments and representations of Plaintiff Bank despite evidence of such representations and evidence of Defendant's [sic] change in position."

{¶ 15} "6. Whether the court below erred when it dismissed Defendants' counterclaims for unjust enrichment given the bank was financially enriched by the

partial performance of the Settlement Agreement and there is evidence that the bank reneged and/or prevented complete performance thereof.

{¶ 16} "7. Whether the court erred in validating the sheriff's sale in which the mortgage holder who is foreclosing failed to provide notice either to the borrower to the borrower's counsel pursuant to Ohio Revised Code 2329.26."

{¶ 17} Because the trial court granted appellee's motions for summary judgment with regard to the issues raised in appellants' Assignments of Error 1 through 6, our review of those assignments of error is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment should be granted to the moving party "when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293.

{¶ 18} In their first assignment of error, appellants contend that because the trial court described the settlement agreement between the parties as an "accord executory," and then supplied the outdated definition of this term, it erred in finding that it could not be used by appellants as an affirmative defense.

{¶ 19} Citing *BancOhio Nat'l Bank v. Abbey Lane Ltd.* (1984), 13 Ohio App.3d 446, 447, the court below defined an "accord executory" as "an agreement for the future discharge of an existing claim by a substituted performance." The judge then referred to *Frost v. Johnson* (1838), 8 Ohio 393, 394, to hold that an accord or an agreement must be fully satisfied, not merely executory, to form a defense. According to appellants, "more recent law and treatise writings on accords executory hold that the original duty for which an accord is to address, is suspended" if the debtor has not committed any breach of that agreement. Appellants therefore claim that because the agreement did not set forth any time constraints for the delivery of the deeds to appellee and they were in the process of complying with the terms of the agreement by continuing in the transfer of title to all of the unsold properties in the Birch Hollow and Rocky Ridge subdivisions to appellee, they were not in breach of that agreement at the time that the bank filed its complaint in foreclosure. Appellants therefore argue that they could employ that agreement as a defense.

{¶ 20} We agree with the trial court in finding that an "accord executory" is an agreement, i.e., contract, for the future discharge of an existing claim by a substituted performance. *BancOhio Nat'l Bank v. Abbey Lane Ltd.* at 447. (Citation omitted.) Under an accord executory, a debtor promises to discharge a debt by the "performance of a certain act, usually the deliverance of a lesser sum of money or some valuable object to the creditor, or the performance of some service." Id. at 447-448. See, also, Black's Law Dictionary (6th Ed. 1991) 11. Thus, the creditor does not give up his right to sue the

debtor for the full amount; "[r]ather, he wants possession of the money or object, or a performance of a service before discharging the debt." Id. Nonetheless, even though the accord executory does not immediately discharge the original duty, in this case, the debt owed by appellants to appellee, it is suspended unless there is a breach of the accord by the debtor. *Barnhouse v. Rollins Acceptance Corp.* (Dec. 16, 1987), 4th Dist. No. 393. Thus, in an instance where no such breach by the debtor occurs, the debtor may plead the executory accord as a defense. Id.

{¶ 21} Here, appellants argue that due to the fact that the accord executory in this cause sets forth no time limit in which they had to sign over the deeds to the unsold lots in Birch Hollow and Rocky Ridge, they did not abridge the accord and could raise this issue as an affirmative defense in the bank's action on the loans owed it by appellants. We disagree.

{¶ 22} When the performance period of a contract is undefined, the law implies a term assuming that the parties intended that performance take place within a reasonable time. *Lewis v. DR Sawmill Sales, Inc.*, 10th Dist. No. 04AP-1096, 2006-Ohio-1297, ¶ 18, citing *Stewart v. Herron* (1907), 77 Ohio St. 130, 147. What constitutes a reasonable time for performance is an issue of fact to be determined by the conditions and circumstances under which the parties executed their agreement and contemplated performance. *Miller v. Bealer* (1992), 80 Ohio App.3d 180, 182.

{¶ 23} In the case before us, appellants drafted the settlement agreement, leaving out any specific time for performance. Appellee filed its foreclosure action more than six

months after entering into that agreement. It is undisputed that appellants had not complied with the terms of the settlement agreement at that point in time, nor did they ever comply with those terms at any point during the proceedings below. Consequently, we find that the trial court did not err in granting summary judgment on this issue because no genuine issue of material fact exists on the question of whether appellants did breach the accord. Accordingly, appellants could not plead the executory accord in this case as a defense. Therefore, their first assignment of error is found not well-taken.

{¶ 24} In their second assignment of error, appellants contend that the trial court erred when it concluded that appellee did not breach the settlement agreement and that appellants did breach the settlement agreement. Appellants rest this argument on the fact that there was no set time for performance by appellants in the settlement agreement. We have already determined in appellants' first assignment of error that an implied period of reasonable time for the performance of the accord was part of this contract and that appellant did breach the terms of this contract by failing to timely comply with those terms by signing over the title to all of the unsold lots in Birch Hollow and Rocky Ridge. Therefore, appellants' second assignment of error is found without merit.

{¶ 25} Appellants' third assignment of error argues that the trial court erred when it accepted appellee's confession of judgment because the executory accord suspended their obligations under the promissory notes and guarantees given to appellee in exchange for loans. We must again find this argument without merit because appellants breached the accord by failing to comply with the accord within a reasonable time. Thus, third assignment of error is found not well-taken.

{¶ 26} In their fourth assignment of error, appellants assert that the trial court erred in accepting the bank's confessions of judgment because: (1) appellee's attorney did not file appellants' confessions of judgment until one year after appellants' answer; and (2) said filing violated appellants' rights to "fundamental due process" because appellee was required to request leave to file an amended complaint or, in the alternative, to dismiss its complaint under Civ.R. 41(A) and then "refile a new complaint alleging both a default and right to judgment upon the cognovit note(s)." Appellants cite to *Union Sav. Ass'n v. Home Owners Aid, Inc.* (1969) 18 Ohio App.2d 63 to support these propositions. Nonetheless, upon reading this case, we find that it does not stand for the propositions cited by appellant. Rather, the Eighth District Court of Appeals found that a defendant's attorney need not be physically in court when confessing judgment. Id. Instead, the *Union* court determined that, under certain conditions, the plaintiff's attorney can act as his or her agent. Id. Furthermore, there is nothing in the statutes, either R.C. 2323.13 or R.C. 2323.12, governing the confession of judgments to support appellants' allegations. In addition, R.C. 2323.12 provides, in material part, that the confessed judgment "shall operate as a release of errors." For all of these reasons, appellants' fourth assignment of error is found not well-taken.

{¶ 27} In their fifth assignment of error, appellants maintain the trial court erred in granting appellee's supplemental motion for summary judgment on their counterclaim alleging detrimental reliance.

{¶ 28} In the present case, appellants never filed their memorandum in opposition to appellee's motion for summary judgment until after the trial court granted appellee's motion for summary judgment on appellants' counterclaim of detrimental reliance. Specifically, the trial court's judgment was filed on the morning of May 7, 2010,[3] and appellant's memorandum in opposition was filed on the afternoon of May 7, 2010. Moreover, even though appellants argue that the trial court treated its counterclaim as one asserting promissory estoppel, the trial court, in granting the supplemental motion for summary judgment states: "Detrimental reliance is not a recognized independent cause of action." The trial court was correct. See *Complete Gen. Constr. Co. v. Kard Welding, Inc.*, 182 Ohio App.3d 119, 2009-Ohio-1861, ¶ 21. Consequently, appellants' fifth assignment of error is meritless.

{¶ 29} In their sixth assignment of error, appellants urge that the trial court erred in dismissing their counterclaims premised upon unjust enrichment because there was evidence that appellee "reneged and/or prevented complete performance" of the settlement agreement. As stated previously, it was appellants who breached the settlement agreement by failing to provide good title to the unsold lots in the Birch Hollow and Rocky Ridge subdivisions within a reasonable time. Contrary to appellants' arguments, there is no evidence in the record of this cause tending to demonstrate that the bank was *unjustly* enriched in any fashion as the result of the loans made to John A. Laskey, Thomas R. Taylor, and their company, Old Granite. Thus, the trial court did not

[3]The court's judgment was not journalized, however, until May 10, 2010.

err in granting summary judgment to appellee on this counterclaim, and appellants' sixth assignment of error is found not well-taken.

{¶ 30} Finally, in the seventh assignment of error, Laskey asserts that the trial court erred in validating the sheriff's sale of his residence because, as required by R.C. 2329.26, he did not receive actual notice of the sale from First Federal Bank of the Midwest. Appellee argues that the notice of a sheriff's sale of Laskey's residence filed by the attorney representing Fifth Third Mortgage Company was sufficient to satisfy this statute. While we do not agree, we find that this was harmless error pursuant to Civ.R. 61, which provides:

{¶ 31} "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

{¶ 32} R.C. 2329.26 states, in relevant part:

{¶ 33} "(A) Lands and tenements taken in execution shall not be sold until both of the following occur:

{¶ 34} "(1)(a) Except as otherwise provided in division (A)(1)(b) of this section, the judgment creditor who seeks the sale of the lands and tenements or the judgment creditor's attorney does both of the following:

{¶ 35} "(i) Causes a written notice of the date, time, and place of the sale to be served in accordance with divisions (A) and (B) of Civil Rule 5 upon the judgment debtor and upon each other party to the action in which the judgment giving rise to the execution was rendered;

{¶ 36} "(ii) At least seven calendar days prior to the date of sale, files with the clerk of court that rendered the judgment giving rise to the execution a copy of the written notice described in division (A)(1)(i) of this section with proof of service endorsed on the copy of the form described in division (D) of Civil Rule 5." R.C. 2327(B)(1) provides that the failure to comply with the notice requirements of R.C. 2329.26 "shall be set aside, on motion, by the court to which the execution is returnable."

{¶ 37} In applying R.C. 2329.26, the Supreme Court of Ohio held that "notice only by publication to a party to a foreclosure sale * * * is insufficient to satisfy due process when the address of that party * * * is known or easily ascertainable." *Central Trust Co., N.A. v. Jensen* (1993), 67 Ohio St.3d 140, syllabus. The *Jensen* court further held that notice made, at the least, "by mail is a constitutional prerequisite to a proceeding that adversely affects a property interest where the interest holder's address is known or easily ascertainable." Id. at 143. See, also, *Beneficial Ohio, Inc. v. Primero, L.L.C.*, 166 Ohio App. 3d 462, 2006-Ohio-1566, ¶ 7.

{¶ 38} Accordingly, we find that, as a judgment creditor seeking the sale of appellant's residence, First Federal Bank of the Midwest was required to serve Laskey with the notice of the date, time, and place of the sheriff's sale. It is undisputed that

appellee failed to provide any proper written notice of the sheriff's sale as to Laskey's residence. Nonetheless, Laskey was notified by Fifth Third Mortgage Company of the sheriff's sale of his residence to be held on June 17, 2010, he attended that sale and made a bid on that property. Accordingly, we find that appellee's failure to notify Laskey of the sheriff's sale of his residence did not affect his substantial right to receive notice under R.C. 2329.26 and was, therefore, harmless error pursuant to Civ.R. 61. Appellants' seventh assignment of error is found not well-taken.

{¶ 39} The judgment of the Wood County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.