[Cite as *Opaczewski v. Port Lawrence Title and Trust Co.*, 2011-Ohio-360.]

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

James Opaczewski, et al.

Appellants

v.

Port Lawrence Title and Trust Company

Appellee

Court of Appeals No. L-09-1323

Trial Court No. CI0200804353

DECISION AND JUDGMENT

Decided: January 28, 2011

* * * * *

James and Patty Opaczewski, pro se.

Michael J. Sikora III and Ann M. Johnson, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that denied the motion of pro se plaintiffs-appellants, Patty M. and James Opaczewski, for relief from judgment. Also pending before this court is the motion of defendant-appellee, Port Lawrence Title and Trust Company ("Port Lawrence") to

substitute First American Title Insurance Company ("First American") as appellee in this matter and appellants' memorandum in opposition to a substitution.

{¶ 2} The relevant facts of this case are as follows. On March 24, 1999, appellants entered into an agreement with Steven and Darla Stuart to purchase the Stuarts' real property, commonly known as 3235 River Road in Toledo, Ohio. That agreement included the metes and bounds legal description of the subject property. On March 25, 1999, Port Lawrence issued to appellants a Title Guaranty Commitment. That commitment represented that record title to the subject property, as described in the metes and bounds legal description of the deed conveying title to the Stuarts, was vested in the Stuarts, subject to the provisions of Schedules A and B and the Conditions and Stipulations of the commitment, and the Exclusions from Coverage and the Conditions and Stipulations of a Title Guarantee that would subsequently be issued.

{¶ 3} On April 26, 1999, the Stuarts executed a general warranty deed conveying the subject property to appellants. Again, the deed contained the legal metes and bounds description of the property, which was the same description that had been included in the Stuarts' deed and the purchase agreement. That deed was recorded in the Lucas County Recorder's office on April 28, 1999. In connection with appellants' purchase of the subject property, appellee issued a Title Guaranty to appellants. The Guaranty represented that record title to appellants' property, as described in the legal metes and bounds description of the property, was vested in appellants, subject to the terms, conditions, and exclusions contained in the Guaranty. The Guaranty did not provide for

indemnification for matters specifically excluded nor did the Guaranty impose upon Port Lawrence a duty to defend.

{¶ 4} After appellants took possession of the property, a controversy arose with the owner of the abutting property, Peter Harvey, regarding a one-tenth acre triangular strip of land that appellants claimed was theirs. On May 18, 2005, Harvey filed an action against appellants in the Lucas County Court of Common Pleas, to quiet title to the disputed property. See *Harvey v. Opaczewski*, Lucas County Common Pleas case No. CI-05-03171. In August 2006, appellants presented a claim to Port Lawrence for the "mis-description" of the legal description in their deed, to cover their legal fees in the *Harvey* matter and for any other fees to which they are entitled under their "title insurance" policy. It is noteworthy that appellants never purchased a policy of title insurance from appellee. In a letter dated August 31, 2006, appellee notified appellants that it had investigated but was declining their claim. First, appellee noted that the Title Guaranty was not a policy of title insurance and so it did not afford any coverage or duties of a policy of title insurance, including marketability of title and the duty to defend. With regard to appellants' claim, appellee stated that appellants' claims based on the right-of-way at the river's edge and the boundary line were specifically excluded from coverage under the "Exclusions from Coverage" provision. Finally, appellee stated that the Guaranty is a guaranty of the record title only and that appellants had not provided any evidence of a compensable loss. That is, because the disputed property was not

included in the legal description set forth in appellants' deed, they had no claim under the Title Guaranty.

{¶ 5} On December 21, 2007, appellants and Harvey settled the matters at issue in *Harvey* with the filing of a final judgment entry reflecting that settlement. Through that settlement, appellants agreed to purchase and Harvey agreed to sell to appellants the disputed one-tenth acre of land.

{¶ 6} On May 27, 2008, appellants filed a pro se declaratory judgment action against appellee. The complaint is nearly unintelligible. What is clear is that appellants believed that the property they bought in 1999 from the Stuarts should have included the one-tenth acre triangular strip of land and that appellee somehow breached a duty to them by not notifying them that their purchase did not include the disputed property. In their claim for relief, appellants sought an order from the lower court adjudging appellee responsible to perform its obligations under the Title Guaranty Commitment and Title Guaranty and adjudging appellee responsible to abide by its obligations under R.C. Chapter 1735. Appellee responded by filing an answer and counterclaim for declaratory judgment. Appellee sought an order from the court declaring that it had fulfilled and satisfied all of its duties and obligations to appellants as set forth in the Title Guaranty.

{¶ 7} The parties filed cross-motions for summary judgment and opposition memoranda in the court below. The court held a hearing on the motions but no transcript of that hearing is in the record on appeal. On April 1, 2009, the lower court issued an opinion and judgment entry granting appellee summary judgment, denying appellants

summary judgment and entering final judgment for appellee. In reviewing the parties' claims and the evidence submitted in support of the summary judgment motions, the court determined that the Title Guaranty was plain and unambiguous, that it guaranteed good title to appellants of the property identified in Schedule A attached to the guaranty, subject to the exclusions for coverage and conditions and stipulations thereof. Schedule A refers to the covered property by its legal metes and bounds description and then states that title to that property is "guaranteed by this Title Guaranty." Moreover, in the definitions section of the guaranty, the term "land" is defined as: "The land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, the term 'land' does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, lanes, ways or waterways." It was undisputed that the legal metes and bounds description of appellants' property set forth in Schedule A did not include the triangular one-tenth acre section of property at issue and that the disputed property was within the legal boundary of the Harvey property. The lower court therefore held that appellants had failed to establish a loss that was covered by the Title Guaranty and that appellee had satisfied all of its duties and obligations to appellants. Accordingly, summary judgment was granted to appellee.

{¶ 8} On April 29, 2009, appellants filed a motion for relief from judgment in the court below. The motion is, again, a rambling 44-page document that is nearly incomprehensible. Nevertheless, through this motion, appellants sought relief from judgment pursuant to Civ.R. 60(B)(1), (3) and (5). Upon review, the lower court determined that appellants had failed to present a meritorious claim and, therefore, denied their motion for relief from judgment. It is from that judgment that appellants now appeal.

{¶ 9} We will first address the motion of Port Lawrence to substitute First American as appellee in this appeal. Port Lawrence asserts that when appellants first filed their declaratory judgment action against it in May 2008, Port Lawrence was a wholly owned subsidiary of First American. Effective October 1, 2009, however, Port Lawrence merged into First American. As a result, Port Lawrence has been merged out of existence and the surviving entity is First American. Port Lawrence has attached to its motion copies of the documents from the Ohio Secretary of State's Office that establish that Port Lawrence has been merged out of existence and that First American is the surviving entity. An additional document establishes that Port Lawrence is now a registered trade name of First American.

{¶ 10} Although Port Lawrence cites Civ.R. 25(C) in support of its motion to substitute, that rule applies to substitution of a party at the trial court level upon the transfer of an interest in the litigation. App.R. 29(B) specifically addresses the situation raised by Port Lawrence's motion. That rule reads: "If substitution of a party in the court

of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (A)." Accordingly, in a situation other than the death of a party, the issue becomes whether the substitution is "necessary." *State ex rel. Portune v. Natl. Football League*, 155 Ohio App.3d 314, 2003-Ohio-6195, ¶ 6. "Interpreting the requirement of necessity * * * courts have held that a party must be unable to continue to litigate as opposed to voluntarily choosing to cease his or her participation in the litigation." Id. at ¶ 7, citing *Alabama Power Co. v. Interstate Commerce Comm.* (C.A.D.C.1988), 852 F.2d 1361, 1366. R.C. 1701.82(A) provides in relevant part:

{¶ 11} "(A) When a merger or consolidation becomes effective, all of the following apply:

{¶ 12} "* * *

{¶ 13} "(4) Subject to the limitations specified in section 2307.97 of the Revised Code, the surviving or new entity is liable for all the obligations of each constituent entity, including liability to dissenting shareholders. Any claim existing or any action or proceeding pending by or against any constituent entity may be prosecuted to judgment, with right of appeal, as if the merger or consolidation had not taken place, or the surviving or new entity may be substituted in its place."

{¶ 14} Accordingly, when a merger or consolidation becomes effective, the surviving entity may, but need not, be substituted in place of the constituent entity. Either way, the rights of the opposing party are protected. We therefore find that

substitution of First American for Port Lawrence, under the facts of this case, is not necessary and Port Lawrence's motion to substitute is not well-taken and denied.

{¶ 15} We will now address the merits of appellants' appeal. Appellants have stated four assignments of error for our review. For the sake of clarity, we will not quote them here but, rather, will paraphrase them as needed. To summarize, appellants assert that the lower court erred in denying their motion for reconsideration, erred in denying their motion for relief from judgment, and erred in failing to grant them a hearing on their motion for relief from judgment.

{¶ 16} Civ.R. 60(B) provides:

{¶ 17} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A

motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

{¶ 18} The Supreme Court of Ohio has determined that, "[t]o prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. If any one of the three *GTE* requirements is not met, the motion should be overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. A trial court's decision on a motion for relief from judgment under Civ.R. 60(B) will not be reversed on appeal absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77; *McGee v. Lynch*, 6th Dist. No. E-06-063, 2007-Ohio-3954, ¶ 29.

{¶ 19} In appellants' motion for relief from judgment and in their brief before this court, appellants appear to assert that the court, in granting appellee summary judgment, failed to examine both the March 25, 1999 Title Guaranty Commitment and the April 29, 1999 Title Guaranty, to determine if appellee had breached a duty owed to them. Through this argument, however, they simply reasserted the claims made in their motion for summary judgment and memorandum in opposition to appellee's motion for summary judgment. In granting appellees summary judgment, the lower court determined that

appellee had satisfied all of its duties and obligations to appellants. Appellants, therefore, failed to raise a meritorious claim in their motion for relief from judgment and the lower court did not abuse its discretion in denying the motion.

{¶ 20} Appellants further assert that the lower court erred in failing to grant them a hearing on their motion for relief from judgment. Generally, a trial court has discretion whether or not to hold an evidentiary hearing before ruling on a motion for relief from judgment. *U.A.P. Columbus JV326132 v. Plum* (1986), 27 Ohio App.3d 293, 294. When, however, a movant asking for relief from judgment fails to support its motion with operative facts which would warrant relief, the trial court does not abuse its discretion by denying the movant a hearing and overruling the motion. *Kay v. Marc Glassman* (1996), 76 Ohio St.3d 18, 19; *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105.

{¶ 21} As set forth above, appellants failed to support their motion with operative facts that would warrant relief from judgment but, rather, supported it with the same arguments used to support their motion for summary judgment. Accordingly, the lower court did not err in failing to grant appellants a hearing on their motion.

{¶ 22} Finally, appellants assert that the lower court erred in denying their motion for reconsideration. In filing their motion for relief from judgment, appellants requested that, upon relief from judgment being granted, the lower court reconsider their motion for summary judgment in light of the "admissible evidence," which appellants identified as the March 25, 1999 Title Guaranty Commitment and the April 28, 1999 Title Guaranty.

{¶ 23} It is well established that motions for reconsideration of a final judgment in the trial court are a nullity. *Pitts v. Dept. of Transp.* (1981), 67 Ohio St.2d 378, 379-380. Because the lower court's order granting appellee summary judgment and denying appellants summary judgment disposed of all of the pending claims, it was a final order. Indeed, appellants originally appealed that order to this court but, thereafter, voluntarily dismissed the appeal. In its order denying appellants relief from judgment, the lower court, in a footnote, refused to address the motion for reconsideration for the reason that such motions are a nullity. We find no error in the lower court's treatment of this issue.

{¶ 24} On consideration whereof, the court finds that substantial justice has been done the parties complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

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

Keila D. Cosme, J. _____
CONCUR.
JUDGE