

[Cite as *ACV Realty v. Bayview Loan Servicing*, 2016-Ohio-5467.]

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

ACV REALTY, LTD. ET AL.,	)	
	)	
PLAINTIFFS-APPELLANT,	)	
	)	CASE NO. 15 MA 0059
V.	)	
	)	OPINION
BAYVIEW LOAN SERVICING, LLC,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 13 CV 2886

JUDGMENT: Affirmed

APPEARANCES:  
For Plaintiffs-Appellants Attorney Andrew R. Zellers  
3810 Starrs Centre Dr.  
Canfield, Ohio 44406

For Defendant-Appellee Attorney Rodney A. Holaday  
52 East Gay St., P.O. Box 1008  
Columbus, Ohio 43216-1008

Attorney Bryan J. Farkas  
200 Public Square, Suite 1400  
Cleveland, Ohio 44114-2327

JUDGES:  
  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite  
Hon. Carol Ann Robb

Dated: August 15, 2016

[Cite as *ACV Realty v. Bayview Loan Servicing*, 2016-Ohio-5467.]  
DONOFRIO, P.J.

{¶1} Plaintiff-appellant, ACV Realty, Ltd, appeals the March 23, 2015, judgment of the Mahoning County Common Pleas Court granting summary judgment to Defendant-Appellee, Bayview Loan Servicing, LLC.

{¶2} On October 23, 2013, Appellant and Carl Vaccar filed an action in tort against Appellee in the form of a Verified Complaint for Money Damages. In the complaint, Appellant claims that it and Vaccar are the owners of real property known as 800 Indianola Avenue in the City of Youngstown. According to Appellant, Appellee had an obligation to and failed to properly maintain Appellant's property for a period of time during which the property was subject to a foreclosure action. As a result, Appellant claims it is entitled to \$1,600,000.00 in compensatory damages, \$1,000,000.00 in punitive damages, interest, attorney fees, and any other remedy the court deems just and equitable. The events that precipitate these allegations are as follows.

{¶3} On April 11, 2006, Appellant secured a loan for \$800,000.00 from Interbay Funding LLC. As security for the loan, Appellant signed a promissory note and a mortgage with regard to the Indianola property. The documents were signed by Carl Vaccar, as "Manager", and by Robin Vaccar, as "Member", of Appellant. Both Vaccars also signed a Guaranty as guarantors of the loan.

{¶4} Soon thereafter, the promissory note and the mortgage were assigned to Appellee. Eventually, Appellant failed to make the promised payments on the loan. On April 18, 2008, Appellee filed a foreclosure action with regard to the property. On September 24, 2008, a decree in foreclosure was granted.

{¶5} After several unsuccessful attempts to sell the property, on September 25, 2012, Appellee released its mortgage. Appellant asserts that it is at this point that it and Vaccar discovered damage to the Indianola property. Appellant asserts that the property was vandalized sometime between the September 24, 2008, decree in foreclosure and the September 25, 2012, release of the mortgage. Appellant claims that the vandalism and resultant damage to the property was the result of the negligence and willful misconduct of Appellee.

**{¶16}** On April 5, 2013, Appellant filed a motion to dismiss the foreclosure action. The motion was granted on April 16, 2013.

**{¶17}** While the above occurred, Appellant was dissolved retroactively effective January 1, 2008, prior to the date of the original filing of the foreclosure action on April 18, 2008. Also, Carl Vaccar and Robin Vaccar filed a Chapter 7 bankruptcy on November 19, 2009. Both were discharged on January 27, 2011. The Vaccars did not list Appellant or the Indianola property in their bankruptcy case.

**{¶18}** On October 23, 2013, Appellant and Vaccar filed the action that gives rise to this appeal. Appellant and Vaccar assert that Appellee had a duty to maintain the Indianola property from sometime after the filing of the foreclosure against the property until the September 25, 2012, release of the mortgage. Appellant and Vaccar complain that Appellee breached its duty to them through negligence and willful misconduct and as a result they were damaged in excess of \$2,600,000.00. Appellee filed a timely answer and counterclaim asserting breach of contract on the promissory note.

**{¶19}** On December 24, 2013, Appellee filed a Motion to Dismiss Claims of Carl J. Vaccar claiming that Vaccar lacked standing and was not the real party in interest as the result of his Chapter 7 bankruptcy. This issue was briefed by the parties. On May 6, 2014, the trial court granted the motion to dismiss Vaccar's claims. The trial court concluded that Vaccar has no ownership interest in the subject real estate, is not the real party in interest, and otherwise lacks standing to bring this action as a party Plaintiff. No appeal was taken from this judgment and no assignment of error set forth by Appellant addresses this issue.

**{¶110}** On November 28, 2014, Appellee filed a motion for summary judgment with regard to Appellant's claims and Appellee's counterclaim. In its motion for summary judgment, Appellee asserted three reasons it believes it is entitled to summary judgment. First, Appellee claimed that the mortgage signed by Appellant included an indemnification and hold harmless provision which relieves Appellee from all claims asserted in the action by Appellant. Second, Appellee asserted that

Appellant failed to produce any evidence to support a claim of negligence or willful misconduct. And, third, according to Appellee, any claims that Appellant might have are the property of the bankruptcy estate and Appellant lacks standing to assert any such claim. In support of its motion, Appellee submitted the affidavits of Jose Gonzalez and Nathan Kott, both with attached exhibits. In its response, Appellant offered no evidence beyond Appellant's verified complaint.

**{¶11}** The Magistrate filed findings of fact and conclusions of law sustaining Appellee's motion with regard to Appellant's claim but denying it on Appellee's counterclaim. Appellant filed objections (in part) to the Magistrate's decision.

**{¶12}** After conducting an independent review of the objections, the trial court, on March 23, 2015, filed a judgment entry adopting the Magistrate's decision and otherwise granting Appellee's motion for summary judgment with regard to Appellant's action against Appellee. The trial court concluded that Appellant's claims are barred by the express terms of the mortgage agreement wherein Appellant agreed to indemnify Appellee and hold Appellee harmless for the claims contained in Appellant's complaint; that Appellant failed to cite any law that placed any duty on Appellee to care for the property after the foreclosure was filed and that Appellant's bare conclusory statements to that effect do not create any duty upon which Appellant could maintain its action; that Appellant failed to produce any evidence admissible under Civ.R. 56(E) or otherwise to support a claim for willful misconduct and that all of the evidence indicates that Appellee, in fact, took steps to secure the premises "including chaining and padlocking gates and doors, conducting frequent inspections, boarding windows and welding doors shut to prevent further vandalism upon the property"; that Appellant lacks standing to bring this action because any property rights in the Indianola property are vested in the bankruptcy trustee; and that Appellant has no capacity or standing to maintain this action since it was voluntarily dissolved effective January 1, 2008, and this action is not a part of "winding up its affairs."

**{¶13}** No appeal was filed with regard to the denial of Appellee's motion for

summary judgment on its counterclaim. Appellee voluntarily dismissed the counterclaim on April 2, 2015. Appellant filed a timely notice of appeal on April 17, 2015. Appellant sets forth four assignments of error.

{¶14} An appellate court reviews the granting of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper.

{¶15} A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher*, 9th Dist. No. 27799, 2015-Ohio-4167, ¶8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 663 N.E.2d 264 (1996). If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id.*; Civ.R. 56(E). “Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party.” *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191, 617 N.E.2d 1129.

{¶16} Appellant’s first assignment of error states:

TRIAL COURT ERRED WHEN IT ENFORCED UNENFORCEABLE  
TERMS OF THE SUBJECT MORTGAGE BARRING THE PLAINTIFF-  
APPELLANT’S CLAIMS.

{¶17} Appellant does not contest that it signed a mortgage agreeing to hold the lender harmless for any damage to the secured property and indemnify the lender with regard to the same. Article 11 of the mortgage is entitled “INDEMNIFICATION” and provides, in pertinent part, that Appellant agrees to

indemnify and hold harmless the Indemnified Parties \* \* \* [which includes Appellee] from and against any and all Losses \* \* \* imposed upon or incurred by or asserted against any Indemnified Parties and directly or indirectly arising out of or in any way relating to \* \* \* (d) any failure of the Property to be in compliance with any Applicable Laws; \* \* \*(f) Borrower's [Appellant's] breach of any term, covenant, condition, representation or warranty contained herein;

Mortgage 11.1.

**{¶18}** Article 3 of the mortgage is titled "BORROWER COVENANTS." Section 3.9 of this article provides that "Borrower [Appellant] shall cause the Property to be maintained in a good and safe condition and repair."

**{¶19}** Appellant's action against Appellee is based on negligence. Appellant states this often. For example, in its Brief, Appellant states – "The main argument in that [this] lawsuit was that the Defendant-Appellee was negligent in their preservation of the collateral while it was in their possession \* \* \*" (Brief of Plaintiff-Appellant, p. 8). Appellee's position, with which the trial court agreed, is that even assuming Appellee was negligent, this provision of the agreement places responsibility for maintaining the property upon Appellant and Appellant has agreed to indemnify and hold Appellee harmless in the event Appellee was negligent in maintaining the property.

**{¶20}** While not challenging Appellee's assertion that these provisions defeat Appellant's claim in this action, Appellant instead argues that these provisions are unenforceable. Appellant first asserts that these provisions are unenforceable because they are "unconscionable, a violative [sic] of public policy, and specifically disclaim duties which cannot be disclaimed by agreement \* \* \*" (Brief of Plaintiff-Appellants, p. 17).

**{¶21}** Appellant relies upon *CitFed Mortg. Corp. of America v. Parish*, 10th Dist. Nos. 96APE07-909, 96APE08-988, 96APE08-1025, 96APE08-1029, 1997 WL 156616 (April 3, 1997), for the propositions that loan contracts based on one-sided agreements and agreements to indemnify for willful and wanton misconduct are

contrary to public policy. (Brief of Plaintiff-Appellants, p. 17). Appellant then cites *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 696 N.E.2d 201 (1998), for the definition of wanton misconduct. According to *Zivich* and Appellant, wanton misconduct is conduct where one fails to exercise any care whatsoever towards one to whom a duty of care is owed, under circumstances where there is a great probability that harm will occur.

{¶22} Appellant has produced no record evidence, other than allegations and conclusory statements, which suggests in any way that the loan contract was one-sided, or that Appellee engaged in willful misconduct.

{¶23} Appellant also claims that the clause at issue is unconscionable. The Eleventh District explained:

unconscionability involves a two-prong determination: substantive unconscionability and procedural unconscionability. “A substantive unconscionability analysis considers whether the actual terms of the contract are commercially reasonable. ‘Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible.’”

*Pearson v. Manorcare Health Servs.*, 11th Dist. No. 2014-L-047, 2015-Ohio-5460, ¶28, quoting *Manley v. Personacare of Ohio*, 11th Dist. Lake No. 2005-L-174, 2007-Ohio-343, ¶ 14. Appellant offers no facts to support either theory of unconscionability. See also *Deutsche Bank Natl. Trust Co. Pevarski*, 187 Ohio App.3d 455, 2010-Ohio-785, 932 N.E.2d 887 (4th Dist.).

{¶24} Appellant next relies upon R.C. 1309.602 for its arguments regarding good faith, diligence, reasonableness, and care. Appellant asserts that “our legal system traditionally has looked with suspicion on debtors [sic] rights and freed the

secured party of its duties.” (Brief of Plaintiff-Appellants, p. 18). Appellant asserts that these provisions establish that certain rights cannot be waived especially with regard to the use and operation of collateral. However, as Appellee points out, these provisions are not applicable here. R.C. Chapter 1309 relates primarily to security interests in personal property and R.C. 1309.109(D)(11) specifically excludes from R.C. Chapter 1309 the “creation or transfer of an interest in or lien on real property.” Appellant seemingly concedes this point in its Reply Brief by stating that this section does “not technically apply to mortgages.” Nonetheless, Appellant continues to argue that “it does apply to very similar factual issues.” (Reply Brief of the Appellants, p. 8). Appellant does not explain how and/or why these “very similar factual issues” relieve it of the indemnification/hold harmless provisions to which it agreed in the mortgage. Appellant concedes that all of its references to R.C. Chapter 1309 are inapplicable except by way of analogy to some equitable principle.

**{¶25}** In its Brief, Appellee offers a number of contract theories which support the enforcement of the indemnification/hold harmless provisions of the mortgage, e.g., contracts are generally enforceable against the parties, even where one party may have failed to read the contract (not asserted here by Appellant), *Campco Distributors, Inc. v. Fries*, 42 Ohio App.3d 200, 203, 537 N.E.2d 661 (2d Dist.1987); contracts need not contain equal rights, responsibilities, and liability exposure with regard to all the parties, and courts will not invalidate contracts simply because of a “bad deal”, *Deutsche* at ¶ 40; and contracts limiting liability for negligence are acceptable under the theory of freedom to contract, *Schwenck v. Spitzer Marina*, 8th Dist. No. 65660, 1994 WL 385972, \*2-\*3 (July 21, 1994), citing *Mansfield Mutual Ins. Co. v. Cleveland, Cincinnati, Chicago & St. Louis R.R. Co.*, 74 Ohio St.3d 30, 77 N.E. 26 (1906).

**{¶26}** Appellant offers no legal authority or facts which would result in a declaration that the hold harmless/indemnification agreement to which it agreed cannot be enforced. Thus, Appellant’s first assignment of error is without merit and is overruled.

{¶27} Appellant's second assignment of error states:

THE TRIAL COURT ERRED WHEN IT HELD THAT THE DEFENDANT-APPELLEE OWED NO DUTY [SIC] THE PLAINTIFF-APPELLANT TO PRESERVE COLLATERAL IN THEIR POSSESSION THUS PREVENTING PLAINTIFF-APPELLANTS' NEGLIGENCE CLAIM FROM GOING FORWARD.

{¶28} This assignment of error is contingent upon a resolution in favor of Appellant with regard to its first assignment of error, i.e., that the hold harmless/indemnification clause to which it agreed is unenforceable against Appellant. Otherwise, as the trial court determined, Appellant has agreed to hold harmless and indemnify Appellees for the exact conduct upon which their lawsuit is based, i.e., negligence.

{¶29} Appellant claims in its second assignment of error that, as of the date Appellee "took possession" of the property, Appellee owed a duty to Appellant to preserve the property. Appellant agrees that in order to establish actionable negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. *Hall v. Watson*, 7th Dist. No. 01 CA 55, 2002-Ohio-3176. With regard to this claim, the trial court concluded:

Plaintiff has failed to cite the Magistrate to a single opinion or statute imposing such a duty upon Defendant. Absent such a duty, no action for negligence can lie as a matter of law and Plaintiff cannot create the existence of such a duty through bare conclusory statements.

Magistrate's Decision Findings of Fact and Conclusions of Law.

{¶30} Appellant initially asserts that R.C. 1309.207, imposes a duty upon Appellee to preserve the Indianola property. Indeed, Appellant argues – "As for the legal support for the Plaintiff-Appellants [sic] contention that a duty was owed to them by the Defendant-Appellee, one must simply look at the Ohio Revised Code Section

1309.207.” (Brief of Plaintiff-Appellants, p. 25). Appellant continues – “The above quoted sections of the Ohio Revised Code speak clearly to the contrary; thus clearly showing that the Trial Court committed reversible error.” (Brief of Plaintiff-Appellants, p. 26).

{¶31} As with assignment of error number one, Appellee responded that R.C. 1309.207 is inapplicable here. Apparently acknowledging that R.C. 1309.207 does not impose any duty on Appellee in this case, Appellant then contends that “While that section may not directly apply to mortgages \* \* \* the duty Appellant seeks to impose is similar to a duty O.R.C. 1309 imposes on a secured party in possession of collateral.” (Reply Brief of the Appellants, p. 11). But, Appellant fails to identify what that similar duty is or the legal basis for imposing liability upon Appellee under these circumstances, especially where Appellant agreed to hold Appellee harmless for such conduct.

{¶32} In its Reply Brief, Appellant then asserts yet another theory which it claims imposes a duty upon Appellee with regard to the Indianola property. Appellant claims that “once the Appellee took possession and control of the Appellants [sic] primary asset, a special relationship was born.” (Reply Brief of the Appellants, p. 12). According to Appellant, this special relationship made Appellee responsible for any foreseeable events that could happen and that, since Appellee was aware of criminal acts of third parties vandalizing the property, these are foreseeable events for which Appellee should be held liable. Appellant cites no authority to support this theory of liability. Appellee responds that there is no authority to support Appellant’s proposition that there is a duty to protect against criminal trespassers and vandals, the only identified cause for the damage to the property here. In response, Appellee relies on *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, 861 N.E.2d 920 (10th Dist.) wherein the court held that, absent some special relationship between a defendant and the third party who causes the damage, a defendant has no duty to protect a plaintiff from the actions of the third party. *Abrams* involved the former employee of a moving company breaking into a customer’s home and causing

damage. Appellant has not identified any law to support its theory that Appellee should be held liable for the actions of third parties (vandals) who caused damage to the property.

{¶33} There is some support for Appellant's argument that when a mortgagee takes exclusive control of the mortgaged property, the mortgagee has some duty to take steps to keep the property at least in the same condition as when the mortgagee takes possession. *O'Donnell v. Dum*, 10 Ohio Dec. Rep. 48, 1887 WL 867 (C.P. 1887). In *O'Donnell*, the trial court observed:

It is the duty of the mortgagee in possession, to preserve the estate in as good condition as it was when he took possession. He is not amenable, however, to the same degree of care that a person would take of his own property. He is only bound to make necessary repairs and improvements, but these do not include the repair of defects caused, in the ordinary way, by waste and decay.

*Id.* at \*4. However, even assuming the existence of some duty, Appellant provides no facts that demonstrate how Appellee violated such duty. In fact, as the trial court noted, the only evidence of record suggests that Appellee took reasonable steps to preserve the property. The trial court noted that the only evidence before it demonstrated that Appellee took steps to secure the property including chaining and padlocking gates and doors, conducting frequent inspections, and boarding windows and welding doors shut. (Magistrate's Decision Findings of Fact and Conclusions of Law). During discovery, Appellant was asked to state what facts supported its claim that Appellee was negligent in securing the property. Appellant responded that it did not know what steps, if any, Appellee took, at that time, to secure or maintain the property. (Appellant's answer to Interrogatory No. 6).

{¶34} Appellant's position is unclear. Appellant first argued Appellee failed to take steps to preserve the property. But once the Magistrate's decision confronted it with the action Appellee took to maintain the property, Appellant shifted its theory of

liability:

What the Plaintiffs contend is that because the subject property became difficult for Defendants to preserve and perform their duty, they decided to dump the problem back on the Plaintiff without notice. Such an act is willful, and wrong.

(Plaintiffs' Objections in Part to the Magistrate's Decision Finding of Facts and Conclusions of Law, p. 6). While some may perceive the fact that Appellee relinquished its mortgage on Appellant's property under these circumstances to be "willful" or "wrong", this does not create a legal cause of action against Appellee.

**{¶35}** Here, Appellant admits in its brief that "Defendant-Appellee actively marketed the property, engaged entities to try and preserve and prepare the property for Sheriff Sale \* \* \*" (Brief of Plaintiff-Appellants, p. 33).

**{¶36}** In addition to the above, attached as Exhibit D to the affidavit of Jose Gonzalez, Assistant Vice President of Appellee, submitted in support of its motion for summary judgment (as Defendant's Exhibit 1), are "servicing notes." The servicing notes reflect, *inter alia*, the following: October 30, 2008 – Appellant recommends property be winterized (Servicing Notes ["SN"], 142); November 14, 2008 – Appellant refuses Appellee access to property (SN, 139); January 2, 2009 – Appellee's agent (hereinafter Appellee's agent is referred to as "M&M") replaces padlock and inspects property (SN, 133); January 16, 2009 – Appellant authorizes Appellee to do whatever is necessary to secure and winterize property (SN, 132); February 11, 2009 -- M&M replaces commercial door locks on entrance, installs deadbolt lock on boiler house, and installs padlocks with chains on other doors and fence gates (SN, 129); March 12, 2009 – property inspection (SN, 124); April 17, 2009 – property inspection (SN, 122); June, 2009 – property inspection (SN, 116-117); August 28, 2009 – property inspection (SN, 109); October 9, 2009 – inspection ordered (SN, 107); October 30, 2009 – inspection (SN, 106); January 8, 2010 – inspection (SN, 100); February 11, 2010 – M&M inspection ordered (SN, 97); November – December 2010 – boarded 44

windows, installed additional padlocks, replaced locks, and removed debris (SN, 67); December 22, 2010 – boarded all commercial/glass entrances, installed padlock and chains, welded rear metal doors, boarded all first floor windows (SN, 62). Corroborating this evidence are records from M&M Mortgage Services, Inc. reflecting instances of work performed on the property with regard to securing the same from vandals and others. (Exhibit G to Affidavit of Jose Gonzalez; SN 702-713).

**{¶37}** Appellant states:

From 2009 to 2011 the Plaintiff-Appellants [sic] hired a company by the name of M&M Mortgage Services to look after the property and keep it maintained, thereby becoming an agent of the Defendant-Appellees. At the time of the filing of the Complaint, the Plaintiff-Appellant was completely unaware that the Defendant-Appellee had done such a thing, as they had been excluded from the property sometime in October 2008. During this time that the Defendant-Appellees were maintaining the property, there were numerous break-ins and vandalism essentially destroying the property, rendering it of insignificant value.

(Brief of Plaintiff-Appellants, p. 12).

**{¶38}** Thus, even assuming that Appellee had some duty to preserve the property, Appellant concedes that the above steps were taken to accomplish this. Appellant offers no evidence, authority, or explanation of how Appellee nonetheless breached its duty in these circumstances and what, if any, damage resulted from that failure. In other words, Appellant does not explain what action, other than what Appellee did as described above, Appellee had the duty to do and how Appellee failed to perform its duty. Appellant offers only, as the trial court noted, multiple conclusory statements with no factual or legal foundation to support the same. Appellant's second assignment of error is without merit and is overruled.

**{¶39}** Appellants' third assignment of error states:

THE TRIAL COURT ERRED WHEN IT HELD THAT THERE WAS INSUFFICIENT EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT WITH REGARDS TO THE DEFENDANT-APPELLEE'S WILLFUL MISCONDUCT.

{¶40} Appellant asserts that the record is "replete with evidence" to prove the willful misconduct of Appellee. (Brief of Plaintiff-Appellants, p. 26). Appellant notes that whether the evidence proves misconduct is a question for the finder of fact. Although this is true, Appellant does need to cite to some evidence to demonstrate there is a genuine issue of material fact. As Appellant acknowledges, the trial court concluded that Appellant "failed to produce any evidence, appropriate and otherwise admissible under Civ.R. 56(E) in support of such a claim." The trial court pointed to the efforts of Appellee to secure the property. Those efforts are discussed under assignment of error number two. In addition, as discussed under Appellant's second assignment of error, Appellant admitted in pleadings before the trial court that efforts were made to secure and sell the property. Appellant fails to demonstrate a genuine issue of material fact with regard to a negligence claim in its second assignment of error. It is more difficult to establish a claim of willful misconduct. Appellant claims this issue, too, was wrongfully decided by the trial court.

{¶41} Appellant states that Appellee decided to return the property to Appellant long before the property was actually returned; that vandalism of which Appellee was aware caused significant damage to the property; that Appellee filed an insurance claim "and only received \$90,000.00"; that Appellee "walked stealthily away \* \* \* dumping the mess" in Appellant's lap; and that Appellant did not know that Appellee twice failed to sell the property. Appellant asserts that this establishes clear misconduct for which Appellee should be held liable.

{¶42} Appellee responds by noting that the purpose of the mortgage was to protect the lender's interest and for it to release its security interest is financially rational and not legally prohibited. Indeed, Appellant cites to no law that prohibits a lender from releasing its security interest in property. Furthermore, the mortgage

agreement expressly allowed Appellee to “receive and apply the proceeds from any insurance \* \* \* for damage to the Property.” (Affidavit of Jose Gonzalez, Exhibit 1(B), ¶ 1.1(g), attached to motion for summary judgment).

{¶43} Willful misconduct, which Appellant claims Appellee committed, “implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury.” *Weller v. Salasek*, 10th Dist. No. 15CAE040033, 2015-Ohio-5192, ¶ 22, quoting *Anderson v. Massilon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 32-34.

{¶44} Appellant presents no facts which support its argument that Appellee engaged in this type of willful misconduct. Appellant has failed to identify any facts that create a genuine issue of fact with regard to its claim of willful misconduct. Appellant’s third assignment of error is without merit and is overruled.

{¶45} Appellant’s fourth assignment of error states:

THE TRIAL COURT ERRED WHEN IT HELD THAT THE PLAINTIFF-  
APPELLANTS LACKED STANDING TO BRING THEIR ACTION  
AGAINST DEFENDANT-APPELLEE.

{¶46} In its fourth assignment of error, Appellant contends that the trial court’s judgment that Appellant lacked standing to bring this action was error because Appellee waived its right to raise the standing issue; that although the Indianola property was part of the bankruptcy estate the bankruptcy trustee could not pursue litigation as the trustee functioned only as a judgment creditor; and that this litigation should be perceived as a part of Appellant’s winding up of its affairs.

{¶47} First, the only authority cited by Appellant for its claim that Appellee waived its ability to claim Appellant did not have standing to bring this action is Civ.R. 12(B). Appellant cites no specific language or any interpretation of the Rule to support its position. As the trial court pointed out, relying on *Fed. Home Loan Mtg.*

*Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, standing is jurisdictional and can be raised at any time. This is the correct conclusion. See also *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218, 513 N.E.2d 302 (1987) and *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 17.

{¶48} Second, there is some confusion about the standing of Carl Vaccar to maintain this action and the standing of Appellant to maintain this action. Vaccar's claims were dismissed for lack of standing on May 6, 2014. As previously noted, Vaccar filed Chapter 7 bankruptcy on November 19, 2009, and was discharged on January 27, 2011. Since he failed to identify any interest in either Appellant or the Indianola property, any interest he had in either became part of the bankrupt estate. Since the bankruptcy trustee did not abandon any interest in the same, Vaccar has no standing to maintain this action and the trial court dismissed all of his claims. No appeal was taken from that order.

{¶49} It appears from the record that Appellant never filed for bankruptcy. Thus, the next question presented is whether Appellant has standing to bring the tort action.

{¶50} Appellant claims that even though it was dissolved on January 1, 2008, it could still bring this action in 2013 under R.C. 1705.45(B)(2) as it was "winding up" its affairs.

{¶51} The instant action was filed on October 10, 2013, almost six years after the effective date of the dissolution of Appellant. The foreclosure action in this case was filed on April 18, 2008. The decree in foreclosure was filed on September 24, 2008. Appellant maintains that all the alleged damage to this property occurred sometime after the decree of foreclosure. Appellant, for example, asserts:

Plaintiff-Appellant does not begin to allege that a duty was imposed upon the granting of a foreclosure judgment. The Plaintiff-Appellant clearly explicitly stated in all of its Briefs and Representations to the Trial Court that a duty was created not upon judgment of foreclosure,

but rather upon taking of possession by Defendant-Appellee.

(Brief of Plaintiff-Appellants, p. 24). Thus, all of these events, and especially the alleged damage to the property, occurred after the effective date of the dissolution of Appellant.

{¶52} The trial court indicated it was not persuaded that “this litigation, which involves the Defendant’s alleged actions well after the dissolution of Plaintiff bears any relation whatsoever to the ‘winding up of its affairs.’” (Judgment Entry, p. 3). In analogous business settings, Appellee cites authority supportive of the concept that lawsuits based on facts that occur sometime after the effective dissolution date of a business are not within the meaning of “winding up” business affairs under R.C. 1705.45(B)(2). See *St. Clair Builders, Inc. v. Aetna Casualty & Sur. Co.*, 81 Ohio App.3d 675, 680, 611 N.E.2d 1009 (8th Dist. 1992); *Mack Constr. Dev. Corp. v. Austin Smith Constr. Co.*, 65 Ohio App.3d 402, 405-6, 583 N.E.2d 1384 (12th Dist. 1989); and *Benefit Mgmt. Consultants v. Gencorp*, 8th Dist. No. 17488 1996 WL 267747 (May 22, 1996). Appellant offers no facts other than its conclusory assertion that it was engaged in the process of winding up its affairs or that this legal action was part of the same. The record suggests that Appellant engaged in no business activity from at least as early as April, 2008, when the foreclosure action was filed. This, too, is after the dissolution.

{¶53} Lastly, Appellant asserts – “To put it in a simplified legal context, while there may be no case law to support Plaintiff-Appellants [sic] position, the doctrine of estoppel would applies [sic] here.” (Brief of Plaintiff-Appellants, p. 33). However, not only does Appellant admittedly fail to cite any law to support its position with regard to equitable estoppel, it fails to cite any law whatsoever that would suggest this as a satisfactory basis for denying Appellee’s motion for summary judgment. Appellant has remained the owner of the property throughout all of these proceedings. For Appellant to assert now that, if it had known it would still own the property subsequent to its dissolution and the Vaccars’ bankruptcy, it might have pursued a different course, is an insufficient legal basis to deny the motion for summary

judgment. Appellant's fourth assignment of error is without merit and is overruled.

**{¶54}** For the reasons stated above, the trial court's judgment is affirmed.

Waite, J., concurs.

Robb, J., concurs.