

[Cite as *Dedinski v. Booth*, 2010-Ohio-2349.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93481

ROBERT DEDINSKY, ET AL.

PLAINTIFFS-APPELLEES

vs.

ELAINE J. BOOTH

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-662613

BEFORE: Kilbane, P.J., McMonagle, J., and Jones, J.

RELEASED: May 27, 2010

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Elaine Booth (“Booth”), appeals the granting of summary judgment in favor of appellees, Robert and Sandra Dedinsky (“the Dedinskys”), with respect to a claim stemming from a real estate contract. After a review of the record and the applicable law, we reverse and remand.

{¶ 2} The following facts give rise to the instant appeal.

{¶ 3} On November 25, 2007, Booth signed an agreement to purchase the Dedinskys’ home located at 8180 Royalview Drive, Parma, Ohio, for \$185,000. The purchase agreement was prepared by the Dedinskys’ real estate agent, Maureen O’Donnell (“O’Donnell”), of Real Living Real Estate. Booth was to obtain financing for \$135,000 of the purchase price, and she anticipated a friend would provide her with the additional \$50,000. The purchase agreement was contingent upon Booth obtaining financing “on or about” December 14, 2007. It further stated that the agreement would be null and void if, after a good faith attempt, Booth was still unable to secure financing. The parties agreed on a closing date of December 31, 2007.

{¶ 4} Shortly after signing the purchase agreement, O’Donnell referred Booth to Donald Jarecki (“Jarecki”) at Real Living Mortgage, the in-house financing department at Real Living Real Estate. Booth subsequently applied for financing with Jarecki. On December 10, 2007, the parties agreed to extend the closing date to February 1, 2008.

{¶ 5} On January 28, 2008, Booth received a letter from Real Living Mortgage indicating that her credit report noted serious delinquencies and a high ratio of debt compared with her available credit limits. That same day, the parties went to the escrow agent, Real Living Title, also a division of Real Living Real Estate, in order to sign closing documents. Booth was to bring a certified check in the amount of \$53,510.34 to cover her \$50,000 down payment and a portion of the closing costs. The Dedinskys were to bring a certified check in the amount of \$11,800 to cover the remainder of the closing costs. While the Dedinskys brought a certified check in the appropriate amount, Booth did not bring the required check. Booth stated she would bring the check at closing.

{¶ 6} Booth stated that on January 31, 2008, she received a voicemail from O'Donnell stating that Jarecki had "played with the figures" and that Booth should go ahead and sign the documents. However, when Booth reviewed the loan application, she realized that her income and assets were significantly inflated.

{¶ 7} Booth stated that she called Jarecki at Real Living Mortgage who informed her that it did not matter what the figures were on the application and that she should go ahead and sign it. Booth stated that she signed the fraudulent loan application because she felt pressured, but she did make notes at the top and bottom of the loan application indicating that her income and

assets were fabricated. Based upon this application, Booth was provided financing for \$135,000.

{¶ 8} On February 1, 2008, the scheduled closing date, Booth did not have the requisite check for \$53,510.34. Consequently, the sale did not go forward. Although Booth was unable to secure the funds to purchase the property, she continued to express interest in eventually purchasing the house and asked the Dedinskys if she could rent the home while she sought financing for the entire purchase price. The Dedinskys retained an attorney who prepared a lease agreement.

{¶ 9} On February 23, 2008, Booth again applied for a loan with Real Living Mortgage, this time for \$183,126 and using a cosignor, Raymond Cox (“Cox”). This second application indicated Booth had a considerably lower income and less assets than the first application. Booth’s loan application was ultimately denied.

{¶ 10} The Dedinskys presented Booth with the lease agreement she requested, at which point she indicated she could not afford the payments and was no longer interested in the property.

{¶ 11} In March 2008, the Dedinskys relisted their home for sale. On April 12, 2008, the Dedinskys sold their home to another couple for \$180,000. The transaction closed on May 15, 2008.

{¶ 12} On June 18, 2008, the Dedinskys filed suit against Booth for breach of contract, asserting that as a result of Booth's failure to complete the sale they sold their home for \$5,000 less and with increased commissions. After receiving an extension, Booth filed her answer on September 2, 2008, denying all allegations and asserting numerous affirmative defenses.

{¶ 13} On January 21, 2009, the Dedinskys filed a motion for summary judgment arguing that they were entitled to summary judgment based upon the clear terms of the purchase agreement.

{¶ 14} On February 25, 2009, the trial court issued an entry stating that it had been notified the case was settled and dismissed with prejudice. On March 19, 2009, the Dedinskys filed a motion to reinstate the case to the court's active docket. The Dedinskys argued that the parties had executed a settlement agreement, but Booth failed to make the required payment.

{¶ 15} On April 30, 2009, the trial court reinstated the case to the active docket and stated that Booth would be afforded seven days to respond to the pending motion for summary judgment. On May 5, 2009, Booth filed a brief in opposition to the Dedinskys' motion for summary judgment and a motion for leave to file her own motion for summary judgment.

{¶ 16} On May 7, 2009, the trial court denied Booth's motion for leave to file a motion for summary judgment, concluding that it was nearly four months past the dispositive motion deadline.

{¶ 17} On May 18, 2009, the Dedinskys filed a reply brief in support of their motion for summary judgment. On May 20, 2009, the trial court granted the Dedinskys' motion for summary judgment and rendered judgment against Booth in the amount of \$8,850.25.¹

{¶ 18} Booth appealed, asserting one assignment of error for our review.

ASSIGNMENT OF ERROR NUMBER ONE

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT GRANTED APPELLEES’ MOTION FOR SUMMARY JUDGMENT. APPELLEES WERE NOT ENTITLED TO JUDGMENT AS A MATER OF LAW. THE FINANCING CONTINGENCY IN THE PARTIES’ REAL ESTATE PURCHASE AGREEMENT EXCUSED APPELLANT FROM LIABILITY IN THIS CASE.”

{¶ 19} Booth argues that there was still a genuine issue of material fact as to whether she was able to obtain financing, upon which the purchase agreement was contingent. The Dedinskys argue that Booth received financing from Real Living Mortgage in the amount of \$135,000 prior to the scheduled closing date; therefore, Booth was required to complete the transaction.

Standard of Review

¹The Dedinskys presented evidence that they incurred \$993.26 in expenses to inspect, clean, and repair their residence in conformity with the purchase agreement they entered into with Booth. The Dedinskys also incurred \$656.84 in legal fees in order to recover their \$11,800 escrow deposit, which they maintain was wrongly held by the escrow agent after the sale fell through, and \$450.15 in legal fees for an attorney to draft a rental agreement for Booth to rent the home while she secured financing. Further, the home sold for \$5,000 less than Booth had agreed to pay and required the Dedinskys to pay \$1,750 in additional real estate commissions.

{¶ 20} In Ohio, appellate review of summary judgment is de novo. *Comer v. Risko* 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. “Accordingly, we afford no deference to the trial court’s decision and independently review the record to determine whether summary judgment is appropriate.” *Mobsy v. Sanders*, Cuyahoga App. No. 92605, 2009-Ohio-6459, at ¶11, citing *Hollins v. Schaffer*, 182 Ohio App.3d 282, 286, 2009-Ohio-2136, 912 N.E.2d 637.

{¶ 21} The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 1998-Ohio-389, 696 N.E.2d 201, when it stated, “[p]ursuant to Civ.R. 56, summary judgment is appropriate 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.” *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

Analysis

{¶ 22} A review of the record demonstrates that there are genuine issues of material fact still in dispute; therefore, summary judgment was not appropriate. Essentially, the dispute boils down to whether Booth was

actually able to obtain financing. If Booth was unable to secure financing, pursuant to the express language of the contract, the agreement was null and void. We will not look outside of the contract at a party's intent, when the language of the contract is clear and unambiguous. *Terminal Tower SPE, LLC v. Kaufman*, 8th Dist. No. 91332, 2008-Ohio-5353, at ¶9, citing *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 1992-Ohio-28, 597 N.E.2d 499.

{¶ 23} As an initial matter, the parties dispute whether the purchase agreement became null and void on December 14, 2007, when Booth had not yet obtained a loan commitment. The financing clause states:

“BUYER shall make a written application for the above mortgage loan within 7 days after acceptance and shall obtain a commitment for that loan *on or about Dec. 14, 2007.* * * * If, despite BUYER's good faith efforts, a loan commitment has not been obtained, then this Agreement shall be null and void.” (Emphasis added.)

{¶ 24} Booth argues that the contract became null and void on December 14, 2007, when she did not have a loan commitment. She contends that while the closing date was extended, the date by which Booth was required to procure financing had always remained the same. The Dedinskys argue that the clear language of the financing contingency leaves the precise date open as to when Booth was required to have a loan commitment.

{¶ 25} In support of her argument that the purchase agreement was null and void on December 14, 2007, Booth cites *Levy v. Tirgan* (Oct. 28, 1999), 8th

Dist. No. 76378. In *Levy*, this court held that a buyer could not enforce a purchase agreement against a seller, when the buyer was required to procure financing within 20 days and failed to do so within that time period. However, *Levy* is clearly distinguishable because in *Levy* the purchase agreement specifically provided only 20 days for the buyer to obtain a financing commitment. In the instant case, the language clearly leaves the date open by using the language “on or about.”

{¶ 26} When looking at the parties purchase agreement, the terms must be given their “just and reasonable construction which carries out the parties’ intent.” *Siegler v. Simoni* (May 31, 2001), 8th Dist. No. 78107, citing *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374. Here, the contract states, “on or about December 14, 2007,” evidencing the parties intent that the financing could also be procured sometime during that general timeframe. Further, Booth’s intent to go forward on the sale is clearly evidenced by her agreement to extend the closing date.

{¶ 27} As we have concluded that the purchase agreement was not voided by Booth’s failure to have a loan commitment by December 14, 2007, we must next determine whether the Dedinskys were entitled to summary judgment on the basis that Booth did receive a loan offer just prior to closing for \$135,000.

{¶ 28} The party moving for summary judgment bears the initial 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, 1996-Ohio-107, 662 N.E.2d 264. Therefore, in order for the Dedinskys to have been entitled to summary judgment, they were required to demonstrate that Booth was actually able to procure financing; otherwise, the contract would have been null and void.

{¶ 29} In support of their motion for summary judgment, the Dedinskys attached the purchase agreement, the subsequent amendment, a mortgage note signed by Booth, and a settlement statement. The mortgage note purported to lend Booth \$135,000 to purchase the property. The settlement statement noted that the cash due from Booth at the time of closing was \$53,510.34. The Dedinskys also provided documentation supporting their damages in the amount of \$8,850.25.

{¶ 30} After conducting a de novo review of the evidence presented by the Dedinskys, we conclude that they were able to meet the initial burden entitling them to summary judgment. They specifically established that Booth entered into a purchase agreement for their property, obtained the amount of financing she indicated she needed pursuant to the purchase agreement, and ultimately did not close on the property, causing the Dedinskys to spend additional money in order to sell their property.

{¶ 31} Once the moving party satisfies its burden, the nonmoving party “may not rest upon the mere allegations or denials of the party’s pleadings, but

the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); see, also, *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 32} In Booth's brief in opposition to the motion for summary judgment, Booth submitted her own affidavit, a copy of the loan application that resulted in Booth receiving loan approval for \$135,000, and a second loan application Booth completed with cosignor, Raymond Cox.

{¶ 33} In her affidavit Booth stated that shortly after signing the purchase agreement, she applied for a loan with Real Living Mortgage, LLC. As of January 28, 2008, Booth had not received a loan commitment due to her income level and negative items on her credit report. On January 31, 2008, Booth was informed that the loan officer, Jarecki, had "played with the figures" and that she was approved for the loan. However, Booth stated that when she went to sign the loan documents, she noticed that the figures depicting both her income and her assets were significantly inflated.

{¶ 34} Generally, a self-serving affidavit is insufficient to overcome summary judgment. *N. Eagle, Inc. v. Kosas*, 8th Dist. No. 92358, 2009-Ohio-4042, at ¶26, citing *Davis v. Cleveland*, 8th Dist. No. 83665,

2004-Ohio-6621. However, an affidavit with corroborating evidence can be sufficient to create a genuine issue of material fact preventing summary judgment. Id.

{¶ 35} In support of the facts alleged in her affidavit, Booth submitted the loan application that she alleges contained false information regarding her income and assets. The loan application listed the market values of Booth's various accounts as \$42,000, \$10,000, \$57,200, and \$15,824, and a monthly income of \$5,259. At the bottom of the loan application, Booth wrote, "[t]hese (figures) are not correct," and she placed parentheses around the inaccurate figures.

{¶ 36} The notation was to indicate that the figures in parentheses were inaccurate. Booth placed parentheses around her monthly income, as well as several of her listed assets.

{¶ 37} At the top of the application, Booth also wrote:

"1/31/08 @ 5:15pm spoke to Don J @ real living- said he played with figures- doesn't matter what they are."

{¶ 38} The loan application also listed four credit accounts on which Booth still owed money. Underneath the list of these accounts, Booth wrote, "[w]here are my other payments: Chase[,] Dollar Bank[,] Huntington[,] Sears." It was based on this application that Booth secured a loan for \$135,000.

{¶ 39} Shortly thereafter, Booth attempted to obtain a loan for the entire purchase price and closing costs in the amount of \$183,126. She again filled out a loan application with Real Living. Booth completed this application with Cox as a cosignor and, according to her affidavit, stated that the figures contained in this second application were accurate.

{¶ 40} The figures in the second application were significantly lower. On the second application Booth's income was listed as \$3,361 per month. The market values of her accounts were listed as \$12,624, \$3,200, \$2,200, and \$42,000. While the first application had listed only four credit card accounts on which Booth still owed money, the second application listed 19 separate credit card accounts that had outstanding balances.²

{¶ 41} According to the express terms of the purchase agreement, Booth was required to use good faith in attempting to secure financing. Booth alleges that the only financing she was able to obtain was the loan from Real Living, which was based on inaccurate information in the application. When determining whether a party has exercised good faith in attempting to secure a loan commitment there is a reasonableness standard, as the party is not required to secure financing "no matter the cost." *Scelza v. Mikhael*, 9th Dist. No. 22994, 2007-Ohio-2199, at ¶8.

²It is unclear from the second loan application which of those 19 outstanding accounts belonged to Booth and which belonged to Cox.

{¶ 42} Based upon the evidence in the record, there remains a genuine issue of material fact as to whether Booth exercised good faith in trying to obtain financing. If Booth exercised good faith and could only obtain financing that required her to submit false information in order to secure a loan, then the contract would have been null and void, under which circumstances the Dedinskys would have no claim against Booth.

{¶ 43} Booth's sole assignment of error is sustained.

{¶ 44} Judgment is reversed, and the case is remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., and
LARRY A. JONES, J., CONCUR