[Cite as *Kirkwood v. FSD Dev. Corp.*, 2011-Ohio-1098.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95280

MILDRED KIRKWOOD

PLAINTIFF-APPELLANT

vs.

FSD DEVELOPMENT CORPORATION

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-704593

BEFORE: S. Gallagher, J., Celebrezze, P.J., and Jones, J.

RELEASED AND JOURNALIZED: March 10, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} Plaintiff-appellant Mildred Kirkwood appeals the decision of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of defendant-appellee FSD Development Corporation ("FSD"). For the reasons stated herein, we reverse the judgment of the trial court and remand the matter for further proceedings.

{¶ 2} Kirkwood filed her complaint on September 22, 2009. She claimed that FSD was in breach of a purchase agreement under which FSD was to purchase land belonging to Kirkwood and her now deceased husband. Kirkwood alleged that FSD failed to cooperate with a lot split and consolidation required by the agreement.

{¶ 3} The purchase agreement was entered into on October 7, 1997. Under the terms of the agreement, FSD was to purchase land belonging to Kirkwood, located at

5080 Brainard Road in Solon, Ohio, for the price of $87,500. The land to be purchased consisted of all of permanent parcel number 951-02-14 ("parcel 14") and the rear part of parcel number 951-02-15 ("parcel 15"). Essentially, Kirkwood sought to retain one acre of parcel 15, where she resided, and to convey the remainder of her land to FSD.

{¶ 4} FSD states that it was conveyed marketable title to parcel 14 and Kirkwood was paid for that parcel. To complete the conveyance of the rear of parcel 15, a lot split was required.

{¶ 5} In May 2004, Kirkwood submitted an application to the Solon Planning Commission for a lot split and consolidation. Kirkwood's request was to split the rear 1.26 acres off parcel 15 and to consolidate it with parcel 14. Kirkwood claims she was unable to complete this request and obtain the lot split because of a lack of cooperation from FSD.

{¶ 6} FSD filed a motion for summary judgment in the matter. Kirkwood opposed the motion and submitted an affidavit in which she states as follows: "[D]espite repeated assurances that [FSD] would have the plat and survey prepar[ed] for the application, [FSD] never had the documents prepared and indicated to me through my counsel that they would not be prepared due to [FSD] no longer wanting the property."

{¶ 7} The trial court's judgment entry, as corrected, granted FSD's motion. This appeal followed. Kirkwood has raised one assignment of error challenging the trial court's decision to grant summary judgment to FSD.

{¶ 8} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9, citing *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 9} It is well-recognized that every contract contains an implied duty of good faith and fair dealing. E.g., *O'Brien v. Ravenswood Apts., Ltd.*, 169 Ohio App.3d 233, 2006-Ohio-5264, 862 N.E.2d 549, ¶ 36; *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49, ¶ 27. In *Littlejohn*, the court described the duty as follows: "'Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.' * * * [B]ad faith may consist of inaction, or may be the 'abuse of a power to specify terms, [or] interference with or failure to cooperate in the other party's

performance.'" Id. at ¶ 26, quoting Restatement of the Law 2d, Contracts (1981), Section 205, Comments a and d. "Generally, a breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the nonbreaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the nonbreaching party suffered damages as a result of the breach." (Internal citation omitted.) *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 108, 661 N.E.2d 218.

{¶ 10} In this case, Kirkwood claims that she met or attempted to meet all of her contractual obligations. She states in her affidavit that she applied for a lot split, but was unable to complete the request because of a "lack of cooperation from [FSD]." More specifically, she states that FSD gave her "repeated assurances" that it would prepare the plat and survey for the application. She also states that FSD's counsel represented to the city of Solon at a planning commission meeting that "he would be having the plat prepared." Despite these assurances, the plat was never provided. As indicated by plaintiff's counsel in his affidavit, at some point, FSD changed its mind and informed plaintiff's counsel that FSD "would not be preparing a plat" and "was no longer interested in the property."

{¶ 11} FSD argues in its appellate brief that "[w]hile it may be true that there were discussions as to whether appellee would obtain the plat, there never was a writing to that effect." FSD claims that any oral agreement would run afoul of the parol evidence rule. However, "[t]he parol evidence rule does not apply to evidence of subsequent

modifications of a written agreement or to waiver of an agreement's terms by language or conduct." *Star Leasing Co. v. G & S Metal Consultants, Inc.*, Franklin App. No. 08AP-713, 2009-Ohio-1269, at ¶ 29.

{¶ 12} Although the purchase agreement indicates the property is to be conveyed by Kirkwood, it does not explicitly resolve the parties' obligations regarding the lot split. FSD had an implied obligation to cooperate in the transfer of the property and not to hinder Kirkwood's performance under the contract. There is unrefuted evidence that FSD offered repeated assistance in preparing the plat required by the city of Solon for the lot split, yet failed to cooperate because it changed its mind about purchasing the property. "'A contracting party impliedly obligates himself to cooperate in the performance of his contract and the law will not permit him to take advantage of an obstacle to performance which he has created or which lies within his power to remove.'" *Synergy Mechanical Contrs. v. Kirk Williams Co.* (Dec. 22, 1998), Franklin App. No. 98AP-431, quoting *Gulf, Mobile & Ohio RR. Co. v. Illinois Cent. RR. Co.* (1954), 128 F.Supp. 311, 324.

{¶ 13} Upon our review of the record, we find that there are genuine issues of material fact as to whether FSD breached the purchase agreement by failing to cooperate regarding the lot split and consolidation with the city of Solon and in deciding it did not want the property. Kirkwood's sole assignment of error is sustained.

Judgment reversed; case remanded.

It is ordered that appellant recover from appellee 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.

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
LARRY A. JONES, J., CONCUR