

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

HITCHCOCK DEVELOPMENT CO.,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-04-043
- vs -	:	<u>OPINION</u>
	:	8/31/2009
GEORGE HUSTED, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 06 CV 66524

Charles H. Lease, 1188 South High Street, Columbus, Ohio 43206, for plaintiff-appellant

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Christopher A. Watkins, 500 Justice Drive, Lebanon, Ohio 45036, for defendants, Jim Aumann and Nick Nelson

BRESSLER, J.

{¶1} Plaintiff-appellant, Hitchcock Development Co. (Hitchcock), appeals the decisions of the Warren County Court of Common Pleas denying its motion for partial summary judgment against defendant-appellee, Peoples Community Bank (Peoples), and

granting summary judgment in favor of Peoples in a foreclosure action. For the reasons set forth below, we affirm the judgment of the trial court.

{¶2} This case involves a dispute regarding the sale and subsequent foreclosure of an interest in real property. On March 22, 2005, Gearied F. Hitchcock, Jr., as president of Hitchcock, entered into a real estate purchase agreement with George and Angie Husted, individually, and Holt Homes LLC (collectively buyers), under which Hitchcock agreed to sell to buyers approximately 37.9 acres of property on Lower Springboro Road in Clearcreek Township in Warren County.

{¶3} At the time the purchase agreement was executed, the property was intended to be platted into 25 lots for the Bello Vista Villas residential development. Due to apparent financial constraints, the buyers lacked the funds necessary to purchase all 25 lots at a price acceptable to Hitchcock. As a result, the purchase agreement provided for a purchase price of "nine hundred thousand dollars (\$900,000.00) plus lots 10 [and] 13" in Bello Vista.

{¶4} The transaction was complicated by the fact that lots 10 and 13 could not be separately deeded to Hitchcock at the time of the sale because they were undeveloped, and a final plat establishing lot lines had not been recorded.¹ As a result, all 25 lots were conveyed by Hitchcock at closing.

{¶5} Hitchcock contends that the buyers were to develop lots 10 and 13 on its behalf, and convey the lots back to Hitchcock free and clear of any liens and encumbrances. In furtherance of this goal, the purchase agreement required the buyers to develop the lots within seven months of the date of the agreement. In the event the development was to be phased, the agreement required lot 10 to be developed within seven months, and lot 13

1. The record indicates that the final plat for the property was recorded in the spring of 2007. In the final plat, lot 10 was re-numbered as lot 11, and lot 13 was re-numbered as lot 14. For ease of discussion, we will refer to the lots at issue as "lots 10 and 13."

within 19 months.

{¶6} According to Hitchcock, it was anticipated that the buyers could develop and sell some of the remaining 25 lots, which would generate enough income to allow them to purchase lots 10 and 13 from Hitchcock. The purchase agreement granted the buyers an option to purchase the lots in the event that one lot was purchased by May 5, 2006, and the remaining lot was purchased by May 5, 2007. The stated purchase price for lot 10 was \$79,990 and the price for lot 13 was \$82,990. If one or both lots were not purchased by the dates specified in the agreement, Hitchcock had no further obligation to hold or sell the lots to the buyers.

{¶7} The record indicates that after the purchase agreement was executed, Holt's interest and obligations under the agreement were assigned to Bello Homes, LLC (Bello). Bello financed the purchase of the property through Peoples, and executed a promissory note in the face amount of \$1,580,000. The note was secured with a mortgage on the property, which included all 25 lots.

{¶8} As a result of the declining real estate market, the buyers were unable to develop lots 10 and 13 within the timeframes set forth in the purchase agreement, and the lots were not conveyed to Hitchcock. Bello also defaulted under the terms of its promissory note.

{¶9} Several lawsuits were initiated between the parties, which were subsequently consolidated into one action. Hitchcock filed suit against the buyers in July of 2006, seeking specific performance of the purchase agreement to require the buyers to convey title to the lots. Hitchcock further requested that the court enjoin the buyers from selling, transferring, or conveying the lots to a third party. Bello intervened in the case as a party defendant. After both lots were developed and the final plat was recorded in the spring of 2007, Hitchcock filed a motion for partial summary judgment on its specific performance claim. The trial court

granted summary judgment in its favor, and ordered title to lots 10 and 13 to be transferred to Hitchcock. Upon transfer, however, the lots were subject to Peoples' mortgage lien.

{¶10} Hitchcock filed suit against Peoples in May 2007, alleging claims for specific performance, promissory estoppel, negligent misrepresentation, intentional misrepresentation and fraud. Hitchcock averred that Peoples was aware of the terms of the purchase agreement and had entered into a separate, oral agreement with Hitchcock that its mortgage lien on lots 10 and 13 would be released once the two lots were developed. According to Hitchcock, Peoples partially performed on its promise by paying Hitchcock \$900,000, but despite its agreement to the contrary, failed and refused to release its mortgage lien. As a result, the buyers were unable to convey lots 10 and 13 to Hitchcock free and clear of any liens and encumbrances.

{¶11} Peoples initiated a foreclosure action against Bello in September of 2007 as a result of Bello's default under the terms of the promissory note. Peoples' complaint was amended to include Hitchcock as an additional party defendant. Hitchcock counterclaimed, re-alleging claims for specific performance, promissory estoppel, negligent misrepresentation, intentional misrepresentation and fraud. Hitchcock also asserted a partition claim, and requested that the trial court appoint a receiver.

{¶12} Both Hitchcock and Peoples moved for summary judgment on their respective claims. In December 2007, Hitchcock moved for partial summary judgment against Peoples, arguing that it was entitled to specific performance on Peoples' alleged promise to release its mortgage lien. In January 2008, Peoples moved for summary judgment against Bello, seeking to foreclose on its mortgage. Peoples' motion did not include lots 10 and 13, and was unopposed by Bello.

{¶13} In its April 24, 2008 decision, the trial court granted summary judgment in favor of Peoples. The court, however, denied Hitchcock's motion for partial summary judgment,

determining that questions of material fact remained as to whether an agreement existed between Hitchcock and Peoples, and if so, whether Peoples had any obligation to release its lien. The court determined that Hitchcock had "failed to meet its burden proving otherwise."

{¶14} Peoples filed a second motion for summary judgment against Bello on June 20, 2008, requesting foreclosure of its mortgage lien on lots 10 and 13. Approximately nine months later, on March 24, 2009, the trial court granted Peoples' motion. The court found that the sale was financed using all 25 lots as security for the loan, and that Peoples' lien on the lots had priority to any claimed interest of Hitchcock. In addressing the merits of Hitchcock's promissory estoppel claim, the court determined that there was no evidence to indicate that Peoples made an oral promise to Hitchcock that the lots would be released as security for Bello's loan. The court further reasoned that even if the oral representations alleged by Hitchcock were in fact made by Peoples, Hitchcock could not justifiably rely on them.

{¶15} The court's March 24 decision was subsequently incorporated into a decree of foreclosure for lots 10 and 13 on March 30, 2009.

{¶16} Hitchcock appeals the decisions of the trial court, advancing two assignments of error for our review.²

{¶17} Assignment of Error No. 1:

{¶18} "THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR SUMMARY JUDGMENT WHEN NO GENUINE ISSUES OF MATERIAL FACT REMAINED."

{¶19} In its first assignment of error, Hitchcock argues that the trial court erred in

2. Hitchcock's appeal incorporates the trial court's April 24, 2008, March 24, 2009, and March 30, 2009 decisions. Although Hitchcock's claims for specific performance, negligent misrepresentation, intentional misrepresentation, fraud, partition and the appointment of a receiver were not specifically adjudicated by the trial court, the March 30, 2009 decision and entry of foreclosure effectively disposed of Hitchcock's remaining claims, and the parties have not raised any issue with respect to those claims on appeal. See, generally, *General Acc. Ins. Co. v. Ins. Co. of N. America* (1989), 44 Ohio St.3d 17, 21.

denying its December 2007 motion for partial summary judgment against Peoples.

{¶20} Summary judgment is a procedural device used to terminate litigation and avoid a formal trial where there are no issues in a case to try. *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 370, citing *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2. This court reviews summary judgment decisions de novo, which means that we review the trial court's judgment independently and without deference to its determinations. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. We utilize the same standard in our review that the trial court should have employed. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129.

{¶21} The Ohio Supreme Court has repeatedly held that summary judgment is appropriate under Civ. R. 56 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." *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389. The party moving for summary judgment has the initial burden of producing some evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. The nonmoving party must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings. *Id.*; Civ.R. 56(E).

{¶22} Hitchcock initially contends that the trial court in its March 24, 2009 decision, failed to properly analyze the facts in connection with Hitchcock's unjust enrichment claim against Peoples. At the outset, we note that the court's March 24 decision related only to Peoples' June 20, 2008 motion for summary judgment. The foundation for Hitchcock's first assignment of error originates instead from the trial court's April 24, 2008 decision denying its

motion for partial summary judgment. As a result, our review is confined to the court's April 24, 2008 decision.

{¶23} In the April 24 decision, the trial court did not address a claim of unjust enrichment. However, upon review of the record, Hitchcock failed to plead this claim in its original complaint or counterclaim, and there is nothing in the record to suggest that Hitchcock amended its pleadings to allege this claim. We are therefore unable to entertain Hitchcock's arguments with respect to this issue on appeal. See *Armaly v. City of Wapakoneta*, Auglaize App. No. 2-05-45, 2006-Ohio-3629, ¶32.

{¶24} Hitchcock also argues that the trial court failed to analyze the facts in connection with its promissory estoppel claim.³ Promissory estoppel is a quasi-contractual concept where a court in equity seeks to prevent injustice by effectively creating a contract where none existed. *Gus Hoffman Family Ltd. Partnership v. David*, Clermont App. No. CA2006-09-076, 2007-Ohio-3968, ¶6. In order to prevail under a claim of promissory estoppel, a party must establish the following elements: (1) a clear and unambiguous promise was made; (2) upon which it would be reasonable and foreseeable for the party to rely; (3) actual reliance on the promise; and (4) the party was injured as a result of the reliance. *Id.* at ¶5. A clear and unambiguous promise is one that the promisor would expect to induce reliance; this element is not satisfied by vague or ambiguous references. *Stern v. Shainker*, Cuyahoga App. No. 92301, 2009-Ohio-2731, ¶9. (Internal citations omitted.)

{¶25} Support for Hitchcock's claim centers primarily on the deposition testimony of Brian Schultz, a vice president in the commercial lending department at Peoples at the time of the sale. Although the record reflects that Schultz's deposition was filed with the trial court,

3. In support of its argument, Hitchcock similarly references the court's March 2009 decision granting summary judgment in favor of Peoples. However, as discussed above, our review of this assignment of error is limited to the court's April 2008 decision.

it was not included in the record on appeal. "Upon appeal of an adverse judgment, it is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review." *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. As a result, our review is limited to accepting as facts only those portions of Schultz's deposition testimony and the exhibits thereto which were appended to the parties' briefs in support of, or in opposition to, summary judgment. See *Urbanek v. All State Home Mortgage Co.*, 178 Ohio App.3d 493, 2008-Ohio-4871, ¶2.

{¶26} During Schultz's deposition, a reference was made to correspondence he apparently exchanged with a real estate appraiser employed by Peoples to conduct an appraisal of the 25 lots.⁴ When ordering the appraisal, Schultz testified to informing the appraiser that the sale of only 23 of the 25 lots would be used to pay down Bello's loan, as "two developed lots will be given back to the original seller at no cost. Therefore, the seller is taking a reduced sales price up front with the remainder coming back in the form of free and clear lots for him to build on." Hitchcock also supported its motion with the affidavit of Gearied Hitchcock, who averred generally that Peoples was provided with the purchase agreement and all attachments and had "agreed and promised" Hitchcock that it would finance the purchase pursuant to the terms of the agreement, which included the return of the two lots free and clear of any liens.

{¶27} In its memorandum in opposition, Peoples did not dispute Hitchcock's claim that it was aware of the terms of the purchase agreement, but argued that no promise was ever made to Hitchcock to release the two lots after the development contingencies were met. Peoples pointed to Schultz's deposition, during which he testified to telling the loan

4. The document referenced by Hitchcock as an exhibit to Schultz's deposition is not included in the record on appeal.

committee that lots 10 and 13 would be the last lots released, and that "[a]t the end of the day, we would need them as part of the collateral * * *." Schultz also testified that he had no recollection of any conversation with Gearied Hitchcock regarding an agreement on the part of Peoples to release the two lots.

{¶28} Peoples also submitted the affidavit of Robert Nail, first vice president and senior credit manager of Peoples, who averred that he had reviewed the written appraisal provided to Peoples, which included all 25 lots in Bello Vista. Nail also stated that the loan was approved with "the express understanding that all 25 lots of [t]he Bello Vista Villas [s]ubdivision were to be pledged as collateral to secure full repayment of the loan." Nail's affidavit incorporated by reference a commercial loan narrative provided to Peoples' lending committee, which was prepared by Nail and Schultz and submitted prior to the loan approval. The commercial loan narrative specifically provided that, as a condition of loan approval, Hitchcock's interest in the two lots would be subordinated until Peoples' loan was paid in full.

{¶29} Based upon our review of the limited record before us, we conclude that the trial court properly denied Hitchcock's motion for partial summary judgment. The parties do not dispute that Peoples was aware of the terms of the purchase agreement. Although Hitchcock argues that Schultz's correspondence with the appraiser shows the bank's "actual knowledge and intention," it does not establish the first element of Hitchcock's promissory estoppel claim, i.e., that a clear and unambiguous promise was made by Peoples to Hitchcock that its mortgage lien on the two lots would be released once the lots were developed. Hitchcock failed to produce any affirmative evidence establishing that an oral promise was in fact made by Peoples. Construing the evidence in favor of Peoples, we conclude that Hitchcock failed to demonstrate the absence of a genuine issue of material fact such that it was entitled to summary judgment on its promissory estoppel claim.

{¶30} Hitchcock's first assignment of error is therefore overruled.

{¶31} Assignment of Error No. 2:

{¶32} "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO APPELLEE PEOPLES COMMUNITY BANK WHEN GENUINE ISSUES OF MATERIAL FACT REMAINED."

{¶33} In its second assignment of error, Hitchcock argues that the trial court was estopped from entering summary judgment in favor of Peoples in its March 24, 2009 decision in light of the court's April 2008 denial of Hitchcock's motion for partial summary judgment. Although Hitchcock fails to cite any legal authority in support of its argument, Hitchcock contends that the two decisions are "facially inconsistent" and cannot be reconciled. We disagree.

{¶34} In its consideration of the parties' respective motions, the court was presented with different analytical frameworks. As discussed above, in its April 2008 decision the trial court determined that Hitchcock, as the moving party, had failed to meet its initial burden of setting forth specific facts demonstrating that it was entitled to summary judgment on its promissory estoppel claim. In granting Peoples' motion for summary judgment on March 24, 2009, the court determined that Peoples, as the moving party, had met its burden of demonstrating the absence of a genuine issue of material fact that Bello's note was in default and that it was entitled to foreclose on its mortgage.

{¶35} In that decision, the court also determined that Hitchcock had failed to meet its reciprocal burden of establishing that its promissory estoppel claim should prevent the foreclosure of Peoples' mortgage interest. The court concluded that Hitchcock did not establish the existence of an oral agreement, and that even if Peoples made any representations with regard to the release of the lots, Hitchcock could not justifiably rely on them.

{¶36} Notably, in its memorandum in opposition to Peoples' motion, Hitchcock did not

present any new evidence in support of its claim. Hitchcock argued generally that summary judgment was inappropriate in light of the issues of material fact set forth in Hitchcock's "several pleadings and affidavits." However, the record indicates that the only affidavit submitted by Hitchcock was that of Gearied Hitchcock, in which he alleged generally that Peoples had promised to release its mortgage lien. There is nothing in the record to suggest that Hitchcock supplemented its memorandum in opposition with additional evidence after the close of discovery on December 1, 2008.

{¶37} Based on the foregoing, we do not find that the trial court's decisions were inconsistent. Hitchcock bore the burden of production on its promissory estoppel claim. Both in support of its own motion, and in opposition to the motion filed by Peoples, Hitchcock simply failed to present any evidence that would support a judgment in its favor on its claim. Hitchcock's second assignment of error is therefore overruled.

{¶38} Judgment affirmed.

YOUNG and RINGLAND, JJ., concur.

[Cite as *Hitchcock Dev. Co. v. Husted*, 2009-Ohio-4459.]