

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

Merivale Investments, et al.

Court of Appeals No. L-08-1439

Appellees

Trial Court No. CI07-4064

v.

Debbie Tuggle, et al.

DECISION AND JUDGMENT

Appellants

Decided: December 11, 2009

* * * * *

Joanne E. Baron, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an accelerated appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court granted motions for summary judgment filed by appellees, Raymond Kadri and Merivale Investments, and denied a motion for summary judgment filed by appellant, Debbie Tuggle.

{¶ 2} On or about September 19, 1997, Tuggle and her then-boyfriend, Alfred Smith, entered into a land installment contract with Kadri. Under the contract, Kadri

agreed to sell to Tuggle and Smith property he then owned jointly with Paul Tunks at 130 Elgin Street, Toledo, Ohio. The price for the property was \$30,000, payable in monthly installments of \$400 per month. On or about March 1, 2003, Kadri and Tunks sold the property to Said Elmajzoub, subject to the land contract. Elmajzoub then sold the property to Merivale, on or about August 31, 2005. Tuggle recorded the land contract on or about March 26, 2007. Prior to this date, the land contract had not been recorded. On May 9, 2007, Kadri assigned his interest in the land contract to Merivale.

{¶ 3} Tuggle asserts that, during the summer of 2004, the property suffered rainwater damage resulting from a leaky roof. Tuggle applied for assistance through the E.O.P.A. Senior Emergency Repair Program to repair the property. Her request was denied, however, because the property was not titled in her name. Tuggle continued to live in the property until the property became so uninhabitable that she moved out.

{¶ 4} On June 5, 2007, Merivale filed a Complaint for Foreclosure of Land Contract against Tuggle and Smith, alleging that they had failed to make payments under the land contract since March 2007. This case was assigned Lucas County Case No. CI07-4064. Also on June 5, 2007, Tuggle filed suit against Elmajzoub, Kadri, and Merivale and/or Ali Ishmail, statutory agent for Merivale. This case was assigned Lucas County Case No. CI07-4067. In her complaint, Tuggle alleged that Kadri, Elmajzoub, and Ishmail failed to record the land contract, in violation of R.C. 5313.02, and that as a result she could not pull permits to repair the damage to the roof, lost funding to assist in payment of the roof repairs, lost the use and quiet enjoyment of the house, and she was

forced to move. Additionally, Tuggle alleged that Ishmail and/or Merivale committed fraud by trying to evict her, and she sought an injunction "for money for the mortgage held in escrow with the Toledo Municipal Court* * *."

{¶ 5} On June 21, 2007, Kadri filed a crossclaim in Case No. CI07-4067 against Elmajzoub and Merivale, requesting that he be held harmless and that he receive judgment against them for any amount that he might be held responsible. On July 9, 2007, Tuggle and Smith filed a counterclaim in Case No. CI07-4064. This counterclaim included the same allegations as those raised in Tuggle's complaint in Case No. CI07-4067.

{¶ 6} On July 10, 2007, Case No. CI07-4067 was consolidated with Case No. CI07-4064, under the latter case number.

{¶ 7} On November 6, 2007, Tuggle filed a motion for summary judgment. On January 28, 2008, Merivale filed a counter motion for summary judgment. And on February 27, 2008, Kadri moved for summary judgment.

{¶ 8} On March 26, 2008, Tuggle and Smith filed an amended counterclaim. In their "First Counterclaim," Tuggle and Smith allege that Kadri, Elmajzoub, and Ishmail failed to record the land contract, as required by R.C. 5313.02, and as a result, they were damaged. In their "Second Counterclaim," Tuggle and Smith allege that, since the property was not titled in their names, they were not able to pull permits or get funding, and thus they were not able to repair the roof. Tuggle and Smith allege in their "Third Counterclaim" that they were deprived of the use and quiet enjoyment of their property

due to defendants' failure to record the land contract. The "Fourth Counterclaim" contends that Ishmail "committed fraud by violating R.C. 5313.02 in trying to evict Plaintiff." In their Fifth Cause of Action,¹ Tuggle and Smith seek an injunction for money held in escrow in the Toledo Municipal Court. In their Sixth Cause of Action, Tuggle and Smith assert that Elmajzoub, Ishmail, and Kadri violated R.C. 5313.02 as Elmajzoub and Ishmail took out loans in excess of the amount owed on the land contract, and Kadri was the holder of these mortgages. The Seventh Cause of Action contains a claim that Elmajzoub and Kadri breached the land contract with the above mortgages. In their Eighth Cause of Action, Tuggle and Smith claim that Kadri, Elmajzub, and Merivale "with Defendant Ishmail" were deceptive as they never intended to transfer the deed to Tuggle and Smith. In the Ninth Cause of Action, Tuggle and Smith assert that Elmajzoub and Merivale "with Defendant Ishmail" "were complacent in the Defendant Kadri's fraud" and, further, knew that the land contract was not recorded, took out mortgages in excess of the amount owed on the land contract, and deprived Tuggle of her claim to the property. Lastly, the Tenth Cause of Action contains a claim that the property is uninhabitable, unrepairable, and will be demolished and that Kadri, Elmajzoub, and Ishmail "purposefully divested * * * Tuggle of her interest in the property."

¹Beginning with the fifth claim, Tuggle and Smith changed their heading from "Counterclaim" to "Cause of Action."

{¶ 9} The trial court, in an opinion and judgment entry dated November 14, 2008, granted the motions for summary judgment filed by Merivale and Kadri and denied the motion for summary judgment filed by Tuggle.

{¶ 10} Tuggle timely filed an appeal from the trial court's judgment, raising the following assignments of error:

{¶ 11} I. "WHETHER THE TRIAL COURT ERRED WHEN IT HELD APPELLANT BREACHED THE LAND CONTRACT?"

{¶ 12} II. "WHETHER THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT?"

{¶ 13} III. "WHETHER THE TRIAL COURT ERRED WHEN IT HELD APPELLANT DID NOT SUFFER ANY DAMAGES?"

{¶ 14} IV. "WHETHER THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE MERIVALE INVESTMENT LLC'S MOTION FOR SUMMARY JUDGMENT?"

{¶ 15} V. "WHETHER THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE KADRI'S MOTION FOR SUMMARY JUDGMENT?"

{¶ 16} An appellate court reviewing a trial court's granting of summary judgment does so de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides:

{¶ 17} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of

evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as considered in this rule. * * *

{¶ 18} Summary judgment is proper where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Ryberg v. Allstate Ins. Co.* (July 12, 2001), 10th Dist. No. 00AP-1243, citing *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 629.

{¶ 19} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

{¶ 20} Appellant argues in her first assignment of error that the trial court erred when it held that she had breached the land contract. R.C. 5313.01 defines a land contract as an executory agreement which is not required to be performed within one year of the date of the agreement and "under which the vendor agrees to convey title in real property * * * to the vendee and the vendee agrees to pay the purchase payment in

installments, while the vendor retains title to the property as security for the vendee's obligation." R.C. 5313.01.

{¶ 21} In the instant case, the trial court found that Merivale was entitled to summary judgment on its foreclosure complaint, because Tuggle had admitted to not making payments pursuant to the contract. We agree.

{¶ 22} Tuggle disputes this conclusion, stating that she "substantially performed" her portion of the contract by making payments into an escrow account, "which [were] then given to Appellee Merivale." Although the record demonstrates that certain payments were, in fact, paid into an escrow account, the record likewise shows that the escrow account was terminated in June 2007. To the extent that Tuggle is alleging that she has since placed her payments into some other escrow account, such allegations are unavailing. The contract requires that payments be made at 355 East Broadway, Toledo, Ohio, 43605. Neither the law nor the terms of the contract provide for placing land contract installments into escrow.

{¶ 23} Tuggle argues that the land contract was unenforceable against her, because appellees failed to strictly comply with the requirements of R.C. 5313.02. Specifically, Tuggle argues that: (1) appellees never recorded the agreement; and (2) appellee Merivale, without Tuggle's permission, took out a blanket mortgage on the property for \$170,000, which amount vastly exceeded the value of the property (for which Tuggle agreed to pay \$30,000).

{¶ 24} R.C. 5313.02(C) provides that "[w]ithin twenty days after a land installment contract has been signed by both the vendor and the vendee, the vendor shall cause a copy of the contract to be recorded * * *."

{¶ 25} In addition, R.C. 5313.02(B) provides that "[n]o vendor shall hold a mortgage on property sold by a land installment contract in an amount greater than the balance due under the contract, except a mortgage that covers real property in addition to the property that is the subject of the contract where the vendor has made written disclosure to the vendee of the amount of that the [sic] mortgage and the release price, if any, attributable to the property in question.

{¶ 26} "No vendor shall place a mortgage on the property in an amount greater than the balance due on the contract without the consent of the vendee."

{¶ 27} Even assuming appellees' noncompliance with the foregoing provisions, we find that such noncompliance does not affect the enforceability of the land contract as against Tuggle. "Despite the mandatory language of R.C. 5313.02, it is well-established that a land contract may be held to be enforceable as between the parties even though it does not strictly comply with the requirements of R.C. 5313.02." *Gollihue v. Russo*, 152 Ohio App.3d 710, 2003-Ohio-2663, at ¶ 33, citing *Real Flo Properties v. Kelly* (Dec. 17, 1999), 6th Dist. No. L-99-1099 ("a document need not strictly comply with R.C. 5313.02(A) in order to be deemed an enforceable land installment contract"), and *Shimko v. Marks* (1993), 91 Ohio App.3d 458, 461-462 (substantial compliance with the statutory

requirements of R.C. 5313.02 was sufficient to establish a valid installment contract); see, also, *Phillips v. May*, 11th Dist. No. 2003-G-2520, 2004-Ohio-5942, ¶ 21.

{¶ 28} The purpose of R.C. Chapter 5313 is to protect consumers by making specific information available to vendees in the land installment contract. *Phillips*, supra, at ¶ 22. Courts have voided contracts under R.C. 5313.02 where there has been material non-compliance to the detriment of the buyer. *Id.* at ¶ 23. It is only when the omission of information required by R.C. 5313.02 is substantial enough to cause a buyer to refuse to execute the contract if he had knowledge of the facts that the contract becomes voidable. *Id.*

{¶ 29} Here, Tuggle fails to demonstrate how appellees' alleged deficient performance has worked to her detriment. In her brief, she admits that eventually the land contract was recorded and the mortgage that was held on the property was released. Because Tuggle never completed making the payments under the contract, she was never entitled to receive a general warranty deed on the property, so she remained unharmed by the ultimately released mortgage.

{¶ 30} Although Tuggle claims that the fact that the land contract was not recorded prevented her from getting assistance from the Senior Emergency Repair Program to repair the premises, we find that the record does not support this claim. Undisputed evidence in the record provides that Tuggle's request for assistance was denied, not because the land contract was not recorded, but rather because the property was not titled in her name.

{¶ 31} Accordingly, we hold that appellees' alleged noncompliance with R.C. 5313.02 does not render the land contract unenforceable. For all of the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 32} Tuggle argues in her second assignment of error that the trial court erred when it denied her motion for summary judgment. She bases this argument on the claim that appellees breached the land contract and, therefore, she is entitled to damages. Tuggle's third assignment of error deals with a claim that the trial court erred when it held that Tuggle did not suffer damages. As appellant's second and third assignments of error involve overlapping issues, we examine them together in this analysis.

{¶ 33} As in her first assignment of error, Tuggle claims that she was harmed because of the delayed recording of the land contract and because of the \$170,000 mortgage. As discussed above, these deficiencies did not result in any harm to Tuggle.

{¶ 34} Tuggle further complains that when Kadri sold the property, he did so prior to assigning the land contract and, thus, could not have transferred good and merchantable title to Tuggle pursuant to the terms of the contract. Tuggle admits, however, that Kadri did eventually assign the land contract to Merivale. Thus, had Tuggle finished making payments under the contract, Merivale could have transferred proper title to her. Again, Tuggle remained unharmed by any alleged deficiency.

{¶ 35} Tuggle next argues that she has suffered damages because she has "lost all of the equity she had built up by paying approximately two thirds [sic] of the land contract." Any equity that may have been lost to Tuggle was due entirely to Tuggle's

failure to make payments under the contract, and not as the result of any acts or omissions on the part of appellees.

{¶ 36} For the foregoing reasons, Tuggle's second and third assignments of error are found not well-taken.

{¶ 37} Tuggle argues in her fourth assignment of error that the trial court erred when it granted Merivale's motion for summary judgment, because there remain three genuine issues of material fact: (1) whether appellant failed to make her payments under the contract; (2) whether the contract was valid; and (3) to what address appellant was supposed to make her payments. As indicated previously in this decision: (1) there is no question that Tuggle did fail to make her payments under the contract; (2) the contract was valid and enforceable as against Tuggle; and (3) the address to which Tuggle was supposed to make her payments was 355 East Broadway, Toledo, Ohio, 43605. Accordingly, Tuggle's fourth assignment of error is found not well-taken.

{¶ 38} Finally, Tuggle argues in her fifth assignment of error that the trial court erred when it granted Kadri's motion for summary judgment, because Kadri "should have recorded the land contract" and, therefore, was liable for any resulting damages. As discussed above, Tuggle did not suffer any harm as a result of Kadri's failure to record the land contract. Tuggle's fifth assignment of error is found not well-taken.

{¶ 39} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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