

[Cite as *Settler's Village Condominium v. Nestor*, 2008-Ohio-7146.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90028

SETTLER'S VILLAGE CONDOMINIUM

PLAINTIFF-APPELLEE

vs.

ROBERT M. NESTOR, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-587237

BEFORE: Boyle, J., Cooney, P.J., and Stewart, J.

RELEASED: May 29, 2008

JOURNALIZED:

ATTORNEY FOR APPELLANT

Michael Westerhaus
14255 Peppercreek Drive
Strongsville, Ohio 44138

ATTORNEYS FOR APPELLEES

FOR: Settler's Village Condominium

Arthur F. Foth
Joseph F. Salzgeber
Foth & Foth Co., L.P.A.
11221 Pearl Road
Strongsville, Ohio 44136

FOR: Washington Mutual Bank

Melissa Whalan
P.O. Box 5480
Cincinnati, Ohio 45201

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) 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(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10)

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(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

BOYLE, M.J., J:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the Cuyahoga County Court of Common Pleas, the oral arguments and the briefs of counsel. Defendant-appellant Robert Nestor appeals from a summary judgment rendered in favor of plaintiff-appellee, Settler's Village Condominium, on its claims that Nestor failed to reimburse Settler's Village for repairs made to the interior walls of his condominium after the common area roof failed and caused damage.

{¶ 2} Settler's Village filed a complaint for foreclosure and marshaling of liens against Nestor. The lien arose after Nestor made interior repairs to his condominium using a company that Settler's Village had hired to make repairs to the roof of the complex in a common area for the condominium owners. Settler's Village later realized that the association rules made all owners responsible for interior loss, regardless whether it occurred because of a failure of common property, so it billed Nestor for the repair. Nestor refused to repay Settler's Village, claiming that the association should pay for the repairs because the common area of the roof failed, causing the

damage to his unit. Settler's Village eventually filed a lien against Nestor and then filed this action to foreclose.

{¶ 3} Settler's Village filed a motion for summary judgment. The parties agreed that Settler's Village would answer Nestor's request for admissions and interrogatories by January 31, 2007, and that Nestor would respond to the motion for summary judgment by February 28, 2007. The court noted that no extensions would be given to these deadlines. Nestor did not respond to the motion for summary judgment. A magistrate then granted the motion for summary judgment. Nestor objected to the magistrate's decision, claiming that he did not respond within the deadline because Settler's Village failed to produce the required discovery. He also complained that the magistrate failed to consider his argument, raised by way of counterclaim, that the lien was invalid because the money that Settler's Village claimed he owed had been necessitated by a failure of a common area. The court overruled the objections and adopted the magistrate's decision.

{¶ 4} We find that the court did not err by overruling Nestor's objections and adopting the magistrate's decision because Nestor failed to respond to the motion for summary judgment. He conceded that he did not respond to the motion for summary judgment as required by the court's

pretrial order, but said that he did not do so because Settler's Village did not respond to his request for admissions by the court's deadline. By his own admission, Nestor did not seek an extension of the deadline for responding to summary judgment under Civ.R. 56(F), nor did he file a motion to compel discovery. In *Taylor v. Franklin Blvd. Nursing Home, Inc.* (1996), 112 Ohio App.3d 27, 30, we held that a party who fails to seek relief under Civ.R. 56(F) in the trial court does not preserve its rights thereto for purposes of appeal. See, also, *Maschari v. Tone*, 103 Ohio St.3d 411, 2004-Ohio-5342, at ¶20; *Stegawski v. Cleveland* (1987), 37 Ohio App.3d 78, 86. By failing to seek the court's intervention pursuant to Civ.R. 56(F), Nester cannot be heard to complain that he could not respond to the motion for summary judgment because Settler's Village failed to respond to discovery requests.

{¶ 5} Even when a motion for summary judgment is unopposed, the motion and supporting evidence must show the absence of any material fact before the court can grant the motion — the motion can only be granted if there are no issues of material fact and the party making the motion is entitled to judgment as a matter of law. *Charles Gruenspan Co., L.P.A. v. Thompson*, Cuyahoga App. No. 80748, 2003-Ohio-3641. The motion for summary judgment filed by Settler's Village established the existence of a lien and Nestor's nonpayment of the debt on which the lien was based.

Appended to the motion was a copy of the lien, a printout showing outstanding payments for the repairs, and an affidavit which attested to the veracity and accuracy of those documents. With the absence of any evidentiary material to the contrary, Settler's Village established that it was entitled to judgment as a matter of law.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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 JANE BOYLE, JUDGE

COLLEEN CONWAY COONEY, P.J., and
MELODY J. STEWART, J., CONCUR