[Cite as *Lawyers Title Ins. Corp. v. MHD Corp.*, 2010-Ohio-5174.]

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

Lawyers Title Insurance Corp.	Court of Appeals No. E-10-007
Appellant/Cross-Appellee	Trial Court No. 2006 CV 499
v.	
MHD Corporation, et al.	**DECISION AND JUDGMENT**
Appellee/Cross-Appellant	Decided: October 22, 2010

* * * * *

Michael J. Sikora III, Maria Mariano Guthrie, Ann J. Johnson, and David J. Sipusic, for appellant/cross-appellee.

Sean T. Needham, for appellee/cross-appellant.

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OSOWIK, P.J.

{¶ 1} This is an appeal and cross-appeal from two judgments of the Erie County Court of Common Pleas. Appellant/cross-appellee Lawyers Title Corp. ("Lawyers Title") appeals from summary judgment granted in favor of appellee/cross-appellant MHD Corporation ("MHD") in this action arising from a transfer of real property for

which Lawyers Title served as title, closing and settlement agent. Additionally, MHD cross-appeals from an earlier decision of the trial court which granted Lawyers Title's motion to dismiss MHD's amended counterclaim for failure to state a claim under Civ.R. 12(B)(6). For the reasons that follow, this court affirms the trial court's decisions granting summary judgment in favor of appellee and dismissing MHD's counterclaim.

{¶ 2} In November 1991, MHD purchased 12.74 acres of real property in Erie County, Ohio, from S&S Realty, Inc. ("S&S"). Title was conveyed by warranty deed in December 1991 and was recorded by Lawyers Title. The warranty deed contained a right of first refusal retained by S&S on the premises as well as certain other restrictive covenants which benefited S&S and burdened the premises.

{¶ 3} Lawyers Title conducted a records search and title examination; it acted as escrow agent and title agent, and also issued a title guaranty under the purchase agreement. The title guaranty prepared and issued by Lawyers Title did not list the right of first refusal retained by S&S.

{¶ 4} In April 2000, as a result of an action filed against S&S and MHD by the Ohio Department of Transportation ("ODOT"), MHD conveyed to ODOT a parcel of the land it had purchased from S&S in 1991.

{¶ 5} In September 2000, MHD entered into an agreement to exchange real property with Robert and Helen Schoen ("Schoens"). Under the agreement, MHD was to convey two parcels of real property and cash in exchange for a single piece of real property then owned by the Schoens. One MHD parcel was located in Sandusky, Ohio,

and the other in Milan, Ohio. Legal title to the Sandusky parcel was vested in Robert Schoen individually while legal title to the Milan parcel was vested in Helen Schoen individually. The real property vested in Helen Schoen ("Schoen") is the subject of this lawsuit.

{¶ 6} The MHD deed stated with particularity the metes and bounds of the real property being conveyed to Schoen and further stated that it excluded the land already transferred to ODOT in April 2000.

{¶ 7} Lawyers Title was hired to conduct the title examination and escrow work for the Schoen agreement. Due to an internal omission in cross-referencing the title and escrow files from the 1991 transfer from S&S and the 2000 ODOT transaction, Lawyers Title did not provide notice of the potential existence of the right of first refusal to either party to the Schoen agreement. Lawyers Title subsequently issued a policy of title insurance to Schoen under the Schoen agreement. Under the terms of the title policy, Lawyers Title was to provide notice of all restrictions, liens, encumbrances and defects which were of public record and which related to the parcel being transferred by MHD to Schoen under the MHD deed. Lawyers Title did not list the right of first refusal as a restriction, lien, encumbrance or defect in title to the parcel being transferred to Schoen. Further, Lawyers Title did not provide notice to its insured, or any other party to the exchange, of any potential issue surrounding the April 2000 transfer of land to the Ohio Department of Transportation. The Schoen agreement closed on October 27, 2000.

{¶ 8} On December 8, 2000, S&S filed a complaint in the Erie County Court of Common Pleas against MHD and the Schoens alleging, among other things, a violation of S&S's first refusal right pursuant to the 1991 deed. On March 23, 2001, Lawyers Title settled the S&S litigation. Under the terms of the settlement, S&S released all claims against the Schoens with prejudice in consideration of Lawyers Title's payment of $230,000 in line with the provisions of the Owners Policy of Title Insurance issued to the Schoens on October 30, 2000. S&S dismissed all claims against MHD without prejudice. Also in March 2001, Schoen dismissed her cross-claim against MHD without prejudice in consideration of Lawyers Title's payment of $78,000 pursuant to the provisions of the Owners Policy of Title Insurance issued to her on October 30, 2000.

{¶ 9} On June 14, 2006, Lawyers Title filed this case seeking relief by subrogation through the express terms of the title insurance policy issued to Schoen; Lawyers Title also alleged breach of contract and asked for indemnification, specific performance and declaratory judgment. MHD filed an answer and counterclaim denying liability and alleging, among other things, negligence against Lawyers Title. In February 2009, MHD filed an amended answer and counterclaim, which Lawyers Title moved to dismiss pursuant to Civ.R. 12(B)(6). The motion to dismiss was granted by order dated June 25, 2009. That dismissal is the subject of MHD's cross-appeal.

{¶ 10} On October 16, 2009, MHD and Lawyers Title each filed motions for summary judgment. On January 11, 2010, the trial court granted summary judgment in

favor of MHD and denied the motion filed by Lawyers Title. It is from that judgment that Lawyers Title appeals.

{¶ 11} Lawyers Title sets forth the following assignments of error:

{¶ 12} "I. The trial court erred in holding that Lawyers Title is not entitled to subrogation.

{¶ 13} "II. The trial court erred in holding that MHD did not breach the Schoen Purchase Agreement.

{¶ 14} "III. The trial court erred in holding that MHD did not breach the provisions of the MHD Warranty Deed.

{¶ 15} "IV. The trial court erred in holding that MHD did not breach any of the representations contained in the Schoen Agreement.

{¶ 16} "V. The trial court erred in holding that Lawyers Title is not entitled to summary judgment on its indemnification, specific performance, and declaratory judgment claims."

{¶ 17} We note at the outset that an appellate court reviews a trial court's grant of summary judgment de novo, applying the same standard used by the lower court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is granted where there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 18} Lawyers Title's five assignments of error all arise from the trial court's decision granting MHD's motion for summary judgment. In support of its first assignment of error, Lawyers Title asserts that the trial court erred by finding that the title company is not entitled to subrogation based on its own actions. The trial court found that Lawyers Title's loss was precipitated by its own negligent actions in failing to apprise its insured of potential restrictions, encumbrances or defects which were publicly and properly recorded in the Erie County records.

{¶ 19} Lawyers Title first argues that it had the ability to assert any claims that Helen Schoen could have asserted against MHD pursuant to the express terms of the policy, under which Lawyers Title reserved the right to pursue an action for recovery from anyone responsible for injury to Schoen related to the property. Section 13 of the Owners Policy of Title Insurance issued to Helen Schoen by Lawyers Title states, in relevant part:

{¶ 20} "(a) The Company's right to Subrogation,

{¶ 21} "Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant."

{¶ 22} Lawyers Title asserts that, while the trial court noted that the title company appears in this matter under a claim of conventional subrogation, the court erroneously determined that the title company was estopped from taking steps toward recovery from MHD based on its conduct in the transaction.

{¶ 23} The trial court concluded that Lawyers Title possessed constructive knowledge of the existence of a potential encumbrance on the property due to the recordation of the 1992 warranty deed in the public records, as well as actual knowledge of the same, as it was in possession of a copy of the deed in 2000 when MHD transferred the property to Schoen. The trial court properly distinguished between Lawyers Title's general *entitlement to the doctrine of subrogation* and its more specific *right to recovery* under the doctrine in light of its own negligent action in this matter.

{¶ 24} In order to entitle one to subrogation, his equity must be strong and his case clear. *State v. Jones* (1980), 61 Ohio St.2d 99. Where an imperfect title search has been performed and relied upon by a lender, equity will not reward such negligence by applying the doctrine of subrogation in favor of the negligent party. *Jones*, supra. See, also, *Genoa Banking Co. v. Tucker*, 184 Ohio App.3d 303, 2009-Ohio-4918; *First American Title Ins. Co. v. Haggins* (Jan. 29, 1998), 8th Dist. No. 71877.

{¶ 25} Lawyers Title had a duty to inform the Schoens of the actual or potential restriction, encumbrance or defect of public record in 2000 which concerned the property Helen Schoen was purchasing. Further, Lawyers Title not only possessed constructive knowledge of the existence of said potential encumbrance due to the recordation of the warranty deed in the Erie County public records, it had actual knowledge of the potential encumbrance due to being in possession of the warranty deed.

{¶ 26} Lawyers Title further asserts that even if this court determines that the equities should be considered, the company is entitled to subrogation because its failure

to discover the right of first refusal was a "simple mistake." Lawyers Title correctly argues that Ohio courts have used equitable subrogation "to provide relief against mistakes." However, the cases cited by appellant did not forgive the mistake of a negligent party but rather used the doctrine to place parties in the position which they would have held but for a negligent party's mistake.

{¶ 27} Based on the foregoing, appellant Lawyers Title's first assignment of error is not well-taken.

{¶ 28} In support of its second assignment of error, Lawyers Title asserts that the trial court erred by applying the doctrine of merger and that the trial court erred by finding that MHD did not breach the Schoen purchase agreement. Lawyers Title argues that MHD admitted that it breached the 1991 purchase agreement.

{¶ 29} As to the first argument, the trial court noted that Ohio courts recognize the doctrine of merger with regard to contracts for the sale of real property and applied the principle in determining that MHD did not violate the purchase agreement. The trial court determined that MHD could not have violated the purchase agreement when transferring the parcel of land to Schoen in 2000 because all rights and obligations under the purchase agreement were merged out of existence upon delivery and acceptance of the warranty deed in 1992. Therefore, the trial court concluded, Lawyers Title cannot maintain an action against MHD stemming from or in any way relating to the terms and provisions of the 1991 purchase agreement.

{¶ 30} Absent fraud, misrepresentation of latent defects, or express language of reservation, a contract to purchase real estate will merge with the deed upon delivery and acceptance. *Fuller v. Drenberg* (1965), 3 Ohio St.2d 109. Only agreements which are collateral to and independent of the main purpose of the transaction are not merged in the deed. *Medeiros v. Guardian Title and Guar. Agency, Inc.* (1978), 57 Ohio App.2d 257. Here, the intent of the parties was clearly and unambiguously reflected in the warranty deed; the purchase agreement does not aid the court in interpreting the intent of the parties. As such, the trial court properly found that the doctrine of merger precludes a breach of the 1991 purchase agreement.

{¶ 31} Lawyers Title further asserts that MHD admitted to breaching the purchase agreement. Lawyers Title relies on admissions by MHD that it did not provide S&S with the opportunity to exercise the right of first refusal prior to conveying the property to Schoen. However, even if admissions cited by Lawyers Title establish a breach of the 1991 purchase agreement, such admissions are not material facts, as the doctrine of merger—which we found, above, was properly applied by the trial court—precludes a breach ab initio. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340. Accordingly, this argument is without merit.

{¶ 32} Based on the foregoing, appellant's second assignment of error is not well-taken.

{¶ 33} In support of its third assignment of error, Lawyers Title asserts that the trial court erred by holding that MHD did not breach the provisions of the 1992 deed

when it transferred the parcel to Schoen in 2000. First, Lawyers Title argues that MHD failed to submit any Civ.R. 56(C) evidence to support its argument that the right of first refusal did not apply to the Schoen transaction.

{¶ 34} Civ.R. 56(C) states in pertinent part:

{¶ 35} "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."

{¶ 36} The 1992 warranty deed and the MHD deed from 2000, both of which contain legal descriptions of parcels of real property that were distinct from each other, were properly incorporated into the pleadings, depositions and written admissions before the trial court. The trial court properly considered evidence attached to the complaint, the amended answer and counterclaim, as well as Lawyers Title's deposition transcript and exhibits incorporated into MHD's motion. This argument is without merit.

{¶ 37} Lawyers Title next argues that the parties to the 1992 transaction intended that the right of first refusal would extend to "all and/or part" of the property. Lawyers Title does not, however, support its claim as to the intent of the parties with any language from the deed. The trial court found that the warranty deed contained no ambiguous terms and confined its determination to the contents of the document. The warranty deed

did not limit or restrict the alienation of real property and, therefore, sanctioned the use of the property in the manner put into effect by MHD.

{¶ 38} The trial court properly noted that "the parties chose not to incorporate inclusive language demonstrating their intent to extend [the right of first refusal] to smaller portions of the real property being conveyed, and it is not the place of the judiciary to insert language that the parties themselves failed to use."

{¶ 39} This court finds that the language of the deed is clear and unambiguous. The clear, plain and unequivocal language used by the parties demonstrates their intent to insure that if MHD ever desired to sell the real property as described in the warranty deed, MHD would have to first offer that defined real property to S&S. Exhibit A to the warranty deed sets forth the legal metes and bounds of the larger premises conveyed to MHD in 1992 under the purchase agreement. The parties chose not to incorporate language therein demonstrating an intent to extend the right of first refusal to any smaller portions of the real property being conveyed. It is not this court's place to insert language that the parties failed to use. *Larwill v. Farrelly* (1918), 8 Ohio App. 356, 360.

{¶ 40} The warranty deed which conveyed the parcel to Schoen in 2000 lacks language indicating an intent to restrict the free use of the land. The parcel received by Schoen – a smaller portion of the larger property over which S&S maintained a right of first refusal – was owned by MHD in fee simple without restriction. Absent clear indication that the parties intended the right of first refusal to cover smaller portions of

the larger defined property, this court will not create a restriction through inference. This argument is without merit.

{¶ 41} Lawyers Title next asserts that the trial court's interpretation of the right of first refusal conflicts with this court's holding in *Janas v. Simmons* (Apr. 17, 1987), 6th Dist. No. WD-86-60. In its decision herein, the trial court noted that Lawyers Title had cited *Janas* for the proposition that the right of first refusal survives the transfer of a portion of the premises. The trial court concluded, however, that *Janas* is factually distinct from the instant case, a conclusion which Lawyers Title now contests.

{¶ 42} In *Janas*, the grantor of certain real property tried to avoid a right of first refusal attached to three separate parcels of land by selling the encumbered portions of the three parcels as one transaction. In its decision, which was adopted in its entirety by this court, the trial court in *Janas* determined that the subject property should be conveyed to each of the separate holders of the rights of first refusal. Factually, *Janas* was properly distinguished from the instant case as in *Janas*, the property holder attempted to circumvent the right of first refusal by expanding the real property; in the case before us, the property in question consisted of a small parcel originally a part of the larger plot which carried the right of first refusal. This argument is without merit. Accordingly, Lawyers Title's third assignment is not well-taken.

{¶ 43} As its fourth assignment of error, Lawyers Title asserts that the trial court erred by holding that MHD did not breach any of the representations contained in the Schoen agreement. This argument is essentially a restatement of appellant's other claims

which have been found to be without merit, and, accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 44} In support of its fifth assignment of error, Lawyers Title asserts that it is entitled to indemnification, specific performance or declaratory judgment. The trial court herein found that those claims were contingent upon a finding that MHD breached the Schoen agreement. This court agrees. Having found that MHD did not breach the provisions of the exchange agreement, we find that Lawyers Title, standing in the shoes of Schoen, is estopped from recovering against MHD in subrogation. Lawyers Title's fifth assignment of error is not well-taken.

{¶ 45} Upon consideration of the foregoing, this court finds that there is no genuine issue of material fact and MHD is entitled to judgment as a matter of law. The trial court did not err by denying Lawyers Title's motion for summary judgment and granting summary judgment in favor of MHD.

{¶ 46} Lastly, appellee MHD presents the following single cross-assignment of error asserting that the trial court erred by dismissing its amended counterclaim for failure to state a claim under Civ.R. 12(B)(6):

{¶ 47} "I. The trial court erred in dismissing the amended counterclaim of MHD Corporation dba MHD Management Inc. for failure to state a claim under Rule 12(B)(6) of the Ohio Rules of Civil Procedure."

{¶ 48} Through its counterclaim, MHD sought to enforce the express terms of the title guaranty issued by Lawyers Title in 1992 and recover for losses sustained as a result

of Lawyers Title's conduct in handling the property exchange in 2000. The claims relevant to this cross-appeal alleged breach of the express terms of the title guaranty, bad faith in not properly investigating the S&S litigation, breach of fiduciary duty in closing the 1991 purchase agreement and negligent misrepresentation.

{¶ 49} The standard of appellate review of dismissals granted pursuant to Civ.R. 12(B)(6) is well established. We review such trial court rulings de novo. *Battersby v. Avatar, Inc.*, 157 Ohio App.3d 648, 2004-Ohio-3324, ¶ 5. "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. A Civ.R. 12 (B)(6) motion to dismiss should be granted only when a plaintiff can prove no set of facts that would entitled her to relief. *O'Brien v. Univ. Community Tenants Union, Inc*. (1975), 42 Ohio St.2d 242, syllabus.

{¶ 50} In its June 25, 2009 judgment entry, the trial court determined that each of the 19 claims MHD asserted in the amended counterclaim should be dismissed. MHD has appealed the trial court's decision as to only four of the claims: (1) breach of contract; (2) bad faith; (3) breach of fiduciary duty and (4) negligence.

{¶ 51} Under Ohio law, each of those four claims is governed by the four-year statute of limitations set forth in R.C. 2305.09. See *Wolfe v. Continental Cas. Co.* (C.A.6, 1981), 647 F.2d 705, certiorari denied (1981), 454 U.S. 1053 (breach of duty of good faith); *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Quaranta*, 7th Dist. No.

01 CA 60, 2002-Ohio-1540 (negligence), and *DeAscentis v. Margello*, 10th Dist. No. 08AP-522, 2008-Ohio-6821 (breach of fiduciary duty).

{¶ 52} As to the claim for breach of duty of good faith, MHD alleged that Lawyers Title was involved in "secret negotiations" with Helen Schoen during the S&S litigation. MHD acknowledges, however, that the S&S litigation was settled in March 2001. Thus, MHD was aware, or should have been aware, that settlement discussions had taken place between the parties as of March 26, 2001, at the latest. Accordingly, MHD's breach of duty of good faith claim, asserted on February 17, 2009, is time-barred.

{¶ 53} As to MHD's negligence claims, we find that MHD knew, or should have known, of the allegedly negligent actions of Lawyers Title at the settlement of the S&S litigation in March 2001. MHD's negligence claims, asserted more than eight years later, are time-barred.

{¶ 54} A cause of action for breach of fiduciary duty arises when the act or commission constituting the breach of fiduciary duty occurs. *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 249. This cause of action arose, at the latest, at the time of the settlement of the S&S litigation in March 2001. Therefore, this claim is time-barred.

{¶ 55} Concerning MHD's claim for breach of contract, a title insurance company is generally only liable to a claimant when it has privity of contract with that claimant. *First Merit Bank v. Guarantee Title & Trust Co.*, 9th Dist. No. 22894, 2006-Ohio-3333.

The liability of the title company is limited to the terms of any such contract. *Chicago Title Ins. Co. v. The Huntington Natl. Bank* (1999), 87 Ohio St.3d 270.

{¶ 56} A copy of the title guaranty issued by Lawyers Title to MHD and the Citizens Banking Company on January 3, 1992, was attached to MHD's amended answer and counterclaim. The third page of the guaranty sets forth the conditions and stipulations of the guaranty and specifically states at paragraph three:

{¶ 57} "In case knowledge shall come to the party guaranteed of any lien, encumbrance, defect, or other claim of title guaranteed against and not excepted in this Guaranty, whether in a legal proceeding or otherwise, the party guaranteed *shall notify [Lawyers Title] promptly in writing* and secure to it the right to oppose such proceeding or claim, or to remove such lien, encumbrance or defect, at its own cost. *Any action for the payment of any loss under this Guaranty must be commenced within one year after such loss is sustained*." (Emphasis added.)

{¶ 58} MHD was aware of the right of first refusal in December 1991 at the time that the MHD transaction with S&S closed. MHD admits in the amended counterclaim that it did not tender any claim to Lawyers Title in connection with the right of first refusal and the S&S litigation until December 24, 2008, over eight years after Helen Schoen and S&S asserted claims against MHD, and over 18 months after being served with Lawyers Title's complaint. MHD did not timely notify Lawyers Title of any claim in connection with the guaranty, any such claims are time-barred by the express terms of the guaranty.

{¶ 59} Based on the foregoing, this court finds that the trial court did not err by dismissing MHD's counterclaim and, accordingly, MHD's sole assignment of error on appeal is found not well-taken.

{¶ 60} On consideration whereof, the judgments of the Erie County Court of Common Pleas are affirmed. Costs of this appeal are assessed to each party equally pursuant to App.R. 24.

JUDGMENTS AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE