[Cite as *Main & High Dev., L.L.C. v. Oxford* , 2009-Ohio-6048.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MAIN AND HIGH DEVELOPMENT, LLC, et al.,	:	
	:	CASE NO. CA2009-03-079
Plaintiffs-Appellants,	:	O P I N I O N
	:	11/16/2009
- vs -	:	
	:	
CITY OF OXFORD, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2006-08-3003

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RINGLAND, J.

{¶1} Plaintiff-appellant, Main & High Development, LLC, appeals a decision of the Butler County Court of Common Pleas granting summary judgment in favor of

defendant-appellee, Jane Howington.

{¶2} Main & High is a limited liability company comprised of two principals, Christopher Rodbro and Bernard Rumpke. The company owns a piece of property located in the uptown district of Oxford at the intersection of Main and High Streets. The property is comprised of two lots totaling approximately 8,400 square feet. Main & High operated a Wendy's fast food franchise on the property until August 2005 when the building was severely damaged by a fire during a remodeling mishap. Rather than rebuild the restaurant, Main & High planned to split its two lots into four and build four new buildings on the property. Each new building was to contain three, four-bedroom dwelling units above a commercial space. In November 2005, Main & High hired an outside party to survey the property and prepare a plan for its application to split the lots.

{¶3} On December 1, 2005, the city planner and development director for the city of Oxford informed City Manager Jane Howington that the city's current statutory code did not contain procedures or regulations regarding lot splits. Between 1:00 p.m. and 2:00 p.m., Howington contacted Tim Myers, a local real estate developer with extensive experience in the Oxford area. According to Howington, she contacted Tim Myers because he was often aware of potential real estate development in the city and she wished to get a feel for the number of lot split applications the city may receive in the near future. Howington asked if Tim Myers was currently involved with any projects in Oxford's uptown district, including any potential lot splits. He replied that he was not, but his son, Lindsay Myers, was.

{¶4} Main & High had hired Lindsay Myers as its agent to develop the property at issue in this case once the lots were split. Lindsay was at Tim's office at the time and Tim invited Lindsay to join the telephone conversation with Howington. Lindsay informed Howington of his involvement with the Main & High development and asked if

the city council was planning any action regarding lot splits or minimum lot size. In response, Howington stated that there was no meeting planned; there was nothing that he needed to worry about; and to "just keep on doing what you're doing." The conversation concluded shortly thereafter.

{¶5} Tim Myers found Howington's phone call "so unusual that once she hung up, I commented * * * 'I smell a skunk.'" According to Tim Myers, in the eight to ten years that Howington had served as city manager, she had never called him to "discuss business outside of her chambers." Tim Myers cautioned Lindsay that "something's in the wind," and advised him to immediately get to work on any potential uptown district projects. Tim Myers immediately called Christopher Rodbro about the situation, stating "[t]here is something rumbling out here. It's not right what's going on here. Whatever you're working on, you need to get to it right now." Around 3:30 p.m. on December 1, the surveyor delivered the completed plan to Main & High, which included all the necessary documentation to apply for the lot splits. According to Rodbro, after speaking with Tim Myers, he interpreted Howington's conduct to mean that city council planned to take no legislative action regarding lot splits in the uptown district and the company did not file the application that day.

{¶6} Through her conversations with the Myers, her staff, and other local individuals, Howington determined that Oxford may face up to eight lot split applications in the near future. Following her conversation with the Myers, Howington, the city planner and the city's attorney discussed what procedures were necessary in order for city council to hold an emergency meeting that evening for the purpose of considering a moratorium on lot splits.

{¶7} Howington called the clerk of council to inform her of the number of potential lot splits Oxford could face. Howington also outlined the actions available to

council should they wish to remedy the omissions in the Oxford code. The clerk of council contacted each city council member to relay Howington's findings and awaited their determination on how to proceed with the matter. Council members concluded that an emergency meeting was necessary. In an effort to inform the public of the emergency meeting, city council aired a public notice on a local radio station and posted notice bulletins at the meeting place. At approximately 5:30 p.m. that evening, the council convened to discuss lot splits. The minutes of the meeting reveal that Howington had approached each member of the council earlier in the day to request an emergency meeting to enact a moratorium on lot splits. At the meeting, Howington recommended a four-month moratorium on lot splits, noting that there were a large number of lot splits being considered throughout the city that could create nonconforming lots and would add congestion to certain areas of the city. At the conclusion of the meeting, city council passed a resolution adopting Howington's recommendation to begin a four-month moratorium on lot splits.

{¶8} The following day, Main & High submitted its lot split application and plan for the parcel of property. Oxford rejected the application and returned them unreviewed. On January 30, 2006, Oxford notified Main & High that the damaged Wendy's building on the property was in violation of the Oxford Property Maintenance Code. The notice ordered the property owners to bring the property into compliance by either repairing or razing the building within 60 days.

{¶9} In March 2006, council passed an ordinance setting the minimum lot requirement at 3,000 square feet. In May 2006, Main & High received a certificate to raze the building, however, the company failed to proceed with the demolition. On August 10, 2006, Oxford once again notified Main & High that the property remained in violation of the maintenance code and ordered compliance within 30 days.

{¶10} On August 29, 2006, Main & High filed suit against the city of Oxford, Oxford City Council, and Jane Howington. Through a stipulated partial dismissal of claims, Main & High dismissed all claims except for the claim of fraud against Howington, alleging that her statements to Lindsay Myers during the December 1, 2005 telephone conversation were fraudulent. Main & High claims that Howington intentionally made "a material misrepresentation regarding the pendency of an Oxford City Council meeting which was held on the same day for the purpose of obtaining [Main & High's] detrimental reliance thereon, to wit, their forbearance in filing an application for a lot split under the then-existing Oxford City Code, the approval of which was a mandatory duty."

{¶11} Following a motion for summary judgment filed by Howington, the trial court entered judgment in her favor finding that no genuine issues of material fact exist because Howington had no legal authority to call a city council meeting, Howington's statements did not advise Main & High to delay filing its application, and Main & High did not justifiably rely upon the statements by Howington. Main & High timely appeals, raising one assignment of error:

{¶12} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT, WHEN THERE WAS COMPETENT, CREDIBLE EVIDENCE TO SUPPORT EACH AND EVERY ELEMENT OF PLAINTIFF-APPELLANT'S CAUSE OF ACTION FOR FRAUD."

{¶13} On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in

that party's favor. See Civ.R. 56(C); see, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once this burden is met, the nonmovant has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id.

{¶14} To prevail upon a claim of fraud, a plaintiff must show: (1) a representation; (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55.

{¶15} The trial court in this case stated that "immediately after speaking with the Myers, Howington not only discussed the possibility of an emergency meeting and moratorium with [the city attorney], she also contacted city council members directly to request a meeting and moratorium. From that evidence, one could reasonably infer that, at the time Howington spoke with Myers, she believed that it was distinctly possible that city council would call an emergency meeting and enact a moratorium on lot splits. Thus, one could reasonably conclude that when Howington told Myers that there was no meeting planned and that [Main & High] need not worry, her representation was false or, at the very least, provided a false impression of city council's possible intentions regarding lot splits."

{¶16} However, the court found insufficient evidence to create a question of fact for the fourth and fifth elements. With regard to Howington's intent to mislead, the court

concluded, "the comment did not expressly advise [Main & High] to delay filing its application. * * * [T]here is no evidence that at the time Howington spoke with Lindsay Myers, she was aware that [Main & High] was able to, or would soon be able to, file its application. Lindsay Myers did not indicate to Howington that [Main & High]'s lot split application filing was imminent, and at no time during the conversation did Howington inquire into [Main & High]'s progress on its lot split. * * * By advising [Main & High] to 'just keep on doing what you're doing,' Howington was essentially advising it to continue with its plans to file its application when it was able to do so. It would be curious for Howington to advise [Main & High] to continue with its plans to file a lot split application while at the same time possessing the intent to prevent its December 1st filing."

{¶17} Similarly, relating to the justifiable reliance element, the court found, "Ohio courts have found that reliance is unjustified in instances where the maker of a representation has no legal authority to ensure or fulfill that representation. * * * [T]here is no question that while Howington served at the direction of the city council, she had no statutory authority to dictate its actions. It is well-established that under R.C. 705.59, Howington had no authority to call or prevent city council meetings.[1] Because Howington had no authority to ensure that city council would not meet to take action on lot splits, [Main & High] was not justified in relying on any statements to that effect. Essentially, [Main & High] decided to delay its application after speaking with the wrong person. Only city council members could have conclusively represented the pendency of an emergency meeting."

{¶18} In the sole assignment of error, Main & High argues that the trial court incorrectly found insufficient evidence to support the claim for fraud. Main & High urge

1. Effective November 6, 2007, Oxford adopted a charter with a Council-Manager Plan form of government. Under the charter, the city manager's authority too call or prevent city council meetings is similarly limited as it is under R.C. 705.59. See Oxford Charter Sections 1.04, 4.02; Oxford Cod. Ord.

that Howington's intent to deceive may be inferred from the fact that she made a false statement and that the company justifiably relied upon her misrepresentation. Main & High further claim that, had Howington not made the statements to Lindsay Myers, the lot split application would have been filed on December 1, 2005.

{¶19} After review of the record, we agree with the conclusion of the trial court.

Intent to Induce Delay

{¶20} Howington recognized an omission in the city code relating to the lot split procedure. As a result, she contacted Tim Myers, and other individuals in the community, to determine the amount of lot splits the city may face in the near future. Tim Myers relayed that his son, Lindsay, was involved in a potential development project and Lindsay joined the telephone conversation. As the trial court astutely noted, Main & High submitted no evidence that Lindsay provided any details to Howington about the status of the project or how soon the company planned to file the lot split application. If evidence existed that Howington knew these important details, her words could possibly be construed differently. However, based on the record, the substance of the statements attributed to Howington does not demonstrate an intent to prevent Main & High from filing the application that day. *Knox Machinery, Inc. v. Doosan Machinery, USA, Inc.*, Warren App. No. CA2002-03-033, 2002-Ohio-5147, ¶31. Rather, Howington instructed Lindsay Myers to "just keep on doing what you're doing." Howington did not know when Main & High planned to file the application, nor did Howington instruct or even imply that Main & High should delay the filing.

Justifiable Reliance

{¶21} Similarly, Main & High failed to establish a genuine issue of fact for the justifiable reliance element. The record demonstrates that Howington knew the city

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111.01.

would face a problematic lot split request from Main & High at some point in the future, but there is no indication that her statements induced Main & High to forbear from filing the application on December 1, 2005.

{¶22} Main & High had all plans and necessary paperwork for filing the lot split application completed and in its possession by 3:30 p.m. on December 1. Further, following the phone conversation with Howington, Tim Myers commented to Lindsay about the unusual nature of Howington's call. Tim warned Lindsay that "something's in the wind," and advised him to immediately finalize the uptown project. Further, Tim Myers immediately contacted Christopher Rodbro, a principal owner of Main & High, and warned him that "[t]here is

something rumbling out here. It's not right what's going on here. Whatever you're working on, you need to get to it right now."

{¶23} Main & High urges that the application would have been filed on December 1 absent Howington's statements inducing the company to forbear from filing. Yet, Howington concluded the conversation by advising Lindsay to "keep on doing what you're doing." If Main & High intended to file the application on December 1, it should have followed Howington's advice and continued with its alleged plan to file on that date; especially considering the unusual nature of Howington's conversation with the Myers, the warnings by Tim Myers, and the fact that the application was ready for filing at the time.

{¶24} Despite some suspicious circumstances noted by the trial court, City Manager Howington's statements in this case do not support Main & High's claim for fraud. Main & High wishes to blame Howington for its delay, however, the record demonstrates that no genuine issue of fact exists regarding whether Howington's actions prevented or induced Main & High from filing the application on December 1 and that

Howington is entitled to judgment as a matter of law.

{¶25} Main & High's sole assignment of error is overruled.

{¶26} Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur.