

EXHIBIT B

LEXSEE 1996 OHIO APP. LEXIS 1141

RICHARD A. DAVIS Appellee v. ALEXANDER & SUSAN DIFILIPPO Appellants

C.A. NO. 95CA0046

**COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, WAYNE
COUNTY**

1996 Ohio App. LEXIS 1141

March 27, 1996, Dated

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT. COUNTY OF WAYNE, OHIO. CASE NO. 94-CI-307.

DISPOSITION: Judgment affirmed.

COUNSEL: APPEARANCES:

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MICHAEL J. JORDAN, Attorney for Appellants, 1991 Crocker Rd., Ste. 550, Westlake, OH 44145.

JUDGES: LYNN C. SLABY, QUILLIN, P.J., DICKINSON, J., CONCUR

OPINION BY: LYNN C. SLABY

OPINION: DECISION AND JOURNAL ENTRY

Dated: March 27, 1996

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

Alexander and Susan DiFilippo appeal from the Wayne County Court of Common Pleas' entry of summary judgment in favor of Richard Davis. We affirm.

In September of 1993, the DiFilippos contracted to purchase from Davis real property located in Wayne County, Ohio. The property was [*2] a parcel in a new subdivision, yet to be platted and for which rezoning was sought. The contract provided:

"The Closing Date shall be no later than October 4, 1993. ***

"[Davis] shall deliver possession of the Premises to [the DiFilippos] on the Closing Date.

"The Closing shall proceed as if the rezoning *** has occurred, with the deed to be executed and recorded as soon as possible after the rezoning. If the rezoning has not occurred ***, then a different deed [described elsewhere] shall be executed and recorded as soon as possible after the rezoning is defeated or December 31, 1993, whichever occurs first."

The contract further provided:

"On the Closing Date, [Davis] shall convey to [the DiFilippos] good and marketable title in fee simple to the Premises (but subject to *** restrictions of record) by warranty deed in recordable form."

On October 7, 1993, the DiFilippos tendered the entire purchase price of the property to Davis. Davis negotiated the check on October 12, 1993. The property was rezoned prior to the end of 1993, and on December 30, 1993, Davis executed a warranty deed to the property "free from all encumbrances [*3] whatsoever except for *** restrictions *** of record." On January 3, 1994, Davis recorded the plat for the subdivision and a copy of the "Grant and Declaration of Easements and Restrictions" on the subdivision, which included a provision that forbade the placement of signs without the prior approval of Davis. Davis caused the deed to be recorded on January 6, 1994. The deed was not actually delivered to the DiFilippos until after that date.

In April of 1994, the DiFilippos purchased a sign, which they desired to place on their lot so as to draw attention to Mr. DiFilippo's dental practice from those travelling on a nearby road. The parties held a meeting in which Davis gave consent to the DiFilippos to place the sign in a specified area other than the one desired. The DiFilippos had the sign erected in the unapproved area.

Davis sought a mandatory injunction from the trial court to require the DiFilippos to remove their sign from the chosen location. The DiFilippos counter-claimed and sought a declaration from the court that the deed restriction against the sign was invalid. The parties filed cross-motions for summary judgment. Finding that the delivery date controlled the transaction [*4] and that delivery occurred at the time when the deed was recorded, the trial court held that the restriction was valid; accordingly, summary judgment was rendered in favor of Davis. The DiFilippos appeal from and assign one error to the proceedings below:

"It was clearly erroneous for the trial court to hold that deed restrictions recorded by [Davis], with respect to property he transferred to [the DiFilippos], were valid."

In reviewing a trial court's entry of summary judgment, an appellate court applies the same standard used by the trial court. *McConville v. Jackson Comfort Sys., Inc.* (1994), 95 Ohio App. 3d 297, 301, 642 N.E.2d 416. In order to grant summary judgment pursuant to *Civ.R. 56(C)*, a trial court must first determine that:

"(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evi-

dence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the nonmoving party."

State ex rel. Howard v. Ferreri (1994), 70 Ohio St. 3d [*5] 587, 589; see, also, *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327, 364 N.E.2d 267. The moving party has the burden of showing that summary judgment is appropriate. *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112, 115, 526 N.E.2d 798. It must:

"*** inform[] the trial court of the basis for the motion, and identify[] those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim."

Dresher v. Burt (Mar. 6, 1996), __ Ohio St. 3d __, 1996 Ohio Lexis 187 at * 37. The nonmoving party bears a "reciprocal burden of specificity," which requires it to set forth specific facts, by affidavit or other evidence, explaining that a genuine issue for trial does exist. *Id.* at * 33, quoting *Mitseff*, 38 Ohio St. 3d at 115; *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St. 3d 48, 52, 567 N.E.2d 1027. If the nonmoving party can offer only a scintilla of evidence, or if his evidence is merely colorable or not significantly probative, then the moving party is entitled to judgment as a matter of law. *Buckeye Union Ins. Co. v. Consol. Stores Corp.* (1990), [*6] 68 Ohio App. 3d 19, 22, 587 N.E.2d 391.

In the instant case, on cross-motions for summary judgment, Davis had the burden of showing that he was entitled to the mandatory injunction under the provisions of the deed; the DiFilippos had the burden of showing that the deed restrictions were invalid. Although the parties confused the issues, the controlling question in Davis' action was whether the restrictions to which the deed referred included the restrictions that were recorded on January 3, 1994; this issue, in turn, depended upon when the deed was effective to pass title. If the deed were effective when executed or earlier, the restrictions of record to which the deed referred would not include the sign restriction and the DiFilippos would prevail. If the deed were effective when recorded, the restrictions would include the sign restriction, and the DiFilippos could obtain relief only if the deed did not reflect the true intention of the parties, i.e., if they could establish a right to reformation. See *Petry v. Petry* (1991), 81 Ohio App. 3d 30, 33-34, 610 N.E.2d 443.

The trial court, while finding that the deed passed title when recorded, did not determine whether the [*7] deed conformed to the intention of the parties as stated in the purchase agreement. Indeed, this was unnecessary as the DiFilippos *never sought reformation of the deed in their counterclaim*. Instead, the DiFilippos requested that the restriction be declared unenforceable against them because they allegedly did not contract for restrictions imposed after the October "closing date." Davis countered that the transaction was not completed until the deed was constructively delivered through recording, and that the provisions of the deed controlled.

It is well-settled property law that a deed does not operate to transfer title to real property until it has been delivered to and accepted by the grantee. *In re Estate of Ault (1992)*, 80 Ohio App. 3d 399, 402-03, 609 N.E.2d 568. The recording of the deed constitutes prima facie evidence of delivery. *Gatts v. GMBH (1983)*, 14 Ohio App. 3d 243, 246, 470 N.E.2d 425. Moreover, unless there is evidence to the contrary, the deed is presumed to have been accepted by the grantee. 35 Ohio Jurisprudence 3d (1982) 291, Deeds, Section 58; see, generally, *Gatts*, 14 Ohio App. 3d at 246.

A grantee who accepts delivery of a warranty deed [*8] that is subject to "restrictions of record" is deemed to have knowledge of those restrictions that appear in the purchaser's chain of title, and, therefore, takes the property subject to those restrictions. *37 Robinwood Assoc. v. Health Industries, Inc. (1988)*, 47 Ohio App. 3d 156, 157, 547 N.E.2d 1019. Once having accepted delivery of the deed, the grantee will no longer have a cause of action on his purchase contract with respect to essential terms covered by the deed. *Fuller v. Drenberg (1965)*, 3 Ohio St. 2d 109, 209 N.E.2d 417, paragraph one of the syllabus. This doctrine is called "merger by deed" or "estoppel by deed." See *id. at 111*; *37 Robinwood Assoc.*, 47 Ohio App. 3d at 157-58. The language of the deed, if unambiguous, is conclusively presumed to express the parties' intentions. *Id. at 157*; *Sword v. Sword (1993)*, 86 Ohio App. 3d 161, 166, 620 N.E.2d 199.

In the case *sub judice*, the undisputed facts entitled Davis to judgment as a matter of law. Because the DiFilippos did not take actual delivery prior to January 6, 1994, when the deed was recorded, delivery was accomplished on that date. Acceptance of the deed may be presumed from the DiFilippos' [*9] actual receipt of the deed and their acquiescence in its clear and unambiguous terms. The deed provided that Davis warranted title subject to restrictions of record. The restrictions on the property were properly recorded and appeared in the DiFilippos' chain of title; accordingly, the DiFilippos had constructive notice of the restrictions. They cannot assert the terms of the contract, which were merged into the

deed, to defeat enforcement of the restrictions against them.

Counsel for the DiFilippos maintained at oral argument that their declaratory judgment action was the equivalent of an action for reformation. Assuming *arguendo* that their counterclaim could be so construed, the DiFilippos failed to produce sufficient evidence of grounds for reformation to survive summary judgment. Reformation is generally available upon the grounds of mutual mistake or fraud. See *Wagner v. Nat. Fire Ins. Co. (1937)*, 132 Ohio St. 405, 412, 8 N.E.2d 144; *Kungle v. Equitable Gen. Ins. Co. (1985)*, 27 Ohio App. 3d 203, 206, 500 N.E.2d 343. Grounds for reformation must be shown by clear and convincing evidence. *Mason v. Swartz (1991)*, 76 Ohio App. 3d 43, 50, 600 N.E.2d 1121.

The evidence [*10] produced on summary judgment did not demonstrate a question of fact supporting either mutual mistake or fraud. At best, the evidence showed that the DiFilippos may have believed that restrictions would not be added after they tendered the purchase price; the contract itself did not state this condition in any express terms. Instead, the contract contemplated a delay in the execution and recording of the deed until after the city decided whether to rezone the property. n1 In addition, Davis' promise to deliver fee simple title expressly permitted restrictions of record. Finally, there was no evidence that either party insisted on strict compliance with the contract deadlines, particularly regarding execution, delivery and recording of the deed.

n1 The contract is actually inconsistent with regard to the timing of execution: one provision provides for execution after rezoning up until December 31, 1993, while another refers to delivery on the "closing date," which was to be in October of that year. Delivery of an executed deed could not occur under those terms unless the rezoning decision was made prior to the closing date, which it was not.

[*11]

The trial court did not err in granting summary judgment to Davis. We overrule the assignment of error and affirm the judgment of the court below.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Wayne Common Pleas Court to carry this judgment into execution. A certified

copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*.

Costs taxed to Appellants.

Exceptions.

LYNN C. SLABY

FOR THE COURT

QUILLIN, P.J.

DICKINSON, J.

CONCUR