

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

COMSTOCK HOMES, INC.

C. A. No.     24627

Appellee

v.

KAREN EDWARDS-SMITH, TRUSTEE,  
SMITH FAMILY TRUST, et al.

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CV 07 01 0291

Appellants

DECISION AND JOURNAL ENTRY

Dated: September 16, 2009

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DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Comstock Homes Inc. agreed to buy seven lots from the Smith Family Trust and made a \$25,000 deposit. When the Trust did not provide clear title to the lots by the required deadline, Comstock cancelled the deal and asked for its deposit back. After the Trust refused to return the deposit, Comstock sued it for breach of contract. It also sued Robert G. Smith because he had personally guaranteed the Trust’s performance under the contract. The parties filed cross-motions for summary judgment, and the trial court granted summary judgment to Comstock, concluding it had the right to cancel the agreement. The Trust and Mr. Smith have appealed, arguing that the trial court incorrectly granted summary judgment to Comstock because it failed to meet its obligations under the contract. Mr. Smith has also argued that the trial court incorrectly enforced his guaranty. Because the Trust’s failure to provide clear title to the lots by

the required date excused Comstock from further performance under the contract and the trial court properly enforced the guaranty, this Court affirms.

#### FACTS

{¶2} On March 6, 2006, Comstock and the Trust signed a purchase agreement, in which Comstock agreed to buy seven lots from the Trust. Comstock paid \$25,000 as a deposit and agreed to make another \$25,000 deposit by May 31, 2006. The Trust promised to provide Comstock with a title report within fifteen days. The contract provided that, if the report revealed any defects, Comstock had fifteen days to object to them. The Trust then had thirty days to remove those defects. If it did not, Comstock could cancel the agreement by written notice. The contract also provided that Mr. Smith “personally warrants and guarantees the performance of this contract by [the Trust] as if he personally was [the Trust].” Comstock, Mr. Smith, and the Trust each signed it.

{¶3} On March 14, 2006, Comstock received the title report. It indicated that the Trust previously had agreed to sell the same lots to a different company and that a lawsuit was pending between the Trust and the other company. On March 22, 2006, Comstock sent a letter to the Trust, telling it that it had to resolve the issues with the other company “to have an unobjectionable title.”

{¶4} Comstock did not pay the Trust the second deposit by May 31, 2006. On June 5, 2006, it sent the Trust another letter, agreeing to give the Trust until July 1, 2006, to resolve the title defects. On August 15, 2006, it wrote the Trust again, explaining that, because the title objections remained, it was cancelling the agreement and demanding return of its \$25,000.

{¶5} The Trust refused to return Comstock’s deposit because it thought the contract gave it until January 1, 2007, to resolve title defects. On January 11, 2007, Comstock filed a

complaint against the Trust and Mr. Smith, alleging breach of contract. Following discovery, the parties filed cross-motions for summary judgment. The trial court concluded that, because the Trust did not resolve the defects disclosed in the title report, Comstock had the right to cancel the contract. It also concluded that, even though Comstock did not pay the remainder of the deposit, the Trust had waived any default because it did not give Comstock written notice and an opportunity to cure, as required by the contract. The court, therefore, entered judgment for Comstock. The Trust and Mr. Smith have appealed, assigning three errors.

#### FULFILLMENT OF OBLIGATIONS

{¶6} The Trust and Mr. Smith’s first assignment of error is that the trial court incorrectly granted summary judgment to Comstock on its breach of contract claim because Comstock did not perform its obligations under the contract. In reviewing a trial court’s ruling on a motion for summary judgment, this Court applies the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶7} “[T]o prove a breach of contract claim a plaintiff must demonstrate by a preponderance of the evidence that: (1) a contract existed, (2) the plaintiff fulfilled [its] obligations, (3) the defendant failed to fulfill [its] obligations, and (4) damages resulted from this failure.” *Second Calvary Church of God in Christ v. Chomet*, 9th Dist. No. 07CA009186, 2008-Ohio-1463, at ¶9 (citing *Lawrence v. Lorain County Cmty. Coll.*, 127 Ohio App. 3d 546, 548-49 (1998)). The Trust and Mr. Smith have argued that Comstock failed to prove there was no genuine issue of material fact that it fulfilled its obligations under the contract. In particular,

they have argued that it failed to pay the balance of the deposit, which was due “no later than May 31, 2006.”

{¶8} “[If] a plaintiff seeks to recover damages for breach of contract, the burden is upon [it] to show either substantial performance or tender of performance of the conditions on [its] part to be performed.” *Thomas v. Matthews*, 94 Ohio St. 32, paragraph one of the syllabus (1916). If a party to a contract, however, “neglects or refuses to perform a material promise in a contract, there is a failure of consideration.” *Hutchinson v. S.M.C. Aluminum Foundry Inc.*, 6th Dist. No. 91WD121, 1993 WL 43034 at \*3 (Feb. 19, 1993) (citing *Colonial Ins. Co. v. Graw*, 102 Ohio App. 430, 438 (1955)). “Failure of consideration exists when a promise has been made to support a contract, but that promise has not been performed. . . . Where a failure of consideration exists, the other party is thereby excused from further performance.” *England v. O’Flynn*, 2d Dist. No. 18952, 2002 WL 27314 at \*9 (Jan. 11, 2002) (quoting *Rhodes v. Rhodes Indus. Inc.*, 71 Ohio App. 3d 797, 807 (1991)); *Hutchinson*, 1993 WL 43034 at \*3 (“Failure of consideration excuses nonperformance on the part of the other party.”). “[T]he act failed to be performed must go to the root of the contract.” *Graw*, 102 Ohio App. at 439 (quoting 12 Am. Jur. Contracts § 360 (1936)).

{¶9} The contract provided that the Trust would provide Comstock with a title report within fifteen days of the execution of the contract. Comstock then had fifteen days to object to any title defects. If Comstock made objections, the Trust had thirty days to remove those defects or Comstock could cancel the agreement.

{¶10} The Trust and Mr. Smith have not disputed that Comstock received the title report on March 14, 2006, and told the Trust its objections on March 22, 2006. The Trust, therefore, had until April 21, 2006, to remove the defects Comstock found objectionable. It is undisputed

that the Trust failed to remove the defects Comstock objected to by that date. Because Comstock had the right to cancel the contract if there were unresolved title defects, the Trust's failure to remove them went to the root of the contract. Accordingly, because the Trust failed to remove the title defects Comstock wanted resolved, the trial court correctly concluded that Comstock had the right to cancel the contract without further obligation, including payment of the other \$25,000. The Trust and Mr. Smith's argument that Comstock failed to fulfill its obligations under the contract is without merit. Their first assignment of error is overruled.

#### WAIVER

{¶11} The Trust and Mr. Smith's second assignment of error is that the trial court incorrectly concluded that the Trust waived Comstock's performance. The court determined that, even though Comstock failed to pay the second deposit, it was not in default because the Trust did not give it written notice and an opportunity to cure, as required under the contract. It, therefore, concluded that the Trust had waived Comstock's failure to make the deposit. This Court concludes that, since Comstock was excused from paying the second deposit because the Trust did not remove all of the objectionable title defects, even if the trial court mistakenly determined that the doctrine of waiver applied, the error was, at most, harmless. See Civ. R. 61. The Trust and Mr. Smith's second assignment of error is overruled.

#### PERSONAL GUARANTY

{¶12} Mr. Smith's third assignment of error is that the trial court incorrectly concluded that he is personally liable for Comstock's damages. He has argued that, because the Trust is not liable, he is not liable. He has also argued that he is only liable if the Trust is unable to pay. He has further argued that he did not waive Comstock's performance under the contract.

{¶13} Mr. Smith’s arguments regarding waiver and whether the Trust is liable are meritless as explained above. Regarding whether he can be held liable even though the Trust is solvent, Mr. Smith relies on language from this Court’s opinion in *Preferred Capital Inc. v. Sturgil*, 9th Dist. No. 21787, 2004-Ohio-4453, in which it wrote that “a guarantor is liable for the debt of the principal party . . . only when that party is unable to tender payment.” *Id.* at ¶12 (citing *Liquidating Midland Bank v. Stecker*, 40 Ohio App. 510, 517 (1930)). He has argued that, because the Trust owns a number of lots that could be sold to satisfy the judgment, he is not liable.

{¶14} This Court concludes that its statement of law in *Sturgil* was an anomaly and should be limited to the facts of that case. The Ohio Supreme Court has long recognized that “[t]he contract of the guarantor is that he will pay if the obligor does not.” *Cincinnati, H. & D. Ry. Co. v. Kleybolte*, 80 Ohio St. 311, 320 (1909). In *Kleybolte*, the Supreme Court did not indicate that a guarantor’s obligation to pay depended on the solvency of the obligor. The only requirement it noted was that a debt “does not become the guarantor’s . . . until the principal debtor makes default in payment.” *Id.* at 321. Consistent with *Kleybolte*, this Court wrote in *Mihalca v. Malita*, 9th Dist. No. 19395, 2000 WL 372309 at \*4 (Apr. 12, 2000), that “a creditor need not proceed against a principal debtor before pursuing a guarantor who has given an absolute guaranty; however, [a] guarantor is only liable . . . upon the default of the primary debtor.” See also *Medina Supply Co. Inc. v. Dig It Foundations Ltd.*, 9th Dist. No. 20685, 2002 WL 500340 at \*3 (Apr. 3, 2002) (quoting *Mihalca*, 2000 WL 372309 at \*4).

{¶15} In *Sturgil*, it was undisputed that the principal debtor was insolvent, so the fact that this Court wrote that liability can only attach if the obligor “is unable” to tender payment did not affect the outcome. *Preferred Capital Inc. v. Sturgil*, 9th Dist. No. 21787, 2004-Ohio-4453,

at ¶12, 17. Mr. Smith has not offered any rationale for why the liability of a guarantor under an absolute guaranty should be limited to situations in which the principal obligor is insolvent. This Court, therefore, will apply the rule recognized by the Ohio Supreme Court in *Kleybolte*, that the guarantor of a debt must pay “if the obligor does not.” *Cincinnati, H. & D. Ry. Co. v. Kleybolte*, 80 Ohio St. 311, 320 (1909). Because the Trust failed to return Comstock’s deposit as required by the contract, the trial court correctly concluded that Mr. Smith was liable under the guaranty. Mr. Smith’s third assignment of error is overruled.

### CONCLUSION

{¶16} The trial court properly concluded that there was no genuine issue of material fact regarding whether the Trust breached the purchase agreement and whether Mr. Smith was liable under his guaranty and correctly entered judgment for Comstock on its motion for summary judgment. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, 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). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

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CLAIR E. DICKINSON  
FOR THE COURT

WHITMORE, J.  
CONCURS

CARR, J.  
DISSENTS, SAYING:

{¶17} As I would conclude that the trial court’s award of summary judgment was improper because genuine issues of material fact exist, I respectfully dissent. A review of the contract indicates internal inconsistencies giving rise to ambiguity. Specifically, the “Title Defects” provision requires Comstock to notify the sellers in writing of any objections to title, which then gives the sellers thirty days to remove any objectionable title defects. If the sellers cannot remove the defects within that time period, Comstock has two options: (1) to cancel the agreement by written notice, or (2) to accept title “as is.” The “Closing” provision, however, allows the parties to terminate the contract if the sellers cannot convey title within six months of from July 1, 2006, i.e., by January 1, 2007. Furthermore, the contract contains a “Default” provision which allows either party to notify the other in writing of “defaults under any of the terms” of the contract and grants the party in default ten days in which to cure.

{¶18} “While a trial court retains broad discretion to clarify ambiguity in a contract, the determination whether a contract is ambiguous is a matter of law.” *Turner v. Turner*, 9th Dist.



No. 07CA009187, 2008-Ohio-2601, at ¶14. Questions of law are reviewed by an appellate court de novo. *Butler v. Joshi* (May 9, 2001), 9th Dist. No. 00CA0058. Because we review questions of law de novo, we do not give deference to the trial court’s conclusions. *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 602; *Tamarkin Co. v. Wheeler* (1992), 81 Ohio App.3d 232, 234. “Extrinsic evidence is admissible to ascertain the intent of the parties when the contract is unclear or ambiguous[.]” *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313-14.

{¶19} In this case, the trial court concluded that the “Closing” and “Title Defects” provisions are not ambiguous and that the parties’ intent may be ascertained without resort to extrinsic evidence. I disagree. The trial court concluded that the “Title Defects” provision would be rendered a nullity if construed, as advanced by the sellers, to be subsumed within the terms of the “Closing” provision phrase, “if Seller cannot convey the Sublots to Buyer *in accordance with the terms of this Agreement,*” because Comstock would be prohibited from exercising its right to cancel the contract. However, reading each provision independently renders a nullity the sellers’ right to foreclose termination of the contract until January 1, 2007, in the event they cannot convey title until then.

{¶20} Furthermore, the “Default” provision relieves Comstock of further liability to the sellers, allows it to terminate the contract, and provides remedies in the event of the sellers’ default “under any terms of this Agreement,” if the sellers fail to cure the default within ten days after written notice by Comstock. Under the “Closing” provision, closing will be automatically “extended to a date being thirty (30) days after Seller notifies Buyer that it *can* convey title to Buyer as required[.]” as long as the sellers can convey title by January 1, 2007. (Emphasis added.) However, if the sellers are unable to meet any of the seven assigned closing dates

between April 1 and December 1, 2006, Comstock may terminate the contract and seek other remedies pursuant to the “Default” provision, nullifying the sellers’ right to extend the time for closing.

{¶21} Because I believe the contract is rife with ambiguity, I would reverse the granting of summary judgment and remand to the trial court to hear extrinsic evidence on the parties’ intent.

{¶22} For the foregoing reasons, I respectfully dissent.

APPEARANCES:

KAREN EDWARDS-SMITH, attorney at law, for appellants.

MARK I. WACHTER, and NEIL S. SARKAR, attorneys at law, for appellee.