[Cite as *Heintschel v. Montgomery*, 2010-Ohio-6519.]

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

Louisa Heintschel	Court of Appeals No. L-10-1060
Appellant	Trial Court No. CI0200803363
v.	
Robert Montgomery, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: December 30, 2010

* * * * *

George R. Royer, for appellant.

Jenelda E. Witcher, for appellee Robert Montgomery.

Julia R. Bates, Lucas County Prosecuting Attorney, John A. Borell and Maureen O. Atkins, Assistant Prosecuting Attorneys, for appellees Lucas County Board of Commissioners and Waldon Wilson.

James E. Jones, for appellee Poggemeyer Design Group, Inc.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Plaintiff-appellant, Louisa Heintschel, appeals the December 3, 2009 and the February 5, 2010 judgments of the Lucas County Court of Common Pleas which granted summary judgment in favor of the Lucas County Board of Commissioners, Waldon Wilson,[1] Poggemeyer and Associates, and Robert E. Montgomery.[2] Because we agree that no genuine issues of fact remain, we affirm the trial court's judgment.

{¶ 2} The facts of this case are as follows. On the relevant dates herein, appellant, Louisa Heintschel, owned real property located in Martin, Lucas County, Ohio. On January 9, 2006, appellant filed an application for housing assistance with the Lucas County Economic Development's Community Housing Improvement Program ("CHIP"). The purpose of the program was to provide housing assistance for low and moderate income individuals. Appellant's application was approved on January 24, 2006, and she was awarded a $27,145 deferred loan, payable upon sale of the property, to rehabilitate her home. The terms of the agreement required that a competitive bidding process, by approved CHIP contractors, be utilized. The agreement also stated that appellant had the right to reject the lowest bidder and contract with the next lowest bidder. Appellant also signed a "Lucas County Complaint Procedure" form which outlined the administrative review process.

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[1]We acknowledge that some of the parties' legal names are misspelled but will use the spellings set forth in the case caption.

[2]The court dismissed any claims against Robert Montgomery Construction because no such legal entity existed.

{¶ 3} Ultimately, appellee, Robert E. Montgomery, was the lowest bidder and entered into the contract with appellant. Appellee Poggemeyer Design Group, which contracted with Lucas County to assist in administering the CHIP program, conducted the initial inspection of the property prior to the loan approval. Poggemeyer periodically returned to the home to inspect Montgomery's work. Construction at appellant's home ran from February until September 2006. Montgomery completed repairs to the foundation, repaired ceiling and wall damage (which included removal of lead-based paint), installed new drywall in various locations, repaired damage to the roof, attic, and floors, installed new windows, installed inside access to the attic, and finished various minor repairs. Following completion of the work and inspection by Lucas County, a certificate of occupancy was issued.

{¶ 4} Appellant, apparently unsatisfied with Montgomery's work, spoke with appellee Wilson. Appellant acknowledged that a meeting was set to discuss her claims but that she failed to attend. It was determined at the meeting that Montgomery had adequately addressed appellant's complaints.

{¶ 5} On April 11, 2008, appellant commenced the instant action. As to Montgomery, appellant alleged that Montgomery failed to complete the repairs in a workmanlike manner and that such failure constituted a breach of contract. As to appellees Poggemeyer and Steven Dohm, appellant alleged that they failed to properly supervise Montgomery's work and, as a result, the work was improperly completed. The claim against Waldon Wilson and the Lucas County Board of Commissioners was that

they failed to provide competent contractors. Appellant also alleged negligence as to Montgomery, Wilson and Dohm.

{¶ 6} On September 3, 2009, Poggemeyer filed its motion for summary judgment. In its motion, Poggemeyer stressed that it and appellant did not have a contractual relationship; further, appellant was not a third-party beneficiary to Poggemeyer's contract with Lucas County.

{¶ 7} Thereafter, on September 4, 2009, appellees Lucas County and Wilson filed a motion for summary judgment. The motion argued that there was no contract between the parties and that, under R.C. Chapter 2744, Lucas County and Wilson were immune from liability.[3]

{¶ 8} On November 24, 2009, following the presentation of oral arguments, the trial court granted appellees Lucas County's and Wilson's motion for summary judgment. The order was journalized on December 3, 2009. On January 5, 2010, the court held an oral hearing on Montgomery's motion for summary judgment and the motion was granted. The order was journalized on February 5, 2010. This appeal followed.

{¶ 9} On appeal, appellant raises four assignments of error for our consideration:

{¶ 10} "Assignment of Error Number One: The court should not have granted summary judgment as to each defendant in this case.

[3]Also on September 4, 2009, appellant filed a motion for summary judgment as to Montgomery and Poggemeyer; the motion was later withdrawn.

{¶ 11} "Assignment of Error Number Two: The defendant Lucas County and Waldon Wilson were not entitled to absolute or qualified immunity (limited) as to the contractual matters herein.

{¶ 12} "Assignment of Error Number Three: There was no obligation to arbitrate the matters herein.

{¶ 13} "Assignment of Error Number Four: The court erred in allowing appellees' motion for summary judgment as not being in compliance with Civil Rule 56(E)."

{¶ 14} Because appellant's first assignment of error raises arguments contained in Assignment of Error Nos. Two through Four, they will be concurrently addressed. Appellant argues that the trial court erred when it granted summary judgment to each of the defendants. Specifically, appellant argues that as to Lucas County and Wilson, the court erroneously found that they were entitled to governmental immunity, that appellant had no contractual obligation to arbitrate the dispute, and that the affidavits in support of summary judgment failed to comply with Civ.R. 56(E).

{¶ 15} We first note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the

moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 16} Appellant contends that the trial court erred by allowing the affidavit of appellee Montgomery because it was not based on personal knowledge and the attached documents were not verified. Appellant further argues that the affidavits of appellee Waldon Wilson and appellee Poggemeyer, made by the principal owner, Paul Tecpanecatl, were not based upon personal knowledge.

{¶ 17} Civ.R. 56(E) provides:

{¶ 18} "(E) Form of affidavits; further testimony; defense required

{¶ 19} "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is

made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶ 20} First, as to appellee Montgomery's affidavit, appellant claims that the affidavit was not "stated as being based on personal knowledge" and, thus, failed to meet the requirement of Civ.R. 56(E). We disagree. Montgomery clearly states throughout the affidavit that he personally observed or experienced the claimed assertions. Further, as to the attachments, Montgomery stated that he was a party to the matters and had knowledge of the requirements set forth therein.

{¶ 21} Next, as to appellee Wilson, in his affidavit Wilson clearly states that he has personal knowledge of the matters. Further, Wilson authenticated the documents attached to his affidavit by attesting that he had personal knowledge of the documents and that they were kept in the regular course of business. Cf. *JRC Holdings, Inc. v. Samsel Servs. Co.*, 166 Ohio App.3d 328, 2006-Ohio-2148, ¶ 26.

{¶ 22} Likewise, in the Poggemeyer affidavit, Tecpanecatl specifically stated that he assisted in administering the CHIP program in Lucas County. Tecpanecatl stated that he is familiar with the contractual obligations of the various parties involved in the program. Tecpanecatl then indicated that the only contractual obligation Poggemeyer

had was between it and Lucas County. Tecpanecatl also authenticated the documents attached to his affidavit.

{¶ 23} Based on the foregoing, we conclude that the affidavits submitted in support of the parties' summary judgment motions were in compliance with Civ.R. 56 and were properly considered by the trial court.

Summary Judgment as to Appellees Lucas County and Wilson

{¶ 24} Appellant argues that issues of fact remained and Lucas County was not entitled to immunity regarding whether it failed to provide "competent contractors" as required by certain "guidelines" and created by an "agreement". Appellant further claimed that Lucas County was required to supervise the construction to ensure proper completion of the work. Negligence was alleged against Wilson.

{¶ 25} As to the breach of contract claim, we must agree that appellant and Lucas County were not parties to a contract. As set forth by Lucas County, R.C. 305.25 provides the procedure the county must follow to enter into a valid contract. The statute provides: "No contract entered into by the board of county commissioners, or order made by it, shall be valid unless it has been assented to at a regular or special session of the board, and entered in the minutes of its proceedings by the county auditor or the clerk of the board." There is no evidence that any alleged agreement between appellant and Lucas County was approved by the board. See *Drillex, Inc. v. Lake Cty. Bd. of Commrs.* (2001), 145 Ohio App.3d 384.

{¶ 26} In addition to failing to adhere to the statutory requirement, in the materials signed by appellant, appellee Wilson signed as a witness only not as a representative or party to the contract. The "Agreement for Loan and Contract for Housing Rehabilitation" was signed by appellant and Montgomery and witnessed by Wilson. The document provided: "The Owner and Contractor agree to hold the LPA (local public agency) harmless for any damages relating to the accomplishment of the rehabilitation work and execution of the Contract."

{¶ 27} Appellant also argued that Lucas County and Wilson were not entitled to governmental immunity. R.C. 2744.02(A)(1) provides that a political subdivision is generally immune from tort liability for injury, death, or loss to persons or property incurred in connection with the performance of a governmental or proprietary function of the political subdivision. R.C. 2744.02(B) then lists several exceptions to this general grant of immunity. Thereafter, R.C. 2744.03 provides various defenses to the exceptions.

{¶ 28} For individual employees of governmental entities, R.C. 2744.03(A)(6) provides that the employee is immune from liability unless "[t]he employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities" or "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶ 29} Even construing appellant's claim against Lucas County as a "negligent" failure to follow "guidelines," appellant has failed to set forth a specific guideline. Moreover, if such guideline exists, R.C. Chapter 2744 would provide immunity unless

appellant could establish one of the enumerated exceptions. Appellant has failed to do so. Further, as to Wilson, appellant has failed to demonstrate any acts that were outside the scope of his employment or done maliciously. Accordingly, Lucas County and Wilson were entitled to immunity from appellant's claims.

Summary Judgment as to Poggemeyer

{¶ 30} Appellant argues that summary judgment should not have been granted as to appellee Poggemeyer because genuine issues of fact remained as to whether appellant was a third-party beneficiary of the contract between Lucas County and Poggemeyer. A third-party beneficiary is defined as one for whose benefit a promise has been made in a contract but who is not a party to the contract. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 303. However, before a third-party beneficiary can enforce that contract, the individual must be an intended beneficiary, as opposed to merely an incidental beneficiary. *Hill v. Sonitrol of Southwestern Ohio, Inc*. (1988), 36 Ohio St.3d 36, 40. It is not necessary for the third party to be expressly identified in the contract; however, the contract must have been made and entered into with the intent to benefit that individual. See *Doe v. Adkins* (1996), 110 Ohio App.3d 427, 436.

{¶ 31} To determine whether appellant was an intended beneficiary of the contract between Lucas County and Poggemeyer, we must examine the terms of the contract between Poggemeyer and Lucas County. We first note that the contract was entered into in 2004, two years prior to appellant's acceptance into the program. The contract clearly is a consulting agreement wherein Lucas County was to pay Poggemeyer a set price for

various professional services for the "administration and implementation" of the CHIP program. It appears that the chief service, as it relates to appellant, was to conduct lead-based paint risk assessments.

{¶ 32} Upon review, we find that the record is devoid of evidence that the agreement between Lucas County and Poggemeyer contained the intent to benefit appellant. Thus, Poggemeyer did not have a contractual duty to appellant.

{¶ 33} As set forth above, a negligence claim was raised as to Steven Dohm, an alleged employee of Poggemeyer. However, Dohm was never properly served with the complaint. Poggemeyer filed a "Refusal of Service" stating that they have never had an employee named "Steven Dohm" and that an employee who "most closely" matched the name had left their employ in September 2006; they had no further contact with the individual.

Summary Judgment as to Robert Montgomery

{¶ 34} Appellant's claims against Montgomery included breach of contract and negligence. Appellant argues that summary judgment was not appropriate because the complaint procedure did not require that the parties arbitrate the dispute. Montgomery counters that any complaints were subject to the complaint review procedure and arbitration. The complaint procedure signed by appellant provides:

{¶ 35} "Lucas County's Client Complaint Procedure will be as follows:

{¶ 36} "1. Any complaints regarding this housing program are to be in writing and forwarded to the Program Administrator, who will in turn contact the complainant and

attempt to resolve the problem. A written response will be made within 15 working days of receipt of the complaint.

{¶ 37} "2. If the Program Administrator is unable to resolve the complaint, the President of the Commissioners will be advised of the complaint and possibly asked to review and recommend a resolution, or it will be forwarded to the client complaint review committee.

{¶ 38} "3. A client complaint review committee has been established for all complaints that cannot be resolved by the Program Administrator. This committee is comprised of three people, a third party contractor, a local property owner, and a representative of the County. The Program Administrator and the members of the housing staff cannot serve on this committee. * * * The complainant may choose to make a presentation or submit a written description (including documentation) to the committee at a review hearing. The Program Administrator shall notify the complainant of the committee's decision within 15 working days of the date of the hearing.

{¶ 39} "4. If the client complaint review committee is unsuccessful in resolving the complaint, the services of the closest Dispute Resolution/Mediation Program will be retained to resolve the outstanding issues.

{¶ 40} "5. After all previous steps have failed to resolve the complaint, the Office of Housing and Community Partnerships (OHCP) will be contacted in writing detailing the complaint and steps taken to resolve it. Only then will OHCP review the complaint and render a decision."

{¶ 41} Further, the CHIP program had terms and conditions that Montgomery was required to adhere to. The conditions included:

{¶ 42} "Arbitration

{¶ 43} "In the event of a dispute between the Owner and Contractor relating to the successful completion of the Contract in accordance with the terms set forth herein, including any rehabilitation work undertaken hereunder which it is claimed was not properly done and any work which is claimed was included in the scope of this Contract but not completed, the LPA shall attempt to reconcile such dispute to the mutual satisfaction of both the Owner and the Contractor. If such efforts cannot be voluntarily resolved by the LPA, the matter in dispute shall be, at the request of the Owner, Contractor, or LPA, submitted to the governing body of the grantee for final resolution."

{¶ 44} Appellant did contact Wilson regarding her complaints with Montgomery's work. Thereafter, the complaint review committee met to resolve the issues. Had appellant been dissatisfied with the outcome of the meeting, she should have requested that the matter proceed to dispute resolution and, ultimately, be submitted to arbitration.

{¶ 45} Even considering the merits of appellant's claims against Montgomery, we must conclude that no material issues of fact remain. The complaint review committee specifically found that certain "controversial issues" had been resolved. These issues included re-installation and insulation of some of the windows, fixing drywall and plaster "due to structural settling and lack of heat when the work was initially done." The foundation work was approved by the building department. Finally, rubber feet were

recommended for the attic pull-down stairs which were scratching the wood floor; according to the meeting minutes, appellant refused to allow access for the repair to be made.

{¶ 46} During her deposition, appellant acknowledged that she signed the complaint procedure document but that she was not sure if she "followed it to the letter." Appellant stated that she did go through the first contact, Waldon Wilson, but that she did not appear at the complaint committee meeting or submit documents on her behalf. Appellant was aware that the work had been approved.

{¶ 47} Based on the foregoing, we find that no genuine issues of fact remain and the trial court did not err when it granted summary judgment to appellees. Appellant's first, second, third, and fourth assignments of error are not well-taken.

{¶ 48} On consideration whereof, we find that substantial justice was done the party complaining and the judgments of the Lucas County Court of Common Pleas are affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Keila D. Cosme, J.
CONCUR.

_____
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.