

**IN THE SUPREME COURT OF  
THE STATE OF OHIO**

**JAMES F. O'BRIEN, TRUSTEE, et al.,**

Plaintiffs-Appellees,

vs.

**THE RAVENSWOOD APARTMENTS,  
LTD., et al.,**

Defendants-Appellants.

Case No.: 2006-2131

On Appeal from the Hamilton County Court of  
Appeals, First Appellate District

Court of Appeals Case No. C050713

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**APPELLEES' MEMORANDUM IN OPPOSITION TO  
APPELLANTS' MEMORANDUM IN SUPPORT OF  
JURISDICTION**

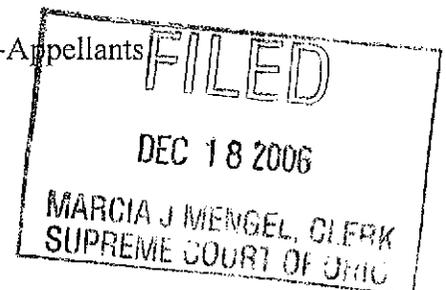
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Brian R. Redden (#0070610)  
*Counsel of Record*  
Richard M. Hopple (#0018669)  
BECKMAN WEIL SHEPARDSON LLC  
300 Pike Street, Suite 400  
Cincinnati, OH 45202  
Telephone: (513) 621-2100  
Facsimile: (513) 621-0106  
brediten@beckman-weil.com  
rhople@beckman-weil.com

Counsel for Plaintiffs-Appellees  
James F. O'Brien, et al.

Mark A. Vander Laan (#0013297)  
Bryan E. Pacheco (#0068189)  
DINSMORE & SHOHL LLP  
Chemed Center  
255 E. Fifth Street, Suite 1900  
Cincinnati, OH 45202-4720  
Telephone: (513) 977-8238  
Facsimile: (513) 977-8141  
mark.vanderlaan@dinslaw.com  
bryan.pacheco@dinslaw.com

Counsel for Defendants-Appellants  
Jack Brauer, et al.



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## II. STATEMENT OF THE CASE

### A. Introduction

In their Complaint and Amended Verified Complaint, Appellees sought damages from Defendant Ravenswood and Appellants for their respective breaches of the terms of a Land Installment Contract and Guaranty.

Based on the First Amended Verified Complaint, written discovery, and the two Affidavits of Roger Corbly, Appellees moved for summary judgment on the Third and Sixth Counts of their Amended Verified Complaint seeking judgment against Appellants under the Guaranty for Ravenswood's unpaid principal and interest payments and unpaid property tax and insurance escrow payments. After briefing and oral argument, the Trial Court granted partial summary judgment in Appellees' favor on Count Three.

Upon appeal, the First Appellate District Court affirmed Summary Judgment for all amounts owed through the date of judgment, but reversed the award of future damages.

Appellants seek review of the First District's Opinion claiming error and that this matter is of great public or general interest.

### B. Statement of Facts

#### 1. The Parties

Appellee James F. O'Brien, Trustee is the vendor of the real property at 3387, 3397, 3407, and 3417 Erie Avenue, Cincinnati, Hamilton County, Ohio, known as the Ravenswood Apartments (the "Premises"). The trust benefits Appellees Roger S. Corbly and Glen A. and Carol Burns. All four of these parties (collectively referred to as "Appellees") are the record owners of the Premises.

Ravenswood Apartments, Ltd. ("Ravenswood") is an Ohio limited liability company and the vendee of the Premises under the Land Installment Contract ("LIC") at issue. Appellants John C.

Brauer, Cynthia Brauer, Hisham Shtayyeh, and Souhad Shtayyeh (collectively referred to “Appellants”) individually guaranteed the LIC and each has an ownership interest in Ravenswood.

**2. The Land Installment Contract and Guaranty**

In November 1996, Ravenswood entered into the LIC for a purchase price of \$3,415,000.00. This purchase was financed with a down payment of \$92,437.50 with monthly installments of \$26,734.09 per month from December 1, 1996 through December 1, 1998 and \$27,206.47 from January 1, 1999 through November 1, 2020, with any remaining balance due then.

Ravenswood agreed in to pay Appellees 1/12<sup>th</sup> of the annual real estate property tax by the 10<sup>th</sup> of each month.<sup>1</sup> Ravenswood agreed to insure, at its expense, the full replacement cost of all Premises buildings and improvements against loss by fire, elements, earthquakes, and such other coverage as required by Appellees' lender and to name Appellees as additional insureds.<sup>2</sup> Ravenswood also agreed to escrow 1/12<sup>th</sup> of the total annual insurance premiums due on the Premises with Appellees by the 10<sup>th</sup> of each month.<sup>3</sup> In Paragraph 6(d), Ravenswood agreed to provide complete copies of these insurance policies and binders covering the Premises to Appellees.

Contemporaneously with the execution of the LIC, Appellants, jointly and severally, unconditionally and absolutely guaranteed to Appellees the prompt performance of each and every obligation or liability contained within the LIC<sup>4</sup>.

Appellants' obligations under the Guaranty are not to be released, discharged, or in any way affected by the invalidity or unenforceability of any claims Appellees have against Ravenswood or by any alleged defenses or claims to which Appellants may be entitled.<sup>5</sup>

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<sup>1</sup> LIC, ¶ 4.

<sup>2</sup> LIC, ¶ 6.

<sup>3</sup> Id.

<sup>4</sup> Guaranty, ¶ 1.

<sup>5</sup> Guaranty, ¶ 2 (c), (f).

### 3. Defendants' Respective Defaults

From July 2003 through the present, Ravenswood has failed to provide insurance coverage in accordance with the provisions of the LIC. Ravenswood has failed to escrow 1/12<sup>th</sup> of the total annual insurance premiums and real estate property tax with Appellees. Ravenswood failed to provide Appellees complete copies of their insurance policies and binders as those policies were issued and failed to provide proof to Appellees that they are additional insureds on those policies.

In violation of the LIC, Ravenswood permitted the Premises to deteriorate into poor physical condition such that significant concrete work, railing and stair work, roof work, and structural work are required and vacancies at the Premises were in excess of 30% for most of 2004.

Pursuant to LIC Paragraph 29, Appellees informed Appellants in writing that the excessive vacancy rate, the material and substantial disrepair of the Premises, and Appellants' failure to provide proof of adequate insurance coverage had caused Appellees to believe that they were insecure and that Appellants had 30 days to cure those defaults. Appellants failed and refused to cure those conditions. In May 2004, Appellees were notified by their mortgagee that they were in default of their financing on the Premises due to Appellants' failure to adequately insure the Premises.

Because of these numerous defaults and in accordance with the Guaranty, Appellees demanded Appellants provide the prompt performance of each and every obligation of the LIC that Ravenswood had failed to perform. Appellants refused to perform as promised.

In July 2004, Defendant Ravenswood filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the Southern District of Ohio in Case Number 04-15832.

From July 2004 to the present, Ravenswood and Appellants have been in default of the payment provisions of the LIC due to their failure to pay Appellees the full monthly purchase price

installment of \$27,206.47. However, in October 2004, Ravenswood began making direct payments of \$ 17,916.55 to mortgagee Union Central Life Insurance Company (“Union Central”) under an order of the Court in Ravenswood’s Chapter 11 bankruptcy proceeding, but \$9,289.92 remains unpaid to Appellees for each month since October 2004. In total, and including interest and late fees under the LIC, Appellants owed Appellees the total sum of \$163,735.73 for principal and interest as of the filing of Appellees’ partial summary judgment motion.

From May 2004 to the present, Appellants have been in default of the property tax escrow provisions of LIC Paragraph 4 due to their failure to pay Appellees the monthly real estate tax installment of \$2,269.52. Defendants owed Appellees the sum of \$23,829.96 for real property tax escrow, plus interest and late fees, as of the date of filing of Appellees’ motion for partial summary judgment.

From May 2004 to the present, Appellants have been in default of the insurance escrow provisions of Paragraph 6 of the LIC due to their failure to pay Appellees the monthly insurance escrow payments in the amount of \$2,814.83 per month. Appellants owed Appellees the sum of \$40,805.45 for insurance escrow, plus interest and late fees, as of the date of filing of Appellees’ motion for partial summary judgment.

In total, Appellants owed Appellees the sum of \$228,371.14, plus pre- and post-judgment interest from July 2004 through satisfaction, for their defaults at the time of the trial court’s summary judgment. This amount increases in an amount of not less than \$14,374.27 per month until Appellants resume full payments.

### **III. THIS CASE IS NOT A CASE OF GREAT GENERAL OR PUBLIC INTEREST.**

This case is a very simple matter that is of neither great general nor public interest. In 1996, Appellants and Appellees agreed to two distinct legal arrangements – the LIC and the Guaranty. The LIC is an agreement between Appellees and Appellants in their corporate capacities as Ravenswood. The Guaranty is between Appellees and Appellants in their personal capacities. Such financing arrangements are created every day between lenders and borrowers in the State of Ohio. Indeed, such agreements have generated a great deal of litigation and case law in Ohio. In response to this large body of law, lenders have revised and developed their guaranty documents to avoid the pitfalls of prior drafters, often seeking to have guarantors waive defenses of the primary obligor and consent to absolute, unconditional liability when the primary obligor defaults. It is only under these terms and conditions that intelligent lenders and borrowers are able to enter into commercial lending transactions and maintain the free flow of commercial credit.

Into this background come Appellants seeking a radical and unfounded change to the long settled concepts of guaranty law in Ohio. Appellants argue that the documents to which they agreed do not mean what they say and that either the bankruptcy of the primary obligor or Revised Code Chapter 5313 derivatively alters the terms of their separate obligations under the Guaranty.

Appellants' position has no merit under existing Ohio or federal commercial law. Moreover, there is no serious argument that this case involves a matter having great general or public interest since the advancement of Appellants' position only serves to undermine well-settled principles of commercial financing law in Ohio and would harm the public by interfering with the availability of funds to borrowers from lenders in Ohio. The only persons benefited from review of this case would be Appellants in their quest to avoid or delay the obligations they accepted in 1996. For this reason and the reasons below, this Court should deny review of Appellants' case.

#### IV. ARGUMENT

##### A. Appellees Position with Regard to Appellants' First Assignment of Error.

**Appellants Proposition of Law No.1: Under R.C. Chapter 5313, when a buyer's obligations under a land installment contract are altered by operation of law, the underlying derivative obligations of the buyer's guarantor are likewise altered.**

In their first Proposition of Law, Appellants argue that either through the bankruptcy of Ravenswood or a "derivative" effect of R.C. Chapter 5313 that their obligations to guaranty the LIC have somehow been altered. This position has no support under existing Ohio law or under public policy and this case is not a case of great public interest meriting the review of this Court.

##### **1. The Treatment Of The Land Installment Contract By The United States Bankruptcy Court Is Irrelevant To The Court's Treatment Of Appellants.**

Without benefit of authority or rationale, Appellants argue that their obligations under the Guaranty have been altered by R.C. Chapter 5313 through Ravenswood's bankruptcy proceeding. This position has no merit.

The Bankruptcy Court did not hold that the LIC had been converted into a mortgage by operation of law under R.C. Chapter 5313. Rather, it held that the LIC was to be treated as a secured claim, not an executory contract requiring immediate payments by Ravenswood in the bankruptcy.<sup>6</sup> However, this decision of the Bankruptcy Court cannot apply to Appellees' present judgment as Appellants are not a party to the bankruptcy case and because the decision on which Appellants rely has been reversed by the Bankruptcy Appellate Panel of the Sixth Circuit.<sup>7</sup>

Even assuming that the Bankruptcy Court's decision held exactly as Appellants claim (it does not) and assuming its decision had not been reversed (it has been), this Court need not be influenced by the Bankruptcy Court's treatment of Ravenswood's obligations when considering

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<sup>6</sup> *In re Ravenswood Apartments, Ltd.* (U.S. Dist. Ct., S.D. Ohio Bk.) Case No. 1:04-bk-15832, Doc. 69 ("Ravenswood I").

<sup>7</sup> *In re Ravenswood Apartments, Ltd.*, (6<sup>th</sup> Cir. BAP 2006) 338 B.R. 307, at \*315 ("Ravenswood II").

Appellants' obligations under the Guaranty. This issue is long-settled by federal bankruptcy courts throughout the United States. While the Sixth Circuit has held that the automatic stay of actions against a primary obligor does not extend to guarantors or sureties<sup>8</sup>, it has not specifically addressed the issue of whether a discharge of a primary obligor extends to a guarantor or surety. On the other hand, several Federal Circuits hold that co-debtors and guarantors of a discharged debtor are not entitled to a discharge by extension or necessity. The Third, Seventh, Eighth, Ninth, and Tenth Federal Circuits all hold that a bankruptcy court has no power to discharge the liabilities of a bankrupt debtor's guarantor since the guarantor is not a party to the bankruptcy action.<sup>9</sup>

This cursory review of relevant case law makes clear that Appellants are not entitled to a release or a reduction of their obligations under the Guaranty due to any federal bankruptcy ruling affecting Ravenswood. The same conclusion is mandated by Ohio law and the Guaranty.

Ohio courts have long held that guarantors or sureties of obligations on which the primary obligor is excused by bankruptcy continue to be held to their guaranty or surety, even though the primary obligor is relieved of that debt. In *Central Nat'l. Bank of Cleveland v. Mills*<sup>10</sup>, the court held that the discharge of the debt of a bankrupt debtor has no effect on the obligations of a guarantor.

The Second District held the same to be true in *Gosiger, Inc. v. Collinsworth*.<sup>11</sup> Like the case at bar, the obligor corporate defendant defaulted on its financial agreement with Plaintiff and filed for bankruptcy. Plaintiff had procured a guaranty from the principals of the corporate obligor securing the underlying note. Unlike this case, the bankrupt corporate defendant reached an accord

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<sup>8</sup> *Lynch v. Johns-Manville Sales Corp.* (6<sup>th</sup> Cir. 1983) 710 F.2d 1194, 1197-1198

<sup>9</sup> *Union Carbide Corp. v. Newboles*, (7<sup>th</sup> Cir. 1982) 686 F. 2d 593, 595; *In re Modern Textile*, (8<sup>th</sup> Cir. 1990) 900 F. 2d 1184, 1191; *Underhill v. Royal*, (9<sup>th</sup> Cir. 1985) 769 F. 2d 1426, *Star Phoenix Mining Co. v. West One Bank*, (9<sup>th</sup> Cir. 1998) 147 F. 3d 1145, 1147; See, *Mellon Bank v. M.K. Siegel*, (E.D.Pa. 1989) 96 B.R. 505, 506; *In re Sunflower Racing, Inc.* (D.Kan. 1998) 226 B.R. 673, 693.

<sup>10</sup> (Franklin App. 1939) 62 Ohio App. 413, 24 N.E.2d 607, at paragraph one of Syllabus.

<sup>11</sup> (March 23, 1989) Greene App. No. 88-CA-79, 1989 WL 27194

and satisfaction in the bankruptcy with the Plaintiff to pay \$12,000.00 of the \$20,509.94 debt owed by the bankrupt corporation. Plaintiff then sued the guarantor for the difference. The *Gosiger* court held that the guarantor was still liable regardless of the accord or discharge.<sup>12</sup>

With very similar reasoning, the Ninth District, following *Mills*, held in *Kutza v. Parker*<sup>13</sup> that the defense of bankruptcy in a tort action, when the bankrupt tortfeasor was insured by a third-party auto liability insurer, cannot be interposed to prevent a judgment on the merits of the tort action, but only served to prevent execution against the bankrupt debtor on plaintiff's judgment.<sup>14</sup>

Finally, the Guaranty states, in pertinent part, that:

The obligations of the **GUARANTOR** hereunder shall not be released, discharged, or in any way affected, nor shall the **GUARANTOR** have any rights against the lender by reason of: . . . (c) the invalidity or unenforceability for any reason of any obligation or liability of the **BORROWER**...or (f) any other defense in law or equity to which the **GUARANTOR** may be entitled.<sup>15</sup>

This unambiguous language, to which the Guarantors jointly and severally agreed, prohibits the result that they argue is error by the First District.

Guarantors' obligation to unconditionally guaranty the prompt performance of each and every obligation or liability of Ravenswood to Appellees cannot be altered by the Bankruptcy Court because the Guarantors have contractually waived their right to request such relief, as they are allowed to do under Ohio law.<sup>16</sup> However, even if they had not done so, the overwhelming majority of federal bankruptcy and Ohio case law on the issue opposes such a finding.

**2. Even If R.C. Chapter 5313 Applies To The LIC, The Appellants Receive No Benefit From That Statute.**

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<sup>12</sup> *Id.*, at \*4.

<sup>13</sup> (Lorain App., 1962) 115 Ohio App. 313, 316, 185 N.E.2d 53.

<sup>14</sup> *Id.*, at 316; See also, *Sharon Regional Physician Services v. Giannini*, (March 28, 2001), Mahoning App. No 00 CA 41, 2001 WL 315231.

<sup>15</sup> Guaranty, ¶ 2.

<sup>16</sup> *Mutual Finance v. Politzer* (1970) 21 Ohio St.2d 177, 183-184, 256 N.E. 2d 606.

Regardless of the applicability of Ravenswood's bankruptcy, R.C. Chapter 5313 does not provide Appellants the benefit they claim. Because the inapplicability of R.C. Chapter 5313 is clear, Appellant's argument that this matter needs to be reviewed by this Court fails.

R.C. Chapter 5313 solely addresses land installment contracts.<sup>17</sup> Accordingly, R.C. 5313 only provides rights and remedies to the vendor and the vendee under a land installment contract.<sup>18</sup> Ravenswood, Appellants' corporate entity, is the vendee under the LIC. The Guaranty is a separate, binding legal agreement executed between Appellees and Appellants to unconditionally guarantee the prompt performance of every obligation and liability of Ravenswood created by the LIC.<sup>19</sup> This absolute liability is made clear within Paragraph 2, quoted above, where Appellants agreed that the "invalidity or unenforceability for any reason of any obligation or liability" of Ravenswood would not affect their liability to Appellees. Since there is no ambiguity in the Guaranty, it should be enforced as it is written.<sup>20</sup> However, just as Ravenswood has sought to extricate itself from the negotiated terms of the LIC within bankruptcy, Appellants now seek to do the same despite agreeing to language in the Guaranty precluding such a result.

Even if R.C. Chapter 5313 could protect the Appellants, it cannot be used to limit Appellees' remedies to merely seeking foreclosure sale of the Premises to recover their damages. R.C. Chapter 5313 does not prevent a vendor from bringing an action for unpaid installments, which is exactly the claim Appellees have pursued to judgment.<sup>21</sup> In this case, the balance of all unpaid installments due on the LIC as of June 1, 2005 was \$ 228,371.14, plus pre- and post-judgment interest from July 1, 2004.

All Appellees sought from Appellants before the Trial Court and all that was affirmed by the

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<sup>17</sup> See, R.C. § 5313.01(A).

<sup>18</sup> R.C. §§ 5313.01(C) and (D).

<sup>19</sup> *Morgan v. Boyer*, 39 Ohio St. 324, 1883 WL 183, at paragraph two of Syllabus.

<sup>20</sup> *Stone v. National City Bank* (Cuyahoga Cty. App. 1995), 106 Ohio App.3d 212, 217, 665 N.E.2d 746.

<sup>21</sup> R.C. § 5313.07

First District was a judgment for the unpaid installments through the date of judgment. Further, the First District specifically recognized that Appellees' action against Appellants was purely one in contract seeking that payment as is authorized under R.C. 5313.07.<sup>22</sup>

Since the action pursued to judgment by Appellees is one authorized under R.C. Chapter 5313, Appellees cannot be constrained to merely foreclose upon the Premises. They have the power to sue for unpaid installments and have properly exercised that power. Therefore, this case presents no issue of public or great general interest that would lead to a new interpretation of R.C. Chapter 5313.

**3. By Executing The Guaranty, Appellants Waived Their Right To Object, To Seek A Release, Or To Seek a Discharge Of Their Obligations To Appellees.**

The terms of the Guaranty are clear. Paragraph 2 states that the Guaranty is “absolute and unconditional” and that Appellants' liability to Appellees is “direct, immediate, and not conditional or contingent” upon Appellees' pursuit of Ravenswood.<sup>23</sup> Further, Appellants agreed that they were not to be “released, discharged or in any way affected” due to the “invalidity or unenforceability” of any “obligation or liability” of Ravenswood.<sup>24</sup> Appellants also agreed that their obligations would not be “released, discharged or in any way affected” by reason of “any other defense in law or equity.”<sup>25</sup> Because the Guarantors knowingly and intelligently agreed to the terms of the Guaranty, there is no great general or public interest in the review of this case.

Despite unequivocal language prohibiting the defenses that Appellants advance, they continue to pursue these defenses to avoid their legal obligations. It would be unconscionable for this Court to allow Appellants to subvert the terms of the Guaranty for any further period of time in a manner contrary to Ohio law and to the public policy of Ohio. Given the weight of law and the

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<sup>22</sup> *O'Brien v. The Ravenswood Apts. Ltd.*, (Oct. 6, 2006) Hamilton App. No. C-050713, 2006-Ohio-5264, at ¶¶ 26, 40.

<sup>23</sup> Guaranty, ¶ 2.

<sup>24</sup> Guaranty, ¶ 2(c).

<sup>25</sup> Guaranty, ¶ 2 (f).

overwhelming policy considerations supporting enforcement of the Guaranty, Appellants' argument for jurisdiction has no merit.

**B. Appellees' Position With Regard To Appellants' Second Assignment of Error**

**Appellants' Proposition of Law No. 2: A plaintiff cannot recover damages in a breach of contract action if the contract does not authorize such an award.**

**1. Appellees' Award of Damages For Property Tax and Insurance Escrow Was Proper and Was Never Challenged By Competent Evidence.**

Appellants are simply wrong as a matter of fact that the sums affirmed by the First District for damages for unpaid real estate tax escrow and insurance escrow were not due or authorized under the LIC. Indeed, to make such an argument, they must mislead this Court that no evidence was produced to support these awards or that they provided evidence to counter Appellees' proof that these sums were due. The First District recognized this both in its Opinion and by overruling Appellants' Motion for Reconsideration. Because there is no basis to review the First District's or trial court's decisions in this regard, this Court should refuse to review this issue as well.

Appellees alleged in their Verified Amended Complaint and provided sworn testimony in the Affidavits of Roger Corbly in Support of Plaintiffs' Motion for Partial Summary Judgment that both Ravenswood and Appellants had failed to escrow property tax and insurance funds as they were required to do under the LIC and Guaranty. The only statement to the contrary contained in the record is Appellants' general denial contained in their Verified Answer. Appellants provided no testimony or evidence to place these facts in dispute.

When one party files a motion for summary judgment and properly supports that motion with affidavits and evidence, an adverse party may not rest upon the mere allegations or denials of his pleadings, but the party's response, by affidavit or as otherwise, must set forth specific facts

showing that a genuine issue of material fact is present.<sup>26</sup> If the party does not so respond, summary judgment should be awarded against him.<sup>27</sup>

Only after judgment has been rendered and affirmed have Appellants attempted to inflate a general denial in their Answer to a genuine issue of material fact. This inflation is not supported under the Civil Rules or under precedent.

A party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion and identifying the portions of the record that support the demand for summary judgment.<sup>28</sup> If the moving party satisfies its burden of proof, the non-moving party has a reciprocal burden to set forth specific facts and evidence showing that there is a genuine issue of material fact for trial. If the non-movant can do so, then summary judgment should not be granted.<sup>29</sup> If the non-movant does not do so, summary judgment should be entered against that party.<sup>30</sup>

The non-moving party may not rest upon mere allegations or denials within its pleadings, but must set forth specific facts demonstrating a genuine issue of material fact for trial.<sup>31</sup> The failure of Appellants to point to any portion of the record that actually supported their argument relating to the escrow of property tax and insurance funds eliminates any possibility of mistake by either the First District or the Trial Court. It is not the Courts' obligation to comb the record to search for evidence to overcome the moving party's request for summary judgment. Rather, the burden of production of specific evidence rests upon Appellants to point to meaningful evidence that would defeat the motion.<sup>32</sup>

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<sup>26</sup> Civ. R. 56(C).

<sup>27</sup> *Id.*

<sup>28</sup> Civ. R. 56; *Dresher v. Burt*, (1996) 75 Ohio St.3d 280, 662 N.E.2d 264.

<sup>29</sup> *Yahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259.

<sup>30</sup> *Dresher*, at 293.

<sup>31</sup> *Stone v. Nat'l City Bank*, (Cuyahoga App. 1995) 106 Ohio App.3d 212, 217, 665 N.E.2d 746.

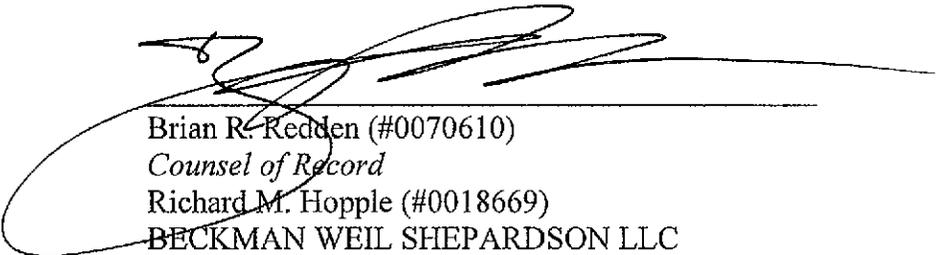
<sup>32</sup> *Loukinas v. Roto-Rooter Servs. Co.* (Hamilton App.) 2006-Ohio-3172, at ¶ 7.

LIC Paragraphs 4 and 6 require that Ravenswood make monthly property tax and insurance escrow payments to Plaintiffs. Ravenswood has failed to do so since June 2004. Under the Guaranty, Appellants are required to pay in default of Ravenswood's performance and have failed to do so. The unsupported statements of Appellants' counsel as to what should or should not have been paid ten years after the execution of these agreements is proof of nothing.

## V. CONCLUSION

Based on the foregoing, Appellants do not raise an issue of public or great general interest as this case presents no novel legal issues, but is resolved on well-settled principles of commercial and contract law. This Court should decline jurisdiction.

Respectfully submitted,



Brian R. Redden (#0070610)

*Counsel of Record*

Richard M. Hopple (#0018669)

BECKMAN WEIL SHEPARDSON LLC

300 Pike Street, Suite 400

Cincinnati, OH 45202

Telephone: (513) 621-2100

Facsimile: (513) 621-0106

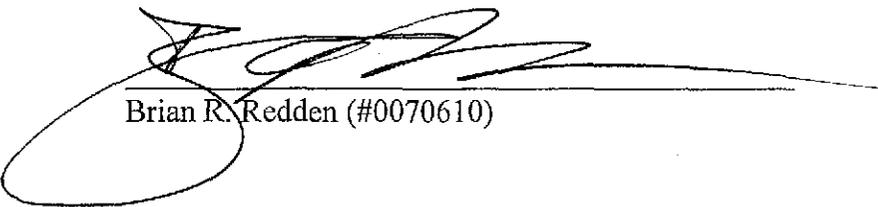
bredden@beckman-weil.com

rhopple@beckman-weil.com

Counsel for Plaintiffs-Appellees

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing as been sent to Mark A. Vander Laan, Esq., and Bryan Pacheco, Esq., Dinsmore & Shohl LLP, 1900 Chemed Center, 255 East Fifth Street, Cincinnati, Ohio 45202-4720 as counsel to Appellants John C. Brauer, Cynthia Brauer, Hisham Shtayyeh, and Souhad Shtayyeh, this 15th day of December, 2006 by regular U.S. mail.



Brian R. Redden (#0070610)

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