

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

P.M.D. LAND COMPANY,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-T-0021
WARNER REALTY, INC., et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 2381.

Judgment: Reversed and remanded.

Thomas C. Nader, Nader & Nader, 5000 East Market Street, #33, Warren, OH 44484
(For Plaintiff-Appellee).

Donald L. Guarnieri, Guarnieri & Secrest, L.L.P., 431 East Market Street, P.O. Box 392, Warren, OH 44482 (For Defendants-Appellants).

MARY JANE TRAPP, P.J.

{¶1} Warner Realty Inc. (“Warner Realty”) appeals from the judgment of the Trumbull County Court of Common Pleas awarding summary judgment in favor of P.M.D. Land Company Ltd. (“PMD”) for money due on a land contract formed between the parties in July of 1998.

{¶2} It is uncontroverted that Warner Realty has been in default of the payment of the balance remaining on the contract since February 1, 2006. Since that time Warner Realty also failed to pay the real estate taxes and water bills as agreed. The

trial court determined that no genuine issues of fact remained to be determined and that as a matter of law, PMD was entitled to the balance due and outstanding.

{¶3} The seven assignments of error Warner Realty raises on appeal center around the basic argument that the court erred in failing to follow the statutory mandates of R.C. 5313 et. seq., which govern land installment contracts for residential dwellings.

{¶4} We disagree with Warner Realty's contentions. PMD's forfeiture action is not governed by Chapter 5313 as the contract seemingly concerns an investment property. Even more fundamentally, Warner Realty failed to carry its burden on summary judgment and rebut PMD's evidence that it was entitled to judgment as a matter of law, indeed introducing no evidence of a genuine issue of material fact. Thus, we agree with the trial court's finding that PMD was entitled to a judgment for the unpaid balance due and owing on the land contract.

{¶5} The conundrum in this case, however, is that the issue of the transfer of the title for the property upon the satisfaction by Warner Realty of the amount outstanding was not addressed by either party, or the trial court. Therefore, we reverse and remand because the issue of title passing upon satisfaction of the amount due under the contract was not determined, and thus, the judgment is incomplete.

{¶6} **Substantive and Procedural History**

{¶7} The instant dispute arises from the delinquency on a land contract regarding two adjoining lots that comprise the address of 1024 Hadley Avenue in Trumbull County, Ohio, for sums due to PMD.

{¶8} On July 10, 1998, Warner Realty,¹ the vendee, and PMD, the vendor, entered into a land contract with a purchase price of \$65,293.66 for the subject property. Warner Realty paid a \$1,000 deposit upon execution, and agreed to pay monthly installments of \$696 beginning August 1, 1998, until all unpaid balances came due on February 1, 2006. Warner Realty also agreed to pay the real estate taxes, as well as maintain and insure improvements on the property.

{¶9} The contract also contained a provision that if any unpaid installment is not paid when due or within 30 days thereafter, then PMD “may initiate forfeiture of the interest of the Vendee in default, as provided by law.”

{¶10} As of February 1, 2006, Warner Realty owed \$36,000 on the contract, and was further delinquent in paying the real estate taxes for 2007 and 2008 for a total of \$7,551.40, as well as the water bills, which amounted to \$759.35.

{¶11} Accordingly, PMD filed a “Complaint for Forfeiture of Land Installment Contract” on September 17, 2007, praying for a money judgment of the unpaid balance remaining on the contract, as well as the real estate taxes and water bill, for a total of \$38,144.86, plus interests and costs.

{¶12} In January of 2009, PMD filed a motion for summary judgment arguing it was entitled to judgment as a matter of law as no material facts were in dispute. PMD attached an affidavit of Mr. Paul M. Dieter, the managing member of PMD, the Land Installment Contract, and a copy of the Business Filing Information screen for Warner Realty from the Ohio Secretary of State website. Mr. Dieter stated in his affidavit that all

1. Warner Realty was incorporated on July 17, 1962, but its charter was cancelled by the tax department on March 9, 1984; thus, Mr. Donald Guarneri, as the corporation’s agent, is personally liable on the contract and he does not dispute this fact.

remaining balances were due on February 1, 2006, that the balance due was \$36,000, and that Warner Realty failed to pay the real estate taxes for 2007 or 2008 in the amount of \$7,551.40 and the water service charges in the amount of \$759.35.

{¶13} Warner Realty filed a brief in opposition, attaching no evidentiary materials of quality. Warner Realty argued PMD's motion should be denied since neither the Trumbull County Treasurer, nor the water department, was added as a necessary party. Warner Realty further posited the amount alleged to be due and owing is impossible to compute, and that if money is owed, it is due to Bank One, not to PMD, the holder of PMD's mortgage. Thus, the proper remedy, according to Warner Realty, was a public sale of the property, with the proceeds paid to Bank One, and the remainder, if any, to Warner Realty. Warner Realty also claimed PMD's motion for summary judgment should be denied because PMD did not indicate PMD is a corporation authorized to maintain an action in the state of Ohio. Attached to Warner Realty's brief in opposition is a February 5, 2009 invoice from PMD to Warner Realty for the February 2006 installment of \$686.55, and a copy of a form entitled "2009 Ohio Corporation Franchise Tax Abbreviated Instructions for the Taxable Year Ending in 2008" with a copy of what appears to be a mailing label addressed to "Warner Realty, Inc."

{¶14} On February 27, 2009, the court awarded summary judgment to PMD, finding that the case involved a land contract between PMD, the seller/vendor, and Warner Realty, as buyer/vendee. The trial court found that Warner Realty failed to provide any evidence that created a genuine issue of material fact, and that based on the unrebutted evidence of Mr. Dieter, the balance remaining on the property, the taxes, and the water bill were duly owed to PMD, who remains in title of the property. Thus,

the court found summary judgment appropriate as PMD was entitled to a money judgment as a matter of law. Judgment was entered for PMD against Warner Realty and Donald Guarnieri, in the amount of \$44,310.75, plus interests and costs.

{¶15} Warner Realty timely appealed, raising the following assignments of error:

{¶16} “[1.] The trial court erred [sic] in not finding the agreement attached to the plaintiff complaint to be a ‘Land Installment Contract’ pursuant to O.R.C. 5313.01.

{¶17} “[2.] The trial court erred [sic] in not finding the agreement a land installment contract pursuant to O.R.C. 5313.02 et. seq.

{¶18} “[3.] The trial court erred [sic] in not finding that the vendor was required under the land installment contract to furnish a statement to the vendee at least once a year showing the following: the amount credited to principal and interest and the balance due.

{¶19} “[4.] A [sic] trial court failed to grant appropriate relief by making a judgment without requiring, marshaling of liens, naming a necessary party defendant and sale in the event the vendee, has money due or equitable interest.

{¶20} “[5.] The trial court erred [sic] in not requiring evidence of the expiration of a (thirty) 30 day period.

{¶21} “[6.] The trial court erred [sic] in not finding the plaintiff complied with Sec. [sic] 5315.06.

{¶22} “[7.] The trial court erred [sic] in not finding that more than 20% of the purchase price had been paid by the vendee.”

{¶23} **Summary Judgment Standard of Review**

{¶24} Warner Realty’s overarching argument is that the trial court erred in awarding summary judgment in favor of PMD as a matter of law, contending for the first time on appeal that the land installment contract is governed by the consumer protection statutes of Chapter 5313 et. seq. Thus, we review all seven assignments of error de novo.

{¶25} “Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Holik v. Richards*, 11th Dist. No. 2005-A-0066, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 290, 293. In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party. *Id.*, citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is de novo. *Id.*, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶26} “Accordingly, ‘[s]ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of a material fact. The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying 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.’ *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. ‘Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.’ *Id.*, citing

Dresher at 293.” *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶36-37.

{¶27} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial.’ The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party’s claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

{¶28} “The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, *** is too broad and

fails to account for the burden Civ.R. 56 places upon a moving party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*.

{¶29} “The Supreme Court in *Dresher* went on to hold that when neither the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and ‘identifying 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.’ *Id.* at 276.” *Id.* at ¶40-42.

{¶30} Initially, we note that Warner Realty failed to raise any of the issues it raises on appeal in the trial court, which should have been pled as affirmative defenses pursuant to Civ.R. 8(C) and (D). See *Sanders v. Crawford*, 5th Dist. No. 2006 CA 00194, 2007-Ohio-2326, ¶28-29. For this reason alone, its arguments fail. Moreover, Warner Realty failed to rebut, or even dispute, any of PMD’s evidence on summary judgment.

{¶31} We, must, however, take notice of the court’s judgment and reverse and remand, because although the court correctly ordered Warner Realty to pay the amount due and outstanding on the contract, the court’s judgment is silent as to the passing of the title upon satisfaction of the amount due.

{¶32} Land Installment Contracts Pursuant to Chapter 5313.01 et. seq.

{¶33} In its first assignment of error, the determination of which summarily disposes of Warner Realty’s arguments, Warner Realty contends that the court erred in

failing to find the contract was a land installment contract pursuant to R.C. 5313.01. While R.C. 5313.01(A) defines “land installment contracts,” R.C. 5313.01(A) must be read in pari materia with R.C. 5313.03(B). Thus, when read as a whole, the consumer protection provisions of Chapter 5313 do not apply in this case as Warner Realty failed to establish the predicate trigger for such protection, that is, that the improvement upon the real property was a “dwelling” as defined by R.C. 5313.03(B), which has been determined by the courts to concern and apply to residential dwellings only. The property in this case concerns an investment property, which neither party disputes. The record is devoid of any further description of the real property or the improvements.

{¶34} R.C. 5313.01(A) defines a “Land installment contract” as “an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee’s obligation.”

{¶35} “Property” is defined as “real property located in this state improved by virtue of a dwelling having been erected on the real property.” See R.C. 5313.01(B).

{¶36} We recognize that “[o]n its face, R.C. 5313.01(B) makes no distinction between residential and commercial property.” *Taylor v. Nickston Investments*, 10th Dist. No. 92AP-508, 1992 Ohio App. LEXIS 5836, 11.

{¶37} Chapter 5313, however, has been interpreted by the courts as applying to residential dwellings only. “Although R.C. 5313 does not explicitly set forth a legislative intent, a perusal of the chapter as a whole reveals that it was enacted to protect buyers.

Hilton v. Tire Tread Development, Inc. (June 30, 1993), 11th Dist. No. 92-P-0053, 1993 Ohio App. LEXIS 3356. However, the use of the word ‘dwelling’ in the statute has resulted in its required application only to residential land installment contracts. *Johnson v. Maxwell* (1988), 51 Ohio App.3d 137, 139.” *Fannin v. Reagan* (Nov. 9, 1995), 11th Dist. No. 94-P-0091, 1995 Ohio App. LEXIS 5023, 9.

{¶38} The Fifth Appellate District further explained in *Smith v. Jewett*, 5th Dist. No. 04 CA 96, 2005-Ohio-3982, that “R.C. 5313.01(B) limits Chapter 5313 to land contracts for the sale of properties with ‘dwellings.’” *Id.* at ¶15, citing *Addair v. Mitchell*, 5th Dist. No. 03 CA 19, 2003-Ohio-6800, ¶10, citing *Johnson v. Maxwell* (1988), 51 Ohio App.3d 137.

{¶39} The court in *Smith* explained “[t]o a major degree the [Ohio land contract] statute does not purport to supercede or rescind the general substantive principles of law previously existing as to these contracts and merely provided remedies for enforcement by either the vendee or the vendor, as the case might be. *Shriver v. Grabenstetter* (May 18, 1988), 3d Dist. No. 13-87-13, 1988 Ohio App. LEXIS 1980, 12. Upon review, we hold the trial court did not err in failing to apply the statutory provisions of R.C. Chapter 5313 and in proceeding to order forfeiture under the terms of the land contract at issue.” *Id.* at ¶16, citing *Fannin* (holding that in view of the fact that the vendees contracted to purchase commercial property, the vendors were not required to comply with the provisions of R.C. 5313).

{¶40} Similarly in this case, there is no evidence or even an argument raised that the property concerns a residential dwelling as defined by R.C. 5313.01. In its motion for summary judgment, PMD contended that the transaction concerned the sale

of property between “two sophisticated parties.” Not only did Warner Realty agree the contract concerned an investment property, but, further, failed to introduce any evidence or even argue that the contract concerned a residential dwelling, which would require the application of the consumer protection statutes afforded in Chapter 5313. Quite simply, neither party asserts that the contract is for a residential property. Warner Realty failed to establish the threshold issue that this contract concerned a residential dwelling, which would trigger the application of the consumer protection provisions of Chapter 5313 et. seq.

{¶41} Thus, it is clear the trial court properly applied the general law of land contracts. As the court cogently stated in *Smith*, “[f]orfeiture clauses contained in land contracts are enforceable in Ohio, so long as the resulting benefit to the vendor is not ‘extravagantly unreasonable or manifestly disproportionate to the actual damages sustained’ by the vendor.” Id. at ¶19, quoting *Johnson*, citing *Norpac Realty Co. v. Schackne* (1923), 107 Ohio St. 425, paragraph one of the syllabus.

{¶42} Warner Realty’s other six assignments of error also fail for this reason. There is no evidence in the record to support the arguments Warner Realty raises for the first time on appeal: that the land contract does not comply with R.C. 5313.02(B) (which deals with excessive mortgages on properties); that PMD failed to furnish yearly statements to the vendee pursuant to R.C. 5313.03; that the proper remedy was a public sale; that the court should have required evidence that PMD gave Warner Realty 30 days past the date of default to cure and halt the forfeiture proceedings; that PMD did not comply with proper notice pursuant to R.C. 5313.06; and that R.C. 2323.07

should have been applied, even though no mortgage or specific lien was being enforced on the property.

{¶43} Quite simply, neither party claimed, nor do we have a finding by the trial court that this contract concerns a residential dwelling and that the consumer protection provision statutes of Chapter 5313 should apply.

{¶44} Although the trial court properly ordered Warner Realty to pay the sum due and outstanding on the land contract, the court's judgment is silent as to the issue of the transfer of title upon Warner Realty's payment of the outstanding amount under the contract. This issue was neither raised nor addressed by either party or the trial court. Thus, the judgment is seemingly incomplete. We do not disagree with the court's ruling, but the outstanding issue of title passing upon satisfaction of the contract must be resolved.

{¶45} For the reasons stated in this opinion, the judgment of the Trumbull County Court of Common Pleas is reversed and remanded for further proceedings.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.