[Cite as *Middlefield Banking Co. v. Deeb*, 2012-Ohio-3191.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

THE MIDDLEFIED BANKING COMPANY,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-G-3007**
- vs -	:	
CHARLES G. DEEB, SUCCESSOR TRUSTEE, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 09 M 001385.

Judgment: Affirmed.

William C. Hofstetter, 155 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Jesse M. Schmidt, Jesse M. Schmidt Co., L.P.A., 1402 Rockefeller Building, 614 West Superior Avenue, Cleveland, OH 44113-1900 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is based upon a final judgment and accompanying decision of the Geauga County Court of Common Pleas. In the written decision, the court granted summary judgment in favor of appellee, Middlefield Banking Company ("the bank"), on its foreclosure complaint and the five counterclaims of appellant, Charles G. Deeb, the successor trustee for the Thomas Casgar Living Trust ("Trustee Deeb"). In light of the disposition of the pending claims, the court ordered the sale of the

encumbered property in its subsequent final judgment. As the primary grounds for his appeal, Trustee Deeb challenges the trial court's analysis as to the enforceability of a mortgage agreement.

{¶2} The subject matter of the underlying case generally concerns the financing of a real estate purchase and the ensuing development of the land as a housing project. In May 2004, the Thomas Casgar Living Trust agreed to sell the land in question, 75.63 acres located in Auburn Township, Ohio, to Kar & Ben Holdings, LLC ("Kar & Ben"). As of the date of the execution of the purchase agreement, the living trust was represented by Robert Myers, Jr. At some point immediately prior to the initiation of this case in late November 2009, Deeb replaced Myers as the trustee.

{¶3} Under the terms of the purchase agreement, Kar & Ben was required to pay the trust a total sum of $800,000 for the property, with an initial amount of $400,000 being immediately due once Kar & Ben had obtained the necessary financing from the Middlefield bank. As to the remaining $400,000, the agreement stated that Kar & Ben would be liable for the balance within 180 days following the closing of the loan or the completion of the recorded plat for the proposed subdivision. Additionally, the purchase agreement provided that the sale of the land would not "close" until after the road for the subdivision had been approved and dedicated.

{¶4} Although not expressly stated in the agreement, it is evident that Trustee Myers and Kar & Ben did not envision that the dedication of the subdivision would take place immediately. As to this point, this court would note that the entire transaction was conditioned upon the trust's execution of a mortgage deed in favor of the bank, under which the entire 75.63 acres of land would act as security for the $800,000 loan. Thus,

despite the fact that Kar & Ben was purchasing the land and would be the liable party under any promissory note with the bank, the trust was responsible for initially providing the mortgage in support of the loan.

{¶5} Throughout the purchase agreement, a distinction was made between the entire tract and a section of 32.98 acres that was contained within the 75.63 acres. This separate section of the property was ultimately intended to be used as a polo field. As to the final ownership of the "polo" section, clause 18 of the agreement basically stated that, even though the section would initially be transferred to Kar & Ben, it would then be conveyed back to the trust at no cost when the subdivision road had been dedicated or installed. Clause 18 also indicated that the final purchase price for the "polo" section would be $308,000, but it is unclear whether this sum would be an amount Kar & Ben would pay in addition to the $800,000.

{¶6} In light of the foregoing provisions governing the "polo" section of the land, it is apparent that Kar & Ben was, in actuality, only buying 42.65 acres for the $800,000. Furthermore, it is apparent that, although the trust did not intend for the "polo" section to be subject to the mortgage once the re-conveyance had occurred, it was necessary to include that section in the original mortgage in order to provide sufficient security for the entire loan to Kar & Ben.

{¶7} Within a few days of executing the purchase agreement for the land, Kar & Ben entered into its loan agreement with the Middlefield bank by signing a promissory note for $750,000. In conjunction with the note, and consistent with the basic terms of the purchase agreement, Trustee Myers executed an open-end mortgage in favor of the bank, covering the entire 75.63 acres. In the "secured debt" provision of the mortgage,

only the loan from the bank to Kar & Ben was referenced. Moreover, notwithstanding the fact that the mortgage contained a legal description of the entire tract, no reference was made to the "polo" section of the property.

{¶8} Once Kar & Ben had completed the loan transaction with the bank, it paid the trust the initial sum of $400,000, and commenced construction on certain aspects of the proposed subdivision. However, certain problems quickly developed concerning the approval and dedication of the subdivision road. As a result, the sale of the 75.63 acres never technically "closed" in accordance with the terms of the purchase agreement, and title to the land remained with the trust throughout the entire development period, except as to any sublot which was sold to an individual homeowner. This meant that clause 18 of the purchase agreement, pertaining to the "re-conveyance" of the "polo" section, was never triggered because title to that portion was not transferred to Kar & Ben in the first place.

{¶9} Despite the difficulties with the subdivision road, some progress was made on the project over the next three years. Whenever Kar & Ben was able to sell a sublot, it would make a payment to the Middlefield bank on the loan. In turn, upon receiving the payment for a particular sublot, the bank would release that sublot from coverage under the mortgage.

{¶10} At some point in early 2007, Kar & Ben defaulted on its loan with the bank. Attempting to resolve the situation before instituting any legal action, the bank entered into negotiations with Kar & Ben and the trust on a separate forbearance agreement. At approximately the same time, the trust had found a separate buyer for the "polo" section of the property, at a price of $225,000.

{¶11} The parties were able to reach an accord on the forbearance agreement in June 2007. In return for agreeing to not bring any foreclosure proceeding for a period of six months, the bank received, inter alia, the $225,000 which the trust had obtained for the "polo" section. Consequently, the bank released the "polo" land from the mortgage. This meant that the mortgage given by the trust only applied to those sublots which had never been sold to any individual homeowner. Again, as previously noted, the unsold sublots still belonged to the trust because the sale of the entire tract was never "closed" under the terms of the original purchase agreement.

{¶12} During the six-month "forbearance" period, Kar & Ben was never able to bring its loan payments up to date and correct the default. Thus, in November 2009, the Middlefield bank obtained a cognovit judgment against Kar & Ben in the Geauga County Court of Common Pleas. Under that judgment, it was held that Kar & Ben and the three separate guarantors of the loan were liable to the bank for the sum of $345,756.66.

{¶13} Within days of obtaining the cognovit judgment, the bank filed the instant action in foreclosure against Charles G. Deeb, as the successor trustee. As the basis for its complaint, the bank essentially asserted that, because the mortgage given by the trust had granted the bank a security interest in the remaining part of the 75.63 acres, it was entitled to have that property sold to cover the outstanding debt under the loan to Kar & Ben.

{¶14} In conjunction with his answer, Trustee Deeb raised five counterclaims against the bank. Under the first two counterclaims, he sought to recover the $225,000 which the trust had paid to the bank in regard to the "polo" section under the separate forbearance agreement. In support of these claims, Trustee Deeb cited the clause of

the purchase agreement pertaining to the proposed "re-conveyance" of the "polo" land. Trustee Deeb's third counterclaim alleged that the bank had negligently misrepresented the extent of its knowledge of the intended disposition of the "polo" section. Under the last two counterclaims, he sought a declaratory judgment that the mortgage in question was not legally enforceable.

{¶15} Once the bank had answered the counterclaims, the parties filed a series of motions for summary judgment. First, the bank moved for summary judgment on its entire foreclosure complaint and Trustee Deeb's final two counterclaims. As part of his response, Trustee Deeb moved for summary judgment on all pending claims. As to the legality of the mortgage, he argued that it should be declared void because: (1) Trustee Myers never executed an accompanying document indicating that the trust was liable to the bank for a debt; and (2) the trust never received any consideration in return for the mortgage. Finally, in conjunction with its response to Deeb's motion, the bank moved for summary judgment on the remaining three counterclaims.

{¶16} In its written decision, the trial court overruled Trustee Deeb's Civ.R. 56 motion and granted summary judgment in favor of the bank as to all pending claims. In holding that the mortgage was enforceable, the trial court concluded that, since Kar & Ben had given Trustee Myers $400,000 from the loan, the trust had received sufficient consideration for the mortgage. As to the claim of negligent misrepresentation, the trial court held that Trustee Deeb would never be able to show that the trust had sustained any compensable injury due to the bank's refusal to disclose any information about its loan to Kar & Ben. As to Trustee Deeb's other two counterclaims concerning the funds paid to the bank for the "polo" land, the trial court concluded that, even if the $225,000

should have been retained by the trust, its only remedy would be against Kar & Ben.

{¶17} After disposing of the summary judgment motions, the trial court rendered a separate judgment ordering the sale of the underlying land. Trustee Deeb then filed this appeal, and has raised the following assignments of error:

{¶18} "[1.] The trial court erred when it granted [the bank's] motion for summary judgment on its claim against [Trustee Deeb].

{¶19} "[2.] The trial court erred when it granted [the bank's] motion for summary judgment and denied [Trustee Deeb's] motion for summary judgment on [his] counterclaims."

{¶20} Under his first assignment, Trustee Deeb contests the trial court's analysis as to the validity of the mortgage which was executed by the previous trustee. Although he raised two arguments on this issue in his motion for summary judgment, he has only advanced one challenge before this court. Specifically, he submits that a mortgage on real property must be declared invalid when the maker of that mortgage does not owe any underlying debt to the bank. In regard to the facts of our case, Trustee Deeb states that the mortgage cannot be enforced against the trust because Trustee Myers never executed a second document evidencing the existence of a separate debt owed by the trust.

{¶21} In support of this contention, Trustee Deeb cites a series of cases which stand for the legal proposition that a mortgage is a mere incident to the underlying debt, and that the negotiation of the promissory note automatically results in the equitable transfer of the accompanying mortgage. *See, e.g., U.S Bank, N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178. In other words, the cited cases conclude that the

note and mortgage must be held by the same creditor/mortgagee.

{¶22} Trying to build upon the foregoing proposition, Trustee Deeb asserts that the instant mortgage was essentially meaningless because the trust and appellee were not parties to an underlying promissory note. However, in making this assertion, he has failed to acknowledge one salient fact. That is, the mortgage signed by Trustee Myers expressly stated that it was intended to cover the debt owed by Kar & Ben under its loan with appellee. Thus, the actual issue before this court is whether one party can grant a mortgage to secure the debt of a second party.

{¶23} Under Ohio law, the foregoing query has been answered in the affirmative. "'A mortgage given to secure the obligation of a third party is valid and enforceable, ***." *Liberty Sav. Bank, F.S.B. v. Sortman*, 2nd Dist. No. 16532, 1998 Ohio App. LEXIS 1667, *17 (Apr. 17, 1998), quoting 69 Ohio Jurisprudence 3d (1986) 116, Mortgages, Section 73. *See, also, Hilton v. Catherwood*, 10 Ohio St. 109 (1859). Under such circumstances, the mortgagor basically becomes a surety for the underlying debt. *City of Mentor v. Hutson*, 11th Dist. No. 99-L-055, 2000 Ohio App. LEXIS 2654, *8 (June 16, 2000).

{¶24} In the present case, a review of the parties' evidentiary materials indicates that there was no factual dispute as to the terms of the mortgage; i.e., it was agreed that the mortgage would provide security for the loan of Kar & Ben. Since, as a matter of law, such a mortgage is valid, the fact that the trust itself did not owe any separate debt to the bank is inconsequential. Therefore, because the trial court did not err in granting summary judgment in favor of the bank on its complaint in foreclosure, Trustee Deeb's first assignment is without merit.

{¶25} Under his second assignment, Trustee Deeb maintains that the trial court erred in granting the bank summary judgment in regard to his counterclaim for negligent misrepresentation. He asserts that the evidentiary materials accompanying his Civ.R. 56 motion were sufficient to raise a factual dispute as to each element of that particular claim, including whether the bank failed to disclose that its employees had knowledge of the fact that, under the purchase agreement between the trust and Kar & Ben, the "polo" section of the tract was to be retained by the trust.

{¶26} As previously noted, our review of the bank's evidentiary materials shows that, after Kar & Ben's initial default on the loan, the three parties negotiated a separate forbearance agreement, under which the bank promised not to institute any foreclosure case for six months. As part of the consideration for the forbearance, the bank received the sum of $225,000 covering the "polo" section of the property. These funds had been obtained through the trust's conveyance of the "polo" section, which accordingly was released from coverage under the mortgage.

{¶27} During the course of the negotiations, Trustee Myers requested the bank to reveal any information it had concerning whether the "polo" section was exempt from the lien of the mortgage in light of the clause in the purchase agreement. In response, the bank stated that it was unable to reveal any information because the trust was not a party to the promissory note. However, after the filing of the underlying action, Trustee Deeb received copies of certain documents during discovery which readily showed that the bank employees did have prior knowledge of the clause in the purchase agreement governing the ultimate disposition of the "polo" section.

{¶28} In light of the foregoing, Trustee Deeb submits that the bank's actions had

the effect of misleading Trustee Myers as to the status of the "polo" section at the time the forbearance agreement was signed. He further contends that If Trustee Myers and the beneficiary of the trust had been aware of the extent of the bank's knowledge, the trust would not have agreed to give the $225,000 to the bank. In essence, it is Trustee Deeb's position that, because the "polo" land was ultimately to be retained by the trust under the governing clause of the purchase agreement with Kar & Ben, it was entitled to the $225,000 stemming from the section's conveyance.

{¶29} The elements for the tort of negligent misrepresentation are well-settled under Ohio law:

{¶30} "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Delman v. Cleveland Heights*, 41 Ohio St.3d 1, 4 (1989).

{¶31} Negligent misrepresentation was originally recognized as a distinct claim for relief in *Haddon View Inv. Co. v. Coopers & Lybrand*, 70 Ohio St.2d 154 (1982). In subsequent opinions, the Supreme Court of Ohio has emphasized that the new tort was not intended to have extensive application:

{¶32} "In *Haddon View*, this court discussed the liability of an accountant for professional negligence in accord with 3 Restatement of the Law 2d (1979), Torts, Section 552. *** That section recognizes professional liability, and thus a duty in tort, only in those limited circumstances in which a person, in the course of business,

negligently supplies false information, knowing that the recipient either intends to rely on it in business, or knowing that the recipient intends to pass the information on to a foreseen third party or limited class of third persons who intend to rely on it in business." *Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, ¶9.

{¶33} Given the narrow language employed by the Supreme Court, a claim of negligent misrepresentation has been characterized as a mere "business tort related to professional malpractice." *Thornton v. State Farm Mut. Auto Ins. Co.*, N.D.Ohio No. 1:06-cv-00018, 2006 U.S. Dist. LEXIS 83968, *49 (Nov. 17, 2006). Consistent with this limited application, the Eighth Appellate District has summarized the elements of the tort in the following manner:

{¶34} "Therefore, the elements for negligent misrepresentation 'require (1) a defendant who is in the business of supplying information; and (2) a plaintiff who sought guidance with respect to his business transactions from the defendant.'" *Hamilton v. Sysco Food Servs. of Cleveland, Inc.*, 170 Ohio App.3d 203, 2006-Ohio-6419, ¶20, quoting *Nichols v. Ryder Truck Rental, Inc.*, 8th Dist. No. 65376, 1994 Ohio App. LEXIS 2697 (June 23, 1994).

{¶35} In *Hamilton*, the appellate court expressly held that an employee cannot maintain a claim of negligent misrepresentation against her employer because, in that type of relationship, the employer is specifically not in the business of supplying information to other persons. *Id.*, at ¶21. As part of its discussion of the point, the *Hamilton* court emphasized that the class of persons who are in the business of supplying information to others is limited to certain professionals, such as "'attorneys,

surveyors, abstractors of title and banks dealing with no-depositors' checks.'" *Id*., quoting *Nichols*, 1994 Ohio App. LEXIS 2697. *See, also, Thornton*, 2006 U.S. Dist. LEXIS 83968, at *50, in which the federal court stated that, under Ohio law, the tort of negligent misrepresentation has no application to consumer transactions or typical business transactions.

{¶36} In this case, the underlying transaction consisted solely of a business loan in which the living trust executed a mortgage to provide security for the payment of Kar & Ben's debt under the promissory note. In this type of transaction, the Middlefield bank clearly was not engaging in the business of supplying information to the trust for its use in other financial matters. That is, the bank did not have a fiduciary-like relationship with the trust, in which it had a professional duty to provide dependable information; instead, the relationship was limited to an arms-length loan transaction. Given these undisputed facts, the tort of negligent misrepresentation was inapplicable to the business dealings between the bank and the trust. Therefore, as a matter of law, the bank was entitled to summary judgment on Trustee Deeb's third counterclaim.

{¶37} In conjunction with the foregoing analysis, this court would reiterate that sale of the entire 75.63 acres did not go forward in accordance with the provisions of the purchase agreement between Kar & Ben and the trust. Under the governing terms, the sale was to become final when Kar & Ben made the second required payment and the subdivision road was approved and dedicated. Although not expressly set forth in the purchase agreement, it is apparent that, after the sale was finalized and title to the land had been transferred, Kar & Ben would have executed a new mortgage which would have superseded the trust's mortgage. Moreover, since the "polo" section was to be re-

conveyed to the trust, the new mortgage would not have encompassed the "polo" land.

{¶38} However, the undisputed facts before this court establish that a second mortgage was never executed, and that the trust's mortgage always remained effective. Under the plain and unambiguous terms of the trust's mortgage, the entire 75.63 tract of land was encumbered; i.e., the mortgage did not provide for an exemption for the "polo" area. Under such circumstances, the fact that the purchase agreement contained a "re-conveyance" clause was simply irrelevant, since the existence of such a clause would have no effect upon the interpretation or application of the mortgage. Therefore, even if the bank's employees were aware of the existence of the "re-conveyance" clause, the scope of its security interest in the property would not be altered.

{¶39} To this extent, any misleading statement by the bank's employees, if one was ever actually made, would not have been harmful to the trust. Given that the "polo" section was obviously covered under the mortgage, it could not be released from the mortgage until an appropriate sum had been paid to the bank. Since Kar & Ben did not evidently have sufficient funds to pay the bank, the burden fell upon the trust to pay the debt so that the security interest could be extinguished and the "polo" section could be sold. In light of the express terms in the purchase agreement with Kar & Ben, the trust clearly intended to sell the "polo" area for a profit; nevertheless, its inability to obtain that profit was solely attributable to the fact that the terms of the purchase agreement were never fulfilled, not to any actions on the part of the bank.

{¶40} As a separate point under his second assignment, Trustee Deeb submits that summary judgment was not warranted on his fifth counterclaim. Under that specific claim, he asserted that the mortgage should be declared void because the trust had not

incurred a separate debt to the bank under a promissory note. Pursuant to our analysis of this issue under the first assignment, this particular argument also is without merit. Thus, since the trial court did not err in granting summary judgment as to both the third and fifth counterclaims, the entire second assignment is not well taken.

{¶41} Since neither of Trustee Deeb's two assignments of error have merit, it is the order and judgment of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.