[Cite as *Huntington Natl. Bank v. A & J Plumbing, Inc.*, 2012-Ohio-526.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

THE HUNTINGTON NATIONAL BANK,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-G-3021**
- vs -	:	
VAL HOMES, INC., et al.,	:	
Defendants,	:	
A & J PLUMBING, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 10 F 000226.

Judgment: Affirmed.

Kirk W. Roessler and *Janeane R. Cappara*, Ziegler, Metzger & Miller, L.L.P., 2020 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115 (For Plaintiff-Appellee).

Frederic L. Zuch, 7343 Chillicothe Road, Mentor, OH 44060 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, A & J Plumbing, Inc. (A & J), appeals from the Judgment Entries of the Geauga County Court of Common Pleas, denying A & J's Motion for Summary Judgment and ruling in favor of plaintiff-appellee, Huntington National Bank (Huntington) on A & J's Counterclaim. The issues to be determined by this court are whether a non-party to a contract may recover for the negligence of a

party to the contract, whether a party who has limited authority to act as an attorney-in-fact is liable for negligence if it did not exercise its power, and whether a builder's affidavit that contains false information is fraudulent on its face. For the following reasons, we affirm the judgment of the court below.

{¶2} On December 11, 2007, Val Homes, Inc. (Val Homes) executed a promissory note in favor of Huntington in the amount of $258,700, secured by a mortgage on the real property located at 13450 Walking Stick Lane, in Hambden, Ohio. The loan funds were to be used by Val Homes, as a general contractor, to finance the construction of a new residential home on the real property.

{¶3} Huntington and Val Homes also signed a Construction Loan Agreement on December 11, 2007, which contained provisions discussing the disbursement of the funds and the rights of the parties related to the construction project. The Agreement contains several pertinent provisions:

> **{¶4}** LIMITATION OF RESPONSBILITY: The making of any Advance by Lender shall not constitute or be interpreted as either (A) an approval or acceptance by Lender of the work done through the date of the Advance, or (B) a representation or indemnity by Lender to any party against any deficiency or defect in the work or against any breach of contract. Inspections and approvals of the Plans and Specifications, the Improvements, the workmanship and materials used in the Improvements, and the exercise of any other right of inspection, approval, or inquiry granted to Lender in this Agreement are acknowledged to be solely for the protection of the Lender's interests, and under no circumstances shall they be construed to impose any responsibility or liability of any nature whatsoever on Lender to any party. Neither Borrower nor any contractor, subcontractor, materialman, laborer, or any other person shall rely, or have any right to rely, upon Lender's determination of the appropriateness of any Advance. No disbursement or approval by Lender shall constitute a representation by Lender as to the nature of the Project, its construction, or its intended use for Borrower or for any other person, nor shall it constitute an indemnity by Lender

> to Borrower or any other person against any deficiency or defects in the Project or against any breach of any contract.

{¶5} In addition, under the section titled "DISBURSEMENT OF LOAN FUNDS", the Agreement states:

> **{¶6}** **Payments**. At the sole option of the Lender, Advances may be paid in the joint names of Borrower and the General Contractor, subcontractor(s), or supplier(s) in payment of sums due under the Construction Contract. At its sole option, Lender may directly pay the General Contractor and any subcontractors or other parties the sums due under the Construction Contract. Borrower appoints Lender as its attorney-in-fact to make such payments. This power shall be deemed coupled with an interest, shall be irrevocable, and shall survive an Event of Default under this Agreement.

{¶7} The loan funds were disbursed in separate payments throughout the course of the construction project. During the period of construction, Val Homes submitted six requests to Huntington for disbursement of loan funds. Upon submitting each request, Val Homes also supplied an Affidavit of Contractor to Lending Institution, pursuant to R.C. 1311.011(B)(4), certifying that Val Homes had paid in full for all materials and for all work performed by its subcontractors. On each occasion, Huntington performed a title update to confirm that no liens had been filed on the property and then disbursed funds to Val Homes. The last payment was disbursed on March 17, 2009.

{¶8} During the construction project, Val Homes retained the services of A & J as a subcontractor to perform plumbing work. A & J performed plumbing work on the property in three stages, and submitted two separate invoices to Val Homes, dated February 10, 2008, and March 12, 2009. A & J did not receive full payment from Val Homes for its services and subsequently filed an Affidavit for a Mechanic's Lien on the

Walking Stick property on May 18, 2009, alleging that Val Homes owed $10,242.50 for work performed.

{¶9} On February 26, 2010, Huntington filed a foreclosure action against Val Homes for failure to pay the balance due on the promissory note, with A & J being a defendant based upon the mechanic's lien on the property.

{¶10} A & J filed a Counterclaim on April 5, 2010, asserting that Huntington committed gross negligence by failing to properly exercise its rights under the Construction Loan Agreement to monitor Val Homes' payment of subcontractors, to ensure that A & J was properly paid for its services. A & J argued that, therefore, Huntington was responsible for the unpaid balance of its invoices, in the amount of $10,242.50.

{¶11} On September 1, 2010, Huntington filed a Motion for Summary Judgment on A & J's Counterclaim, asserting that A & J had no privity of contract with Huntington and that it was not grossly negligent.

{¶12} On December 14, 2010, A & J also filed a Motion for Summary Judgment on its Counterclaim.

{¶13} A trial was held in this matter on January 28, 2011. During the trial, the foreclosure was granted and A & J presented four causes of action related to its Counterclaim, including a negligence claim, a third-party beneficiary claim, and two claims related to builder's affidavits. The following testimony was presented.

{¶14} Andrew Kelly, a construction loan officer for Huntington, handled the loan made to Val Homes. He testified that, during the course of construction, he did not require Val Homes to submit lien waivers, receipted bills, or other forms of payment

acknowledgments showing that the subcontractors had been paid, although the Loan Agreement allowed Huntington to do so. He did not identify or ask for information regarding any of the subcontractors working for Val Homes. He explained that the bank usually did not require lien waivers or other payment acknowledgments on small projects, such as residential construction, and that, based on his 25 years of experience in the banking industry, this was a standard procedure. He believed that the language in the Construction Loan Agreement regarding this issue was for the benefit of Huntington and that it was not required to take such steps. Kelly testified that he did receive the affidavits required by R.C. 1311.011(B)(4), and that according to these affidavits, Val Homes had paid all of its subcontractors. Kelly also testified that a lien search was performed before each disbursement of funds and no lien was placed on the property until after all funds had been disbursed.

{¶15} Jeffrey Head, Vice President of A & J, testified that two bills were submitted for the plumbing services performed and that a portion of the total bill was satisfied through payment credits from other projects. He explained that Val Homes did not pay in full, leading A & J to file a mechanic's lien on the subject property. Head testified that, aside from filing the lien, A & J never notified Huntington that it failed to receive payment from Val Homes.

{¶16} On March 30, 2011, the trial court issued a Judgment Entry overruling Huntington and A & J's Motions for Summary Judgment. On the same date, the trial court also issued its Decision, holding that Huntington did not violate R.C. 1311.011(B)(5) or commit gross negligence. The court also held that A & J was not a third party beneficiary to the loan agreement between Huntington and Val Homes and

the designation of Huntington as Val Homes' attorney-in-fact did not create any rights for A & J.

{¶17} On April 26, 2011, the trial court issued an Order, rendering judgment in favor of Huntington and against A & J on its Counterclaim.

{¶18} A & J timely appeals and raises the following assignments of error:

{¶19} "[1.] The trial court committed prejudicial error by denying the defendant-appellant's motion for summary judgment, pursuant to R.C. 1337.092(B)(3), regarding the assertion that an attorney-in-fact (plaintiff-appellee) is liable for the debts of the principal (Val Homes) when the attorney-in-fact disregards the applicable payment procedures of a contract which created the attorney-in-fact relationship.

{¶20} "[2.] The trial court committed prejudicial error when it determined that the contractual designation of the appellee as the attorney-in-fact for the general contractor (Val Homes) created no rights for the appellant as a subcontractor, nor did it impose any duties upon the appellee for the benefit of the appellant.

{¶21} "[3.] The trial court committed prejudicial error in concluding that the appellant was not a third-party beneficiary under the Construction Loan Agreement between Huntington and Val Homes.

{¶22} "[4.] The trial court committed prejudicial error by concluding that a builder's affidavits, considered collectively, and submitted pursuant to R.C. 1311.011(B)(4)&(5) did not appear fraudulent on their face.

{¶23} "[5.] The trial court committed prejudicial error by concluding that it was not gross negligence when a lender failed to follow any of the available and defined

procedures designed to independently monitor and verify how loan proceeds were actually utilized."

{¶24} We will consider the assignments of error out of order.

{¶25} In its second assignment of error, A & J argues that Huntington's designation as attorney-in-fact for Val Homes in the Construction Loan Agreement created certain rights for A & J as a subcontractor and made Huntington personally liable for Val Homes' debt if it acted negligently. A & J essentially argues that the trial court improperly interpreted the contract between Huntington and Val Homes to find that the attorney in fact provision did not apply to A & J.

{¶26} The interpretation of a written contract is a question of law. The trial court's interpretation of the contract is subject to de novo review. *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 697 N.E.2d 208 (1998). "Absent ambiguity in the language of the contract, the parties' intent must be determined from the plain language of the document." (Citation omitted.) *J.B.H. Properties, Inc. v. N.E.S. Corp*., 11th Dist. No. 2007-L-024, 2007-Ohio-7116, ¶ 10.

{¶27} At the outset, we note that A & J was not a party to any contract with Huntington, but only with Val Homes, as the plumbing subcontractor for the construction project. Therefore, A & J's ability to recover from Huntington for Val Homes' failure to pay is limited. A & J asserts that one method of recovery is Huntington's negligent behavior as attorney-in-fact. An attorney-in-fact is personally liable for a debt of the attorney in fact's principal if "[t]he negligence of the attorney in fact gave rise to or resulted in the debt." R.C. 1337.092(B)(3).

{¶28} The Construction Loan Agreement in this case stated that Huntington could act as attorney-in-fact for Val Homes, in a limited capacity. In the "Payment" provision, the Agreement stated that "Borrower appoints Lender as its attorney-in-fact" to make payments directly to general contractors, subcontractors, or any other parties owed payment. The clause also states that Huntington could make such payments "at its sole option." This was the only provision appointing Huntington as attorney-in-fact for Val Homes, as is conceded by A & J.

{¶29} The facts presented in this case show that Huntington never exercised its option under this provision and did not make direct payments to contractors or subcontractors but instead disbursed funds only to the borrower, Val Homes. Therefore, Huntington never exercised its limited power to act as attorney-in-fact to make payments to anyone other than the borrower and cannot be considered as acting as Val Homes' attorney-in fact. *See In re Blackburn*, 4th Dist. No. 05CA3014, 2006-Ohio-406, ¶ 19 (specific grants of authority to act as an attorney-in-fact necessarily exclude the power to act as an attorney-in-fact on other issues); *Spence v. Emerine*, 46 Ohio St. 433, 440, 21 N.E. 866 (1889) (if a grant of power to act as an attorney in fact is expressly limited, courts must only apply the power within those limits). Since Huntington did not act as an attorney-in-fact, it is not liable for any negligent behavior.

{¶30} In addition, as the trial court found, it also cannot be said that Huntington had a duty to exercise its power to act as attorney-in-fact for the benefit of A & J. The Agreement allowed Huntington to act as attorney-in-fact "at its sole option." Therefore, this clause did not require Huntington to exercise its option and the failure to do so does not create rights for either Val Homes or A & J.

{¶31} A & J asserts that Huntington also failed to exercise or follow through with other provisions contained in the Agreement. However, none of these provisions fall under the scope of the limited attorney-in-fact provision. Since the power was limited, as addressed above, this power does not extend to other portions of the agreement. Claims regarding other benefits under the Agreement can only be raised by a party to the Agreement. *Westwinds Dev. Corp. v. Outcalt*, 11th Dist. No. 2008-G-2863, 2009-Ohio-2948, ¶ 17 (citation omitted).

{¶32} The second assignment of error is without merit.

{¶33} In its first assignment of error, A & J contends that the trial court erred by denying its Motion for Summary Judgment on its Counterclaim regarding Huntington's status as an attorney-in-fact for Val Homes.

{¶34} This assignment of error is rendered moot by our affirmance of the trial court's judgment on the merits of the Counterclaim in the second assignment of error. *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 642 N.E.2d 615 (1994), syllabus ("[a]ny error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made"); *Bull Run Properties., LLC v. Albkos Properties, LLC*, 11th Dist. No. 2011-L-003, 2011-Ohio-5712, ¶ 51.

{¶35} The first assignment of error is without merit.

{¶36} In its third assignment of error, A & J asserts that although it was not a party to the agreement between Huntington and Val Homes, it is a third party beneficiary entitled to certain benefits under the Construction Loan Agreement.

Specifically, A & J asserts that the Agreement made various statements regarding subcontractors, giving them rights and benefits.

{¶37} "In Ohio, only a party to a contract or an intended third-party beneficiary may bring an action on a contract." *Westwinds*, 11th Dist. No. 2008-G-2863, 2009-Ohio-2948, at ¶ 17 (citation omitted). "The parties to the contract must intend that a third party benefit from the contract in order for the third party to have enforceable rights under the contract." *Clem v. Steiner*, 11th Dist. No. 2002-P-0056, 2003-Ohio-4865, ¶ 19, citing *Laverick v. Children's Hosp. Med. Ctr., Inc.*, 43 Ohio App.3d 201, 204, 540 N.E.2d 305 (9th Dist.1988). "[T]he mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary." *Hill v. Sonitrol of Southwestern Ohio, Inc*., 36 Ohio St.3d 36, 40, 521 N.E.2d 780 (1988).

{¶38} "A determination of the parties' intentions is a factual inquiry. A reviewing court must presume that the trial court's interpretation of the agreement regarding the parties' intentions is correct. That determination will be upheld if supported by some competent, credible evidence." *Clem* at ¶ 19.

{¶39} In the present case, the trial court found that Huntington agreed to loan Val Homes $258,700 for the intended purpose of constructing a single family home and held that A & J was not a third-party beneficiary of the Construction Loan Agreement. We find that this is supported by some competent, credible evidence.

{¶40} Andrew Kelly of Huntington testified regarding the various clauses in the agreement, such as those located in the section entitled "CONDITIONS PRECEDENT

TO EACH ADVANCE," that require the borrower to obtain lien waivers from subcontractors and allow Huntington to communicate with subcontractors to verify that they have been paid. He explained that these clauses were intended to benefit Huntington, by allowing it to collect information necessary to protect against liens being filed on the property and to protect its priority. The Limitations of Responsibility clause in the Loan Agreement also supports a finding that Huntington did not intend to provide a benefit to subcontractors through investigating whether they were paid by Val Homes. The clause states that "the exercise of any * * * right of inspection, approval, or inquiry granted to Lender in this Agreement are acknowledged to be solely for the protection of the Lender's interests, and under no circumstances shall they be construed to impose any responsibility or liability of any nature whatsoever on Lender to any party." Therefore, although A & J asserts that these clauses may have benefitted subcontractors, the very language of the Agreement states that there was no intent for the provisions to benefit any party except Huntington.

{¶41} Regarding the issue of payment of subcontractors, the Construction Loan Agreement does allow Huntington to directly pay subcontractors, "at its sole discretion," as discussed above. Although A & J asserts that the right to be paid is more than an incidental benefit, there is nothing in the contract that requires Huntington to pay the subcontractors, and therefore, Huntington had no duty to do so. In the absence of such a duty, we cannot find A & J to be an intended beneficiary. *Hill*, 36 Ohio St.3d at 40, 521 N.E.2d 780.

{¶42} Although A & J asserts that it received more than just an incidental benefit through payment for its subcontracting services, it does not follow that the contract was

intended to benefit A & J or any other subcontractor. The intent of the Construction Loan Agreement was to set forth certain conditions that would be met in order to distribute funds from Huntington to Val Homes during the course of the construction and to ensure that Huntington would be repaid. Although there may have been some potential benefit to A & J from the Agreement, this alone does not make it an intended beneficiary. *See Transcontinental Ins. Co. v. Exxcel Project Mgt., Inc.*, 10th Dist. No. 04AP-1243, 2005-Ohio-5081, ¶ 22 (although some sections of the contract conferred benefits upon the appellant, the evidence was insufficient to show that the appellant was an intended third-party beneficiary).

{¶43} The third assignment of error is without merit.

{¶44} In its fourth assignment of error, A & J asserts that the trial court erred by finding that the builder's affidavits submitted by Val Homes to Huntington were not fraudulent on their face, and argues that the affidavits were not in compliance with R.C. 1311.011(B)(4).

{¶45} The factfinder is to weigh the evidence to determine whether a document is fraudulent. *Chase Bank of Ohio v. Nealco Leasing, Inc.*, 92 Ohio App.3d 555, 564, 636 N.E.2d 388 (1st Dist.1993). "Judgments supported by some competent, credible evidence * * * will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co*., 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶46} Pursuant to R.C. 1311.011(B)(4), "[n]o lending institution shall make any payment to any original contractor until the original contractor has given the lending institution the original contractor's affidavit stating * * * [t]hat the original contractor has

paid in full for all labor and work performed * * * prior to the payment period, except such unpaid claims as the original contractor specifically sets forth and identifies both by claimant and by amount claimed," and certifying "[t]hat no claims exist other than those claims set forth and identified in the affidavit." The lending institution may "accept the affidavit of the original contractor required by division (B)(4) * * * and act in reliance upon it, unless it appears to be fraudulent on its face." R.C. 1311.011(B)(5).

{¶47} "The lending institution is not financially liable to the owner, part owner, purchaser, lessee, or any other person for any payments, except for gross negligence or fraud committed by the lending institution in making any payment to the original contractor." *Id.* If a lending institution fails to obtain the required affidavits, "[a] subcontractor is an appropriate party to assert a cause of action against a lending institution under R.C. 1311.011." *Thompson Elec., Inc. v. Bank One, Akron, N.A.*, 37 Ohio St.3d 259, 265, 525 N.E.2d 761 (1998).

{¶48} In the present case, both parties agree that Val Homes submitted the required builder's affidavits to Huntington prior to each disbursement of loan funds. However, A & J asserts that the affidavits were fraudulent on their face, as in each of the six affidavits, Val Homes made the statement that all of its subcontractors and other debts were paid. A & J argues that it should have been obvious to Huntington that such statements were false, because it is unlikely that a contractor would not have some outstanding bills during a residential construction project.

{¶49} A review of the six affidavits shows that on two, the area designated for listing creditors was left blank, thereby indicating that all subcontractors and other parties had been paid in full. On the remaining four affidavits, a representative of Val

Homes wrote “none” in the designated space, also indicating that no subcontractors or other creditors were left unpaid.

{¶50} Although A & J asserts that the affidavits are fraudulent on their face, it provides no support for this argument. There was no evidence presented at trial showing that alterations or changes were made to the documents that would affect their appearance or render them suspicious. Kelly testified that, as a person with 25 years of experience in the construction loan industry, he did not see anything about the affidavits that caused him concern, including the fact that each of the affidavits stated that there were no outstanding debts.

{¶51} A & J instead asserts only concerns with Huntington’s lack of exploration into whether the assertions contained in the affidavits were truthful. This does not support the contention that the affidavits were fraudulent *on their face*. *Tanoh v. Strawbridge*, 8th Dist. No. 76094, 2000 Ohio App. LEXIS 2092, *11-12 (May 18, 2000) (although appellants indicated that the affidavits contained false statements, since there was no evidence that the bank was aware of this and the appellants “failed to present any evidence that the affidavits [were] facially invalid,” the affidavits were not fraudulent on their face); *Erb Lumber Co. v. First Fed. Sav. & Loan Assn. of Lima*, 67 Ohio App.3d 836, 843, 588 N.E.2d 935 (2nd Dist.1990) (even where an affidavit was shown to have contained false information, a false address, it was not fraudulent on its face since the parties could not readily determine the fraud by looking at the affidavit); *Tellez v. Bank One, N.A.*, 3rd Dist. No. 1-92-63, 1993 Ohio App. LEXIS 250, *12-13 (Jan. 21, 1993).

{¶52} While it may be possible that Val Homes did not actually pay all of its invoices in full, there is nothing about the face of the affidavits themselves that appears

fraudulent. In the absence of such fraud, Huntington was entitled to rely on Val Homes' assertions in the affidavit and the trial court's finding that they were not fraudulent is supported by competent, credible evidence. R.C. 1311.011(B)(5).

{¶53} The fourth assignment of error is without merit.

{¶54} In its fifth assignment of error, A & J asserts that even if the affidavits were not fraudulent on their face, Huntington still committed gross negligence. A & J argues that this is actionable under R.C. 1311.011(B)(5), which holds a lending institution liable for gross negligence committed in lending funds to a contractor.

{¶55} Huntington asserts that the trial court properly found that it did not commit gross negligence and its decision was not against the manifest weight of the evidence.

{¶56} Gross negligence has been described as "the failure to exercise any or very slight care" or the failure "to exercise even that care which a careless person would use.'" (Citations omitted.) *Thompson*, 37 Ohio St.3d at 265, 525 N.E.2d 761.

{¶57} R.C. 1311.011(B)(5) provides one example of gross negligence: "After receipt of a written notice of a claim of a right to a mechanic's lien by a lending institution, failure of the lending institution to obtain a lien release from the subcontractor * * * who serves notice of such claim is prima-facie evidence of gross negligence." Other acts or omissions may also rise to the level of gross negligence under the statute. *Thompson* at 266. However, courts have generally been reluctant to find gross negligence in cases involving R.C. 1311.011(B)(5), as the statute is "intended to insulate a lending institution against further liability for claims when it relies on what it reasonably believes to be a complete and truthful disclosure of the original contractor's expenses in an R.C. 1311.011(B) affidavit." *Blanchester Lumber & Supply, Inc. v.*

Cardinal State Bank, 56 Ohio App.3d 25, 28, 564 N.E.2d 1074 (12th Dist.1988); *Erb*, 67 Ohio App.3d at 844, 588 N.E.2d 935.

{¶58} In the present case, we cannot find the trial court's holding that Huntington did not commit gross negligence is against the weight of the evidence. There is no evidence that Huntington was aware that subcontractors had not been paid by Val Homes at the time of any of the six disbursements. In fact, A & J admitted that it never contacted Huntington and that the lien was not filed until after the final disbursement was made. The undisputed evidence showed that Huntington received the builder's affidavits, as required by R.C. 1311.011(B)(4), performed a title search to locate liens prior to each disbursement, and did an inspection of the property to determine the progress and completion of the project. Although it is possible that Huntington could have taken more steps to protect subcontractors, its actions did not rise to the level of gross negligence. *See Erb* at 844 (when a lender followed procedures such as checking for liens and obtaining builder's affidavits but did not take additional safeguards, even though it was determined that false statements were made on the affidavits, the lender's actions did not rise to the level of gross negligence).

{¶59} Additionally, we note that A & J failed to take any action to alert Huntington that it was not paid by Val Homes. A & J waited over a year after its first invoice remained unpaid to file the lien, which occurred after Huntington had made the final disbursement of loan funds to Val Homes. A & J's failure to give Huntington notice of nonpayment precludes it from asserting that there is any prima-facie evidence of gross negligence under R.C. 1311.011(B)(5) and further weakens its claim that gross negligence occurred. *See Thompson*, 37 Ohio St.3d at 270, 525 N.E.2d 761 (the

responsibility for unpaid bills fell on the subcontractor when it failed to file mechanic's liens on the property prior to the conclusion of disbursement, did not serve written notice to the bank of its claims regarding nonpayment, and failed to verbally notify the bank of the financial problems encountered with the contractor).

{¶60} The fifth assignment of error is without merit.

{¶61} Based on the foregoing, the judgment of the Geauga County Court of Common Pleas, denying A & J's Motion for Summary Judgment and ruling in favor of Huntington on A & J's Counterclaim, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.