[Cite as *Berry v. Turner*, 2009-Ohio-6832.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

Janet Beery	:	
Plaintiff-Appellant,	:	
	:	Case No. 09CA5
v.	:	
	:	DECISION AND
Bert O. Turner	:	JUDGMENT ENTRY
Defendant-Appellee.	:	File-stamped date: 12-21-09

APPEARANCES:

Forrest F. Beery and Fred J. Beery, Hillsboro, Ohio, for Appellant.

Bert O. Turner, pro se, Lebanon, Ohio, for Appellee.

Kline, P.J.:

{¶1} Janet Beery (hereinafter "Janet") appeals the judgment of the Highland County Court of Common Pleas. The trial court denied Janet's prayer for declaratory judgment and found for Bert Turner (hereinafter "Bert") on his counterclaim in foreclosure. On appeal, Janet contends that she was a third-party beneficiary of the real estate purchase agreement between her ex-fiancée, Ben Fenner (hereinafter "Fenner"), and Bert's parents. We disagree for various reasons, especially because (1) there was no written sales contract and (2) a third party should not benefit from a deceitful transaction. Next, Janet contends that Bert does not have standing to bring his counterclaim. We disagree. Bert has standing because he is the executor of his mother's estate. Finally, Janet

contends that the trial court should have used the damages she suffered to offset the judgment against her. We disagree. Janet cannot bring an action on the original real estate purchase agreement because she was not a third-party beneficiary of that contract. Further, the trial court found that there was no fraud. As a result, Janet has suffered no damages, and, therefore, the principle of offset does not apply to the present case. Accordingly, we overrule all of Janet's assignments of error and affirm the judgment of the trial court.

I.

{¶2} In 1996, Fenner purchased real property from John Turner and Rena Turner, husband and wife (collectively the "Turners"). At the time, Janet was engaged to Fenner. According to testimony, Janet and Fenner planned to use the property as both a residence and an art school. Some confusion exists as to whether there was a written purchase agreement for the property. At a minimum, neither party produced a written purchase agreement during these proceedings. And regardless, it is undisputed that Fenner purchased the property in his own name. Bert's attorney and Janet had the following exchange during the trial below:

Q. "And there is absolutely no question that the original purchase was to Mr. Fenner first in his name, correct?

A. He signed it, yes.

Q. Okay, and there was an original note and mortgage from him to the Turners, correct?

A. Yes, that's right."

Transcript of Bench Trial at 155.

{¶3} Additionally, the deed lists Fenner as the only grantee. Nevertheless, Janet claims that it was her idea to purchase the property and that she had paid $20,000 of the $25,000 down payment. Thus, according to Janet, purchasing the property was her "deal."

{¶4} Janet claims that the transaction was in Fenner's name because of an outstanding I.R.S. tax lien against her. The lien states the following: "As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is given that taxes (including interest and penalties) have been assessed against the following-named taxpayer. Demand for payment of this liability has been made, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue." The I.R.S. lien was recorded in Highland County, and Janet claims that she did not want her name on the deed until the I.R.S. had released the lien.

{¶5} After their engagement broke off, Fenner transferred the property to Janet by quitclaim deed. Janet assumed the original agreement between Fenner and the Turners, and she continued to make payments to the Turners pursuant to that agreement. But in either July or August 1999, Janet entered into a new mortgage agreement (hereinafter the "1999 Mortgage") with the Turners. The 1999 Mortgage was recorded in Highland County and listed both John Turner and Rena Turner as mortgagees. Janet also signed a promissory note for $53,452.69, the amount of the 1999 Mortgage.

{¶6} John Turner died in 2002, and his will passed everything to Rena Turner. However, John Turner's will was not brought before the probate court at that time.

{¶7} In 2004, Rena Turner died. Rena Turner's will was admitted to probate, and the Warren County Probate Court appointed Bert, the Turners' son, as the executor of Rena's estate.

{¶8} In 2005, Bert filed two Affidavits Of Transfer with the Highland County Recorder's Office. In the first affidavit, Bert stated that "John W. Turner died with a will which left everything to his wife, Rena Turner, but that said will was not probated and there was no administration of his estate. * * * [A]s the surviving spouse, Rena Turner was entitled to all of the assets of John W. Turner at his death, and that by virtue of his death, she became the sole owner and mortgagee of the [1999 Mortgage]." And in the second affidavit, Bert stated that "as a surviving heir and Executor, Bert O. Turner was entitled to all of the assets of Rena Turner at her death, and that by virtue of her death, he becomes the owner and mortgagee of the [1999 Mortgage]."

{¶9} After Rena's death, Janet made payments to Bert pursuant to the 1999 Mortgage. Sometime thereafter, Bert (1) threatened to file a foreclosure action against Janet and (2) sent her a sample complaint in foreclosure. Janet filed her Complaint for Declaratory Judgment in response to these actions.

{¶10} In her August 3, 2007 complaint, Janet alleged that Turner's "proof of ownership as set forth in his threatened foreclosure action is inadequate and insufficient to establish his ownership [of the 1999 Mortgage]; that [Turner]

appears to lack standing to maintain a foreclosure action on [Janet's] said mortgage indebtedness and to collect the proceeds, if any, therefrom."

{¶11} Janet also alleged that, "at the time of the negotiations for the original purchase of the security property herein, she was the real party in interest in said proposed purchase, this fact being well known to the sellers[.]" Further, Janet alleged that the Turners (1) misrepresented the nature of the property and (2) concealed defects in the property during the sale to Fenner. Because of these defects, Janet alleged that the Turners' misrepresentations and concealments caused her to suffer damages. Janet also attached several exhibits to her complaint, including a copy of the I.R.S. tax lien.

{¶12} Bert filed a counterclaim against Janet. In relevant part, Bert alleged that Janet had defaulted on the promissory note and the 1999 Mortgage. As a result, Bert sought to foreclose upon the property.

{¶13} In April 2008, Bert filed an application to release John Turner's estate from administration. The Warren County Probate Court then relieved John Turner's estate from administration, appointed Bert as commissioner of the estate's assets, and ordered that John Turner's interest in the 1999 Mortgage be transferred to the estate of Rena Turner.

{¶14} In response to Bert's Motion for a Definite Statement, Janet filed an Amended Complaint for Declaratory Judgment on July 18, 2008. Janet's amended complaint asserts essentially the same claims as the August 3, 2007 complaint, but the amended complaint discusses Janet's allegations in greater detail. Subsequently, Janet filed a motion to make the "personal representatives

of the Estates of John W. Turner and Rena Turner parties Defendant herein or, in the alternative, to make said Estates Parties Defendant."

{¶15} The trial court held a bench trial on December 12, 2008, and an evidentiary hearing to determine the amount of damages on December 23, 2008. In a February 4, 2009 Entry, the trial court found the following: "(1) That the real property owned by Janet Beery, which is the collateral for the note executed by her to the Defendant's parents, John W. Turner and Rena Turner, was purchased by Ben Fenner and that there was no privity of contract between the defendant herein, as fiduciary representative of his parents, and the Plaintiff herein;

{¶16} (2) That estate proceedings were filed for the estates of John W. Turner and Rena Turner and therefore the pleadings are amended to show that the defendant has appeared as Executor of the Estates of John W. Turner and Rena Turner.

{¶17} (3) That there is no fraud in the transaction by and between the Defendant, as Mortgagee and the Plaintiff, as Mortgagor;

{¶18} (4) That credit is granted to Plaintiff for all payments of $800.00 per month from the date of execution of the original note and mortgage in July of 1999 up to the death of John W. Turner in October of 2002;

{¶19} (5) That there is due and owing on the note and mortgage set forth on Defendant's counterclaim, the total sum of $3,831.25, plus interest at a rate of 9.5% per diem, being $1.00 per diem, and costs from the 12th day of December, 2008.

{¶20} THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

{¶21} a. That Plaintiff's prayer for Declaratory Judgment and all other Motions be and are hereby denied;

{¶22} b. That Bert O. Turner, as Executor of the Estates of John W. Turner and Rena Turner is hereby added as a party defendant to this action;

{¶23} c. That Defendant is granted a judgment against Plaintiff herein for money due and owing on the note and mortgage set forth on Defendant's counterclaim, the total sum of $3,831.25, plus interest at a rate of 9.5% per diem, being $1.00 per diem, and costs from the 12th day of December, 2008.

{¶24} d. That unless the Plaintiff, JANET BEERY, shall within three days of the entry of this decree pay or cause to be paid to the Clerk of this Court the costs of this action and to the Defendant herein the sum so found due, as aforesaid, with interest and costs, then said Plaintiff's equity of redemption shall be foreclosed[.]" Trial Court's February 4, 2009 Entry at 1-2.

{¶25} Janet appeals, asserting the following three assignments of error: I. "The trial court erred in finding that the Plaintiff was not the real party in interest." II. "The trial court erred in finding that Defendant had standing to maintain the counterclaim in his individual capacity." And, III. "The trial court erred in failing to apply [R.C.] 2309.19 so as to allow a portion of the damages claimed by Plaintiff as a set-off against the amounts claimed by Defendant on the alleged balance of Plaintiff's mortgage note."

II.

{¶26} Janet's first assignment of error states that "[t]he trial court erred in finding that the Plaintiff was not the real party in interest." Janet claims that the Turners (1) misrepresented the nature of the property and (2) concealed defects in the property when the Turners sold the property to Fenner. Essentially, Janet argues that, because of the Turners' alleged behavior, she should be able to bring an action on the Turner-Fenner contract. Here, we note that the trial court did not use the term "real party in interest" in its judgment entry. Instead, the trial court found "[t]hat the real property * * * was purchased by Ben Fenner and that there was no privity of contract between the defendant herein, as fiduciary representative of his parents, and the Plaintiff herein[.]" From her brief, it appears as though Janet is arguing that she was a third-party beneficiary of the contract between the Turners and Fenner. Thus, we will interpret Janet's first assignment of error in the following manner: The trial court erred in finding that Janet was not a third-party beneficiary of the Turner-Fenner contract. See, generally, *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 168 Ohio App.3d 592, 2006-Ohio-4779, at ¶19 (discussing third-party beneficiaries and real parties in interest); *Burkey v. George Ballas Buick GMC Truck* (Jun. 30, 1986), Lucas App. No. L-86-013 (same).

{¶27} "The construction and interpretation of contracts are matters of law." *Boggs v. Columbus Steel Castings Co.*, Franklin App. No. 04AP-1239, 2005-Ohio-4783, at ¶5, citing *Latina v. Woodpath Development Co.* (1991), 57 Ohio St.3d 212, 214. "We review matters of law on a *de novo* basis." *Ervin v. Oak*

Ridge Treatment Ctr. Acquisition Corp., Lawrence App. No. 05CA27, 2006-Ohio-3851, at ¶7.

{¶28} "Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio." *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161. See, also, *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust*, 156 Ohio App.3d 65, 2004-Ohio-411, at ¶23. In the case of third-party beneficiaries, the "third party need not be named in the contract; however, to recover on a breach of contract claim, 'it must be shown that the contract was made and entered into with the intent to benefit the third person.'" *McGuire v. Draper, Hollenbaugh and Briscoe Co., L.P.A.*, Highland App. No. 01CA21, 2002-Ohio-6170, at ¶45, fn. 3, ¶b, quoting *Kappes v. Village of Moscow* (May 4, 1998), Clermont App. No. CA97-09-078. The Supreme Court of Ohio adopted the "intent to benefit" test in *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36. Under this test, "there must be evidence, on the part of the promisee, that he intended to directly benefit a third party, and not simply that some incidental benefit was conferred on an unrelated party by the promisee's actions under the contract. There must be evidence that the promisee assumed a duty to the third party." *TRINOVA Corp. v. Pilkington Bros., P.L.C.* (1994), 70 Ohio St.3d 271, 278, citing *Norfolk & W. Ry. Co. v. United States* (C.A.6, 1980), 641 F.2d 1201.

{¶29} Here, we agree that Janet was not a third-party beneficiary of the contract between the Turners and Fenner. First, it is undisputed that Fenner purchased the property in his own name, and we can find no evidence that either

Fenner or the Turners assumed a duty to Janet. Second, "[t]hose cases which have construed whether a contract was made for the direct or incidental benefit of a third party have looked necessarily to the language of the contract to make this determination." *McGuire* at ¶45, fn. 3, ¶b (internal quotations omitted); *Lin v. Gatehouse Constr. Co.* (1992), 84 Ohio App.3d 96, 100. In the present case, we cannot look to the language of the real estate sales contract because a written contract either (1) does not exist or (2) is not in the record. See, generally, *Walker v. Jefferson County*, Jefferson App. No. 02JE14, 2003-Ohio-3490, at ¶40 ("[Appellant] has presented no evidence that these contracts existed, let alone the terms of those contracts. Accordingly, it is impossible to determine whether [appellant] is entitled to enforce them as a third-party beneficiary."). Third, the deed lists Fenner as the only grantee, and we can discern no intent to benefit Janet from the deed's language.

{¶30} Finally, we believe that it would be inappropriate to find a third-party beneficiary in this type of transaction. Basically, Janet contends that she was a secret owner of the property. As Janet notes in her brief, "an unrelated IRS lien from a former marriage would necessitate having the property conveyed to Ben Fenner as her agent. Plaintiff did not want to have her name on the Deed until said lien was released which it later was." Brief of Appellant, Janet Beery at 18. Thus, under her version of the facts, Janet readily admits to structuring this deal so as to avoid being detected by the Internal Revenue Service. As such, we do not believe that Janet should "benefit" from what was, essentially, a deceitful transaction.

{¶31} Accordingly, for the foregoing reasons, we overrule Janet's first assignment of error.

III.

{¶32} Janet's second assignment of error is somewhat confusing. Nevertheless, in her second assignment of error, Janet essentially contends that Bert did not have standing to bring his counterclaim in his individual capacity.

{¶33} "The issue of standing is a matter of law, which we review de novo." *Lindsey v. Lindsey*, Scioto App. No. 06CA3113, 2007-Ohio-3803, at ¶12, citing *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, at ¶90.

{¶34} "[B]efore an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *Newman v. Enriquez*, Scioto App. No. 06CA3091, 2007-Ohio-1934, at ¶30, citing *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320. Whether a party has standing depends upon whether he has a "'personal stake in the outcome of the controversy.'" *Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 75, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732. The requirement that a party have standing ensures that "'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" *Sierra Club* at 732, quoting *Flast v. Cohen* (1968), 392 U.S. 83, 101.

{¶35} Here, the trial court found "[t]hat estate proceedings were filed for the estates of John W. Turner and Rena Turner and therefore *the pleadings are amended to show that the defendant has appeared as Executor* of the Estates of

John W. Turner and Rena Turner." (Emphasis added.) Thus, we find that Bert has standing to bring his counterclaim because he is the executor of Rena Turner's estate. See Civ.R. 17(A) (stating that "[a]n executor * * * may sue in his name as such representative without joining with him the party for whose benefit the action is brought"). Initially, the Warren County Probate Court appointed Bert as executor of Rena Turner's estate. Subsequently, pursuant to R.C. 2113.03, the Warren County Probate Court released John Turner's estate from administration and appointed Bert as commissioner. Further, the Warren County Probate Court ordered that John Turner's interest in the mortgage be transferred to the estate of Rena Turner. And finally, the Warren County Probate Court gave Bert the authority "to execute a release of said mortgage and note upon settlement of the balance due[.]" Because John Turner's estate was released from administration, the trial court below mistakenly referred to Bert as the "executor" of John Turner's estate. See R.C. 2113.03(B) (stating that "the court may appoint a commissioner to execute all necessary instruments of conveyance"). Nevertheless, Bert is unquestionably the executor of Rena Turner's estate. And at a minimum, John Turner's interest in the mortgage passed to the estate of Rena Turner.

{¶36} In summary, Bert filed his counterclaim for foreclosure in his individual capacity. As such, he did not have standing. However, the trial court amended Bert's counterclaim to show that Bert brought the foreclosure action in his capacity as "*Executor* of the Estates of John W. Turner and Rena Turner." In his

capacity as executor, Bert had standing to bring the foreclosure action against Janet.

{¶37} Accordingly, we overrule Janet's second assignment of error.

IV.

{¶38} In her third assignment of error, Janet contends that the trial court erred in failing to apply R.C. 2309.19. Essentially, Janet argues that the trial court should have "allow[ed] a portion of the damages claimed by Plaintiff as a set-off against the amounts claimed by Defendant on the alleged balance of Plaintiff's mortgage note." Brief of Appellant, Janet Beery at 22.

{¶39} R.C. 2309.19 provides: "When cross demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, neither can be deprived of the benefit thereof by assignment by the other, or by his death. The two demands must be deemed compensated so far as they equal each other."

{¶40} Here, we have already found that Janet was not a third-party beneficiary of the contract between the Turners and Fenner. Thus, Janet could not bring an action on the Turner-Fenner contract. Further, the trial court found that there was no fraud in this case, and Janet has not appealed this finding. For these reasons, R.C. 2309.19 does not apply to the present case. In other words, Janet suffered no damages, and, as a result, the principle of offset does not apply to the present case.

{¶41} Accordingly, we overrule Janet's third assignment of error. Having overruled all of Janet's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.