IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 21-CV-597

SIM DEVELOPMENT, LLC,

Appellant,

v.

DISTRICT OF COLUMBIA, *et al.*,

Appellees.

BRIEF OF APPELLANT SIM DEVELOPMENT, LLC

ON APPEAL FROM THE SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA (CIVIL DIVISION)
2019 CA 004477 B

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in finding that expert witness testimony was required to establish the duty of care for the negligence and breach of fiduciary duty claims against the settlement/escrow agent in this case where its duties and actions were well-defined and well-documented in writing, such that a layperson could easily see from the evidence what was supposed to have been done, and what was done?

2. Were the admissions of The District and surrounding evidence sufficient to establish its negligence under the facts of this case, or at least the existence of genuinely disputed material facts which should be determined by a jury?

3. Did the trial court err in finding that the tax sale purchaser's misrepresentations that it was entitled to a judgment foreclosing the right of redemption and a tax deed could not satisfy the elements of fraud or negligent misrepresentation under the facts of this case?

STATEMENT OF THE CASE

This is an appeal of the trial court's orders (1) granting the Motion for Summary Judgment of Defendant 2011 Counties, LLC ("2011 Counties"); (2) granting the Renewed Motion for Summary Judgment of MBO Settlements, Inc.

("MBO"); and granting the Supplemental Motion for Summary Judgment of The District of Columbia ("The District").

On July 8, 2019, Plaintiff Sim Development, LLC ("Sim") filed a Complaint in this case seeking damages in connection with a tax sale foreclosure and tax deed issued for its real property located at 1916 15th Street, SE, Washington, D.C. (Lot 845 in Square 5766) (the "Property") (APX 12-20). Sim claimed that it properly redeemed the Property from the tax sale by paying all legal expenses of 2011 Counties (the tax sale purchaser) and all real property taxes owed to The District. Despite 2011 Counties' knowledge of these undisputed facts, 2011 Counties nevertheless continued its foreclosure action and ultimately obtained a tax deed to the Property. The District has admitted that the tax deed was issued in error. The tax deed was later overturned by the trial court, and a declaration was issued to place title to the Property back in Sim's name, but not until Sim suffered substantial damages resulting from the erroneous tax deed.

Sim further claimed that MBO was responsible for a portion of its damages. MBO conducted a refinance closing at which the legal expenses for the tax sale purchaser were collected and paid to 2011 Counties, as well as real estate taxes to The District. The purpose of the closing was to provide Sim with a construction loan for its development of the Property into a multi-use building. However, MBO never recorded the lender's security interest in the Property, and it never issued a

title insurance policy to the lender for which Sim paid a premium at the closing. Immediately upon learning from Sim's counsel – over two years after the closing -- that its loan was unsecured and uninsured, Capital Bank called the loan as being immediately due in full, which further thwarted Sim's effort to develop the Property and resulted in additional damages.

On July 30, 2020, MBO filed a Motion for Summary Judgment (APX 58-169) in this lawsuit, which Sim opposed on August 18, 2020 (APX 170-225). MBO's motion was granted in part and denied in part on September 1, 2020 (APX 226-235). On September 11, 2020, 2011 Counties filed a Motion for Summary Judgment (APX 236-327), which Sim opposed on September 25, 2020 (APX 481-507). The motion was granted in favor of 2011 Counties on November 2, 2020 (APX 525-537). On September 11, 2020, The District filed a Motion for Summary Judgment (APX 399-480), which Sim opposed on September 25, 2020. The District's motion which was denied on October 23, 2020 (APX 511-524). On September 11, 2020, Sim filed a Motion for Summary Judgment against The District (APX 328-389), to which The District did not file an opposition. Sim's motion was denied on October 23, 2020 (APX 511-524).

Following depositions of the remaining parties (Sim, MBO and The District) and an unsuccessful attempt at mediation, those parties again moved for summary judgment. On June 11, 2021, MBO filed a Renewed Motion for Summary

Judgment (APX 538-689), which Sim opposed on June 25, 2021 (APX 945-985). On July 2, 2021, MBO filed a Reply (APX 1005-1011). MBO's motion was granted on July 29, 2021 (APX 1022-1033). On June 11, 2021, Sim filed a Supplemental Motion for Summary Judgment against The District (APX 772-882), which The District opposed on June 25, 2021 (APX 986-998). On June 11, 2021, The District filed a Supplemental Motion for Summary Judgment against Sim (APX 883-944), which Sim opposed on June 25, 2021. On July 2, 2021, The District filed a Reply (APX 999-1004). On July 20, 2021, The District's motion was granted and Sim's motion was denied (APX 1022-1033).

On August 27, 2021, Sim filed a Notice of Appeal (APX 1034-1036) as to the Orders and Judgments in favor of the three (3) defendants, which were issued on November 2, 2020, July 20, 2021 and July 29, 2021.

STATEMENT OF FACTS

On July 21, 2015, The District sold the Property at a tax sale due to an unpaid charge from the District of Columbia Water and Sewer Authority ("WASA") (APX 321). The successful bidder at the tax sale was 2011 Counties. On March 14, 2016, 2011 Counties filed a complaint to foreclose the right of redemption (2016 CA 001915 L(RP) ("the Foreclosure Action") (APX 308-316).

On April 15, 2016, Plaintiff made a payment in the amount of $4,266.17, bringing the real property taxes current. The District has since acknowledged that the April, 2016 payment redeemed the Property with respect to outstanding taxes (APX 371 and 352).

On March 4, 2016, 2011 Counties sought clarification from The District as to whether the taxes had been paid. The District did not respond until January 24, 2017, stating that it did not consider the Property redeemed (APX 360-365). Relying on the District's advice that taxes were still owing, 2011 Counties thereafter continued the Foreclosure Action (APX 372).

Sim had been planning to improve the Property with the construction of a mixed-use building and was approved for construction financing from Capital Bank (APX 345). On February 24, 2017, a closing for Sim's loan from Capital Bank was conducted by MBO Settlements (APX 367-368).

In preparation for the closing, MBO Settlements learned of the tax sale and contacted the attorneys for 2011 Counties to receive a payoff statement for 2011 Counties' post-complaint legal expenses (APX 491). At the closing, MBO Settlements collected $2,191.15 from Sim's funds to pay 2011 Counties' legal expenses, which payment was identified on the Settlement Statement as "Tax Sale Redemption" (APX 368).

Also at the closing, MBO Settlements collected from Sim: (a) $3,000.00 to the D.C. Treasurer for estimated real property taxes; (b) $1,000.00 to "MBO Fees" for "Title Clearing"; (c) $14,000.00 to "DC WASA" for "DWSS LIEN#63848"; (d) $156.50 for recording the lender's Deed of Trust; and (e) $4,451.25 for issuing a lender's title insurance policy to Capital Bank (APX 367-368).

MBO Settlements later paid $11,178.86 to WASA without refunding Plaintiff the balance of the $14,000.00 it had collected. MBO Settlements made no payment to the District for Plaintiff's real property taxes (APX 966, p. 29, line 22 – p. 30, line 4). Also, MBO Settlements never recorded the Deed of Trust (APX 965, p. 27, lines 4-10) and never issued a title insurance policy to Capital Bank (APX 978).

MBO Settlements completed payment to 2011 Counties for the tax sale redemption on June 19, 2017 (APX 372), which was nearly four months after the loan closing. At that point, Sim had therefore paid both the outstanding real estate taxes and 2011 Counties' legal expenses for the Foreclosure Action, thus completing the redemption process. The District later acknowledged that Sim's redemption was complete as of June, 2017 (APX 374-375).

Despite having received payment for its legal expenses in June, 2017, and despite being made aware that Sim had paid its taxes, 2011 Counties continued the Foreclosure Action until it eventually obtained a judgment foreclosing Sim's right

of redemption on November 20, 2018 APX 499). Neither The District nor 2011 Counties ever informed the Court that both the taxes and the legal expenses had been paid approximately seventeen (17) months before the judgment was entered (APX 825, lines 15-20).

After obtaining its judgment foreclosing right of redemption, 2011 Counties received a tax deed from The District, which it recorded on February 13, 2019 (APX 827). Sim was unaware of the judgment in favor of 2011 Counties because it had never been directly served in the Foreclosure Action and because it had redeemed the Property much earlier. 2011 Counties had obtained service of process on Sim through the District of Columbia Superintendent of Corporations (APX 873). Sim's managing member first learned of the recorded tax deed on March 14, 2019, when he met with a District official regarding his appeal of the tax classification for the Property and the official informed him that Sim was no longer the owner (APX 503-507).

Sim thereafter filed a Motion to Reopen, Vacate Judgment and Void Tax Deed, which eventually resulted in the Court issuing a declaration to restore Sim's title to the Property, which was recorded on June 26, 2019 (APX 378-379).

Meanwhile, when Capital Bank learned from Sim's counsel on April 5, 2019, over 2 years after the loan closing, that MBO had left its security interest unrecorded and uninsured it immediately deemed the loan to be in default and

demanded full repayment of the initial $40,000 advanced at the loan closing, plus interest and additional fees (APX 203 and 975).

At a deposition of The District's representative conducted on April 19, 2021, The District admitted that the Tax Deed was issued in error (APX 827, lines 5-14), and that 2011 Counties continued its Foreclosure Action even after being paid its legal expenses due to the response it received from The District regarding the status of taxes owed on the Property (APX 819, line 21 – 820, line 18).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT EXPERT TESTIMONY WAS REQUIRED TO ESTABLISH NEGLIGENCE AND A BREACH OF FIDUCIARY DUTY BY MBO, WHCH WAS THE ESCROW AGENT FOR SIM'S CONSTRUCTION LOAN CLOSING.

The trial court based its decision to grant summary judgment in favor of MBO solely on the fact that Sim did not identify an expert witness to establish the standard of care required of MBO with respect to Sim's claim that MBO was negligent and/or breached its fiduciary duty by failing to record the construction loan lender's Deed of Trust and failing to issue a title insurance policy to the lender, among other failures. The trial court found that "the standard of care of a settlement/escrow agent does not fall within the realm of common knowledge for the average juror" (APX 1029). As its authority on the issue, the trial court cited only to Carleton v. Winter, 902 A.2d 174 (D.C. 2006), which was a case involving the standard of care applicable to a realtor and which was decided under facts dissimilar to, and distinguishable from, the facts of this case.

It is well settled that "[a] plaintiff must put on expert testimony to establish what the standard of care is if the subject in question is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson." District of Columbia v. Arnold & Porter, 756 A.2d 427, 433 (D.C.2000) (citations omitted). Conversely, no expert testimony is needed if the

subject matter is "within the realm of common knowledge and everyday experience." Id. *See also* Otis Elevator Co. v. Tuerr, 616 A.2d 1254 (D.C. 1992) ("A lay person can infer from the evidence presented in this case that the company's failure to correct fully a malfunction in the elevator which came to its attention on August 4th and recurred on August 20th was negligence.").

In this case, a lay person could certainly examine MBO's written settlement statement and see that MBO charged Sim: (a) $156.50 for recording the lender's Deed of Trust (line 1201); (b) $4,451.25 for issuing a lender's title insurance policy (lines 1108-1109); (c) $1,000.00 for "Title Clearing" (line 1103); (d) $3,000 for payment of real estate taxes to The District (line 905); and $2,191.15 for "Tax Sale Redemption" (i.e. the tax sale purchaser's legal expenses). A layperson could then easily see from the evidence, without any special knowledge, whether those items for which Sim paid MBO to handle were completed or not.

While the duties of a realtor to vouch for careful performance by a home inspector they recommend might require some explanation from an expert with respect to the standards in the industry, as the Court found in Carleton, the duties of MBO in this case were simple and straightforward, and well-defined by the written settlement statement. The performance or non-performance of those duties is clearly shown by the fact that there is no Deed of Trust on record and that no title insurance policy was issued, among other things. Whether MBO performed

its duties is further evident by its own disbursement statement (APX 219-220), showing which payments MBO made on behalf of Sim and which it did not. Simply put, a layperson could see from the evidence what Sim paid MBO to do, and whether it was done.

In Doe v. Medlantic Health Care Group, Inc., 814 A.2d 939 (D.C. 2003), the Court examined whether expert testimony was required regarding a hospital's protocols in protecting a patient's medical records. The protocols were established by a written policy. The Court reasoned that a lay person would not need to know all the details of the hospital's operation and could make factual findings from the specific evidence of the protocols and the acts in questions:

> First, we reject the suggestion that expert testimony was necessary to establish the applicable standard of care in this case. In the negligence context, we have "refused to require expert testimony when the issue before the jury did not involve either a subject too technical for lay jurors to understand or the exercise of sophisticated professional judgment." (internal citation omitted). The jury, as instructed, could consider the protocols that the hospital had established, which had been approved by a national hospital accreditation committee, as establishing the standard of care. The jury was specifically instructed that it could take into account whether the hospital's protocol 'is or is not followed in practice' and 'whether it was successful historically in preventing unauthorized disclosure.' That instruction, which is not challenged by appellee, was proper here, where the evidence showed that Medlantic had failed to follow protocols it had established to safeguard its patients' medical records. WMATA v. Jeanty, 718 A.2d 172, 178 (D.C. 1998) (common carrier's departure from its own inspection schedule was "sufficiently extreme to support a prima facie showing that [it] had failed to exercise the `highest degree of care'" without necessitating expert testimony on the subject); Washington Hosp. Ctr. v. Martin, 454 A.2d 306, 309 (D.C. 1982) (no expert testimony required in medical malpractice case where the

standard of care was "simply that which a reasonable and ordinary lay person would expect a hospital to provide to any patient under like circumstances").

Although there was no direct evidence that the hospital's protocols were deficient or that they were breached to obtain Doe's medical records, evidence that there were significant lapses in the enforcement of the hospital's protocols to safeguard medical records, and that pointed to Goldring, a hospital employee, as the source of the unauthorized disclosure, sufficed to permit the jury to conclude that the hospital breached its duty as a fiduciary to maintain the confidentiality of Doe's medical records. (emphasis supplied)

Doe, 814 A.2d at 952.

In this case, Sim's claims for negligence and breach of fiduciary duty against MBO depends on whether MBO followed its duties as set forth in its own settlement statement and related documents. As in Doe, the jury could determine whether MBO adhered to its clearly stated obligations.

Several Maryland cases are instructive on this issue. In Free State Bank & Trust Co. v. Ellis, 411 A.2d 1090 (Md.App. 1980), the Court addressed the need for expert testimony in the context of a bank's standard of care. this Court held that expert testimony was not required to establish the bank's standard of care because "the average juror would know without expert testimony that banks simply do not ordinarily do what [Free State Bank] did in this case."

Certainly, no expert testimony was needed to show that banks do not ordinarily release the collateral of a customer and take in substitution thereof

> a paper writing which is not collateral, and which does no more than allow the bank to collect monies due on the collateral and credit it to the account of another. No expert testimony is needed to show the jurors that banks do not ordinarily release a deed of trust that secures a $200,000 promissory note payable to the bank's customer and which has been assigned to the bank as collateral for the customer's loan, and accept as substitute collateral a note secured by a deed of trust, payable to a party other than the bank's customer, and which is not even assigned to the bank, except, for all practical purposes, for collection. No expert testimony is needed to demonstrate to the jury that by doing what it did in the instant case, the Bank stripped its customer of his security for a $200,000 loan to another party.
> Id. at A.2d 1090.

The Court concluded by noting that, "even if expert testimony is ordinarily needed to prove the standard of reasonable care used by banks in the community in its dealings with its customers, no expert testimony was required to demonstrate Free State's negligence under the facts at hand." Id. at A.2d 1090. Under the facts at hand in this case, no expert testimony was required to demonstrate to the jury that settlement/escrow agents do not ordinarily charge their customers for common services such as recording documents, issuing title insurance policies and disbursing funds to the proper recipients, but then fail to do so.

In Saxon Mortgage Services, Inc. v. Harrison, 973 A.2d 841 (Md.App. 2009) the Court held that expert testimony was not necessary under the facts of that case. The case concerned the proper endorsement of a check, and the instructions on the back of the check, as well as the bank's own training guidelines, provided that a payee "should endorse its name exactly as it appears on the front of

the check." The Court noted that, "while a bank's own procedures cannot in and of themselves be equated with reasonable commercial standards, a bank's failure to follow its own normal procedures is indicative of a failure to act in accordance with reasonable commercial standards." Accordingly, whether the bank violated a standard of care because it failed to follow its own procedures, as well as the check's express instructions, was not "so particularly related to some science or profession that is beyond the ken of the average lay[person,]" and thus expert testimony was not required. (internal citations omitted). *See also* Schultz v. Bank of America, 990 A.2d 1078 (Md. 2010) ("although expert testimony is generally necessary to establish the requisite standard of care owed by the professional, such testimony is not needed when 'the alleged negligence, if proven, would be so obviously shown that the trier of fact could recognize it without expert testimony." (internal citations omitted).

The trial court in this case did not address whether MBO was negligent or breached its fiduciary duty. "Because the Court finds that Plaintiff has failed to demonstrate an applicable standard of care, it is unnecessary to address whether MBO deviated from that standard or if there was a causal relationship between the deviation and plaintiff's injury." (APX 1029). However, if the standard of care can be determined without expert testimony, as argued above, then the factual determinations regarding MBO's actions and inaction should be determined by a

jury. "[W]hen there is some evidence from which jurors could find the requisite elements of negligence, or when the case turns on disputed facts and the credibility of witnesses, the case must be submitted to the jury for determination. A case may not be taken away from the jury on motion of the defendant if an impartial juror, considering all the evidence, could reasonably find in favor of the plaintiff." Bushong v. Park, 837 A.2d 49, 53 (D.C. 2003) (internal citations omitted).

Also, "[i]n general... there is only a minimal duty—if any—owed to a party who is at arms' length. Once the defendant enters into a relationship with the plaintiff, however, a corresponding duty of care arises. Here, Sim and MBO had a relationship within the real estate closing. *See* Wagman v. Lee, 457 A.2d 401, 404 (D.C. 1983). (an escrow agent occupies a unique position in the "triangular" relationship between purchaser and seller and serves as the dual agent of both parties). In the closing at issue in this case, there was only Sim (as borrower) and Capital Bank (as lender). MBO clearly failed to perform its duties to both, as such duties are well detailed by the settlement statement, loan agreement and other closing documentation.

Had the trial court examined whether MBO was negligent and/or breached its fiduciary duty in this case, there are multiple material facts which, at a minimum, should not have supported a decision by summary judgment. The evidence shows that MBO failed to properly disburse the funds from closing with

respect to payment of real estate taxes, water charges, recording fees and the title policy and instead retained those funds in its escrow account for over two (2) years. MBO ultimately caused Sim to lose any benefit from its construction loan financing, which Sim was forced to repay before any construction began.

For many of the same reasons MBO was negligent, it also breached its fiduciary duty to Sim. The elements of a breach of fiduciary duty are (1) the existence of a fiduciary relationship; (2) a breach of the duties associated with the fiduciary relationship; and (3) injuries that were proximately caused by the breach of fiduciary duties." Jones v. Dist. of Columbia, 241 F. Supp. 3d 81, 90 (D.D.C. 2017). As for the first element, it is well settled that a settlement/escrow agent owes a fiduciary duty to both parties (buyer and seller) to a real estate sale transaction. *See* Aronoff v. Lenkin Co., 618 A.2d 669, 687 (D.C. 1992); Wagman v. Lee, *supra*.

Regarding the second element, "[a]s a fiduciary respecting matters within the scope of the agency, RESTATEMENT (SECOND) OF AGENCY § 13 (1958), the agent owes a duty of good faith and candor in affairs connected with the undertaking, including the duty to disclose to the principal all matters coming to the agent's notice or knowledge concerning the subject of the agency, which it is material for the principal to know for his protection or guidance." Id. (internal citation omitted). Additionally, "[w]hether as settlement agent or escrowee, the

agent has a duty in such circumstances to alert the principal to the real state of affairs." Aronoff, *supra*, at 687. Here, MBO not only failed to perform its duties for which it was paid at the closing, it failed to keep both Sim and its lender informed of the circumstances, instead allowing the problems to linger for over two (2) years until Capital Bank discovered them and immediately demanded full repayment of the loan.

II. THE TRIAL COURT'S RULING THAT THE DISTRICT OF COLUMBIA DID NOT ERRONEOUSLY ADVISE 2011 COUNTIES AND ERRONEOUSLY ISSUE A TAX DEED IS INCORRECT UNDER THE UNDISDPUTED FACTS AND ADMISSIONS.

With respect to Sim's claims against The District, the trial court found that The District acted properly despite its own admissions that Sim had redeemed the Property, by paying all amounts required to do so pursuant to D.C. Code § 47-1361, before the judgment foreclosing the right of redemption. The District even expressly admitted that it issued the Tax Deed in error. In any event, there are unquestionably disputes over material facts that are not appropriate for a determination by summary judgment.

There is no genuine dispute in this case that The District's error in issuing a tax deed after Sim's redemption was a proximate cause of Sim's loss of title to the Property and its resulting damages. However, he trial court evidently discounted the relevance of this material fact.

The District's attorney for the Foreclosure Action, Eli D. Wood, Esquire, testified as follows:

Q. Did you confirm that the property redeemed from tax sale, according to Exhibit 5, on June 19th, 2017?

A. Yes.

Q. And the District issued a tax deed that was recorded on February 13th, 2019, is that right?

A. Give me one second. We issued a tax deed – the District issued a tax deed, yes, recorded February 13th, 2019.

Q. So if the redemption had occurred earlier, back in June of 2017, would you agree that the tax deed was issued in error?

A. Yes.

(APX 827).

Additionally, the District does not deny having mistakenly advised the tax sale purchaser that it continue its pursuit of the tax sale deed 2 years prior to the issuance of the tax deed, despite Plaintiff having already redeemed the property.

Q. And this particular case was in response to this particular tax sale purchaser having questions or concerns, is that right?

A. Correct. They asked a question regarding this property.

Q. Okay. And when you advised the attorney for 2011 Counties, on January 24th, 2017, by the e-mail that's marked as Exhibit 4-1 that the District does not consider the property redeemed, did you intend 2011 Counties to rely on that advice?

MS. MULLEN: Well, objection as to the form.

MR. CRICKMAN: I'm asking about his intent.

THE WITNESS: I intended to convey that the property was not redeemed. I did not intend to convey any particular action on 2011 Counties's part.

Q. Okay. Did you expect that they would rely on that information?

MS. MULLEN: Objection as to form.

THE WITNESS: Yes. I expected that they would continue their tax sale case based on the District's representation.

(APX 827).

The District's liability for Sim losing the Property is further supported by the fact that the trial court, upon later learning the true facts of Sim's timely redemption, invalidated the Tax Deed and issued a Declaration that Sim is the rightful owner of the Property (APX 163-164).

The District's error in not properly crediting Sim's redemption from the tax sale and further advising the tax sale purchaser to continue its foreclosure lawsuit, then mistakenly issuing a tax deed, caused Plaintiff to lose title to the Property

during a critical period for Sim, while it was seeking approval to develop a vacant parcel of land into a mixed-use building with residential and retail units. Sim could no longer proceed with its permits and other plans to improve the property, then the onset of the pandemic only worsened the effect of the delay (APX 347).

The trial court found that The District did not commit error when it responded to 2011 Counties' request for the status of the taxes. While it should have been clear to The District from the wording and context of the request that 2011 Counties was only inquiring about the taxes, The District stated only that it did not consider the Property to have been redeemed (APX 360). The trial court chose to interpret The District's response as including the legal expenses, and indeed Sim had not yet fully paid that amount. However, when examining the express language of the e-mail inquiry and string of responses, 2011 Counties was asking whether Sim *had paid all of its real estate taxes* in order to redeem, so that 2011 Counties could decide whether to continue the Foreclosure Action (APX 360-365). Obviously, 2011 Counties would already know whether its own legal expenses had been paid, and The District would not be expected to have such information. The District could only answer as to the status of the real estate taxes, which it did but incorrectly. As The District later admitted, the taxes had been paid in April 2016, well before its response to 2011 Counties in January 2017.

More specifically, the question posed by 2011 Counties in its initial email to the District on March 4, 2016 was: "If you could review the list of remaining liens we have showing outstanding and let us know if they have paid before we file, it would be greatly appreciated." (emphasis supplied). (APX 365). Having not received a reply, 2011 Counties followed up on October 7, 2016, again asking the status of taxes, and whether "the District will be reimbursing the attorney's fees and costs that we incurred since the payment was misapplied and we were instructed to file our case." Then, on October 26, 2016, 2011 Counties again inquired because "Gwen (a District tax representative) sent an email in March telling Jon (of 2011 Counties) that we could proceed with filing the case as the taxes were still outstanding. Now she's stating that the property was redeemed prior to filing…". After three more inquiries by 2011 Counties in the same e-mail string, sent on November 7, 2016, November 16, 2016 and January 5, 2017, the District finally responded on January 24, 2017 that "OTR does not consider the property redeemed" (APX 360-365). 2011 Counties interpreted the response as meaning the taxes had not been paid and they could continue to prosecute their foreclosure lawsuit.

Since the trial court based its ruling in part on these emails, their apparent ambiguity further demonstrates the existence of genuinely disputes over material facts for the jury to decide. In so viewing the evidence, the court "must take care

to avoid weighing the evidence, passing on the credibility of witnesses or substituting its judgment for that of the jury. If reasonable men could differ on the outcome of the case, it must be sent to the jury." Vuitch v. Furr, 482 A.2d 811, 814 (D.C. 1984) (internal citations omitted).

Additionally, the relevance of the District's misinformation cannot be disputed. "To be relevant, evidence must 'tend to make the existence or nonexistence of a fact more or less probable than would be the case without that evidence.'" Punch v. United States, 377 A.2d 1353, 1358 (D.C. 1977) (internal citation omitted). Again, had The District given a correct response, 2011 Counties would not have proceeded with the Tax Foreclosure which ultimately led to the tax deed. The District acknowledges this when it states in a pleading that "[b]elieving the then-outstanding taxes still needed to be paid, [2011 Counties] continued prosecuting its action." (APX 372).

Sim presented evidence that The District knew or should have known of the redemption before 2011 Counties' motion for judgment was filed and granted, and before the tax deed was issued and recorded. Yet The District failed to cancel the sale, as it was obligated to do pursuant to D.C. Code § 47-1366(b)(1). Sim suffered substantial damages due to The District's actions. *See* Sim's Affidavit, at ¶¶ 18-20 and 22 (APX 344-348). The trial court erred in granting summary judgment to The District under the available evidence.

III. THE TRIAL COURT ERRED IN FINDING THAT SIM HAS NO CAUSE OF ACTION AGAINST 2011 COUNTIES FOR FRAUD OR NEGLIGENT MISREPRESENTATION.

The trial court ruled that Sim failed to establish the necessary requirements for its claims against 2011 Counties of negligent misrepresentation and fraud. With respect to negligent misrepresentation, the trial court found that "[t]here are no facts in the record that 2011 Counties made any material misrepresentation to Sim, or that Sim took any action in reliance upon the representation" [APX 534]. Likewise, with respect to the claim of fraud, the trial court held that "[t]he facts presented to the Court do not demonstrate that Sim took any action based on a false representation from 2011 Counties, or that 2011 Counties falsely represented a material fact with the intent to deceive and harm Sim." [APX 535].

However, the material facts suggest otherwise. 2011 Counties knowingly or negligently misrepresented the status of Sim's redemption efforts with the intention of gaining title to the Property, being fully aware had Sim had already completed the redemption process by paying its legal expenses and by paying the outstanding real estate taxes. Certainly, then, 2011 Counties had an intent to deceive and harm Sim when it accepted the Court's judgment foreclosing the right of redemption and used the judgment to acquire the Property.

Also, when 2011 Counties offered *to Sim* an amount of its legal expenses for

Sim to pay and redeem, and Sim thereafter paid that amount, Sim did so in reliance on 2011 Counties' written statement that the Property would be redeemed because of such payment (APX 166). 2011 Counties cannot deny having received full payment for its legal expenses, nor can it deny its knowledge as early as May 17, 2017 (APX 268), prior to the judgment foreclosing the right of redemption, that the taxes were paid.

While the trial court found that 2011 Counties did not make any material misrepresentations directly to Sim, that circumstance is not necessarily dispositive of the claim. In Nader v. Allegheny Airlines, Inc., 167 U.S. App. D.C. 350, 370, 512 F.2d 527, 547 (D.C. Cir. 1975), the question was posed "when may a third party recover his pecuniary losses for reliance on a misrepresentation that was not made to him." Examining the common law of the District of Columbia, the Court concluded that "the generally accepted rule was that the maker of a fraudulent misrepresentation is liable to those he intends to influence, regardless of privity of contract." Thus, if one "believes that another is substantially certain to act in a particular manner as a result of a misrepresentation [he is considered to have intended the result] although he does not act for the purpose of causing it and does not desire to do so." Restatement (Second) of Torts § 531, Comment c (1977).

In Mills v. Cosmopolitan Insurance Agency, Inc., 424 A.2d 43, 49 (D.C. 1980), the Court confirmed that "privity of contract is not a prerequisite to

recovery where the plaintiff establishes fraudulent misrepresentation." *citing* Peerless Mills, Inc. v. American Telephone & Telegraph Co., 527 F.2d 445, 450 (1975) (defendant liable if plaintiff "can establish that he relied upon . . . [the misrepresentation] to his detriment, and that defendant intended the misrepresentation to be conveyed to him"); Countryside Casualty Co. v. Orr, 523 F.2d 870, 873 (8th Cir. 1975) (in a suit for fraudulent misrepresentation defendant liable "to those he intends to influence and to those he has reason to expect to act in reliance upon the misrepresentation") (citations omitted); Landy v. Federal Deposit Ins. Corp., 486 F.2d 139, 169 (3d Cir. 1973) (defendant liable "to all those persons whom he should reasonably have foreseen would be injured by his misrepresentation"). In this case, it was certainly foreseeable by 2011 Counties that its misrepresentations and/or concealment of information to the trial court regarding the status of Sim's redemption would be conveyed to Sim and would cause Sim to lose the Property.

Other jurisdictions have adopted the Restatements with respect to misrepresentations. "[I]t is also established that a defendant cannot escape liability if he or she makes a representation to one person while intending or having reason to expect that it will be repeated to and acted upon by the plaintiff (or someone in the class of persons of which plaintiff is a member). This is the principle of indirect deception described in section 533 of the Restatement Second of Torts (section

533): 'The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.' Comment d to section 533 makes it clear the rule of section 533 applies where the maker of the misrepresentation has information that gives him special reason to expect that the information will be communicated to others and will influence their conduct. Comment g goes on to explain that it is not necessary that the maker of the misrepresentation have the particular person in mind. It is enough that it is intended to be repeated to a particular class of persons." Shapiro v. Sutherland, 64 Cal.App.4th 1534, 1548 (1998) (internal citations omitted).

Here, the trial court did not address the facts that Sim paid all outstanding real estate taxes necessary to redeem the Property as of April 15, 2016, as well as all of 2011 Counties' legal expenses by June, 2017. Neither party disputes these payments, which were completed more than a year before 2011 Counties moved for its judgment foreclosing Sim's right of redemption.

The docket sheet for the Foreclosure Action makes it clear that again, at a minimum, this case has too many genuinely disputed material facts to be decided

by summary judgment. The following entries reflect hearings at which counsel for 2011 Counties was present:

a. "The following event: Status Hearing scheduled for 05/17/2017 at 10:00 am has been resulted as follows:

Result: Status Hearing Held Courtsmart. Plaintiff's counsel present. **Plaintiff stated that the taxes are paid, but needs to verify**."

b. "The following event: Status Hearing scheduled for 09/13/2017 at 10:00 am has been resulted as follows:

Result: Status Hearing Held. Courtsmart. Atty Byers present. **Legal fees were paid in June."**

(APX 268) (emphasis supplied).

Nevertheless, 2011 Counties thereafter continued to present misinformation to the court in pursuit of a judgment and a tax deed as if the Property had not been redeemed. It must have been obvious to 2011 Counties that misrepresenting its entitlement to a judgment would cause substantial harm to Sim by causing it to lose ownership to the Property.

CONCLUSION

This Court should reverse the decisions of the trial court with respect to all three (3) defendants/appellees and remand the case to the lower court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2022, a copy of the foregoing Brief of Appellant Sim Development, LLC was served electronically upon:

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D.C. Code § 47-1361

§ 47-1361. Required payments; notice to purchaser; certificate of redemption.

(a) To redeem the real property, the person redeeming shall pay to the Mayor, except as set forth in paragraph (6A) of this subsection, for deposit into the General Fund of the District (notwithstanding any other law), the following:
(1) If the real property was sold at tax sale to a purchaser, the amount paid by the purchaser for the real property exclusive of surplus, with interest thereon;
(2) If the real property was bid off to the District, the sale amount with interest thereon beginning on the first day of the month following the date of the tax sale where the real property was bid off;
(3) If the real property was bid off to the District and subsequently sold or the certificate of sale assigned to a purchaser:
(A) The original sale amount with interest thereon beginning on the first day of the month following the date of the tax sale where the real property was bid off; plus
(B) Interest accruing thereafter on the sale amount in subparagraph (A) of this paragraph from the first day of the month following the date the real property was subsequently sold or the certificate of sale assigned to the purchaser;
(4) All other taxes, interest, and penalties paid by a purchaser on behalf of the real property, with the interest that would have been owing if the purchaser had not paid the taxes;
(5) All other real property taxes, business improvement district taxes, and vault rents to bring the real property current; provided, that any such amounts that become due and owing after receipt of the payment that permits a refund to issue to the purchaser under subsection (e) of this section shall not be required to be paid to redeem the real property;
(5A) Any delinquent special assessment owed pursuant to an energy efficiency loan agreement under Subchapter IX of Chapter 8 of Title 47; provided, that any such assessment that becomes due and owing after receipt of the payment that permits a refund to issue to the purchaser under subsection (e) of this section shall not be required to be paid to redeem the real property;
(6) All expenses for which each purchaser is entitled to reimbursement under § 47-1377(a)(1)(A); and
(6A) Where an action to foreclose the right of redemption has been properly filed, the person redeeming shall pay directly to the applicable purchaser all expenses to which the purchaser is entitled to reimbursement under § 47-1377(a)(1)(B); and
(7) Repealed.
(8) If judgment of foreclosure of the right of redemption of the sale is set aside, the reasonable value, at the date of the judgment, of all reasonable improvements made on the real property by the purchaser and the purchaser's successors in interest, subject to § 47-1363.

(b) Notwithstanding subsection (a) of this section, payment of all real property tax liens and permitted accruals assigned or sold and transferred to third parties under § 47-1303.04 shall be required before a person may redeem under this chapter.
(b-1) The redeeming party shall not be required to pay any tax that is required to be certified by § 47-1340 unless the tax has been certified by a taxing agency and appears on a real property tax bill or notice that was mailed to the real property's owner as indicated on the tax roll to the owner's mailing address on the tax roll.
(b-2) Notwithstanding subsection (a) of this section, the remaining amounts that are payable to the Mayor, including tax, interest, penalties, and expenses, for the real property shall be deemed to have been brought current for purposes of redemption if, at any time, the balance falls below $100; provided, that the remaining balance shall remain due and owing and any remaining expense shall be thereafter deemed a real property tax.

(c) The provisions of subsection (a) of this section may apply more than once if the real property has been sold or bid off more than once.

(d)
(1) Subject to the liability threshold set forth in subsection (b-2) of this section, after receipt of the payment set forth in subsection (a)(1) through (6) of this section, the Mayor shall notify the purchaser of the payment. The purchaser shall receive from the Mayor the refund to which the purchaser is entitled, subject to the purchaser's compliance with all procedures for issuance of the refund, as may be established by the Mayor.
(2) If a complaint under § 47-1370 has been properly filed, a purchaser may continue to prosecute the complaint until receipt of the expenses owed to the purchaser and payable to the purchaser by the redeeming party as set forth in subsection (a)(6A) of this section, but shall dismiss the complaint upon receipt thereof.
(3) A complaint to foreclose the right of redemption shall not be maintained solely to await the administrative refund under this subsection.
(4) Notification by the Mayor under this subsection may be accomplished by making the information publicly available through an electronic medium, including by posting on a website.

(e) Upon request, within 60 days of the request, the Mayor shall execute and deliver to the person redeeming the real property a certificate of redemption, which may be recorded in the Recorder of Deeds and, when recorded, shall release any encumbrance created by the recording of the certificate of sale. The Recorder of Deeds shall waive all fees relating to the recordation of a certificate of redemption.

(f) The Mayor may abate interest or penalties or compromise taxes, whether arising before or after the tax sale, in the same manner as set forth in § 47-811.04; provided, that the abatement or compromise shall not affect the refund due to the purchaser.

D.C. Code § 47-1366

§ 47-1366. Cancellation of sale by Mayor.

(a) The Mayor, in the Mayor's discretion, may cancel a sale before the issuance of a final order by the Superior Court of the District of Columbia foreclosing the right of redemption to prevent an injustice to the owner or person with an interest in the real property.

(b) The Mayor shall cancel a sale before the issuance of a final order by the Superior Court of the District of Columbia foreclosing the right of redemption where:
(1) The record owner or other interested party timely pays the amount set forth in the notice of delinquency to avoid the tax sale as required under § 47-1341(a) or otherwise pays the outstanding taxes before the tax sale;
(2) The real property meets the qualifications to be exempt from sale under § 47-1332(c);
(3) In a sale involving Class 1 property with 5 or fewer units that a record owner (or a person with an interest in the property as heir or beneficiary of the record owner, if the record owner is deceased) occupies as his or her principal residence, the record owner or other interested person proves:
(A) A failure of the Mayor to mail any of the notices required by §§ 47-1341(a), 47-1341(b), or 47-1353.01; or
(B) That the mailing address of the person who last appears as the record owner of the real property on the tax roll, as properly updated by the record owner by the filing of a change of address with the Office of Tax and Revenue in accordance with § 42-405, was not correctly or substantively updated by the Office of Tax and Revenue notwithstanding proper filing; or
(4) A properly filed application for a forbearance authorization was filed at least 30 days before the sale and was approved within 60 days after the sale.
(c) Subject to the limitations set forth in § 47-1377(b), (c), (d), and (e), if the Mayor cancels a sale pursuant to this section, the Mayor shall pay to the purchaser the amount that the purchaser would have received if the real property had been redeemed, but no part of the amount shall be considered a payment of tax on behalf of the real property. A certificate of redemption, if necessary, shall be executed and filed by the Mayor with the Recorder of Deeds for no fee.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Signature

21-CV-597
Case Number(s)

Kenneth Crickman
Name

2/8/22
Date

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