IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 21-CV-597

SIM DEVELOPMENT, LLC,

Appellant,

v.

DISTRICT OF COLUMBIA, et al.,

Appellees.

REPLY BRIEF TO BRIEFS OF APPELLEES MBO SETTLEMENTS, INC. AND THE DISTRICT OF COLUMBIA

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

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ARGUMENT

I. MBO'S ARGUMENT RELIES PRIMARILIY ON HYPOTHECAL QUESTIONS AND MATTERS WHICH ARE NOT PRESENT UNDER THE FACTS AND ALLEGATIONS OF THIS PARTICULAR CASE.

In its Brief, Appellee MBO Settlements, Inc. ("MBO") argues that the trial court was correct in determining that expert testimony would be required to establish the duty of care for MBO, as a settlement and escrow agent, under the facts of this case. In support of its argument, MBO seeks to expand the fact-finder's scope of inquiry beyond the issues in this case, in an apparent effort to establish that a layperson could not examine the actual evidence and decide whether MBO had acted negligently or breached its fiduciary duty. Setting aside MBO's irrelevant and distracting references to non-issues, the actual duties of MBO in this case are straightforward, discrete and uncomplicated enough for a layperson to make well-reasoned findings of fact.

Again, 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.

Perhaps seeking to complicate matters and raise the factual inquiries to a level beyond the realm of common knowledge and everyday experience, MBO asks several purely hypothetical questions which have no actual bearing on the claims and defenses in this case. At page 11 of its Brief, MBO asks these questions, to which Sim responds to each in order:

1. "What is 'clear title' to the property?"

   To the extent the meaning of the term is not clear or obvious to the average person, MBO, a settlement company, would certainly be able to define it and describe how it is achieved.

2. "How is a bank lien recorded?"

   It is not mere speculation to presume that the average person is familiar with publicly recorded documents, and how one is recorded is not germane to the claims in this case in any event.

3. "Why would a bank lien be rejected?"

   There is no allegation in this case that a bank lien was rejected.

4. "What are the responsibilities of a settlement and escrow agent to each party in the transaction?"

This is another question posed by MBO that stretches the boundaries of relevance to the limit. One could argue that most people are familiar with the basic purpose of a real estate settlement, that is to either complete a sale or a refinance, collect and distribute funds and record documents in the county land records. The allegations presented in this case are simply that MBO collected Sim's funds but did not disburse them to pay certain charges as shown on the settlement statement, and that MBO did not record the lender's security instrument.

5. "How are funds applied and disbursed?"

A better question for the factfinder would appear to be, "*were* the funds applied and disbursed?", which is a question of provable fact requiring no special expertise. Either the funds that are shown on the settlement sheet as having been collected from Sim were paid by MBO to the payee shown on the settlement sheet, or they were not.

6. "How are property taxes estimated?"

In the context of the claims and allegations set forth in the Complaint, it really does not matter one way or another *how* property taxes are estimated.

7. "What is a tax sale and how is it redeemed?"

These inquiries are best answered by the applicable statutes, which clearly define a tax sale, the tax sale process and the exact procedures required to redeem. An expert witness could not explain the tax sale redemption process any better than the statutes themselves. In fact, an expert's opinion on statutory requirements would only interject possible ambiguities where none exist otherwise. The carefully worded language of the tax sale statutes, as crafted by the legislature, will govern the matter in any event.

Sim analyzes these questions being posed by MBO to show that MBO's argument is based on questions that either need no answer at a trial in this case or that can be answered without the need for an expert witness. Regardless of their lack of relevance, MBO then proceeds on page 12 of its Brief with another list of items that "a trier of fact would need to know". Sim addresses that list as follows.

1. "The requirements to get licensed as a settlement agent."

There are no allegations or issues raised in this case as to whether MBO was licensed as a settlement agent, and there is no reason for the jury to be told of the licensing procedure.

2. "The procedures and steps to close on a loan".

This broad question is again irrelevant to this case. What is relevant are the procedures and steps *MBO took* to close on Sim's loan, specifically

whether they made certain payments and whether they recorded the security instrument.

3. "How a Deed of Trust may be rejected by the District of Columbia".

Sim merely alleges that MBO never recorded the Deed of Trust and proving that fact requires no expert testimony. The Land Records of the District of Columbia are easily accessible to everyone. If MBO wants to offer a defense to its not having recorded the Deed of Trust based on some action of the District of Columbia, that is their burden to prove.

4. "What is required to record a Deed of Trust."

Again, Sim merely alleges that it paid MBO to record the Deed of Trust and that MBO did not do so. Proving that fact requires no expert testimony.

5. "Why a Deed of Trust may be rejected by the District of Columbia."

This is also not a relevant issue under Sim's allegations.

6. "Tax classifications of property within the District of Columbia."

This is another issue with minimal relevance, at best, to the case before the Court. Also, tax classifications are defined by statute and require no description from an expert witness.

7. "How those tax classifications affect recording Deeds of Trust."

A representative of the Office of the Recorder of Deeds would be best suited to testify on this issue, and such a representative was named as a potential witness in this case.

8. "How and when escrow funds can and should be disbursed after closing."

This is also a question that is not "beyond the ken of the average person." The question answers itself as to when funds are disbursed – after closing. How funds are disbursed, by a check or wire transfer, is certainly not a difficult concept to grasp and not beyond any person's everyday experience in paying bills and other financial obligations.

9. "The responsibilities a settlement/escrow agent has with respect to the borrower and the bank."

Again, under the claims and allegations of this case, the responsibilities of *this* settlement/escrow agent, MBO, are set forth in the settlement statement and the lender's written instructions. This is documentary evidence that speaks for itself and can be understood by the average person without input from an expert.

While MBO can speculate on any number of questions and issues for which expert testimony might be necessary in other cases involving real estate settlements, MBO chooses for the most part to not address the *actual* questions the

jury is likely to face in this case. In Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979), the Court noted that whether expert testimony is relevant or admissible depends on the particular facts and allegations of each case. "The substantive element of this test, whether the expert witness' subject matter is 'beyond the ken of the average layman,' means that [the expert's] testimony, to be admissible, must provide a relevant insight which the jury otherwise could not gain in evaluating appellant's self-defense testimony about her relationship with her husband. More specifically, [the expert] must purport to shed light on a relevant aspect of their relationship which a layperson, without expert assistance, would not perceive from the evidence itself." Id. at 633.

In conclusion, MBO's Brief bears close examination and dissection of the irrelevant and non-probative issues it raises to create the appearance of a need for expert testimony. If the case is allowed to proceed to trial, Sim can and will be able to show MBO's negligence and breach of fiduciary duty under the documentary evidence and testimony of the various fact witnesses already identified in this case.

II. THE DISTRICT'S ARGUMENT REGARDING THE PUBLIC DUTY DOCTRINE, WHICH IS NOT ADDRESSED IN SIM'S INITIAL BRIEF, ARE WITHOUT MERIT UNDER THE FACTS OF THIS CASE.

Other than The District's arguments regarding the public duty doctrine, Sim has already addressed The District's arguments in its Brief and need not repeat those here. Under the public duty doctrine, a person seeking to hold The District liable for negligence must allege and prove that the District owed a special duty to the injured party, greater than or different from any duty which it owed to the general public. Akins v. District of Columbia, 526 A.2d 933, 935 (D.C. 1987).

"When a claim is made that the District negligently failed to protect someone from harm, the person advancing that claim must reckon at the outset with 'the fundamental principle that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen.' In order to convert a general duty owed to the public into a special duty owed to an individual, a plaintiff must allege and prove two things: (1) a direct or continuing contact between the injured party and a governmental agency or official, and (2) a justifiable reliance on the part of the injured party. Klahr v. District of Columbia, 576 A.2d 718, 720 (D.C. 1990).

"The purpose of the public duty doctrine is to shield the District and its employees from liability associated with providing 'public services.' As applied

by the court, it has operated to bar lawsuits by a person seeking, as an individual, to enforce the duties to prevent crime and otherwise protect against injury in the absence of a special relationship which imposes a special legal duty." Powell v. District of Columbia, 602 A.2d 1123 (D.C. 1992) (internal citations omitted). "From this general principle, Professor Cooley formulated the following rule for determining when a public official owes a duty:

> If the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. **On the other hand, if the duty is a duty to an individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.** 'The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its nonperformance.' (emphasis supplied)

The Court in Powell went on to further define the meaning of a "special relationship" in this context. "[T]he court adopted a two-prong test for a 'special relationship' of this kind, under which a plaintiff must demonstrate: '1) a direct contact or continuing contact between the victim and the governmental agency or official; and 2) a justifiable reliance on the part of the victim.' The first prong, which focuses on the contact between the plaintiff and the public official, requires 'some form of privity between the police department and the victim that sets the

victim apart from the general public.... That is, the victim must become a reasonably foreseeable plaintiff." Powell, *supra* (internal citations omitted).

First, the District does not identify any case where the public duty doctrine has been applied to a tax sale process, so all its citations are distinguishable on that basis. Second, even if the doctrine applies to this case, it is clear the special relationship exception also applies. 2011 Counties was sending e-mails directly to certain District representatives, asking specific questions regarding the status of the taxes for the Property, and The District was directly and personally responding to those questions. (APX 360-365). 2011 Counties was relying on those direct responses when deciding whether or not to continue its tax sale foreclosure case, and was justified in doing so. Sim's managing member was also directly engaged with The District over the tax status of the Property. (APX 190). And because The District provided false information to the owner of the Property, the foreclosure case continued beyond the point where Sim had already fully redeemed the tax sale.

"It is axiomatic that the District is ordinarily liable for the negligence of its employees... Thus, to preclude summary judgment on a theory of primary negligence, there must be evidence from which a jury could reasonably conclude that Brown, the District's agent, negligently failed to secure the meter cover... ('the requisite showing of a genuine issue for trial is predicated upon the existence of a

legal theory which remains viable under the asserted version of the facts." Sherman v. District of Columbia, 653 A.2d 866, 870 (D.C. 1995). This case involves allegations of negligence acts made by The District's employees directly to the owner of the Property, which proximately caused Sim's damages, and it does not fit under the public duty doctrine.

At a minimum, there is a genuine dispute in this case whether The District misinformed 2011 Counties (the owner of the Property at the time) with false information, which caused the tax sale foreclosure case to continue and the tax deed to be issued in error after Sim had fully redeemed the Property. Since The District had direct and specific contact with the Property owner regarding the status of the real property taxes, the District cannot rely upon the public duty doctrine as a valid defense to its actions in this case.

Respectfully submitted,

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I hereby certify that on May 18, 2022, a copy of the foregoing Reply Brief of Appellant Sim Development, LLC was served electronically upon:

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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
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