In The
DISTRICT OF COLUMBIA
COURT OF APPEALS

Appeal No. 21-CV-597

SIM DEVELOPMENT, LLC

Appellant,

v.

DISTRICT OF COLUMBIA, *et. al.*,

Appellee.

On Appeal from the Superior Court of the District of Columbia,
Civil Division

BRIEF OF APPELLEE MBO SETTLEMENTS, INC.

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Appellee	District of Columbia
Appellee's Counsel	Caroline S. Van Zile, Esq.
Appellee	2011 Counties, LLC
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STATEMENT OF THE ISSUES PRESENTED

1. Whether the superior court abused its discretion in finding that the standard of care of a settlement/escrow agent does not fall within the realm of common knowledge for the average juror requiring expert testimony on the standard of care of a settlement agent.

2. Whether summary judgment was appropriate when no standard of care was established.

STATEMENT OF FACTS

SIM has not disputed the facts of the case.

SIM owned Property that was sold at a tax sale to Defendant 2011 Counties due to an unpaid charge from WASA on July 21, 2015. (APX 00541 ¶ 2). On March 14, 2016, 2011 Counties filed a complaint to foreclose the right of redemption of the Property. *Id*. ¶ 4. On January 24, 2017, the District informed 2011 Counties via email that the Property had not been redeemed. *Id*. ¶ 6.

MBO conducted a closing for SIM's construction loan from Capital Bank on February 24, 2017, and learned about the previous tax sale of the Property during its preparation for the closing. (APX 00541 ¶¶ 1-2). MBO initially informed SIM that there was a tax sale lien on the Property via email on November 4, 2016, and again on December 19, 2016. (APX 00545

¶¶ 29-30) In preparation for the February 2017 closing, MBO contacted the attorneys for 2011 Counties to obtain a payoff statement for their post-complaint legal expenses and pay the tax sale redemption, and disbursed $2,191.15 to 2011 Counties. (APX 00541-542 ¶¶ 7-8). Additionally, SIM gave MBO $14,000 to pay the water charges from WASA, $1,000 to clear the title, and $3,000 for real property taxes. (APX 00542 ¶ 9). In order to determine the amount for real property taxes, MBO used the tax bill for the Property as its guide which classified the Property as Class 1, improved residential real property that is occupied. *Id.* ¶ 10.

MBO attempted to record the DOT on March 13, 2017, March 15, 2017, October 25, 2017, July 22, 2019, July 26, 2019, and August 1, 2019. *Id*. ¶ 12. The DOT was rejected each time due to the Property being classified as a Class 2 or Class 3 for tax purposes. *Id*. ¶ 12. On May 16, 2017, MBO informed SIM via email of the tax status of the Property and that the DOT was rejected. (APX 00545 ¶ 33). MBO never agreed to represent SIM, or to petition for a tax status challenge on SIM's behalf. (APX 00544 ¶ 27).

SIM informed Capital Bank that it had obtained a zoning variance to build a larger building than originally contemplated for the loan. (APX 00543 ¶ 17). Capital Bank's Loan Documents were underwritten and the

Loan approved subject to specific planned improvements and a budget for the Property. *Id*. ¶ 18. On April 24, 2018, the Note between Capital Bank and SIM was modified and no further advances were permitted with a maturity date extended to September 24, 2018. (APX 00544 ¶ 28).

On March 14, 2019, SIM met with a District official regarding SIM's appeal of the tax classification for the Property. (APX 00543 ¶ 15). SIM advised Capital Bank via email on April 5, 2019 that MBO had been unable to record the DOT because of tax status issues. (APX 00544 ¶ 23). On April 6, 2019, Capital Bank acknowledged that no draws on the loan were requested, nor were any advanced and demanded full repayment. *Id*. ¶ 24. The tax sale on the property was vacated June 21, 2019, and SIM's loan with Capital Bank was fully paid on August 8, 2019. *Id*. ¶¶ 25-26.

STANDARD OF REVIEW

A trial court's grant of summary judgment is reviewed *de novo* *Drejza v. Vaccaro*, 650 A.2d 1308, 1312 (D.C.1994), with the same substantive standard applied on appeal as did the trial court in initially considering the motion. *Fry v. Diamond Constr., Inc.*, 659 A.2d 241, 245 (D.C.1995). The record is viewed in the light most favorable to the party opposing the motion. *Graff v. Malawer*, 592 A.2d 1038, 1040 (D.C.1991).

"Summary judgment is proper when a party fails to establish an essential element of his case upon which he bears the burden of proof." *Pannell v. District of Columbia,* 829 A.2d 474, 478 (D.C.2003).

ARGUMENT

I. The trial court was correct to require expert testimony to establish the standard of care of a settlement agent.

SIM claims that the court committed reversable error in finding that an expert witness was required to articulate the standard of care of a settlement agent in a negligence claim and a claim for breach of fiduciary duty.[1]

In order to prevail on a claim for negligence in the District of Columbia, "a plaintiff must show that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the breach of duty proximately caused damage to the plaintiff." *Tolu v. Ayodeji*, 945 A.2d 596, 601 (D.C. 2008) (citations omitted) (quotations omitted). "[Plaintiff] must establish the applicable standard of care, show the defendant deviated from it, and demonstrate that the defendant's conduct was the proximate

[1] The grant of summary judgment for Negligent Misrepresentation (Count II) and Conversion (Count IV) was not appealed.

cause of his injury." *Beard v. Goodyear Tire & Rubber Co*., 587 A.2d 195, 199 (D.C.1991) (citation omitted).

To demonstrate a breach of a fiduciary duty, "[Plaintiff] must allege facts sufficient to show (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. District of Columbia*, 241 F. Supp. 3d 81, 90 (D.D.C. 2017)

Both claims contain the essential element of a duty of care. SIM has the burden to prove what the standard of care is for a settlement agent and how MBO deviated from that standard of care. SIM admitted as much when it stated, in conclusory fashion, that "MBO had a duty to conduct the closing with the degree of care that a reasonably prudent settlement/escrow agent would have exercised." (APX 00952 at 8). However, SIM offered no evidence of what the standard of care is for "a reasonably prudent settlement/escrow agent."

Failure to articulate the relevant standard of care is fatal to a negligence claim because, to recover damages based on negligence, "'the plaintiff must prove that the defendant deviated from the applicable standard of care'. . . . If the standard itself is not proven, then a deviation from that standard is incapable of proof." *District of Columbia v. Carmichael*, 577

A.2d 312, 314 (D.C. 1990) (quoting *Toy v. District of Columbia*, 549 A.2d 1, 6 (D.C. 1988).). "While expert testimony regarding the appropriate standard of care is not necessary for acts 'within the realm of common knowledge and everyday experience', a plaintiff must put on expert testimony to establish what that 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." *Messina v. District of Columbia*, 663 A.2d 535, 538 (D.C. 1995) (internal citation omitted). As noted by the Court of Appeals, the "common knowledge" exception is a limited one and is recognized only in cases in which everyday experience makes it clear that jurors could not reasonably disagree over the care required. *See District of Columbia v. Hampton*, 666 A.2d 30, 35 (D.C. 1995). Conducting a commercial real estate settlement is not an everyday experience within the realm of common knowledge.

Initially, it may seem based on SIM's argument in its brief that this was simply a case where the jury could examine the settlement statement without the guidance of an expert and determine if MBO did the things listed on the statement. (Appellant Brief at 13). Or reviewing the statement and "showing which payments MBO made on behalf of Sim and which it did not." (Appellant Brief at 14).

However, it is not that simple. In this case, SIM alleged in its complaint that "MBO Settlements was negligent in failing to properly and promptly disburse Plaintiff's funds, failing to clear title to the Property and failing to record Capital Bank's lien." (APX-000018). SIM also alleged that, "as the settlement and escrow agent for the Capital Bank loan closing, MBO settlements owed a fiduciary duty to [SIM] which includes a duty to properly handle, apply and disburse [SIM's] funds and a duty to conduct the transaction with scrupulous honesty, skill and diligence." (APX-000019)

It is clear from the complaint and the record that SIM is alleging it was damaged by MBO for Capital Bank's lien not being recorded. (APX-000017)

Based on just the allegations in the complaint it is clear that a real estate settlement and the duties of a settlement agent, post-settlement, are beyond the ken of the average juror.

What is "clear title" to the property? What is failing to record the bank lien? How is a bank lien recorded? Why would a bank lien be rejected? What are the responsibilities of a settlement and escrow agent to each party to the transaction? How are funds applied and disbursed? How are property taxes estimated? What is a tax sale and how is it redeemed?

Among other things, the facts on the record show that MBO attempted to record the Deed of Trust multiple times but was rejected because the tax classification had changed. (APX 00542 ¶12) MBO informed SIM that the tax classification had changed and was unable to record the Deed of Trust. (APX 00545 ¶33) That MBO never agreed to represent or petition on behalf of SIM for a tax status challenge for the tax classification of the property. (APX 00544 ¶27). That MBO informed SIM of the tax sale lien on at least two occasions and asked who SIM's attorney was. (APX 00545 ¶29,30)

Based on the entire record before the court, expert testimony is required to establish the standard of care for a settlement agent. Settlement agents and title producers are licensed by the District's Department of Insurance, Securities, and Banking ("DISB") and are required to pass an exam and maintain continuing education requirements. A trier of fact would need to know: (1) the requirements to get licensed as a settlement agent; (2) the procedures and steps to close on a loan; (3) how a Deed of Trust is recorded; (4) what is required to record a Deed of Trust; (5) why a Deed of Trust may be rejected by the District of Columbia; (6) tax classifications of property within the District of Columbia; (7) how those tax classifications affect recording Deeds of Trust; (8) how and when escrow funds can and

should be disbursed after closing, and; (9) the responsibilities a settlement/escrow agent has with respect to the borrower and the bank.

In the context of real estate transactions, the Court of Appeals has observed that a lay person would not have common knowledge to determine the appropriate standard of care applicable to a realtor. *See Carleton v. Winter*, 901 A.2d 174, 179 (D.C. 2006) ("Real estate agents owe manifold duties to persons they represent; whether and to what extent those duties include 'vouching' for careful performance by a home inspector they recommend are questions on which only the standards of the profession—as articulated by an expert—can enlighten a jury.") (citing *District of Columbia v. Hampton*, 666 A.2d 30, 35 (D.C. 1995)).

Many settlement agents are attorneys, and the standard-of-care in this case would be similar for a legal negligence claim. *See, Flax v. Schertler*, 935 A.2d 1091 (D.C. 2007)("withdrawal of her standard-of-care expert was fatal to all of her claims of legal negligence..."); *Young v. District of Columbia*, 752 A.2d 138 (D.C. 2000) (upholding summary judgment for the District of Columbia where plaintiff had not designated an expert to testify as to the applicable standard of care); See also, *Schultz v. Bank of America*, 413 Md. 15, 30-31 (2010)(The Court affirmed the judgment in favor of Settlement Company on the negligence claim, because Lender failed to

adduce or designate expert testimony as to the standard of care for a settlement company. In this case, expert testimony was required to establish Settlement Company's negligence, "because most lay people are not familiar with the operation of escrow accounts, nor with any standard of care a title company owes to individuals or entities who are not customers, but who deposit funds in escrow with the title company. [Settlement Company's] procedures and safeguards would 'occur behind closed doors, out of the sight of the customer, and may involve numerous unknown procedures' that are 'beyond the ken of the average layperson.')

SIM did not address the need for expert testimony in its Opposition. (*See generally* APX 00945-985). SIM did not submit any affidavit from an expert, nor did it attempt in any other way to define the standard of care applicable to MBO or to identify the respects in which MBO had failed to adhere to that standard.

Only now, in its brief on appeal, does SIM claim that the average layperson can look at the settlement sheet, establish the applicable standard of care and decide if that standard of care was breached.

SIM's reliance on *Doe v. Medlantic Health Care Group, Inc*, 814 A 2d 939 (DC 2003) is inapposite. *Doe* held that, "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." *Id* at 952. In this case there was no evidence of any protocols for a settlement agents proffered by SIM. Contrary to SIM's claim in its brief (Appellant Brief at 15), the settlement statement does not set forth the duties of MBO.

The trial court was correct to require an expert to prove the standard of care of a settlement/escrow agent. The decision whether to admit or require expert testimony on a particular state of facts is confided to the sound discretion of the trial court, and this Court has described that discretion as "broad." *District of Columbia v. White*, 442 A.2d 159, 165 (D.C.1982); *District of Columbia v. Davis*, 386 A.2d 1195, 1200 (D.C.1978). In *Davis*, this Court affirmed a directed verdict in the District's favor, holding that "the decision whether or not to admit (and presumably require) expert testimony is within the discretion of the trial court, whose ruling should be sustained unless clearly erroneous." *Id*. at 1200. The Supreme Court has likewise held that "[t]he trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962). "We have stated that our deference to the trial judge's decision whether to require expert

testimony does not differ from our deference to a ruling as to the admissibility of such evidence." *Varner v. District of Columbia*, 891 A.2d 260 (D.C. 2006) citing *White*, 442 A.2d at 165; *Davis*, 386 A.2d at 1200.

While it is MBO's position that a standard of care expert would be required for any allegation of negligence of a settlement agent in a real estate closing, the "particular state of facts" in this case show that the transaction was much more complicated than the average real estate settlement necessitating an expert to guide the jury.

SIM failed to designate an expert witness to establish the duty of care of a settlement/escrow agent. SIM has failed to proffer evidence, through an expert, as to any duty owed to Plaintiff by MBO. Therefore, summary judgment in favor of MBO as to Negligence and Breach of Fiduciary Duty was proper.

CONCLUSION

For the foregoing reasons, Appellee, MBO Settlements, Inc., respectfully requests that this Honorable Court finds in favor of Appellee MBO Settlements, Inc. and affirms the decision of the D.C. Superior Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2022, a copy of the foregoing Brief of Appellee MBO SETTLEMENTS, INC. was served on the following via the District of Columbia Court of Appeals Appellate E-filing system and email:

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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.

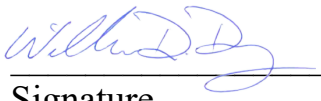
2. Any information revealing the identity of an individual receiving mental-health services.

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-0597

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