APPENDIX A

FILED
NOV 25 2019
DISTRICT OF COLUMBIA
COURT OF APPEALS

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 18-CV-1277

MIREK MACHALA, APPELLANT,

V.

LIBUSE KRAL, *et al.*, APPELLEES.

Appeal from the Superior Court
of the District of Columbia
(CAB-6775-17)

(Hon. Hiram E. Puig-Lugo, Trial Judge)

(Submitted November 19, 2019 Decided November 25, 2019)

Before THOMPSON and MCLEESE, *Associate Judges*, and NEBEKER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant, Mirek Machala, appeals the trial court's grant of summary judgment in favor of defendants-appellees Libuse Kral and Nicholas A. Brown. Appellant presents four issues, which we condense into one: whether the trial court erred in granting the defendants-appellees' joint

motion for summary judgment. [1] We conclude that it did not, and, therefore, affirm.

[1] Appellant also contends that the affidavit of Sharka Walhof should have been stricken pursuant to Rule 56(c)(4) of the Superior Court's rules of civil procedure. However, appellant raises this issue for the first time in his reply brief. The issue, therefore, is waived. *See Washington Convention Ctr. Auth. v. Johnson*, 953 A.2d 1064, 1092 (D.C. 2008) ("[A]rguments raised for the first time in a reply brief come too late for appellate consideration[.]").

I.

On October 6, 2017, appellant filed suit against appellees, alleging that: (1) appellee Kral acted in bad faith and failed to comply with the requirements of the Tenant Opportunity to Purchase Act ("TOPA") because she did not provide him with a building floor plan, a rent roll, an itemized list of major operating expenses, and a schedule of capital expenditures related to prior construction; and (2) appellee Brown knew appellant had rights under TOPA and interfered with those rights by purchasing the property. Both appellees denied liability.

Thereafter, on October 1, 2018, appellees filed a joint motion for summary judgment. In the motion, appellees argued that the sole issue before the court was whether appellee Kral complied with the requirements of TOPA. Appellees further contended that the undisputed facts showed that appellee Kral complied with all requirements under TOPA. In support of their claims, appellees filed a statement of material facts not in dispute and attached exhibits, including affidavits and deposition testimony.

Specifically, appellees argued that TOPA requires that, before an owner of a housing accommodation may sell the accommodation, the landlord must give the tenant an opportunity to purchase the accommodation at a price and terms which represent a bona fide offer of sale. Appellees contended that the undisputed facts showed that appellee Kral provided appellant with two notices, via certified mail and personal process server,

informing him of her intent to sell, listing the asking price and material terms of the sale, and informing him that, if he was interested, she would make available the required documents. Appellees claimed that, when appellant requested an itemized list of monthly expenses, appellee Kral complied, and provided him with more than 140 pages of documents. Then, according to appellees, appellant submitted various requests for a floor plan, rent roll, and capital expenditures related to construction. Appellees claimed that appellee Kral repeatedly told appellant that the documents he requested did not exist and, therefore, could not be provided to him. In addition, appellees maintained that appellant acted as the property manager and, therefore, was aware of the nature of those expenses. Nevertheless, according to appellees, appellant continued to request the same documents. Then, the time period in which he had a right to purchase the property expired, and appellee Kral sold the property to appellee Brown. Thus, according to appellees, the undisputed facts defeated appellant's claim, and the court should grant summary judgment in their favor.

On November 19, 2018, the trial court granted the motion for summary judgment. The court found that the undisputed facts showed the following: (1) appellant acted as appellee Kral's property manager for more than twenty years, and received rent concessions as payment; (2) as property manager, appellant had direct knowledge of the information he sought from appellee Kral; (3) under TOPA, appellee Kral's statement to appellant that there was no floor plan sufficed to fulfill the requirement to provide a floor plan; (4) appellee Kral provided appellant with more than 140 pages of documents related to the property's expenses; and (5) appellant made no offer to purchase the property during the allotted negotiation period. Thus, according to the trial court, the undisputed facts showed that appellee Kral complied with the requirements of TOPA, thereby entitling appellees to summary judgment in their favor.

II.

"This court reviews the grant of a motion for summary judgment *de novo*, applying the same standard as that utilized by the trial court." *Hollins v. Federal Nat'l Mortg. Ass'n*, 760 A.2d 563, 570 (D.C. 2000). A trial court will grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 949 (D.C. 2012) (internal quotations and citations omitted). The moving party bears the initial burden of identifying portions of the record that demonstrate the absence of a genuine

issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant makes the required showing, then the burden shifts to the non-moving party to present sufficient evidence to support a conclusion that a factual dispute exists, such that a judge or jury must resolve the conflicting assertions at a trial. *See Clay Props., Inc. v. Washington Post Co.*, 604 A.2d 890, 893-94 (D.C. 1992). Such opposition must "be supported by affidavits or other competent evidence tending to prove disputed material issues of fact." *Hamilton v. Howard Univ.*, 960 A.2d 308, 318 (D.C. 2008). "Conclusory allegations . . . are insufficient . . . to defeat the entry of summary judgment." *Id.* at 313.

We conclude the trial court did not err in granting the motion for summary judgment in favor of appellees. The sole issue before the court was whether appellee Kral complied with the TOPA requirements — whether she served appellant with the required TOPA notices and whether she provided the required information. Appellees carried their burden of showing no genuine issue of material fact.

As to the service of TOPA notices, appellees presented affidavits from process servers, in which the process servers stated the notices had been delivered. Appellant did not provide competent evidence disputing the affidavits; rather, appellant made a conclusory allegation that he had not received the TOPA notices, which is insufficient to create a genuine issue of material fact. The trial court did not err, therefore, in finding that the undisputed facts showed appellant had been served with the required notices.

As to whether appellee Kral provided appellant with the required information, appellees presented letters, deposition testimony, and an affidavit from appellee Kral all stating that appellant had either been provided with the documents he requested or the document did not exist, but appellant nevertheless had personal knowledge of the expense because he served as property manager. Appellant did not present competent evidence to the contrary; rather, he made a conclusory denial, which is insufficient to create a genuine issue of material fact. The trial court did not err, therefore, in holding that the undisputed facts showed appellee Kral complied with the requirements under TOPA.

For these reasons, we conclude that the trial court did not err in granting summary judgment in favor of appellees.

For the foregoing reasons, the decision of the trial court is hereby

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

Signature
JULIO A. CASTILLO
Clerk of the Court

Copies to:
Honorable Hiram E. Puig-Lugo
Director, Civil Division

Copies e-served to:

Mirek Machala
Roy L. Kaufmann, Esquire
Mark Schweitzer, Esquire
Craig M. Palik, Esquire

APPENDIX B

FILED
DEC 20 2019
DISTRICT OF COLUMBIA
COURT OF APPEALS

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No. 18-CV-1277

MIREK MACHALA,
Appellant,

v.

CAB6775-17

LIBUSE KRAL, *et al.*,
Appellees

BEFORE: Thompson and McLeese, Associate Judges, and Nebeker, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED that appellant's petition for rehearing is denied.

PER CURIAM

Copies mailed to:

Honorable Hiram E. Puig-Lugo

Director, Civil Division
Quality Management Unit

Copies e-served to:

Mirek Machala

Roy L. Kaufmann, Esquire
Craig M. Palik, Esquire
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APPENDIX C

Filed
D.C. Superior Court
11/19/2018 11:38ÄM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

MIREK MACHALA
Plaintiff,

Case No. 2017CA006775 B
Judge Hiram E. Puig Lugo

LIBUSE KRAL, et al. Defendants.

ORDER

This matter comes before the Court upon consideration of Joint Defendants Libuse Kral and Nicholas A. Brown' s Motion for Summary Judgment and Request for a Hearing ("Defs. Mot. Summ. J."), filed on October 1, 2018; Plaintiffs Motion for Discovery Under the Superior Court of the District of Columbia Rule of Civil Procedure 56(D) ("Pl.'s Mot.

Disc. Rule 56(D)"), filed October 24, 2018; and, Defendant Brown's Opposition to Plaintiffs Motion for Discovery under the Superior Court of the District of Columbia Rule of Civil Procedure 56(D) ("Def. Brown's Opp'n Pl. ' s Mot. Disc. Rule 56(D)"), filed November 6, 2018. The Court has considered the pleadings, the relevant law, and the record. For the following reasons,

Defendants' Motion for Summary Judgment is **GRANTED**.

BACKGROUND

On October 6, 2017, Plaintiff Mirek Machala ("Machala") filed the above-captioned matter against Defendants Libuse Kral and Nicholas A. Brown ("Kral" and "Brown"). Complaint at 1. This matter concerns a subject property that was run by Kral as a "4-unit apartment house" for more than twenty-three years. Complaint at 3. The subject property was

occupied by Machala and subject to the D.C. Tenant Opportunity to Purchase Act ("TOPA"). Id. Machala alleges that on or about December 14, 2016, the subject property was listed for sale, which triggered Machala's TOPA rights. Id. On February 23, 2017, an "Offer of Sale with Third Party" contract was delivered to Machala at the subject property. Id. On February 27, 2017, as required by Title IV of the Rental Housing Conversion and Sale Act of 1980, D.C. Code § 42-3404 as amended, Machala provided a written statement of interest and request for information to Kral and the D.C. Department of Housing and Community Development, Rental Conversion and Sales Division ("DC DHCD"). Complaint at 3.

On or about March 8, 2017, Kral responded to the request for information as required by TOPA. Complaint at 4. Kral's response contained over 140

pages of detailed information on recurring expenses, including utility bills, real estate taxes and insurance. Id. Machala asserts that the "[s]chedule (itemized list) of major operating expenses related to core operations of the property. . . building floor plan. . . rent roll [and] [s]chedule of Capital Expenditures describing illegal[2] construction" were missing from Kral's response. Complaint at 4. Thereafter, between March 21, 2017 and September 4, 2017, Machala sent repeated requests to Kral for the alleged missing information. Complaint at 4 — 7. Kral, by way of her attorney, repeatedly responded that she had provided all information in her possession, had no further information, and reiterated her invitation to Machala to enter into negotiations, advising

[2] Machala attempts to assert through language that illegal construction look place on the subject properly, and as such, a floor plan was necessary (o assess the feasibility of purchasing the properly. This Court will address this accusation, as this Motion for Summary Judgment (urns on whether Defendants complied with the TOPA requirements.

Machala that the negotiation period had commenced. Answer and Counterclaim of Defendant/Counter-Plaintiff Libuse Kral at 7 _ 10.

On or about September 13, 2017, Machala learned that Kral had sold the subject property to a third party purchaser, Brown, and that Brown recorded the deed of trust. Complaint at 9. Machala asserts that Kral intentionally failed to comply with the TOPA statute without reasonable justification for doing so; carried out the TOPA process in bad faith; and, violated Machala's TOPA rights. Complaint at 8. Machala also asserts that Brown had actual and/or constructive knowledge of Machala's superior rights at the time it acquired the subject property, and therefore was not a bona fide purchaser. Complaint at 9.

On October 23, 2018, both Defendants jointly filed a Motion for Summary Judgment and Request for a

Hearing. Both Defendants argue that there is no genuine dispute of fact that Kral complied with TOPA; that Machala had been the property manager at the property for decades with intimate knowledge and familiarity with the property; and, that Machala failed to exercise his TOPA rights within the negotiation period. The Court agrees with the Defendants.

LEGAL STANDARD

Superior Court Rule of Civil Procedure 56(a)-(b) provides that either a claimant or a defending party may move, with or without supporting affidavits, for a partial or complete Summary Judgment in the party's favor. Based on the entirety of the record, including the pleadings, depositions, and any affidavits, "[a] judgment sought shall be rendered forthwith if [the record] show[s] that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." *See* Super. Ct. Civ. R. 56(c); *Han v. Se. Acad. of Sch01astic Excellence Pub. Charter Sch.*, 32 A.3d 413, 416 (D.C. 2011). The record is reviewed in the light most favorable to the non-moving party, however conclusory allegations are insufficient to avoid Summary Judgment. *See Doe v. Safeway, Inc.*, 88 A.3d 131, 132 (D.C.2014).

The party moving for Summary Judgment bears the initial burden of identifying portions of the record that demonstrate the absence of a genuine issue of material fact. *See Celolex Corp.v. Catrett,* 477 U.S. 317, 323 (1986); *Wash. Inv. Partners of Del., LLC v. sec. House, KSCC,* 28A.3d 566, 573 (D.C. 2011).

Once the movant makes the requisite showing, the burden shifts to the non-movant party to present sufficient evidence to support a conclusion that a

factual dispute exists, such that a judge or jury must resolve the conflicting assertions at a trial. *See Clay Props., Inc. v. Wash. Post Co.*, 604 A.2d 890, 893-94 (D.C. 1992). To survive a request for Summary Judgment, the non-movant "must set forth specific facts showing that there is a genuine issue for trial," and cannot rely upon conclusory statements in its pleadings. *See Kibunja v. Alturas, LLC,* 856 A.2d 1120, 1127-28 (D.C. 2004); *Hamilton v. Howard Univ.,* 960 A.2d 308, 318 (D.C. 2008) (the opposition "must . be supported by affidavits or other competent evidence tending to prove disputed material issues of fact.")

ANALYSIS

Machala's Statements and Actions Confirm Him as Property Manager

Machala argues that Kral did not comply with requests for information, as required by TOPA § 42-3404.03 "Offer of Sale." Specifically, Machala's repeated requests for information state that Kral failed to provide a "[s]chedule (itemized list) of major operating expenses related to core operations of the property. .. building floor plan. .. rent roll [and] [s]chedule of Capital Expenditures describing illegal construction." Complaint at 4. Defendants assert that they do not have the information that Machala is seeking because Machala, himself, has the very information he seeks by virtue of having been the property manager of the subject property for over twenty years. Def. Mot. Summ. Judgment at 6, 14.

Under § 47-2853.141 of the D.C. Code, the term "property manager" means "an agent for the owner of real estate in all matters pertaining to property management which are under his or her direction, and who is paid a commission, fee, or other

valuable consideration for his or her services." D.C. Code § 47-2853.141 (2018).

Whether an agency relationship exists in a given situation depends on the particular facts of each case. *Judah v. Reiner,* 744 A.2d 1037, 1040 (D.C. 2000). "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal ' s manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) of Agency: Actual Authority § 2.01 (2006). Actual authority can be created expressly or by implication through "written or spoken words or other conduct of the principal, which reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." *A-J Marine, Inc. v. Corfu Contrs., Inc.,* 810 F. supp. 2d 168, 175 (D.D.C. 2011).

While Machala denies that he was property manager of the subject property, his admissions in letters to Kral and his continued actions over the past twenty-three years show that he acted with reasonable belief that the principal (here, Kral) wished him to act. Machala admits that,

> For the past 23 years I was keeping your rental business running, including all the responsibilities of the building owner, i.e. tenant responsibilities, rent collection, building maintenance, grounds maintenance, snow removal, leaf removal, tree pruning, cleaning the gutters, etc. These activities were not paid. I think you would agree that 23 years of work and everything that was done in the building is not a freebie.

Def. Mot. Summ. Judgment at 14, citing Exhibit 23.

Machala clearly states instances that affirm his role as property manager, going on in the same letter to state, "Using third-party services would have resulted in high costs and potentially loss-making business, 'I was able to arrange and secure the full renovation of the basement, „and other

changes and renovations in the building, e.g. the kitchen, new closet, floors, electric range hookup etc., were also done." Def. Mot. Summ. Judgment, citing Exhibit 23. Machala states in another letter, "Enclosed please find the payments for rent and utilities; the girl has not paid, she has not shown up here this year yet, I will send it immediately upon receipt." Def. Mot. Summ. Judgment, citing Exhibit 23. In that same letter, Machala states that he "managed to arrange the repair of the ceiling" and deducted the cost of the repair from his rental payment. Id.

Kral presents through her attorney that Machala and Mr. Martin Kral[3] entered into an agreement where Machala would provide "custodial, janitorial, and property management services at the property"

[3] Mr. Martin Kral was Defendant Kral's husband and is deceased as of September 2003.

in exchange for a "very reduced rent rate," also known as a rent concession. Def. Mot. Summ. Judgment, citing Exhibit 16. When Mr. Kral passed away, Mrs. Kral became owner of the property; Mrs. Kral and Machala agreed that Machala would continue his property management services in exchange for the rent concessions. Id. The rent concessions are shown on the table summaries of the utilities records, which were provided to Machala on March 8, 2017. Def. Mot. Summ. Judgment, citing Exhibit 9.

Machala's statements and actions in the record show that he took on the duties of property manager, which included collecting rent, building and grounds maintenance, and more. These services are the equivalent of rent roll, major operating expenses, and potential capital expenditures. The record also shows that the Machala received consideration in the form

of rent concessions, in exchange for his services as property manager for the subject property.

Indeed, it would appear that Machala continues to request information that he already has direct knowledge of, causing undue delay in the negotiation process. Therefore, based on the record, the undisputed facts show that Machala was in fact the property manager of the subject property and has direct knowledge of the information he states he is seeking.

II. Defendant Kral's Compliance with TOPA

There is no material dispute as to Defendant Kral 's timely reply to Machala's first request for information pursuant to TOPA. There is also no dispute that the Act states that, "If the owner does not have a floor plan, the owner may meet the requirement to provide a floor plan by stating in

writing to the tenant that the owner does not have a floor plan." D.C. Code § 42—3404.03(4) (2018). According to the record, and undisputed facts, Kral provided all of the information that she had in a package of over 140 pages, containing utility bills and documentation showing recurring monthly expenses for the property. Def. Mot. Summ. Judgment, citing Exhibit 9. Kral also stated in writing that she did not have a floor plan, which satisfies the TOPA requirement. *Id.* Machala's admission and actions as property manager show that he has access to the remaining information he states he is seeking, as he was the primary person responsible for collecting rent and ensuring that repairs and cleaning services took place. Def. Mot. Summ. Judgment at 14, citing Exhibit 23.

Based on the record, Kral complied with the TOPA requirements and Machala's requests for information and invited Machala into negotiations

within the allotted time period; however, Machala failed to provide an offer within the allotted negotiation period. Despite his assertion, Machala was not entitled to extra days in the negotiation period, because Kral complied with the requests for information and Machala had direct knowledge of the remaining expenses.

Additionally, while Machala subsequently filed a Motion for Discovery Under the Superior Court of the District of Columbia Rule of Civil Procedure 56(D) ("Pl. ' s Mot. Disc. Rule 56(D)"), and Brown subsequently filed an Opposition to Machala' s Motion for Discovery under the Superior Court of the District of Columbia Rule of Civil Procedure 56(D) ("Def. Brown's Opp'n Pl. ' s Mot. Disc. Rule 56(D)"), this Court finds that those motions are unnecessary here.

Based on the record and docket, all parties have appeared in multiple hearings before this Court regarding motions to compel discovery and have had adequate opportunities to pursue said discovery. Therefore, based on the record showing that there is no genuine dispute of material fact, this Court finds that Defendants are titled to summary judgment. Accordingly, it is this 19th day of November, 2018, hereby:

ORDERED that Defendants' Motion for Summary Judgment, filed October 1, 2018 is

GRANTED; and it is further

ORDERED that the Defendants' Request for a Hearing, filed October 1, 2018 is

DENIED AS MOOT; and it is further

ORDERED that the Plaintiffs Motion for Discovery Under the Superior Court of the

District of Columbia Rule of Civil Procedure 56(D) filed October 24, 2018 is **DENIED AS MOOT**; and it is further

ORDERED that the Pre-Trial Hearing scheduled for November 27, 2018 and all future events are **VACATED**; and it is further

ORDERED that this case is now **CLOSED**.

IT IS SO ORDERED.

Hiram E. Puig-Lugo
Associate Judge
Signed in Chambers

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