

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

DREAM FIELDS, LLC,	:	APPEAL NO. C-061029
	:	TRIAL NO. A-0600334
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DUDLEY A. BOGART,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

On February 1, 2003, plaintiff-appellee Dream Fields, LLC, loaned Ponder Woods, LLC, \$300,000. The loan was evidenced by a promissory note, which was made pursuant to a letter of intent dated December 19, 2002. Ponder Woods was in the business of real estate site development. The letter of intent stated that Ponder Woods was owned equally by Thomas Owens and defendant-appellant Dudley Bogart. According to Bogart, Owens ran the day-to-day operations of Ponder Woods. Owens and Bogart also owned interests in Tennessee Investment Properties, LLC. The letter of intent stated that the loan from Dream Fields to Ponder Woods was to be secured by a second mortgage on property located in Jacksboro, Tennessee, and by a second mortgage on “subdivided real estate and improvements known as the Ponder Woods Subdivision” in Clermont County, Ohio. The intent letter stated that the mortgages

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

were to be granted at the “initial closing” in a form satisfactory to Dream Fields’ counsel. Dream Fields was to provide partial releases of the mortgages to permit lot sales in the Clermont County subdivision upon receiving partial payment of the principal amount according to a schedule set forth in the promissory note.

Ponder Woods executed and delivered the promissory note to Dream Fields. Owens signed the note on behalf of Ponder Woods as “President.” Both Owens and Bogart signed a “Guaranty,” which provided that “the undersigned hereby, jointly and severally, unconditionally guarantee payment of any and all amounts at any time owing under the terms of the foregoing Promissory Note.”

Ponder Woods defaulted on the note. After Dream Fields collected partial payment from Ponder Woods and Bogart, the amount due was \$270,141.63, plus interest. Owens was bankrupt. Dream Fields sued Bogart to collect the balance due on the note. The mortgage on the Clermont County property was never recorded. A mortgage had been recorded on the Tennessee property, but another lienholder had taken priority over Dream Fields. It is not clear from the record who recorded the Tennessee mortgage or why the other lienholder took priority.

Dream Fields filed a motion for summary judgment. Bogart opposed the motion on several theories, all of which essentially alleged that Bogart had been released from liability on the note because Dream Fields had failed to record the Clermont County mortgage, and because someone, it is not clear who, had “tardily” recorded the Tennessee mortgage. In support of its motion for summary judgment, Dream Fields filed the affidavit of its “managing member,” Vincent Granieri. Granieri stated that Owens was to record the mortgages, that Dream Fields had received facsimile copies of the mortgage documents, but no originals, and that Owens had told Granieri that the mortgage for the Clermont County property had not been recorded

due to some error on the part of a Ponder Woods employee. Granieri stated that he had spoken to both Owens and Bogart about getting proper mortgage documents for recording and that Bogart had promised that he would look into it. Bogart submitted his own affidavit, which stated that he had relied on a facsimile cover sheet sent from Owens to Granieri that stated “Re: Executed Mortgages” and on Granieri’s silence at the closing to indicate that the mortgages had been recorded. Bogart stated that he had signed the guaranty with the understanding that the mortgages had been sent to Dream Fields and that they had been recorded, although no one had told him that the mortgages had been recorded. Bogart had not asked at the closing whether the mortgages had been recorded.

The trial court granted Dream Fields’ motion for summary judgment. Bogart has appealed, raising two assignments of error that allege that the trial court erred in granting Dream Fields’ summary-judgment motion and that the court erred in granting summary judgment as to the amount owed under the guaranty. Bogart argues under both assignments of error that Dream Fields had the duty to obtain and timely record all mortgages, and that its failure to do so either released Bogart from his contract of guaranty or reduced the amount of damages due.

It is clear from the record that all parties to the transaction contemplated that the promissory note was to be secured by second mortgages on the properties. The letter of intent, the promissory note, and the addendum to the note all referred to the mortgages. The documents did not specify which party was to be responsible for recording the mortgages. We point out that because Bogart signed an unconditional guaranty, he cannot claim that the recording of the mortgages was a condition precedent to the loan contract.

It is the duty of the mortgagor to execute and deliver a mortgage to the mortgagee before the mortgagee has a duty to record the mortgage.² Granieri stated in his affidavit that Owens had been responsible for recording the mortgages and that Dream Fields had never received properly executed mortgages for recording. Granieri also stated that he had spoken to both Owens and Bogart about getting properly executed mortgages for recording. Bogart did not dispute Granieri's testimony that properly executed mortgages were never delivered; he merely stated that he had relied on a facsimile cover sheet regarding "executed mortgages" and "Granieri's silence at the closing" to confirm that the mortgages had been recorded. Bogart did nothing to ensure that the mortgages had been recorded before signing the guaranty, even though it was his company that was executing the mortgages.

There was no genuine issue of material fact as to whether Dream Fields had received the executed mortgages for recording – it had not. Therefore, it did not have a duty to record the mortgages. The assignments of error are overruled.

Therefore, the judgment of the trial court is affirmed.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., HILDEBRANDT and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on September 19, 2007
per order of the Court _____
Presiding Judge

² See *Mantia v. Dugan* (Sept. 18, 1991), 2nd Dist. No. 12568.