

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA 09-626

JOE NEIL

APPELLANT

V.

BARBARA PHILLIPS

APPELLEE

Opinion Delivered DECEMBER 9, 2009

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT, SIXTH
DIVISION, [NO. CV 2007-1289-6]

HONORABLE R. DOUGLAS
SCHRANTZ, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellee Barbara Phillips brought a complaint against appellant Joe Neil on July 2, 2007, seeking to recover damages for breach of covenants in a warranty deed. Joe Neil had executed and delivered a warranty deed to Mrs. Phillips on March 6, 2003, wherein Mr. Neil warranted title to certain property in Benton County. Mrs. Phillips later discovered that Mr. Neil had not paid the real property taxes on a portion of the lands conveyed, and that as a result the State Land Commissioner had conducted a public sale of those lands. Mrs. Phillips successfully filed an action against the Land Commissioner and purchaser to invalidate that sale.

Following a demand that Mr. Neil reimburse Mrs. Phillips for the delinquent taxes, penalties, interest, court costs and attorney's fees incurred in her action against the Land Commissioner, Mr. Neil paid Mrs. Phillips \$750, which was the amount of past-due taxes

he owed. After filing this action against Mr. Neil, Mrs. Phillips filed a motion for summary judgment, wherein she prayed for attorney's fees and costs incurred in defending her title to the property, as well as taxes, penalties, and interest totaling \$1372.30 to redeem the property. Mr. Neil also filed a motion for summary judgment, asserting that he had paid all delinquent taxes that he owed to Mrs. Phillips and that she was entitled to no further damages.

The trial court entered an order granting Mrs. Phillips's motion for summary judgment and denying Mr. Neil's motion. In the order, the trial court awarded Mrs. Phillips a judgment against Mr. Neil for \$6532.80, plus interest and attorney's fees. The amount awarded included attorney's fees and costs incurred by Mrs. Phillips in bringing the suit to invalidate the tax sale, as well as the \$1372.30 she paid to redeem the property, less the \$750 that Mr. Neil had paid Mrs. Phillips voluntarily.

Mr. Neil now appeals from the trial court's order granting Mrs. Phillips's motion for summary judgment. On appeal, he concedes that he is responsible for the \$1372.30 paid by Mrs. Phillips to obtain a release of the tax liens, \$750 of which he has already paid her. However, Mr. Neil contends that the judgment should be reversed to the extent Mrs. Phillips was awarded damages incurred in her litigation to set aside the tax sale, arguing that those damages were not foreseeable and are thus not recoverable. We affirm.

Summary judgment is no longer viewed as a drastic remedy; rather it is viewed simply as one of the tools in a circuit court's efficiency arsenal. *Marlar v. Daniel*, 368 Ark. 505, 247

S.W.3d 473 (2007). It should be granted only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Smith v. Rogers Group, Inc.*, 348 Ark. 241, 72 S.W.3d 450 (2002). All proof must be viewed in the light most favorable to the nonmoving party, and any doubts must be resolved against the moving party. *Id.* Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.*

The proof submitted to the trial court by the parties included a “notice of delinquent real estate taxes” sent from the State Land Commissioner to Mr. Neil on October 8, 2003. In that notice, Mr. Neil was notified that he was delinquent in real estate taxes on the subject property, and that if he failed to pay the delinquent taxes and fees the property would be sold at public auction on July 12, 2005. The notice also provided, “If you have sold this property, please refer this information to the new owner.” Notwithstanding receipt of the notice, Mr. Neil neither paid the delinquent taxes nor informed Mrs. Phillips about the delinquency and impending sale.

As warned, the Land Commissioner sold the property at public auction on July 12, 2005. The buyer was Waggoner & Company, and on August 15, 2005, it was issued a limited warranty deed for forfeited property sold.

Subsequent to the tax sale, Mrs. Phillips brought an action against the Land Commissioner and Waggoner & Company to set aside the sale. Mrs. Phillips sent a letter to

Mr. Neil advising him of the action, and further advising that she intended to sue him for her costs in clearing title to the land. In that action, Mrs. Phillips was granted summary judgment because (1) she had been denied due process of law by the Land Commissioner giving insufficient notice of his intent to sell her property, and (2) the limited warranty deed issued to Waggoner & Company contained a defective legal description and was void as a matter of law. The trial court voided the tax sale and ruled that it did not affect Mrs. Phillips's ownership of the property. Upon payment of \$1372.30 for the unpaid taxes and associated interest and fees, the Land Commissioner issued Mrs. Phillips a redemption deed to the property. In an affidavit accompanying Mrs. Phillips's motion for summary judgment in the instant matter, Mrs. Phillips stated that she incurred \$5551.50 in attorney's fees and \$359.90 in costs defending her title to the property previously conveyed to her by Mr. Neil.

In this appeal, Mr. Neil argues that the trial court erred in awarding Mrs. Phillips damages for her attorney's fees and costs incurred in litigation to set aside the tax sale. Mr. Neil acknowledges that he had a duty, pursuant to his warranty deed, to pass the property free of encumbrances and that this duty was breached by the attachment of a tax lien to the property prior to his executing the warranty deed. However, Mr. Neil contends that his damages should be limited to the \$1372.30 paid by Mrs. Phillips in satisfaction of the tax lien, as these were the only foreseeable damages at the time he signed the warranty deed.

A warranty deed is considered a contract between a grantor and his grantee who has accepted it. *Murchie v. Hinton*, 41 Ark. App. 84, 848 S.W.2d 436 (1993). In making his

argument, Mr. Neil relies on the Restatement (Second) of Contracts § 351 (1979), which provides in pertinent part:

Unforeseeability and Related Limitations on Damages

- (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
- (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
 - (a) in the ordinary course of events, or
 - (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

Mr. Neil also cites *Pfeifer v. City of Little Rock*, 346 Ark. 449, 57 S.W.3d 714 (2001), for the proposition that, in the ordinary course of events, public officials can be presumed to act lawfully.

The thrust of Mr. Neil's argument is that, at the time he signed the warranty deed, it was not foreseeable that State Land Commissioner would conduct an illegal and improper tax sale resulting in costs of litigation to Mrs. Phillips to reclaim her property. Mr. Neil notes that the tax sale was ultimately set aside on the basis that the Land Commissioner failed to give Mrs. Phillips adequate notice of the sale. Mr. Neil submits that this violation of due process did not flow from his breach of warranty in the ordinary course of events, and asserts that had the Land Commissioner acted properly, Mrs. Phillips would not have faced the expense of challenging the improper acts in court. As such, Mr. Neil contends that the summary judgment order should be reversed to the extent it awarded Mrs. Phillips damages related to her litigation to set aside the tax sale.

We hold, on the undisputed facts, that the extent of damages awarded by the trial court was correct as a matter of law. The warranty deed executed by Mr. Neil covenants that the grantor “will forever warrant *and defend title* to these lands against all claims whatever.” (emphasis ours). In this case the warranty was immediately breached upon delivery on March 6, 2003, because the property was encumbered with tax liens. Later, on October 8, 2003, the Land Commissioner expressly notified Mr. Neil of his tax delinquency in writing, advising that if the taxes and costs were not paid by July 12, 2005, the property would be sold at public auction. Moreover, the Land Commissioner asked Mr. Neil to refer the information in the notice to the new owner in the event the property had been sold.

The notice of impending sale from the Land Commissioner made it abundantly clear that Mrs. Phillips’s title to the property was in peril, and at that point it was Mr. Neil’s obligation to defend her title as contracted in the warranty deed. This could have been accomplished by paying the tax delinquency and fees, or by at least notifying Mrs. Phillips of the proceedings as requested by the Land Commissioner. In either case, the tax sale could have been avoided, as would the costs of any future litigation.

Given Mr. Neil’s tax delinquency when he executed the warranty deed, it was not unforeseeable that Mrs. Phillips might incur damages resulting from the delinquency to clear her title. Furthermore, Mr. Neil declined to take simple measures to prevent such damages, despite a contractual obligation to do so. Under such circumstances, we affirm the full extent of damages awarded by the summary judgment granted to Mrs. Phillips.

Cite as 2009 Ark. App. 827

Affirmed.

VAUGHT, C.J., and HART, J., agree.