

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

CASE NO. 000-00-0000

JOHN DOE,

JUDGE

Plaintiff,

vs.

CMI, LLC, et al.,

Defendants.

DEFENDANT WILLIAM SMITH'S MOTION TO DISMISS COMPLAINT

Defendant WILLIAM C. SMITH (hereinafter sometimes referred to as "Defendant SMITH"), by and through undersigned counsel, now files this Motion to Dismiss the Complaint filed by Plaintiff JOHN DOE (hereinafter "Plaintiff") in the above-captioned case. **Ohio R. Civ. P. 12(b)(6)**. For the reasons set forth below, Defendant SMITH contends that Plaintiff's claims against Defendant SMITH should be dismissed with prejudice.

1. On December 21, 2009, Plaintiff filed a two-count complaint against Defendant SMITH and Defendant CMI, LLC. Count I of Plaintiff's Complaint alleges that the parties entered into a real estate purchase agreement whereby Defendants had agreed to purchase twelve (12) designated lots from Plaintiff for an agreed-upon per-lot price, and that Defendants breached said agreement by failing to purchase four (4) of the designated lots. Count II of

Plaintiff's Complaint alleges that the parties entered into a separate real estate purchase agreement whereby the Defendants purchased a designated lot from Plaintiff for an agreed-upon price to be paid after Defendants constructed/sold a residence upon said lot, and that, following Defendants' construction/sale of said residence, Defendants breached said agreement by failing to pay Plaintiff the agreed-upon purchase price.

2. Defendant SMITH now files this Motion to Dismiss on the basis that the two (2) real estate purchase agreements attached to Plaintiff's Complaint (hereinafter "subject agreements") conclusively establish that Defendant SMITH executed said agreements in his representative capacity on behalf of a disclosed principal, and thus has no personal liability as a matter of law.

LAW AND ARGUMENT

3. In determining whether a complaint fails to state a cause of action pursuant to Rule 12(B)(6), the reviewing court's scrutiny is limited to the four corners of the complaint. **Loveland Edn. Assn. v. Loveland City School Dist. Bd. Of Edn. (1979), 58 Ohio St.2d 31, 32.** Because "[a] copy of any written instrument attached to a pleading is a part of the pleading for all purposes[,]" **Ohio R. Civ. P. 10(C)**, the subject agreements are considered part of the complaint for purposes of determining a Rule 12(B)(6) motion. **State ex rel Crabtree v. Franklin Cty. (1997), 77 Ohio St.3d 247, 248**

n.1. In this regard, where a claim is founded on a written instrument and a copy thereof is attached to the complaint, the action is subject to dismissal where “the complaint and the written instrument on their face show to a certainty some insuperable bar to relief as a matter of law.” **National Check Bureau (2006), 9th Dist. No. 06CA008882, 2006 WL 3702638, *4; Hamilton-Parker Co. v. Dillon Homes, Inc. (1997), 10th Dist. No. 96APG08-1023, 1997 WL 128574, *2.**

4. It is well-settled Ohio law that an authorized agent who contracts with a third party on behalf of a disclosed principal is not personally liable on the contract. **Perrysburg Twp. v. Rossford (2002), 149 Ohio App.3d 645, 652; Grimm v. USLife Credit Life Ins. Co., 3rd Dist. No. 2-98-35, 1999 WL 378376, *4; Atlas Energy Group v. R.A. Hatfield & Son Drilling Co., Inc., 9th Dist. No. 2726, 1993 WL 27383, *2; Thompson v. New York Life Ins. Co., 2nd Dist. No. 11416, 1989 WL 148033, *6.** In such cases, the contract is entirely the principal’s contract, and the agent incurs no liability. **Perrysburg Twp. v. Rossford, supra, 149 Ohio App.3d at 652; Grimm v. USLife Credit Life Ins. Co., supra, 1999 WL 378376, *4.**

5. In this case, the text of the subject agreements conclusively and unambiguously establish that an authorized agent (William C. Smith, President) contracted with a third party (John Doe) on behalf of a disclosed principal (CMI, LLC). In this regard,

Plaintiff's Exhibit "A", entitled "Promissory Note", contains the following signature line configuration for the sole signatory:

CMI, LLC
By: [William C. Smith]
William C. Smith, President

Likewise, Plaintiff's Exhibit "B", entitled "[t]his agreement made between CMI, LLC and John Doe", contains the following signature line configuration for the purchaser:

[William C. Smith Pres.] [9/28/04]
CMI, LLC - Purchaser Date

6. Because the text of the subject agreements conclusively and unambiguously establish that an authorized agent (William C. Smith, President) contracted with a third party (John Doe) on behalf of a disclosed principal (CMI, LLC), Defendant SMITH submits that he has no personal liability as a matter of law, **Perrysburg Twp. v. Rossford, supra, 149 Ohio App.3d at 625; Grimm v. USLife Credit Life Ins. Co., supra, 1999 WL 378376, *4; Atlas Energy Group v. R.A. Hatfield & Son Drilling Co., Inc., supra, 1993 WL 27383, *2; Thompson v. New York Life Ins. Co., supra, 1989 WL 148033, *6,** and thus Plaintiff's claims against Defendant SMITH are subject to

dismissal because "the complaint and the written instrument[s] on their face show to a certainty some insuperable bar to relief as a matter of law." **National Check Bureau, supra, 2006 WL 3702638, *4; Hamilton-Parker Co. v. Dillon Homes, Inc. (1997), supra, 1997 WL 128574, *2. Cf. Gross v. Fizet, 7th Dist. No. 98-CA-68, 1999 WL 225417, *3** ("[t]o the extent appellee signed each of the first five notes in his representative capacity, (i.e., as president of the corporation), he cannot be held personally liable on that basis").

CONCLUSION

For the above-mentioned reasons, Defendant SMITH contends Plaintiff's claims against Defendant SMITH should be dismissed with prejudice.

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Counsel for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss has been furnished by U.S. Mail this _____ day of February, 2010, to:

MICHAEL SMITH
Counsel for Defendants