

Case Summary and Issues

Elmer and Sharon Willhite appeal the trial court's grant of summary judgment in favor of MainSource Bank ("MainSource") in this action for mortgage foreclosure. On appeal, the Willhites raise three issues, which we consolidate and restate as: 1) whether the trial court applied the proper standard of review; and 2) whether the trial court erred when it determined that no genuine issues of material fact exist with respect to the Willhites' fraud claims. Concluding that the trial court applied the proper standard, no genuine issues of material fact exist, and MainSource is entitled to judgment as a matter of law, we affirm.

Facts and Procedural History

The Willhites owned a large tract of farm land. Over time, they divided the farm land into smaller plots, selling them individually. The Willhites also acquired two residential properties¹ located at 23050 Mulebarn Road and 807 West Second Street in Sheridan, Indiana. Seeking investment properties, the Willhites purchased a six-unit apartment building located at Harmony Drive in Connerville, Indiana, in the spring of 1998. Mike Morgan, a real estate agent, assisted the Willhites with the purchase of the Harmony apartments. The Willhites obtained financing to purchase the Harmony apartments through Peoples Trust Company.² The Willhites engaged in several other real estate transactions including purchases, sales, charitable transfers, and Section 1031 exchanges.³ On occasion,

¹ For the sake of clarity and brevity, the various properties at issue in this appeal will be referred to by the name of the street on which they are located.

² The actual lending institution involved in the events in this appeal was Peoples Trust Company. MainSource Bank, the party to this appeal, is the successor-in-interest to Peoples Trust Company.

³ A section 1031 exchange is an exchange of certain types of investment or business property intended

the Willhites had previously utilized accounting and legal professionals to assist them with real estate transactions and Peoples Trust to assist them with financing.

Later in 1998, Morgan approached the Willhites about purchasing three additional six-unit apartment buildings located at 3357, 3385, and 3417 Serenity Parkway in Connersville, Indiana. On January 26, 1999, the Willhites executed a purchase agreement to purchase the Serenity apartments for \$625,000. The Willhites then contacted Dennis King at Peoples Trust to arrange financing for a total of \$627,000. On March 15, 1999, Morgan sent a letter to King that included cash flow projections for the Serenity apartments. The letter estimated an annual cash flow of \$32,977 after accounting for mortgage loan payments assuming a vacancy factor of 2.5%. The Serenity apartments were appraised at a value of \$585,000.⁴ Because of this, Peoples Trust required additional collateral from the Willhites to secure the loan of \$627,000. Prior to authorizing the loan, King determined the potential profitability of the Serenity apartments based on the cash flow projections submitted by Morgan. King did not review any profit/loss statements for the Serenity apartments.

The loan committee at Peoples Trust approved the loan, and, on May 7, 1999, the Willhites executed a promissory note and security agreement to Peoples Trust in the amount of \$627,000 secured by mortgages on the Harmony apartments, the Serenity apartments, the Mulebarn residence, and the Second Street residence. Contemporaneously, the Willhites executed two mortgages, one mortgaging the Mulebarn and Second Street residences and one

to avoid a capital gain or loss. See 26 U.S.C. § 1031.

⁴ The actual appraisal document was not included in the record on appeal, however both parties state the value of the appraisal as \$585,000 in their statement of facts supported by the testimony of King.

mortgaging the Harmony and Serenity apartments. The Willhites also entered into an agreement with Morgan's real estate company to manage all of the apartments.

Unfortunately, the apartments did not produce enough income to cover the mortgage payments, and the Willhites defaulted on the loan. On September 2, 2003, MainSource, as successor-in-interest to Peoples Trust, filed a foreclosure action. The Willhites, acting pro se, filed a motion to dismiss for failure to state a claim, which the trial court denied, and subsequently filed their answer. On October 31, 2003, MainSource filed a motion for summary judgment, which the trial court initially granted on January 29, 2004. However, the trial court vacated its prior grant of summary judgment and ordered the parties to mediation on February 2, 2004.

After an unsuccessful first attempt at mediation, the Willhites retained counsel and, with leave of the trial court, filed their amended answer, affirmative defenses, counterclaim against MainSource, and third-party complaint against Morgan⁵ on April 25, 2006. On February 7, 2007, the trial court again ordered the parties to mediation. After a second unsuccessful attempt at mediation, MainSource filed a second motion for summary judgment on August 27, 2007. After a hearing on the motion, the trial court entered a written judgment in favor of MainSource on January 29, 2008. The Willhites filed a motion to correct error on February 22, 2008, which was deemed denied on April 7, 2008, and they now appeal.

⁵ The third-party complaint against Morgan was not addressed in the trial court's order granting summary judgment, nor is it at issue in this appeal.

Discussion and Decision

I. Standard of Review

We review of a motion for summary judgment using the same standard as the trial court – whether the designated evidentiary matter shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ind. Trial Rule 56(C)*; Kreighbaum v. First Nat'l Bank & Trust, 776 N.E.2d 413, 418 (Ind. Ct. App. 2002). In addition:

All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. The review of a summary judgment motion is limited to those materials designated to the trial court. We must carefully review decisions on summary judgment motions to ensure that the parties were not improperly denied their day in court.

Kreighbaum, 776 N.E.2d at 418 (citing Tom-Wat, Inc. v. Fink, 741 N.E.2d 343, 346 (Ind. 2001)).

For purposes of summary judgment, a fact is material if it bears on the ultimate resolution of relevant issues. *Id.* at 419. The burden to demonstrate the absence of a genuine issue of material fact falls upon the party moving for summary judgment. Abbott v. Bates, 670 N.E.2d 916, 921 (Ind. Ct. App. 1996). “Once the movant has made a prima facie showing that there is no genuine issue of material fact, the burden falls upon the non-moving party to identify a factual dispute [that] would preclude summary judgment.” *Id.*

However, a defendant has the burden of proving the existence of its affirmative defenses in a summary judgment proceeding. *Id.* at 922. “In order to meet this burden, a defendant must show that a genuine issue of material fact exists as to each element of the

asserted affirmative defense.” Id. (emphasis in original).

II. Trial Court’s Use of Proper Summary Judgment Standard

The Willhites first argue that the trial court used an incorrect summary judgment standard. Because the trial court did not include any citation to legal authority in its written judgment, we are unable to determine whether it used a correct or incorrect summary judgment standard.⁶ However, this is of no consequence, because on appeal, we review the grant or denial of summary judgment using the same standard as the trial court. See Kreighbaum, 776 N.E.2d at 418. Therefore, our review is unaffected by any error the trial court may have committed in using an incorrect summary judgment standard.

The Willhites argue the trial court erred when it found that they had failed to designate any evidence establishing an issue of material fact supportive of all the essential elements of their affirmative defenses because “the burden of proof is on the proponent of the Motion for Summary [sic], not the opponents.” Appellant’s Brief at 7. On this point, however, the trial court clearly did use a correct standard. The Willhites bear the burden of asserting their affirmative defenses in a summary judgment proceeding and must show that a genuine issue of material fact exists as to each element of the asserted affirmative defense. Abbott, 670 N.E.2d at 922.

⁶ The trial court is not required to enter specific findings of fact or conclusions of law. Bernstein v. Glavin, 725 N.E.2d 455, 458 (Ind. Ct. App. 2000). In addition, while such findings and conclusions offer valuable insight into the rationale for the trial court’s judgment and facilitate our review, we are not limited to reviewing the trial court’s reasons for granting or denying summary judgment. Id.

III. Fraud Claims

The Willhites do not dispute that they signed the promissory note and the mortgages or that they subsequently defaulted on them by failing to make the required payments. Instead, they argue that Peoples Trust fraudulently induced them to sign the instruments and committed constructive fraud by misrepresenting the value and profitability of the apartments. These two arguments comprise the gist of both the Willhites' affirmative defenses⁷ and counter-claims.

A. Fraud in the Inducement

The Willhites argue that King fraudulently induced them to sign the promissory note and mortgages by misrepresenting the past and potential profitability of the Serenity apartments. Fraudulent inducement occurs when a party, through fraudulent misrepresentations, induces another to enter into a contract. Lighting Litho, Inc. v. Danka Indus., Inc., 776 N.E.2d 1238, 1241 (Ind. Ct. App. 2002), trans. denied. One who knowingly misstates the contents of a writing or purposely misstates facts which would cause the signing of a writing commits fraud. Ruff v. Charter Behavioral Health Sys. of Nw. Ind., Inc., 699 N.E.2d 1171, 1174 (Ind. Ct. App. 1998) (“[I]f one knowingly misrepresents the contents of a writing or if the fact is established that the signee was lulled by fraud and deceit into

⁷ The Willhites also included as affirmative defenses that the note and mortgages were executed, filed, and processed in contravention of both state and federal law and a lack of consideration for the inclusion of the Mulebarn and Second Street residences. However, the Willhites did not designate any evidence demonstrating a genuine issue of material fact with regard to these issues in opposition to summary judgment. A defendant, who raises an affirmative defense in its pleadings, but subsequently fails to address the issue in opposition to a summary judgment motion, waives the affirmative defense. See Abbott, 670 N.E.2d at 920 n.1. Therefore, the Willhites have waived these affirmative defenses.

omitting to read the document for himself[,], a charge of fraud is maintainable” (quoting Farm Bureau Mut. Ins. Co. v. Seal, 134 Ind. App. 269, 281, 179 N.E.2d 760, 765 (1962))). “Fraud in the inducement of a contract is a basis for its rescission.” A.G. Edwards & Sons, Inc. v. Hilligoss, 597 N.E.2d 1, 3 (Ind. Ct. App. 1991).

The Willhites point to three allegedly false statements made by King upon which they relied in signing the promissory note and mortgages: 1) “that there had been a good profit margin in the previous years of the apartments [sic] building,” appellant’s brief at 12; 2) “that [King] had researched the property and the loan, and that it looked like a good deal, and that Willhite ‘should go with it,’” id.; and 3) “that even if the apartment building were 70-75 percent vacant, [Willhite] would still be able to pay the loan back,” id. However, the Willhites did not consult with King until after they had signed an agreement to purchase the Serenity apartments. The Willhites consulted King regarding arranging financing for the purchase they had already agreed to make. Therefore, King’s statements, even if they were false, could not have induced the Willhites to agree to purchase the Serenity apartments.

In order to fraudulently induce the Willhites to sign the promissory note and the mortgages, King needed to misstate the contents of those writings or facts specifically regarding those writings. Cf. Payne v. Mundaca Inv. Corp., 562 N.E.2d 51, 55 (Ind. Ct. App. 1990) (genuine issue of material fact existed where debtor signed a blank sheet of paper that was subsequently completed containing terms different than those promised by lender). The Willhites have failed to designate any evidence demonstrating that King misstated terms of the promissory note and mortgages or attempted to prevent them from understanding those

terms prior to signing. King's statements might have been relevant to a fraudulent inducement claim regarding the purchase agreement had they been made prior to signing that agreement, but such is not the case here. Therefore, the Willhites have failed to demonstrate the existence of a genuine issue of material fact regarding their claim of fraudulent inducement. See Otto v. Park Garden Assocs., 612 N.E.2d 135, 139-40 (Ind. Ct. App. 1993) (holding, where mortgagor sought to rescind mortgage based on fraud in the inducement claiming that mortgagee had misrepresented the condition of the property sought to be purchased, that while fraud may have induced signing of the purchase agreement, mortgagor presented no cogent argument connecting the alleged fraud to signing of the mortgage.), trans. denied.

B. Constructive Fraud

Count II of the Willhites' amended counterclaim alleges a claim for constructive fraud. The Willhites did not specifically raise the existence of a genuine issue of material fact regarding their constructive fraud claim in their response to the motion for summary judgment or as an issue in this appeal; however, the language of the argument section of their brief is similar to that in Count II of their amended counterclaim. Generally, a party waives appellate review of an issue or argument not raised before the trial court. Dedelow v. Pucalik, 801 N.E.2d 178, 184 (Ind. Ct. App. 2003). Waiver notwithstanding, however, the Willhites have not demonstrated that a genuine issue of material fact exists regarding their constructive fraud claim.

Constructive fraud consists of:

1) a duty existing by virtue of the relationship between the parties; 2) representations or omissions made in violation of that duty; 3) reliance thereon by the complainant; 4) injury to the complainant as a proximate result thereof; and 5) the gaining of an advantage by the party to be charged at the expense of the complainant.

Paulson v. Centier Bank, 704 N.E.2d 482, 491 (Ind. Ct. App. 1998). The Willhites argue that they had a special relationship of trust and confidence with King based on his assistance with obtaining financing for their prior real estate acquisitions, and that based on this relationship, they relied upon misrepresentations made by King.

Generally, “the mere existence of a relationship between parties of bank and customer or depositor does not create a special relationship of trust and confidence.” Kreighbaum, 776 N.E.2d at 419 (quoting Huntington Mortgage Co. v. DeBrotta, 703 N.E.2d 160, 167 (Ind. Ct. App. 1998)). “Unless special circumstances exist, a lender does not owe a fiduciary duty to a borrower. However, where a relationship of trust and confidence exists between parties, equity will act to protect it and to prevent the party owing the duty from profiting by its breach.” Id. (citations and quotation omitted). A confidential relationship exists where one party reposes confidence in another with resulting superiority and influence exercised by the other. Id. The party reposing the confidence must be in a position of inequality, dependence, weakness, or lack of knowledge, and the dominant party must have abused the confidence by improperly influencing the weaker so as to obtain an unconscionable advantage. Id.

The relationship between the Willhites and King is one of borrower and lender. Hence, generally no fiduciary duty or relationship of trust and confidence exists. However,

the Willhites argue that special circumstances created such a relationship in this case because they had “developed a business relationship” with King and he had given them “specific advice on more than one occasion, which [they] followed.” Appellant’s Br. at 11. It is clear from the designated evidence that the Willhites were not in a position of weakness or lack of knowledge. They had previously engaged in multiple real estate deals including buying and selling real estate, entering into secured loans, charitable transfers of property and section 1031 exchanges. In the past, the Willhites had consulted legal and accounting professionals to assist them with their transactions. Most importantly, the Willhites already owned an apartment building in the same area as the Serenity apartments and had financed the building through Peoples Trust. See Kruse v. Nat’l Bank of Indianapolis, 815 N.E.2d 137, 148 (Ind. Ct. App. 2004) (finding no genuine issue of material fact as to whether lender breached an existing fiduciary duty under similar circumstances).

In addition, even if a confidential relationship existed, the Willhites have not designated any evidence that Peoples Trust gained any unconscionable advantage by abusing the relationship. Peoples Trust loaned a substantial amount of money to the Willhites pursuant to the promissory note and mortgages in return for the Willhites’ promise to repay the loan. However, the Willhites defaulted on the loan and have made no payments since this litigation ensued; hence at this point, Peoples Trust has lost money. Therefore, the Willhites have not demonstrated how Peoples Trust received an unconscionable advantage. See Paulson, 704 N.E.2d at 491.

Finally, as discussed above, the Willhites have failed to designate evidence that they

relied on the misrepresentations by King in deciding to purchase the Serenity apartments because they had already signed the purchase agreement with Morgan prior to discussing the matter with King. See Kreighbaum, 776 N.E.2d at 420-21 (finding a genuine issue of material fact where borrower consulted with and received advice from lender prior to signing purchase agreement). Therefore, the Willhites have failed to demonstrate any genuine issue of material fact regarding their constructive fraud claim.

Conclusion

Without deciding whether the trial court used an incorrect summary judgment standard, we have reviewed the designated evidence according to the proper standard. No genuine issue of material fact exists regarding MainSource's foreclosure action or the Willhites' affirmative defenses and counterclaims of fraud in the inducement and constructive fraud. Therefore, MainSource is entitled to judgment as a matter of law and the trial court did not err in granting summary judgment in its favor.

Affirmed.

CRONE, J., and BROWN, J., concur.