

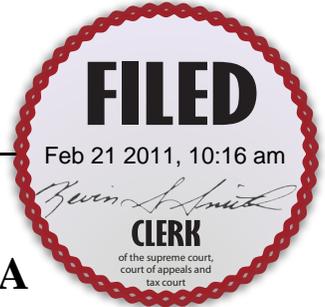
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DUANE A. WALTERS, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
HOME BANK, S.B., )  
 )  
Appellee-Plaintiff, )  
 )  
and )  
 )  
RALPH V. WISE and FELICIA J. WISE,<sup>1</sup> )  
 )  
Appellees-Defendants. )

No. 55A01-1005-MF-193

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APPEAL FROM THE MORGAN CIRCUIT COURT  
The Honorable Matthew G. Hanson, Judge  
Cause No. 55C01-0908-MF-728

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**February 21, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

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<sup>1</sup> Ralph V. and Felicia J. Wise were named defendants in this action but have not pursued an appeal of the trial court's order and have not filed a brief. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

Duane A. Walters (“Walters”) appeals from the trial court’s order granting partial summary judgment and decree of foreclosure in favor of Home Bank, S.B. (“Home Bank”). The following issue is presented in this appeal: whether the trial court erred by granting partial summary judgment in favor of Home Bank where there is a genuine issue of material fact concerning the legal description of the property subject to Home Bank’s mortgage.

We affirm in part, reverse in part, and remand for further proceedings.

### **FACTS AND PROCEDURAL HISTORY**

In January 2007, Walters owned 33.896 acres and a 16-foot passway in Morgan County, Indiana. Walters and Alvin Lee Barnes III (“Barnes”) executed a note borrowing the sum of \$275,825.46 from Home Bank. Walters executed a mortgage, which attached to the real property, in favor of Home Bank to secure the unpaid balance of the note in its principal sum. Home Bank recorded the mortgage.

Walters subdivided the real property into eighteen lots known as Walters First Subdivision. Walters conveyed Lot 13 to Ralph V. and Felicia J. Wise (collectively, “the Wises”). Walters also conveyed Lots 7 and 14 to third parties, and Home Bank provided a partial release of its mortgage as to those lots. Walters and Barnes failed to make payments as required on the note and mortgage, and Home Bank filed a complaint on the note and to foreclose on the mortgage. Both the note and the mortgage contained acceleration clauses in the event of default. The last payment made by Barnes and Walters was on March 13, 2009, which was for the payment due on December 1, 2008.

Home Bank filed a motion for partial summary judgment, which was granted by the trial court. The trial court entered an *in personam* judgment against Walters in the sum of \$253,915.12, plus post-judgment interest at the statutory rate, and an *in rem* judgment against all of the defendants<sup>2</sup> except for Barnes<sup>3</sup> for the same amount plus post-judgment interest at the statutory rate and costs. The trial court also entered a decree of foreclosure. Walters now appeals.

### **DISCUSSION AND DECISION**

Our standard of review for summary judgment is the same as is used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Bd. of Sch. Comm'rs of City of Indianapolis v. Pettigrew*, 851 N.E.2d 326, 330 (Ind. Ct. App. 2006). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. *Pettigrew*, 851 N.E.2d at 330. Review of a summary judgment motion is limited to those materials designated to the trial court. *Id.*

The designated materials in this case reveal that attached to the complaint was the legal description of the property subject to foreclosure including the entire 33.896 acres and 16-foot passway in Morgan County, Indiana. The affidavit of Ralph Wise (“Ralph”) averred that he and his wife purchased Lot 13 in Walters First Subdivision from Walters and received

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<sup>2</sup> Newcomer Lumber & Supply Co. and the Wises were the other named defendants.

<sup>3</sup> Barnes had filed for Chapter 7 Bankruptcy protection by the time of the summary judgment hearing and was not an owner of the real property.

a warranty deed on March 6, 2007 from Walters. *Appellant's App.* at 71, 79. Ralph further stated that he paid \$40,000.00 for the lot and accepted title free and clear of any liens, mortgages, or other indebtedness owed to third parties. *Id.* Ralph also stated that it was his belief that Home Bank did not have a mortgage on the real estate.<sup>4</sup> *Id.*

At the hearing on the motion for summary judgment, the parties and the trial court acknowledged that the complaint was one of the designated materials and that the legal description of the property, which was attached to the complaint, included all of the lots in Walters First Subdivision. Home Bank acknowledged that it had released its mortgage as to Lots 7 and 14, but argued that it was required to attach to its complaint the legal description of the originally mortgaged property *i.e.*, all of Walters First Subdivision. Thus, the legal description contained in the designated evidence did not match the property actually subject to foreclosure.

The following discussion ensued during the summary judgment hearing:

THE COURT: Real quickly, wouldn't we all agree that if there was no designation as you guys are stating and the Home Bank simply redesignates exactly what you're stating, that there would be no issue for material, or there'd be no issue for trial and it could be taken care of by the next step of summary judgment again?

MR. FOLEY: Judge, if . . .

THE COURT: If they designated the evidence that you're calling for, sir, and you're saying that they, and I'm again going to ask for rebuttal to see if he thinks he already did submit that, but this still is going to go away by summary judgment if it's just submitted in that manner. Is that not your argument Mr. Huddleston?

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<sup>4</sup> The Wises have filed a cross-claim against Walters alleging fraud and breach of the warranty to title. *Appellant's App.* at 9.

MR. HUDDLESTON: If, Judge, whatever evidence is designated after my clients, my client reviews that and has the correct description, then possibly, yes, that is correct.

THE COURT: I mean really there's no argument?

MR. HUDDLESTON: That's correct.

THE COURT: Okay.

MR. HUDDLESTON: But . . .

THE COURT: But obviously your argument still exists, Mr. Coffey, 'cause you have the sole issue of talking, what was promised or said between the two, so that doesn't really fix your issue but I just didn't know if that fixed your issue. Okay. Mr. Foley, rebuttal?

MR. FOLEY: Yes, Your Honor. I think the issue, one issue is one of materiality and we set forth the legal description that's contained on the mortgage which is what we have to do. We set forth in our complaint that it was replatted. We set forth in our complaint which two lots were provided a partial release. So it is a nonmaterial fact that, that the affidavit of Ms. O'Dell doesn't contain the meets [sic] and bounds description except lots 7 and 14 and I would pose the as well [sic] to the Walters, Mr. Walters, is there is no, it's a scrivener type of, you know, type of situation. Correcting of a legal description. And as I cited in my response, to the extent it exists, to the extent it exists, the test for determining the sufficiency of a legal description is whether the tract intended to be mortgaged can be located with certainty by the description. And you combine paragraph 10 of our complaint with the legal description that was attached to the mortgage recorded and set forth in the complaint, you get that 33.86 acres or 33.896 acres except lot 7 and 14. That fact won't change. They've offered no designated evidence to dispute those facts.

*Tr.* at 14-15.

While we commend the trial court for its attempt at judicial economy, we are constrained by our standard of review to find that the trial court erred by entering the decree

of foreclosure in this case.<sup>5</sup> Indiana Trial Rule 56(C) requires a designation to the trial court of “all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion.” The legal description contained in one of the designated materials, the affidavit of Kim O’Dell, the Assistant Vice President for Loan Servicing for Home Bank, reflected the property comprising the entire Walters First Subdivision, the property subject to the original mortgage. That was not a correct legal description of the property subject to foreclosure as two lots had been released by Home Bank.

Although all parties acknowledge the deficiency in the designated evidence pertaining to the legal description of the property subject to foreclosure, they fail to also recognize that the interests of others are affected by this deficiency. Title insurers, third-party purchasers, and future mortgagees must rely on the accuracy of the foreclosure judgment and the underlying process. The problem here could have been remedied by Home Bank at the trial court level by amending its designated materials. The decree of foreclosure entered by the trial court is not supported by the designated materials. Accordingly, we must reverse the judgment of foreclosure and remand the case for further proceedings, but affirm the partial summary judgment upon the note.

Affirmed in part, reversed and remanded in part.

CRONE, J., and BRADFORD, J., concur.

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<sup>5</sup> The entry of the *in personam* judgment against Walters is not an issue in this appeal.