

FLW, LLC, (FLW), Michael L. Fulkerson, (Fulkerson), and Fulkerson Enterprises, (the Construction Company), (collectively the Appellants), appeal the trial court's order granting David Wolpert's motion for a preliminary injunction ordering Fulkerson and the Construction Company to deposit a total of \$458,469.00 with the Clark County Clerk. We affirm.

The Appellants raise the following restated issues for our review:

- I. Whether the trial court erred in vacating an April 2008 order and entering a new order in May 2008; and
- II. Whether the trial court erred in granting Wolpert's motion for a preliminary injunction.

In 2005, Fulkerson and his associate, Dean Linden, approached Wolpert about investing in a real estate project to construct and sell a strip mall in Kentucky. Wolpert invested \$25,000.00 in the start-up of the Construction Company and received 25% of the Construction Company's shares. In January 2006, Fulkerson, Linden, and Wolpert formed FLW as an Indiana limited liability company. Five months later, the three men executed an operating agreement, which appointed Fulkerson as the manager of the company.

In April 2006, FLW obtained a construction loan to purchase the real estate and construct the strip mall. Wolpert was the sole personal guarantor of the loan. That same month, FLW entered into a contract with the Construction Company. Pursuant to the terms of the contract, the sum for the construction of the mall was \$2,021,974.00. While

the mall was being constructed, FLW approved 26 change orders totaling \$307,144.77, for an adjusted contract price of \$2,329,118.77.

In May 2007, FLW began to experience cash flow problems. FLW borrowed \$100,000.00 from Wolpert's wife and \$300,000.00 from Classic Cars, LLC, in a series of unsecured promissory notes. Classic Cars was owned by Wolpert; his wife; the mall's architect, David Duvall; Thomas Duddy, and Michael Corum. In order to obtain a portion of these additional funds, Wolpert executed two notes totaling \$312,658.72 that were secured by a second mortgage on his home.

Two months later, after these funds were exhausted FLW borrowed an additional \$200,000.00 from Corum. By September 2007, those funds were exhausted as well, and FLW borrowed an additional \$125,000.00 from Duddy. Both loans were obtained pursuant to FLW promissory notes.

In the fall of 2007, Fulkerson and Wolpert purchased Linden's entire membership in FLW, giving each one a one-half membership interest in the corporation. Fulkerson and Wolpert executed a new operating agreement for the corporation in November 2007. Later that year, Fulkerson and Linden purchased Wolpert's shares in the Construction Company.

FLW accepted a purchase offer for the mall in early 2008. Before the February 29, 2008, closing, Wolpert asked James Lynch, FLW's accountant, for an accounting of FLW's obligations to the mall as well as a projection of the profits from the impending sale. When the accountant failed to provide the accounting, Wolpert undertook his own

investigation of FLW's records. He learned that FLW had paid the Construction Company \$2,163,700.00, leaving a remaining balance of \$165,419.00. At closing, FLW paid an additional \$76,888 to four subcontractors, leaving a balance of \$88,531 on the contract.

FLW received \$1,293,070.82 from the closing of the sale. Wolpert proposed that he, Fulkerson, and Linden meet at FLW's office at 2:00 p.m. following the closing to pay the promissory note obligations on its unsecured loans and to consider the remaining obligations to the Construction Company. Wolpert estimated that FLW would need \$1,000,000.00 to pay the unsecured lenders and that approximately \$300,000.00 would remain for other obligations.

At 3:30 p.m., after Fulkerson and Lynch failed to appear at FLW's office, Wolpert went to the bank and obtained a countercheck for \$395,638.00 on FLW's checking account. Wolpert paid \$309,227.66 to fully release the two notes that were secured by the second mortgage on his home. Wolpert then returned to the FLW office where he found Fulkerson, Lynch, and Duddy. Fulkerson and Wolpert agreed to pay Duddy \$150,000.00, which Duddy accepted in full satisfaction of the FLW note obligations. They also agreed to pay Wolpert's wife in full satisfaction of the FLW note obligation. When Fulkerson mentioned making a payment towards the note obligation to Classic Cars, Wolpert disclosed that he had obtained a countercheck in full satisfaction of that obligation. Neither Fulkerson nor Lynch objected to the payment. When Wolpert mentioned paying off Corum, Fulkerson responded that he planned to ask Corum to

discount the remaining balance that FLW owed him because of the high interest rate he had demanded.

Fulkerson then left the office without mentioning additional plans for the disbursement of FLW funds. Given the disbursements made that afternoon, Wolpert believed that \$600,000.00 should have remained in the FLW account, approximately half of which would be needed to satisfy the notes to Corum if he did not agree to a discount. However, when Wolpert visited the bank on March 4, 2008, he learned that less than \$248,000.00 remained in the FLW account. He also learned that Corum had not been contacted or paid. Wolpert wrote a \$247,800.00 check on FLW's account and paid Corum that amount by cashier's check.

When he obtained an account activity report for the FLW account, Wolpert learned that on February 28 and 29, Fulkerson had written two checks to the Construction Company totaling \$420,000.00 and one \$127,000.00 check to himself. Although Wolpert was unable to reach Fulkerson, Lynch explained that the \$400,000.00 check to the Construction Company was necessary for the company to meet obligations that were not related to FLW, and that the \$127,000.00 check to Fulkerson represented a broker's fee on the sale of the mall.

The following day, Wolpert determined that a substantial portion of the \$400,000.00 check remained in the Construction Company's checking account. As an authorized signatory of the Construction Company's account, Wolpert wrote a check to

FLW for \$127,129.57, which he deposited in FLW's checking account. He then obtained a cashier's check payable to himself for \$127,000.00.

The checks that Fulkerson wrote to the Construction Company and to himself caused several checks written on the FLW account, including the \$130,000.00 payment to Duddy and a \$21,348.96 payment to the mall purchaser, to bounce. At the end of March, Wolpert paid Duddy \$150,000.00 from Wolpert's personal funds in order to purchase Duddy's insufficient funds checks and the unpaid promissory notes that Fulkerson and Wolpert had both personally guaranteed.

Also in March 2008, the Appellants filed a complaint and petition for a preliminary injunction against Wolpert. Specifically, the Appellants alleged that Wolpert had committed civil conversion and fraud when he wrote the checks for \$247,800.00 and \$127,000.00. The Appellants asked the court to enter a preliminary injunction ordering Wolpert to return the \$374,800.00 to the Appellants so that Fulkerson could pay creditors. On April 3, Wolpert filed an answer and counterclaim alleging that pursuant to the terms of the FLW operating agreement, Fulkerson breached his fiduciary duty to Wolpert when he wrote checks from the FLW account to the Construction Company in an amount that exceeded FLW's payment obligation by \$331,469.57. Wolpert also alleged that Fulkerson breached his fiduciary duty to Wolpert when he paid himself a \$127,000.00 broker's fee that was not authorized by the FLW operating agreement. Wolpert asked the trial court to issue a preliminary injunction ordering 1) the Construction Company to pay the Clerk of the Clark County Court the \$331,469.57

overpayment to FLW, and 2) Fulkerson to pay the Clerk the \$127,000.00 that he paid himself as a broker's fee. Upon such payments, Wolpert offered to pay the Clerk the \$127,000 that he paid himself as a surety. FLW creditors would then have the opportunity to file or pursue claims against the funds on hand with the Clerk. At the hearing on the motions for injunctions, Lynch admitted that Fulkerson's repayment plan was predicated on Wolpert, not FLW, paying the obligations that Wolpert personally guaranteed.

On April 25, 2008, the trial court issued the preliminary injunction the Appellants requested when it ordered Wolpert to return the \$374,800.00 to the Appellants so that Fulkerson could pay creditors. Wolpert, however, filed a twenty-page Motion to Reconsider challenging several of the trial court's findings of fact and conclusions thereon in the April 25 order. On May 14, 2008, following a hearing on the motion, the trial court issued an order finding that pursuant to the FLW operating agreement, Fulkerson had the authority to make cash distributions on FLW's behalf subject to the fiduciary duty he owed to fellow member Wolpert. The court concluded that Fulkerson's \$420,000.00 payment to the Construction Company was \$331,000.00 in excess of FLW's remaining obligation to that company and that the \$127,000.00 broker's fee was not contemplated by the agreement. According to the court, it was likely Wolpert would prevail on his breach of fiduciary duty claims at trial and that the Construction Company should pay these funds into the Clerk of the Court so that the funds would be available for legitimate FLW creditors. The court therefore ordered the Construction Company to

pay the Clerk of the Clark County Court \$331,469.57, and Fulkerson to pay the Clerk the \$127,000.¹ The Appellants appeal the May 14, 2008, order.

The Appellants first argue that the trial court erred in issuing the May 14 order. Specifically, they ask us to vacate the trial court's May 14 order and to reinstate the April 25 order. However, the law is well settled that the trial court has inherent power to vacate or modify a previous order so long as the case has not proceeded to final judgment and is still *in fieri*. *Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998). Once a trial court acquires jurisdiction, it retains jurisdiction until it enters a final judgment in the case. *Id.* Here, because the case had not proceeded to final judgment, the trial court had the power to vacate the April order and issue the May one. We find no error and therefore review the May 14 order.

Appellants also argue that the trial court erred in granting Wolpert's motion for a preliminary injunction. A preliminary injunction is a remedy that is generally used to preserve the status quo as it existed prior to a controversy pending a full determination on the merits of that controversy. *U.S. Land Services v. U.S. Surveyor*, 826 N.E.2d 49, 67 (Ind. Ct. App. 2005). In order to make out a successful case for a preliminary injunction, a plaintiff need only show a prima facie case on the merits. *Id.* at 62. The issuance of a

¹ In addition, the order specifically provides that if Construction Company does not have the \$331,469.00 to be paid into the Clerk of the Court, it shall file a notice advising the court that it does not have the funds. Under these circumstances, no deposit of funds is required and the Construction Company is not subject to a finding of contempt. The same provision applies for Fulkerson and payment of the \$127,000.00. If the Construction Company and Fulkerson make the deposits, Wolpert is required to make his \$127,000 deposit as well. If all deposits are made, such funds are to be held on deposit with the Clerk pending further order of the court on application by any party pursuing a claim thereon.

preliminary injunction is within the sound discretion of the trial court, and the scope of appellate review is limited to deciding whether there has been a clear abuse of discretion. When determining whether or not to grant a preliminary injunction, the trial court is required to make special findings of fact and state its conclusions thereon. *Id.*; Ind. Trial Rule 52(A). When findings and conclusions are made, the reviewing court must decide if the trial court's findings support the judgment. *Land Services*, 826 N.E.2d at 62. The trial court's judgment will be reversed only when clearly erroneous. *Id.* Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. *Id.* We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment. *Id.*

To obtain a preliminary injunction, the moving party has the burden of showing by a preponderance of the evidence that: 1) the movant's remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; 2) the movant has at least a reasonable likelihood of success at trial by establishing a prima facie case; 3) threatened injury to the movant outweighs the potential harm to the nonmoving party resulting from the granting of an injunction; and 4) the public interest would not be disserved. *Id.* The moving party also has the burden of showing by a preponderance of the evidence that the facts and circumstances entitle him to relief. *Id.* at 62-63.

Here, our review of the evidence reveals that the trial court simply issued an order to preserve the status quo pending a full determination on the merits of the parties' claims. In addition, the trial court found that Wolpert had a reasonable likelihood of

success at trial on his breach of fiduciary duty claims, that his remedies at law were inadequate, that the threatened injury to him outweighed the potential harm to Fulkerson and the Construction Company, and that the public interest would not be disserved. We find no abuse of the trial court's discretion.

Affirmed.

BAILEY, J., and ROBB, J., concur.