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IN THE
COURT OF APPEALS OF INDIANA

BURL E. GRAYSON and CAROLYN S. GRAYSON,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 54A04-1002-MF-114
	)	
UNION FEDERAL SAVINGS & LOAN ASSOCIATION OF CRAWFORDSVILLE, INDIANA, a Subsidiary of Union Community Bancorp,	)	
	)	
Appellee.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-0312-MF-520

June 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Burl and Carolyn Grayson ("the Graysons") appeal from a negative judgment upon their counterclaim against Union Federal Savings ("Union Federal") seeking damages for Union Federal's disposition of personal property as to which the Graysons were junior holders of a secured interest. We affirm.

Issue

The Graysons present five issues for review, which we consolidate and restate as a single issue: whether the trial court's judgment is contrary to law.[1]

Facts and Procedural History

In the first appeal involving these parties, a panel of this Court stated the relevant facts as follows:

> The Gregorys purchased a business, real estate, equipment and inventory from the Graysons for $500,000.00. Union Federal provided purchase money and took a first mortgage in the building and a security interest in the equipment and inventory. The Graysons held a security interest in the real estate and personal property, junior in interest only to Union Federal's purchase mortgage. When the Gregorys defaulted on the mortgage, Union Federal filed a complaint on December 8, 2003, to collect the debt against the Gregorys. The Graysons also were named as defendants in that action. Count I of the complaint made reference to the real estate involved. Count II of the complaint made reference to the secured interest in the equipment and inventory on the premises of the real estate.
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> The Gregorys and the Graysons failed to answer or appear in the matter. On March 8, 2004, Union Federal filed a motion for default judgment and an

[1] The Graysons articulate five purported issues, to which the numerous sections and subsections of the Argument portion of the brief do not correspond substantively or by numeric designation. Appellate Rule 46(A)(4) requires a statement of issues, which "shall concisely and particularly describe each issue presented for review." Additionally, the Graysons' Statement of Facts fails to state the facts "in accordance with the standard of review appropriate to the judgment or order being appealed" as required by Appellate Rule 46(A)(6)(b).

> affidavit in support of that motion. The affidavit made reference only to the Gregorys. A default judgment was entered in the amount of $339,155.00 plus statutory interest, and an order for foreclosure addressing only the real estate was entered on March 8, 2004. There was no disposition of the personal property at that time. The Sheriff's sale took place on May 6, 2004. Union Federal was the successful buyer of the property for $250,000.00, and received a Sheriff's Deed to the real estate at issue.
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> On June 22, 2005, Union Federal filed a motion to correct order nunc pro tunc with the trial court. In that motion, Union Federal sought the trial court's authority to sell the personal property and to apply the proceeds to the indebtedness. On that date, the trial court entered the order as requested by Union Federal, allowing the bank to sell the inventory and equipment, and to apply the proceeds toward the judgment against the Gregorys.
>
> On July 22, 2005, the Graysons filed their motion to correct error and to vacate order granting motion to correct order nunc pro tunc. The Graysons requested that the court vacate its June 22, 2005 order and for Union Federal to account for the personal property received at the Sheriff's sale.

Grayson v. Union Fed. Savs. & Loan Ass'n of Crawfordsville, 851 N.E.2d 1017, 1018-19 (Ind. Ct. App. 2006), trans. denied. On appeal from the deemed denial of the motion to correct error, this Court reviewed the record to find that, "[w]hile the complaint sought a default judgment regarding both the real and personal property, the original order only addressed the real property." Id. at 1021. The Court concluded that "the Graysons, as junior holders of a secured interest in the personal property, potentially could have been prejudiced" and "the trial court's nunc pro tunc order claiming to dispose of the personal property was made in error." Id. The matter was remanded to the trial court for a trial on the issue of the disposition of the personal property involved, and we observed that Union Federal could "either account for the personal property, or produce the personal property for disposition in a commercially reasonable sale." Id.

On May 27, 2009, a bench trial was conducted and evidence was heard that, within two months of the Sheriff's sale, Union Federal had sold the real estate and all its contents as a package to Ask?LLC for $275,000. The Graysons asserted that the package sale, which included the equipment and inventory for no specified additional value, was not commercially reasonable and deprived the Graysons of $128,500. Union Federal asserted that the equipment and inventory was worth at most $35,000. Union Federal further claimed that, as the holder of a senior and perfected security interest in the personal property, it was entitled to recover up to its deficiency of $95,875.11 and the Graysons thus failed to establish damages from the disposition of the personal property.

On August 17, 2009, the trial court entered its Findings of Fact, Conclusions of Law, and Judgment, concluding that Union Federal, in a commercially reasonable sale, had disposed of personal property "worth much less" than the "deficiency of more than $95,000" and accordingly, the Graysons, as junior holders of a secured interest, were not entitled to damages. (App. 17.) Finally, the trial court found that the Graysons had not perfected their security interest and were not secondary obligors entitled to notice of disposition of proceeds pursuant to Indiana Code Section 26-1-9.1-611(b)-(c). The Graysons filed a motion to correct error, which was deemed denied. They now appeal.

Discussion and Decision

I. Standard of Review

When, as here, the trial court has entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A), we apply a two-tiered standard of review: first, we

determine whether the evidence supports the findings and, second, whether the findings support the judgment. Briles v. Wausau Ins. Co., 858 N.E.2d 208, 212 (Ind. Ct. App. 2006). Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them, and the trial court's judgment is clearly erroneous when it is not supported by the findings of fact and the conclusions which rely upon those findings. Id. In determining whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. Id. We do not reweigh the evidence nor do we assess witness credibility. Id. Finally, we evaluate conclusions of law de novo. Id.

We define the clearly erroneous standard based upon whether the appellant is appealing a negative judgment or an adverse judgment. Gates v. Houston, 897 N.E.2d 532, 535 (Ind. Ct. App. 2008). The Graysons had the burden of proof upon their counterclaim, and thus they appeal from a negative judgment. See id. A party appealing a negative judgment must establish that the evidence is without conflict and leads to but one conclusion, which the trial court did not reach. Truck City of Gary, Inc. v. Schneider Nat'l Leasing, 814 N.E.2d 273, 278 (Ind. Ct. App. 2004). The appellant may attack the trial court's judgment only as contrary to law. Id. On appeal, we affirm the judgment unless all evidence leads to the conclusion that the trial court's findings are clearly erroneous and against the logic and effect of the facts. Id.

II. Analysis

The Graysons contend that the judgment should be reversed because: Union Federal

did not dispose of the personal property in a commercially reasonable sale, the trial court ignored the prior opinion of this Court, the trial court treated the personal property as if it had no separate value, the trial court should have awarded the Graysons statutory damages for conversion, and the trial court erroneously found the Graysons to be estopped from asserting a claim for damages.

Commercially Reasonable Sale. The Graysons admit that the Sheriff's sale resulted in only partial satisfaction of Union Federal's judgment against the Gregorys and a deficiency remained. However, the Graysons contend that the trial court erroneously "fail[ed] to rule that the Bank had forfeited or waived any right to credit from the value of the [personal] property or to any deficiency judgment by failing to dispose of the property in a commercially reasonable manner."[2] Appellant's Brief at 16.

Citing to Indiana Code Section 26-1-9.1-626, a provision of Indiana's Uniform Commercial Code relating to secured transactions, the Graysons assert that Union Federal bore the burden of proving that it disposed of the personal property in a commercially reasonable manner. The referenced statute provides in relevant part:

> (1) A secured party need not prove compliance with the provisions of IC 26-1-9.1-601 through IC 26-1-9.1-628 relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.
> (2) If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or

[2] Indiana Code Section 26-1-9.1-610(b) provides: "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms."

> acceptance was conducted in accordance with IC 26-1-9.1-601 through IC 26-1-9.1-628.

(emphasis added.) The Graysons are not debtors of Union Federal or secondary obligors; rather, their status was that of "junior holders of a secured interest in the personal property."[3] Grayson, 851 N.E.2d at 1021. Accordingly, the Graysons' reliance upon 26-1-9.1-626 is misplaced, as it does not confer upon them the right to place compliance under the UCC in issue.[4]

Nonetheless, the trial court addressed the issue of whether the sale was commercially reasonable. To the extent that the Graysons point to claimed indications that the sale was not commercially reasonable (relationship between buyer and seller, failure to list property with a realtor), they are asking this Court to reweigh the evidence presented on a factual issue. See Moore v. Wells Fargo Const., 907 N.E.2d 1038, 1041 (Ind. Ct. App. 2009) (recognizing that the determination of whether a sale was commercially reasonable presents a question of fact), trans. denied. We do not reweigh such evidence. Briles, 858 N.E.2d at 212.

The Graysons also complain that the trial court's determination of commercial reasonableness was partially premised upon an erroneous finding that "Union Federal had released the Graysons from any personal liability on the obligations of the Gregorys to the bank." (App. 14.) The evidence presented in this regard was that Union Federal had initially proposed that the Gregorys would assume the Graysons' loan and the Graysons would remain

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[3] The Graysons' counterclaim erroneously asserted that they were secondary obligors entitled to notice.

[4] We observe that, under the UCC, one who is not a debtor or secondary obligor may, in some circumstances, recover damages. Indiana Code Section 26-1-9.1-625, identified in the Graysons' counterclaim as a basis for recovery, provides for the potential award of damages to one who "was a debtor, was an obligor, or held a security interest in or other lien on the collateral[.]"

secondarily liable after the assumption. However, the Graysons opposed the assumption. Union Federal then issued a new loan to the Gregorys, the proceeds of which were used to pay off the Graysons' loan to Union Federal and also to directly pay off some of the Graysons' creditors. As the Graysons point out, they were never personally liable for an obligation of the Gregorys. At best, they received some accommodation from Union Federal in the structure of the Gregorys' loan and payout of loan proceeds. Nevertheless, the factual finding that the Graysons were released from liability on the Gregorys' debt is not directed to the facts and circumstances surrounding the sale of the personal property.[5] Accordingly, the finding, although erroneous, is superfluous. Erroneous findings are not fatal to the judgment if the remaining valid findings and conclusions support the judgment. Lasater v. Lasater, 809 N.E.2d 380, 397 (Ind. Ct. App. 2004).

Valuation. The Graysons assert that the value of the personal property disposed of is $128,500 and that the trial court's failure to assign such value disregarded the directive of this Court to the effect that Union Federal should, upon remand, "either account for the personal property, or produce the personal property for disposition in a commercially reasonable sale." Grayson, 851 N.E.2d at 1021.

The trial court noted that it found "the value of the equipment, furniture, fixture[s], and inventories difficult to ascertain." (App. 14.) The trial court then summarized the

[5] The trial court's findings with regard to the facts and circumstances surrounding the sale itself are that Union Federal looked for a buyer when the market for commercial property was moderate to weak, yet obtained $10,000 more than the last offer from the sole prior bidder (an offer that had met Carolyn Grayson's express expectations). The trial court also found that, although Union Federal "made no effort to sell the furniture, fixtures, equipment, and inventory separately from the building and land," the number and value of the items of personal property did not justify an auction. (App. 14.) These findings do not lack evidentiary support in the record.

valuation evidence presented, consisting of: the Graysons' testimonial valuation of $88,221 for equipment and $21,477.51 for inventory, the Graysons' 2001 Financial Statement to Union Federal valuing the equipment less depreciation at $41,378.21 and the inventory at $6,000, Union Federal's 2001 valuation of those items at $35,000, and a 2003 personal property tax return disclosing true tax values as $27,788 for the equipment and $975 for the inventory.[6] The trial court specifically found that, "the values submitted by the Graysons based on the purchase price of the personal property is [sic] not credible" because it did not take into account any depreciation. (App. 17.)

Ultimately, while not assigning a precise dollar value to the equipment and inventory, the trial court concluded that the value of equipment and inventory was less than the $95,875.11 deficiency remaining after partial satisfaction of Union Federal's judgment. The trial court's valuation is within the scope of the evidence, not subject to our revision. Skinner v. Skinner, 644 N.E.2d 141, 144 (Ind. Ct. App. 1994).

In their argument as to damages, the Graysons have repeatedly referenced the prior appellate opinion in this case, suggesting that an award of damages was required on remand and that the trial court disregarded the law of the case. However, the cited opinion explicitly observes that "the Graysons, as junior holders of a secured interest in the personal property, potentially could have been prejudiced." Grayson, 851 N.E.2d at 1021 (emphasis added).

[6] The tax return listed acquisition dates of equipment ranging from an unspecified date prior to March 2, 1993 through March 1, 2003. The total cost was reported to be $69,470. The stock-in-trade, before adjustments, was reported to be $1,500. (Def. Ex. P.)

We directed that Union Federal "either account for the personal property, or produce the personal property for disposition in a commercially reasonable sale." Id.

In other words, upon reversal of the nunc pro tunc order, the Graysons were given their day in court to assert their claim for damages. They were not assured a favorable disposition on the merits. Union Federal was free to defend the claim for damages. Union Federal accounted for the disposition of the personal property by demonstrating that the amount recovered was less than that necessary to satisfy Union Federal's superior secured interest and that nothing remained for satisfaction of a junior security interest. See Ind. Code § 26-1-9.1-615(a) (providing that a secured party shall apply, in the following order, cash proceeds of sale of collateral: first, to reasonable expenses, second, to payment of the debt owed to the primary secured party, and finally "the satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if the secured party receives from the holder of the subordinate security interest or other lien an authenticated demand for proceeds before distribution of the proceeds is completed[.]")

Conversion. The Graysons allege that Union Federal committed criminal conversion and should have been ordered to pay treble damages pursuant to Indiana Code Section 34-24-3-1.

The Indiana crime victim's relief act permits a person who has suffered a pecuniary loss as a result of criminal conversion to bring a civil action to recover the loss. Sam and Mac, Inc. v. Treat, 783 N.E.2d 760, 766 (Ind. Ct. App. 2003). Unlike in a criminal trial, a claimant need only prove by a preponderance of the evidence that the defendant committed

the criminal act. Id. A criminal conviction for conversion is not a condition precedent to civil recovery; however, the claimant must prove all of the elements of the alleged criminal act. Id.

Pursuant to Indiana Code Section 35-43-4-3, "[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion." The Graysons' counterclaim did not specifically assert that Union Federal converted property owned or possessed by the Graysons. To the extent that the issue may have been tried by consent, the Graysons wholly failed in their burden of proof. Years before the alleged conversion, the Graysons had sold their equipment and inventory to the Gregorys, retaining no possessory interest. The Graysons cannot now claim that Union Federal damaged them by exerting unauthorized control over property the Graysons no longer possessed.

Estoppel. Finally, the Graysons challenge the trial court's findings and conclusions with regard to estoppel. According to the trial court, the Graysons were "estopped from claiming any interest in the personal property" because they had not responded to Union Federal's complaint, "waited until after the sale of the personal property to raise the issue," and caused Union Federal to detrimentally rely upon the Grayson's acquiescence. (App. 16.) Such findings are in contravention of the prior opinion rendered by a panel of this Court, wherein we determined that (notwithstanding the Grayson's failure to answer Union Federal's complaint) the Graysons were entitled to "a trial on the issue of the disposition of the personal property involved." Grayson, 851 N.E.2d at 1021.

Nonetheless, as we have already observed, erroneous findings are not fatal to the judgment where the remaining valid findings and conclusions support the judgment. Lasater, 809 N.E.2d at 397. Here, the trial court determined that Union Federal participated in a commercially reasonable sale but received less than the amount of its superior security interest, leaving no residuary for partial satisfaction of the Graysons' junior security interest. The valid findings and conclusions support the judgment.

The gravamen of the Graysons' arguments is that Union Federal should be punished because it did not treat the personal property as separate from the real estate when obtaining a default order, when taking possession, when offering it for sale, and when applying proceeds. As recognized by the prior opinion of this Court, the personal property was indeed not part and parcel of the real estate. Nonetheless, "one of the broad remedial goals of the UCC is that the aggrieved party be put in as good a position as if the other party had fully performed, but not in a better position." Brandeis Mach. & Supply Co., LLC v. Capitol Crane Rental, Inc., 765 N.E.2d 173, 177 (Ind. Ct. App. 2002). Here, the record is devoid of evidence that, had the personal property been offered at a separate sale, this would have produced an amount in excess of the deficiency judgment held by Union Federal. Like the Graysons before them, the Gregorys were unable to profitably operate the spa and timely pay their obligations to Union Federal. The Gregorys closed their business, defaulted on their loans, and filed bankruptcy, leaving no reasonable expectation that a junior secured interest would be satisfied. As the trial court here concluded, the lack of residual funds was not attributable to the absence of a separate sale for personal property.

Conclusion

The Graysons have failed to demonstrate clear error.

Affirmed.

MAY, J., and BARNES, J., concur.