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IN THE
COURT OF APPEALS OF INDIANA

SIMON INVESTMENTS, LLC, TERRY DITTRICH, and DAWN DITTRICH,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 45A03-0903-CV-89
MERCANTILE NATIONAL BANK OF INDIANA,)	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias Schneider, Judge
Cause No. 45D01-0408-PL-97

July 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Simon Investments, LLC, Terry Dittrich, and Dawn Dittrich (collectively, "Appellants") appeal the trial court's grant of summary judgment in favor of Mercantile National Bank of Indiana ("Mercantile"). We affirm.

Issues

We restate the issues as follows:

I. Did the trial court err in granting summary judgment on Appellants' professional negligence claim?

II. Did the trial court err in granting summary judgment on Appellants' constructive fraud claim?

III. Did the trial court err in granting summary judgment on Appellants' unjust enrichment claim?

Facts and Procedural History

In our previous memorandum decision in this case, we recited the following relevant facts:

> On January 10, 1997, Mercantile extended to Dittrich Chrysler-Jeep a $3,000,000 line of credit. Terry was the president of Dittrich Chrysler-Jeep, but he also personally guaranteed the loan along with his wife, Dawn. Dittrich Chrysler-Jeep used this line of credit as floor financing[FN1] to operate its automobile dealership in Hammond, Indiana. Mercantile later renewed and increased the credit line, pursuant to the request of Dittrich Chrysler-Jeep, to $4,000,000. Terry and Dawn also co-own Simon Investments, which at the time owned the land on which the dealership was located. The loan from Mercantile was secured by the dealership land, owned by Simon Investments, and by all of the business assets of Dittrich Chrysler-Jeep, including the car inventory.
>
> [FN1] This type of financing, typically used by car dealerships, allows the dealers to finance their floor stock of cars available for sale. The lender maintains legal ownership of the vehicles while the car dealer displays them for sale.

In September 2003, by way of a floor plan inspection, Mercantile discovered that Dittrich Chrysler-Jeep failed to report $1,482,518 in cars sold. Terry acknowledged that this caused serious shortfall in Mercantile's collateral and constituted default under the loan. In lieu of a foreclosure sale, the assets of Dittrich Chrysler-Jeep were sold to Northlake Chrysler-Jeep pursuant to an Asset Purchase Agreement ("Asset Agreement") dated December 26, 2003. This document included the following "hold harmless" clause (the "hold harmless provision"):

> SELLER also agrees to hold harmless Mercantile National Bank of Indiana, for its assistance and participation in this Agreement and any and all activities related thereto.

"Seller" is earlier defined in the agreement as Terry Dittrich Chrysler-Jeep, Inc. Terry, as president of Dittrich Chrysler-Jeep, and Ronald Morris, president of Northlake Chrysler-Jeep, signed the Asset Agreement.

On March 1, 2004, Mercantile executed a Release of All Obligations, Liabilities and Debts (the "Release") in favor of Dittrich Chrysler-Jeep, Terry, Dawn, and Simon Investments. The Release provided:

> [T]he undersigned, MERCANTILE NATIONAL BANK, for good and valuable consideration provided to the undersigned and as outlined in the Asset Purchase Agreement between TERRY DITTRICH CHRYSLER-JEEP, INC. and NORTHLAKE CHRYSLER-JEEP, INC., the receipt of which is hereby acknowledged, hereby forever releases and discharges Terry Dittrich Chrysler-Jeep, Inc., Terrence E. Dittrich, Dawn Dittrich, Simon Investments, L.L.C. . . . from any and all manner of actions, causes of action, suits, accounts, contracts, liens, debts, claims, and demands whatsoever, at law or in equity, and however arising up to the date of these presents, including, particularly, but not exclusively, all matters:
>
> > 1. For all obligations, liabilities and debts owed by the released parties to Mercantile National Bank, including, but not limited to, commercial real estate payoffs, new and used vehicle floor plans and any amounts listed as owing on a March 1, 2004 Settlement Statement among Terry Dittrich Chrysler-Jeep, Inc., Simon Investments, L.L.C. and Northlake Chrysler-Jeep, Inc.

> The only signature on the Release was that of Dale Clapp, as representative of Mercantile.
>
> The Appellants-Plaintiffs [i.e., Terry Dittrich Chrysler-Jeep, Inc., Simon Investments, Terry, and Dawn] filed their amended complaint on October 1, 2004, alleging duress and undue influence, constructive fraud, unjust enrichment, professional negligence, tortious interference with prospective economic advantage and business relations, tortious interference with contractual relations, slander, intentional infliction of emotional distress, and invasion of privacy on the part of Mercantile. On November 18, 2004, Mercantile filed its answer and counterclaim. In its counterclaim, Mercantile sought a judgment declaring the hold harmless provision valid and enforceable as well as alternative counts claiming fraud, breach of promissory notes, breach of guaranty, breach of contract, and a violation of Indiana's RICO statute on the part of the Appellants-Plaintiffs.
>
> The Appellants-Plaintiffs filed a Motion to Dismiss Mercantile's counterclaim on the basis that the Release barred any claims by Mercantile. In response, Mercantile filed a Motion for Summary Judgment based on the premise that the hold harmless provision from the Asset Agreement, together with the Release, constitute a single, valid and enforceable contract and therefore the hold harmless clause bars any claim proffered by the Appellants-Plaintiffs. Each party subsequently filed memoranda designating evidence and citing caselaw in support of its own motion and in opposition to its opponent's motion. The designated evidence included the loan agreement and renewals, the Asset Agreement, the Release, an affidavit by Terry, and the depositions of the then chairman of the board and vice president division manager of commercial lending at Mercantile.
>
> The trial court conducted a hearing on the motions on March 30, 2006. The next day the trial court issued an order in which, after determining that it would treat the Appellants-Plaintiffs' motion to dismiss as a motion for summary judgment, it granted Mercantile's motion for summary judgment and denied the Appellants-Plaintiffs' motion. On April 26, 2006, the Appellants-Plaintiffs filed a Motion to Correct Errors. The trial court, by Special Judge Richards, held a hearing on the motion and later denied the motion.

Terry Dittrich Chrysler-Jeep, Inc. v. Mercantile Nat'l Bank of Ind., No. 45A03-0607-CV-30, slip op. at 2-5 (Ind. Ct. App. Oct. 26, 2006) (footnote and citation to appendix omitted).

Appellants-Plaintiffs appealed, contending that "the hold harmless provision only applies to Dittrich Chrysler-Jeep and [that] there is a material issue of fact with respect to the execution of the Asset Agreement as to whether it was signed by Terry, as president of Dittrich Chrysler-Jeep, under duress." *Id*., slip op. at 6. As for the first contention, we held as follows:

> Terry, Dawn, and Simon Investments were not parties to either the Asset Agreement or the Release. The Release was unilaterally executed by Mercantile and therefore only binds Mercantile. Thus, it does not matter whether the documents are viewed as one or two contracts, because Terry, Dawn, and Simon Investments were not parties to either the Asset Agreement or the Release and cannot be held to any of the terms. In conclusion, the hold harmless provision does not bar their claims against Mercantile, and the trial court erred in granting summary judgment for Mercantile as to Terry, Dawn, and Simon Investments. We therefore remand the case to the trial court for further proceedings on the claims brought by Terry, Dawn, and Simon Investments. However, our remand should not be construed as conferring standing upon Terry, Dawn and Simon Investments for their claims against Mercantile for its actions in assisting in the sale of Dittrich Chrysler-Jeep via the Asset Agreement, because Terry, Dawn, as individuals, and Simon Investments were not parties to this transaction.

Id., slip op. at 8.

As for the second contention, we stated,

> In essence, Terry, as president of Dittrich Chrysler-Jeep, claims that he was placed under duress by Mercantile when Morrow, the chairman of the board of Mercantile, came over to the Dittrich house and threatened to close the dealership if Terry did not agree to sell it to Northlake Chrysler-Jeep. Even assuming Morrow threatened to foreclose on Dittrich Chrysler-Jeep, it would not have met the definition of duress. In the new broader definition, duress involves the victim being "coerced by fear of a wrongful act by the other party to the transaction." The Dittrichs had deceived Mercantile by not reporting almost $1.5 million in car sales, which put the Dittrichs in default on the loan and placed Mercantile in a position of possibly losing a large sum of money. Under the loan agreement, Mercantile had the ability to foreclose the dealership without notice in the case of default based on the acceleration clause. Thus, if Morrow made a threat of foreclosure, it was not a wrongful act, because pursuant to the loan agreement, Mercantile was legally allowed to take such

> action. Instead of immediately foreclosing, Mercantile offered Dittrich Chrysler-Jeep the option to sell its assets in lieu of foreclosure.
>
> In conclusion, there is no genuine issue of material fact as to the duress claim, making the Asset Agreement valid and enforceable. The hold harmless provision within the agreement bars any claims by Dittrich Chrysler-Jeep against Mercantile regarding the sale of its assets to Northlake Chrysler-Jeep. Thus, the trial court appropriately granted summary judgment for Mercantile as to Dittrich Chrysler-Jeep.

Id., slip op. at 9-10.

Following remand, Mercantile filed a second summary judgment motion on August 1, 2008. According to Mercantile, the trial court granted Appellants until October 3, 2008, to file their response.[1] On that date, Appellants filed their response and designated an unsworn report from their expert, James R. Ellsworth. On October 24, 2008, Mercantile filed a motion to strike Ellsworth's report on the basis that it did not comply with the affidavit requirements of Indiana Trial Rule 56. On November 3, 2008, Appellants filed a response to Mercantile's motion and a supplemental designation of evidence, that being an affidavit from Ellsworth. Mercantile filed a reply on November 5, 2008.

On November 6, 2008, the trial court held a hearing on Mercantile's summary judgment motion and motion to strike. On December 30, 2009, the court issued an order that reads in pertinent part as follows:

> 1. Plaintiffs have failed to demonstrate that Defendant had a special relationship with it beyond that of a lender and borrower. Under Block v. Lake Mortgage Co. Inc., there cannot be constructive fraud without a special relationship between Plaintiff and Defendant. 601 N.E.2d 449, 452 (Ind. App. 1992).

[1] The chronological case summary does not specifically mention this ruling, but Appellants do not dispute this assertion.

> 2. Plaintiffs' argument to recover under the doctrine of unjust enrichment is unsound under Indiana law. Under DiMizio v. Romo for unjust enrichment to apply there must not be a contract in place between the Plaintiffs and the Defendant. 756 N.E.2d 1018, 1024-1025 (Ind. App. 2001).
>
> 3. Plaintiffs have failed to demonstrate that Defendant had a special relationship with them beyond that of a lender and borrower. Under Paulson v. Centier Bank if there is no special relationship between the parties, then there are no grounds for a claim of breach of fiduciary duty. 704 N.E.2d 482, 490 (Ind. App. 1998). Consequently there is no merit to Plaintiff's [sic] claim for breach of fiduciary duty.

Appellants' App. at 20. The trial court granted Mercantile summary judgment on these and all remaining counts of Appellants' complaint.[2] The court did not rule on Mercantile's motion to strike. This appeal ensued.

Discussion and Decision

"The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which can be resolved as a matter of law." *Nationwide Ins. Co. v. Heck*, 873 N.E.2d 190, 196 (Ind. Ct. App. 2007).

> Summary judgment is appropriate only where the designated evidentiary matter shows that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law. When reviewing a grant of a motion for summary judgment, we stand in the shoes of the trial court. Once the moving party demonstrates, prima facie, that there are no genuine issues of material fact as to any determinative issue, the burden falls upon the non-moving party to come forward with contrary evidence. The non-moving party may not rest upon the pleadings but must instead set forth specific facts, using supporting materials contemplated under Trial Rule 56, which show the

[2] The court noted that Appellants had agreed to dismiss their slander claim, and it granted summary judgment for Mercantile on Appellants' claims for tortious interference with contractual and business relations, intentional infliction of emotional distress, and invasion of privacy. Appellants do not challenge the trial court's ruling as to these claims.

> existence of a genuine issue for trial.[3] The party appealing the grant of summary judgment bears the burden of persuading this court that the trial court erred, but we still carefully scrutinize the entry of summary judgment to ensure that the non-prevailing party was not denied its day in court. We do not weigh the evidence but rather consider the facts in the light most favorable to the nonmoving party. We may sustain the judgment upon any theory supported by the designated evidence. The trial court here entered specific findings of fact and conclusions thereon. Although such findings and conclusions facilitate appellate review by offering insight into the trial court's reasons for granting summary judgment, they do not alter our standard of review and are not binding upon this court.

Auburn Cordage, Inc. v. Revocable Trust Agreement of Treadwell, 848 N.E.2d 738, 747 (Ind. Ct. App. 2006) (citations omitted).[4]

I. Professional Negligence

Appellants' professional negligence claim is premised on their contention that they had a fiduciary relationship with Mercantile and that Mercantile breached its fiduciary duty in its handling of the sale of the real estate. *See* Appellants' App. at 28 (count IV of amended complaint);[5] *see also Florio v. Tilley*, 875 N.E.2d 253, 255 (Ind. Ct. App. 2007) ("To prevail on a claim of negligence a plaintiff is required to prove: (1) a duty owed by the defendant to

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[3] Appellants contend that Ellsworth's report raises genuine issues of material fact with respect to their claims. Mercantile argues that the report was inadmissible because it did not comply with the affidavit requirements of Trial Rule 56. We need not address Mercantile's argument, however, because even assuming that the report was admissible, it does not create a genuine issue of material fact with respect to any of Appellants' claims.

[4] Relying on our prior decision in this case, Mercantile contends that Appellants' claims are barred for lack of standing because they were not parties to the Asset Purchase Agreement. Appellants contend that they do have standing because the claims involve the sale of real estate, not assets. They further contend that the trial court must have rejected Mercantile's standing argument because its order "is devoid of any discussion of [this] argument." Appellants' Reply Br. at 1. We remind Appellants that we may affirm on any theory supported by the designated evidence. *Auburn Cordage*, 848 N.E.2d at 747. That said, we address the merits of Appellants' claims because they were parties to the real estate transaction and thus have standing to pursue their claims.

[5] Appellants' amended complaint does not allege separate counts of professional negligence and breach of fiduciary duty.

the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately caused by the breach"). We have stated that

> "[a] fiduciary relationship does not exist between a lender and a borrower unless certain facts exist which establish a relationship of trust and confidence between the two. A confidential relationship exists whenever confidence is reposed by one party in another with resulting superiority and influence exercised by the other. Not only must there be confidence by one party in the other, but the party reposing the confidence must also be in a position of inequality, dependence, weakness, or lack of knowledge. Furthermore, it must be shown that the dominant party wrongfully abused this confidence by improperly influencing the weaker so as to obtain an unconscionable advantage. Whether such a relationship exists is essentially a question of fact."

Kruse v. Nat'l Bank of Indpls., 815 N.E.2d 137, 148 (Ind. Ct. App. 2004) (quoting *Paulson v. Centier Bank*, 704 N.E.2d 482, 490 (Ind. Ct. App. 1998), *trans. denied* (1999)). Nevertheless, what is ordinarily a question of fact may become a question of law "where the facts are undisputed and only a single inference can be drawn from those facts." *Jones v. Ind. Bell Tel. Co.*, 864 N.E.2d 1125, 1127 (Ind. Ct. App. 2007) (breach of duty); *see also Hamilton v. Ashton*, 846 N.E.2d 309, 316 (Ind. Ct. App. 2006) (proximate cause), *clarified on reh'g*, 850 N.E.2d 466, *trans. denied*.

Appellants argue that

> [w]hile the parties' relationship arguably started as an arms-length commercial relationship, the nature of the relationship changed to a fiduciary relationship once Mercantile became intimately involved in orchestrating the forced sale of the real estate to Morris. Mercantile made representations to [Appellants] about the soundness of the agreement to transfer ownership of the real estate and offered them advice through numerous emails, telephone calls, and personal meetings. Mercantile brought Morris to the table and even paid all of Morris' legal expenses. [Appellants] relied upon Mercantile to obtain a commercially reasonable value for the dealership. But what did Mercantile do? Sold the real estate [to] Morris at a substantial discount.

Appellants' Reply Br. at 7-8.

We fail to see how Mercantile transformed its "arms-length commercial relationship" with Appellants into a fiduciary relationship simply by becoming "intimately involved" in the sale of the real estate. Mercantile cannot be faulted for moving aggressively to protect its interests, especially given the serious collateral shortfall caused by Appellants' failure to report over a million dollars in sales.[6] As owners of a car dealership and an investment company, the Dittrichs were no strangers to complex commercial transactions and were perfectly capable of seeking independent advice. Any weakness in Appellants' position or inequality in their relationship with Mercantile was due solely to their own dishonesty, which is hardly a basis for "a relationship of trust and confidence[.]" *Kruse*, 815 N.E.2d at 148. In sum, the only inference that can be drawn from the designated evidence is that no fiduciary relationship existed between Mercantile and Appellants. Therefore, we affirm the trial court's grant of summary judgment on Appellants' professional negligence claim.

II. Constructive Fraud

The elements of constructive fraud are as follows: "(1) a duty existing by virtue of the relationship between the parties; (2) representations or omissions made in violation of that duty; and (3) reliance on that representation or omission by the individual to whom the duty is

[6] As for Appellants' complaint that Mercantile "would not even entertain negotiations" with other potential buyers, Appellants' Br. at 29, we note that Mercantile was not obligated to do so.

owed and to the detriment of that individual." *Slutsky v. Crews*, 713 N.E.2d 288, 291 n.1 (Ind. Ct. App. 1999). "It is well established that a fiduciary or other 'special' relationship must exist in order to support a constructive fraud action." *Epperly v. Johnson*, 734 N.E.2d 1066, 1074 (Ind. Ct. App. 2000). Because no fiduciary relationship existed between Appellants and Mercantile, the trial court did not err in granting summary judgment on Appellants' constructive fraud claim.

III. Unjust Enrichment

Finally, Appellants contend that the trial court erred in granting summary judgment on their unjust enrichment claim. "Unjust enrichment operates when there is no governing contract." *DiMizio v. Romo*, 756 N.E.2d 1018, 1024 (Ind. Ct. App. 2001), *trans. denied* (2002). "To prevail on a claim for unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." *Fowler v. Perry*, 830 N.E.2d 97, 103 (Ind. Ct. App. 2005).[7]

Appellants acknowledge that the real estate mortgage "gave Mercantile the right to declare default, foreclose its security interest, sue Terry and Dawn Dittrich on their personal

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[7] Unjust enrichment is an equitable remedy. *Fowler*, 830 N.E.2d at 103. Mercantile points out that a party "who seeks an equitable remedy must do so with 'clean hands.'" Appellee's Br. at 24 (citing *Wedgewood Cmty. Ass'n v. Nash*, 781 N.E.2d 1172, 1178 (Ind. Ct. App. 2003), *clarified on reh'g*, 789 N.E.2d 495, *trans. denied* (2004)). Appellants contend that Mercantile failed to raise the clean hands defense on summary judgment and therefore has waived the issue. We agree. *See Graves v. Johnson*, 862 N.E.2d 716, 721 n.4 (Ind. Ct. App. 2007) ("Issues not raised before the trial court on summary judgment cannot be argued for the first time on appeal and are waived.").

guarantees, and liquidate the assets of Terry Dittrich Chrysler-Jeep, Inc. to satisfy the outstanding indebtedness." Appellants' Br. at 35. Appellants go on to argue, however, that

> the mortgage did not give Mercantile the right to participate in and facilitate a forced sale of the real estate. As a result of the actions taken by Mercantile in the participation in and facilitation of an agreement which transferred property owned by Terry and Simon, at a grossly undervalued figure, Terry, Dawn, and Simon were not only injured but they [also] conferred a measureable [sic] benefit upon Mercantile. Retention of that benefit by Mercantile in this situation would be unjust.

Id. (paragraph format altered).

We disagree. Mercantile correctly observes that it "forgave a substantial deficiency against a borrower (and his spouse) whose fraud had resulted in a large loss to the bank. Put simply, this is not the stuff of which unjust enrichment is made." Appellee's Br. at 25. Appellants' argument is essentially that Mercantile should have held out for a better deal on the real estate, which it was not obligated to do.[8] Consequently, we affirm the trial court's grant of summary judgment on Appellants' unjust enrichment claim.

Affirmed.

BRADFORD, J., and BROWN, J., concur.

[8] Notably, Appellants do not assert that Mercantile would have received more money for the real estate in a foreclosure proceeding.