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FILED
Sep 03 2009, 8:45 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

JON HUFF and MARY HUFF,	)	
	)	
Appellants-Defendants,	)	
	)	
vs.	)	No. 35A05-0808-CV-455
	)	
MIKE STOFFEL and ROSE STOFFEL,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35C01-0601-PL-11

September 3, 2009

MEMORANDUM DECISION ON REHEARING—NOT FOR PUBLICATION

BRADFORD, Judge

Mike Stoffel and Rose Stoffel brought an action against Jon Huff and Mary Huff alleging breach of contract and constructive fraud. The trial court found in favor of the Stoffels and awarded them $11,525 in damages, $14,036.10 in attorney's fees, and costs. The Huffs appealed, and this court reversed and remanded for vacation of the trial court's judgment on two grounds: (1) the trial court's finding of constructive fraud was based upon an unreasonable interpretation of the contract; and (2) the contract was unenforceable under Indiana Code section 32-21-5-10(c) (2005). The Stoffels filed a petition for rehearing, pointing out that Indiana Trial Rule 9(C) requires a party denying the occurrence of a condition precedent—such as compliance with section 32-21-5-10(c)—to plead it with particularity, which the Huffs did not do. Accordingly, we grant the petition for rehearing, vacate that part of our earlier decision concluding that the contract was unenforceable under section 32-21-5-10(c), remand to the trial court for a factual determination on this issue, and consider the Huffs' recusal challenge. In all other respects we affirm our original decision.

FACTS AND PROCEDURAL HISTORY

In addition to the facts already set out in the original decision, the following facts are relevant to the instant disposition of this case. On January 4, 2006, the Stoffels filed a complaint against the Huffs alleging both breach of contract (Count I) and fraud and misrepresentation (Count II), and seeking damages, attorney's fees, and costs arising out of the parties' purchase agreement. On May 1, 2006, in response to the Huffs' Trial Rule 9(B) motion for a more definite statement on the fraud claim, the Stoffels amended their complaint to expand upon the allegations in Count II. In neither complaint did the Stoffels aver

generally that they had performed all conditions precedent under the contract. On March 1, 2006, the Huffs filed a partial answer to the Stoffels' complaint, and on May 30, 2006, an answer to the Stoffels' amended complaint. In each answer, the Huffs alleged as a general matter "[f]ailure of conditions precedent" as one of their affirmative defenses. App. pp. 353, 361.

The Stoffels filed a motion for summary judgment, and a hearing was held on February 5, 2007. At that hearing, counsel for the Huffs argued that certain contingencies in the purchase agreement had not been met, including that the Huffs' home be sold by November 18. Following the trial court's inquiry as to whether the Huffs' home had in fact sold, defense counsel pleaded ignorance, at which point the trial court stated, "Let's be realistic," and indicated that it would not permit an attorney practicing in that court to "play games like that." App. pp. 36-37. On February 6, 2007, the Huffs filed a motion for recusal on the grounds that the court's statements and tone demonstrated a lack of impartiality and were so prejudicial as to deny them a fair hearing. Following a February 23, 2007 hearing on the recusal motion, the trial court stated that it did not question defense counsel's integrity; indicated its continuing "exasperat[ion]" that the question of whether the Huffs' home had sold, which was a critical issue referenced in the summary judgment pleadings, was unknown by counsel; and denied the motion.

On March 1, 2007, the trial court granted partial summary judgment in favor of the Stoffels. In granting partial summary judgment, the trial court found that the contractual

provision requiring that the property appraise at or above the $225,000 sale price had been met. The trial court denied summary judgment on all other issues.

The trial court held a bench trial on April 4, 2008. During presentation of their case, the Stoffels introduced the purchase agreement as Plaintiff's Exhibit 1. Section 13.02 of the purchase agreement states as follows: "Buyer has not received an executed Seller's Residential Real Estate Disclosure Form required under IC 24-4.6-2[1], as amended." Plaintiff's Exh. 1. In addition, the Stoffels' witness Cole Christman testified that, following the execution of the purchase agreement and the fulfillment of the condition that the property appraise at the $225,000 sale price, there were no other conditions under the contract that had to be met at that time. At the close of the Stoffels' case, the Huffs without objection moved to dismiss pursuant to Indiana Trial Rule 41(B) on the grounds that the Stoffels had failed to establish that the purchase agreement was an enforceable contract under Indiana Code section 32-21-5-10(c), which requires a signed disclosure form. The trial court denied the motion. At the close of trial, the Huffs without objection renewed their motion, which the trial court again denied.

Following trial, the parties submitted proposed findings and conclusions. The proposed findings and conclusions filed by the Huffs included the finding that the Stoffels had failed to demonstrate that the purchase agreement was enforceable pursuant to section 32-21-5-10. The Stoffels subsequently filed a memorandum, with an attached evidentiary

[1] The purchase agreement references Indiana Code chapter 24-4.6-2, as amended,which has been recodified as Indiana Code chapter 32-21-5. Former section 24-4.6-2-10 is current section 32-21-5-10.

exhibit, in response to the Huffs' proposed findings. The trial court ultimately struck this exhibit from the record.

This memorandum and its attached exhibit, which the trial court struck, were not in the record on direct appeal but have since been submitted by the Stoffels in an appendix accompanying their petition for rehearing. In their response brief, the Huffs suggest that we strike this appendix. Accordingly, we strike the appendix as well as that portion of the Stoffels' brief in reliance thereon. *See Luster v. State*, 578 N.E.2d 740, 746 (Ind. Ct. App. 1991) ("An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below.").

On June 17, 2008, the trial court, upon issuing findings and conclusions, entered judgment in favor of the Stoffels. The trial court's order did not address the issue of compliance with section 32-21-5-10(c).

DISCUSSION AND DECISION

I. Compliance with Indiana Code section 32-21-5-10(c)

In seeking rehearing, the Stoffels argue that they were not required to demonstrate compliance with Indiana Code section 32-21-5-10(c) as a condition precedent to the parties' contract because the Huffs failed to plead the denial of such condition specifically and with particularity pursuant to Indiana Trial Rule 9(C). Indiana Trial Rule 9(C) provides as follows:

> **(C) Conditions precedent.** In pleading the performance or occurrence of promissory or non-promissory conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed, have occurred, or

> have been excused. A denial of performance or occurrence shall be made specifically and with particularity, and a denial of excuse generally.

In *Thompson v. City of Aurora*, 263 Ind. 187, 193, 325 N.E.2d 839, 843 (1975), the Indiana Supreme Court interpreted the above language to provide that a general denial of a condition precedent raises no issue as to its performance. The Supreme Court further concluded that, with respect to "true" conditions precedent, a defendant's failure to deny performance specifically and with particularity raises no issue putting a plaintiff to his proof. *Id.* In *Thompson*, the condition precedent at issue was merely procedural and did not fall within the ambit of true conditions precedent governed by Rule 9(C). *Id.* at 193-94; 325 N.E.2d at 843. Here, however, the condition precedent is substantive rather than merely procedural, as we found in our original decision. *Huff v. Stoffel*, No. 35A05-0808-CV-455 (Ind. Ct. App. May 29, 2009), slip op. at 12-13. Under *Thompson*, therefore, the requirements of Rule 9(C) apply.

The Stoffels are correct that the Huffs, who merely alleged "Failure of conditions precedent[]" in their answer, failed to plead with particularity their denial of the Stoffels' performance of the conditions precedent under the contract. App. pp. 353, 361. Under Rule 9(C), this general denial was inadequate to raise the specific issue of the Stoffels' compliance with section 32-21-5-10(c). *Thompson*, 263 Ind. at 193, 325 N.E.2d at 843; *see United Farm Bureau Mut. Ins. Co. v. Wolfe*, 178 Ind. App. 435, 442, 382 N.E.2d 1018, 1019-20 (1978) (citing Indiana Trial Rules 9(C) and 8(C) for proposition that "[t]he affirmative defense of failure to perform a condition precedent must be specifically and particularly asserted in a responsive pleading."). Given the Huffs' failure to adequately allege noncompliance with

section 32-21-5-10(c), we must vacate that part of our original decision reversing the trial court's judgment on the grounds that the contract was unenforceable under section 32-21-5-10(c).

While the Huffs failed to comply with the trial rules, so too did the Stoffels, who failed to aver generally in their complaint, pursuant to Trial Rule 9(C), that all conditions precedent had been met. *See Thompson*, 263 Ind. at 194, 325 N.E.2d at 843 (excepting only procedural precedents from this pleading requirement). Upon a thorough review of the record, however, we must observe that the parties were not limited by their failure to properly plead conditions precedent. During the summary judgment proceedings the Stoffels argued, and the trial court concluded, that the condition precedent regarding the home appraisal at $225,000 had been met, despite the Huffs' argument to the contrary. In addition, the Huffs also challenged whether the condition precedent that their present home sell had been demonstrably satisfied. At trial, the Huffs disputed that the condition precedent regarding financing had been met, but the trial court found against them based upon its finding of their lack of good faith. Similarly, the question of compliance with section 32-21-5-10(c), another condition precedent, was improperly pled by both parties, but this did not limit their challenge in the matter.

Ultimately, the issues in a case are established by the evidence introduced at trial rather than by the pleadings. *Curtis v. Clem*, 689 N.E.2d 1261, 1264 (Ind. Ct. App. 1997) (citing Ind. Trial Rule 15(B)). Under Trial Rule 15(B),

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in

> the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The purpose of Trial Rule 15(B) is to provide some flexibility in litigating a case and to promote justice by permitting evidence brought in at trial to determine the liability of the parties. *Schoemer v. Hanes & Assocs., Inc.*, 693 N.E.2d 1333, 1340 (Ind. Ct. App. 1998). When evidence is presented that does not conform to the pleadings, the party opposing the evidence must object or the issue supported by the evidence will impliedly be consented to having been tried by that party. *Id.* There are generally two factors to be considered when addressing whether a party has impliedly consented to a non-pleaded issue at trial. *Mercantile Nat'l Bank of Ind. v. 1st Builders of Ind., Inc.*, 774 N.E.2d 488, 492 (Ind. 2002). The first is whether the opposing party had notice of the issue; the second, whether the opposing party objected to the issue being litigated at trial. *Id.* If the opposing party both had notice and failed to object at trial, then that party will have impliedly consented to the non-pleaded issue at trial. *Id.* at 492-93.

In spite of their pleadings, both parties litigated the issue of compliance with section 32-21-5-10(c). The Stoffels introduced Exhibit 1, the purchase agreement which indicated that the Huffs had not received the necessary disclosure form. They also introduced

Christman's testimony indicating that all conditions precedent to the performance of the contract had been met prior to the closing. The Huffs did not object to this evidence. The Huffs, in turn, moved to dismiss on the grounds that section 32-21-5-10(c) had not been satisfied both after the Stoffels rested and at the close of evidence. The Stoffels lodged no objection to either motion. The evidence presented and the arguments made demonstrate that compliance with section 32-21-5-10(c) was at issue, and neither party objected to the other's evidence or claims on that ground. Pursuant to Rule 15(B), therefore, it is proper to treat this issue as if it had been properly raised.

In its findings and conclusions, the trial court failed to address the question of the Stoffels' compliance with section 32-21-5-10(c), in spite of the conflicting evidence and the Huffs' clear challenge on this ground. Indeed, contrary to the evidence in the record and the Huffs' section 32-21-5-10(c) challenge, the trial court's findings presume that the only condition precedent at issue was "the condition regarding financing." We therefore remand to the trial court to make a factual determination on the Stoffels' compliance with section 32-21-5-10(c). Because we are unable to address the merits of the breach-of-contract claim without a factual determination regarding the contract's enforceability on this point, we find it unnecessary to address the Huffs' remaining challenges on the merits of the breach-of-contract claim and the trial court's award. In remanding, however, we find it necessary to address the Huffs' recusal challenge.

II. Recusal

The Huffs claim that the trial court erred in denying their motion for recusal. The Stoffels respond by framing the Huffs' claim as one for a change of judge under Trial Rule 76(C)(6) and Indiana Code section 34-35-1-1, and claim under this authority that the Huffs' motion was invalid for lack of proper verification or accompanying affidavit. We are not inclined to address this claim on procedural grounds under Trial Rule 76(C)(6) and Indiana Code section 34-35-1-1, because this authority addresses motions for change of judge, which are distinct from the motion for recusal which appears to be at issue here.[2] *See Stivers v. Knox County Dep't of Pub. Welfare*, 482 N.E.2d 748, 751 (Ind. Ct. App. 1985) (observing that arguments regarding procedural deficiencies apply to "routine change of judge motion[s]" rather than to motions for recusal).

Indiana Judicial Conduct Canon 3(E)(1)(a) provides that a judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, including instances where the judge has a personal bias or prejudice concerning a party or a

[2] The parties similarly disputed the nature of the Huffs' motion during the hearing. The Huffs treated their motion as one for recusal, and the Stoffels responded by framing the Huffs' motion as one for change of venue from the judge, which the Stoffels argued required verification. In response to the Stoffels' argument that the motion was one for change of venue, the trial court indicated, "That's correct," but the CCS indicates that the trial court considered the Huffs' motion as one for recusal. App. p. 47.

party's lawyer,[3] or personal knowledge of disputed evidentiary facts concerning the proceeding.[4] The law presumes that a judge is unbiased and unprejudiced. *James v. State*, 716 N.E.2d 935, 940 (Ind. 1999). But when a judge's impartiality might be reasonably questioned because of personal bias against a defendant or counsel, a judge shall disqualify himself or herself from a proceeding. *Id.* (citing Ind. Judicial Conduct Canon 3(E)(1)(a)). The test for determining whether a judge should recuse himself under Judicial Canon 3(E)(1) is whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality. *Id.*

In their motion opposing summary judgment, the Huffs argued that the Stoffels' failure to designate evidence demonstrating that the Huffs had closed on the sale of their existing home, a condition precedent to the purchase agreement, rendered summary judgment improper. When defense counsel raised this argument during the summary judgment hearing, the court asked defense counsel whether, to his knowledge, this condition precedent had been met. When defense counsel indicated he did not know the answer to this question, the court voiced frustration with defense counsel and suggested that counsel was "play[ing]

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[3] The Stoffels argue, citing *Leistikow v. Hoosier State Bank of Ind.*, 182 Ind. App. 150, 152, 394 N.E.2d 225, 227 (1979), that a judge's alleged bias toward a party's attorney is inadequate to establish judicial bias against the parties. Prior to 1993, then Indiana Judicial Conduct Canon 3(C)(1)(a) recommended disqualification in proceedings in which the judge had a "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Effective March 1, 1993, however, amended Canon 3(E)(1)(a) require disqualification in proceedings in which the judge has a "personal bias or prejudice concerning a party *or a party's lawyer*, or personal knowledge of disputed evidentiary facts concerning the proceeding." (Emphasis supplied). Accordingly, we are unpersuaded by the Stoffels' argument on this ground.

[4] Indiana Judicial Conduct Canon 3 has since been amended, effective January 1, 2009. *See* Ind. Judicial Conduct Canon 2, Rule 2.11(A)(1).

games." Summ. Judg. Tr. p. 20-21. After defense counsel pointed out that there was no designated evidence demonstrating the conditions precedent to the agreement had been met, and contended that it was not his burden to "show that every condition precedent in the contract ha[d] been met," the trial court permitted defense counsel to continue with his argument. Summary Judg. Tr. p. 21. Later, at the recusal hearing, the trial court indicated its "exasperat[ion]" at defense counsel's ignorance regarding the very condition precedent he had challenged in opposing summary judgment. Recusal Tr. p. 32. The trial court subsequently stated, however, that it did not question defense counsel's professional integrity.

Here, the Huffs sought to challenge summary judgment on the basis that a condition precedent to the purchase agreement, specifically that the Huffs' existing home must sell, had not been demonstrably met. Failure to perform a condition precedent is an affirmative defense. *Collins v. McKinney*, 871 N.E.2d 363, 369 n.3 (Ind. Ct. App. 2007) (citing Ind. Trial Rules 8(C) and 9(C)). In summary judgment proceedings, as at trial, the burden of establishing the existence of material affirmative defenses is on the defendant. *Paint Shuttle, Inc. v. Continental Cas. Co.*, 733 N.E.2d 513, 519 (Ind. Ct. App. 2000). 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.* Summary judgment is proper if the defendant, in opposition to the plaintiff's summary judgment motion, fails to designate any evidence from which the trial court could infer the elements of the asserted affirmative defense. *Id.*

In asking defense counsel whether the very affirmative defense he was relying upon was factually accurate, the trial court appeared merely to be holding defense counsel to his burden of proof on the matter, which defense counsel erroneously believed he did not have. Of course the trial court was constrained to review only the materials designated in support of and in opposition to a motion for summary judgment. *See Daugherty v. Fuller Eng'g Serv. Corp.*, 615 N.E.2d 476, 481 (Ind. Ct. App. 1993), *trans. denied*. To the extent the trial court's inquiry may be construed as a request for additional evidence outside the designated materials, we are unable to conclude that this demonstrated a reasonable basis for doubting its impartiality. In seeking the evidence, the trial court was merely emphasizing defense counsel's burden of proof. In addition, the trial court endorsed defense counsel's integrity at the recusal hearing, and it ultimately ruled in the Huffs' favor on all grounds except the unrelated issue of appraisal value. To the extent the Huffs suggest further bias is demonstrated by the court's subsequent rulings, and its review of an *ex parte* documentary submission by the Stoffels, the Huffs' claims on these grounds are largely speculative, and the court struck the *ex parte* submission from the record. We are unpersuaded that this record demonstrates a reasonable basis for doubting the trial court's impartiality.

In sum, we grant the Stoffels' petition for rehearing, vacate that part of our original decision concluding that the purchase agreement was unenforceable, and remand to the trial court for a factual determination on this ground. Because the enforceability of the purchase agreement remains at issue, we find it unnecessary to address the Huffs' remaining

challenges on the merits of the breach-of-contract claim and the trial court's award. In all other respects, we affirm our original decision.

MAY, J., concurs.

FRIEDLANDER, J., concurring in result.

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MIKE STOFFEL and ROSE STOFFEL,	)	
	)	
Appellee - Plaintiffs.	)	
	)	

FRIEDLANDER, Judge, concurring in result

I concur in result reached by the Majority upon rehearing. I write separately to clarify that I continue to adhere to my views regarding the meaning of "pre-approved", as explained in my original separate opinion.