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ATTORNEY FOR APPELLANT:

DYLAN A. VIGH
Law Offices of Dylan A. Vigh, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

DAVID R. KREBS
NICOLETTE E. MENDENHALL
Hostetler & Kowalik, P.C.
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARK BUNKER,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 29A04-0809-CV-524
	)	
NICOLE CHERIE PARADIS,	)	
	)	
Appellee.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
The Honorable David K. Najjar, Magistrate
Cause No. 29D01-0802-CC-199

October 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Mark Bunker appeals the trial court's entry of judgment in favor of Nicole Paradis. We affirm.

ISSUES

1. Whether the trial court denied Bunker due process.

2. Whether the evidence supports the judgment.

FACTS

Paradis is Kristine Bastian's sister. Bunker and Bastian were married on September 4, 2004, and divorced in July of 2007.

On December 9, 2003, Bunker and Bastian executed a promissory note (the "Note") in which they promised to pay Paradis "$40,000.00 with interest from January 15, 2004, on the unpaid principal at the rate of 10.00% per annum," with any remaining principal and interest to be paid on or before January 15, 2006. (Paradis's App. 3).

On February 15, 2008, Paradis filed a complaint against Bunker on the Note, seeking judgment in the amount of $40,000.00, "together with interest from December 9, 2003, at the rate of 10% per annum," plus costs and fees. (Paradis's App. 2). Bunker filed his answer on March 11, 2008, asserting that he had transmitted $47,000.00 to Bastian for payment on the Note. He attached as an exhibit a copy of a cashier's check, dated September 21, 2004, made payable to Bastian in the amount of $47,000.00.

The trial court held a bench trial on July 17, 2008. Bunker appeared pro se, and Paradis appeared by counsel. Paradis, however, did not attend the trial as she was attending her sick mother in California.

Bastian testified that Paradis had designated her as her attorney-in-fact and that the power of attorney authorized her to conduct business in Indiana on Paradis's behalf. Bunker did not refute this testimony. Bastian further testified that she and Bunker were married on September 4, 2004, subsequent to executing the Note. They divorced in July of 2007, entering into a property settlement agreement (the "Settlement Agreement") on July 25, 2007.

According to Bastian, the sums advanced under the Note originally were "to assist in procuring" the marital residence but actually went to Bunker "to use in whatever form he needed . . . ." (Tr. 11). The trial court admitted into evidence a copy of a statement from Paradis's bank, indicating that on December 8, 2003, her bank wired $40,000.00 from her account to Bunker's personal account.

Bastian maintained that the $47,000.00 paid to her on or about September 21, 2004, were proceeds from "an additional money sum of $60,000" wired from Paradis's bank account to Bunker's bank account on or about September 16, 2004. (Tr. 13). She testified that Paradis also had given Bunker $47,709.00 to help with "additional properties that were in trouble[.]" (Tr. 13). The trial court admitted into evidence copies of statements from Paradis's bank, dated September 16, 2004, and March 9, 2004, confirming that $60,000.00 and $47,709.00, respectively, had been wired from her bank account to Bunker's personal bank account.

Bunker testified that the Settlement Agreement addressed the payment of the Note. The trial court admitted the Settlement Agreement into evidence. It provided that after the payment of certain other obligations, the remaining proceeds from the sale of the

marital residence shall be applied to "debt owed to Jean and Nicole Paradis of approximately $450,000.00." (Def.'s Ex. 1). It further provided that "[i]n the event the house proceeds are not sufficient to pay off the . . . debts, and [sic] remaining balance on said debts shall be split 50% to each party with payments of no less than $3,000.00 per month from [Bunker] to [Bastian] . . . ." *Id.*

Bunker also moved to admit into evidence the cashier's check in the amount of $47,000.00 and made payable to Bastian "to show that there were some transactions and monies paid between . . . Bastian" and himself. (Tr. 24). The trial court admitted the cashier's check into evidence. This cashier's check was the same as that attached to Bunker's answer; yet, the cashier's check admitted into evidence had the following notation handwritten on it: "Jean Paradis Mortgage 6901 W. 86th St." (Def.'s Ex. 2). However, the notation did not appear on the copy attached to Bunker's answer.[1]

On August 5, 2008, the trial court entered its order, granting Paradis a judgment against Bunker "in the amount of $40,000.00, plus interest at the rate of 10% per annum from December 9, 2003, through July 17, 2008, in the sum of $18,417.90, and further plus attorney's fees of $1,000.00, for a total sum of $59,417.90 plus costs . . . ." (Bunker's App. 5). A magistrate signed and entered the order.

Bunker filed his notice of appeal on August 14, 2008. The case was fully briefed as of June 8, 2009. On June 11, 2009, this Court ordered Bunker to produce a final appealable order signed by the Judge of the Hamilton Superior Court or to seek remand

[1] This copy is contained in the Paradis's Appendix.

to the trial court for the purpose of entering a final appealable order.[2] This Court retained jurisdiction over the appeal.

On July 8, 2009, Bunker filed a motion for limited remand, which this Court granted on July 27, 2009, for the purpose of obtaining a final appealable judgment. Accordingly, this Court ordered the trial court to issue a signed final judgment in the matter and to file a copy of the final judgment with the Clerk of this Court within twenty days of the date of the order. This Court otherwise retained jurisdiction over the appeal, which it held in abeyance.

On August 11, 2009, the Judge of the Hamilton Superior Court entered an order approving the August 6, 2008, judgment entry and entered the judgment accordingly. The trial court filed its order with the Clerk of this Court on August 27, 2009.

DECISION

1. Due Process

Bunker asserts that the trial court denied him due process and "committed fundamental error by allowing the trial to proceed without Paradis in attendance." Bunker's Br. at 11. Namely, he argues that "[i]t is an affront to the confrontation clause of the federal and Indiana constitutions and deprived [him] of the ability to cross-examine Paradis as to expectations of the parties." *Id.*

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

[2] Indiana Code section 33-23-5-8 provides that a magistrate "may not enter a final appealable order unless sitting as a judge pro tempore or a special judge."

against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. Amend. VI (emphasis added). It "speaks to those accused in criminal prosecutions, not parties to civil actions." *Bowman v. Smoot*, 806 N.E.2d 811, 816 (Ind. Ct. App. 2004). "Therefore, the protections provided by the Sixth Amendment are available only in criminal prosecutions." *Id.*

Similarly, Article 1, Section 13 of the Indiana Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." (Emphasis added). Given the language, its protections clearly are mandated and must be made available only in criminal prosecutions.[3] As this is a civil action, we find no violation.

Furthermore, Bunker could have subpoenaed Paradis to testify at trial pursuant to Indiana Trial Rule 45(E) but did not.[4] He cannot now complain that he was prejudiced by his failure to do so.

2. Judgment

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[3] We note that the Fourteenth Amendment to the United States Constitution prohibits any state from depriving any person of "life, liberty, or property, without due process of the law." U.S. Const. Amend. XIV. "'Generally stated, due process requires notice, an opportunity to be heard, and an opportunity to confront witnesses.'" *Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008). Furthermore, Article 1, Section 12 of the Indiana Constitution provides that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." Bunker, however, makes no argument regarding either the Fourteenth Amendment or Article 1, Section 12 other than to state that "the fundamentals of due process have been violated . . . ." Bunker's Br. at 11. Thus, this argument is waived. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) ("Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), *trans. denied*.

[4] Indiana Trial Rule 45(E) provides, in part, that "[a]t the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of court of the county in which the action is pending when requested . . . ."

Bunker asserts that "[b]ased on the evidence that [he] remitted a check in satisfaction of [the] Note, the evidence was insufficient to award a judgment against [him] as he proffered credible proof of accord and satisfaction." Bunker's Br. at 4. He also argues that the Settlement Agreement "prohibited Paradis from receiving a double recovery as his divorce decree specifically delineated that all debts owed to Paradis would be paid from the proceeds of the marital home." *Id.*

> [W]e will affirm a general judgment upon any legal theory consistent with the evidence. In making that determination, we will neither reweigh the evidence nor judge the credibility of the witnesses. When reviewing a general judgment, we presume that the trial court correctly followed the law, and this presumption is one of the strongest presumptions applicable to our consideration of a case on appeal.

Lynn v. Windridge Co-Owners Ass'n, Inc., 830 N.E.2d 950, 954-55 (Ind. Ct. App. 2005).

a. *Accord and satisfaction*

Bunker argues that "[i]nsufficient evidence exists that the payment of $47,000 by [him] was not accord, and thus, did not satisfy his responsibility under the Note." Bunker's Br. at 7. Accord and satisfaction is an affirmative defense that must be set forth in the responsive pleading. Ind. Trial Rule 8(C). The failure to plead an affirmative defense results in waiver of the issue. *Bunch v. State*, 778 N.E.2d 1285, 1288 (Ind. 2001). Furthermore, "a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court." *GKC Indiana Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). Failure to raise an issue before the trial court will result in waiver of that issue. *Van Winkle v. Nash*, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002).

Here, Bunker failed to plead accord and satisfaction as an affirmative defense. He also failed to raise it before the trial court. Accordingly, he has waived this issue. Waiver notwithstanding, Bunker's argument fails.

"A party required to affirmatively plead any matters . . . shall have the burden of proving such matters." T.R. 8(C). Because Bunker would have had the burden of proof at trial on his affirmative defense, he appeals from a negative judgment. *See Mominee v. King*, 629 N.E.2d 1280, 1282 (Ind. Ct. App. 1994).

> When a party appeals from a negative judgment, he must demonstrate that the evidence points unerringly to a conclusion different from that reached by the trial court. We will reverse a negative judgment only if the decision of the trial court is contrary to law. In determining whether a trial court's decision is contrary to law, we must determine if the undisputed evidence and all reasonable inferences to be drawn therefrom lead to but one conclusion and the trial court has reached a different one.

Id. (internal citations omitted).

"'Accord and satisfaction is a method of discharging a contract, or settling a cause of action by substituting for such contract or dispute an agreement for satisfaction.'" *Id.* (quoting *Daube and Cord v. LaPorte County Farm Bureau Coop. Assoc.*, 454 N.E.2d 891, 894 (Ind. Ct. App. 1983)). "The term 'accord' denotes an express contract between two parties by means of which the parties agree to settle some dispute on terms other than those originally contemplated, and the term 'satisfaction' denotes performance of the contract.'" *Id.*

Accord and satisfaction requires a meeting of the minds or evidence that the parties intended to agree to an accord and satisfaction. *Id.* Whether the party claiming

accord and satisfaction has met its burden is ordinarily a question of fact but becomes a question of law if the requisite controlling facts are undisputed and clear. *Id.*

> [U]nder Indiana law, a check tendered in satisfaction of a claim must be accompanied by an express condition that the acceptance is in full satisfaction of the claim and that the creditor takes the check subject to that condition. Further, and most importantly, the creditor must positively understand the condition upon which the check is tendered.

Id. at 1283.

Bunker presented evidence that he tendered a check to Bastian for $47,000.00. He, however, presented no evidence that Paradis was aware of his action and accepted and cashed the check, or that Bastian did so on behalf of Paradis and as Paradis's attorney-in-fact. Moreover, the check was not accompanied by an express condition or documentation that acceptance of it was in full satisfaction of Paradis's claim; and, there is no evidence that either Paradis or Bastian, as the attorney-in-fact, considered the check to be an accord and satisfaction. Accordingly, we cannot say that the trial court erred in not finding that Bunker proved accord and satisfaction.

b. *Settlement agreement*

Bunker also argues that the Settlement Agreement between him and Bastian "finalized all issues attendant to the alleged debt owed by [him] to Paradis." Bunker's Br. at 9. Specifically, he contends the Settlement Agreement constitutes satisfaction of the debt owed to Paradis, and therefore, any judgment in favor of Paradis would amount to "a double recovery due to the provisions of the [Settlement] Agreement, which already contemplated a 'payback' of the debt . . . ." *Id.* at 10.

> When dissolving a marriage, the parties are free to craft an agreement providing for the maintenance of either party, the custody and support of the parties' children, and the disposition of property. Settlement agreements become binding contracts when incorporated into the dissolution decree and are interpreted according to the general rules for contract construction. Unless the terms of the agreement are ambiguous, they will be given their plain and ordinary meaning. Interpretation of a settlement agreement, as with any other contract, presents a question of law and is reviewed de novo.

Bailey v. Mann, 895 N.E.2d 1215, 1217 (Ind. 2008) (internal citations omitted).

Again, Bunker and Bastian entered into the Settlement Agreement as part of the dissolution of their marriage, which provides that the proceeds from the sale of the marital residence shall be used to pay several debts, including, "debt owed to Jean and Nicole Paradis of approximately $450,000.00." (Def.'s Ex. 1). However, the Settlement Agreement's language does not limit or prevent Paradis from seeking judgment on the debt owed to her.[5] Furthermore, contrary to Bunker's assertion, it does not satisfy the debt owed to Jean and Nicole Paradis; rather, it directs that payment shall be made to Paradis upon of the sale of the marital residence and only after several other unspecified debts are satisfied. It in no way addresses or guarantees payment to Paradis on her personal note or is evidence of satisfaction of her claim against Bunker. We therefore find no error in entering judgment against Bunker for the full amount of the Note, plus interest, fees, and costs.

Affirmed.

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

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[5] We note that Paradis is not a party to the Settlement Agreement, and therefore, is not bound by it. *See Mislenkov v. Accurate Metal Detinning, Inc.*, 743 N.E.2d 286, 289 (Ind. Ct. App. 2001) (stating that a contract generally only binds the parties to the contract).