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IN THE
COURT OF APPEALS OF INDIANA

1991 INVESTORS LIMITED PARTNERSHIP, An Indiana Limited Partnership, PAMELA T. HENNESSY, JOSEPH J. HENNESSY, TAMRYN M. HENNESSY, TERRANCE R. HENNESSY, ST. JOSEPH COUNTY BOARD OF COMMISSIONERS, and 1ST SOURCE BANK,	)	
Appellants-Defendants,	)	
vs.	)	No. 71A03-1105-MF-193
CITIZENS FINANCIAL SERVICES, FSB,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
Cause No. 71C01-0811-MF-832

October 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Citizens Financial Services ("Citizens") made a business loan to 1991 Investors Limited Partnership ("1991 Investors") which was secured by a mortgage on three condominium units. Joseph and Terrance Hennessy, who are partners of 1991 Investors, also signed personal guaranties, as did Pamela and Tamryn Hennessy.[1] When 1991 Investors failed to pay the loan in full, Citizens filed suit against 1991 Investors and the Hennessys (collectively, "the defendants").[2] Citizens filed a motion for summary judgment, to which none of the defendants filed a response. However, at the summary judgment hearing, the defendants argued that Citizens was not entitled to payment for delinquent real estate taxes on the condominiums because Citizens had not paid them and that the amount of their personal liability should not be determined until after the collateral property was sold. The trial court granted Citizens' summary judgment motion except for the two issues raised by the defendants. After the collateral property was sold, the court entered a personal judgment against the defendants. Tamryn filed a motion to correct error, raising several new issues, which the trial court denied. Concluding that Tamryn has waived the issues raised in this appeal, we affirm the judgment of the trial court.

Facts and Procedural History

On September 10, 1998, Citizens and 1991 Investors entered into a business loan

[1] Tamryn is Joseph's wife. The record does not reflect how the other parties are related.

[2] Citizens also named the St. Joseph County Board of Commissioners and 1st Source Bank as defendants because there is a property tax lien on the property and 1st Source apparently holds a second mortgage. Tamryn is the only defendant involved in this appeal. The other parties are named in the caption only because a "party of record in the trial court … shall be a party on appeal." Ind. Appellate Rule 17(A).

agreement. Citizens loaned $575,000 to 1991 Investors, and 1991 Investors gave Citizens a promissory note secured by a mortgage on three condominium units (hereafter "collateral property"). The Hennessys each signed a personal guaranty. According to the promissory note, 1991 Investors was to make 119 payments of $4717.05 beginning on October 1, 1998. The note matured on September 1, 2008, and 1991 Investors was to make a final payment estimated at $476,583.19. The loan agreement and mortgage required 1991 Investors to pay the real estate taxes on the collateral property.

On September 2, 1999, Citizens and 1991 Investors entered into a change in terms agreement. The monthly payments were adjusted to $4727.33, and the first and final payments were pushed back a month. The Hennessys did not sign new guaranties, and Tamryn did not sign the Change in Terms Agreement.

On November 24, 2008, Citizens filed a complaint alleging that 1991 Investors had stopped making payments on the note in August 2008 and had failed to pay real estate taxes on the collateral property from 2006 to 2008. The complaint requested the following relief:

> a) Order an in rem judgment against the [collateral] property … in the principal amount of [$475,779.94], plus interest as provided in the Promissory Note, plus late charges of [$472.72], plus all unpaid real estate taxes due and owing for the years 2006, 2007 and 2008, plus its reasonable attorney fees, expenses and costs incurred in bringing this action.
>
> b) Declare Citizens' Mortgage to be a valid, prior and enforceable lien on [the collateral property].
>
> c) Order Citizens' Mortgage foreclosed as against all defendants, including 1991 Investors, Guarantors, and all persons claiming from, under or through said defendants, declare Citizens' Mortgage lien to be superior to any/all liens r claims asserted by any of the defendants subject to the payment by Citizens of all monies owed to the Board of Commissioners as allowed by law to

> redeem the property from tax sale, and declare all liens, interests and claims of any of the defendants to be inferior and subordinate to Citizens' Mortgage except for the lien of the Board of Commissioners.
>
> d) Enter judgment against 1991 Investors in the principal sum of [$475,779.94], plus interest as provided in the Promissory Note, plus late charges of [$472.72], plus all unpaid real estate taxes due and owing for the years 2006, 2007 and 2008, plus its reasonable attorney fees, expenses and costs incurred in bringing this action.
>
> f)[3] Subject to the payment of those monies due to the Board of Commissioners …, to foreclose the Mortgage as against 1991 Investors, and all other defendants and persons claiming from, under or through it….
>
> g) Pending satisfaction of the obligation owed to the Board of Commissioners …, order the Sheriff of St. Joseph County, Indiana, to sell the [collateral] property.…
>
> h) If the proceeds from such sale are insufficient to satisfy Citizens' claim so that a deficiency exists, Citizens shall have a personal money judgment against 1991 Investors, jointly and severally, in the amount of the deficiency, and, order the Sheriff of St. Joseph County, Indiana, to levy immediately upon the goods and chattels of 1991 Investors until such judgment is satisfied in full.
>
> i) Order a deed issued according to Indiana law, and that Citizens be and is hereby empowered to bid for the real property … or any part thereof with the indebtedness due Citizens, said indebtedness to be credited with amount paid[.]
>
> j) If the defendants do not surrender full and peaceful possession of [the collateral property], the Sheriff of St. Joseph County, Indiana to enter upon [the collateral property] and eject and remove the defendants….
>
> k) Award Citizens the costs of this action, pre and post-judgment interest and all other appropriate relief without delay.

Appellant's App. at 54-56.

On May 21, 2009, Citizens filed a motion for summary judgment. Citizens designated

[3] There was no paragraph e) in the complaint.

the complaint, the loan agreement, the change in terms agreement, the promissory note, the mortgage, the guaranties signed by each defendant, and the affidavit of Richard Cole, the assistant vice president of Citizens. Cole explained the course of dealings between Citizens and the defendants and stated that the defendants were in default, that they were notified of the default, and that they had not cured the default. Cole listed the amounts due for unpaid principal, interest, late fees, costs, an appraisal, real estate taxes, and attorney fees.

The defendants requested and received several extensions of time, but did not file a response or designate any additional evidence. On December 23, 2009, the court held a hearing on Citizens' summary judgment motion. The defendants did not challenge any of Citizens' factual assertions, the authenticity or enforceability of any of the documents designated by Citizens, or Citizens' valuation of any of the damages it sought. In fact, the defendants conceded that most of the relief that Citizens requested was proper, but argued that a money judgment against the defendants personally was premature because the collateral property had not yet been sold so there was no "deficiency" at that time: "You could get a judgment on liability, you know, saying that there's a default on the loan, 1991 [Investors] is liable, the guarantors are liable. But I think it's premature to get a deficiency judgment on the amount now." Dec. 23, 2009 and Mar. 25, 2010 Tr. at 9.[4] The defendants also objected to Citizens' request for the real estate taxes because Citizens had not paid them. The defendants asked the trial court to withhold judgment for thirty days so that they could

[4] The record includes the transcripts of four different hearings, which are bound in three different volumes with separate pagination, contrary to Indiana Appellate Rule 28(A)(2), which states that the "pages of the Transcript shall be numbered consecutively regardless of the number of volumes the Transcript requires." We will cite the volumes by the date of the hearing.

attempt to complete a business deal that they hoped would enable them to pay Citizens the money owed. Citizens argued that it was permitted to pursue all remedies concurrently and did not have to wait for the collateral property to be sold before obtaining a judgment against the defendants personally.

At the conclusion of the hearing, the court ruled as follows:

> Court finds there's no genuine issue of material fact and that the plaintiff is entitled to recover as a matter of law. Plaintiff shall have and recover of and from the defendants the principal sum of $475,799.94, along with interest, late fees, costs, appraisal fee, and attorney fees, for a total judgment in the amount of $545,931.60.…
>
> Court finds that the defendants Hennessy, including Pamela Hennessy, are also liable for deficiency judgment pursuant to the guaranty, and the Court finds that liability is a matter of summary judgment as well. Plaintiff may file affidavit should deficiency develop as a result of the Sheriff's sale, if any.
>
> In addition, the court notes that there remain unpaid real estate taxes in the amount of $131,497.22, and should the plaintiff pay those fees they would also be entitled to recovery from the partnership and the Hennessys, all as per form of order to be provided by the Court.

Id. at 16-17. The court stated that it would officially enter the order on January 15, 2010, so as to give the defendants some extra time to try to pay Citizens.

On January 21, 2010, the court entered an order that included damages for the unpaid real estate taxes and a money judgment against the defendants. The defendants filed a motion to correct error, arguing that the order was not in accordance with the court's ruling on December 23, 2009. On March 25, 2010, the court held a hearing on the motion to correct error. The defendants' attorney stated:

> I'm asking the Court to enter a new order which would enter judgment against the individuals on liability, defer the amount of the liability until after the real

> estate is sold, that's the first issue; then the second issue is the judgment against the corporation should not include any real estate taxes unless and until they have been paid.

Id. at 20. Citizens again argued that it should not have to wait to obtain a personal money judgment against the defendants. The court concluded that it should issue an amended order that reflected what it had originally decided on December 23, 2009.

According to the chronological case summary, on October 8, 2010, Citizens filed a "report of sheriff sale and petition for determination of equity if any in real property that is subject matter for foreclosure action, together with order regarding determination of equity and authority to proceed against personal guarantors."[5] Appellant's App. at iv. Citizens later filed a brief and affidavits in support of its motion. The defendants filed an objection.

On December 23, 2010, the court held a hearing on Citizens' motion. Citizens stated that there had been a sheriff's sale in September 2010. Citizens did not bid at the sale because it did not believe that there was any equity in the property; at the time there was around $120,000 in unpaid real estate taxes and $90,000 in unpaid common area assessments. Citizens apparently submitted an appraisal, but the defendants argued that it was not a valid basis for determining the property's value because it was not accompanied by an affidavit.[6] The defendants argued that there should be an evidentiary hearing to determine whether the property had any equity. Citizens argued that the sale price of the property was evidence of its value and that, in any event, the property did not have to be sold before

[5] This motion and the other filings relating to it are not included in the record before us.

[6] The appraisal also is not included in the record before us.

Citizens could obtain a personal judgment against the defendants. The court concluded that Citizens had made a prima facie showing that the collateral property had no equity and that "the amended decree of foreclosure and judgment, which was issued previously with respect to the subject property *in rem*, shall now be converted to a judgment *in personam* against the Defendants." *Id*. at 26.

On January 24, 2011, Tamryn filed a motion to correct error. Tamryn argued that her guaranty was invalid because it lacked material terms and did not apply to the amended agreement between Citizens and 1991 Investors. Pointing to her answer to Citizens' complaint, Tamryn also argued that Citizens failed to make a prima facie case for summary judgment. In response, Citizens noted that Tamryn had not objected to any of its designated evidence, that she did not respond to the motion for summary judgment, and that she was raising new issues. Tamryn countered by arguing that she did not have to come forward with any evidence because Citizens' designation was not sufficient in the first place. On April 18, 2011, the court denied Tamryn's motion to correct error.

Discussion and Decision

Tamryn argues that the trial court erred by granting summary judgment for Citizens and denying her motion to correct error. We review a trial court's denial of a motion to correct error for an abuse of discretion. *Scales v. Scales*, 891 N.E.2d 1116, 1118 (Ind. Ct. App. 2008). An abuse of discretion occurs where the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id*.

Summary judgment is appropriate only when there are no genuine issues of material

fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). Our standard of review is well settled:

> In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper.

Perryman v. Motorist Mut. Ins. Co., 846 N.E.2d 683, 687 (Ind. Ct. App. 2006) (citations omitted). "In reviewing a trial court's ruling on a motion for summary judgment, we may affirm on any grounds supported by the Indiana Trial Rule 56 materials." *Kozlowski v. Lake County Plan Comm'n*, 927 N.E.2d 404, 408 (Ind. Ct. App. 2010), *trans. denied*.

Tamryn argues that her guaranty is not valid and enforceable because it lacks material terms and does not apply to the change in terms agreement. Tamryn raised these issues for the first time in her motion to correct error; therefore, they are waived. *See Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000) ("A party may not raise an issue for the first time in a motion to correct error or on appeal."). At the summary judgment hearing, Tamryn explicitly conceded that the relief sought by Citizens in paragraphs b) through g) and i) and j) were proper. The only arguments that Tamryn advanced concerning paragraphs a) and h) were that Citizens should not be reimbursed for property taxes because it had not paid them and that there could not be a deficiency judgment against Tamryn until the property was sold. Tamryn conceded that she could be found liable for a deficiency, but that the amount of the deficiency could not be determined at that time. The trial court accepted these arguments and

granted summary judgment for Citizens on all issues except for property taxes and the amount of the guarantors' liability.

Tamryn also argues that Citizens did not meet its burden of proof. In support, Tamryn repeatedly cites to her answer to Citizens' complain, which was not part of the designated evidence. *See Portside Energy Corp., Inc. v. N. Ind. Commuter Transp. Dist.*, 913 N.E.2d 221, 230 (Ind. Ct. App. 2009) ("On appeal, we are abound by the same standard as the trial court, and we only consider the evidence designated to the trial court."). Moreover, any error in finding her personally liable was invited error. *See In re Adoption of L.C.E.*, 940 N.E.2d 1224, 1227 (Ind. Ct. App. 2011) (noting that a party may not complain of errors that he or she induced the court to make and that invited error is not reversible error). Tamryn conceded all issues except for property taxes and whether the property had any equity that would reduce the amount of her liability. Tamryn seems to insinuate that it was improper for the trial court to convert the in rem judgment to an in personam judgment, but Tamryn cites no authority in support. *See Ill. Bulk Carrier, Inc. v. Jackson*, 908 N.E.2d 248, 262 n.7 (Ind. Ct. App. 2009) (Ind. Appellate Rule 46(A)(8)(a) requires that arguments be supported by cogent reasoning and citations to authority; failure to do so generally results in waiver). Furthermore, despite the language that the trial court used, Tamryn had already been found personally liable for the deficiency based on her own concession. In fact, the court proceeded exactly as Tamryn had suggested. *See* Dec. 23, 2009 and Mar. 25, 2010 Tr. at 7-8. ("[Paragraph h)] contemplates that this property would go to Sheriff's sale, be sold, and then there may be a deficiency. And at that time I believe it would be appropriate to come back to court and get a

judgment for the deficiency.”).

The only issue that appears to be preserved is the amount of Tamryn’s liability, but Tamryn’s brief does not address this issue.[7] Although she objected to the appraisal that Citizens submitted to the trial court, Tamryn has not included it in the record. Nor did she dispute that the property is subject to substantial liens for property taxes and common area assessments. Therefore, we conclude that Tamryn has waived all issues raised in this appeal by failing to timely raise them and by failing to support her arguments with proper authorities and citations to the record. The judgment of the trial court is affirmed.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.

[7] The trial court has not found her liable for real estate taxes at any point of these proceedings.