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IN THE
COURT OF APPEALS OF INDIANA

H & J LEGACY FAMILY LIMITED PARTNERSHIP,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 57A03-1105-PL-185
R.L.S. DEVELOPMENTS, L.L.C., ROGER DIEHM, Individually and as a Partner of R.L.S. Developments, L.L.C., and SHELLY DIEHM, Individually and as a Partner of R.L.S. Developments, L.L.C., and COMMUNITY STATE BANK,	)	
Appellees-Defendants.	)	

APPEAL FROM THE NOBEL CIRCUIT COURT
The Honorable Michael J. Kramer, Judge
Cause No. 57C01-0606-PL-12

December 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

In 2005, H & J Legacy Family Limited Partnership ("H & J") won a judgment against R.L.S. Developments, L.L.C. ("RLS"). After failing to collect on the judgment, H & J brought suit against RLS; RLS's members, Roger Diehm and Shelly Diehm ("Roger" and "Shelly" individually, "the Diehms" collectively), individually; and Community State Bank, contending that certain transactions by RLS with the Diehms and Community State Bank were fraudulent and seeking to pierce the RLS corporate veil to reach the Diehms' personal assets to satisfy the prior judgment. Community State Bank was dismissed upon a grant of summary judgment, and the case proceeded to a bench trial on H & J's claims against RLS and the Diehms. The trial court found in favor of RLS and the Diehms and against H & J, and denied H & J's subsequent motion to correct error. H & J now appeals.

We affirm.

Issues

H & J raises numerous issues for our review, which we restate as:

I. Whether the trial court committed reversible error when it:

A. Concluded that H & J's fraudulent transfer claim did not encompass RLS's distributions of cash and property to the Diehms during the pendency of the 2001 action because H & J did not conform with the pleading requirements of Indiana Trial Rule 9(B);

B. Entered its findings as to the year-end balances of RLS's general ledger accounts and RLS's assets before and during the 2001 action;

C. Concluded that the mortgage RLS granted on certain real estate to Community State Bank in exchange for $50,000 was not a fraudulent transfer; and

II. Whether the Indiana Business Flexibility Act provides H & J with an alternate basis for recovery.

Facts and Procedural History

In 2001, H & J first filed suit against RLS ("the 2001 action"). During the pendency of the 2001 action, RLS owned two pieces of real estate: a house at 620 Westgate in Kendallville ("620 Westgate") and a building called the Northeastern Center. In 2002, RLS sold the Northeastern Center for $700,000 (Ex. E), but retained 620 Westgate throughout the pendency of the 2001 action and beyond.

At the beginning of the 2001 tax year for RLS, the company's tax returns reflected total assets of $1,041,462, which included the value of the Northeastern Center, 620 Westgate, and cash and other property; liabilities of $792,569; and owner's capital of $248,893. From 2001 to 2003, RLS made distributions of property and capital totaling $352,305 to the Diehms as members of the company; no distributions were made during 2004. At the end of the 2004 tax year for RLS, the company's tax returns reflected general ledger account balances of $161,259 in assets, of which $8,429 was held as cash and $152,830 was held as "Construction in Process"; $49,876 in liabilities; and $111,383 in owner's capital. (Ex. D.)

By 2004, RLS had incurred around $30,000 in attorney's fees defending the 2001 action, and would incur nearly $10,000 more by the conclusion of an appeal. On November 12, 2004, the Diehms, acting for RLS, granted a mortgage on 620 Westgate with Community

State Bank in exchange for $50,000. Approximately $40,000 of this money was used to pay attorney's fees at trial and on appeal; the remainder of the loan money was used to pay a portion of the principal balance. Roger made further payments on the loan individually.[1]

On January 10, 2005, judgment was entered for H & J against RLS in the amount of $98,927.93 plus costs of $104.00. H & J attempted to collect upon the judgment in the 2001 action by initiating proceedings supplemental, but was unsuccessful because the only asset available for execution was the 620 Westgate property, upon which Community State Bank still held a mortgage lien.

On June 27, 2006, H & J filed its complaint in the instant case. In Count One, H & J alleged that that RLS's grant of a mortgage to Community State Bank prior to the judgment in the 2001 action was a fraudulent transfer. In Count Two, H & J alleged that the Diehms individually possessed adequate assets to satisfy the judgment against RLS, and that "in anticipation of" a lawsuit by H & J the Diehms "secreted away assets or improperly encumbered assets that could be used to satisfy the debt owed herein." (App. 14.) RLS and the Diehms answered the complaint on August 23, 2006, and denied the substance of the allegations.

On January 15, 2007, Community State Bank filed a motion for summary judgment, and on July 9, 2007, its motion was granted, removing it as a party from the case.

On January 19, 2011, RLS submitted a written motion requesting the trial court to

[1] At trial in the instant case, Roger testified that he did not know whether these payments were properly characterized as loans from him individually to RLS, as contributions of capital to RLS, or were subject to some other treatment for accounting and tax purposes.

enter specific findings and conclusions setting forth the basis of its judgment at trial.

On January 20, 2011, a bench trial was conducted. During the trial, H & J sought to introduce into evidence exhibits and testimony related to the financial condition of RLS and its distribution of assets to the Diehms from 2001 to 2004; this consisted of partnership tax returns[2]; testimony from Roger; and expert testimony from Carla Butler ("Butler"), a Certified Public Accountant who had reviewed RLS's tax returns. The trial court admitted much of this evidence and excluded other evidence, sometimes limiting the admission of the evidence for foundational purposes, and based its rulings in part on the specificity or lack thereof of Count Two of the complaint's allegations of fraud by RLS.

In response to a ruling sustaining an objection to evidence relating to RLS's distribution of assets to the Diehms, H & J moved to amend the complaint to conform to the evidence already admitted; the trial court denied this motion. Also during the trial, RLS and the Diehms moved for involuntary dismissal of Count Two of the complaint, which the trial court also denied. Thus, at the conclusion of the trial, evidence related to the second count of the complaint had been admitted, neither of the two counts in H & J's complaint had been dismissed, and neither count had been amended. The trial court indicated, however, that to the extent Count Two might constitute an allegation of fraud or fraudulent transfer, it construed that allegation to pertain to disposition of the proceeds of RLS's sale of the Northeastern Center.

At the conclusion of the trial, the court took the case under advisement. On March 2,

[2] RLS was treated as a partnership for tax purposes.

2011 the trial court entered findings and conclusions:

> 6. When the complaint in [the 2001 action] was filed, R.L.S. had assets consisting of a house at 620 Westgate and what is known as the Northeastern Center building. The house at 620 Westgate was unencumbered [by any liens].
>
> ***
>
> 8. On November 12, 2004, R.L.S. encumbered the property at 620 Westgate and received a mortgage loan for $50,000.00.
>
> 11. In tax year 2001 R.L.S. had income of $16,316.00 and made distribution to partner [sic] in the amount of $85,228.00. It began the tax year with assets of $1,041,462.00 and liabilities of $1,041,462.00, and ended the tax year with assets of $623,807.00 and liabilities of $623,807.00. The capital account for each of the two (2) partners went from $124,448.00 to $89,600.00.
>
> 12. In tax year 2002 R.L.S. had income of $239,154.00 and made distributions to partner [sic] in the amount of $182,596.00. It began the tax year with assets of $623,807.00 and liabilities of $623,807.00, and ended the tax year with assets of $235,755.00 and liabilities of $235,755.00. The capital account for each of the two (2) partners went from $89,600.00 to $117,879.00 during the tax year.
>
> 13. In tax year 2003 R.L.S. had a loss of $7,394.00 and made distributions to partner [sic] in the amount of $84,481.00. It began the tax year with assets of $235,755.00 and liabilities of $235,755.00, and ended the tax year with assets of $122,280.00 and liabilities of $122,280.00. The capital account for each of the two (2) partners went from $117,879.00 to $42,241.00 during the tax year.
>
> 14. In tax year 2004 R.L.S. had a loss of $12,897.00 and made no distributions to partners. It began the tax year with assets of $122,280.00 and liabilities of $122,280.00, and ended the tax year with assets of $161,259.00 and liabilities of $161,259.00. R.L.S. incurred legal fees of $9,229.00.
>
> ***
>
> 20. Count 1 of the complaint in the present cause specifically alleges that the defendant's [sic] defrauded the plaintiff in encumbering the 620

> Westgate property. Count 2 of the complaint generally alleges that the Diehms secreted or improperly encumbered assets that could be used to satisfy the judgment against [RLS].
>
> ***
>
> A. [Reproduces I.C. § 32-18-2-14]
>
> B. "The elements of actual fraud are: 1) a material misrepresentation of past or existing fact by the party to be charged which, 2) was false, 3) was made with knowledge or in reckless ignorance of the falsity, 4) was relied upon by the complaining party, and 5) proximately caused the complaining party injury." Weber v. Costin, 654 N.E.2d 1130, 1133 (Ind.App. 1995).
>
> C. "Ind. Trial Rule 9(B) requires that a party must specifically allege the elements of fraud. In addition, the time, place, substance of the false representations, facts misrepresented, and identification of what was procurred [sic] by fraud must be specifically alleged." Weber v. Costin, 654 N.E.2d 1130, 1134 (Ind.App. 1995).
>
> D. Allegations of fraud regarding the Northeastern Center building were not specially pled and cannot be a basis for recovery.
>
> ***
>
> F. The basis for the complaint is the mortgage loan taken on the 620 Westgate property on November 12, 2004.

(App. 7-9.)

The trial court went on to conclude that, as to Count One, the mortgage was not a fraudulent transfer and there was no evidence that RLS had transferred any of the money obtained from the mortgage loan to the Diehms or had otherwise dissipated or hidden the money to frustrate H & J's attempts to collect on the judgment in the 2001 action, and there was no reduction in the value of RLS as a result of the loan. As to Count Two, after concluding that no form of fraud had been pled with sufficient specificity, the court

concluded that there was no basis upon which to pierce RLS's corporate veil to expose the Diehms personally to liability for RLS's debts. (App. 9-10.)

On March 31, 2011, H & J filed a motion to correct error, which the trial court denied on April 4, 2011.

This appeal followed.

Discussion and Decision

Standard of Review

H & J appeals from the trial court's denial of its motion to correct error. We review such decisions for an abuse of discretion, reversing only when the trial court's decision is against the logic and effect of the facts and circumstances before it or when the trial court errs on a matter of law. Hawkins v. Cannon, 826 N.E.2d 658, 661 (Ind. Ct. App. 2005), trans. denied.

H & J's motion to correct error came after the trial court entered a judgment setting forth specific findings and conclusions upon RLS's written motion. Our standard of review in such situations is well-settled:

> First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Challengers must establish that the trial court's findings are clearly erroneous. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. However, while we defer substantially to findings of fact, we do not do so to conclusions of law. Additionally, a judgment is clearly erroneous under Indiana Trial Rule 52 if it relies on an incorrect legal standard. We evaluate questions of law de novo and owe no deference to a trial court's determination of such questions.

Balicki v. Balicki, 837 N.E.2d 532, 535-36 (Ind. Ct. App. 2005) (quoting Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001)), trans. denied.

The purpose of specific findings and conclusions is to provide the parties and reviewing courts with the legal theory upon which the trial court relied in reaching its decision. Id. (citing Nance v. Miami Sand & Gravel, LLC, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005), trans. denied). We may affirm a judgment on any legal theory, whether or not relied upon by the trial court, so long as the trial court's findings are not clearly erroneous and support the theory adopted. Mitchell v. Mitchell, 695 N.E.2d 920, 923-24 (Ind. 1998). "Where trial court findings on one legal theory are adequate, findings on another legal theory amount to mere surplusage and cannot constitute a basis for reversal even if erroneous." Borth v. Borth, 806 N.E.2d 866, 870 (Ind. Ct. App. 2004) (citing Roser v. Silvers, 698 N.E.2d 860, 863 (Ind. Ct. App. 1998)).

Whether H & J Properly Pursued a Fraudulent Transfer Claim
Against RLS and the Diehms

H & J argued before the trial court that RLS's distributions to the Diehms during 2001, 2002, and 2003 were made fraudulently and that the Diehms should therefore be held personally liable for the judgment in the 2001 action. RLS and the Diehms argued that H & J had not pled the alleged fraud with the specificity required by Trial Rule 9(B) and was thus precluded from pursuing this claim; the trial court agreed. On appeal, H & J argues that the trial court misapprehended the nature of its claim with respect to the distributions, which it contends is a fraudulent transfer action, and that the Defendants' failure to challenge the sufficiency of the complaint under Trial Rule 12(B)(6) amounts to a waiver of any attempt to

limit H & J's claims to an attempt to pierce the corporate veil. H & J's arguments are unavailing for several reasons.

Statements of Counsel to the Trial Court

Among H & J's arguments on appeal is the contention that the second count of their complaint should have been construed as a fraudulent transfer claim rather than the theories of actual or constructive fraud and piercing the corporate veil that H & J stated it was pursuing in its representations to the trial court.

This court recently addressed the potentially binding effect of an attorney's statement to a trial court in Heyser v. Noble Roman's, Inc., 933 N.E.2d 16 (Ind. Ct. App. 2010), trans. denied. "An attorney can make an admission to a trial court that is binding upon his client," though a statement expressing ambiguity or doubt is not binding. Id. at 19 (citing Hockett v. Breunig, 526 N.E.2d 995, 998 (Ind. Ct. App. 1998); Maldonado by Maldonado v. Gill, 502 N.E.2d 1371, 1372 (Ind. Ct. App. 1987), trans. denied). In Heyser, the plaintiffs appealed from the trial court's grant of partial summary judgment dismissing their claims of constructive fraud. 933 N.E.2d at 18. During argument before the trial court, the plaintiffs' attorney stated, "We haven't pleaded constructive fraud so I would submit to the Court that we state the cause of action for fraud." Id. at 20 (quoting the appellant-plaintiffs' appendix). We affirmed the trial court's grant of summary judgment based upon the binding nature of the attorney's representation to the court. Similarly, in Hockett, where the plaintiff's attorney stated during a summary judgment hearing that a post-conviction court's decision would "probably bind" the trial court in a civil action alleging legal malpractice, we held that

summary judgment was appropriate after Hockett was denied post-conviction relief. Hockett, 526 N.E.2d at 998.

In its opening statement at trial, H & J stated that it would introduce evidence showing that fraudulent transfers occurred between RLS and the Diehms. During the trial, H & J introduced into evidence tax returns for RLS from tax years 2001 through 2004. RLS objected to their admission, leading to argument between H & J and RLS regarding the scope of H & J's complaint and the relevance of the tax returns and RLS's sale of the Northeastern center to H & J's action.[3] During this exchange, H & J referred the trial court to its pre-trial brief,[4] told the court that it was pursuing claims of "actual fraud or constructive fraud" (Tr. 37), and that the Diehms "individually combined together to secrete [RLS's] assets [from the sale of the Northeastern Center]" and that H & J sought to "pierce the corporate [veil]" and hold the Diehms personally liable for those assets. (Tr. 37-38.) When the trial court asked whether H & J's second count was "based upon … actual or constructive fraud," H & J's attorney answered "Yes." (Tr. 39.) After RLS and the Diehms argued—and the trial court agreed—that H & J's complaint failed to properly plead fraud, H & J moved the court to amend the complaint to conform to the evidence presented at trial without indicating any theory beyond actual or constructive fraud and piercing the corporate veil. That motion was denied.

Without directly challenging the trial court's denial of that motion, H & J now

[3] The trial court ultimately admitted the tax returns on the basis that they were relevant to issues related to piercing RLS's corporate veil, and RLS and the Diehms do not challenge their admission on appeal.

[4] H & J's pre-trial brief was not provided to this court.

contends that the trial court erred by misconstruing the nature of its claims as directed toward actual fraud and piercing the corporate veil, arguing instead that its claims rested upon the doctrine of fraudulent transfer. We cannot agree with H & J. While the statements made by H & J's attorney during the trial are not entirely concise, they nevertheless are clear: counsel made affirmative representations that H & J's claims rested on theories of actual or constructive fraud and that the Diehms had managed RLS in a manner that would make it unjust not to hold them personally liable for the judgment owed in the 2001 action.

Thus, H & J's argument that Count Two of its complaint against H & J and the Diehms rested on a theory of fraudulent transfer is new to this appeal, and is therefore waived. See M.S. v. C.S., 938 N.E.2d 278, 285 (Ind. Ct. App. 2010) (reiterating our standard that "[a] party waives appellate review of an issue or argument unless the party raised that issue or argument before the trial court").

Adequacy of H & J's Fraudulent Transfer Complaint

Moreover, even absent statements of H & J's trial counsel, we cannot conclude that H & J properly pled a cause of action for fraudulent transfer as to the distributions RLS made to the Diehms. The Indiana Uniform Fraudulent Transfers Act ("UFTA") sets forth Indiana law on what transactions constitute fraudulent transfers. Indiana Code section 32-18-2-14 provides:

> A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> > (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> >
> > (B) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as the debts became due.

Indiana Code section 32-18-2-15 further provides:

> A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:
>
> (1) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and
>
> (2) the debtor:
>
> > (A) was insolvent at that time; or
> >
> > (B) became insolvent as a result of the transfer or obligation.

Thus, a transaction may be a fraudulent transfer when the transferor engages in a transaction either with actual intent to interfere with a creditor's collection of a debt, or when the transferor should have known that the transaction would not provide the transferor with "reasonably equivalent value in exchange" for the transferred property and either would likely result in the transferor's insolvency or occurred while the transferor was insolvent.

A fraudulent transfer claim has as its goal "the removal of obstacles which prevent the enforcement of the judgment by the executive officers of the state through the levy of execution." Beavans v. Groff, 211 Ind. 85, 90, 5 N.E.2d 514 (1937). Fraudulent transfer "is not for the wrong or tort," id. at 90, but rather allows a creditor to obtain either the asset

transferred or its proceeds from the transferor/debtor or the transferee. I.C. § 32-18-2-17; Rose v. Mercantile Nat'l Bank of Hammond, 868 N.E.2d 772, 776 (Ind. 2007) (quoting Beavans, 211 Ind. at 90). Thus, fraudulent transfer claims are frequently pursued through proceedings supplemental under the same cause number as the judgment a creditor seeks to enforce, and it is "prudent policy" that "any action that may result in imposition of a new judgment should be filed under a new cause number." Rose, 868 N.E.2d at 777. "If a fraudulent transfer action is successful, '[t]he conveyances continue [to be] valid as between the grantor and grantee, and the only effect of the judgment is to subject the property to execution as though it were still in the name of the grantor.'" Id. at 776 (quoting Beavans, 211 Ind. at 90.)

Here, H & J attempted to collect on the judgment from the 2001 action by filing its claim under a new cause number and naming as defendants RLS, the judgment debtor from the 2001 action; the Diehms, who were named defendants in the 2001 action but were not found to be liable in that case; and Community State Bank, which extended the mortgage loan to RLS. At trial, H & J attempted to introduce into evidence testimony and exhibits regarding the financial state of RLS. RLS and the Diehms objected, pointing to Trial Rule 9(B)'s pleading requirements for fraud. The trial court admitted some evidence and excluded other evidence, but generally agreed with RLS and the Diehms that H & J had made a specific allegation only as to the mortgage on 620 Westgate, and considered the distribution of assets from RLS to the Diehms only in the context of piercing the corporate veil as to RLS's members. The trial court denied H & J's oral motion at trial to reform the complaint

to conform to the evidence or to otherwise permit H & J to amend the complaint and continue the proceedings, a ruling which H & J does not challenge directly in its briefs.

On appeal, H & J takes issue with the trial court's findings and conclusions. H & J argues that while its second count may have improperly pleaded its fraudulent transfer theory under Trial Rule 9(B) due to lack of specificity, it was entitled to have that claim considered at trial because RLS and the Diehms did not move to dismiss the count in a responsive motion under Trial Rule 12(B)(6). The findings and conclusions largely agree with the trial court's rulings with respect to the question of the pleading requirements of Trial Rule 9(B), which requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred. Malice, intent, knowledge, and other conditions of mind may be averred generally." The rule requires not only pleading the elements of fraud, but also that "the time, place, substance of the false representations, facts misrepresented, and identification of what was procured by fraud must be specifically alleged." Weber v. Costin, 654 N.E.2d 1130, 1134 (Ind. Ct. App. 1995).

The second count of H & J's complaint alleged that the Diehms had "sufficient assets to satisfy the debt" RLS owed as a result of the judgment in the 2001 action and that "[p]rior to the commencement of suit and in anticipation of the same, Defendants Roger Diehm and Shelly Diehm have secreted away assets or improperly encumbered assets that could be used to satisfy the debt owed herein." (App. 14.) H & J therefore sought a judgment that the Diehms "be found personally liable for the monies owed to Plaintiff." (App. 14.) The trial court concluded that this amounted to a claim to set aside the protections afforded to the

Diehms as members of RLS, a limited liability company, and not as a properly pleaded claim for any form of fraud.

We agree with the trial court. While equitable in origin, fraudulent transfer actions arise from statutory provisions and are grounded in fraud. Our supreme court has held that statutory causes of action "based on fraud" must be pled under the requirements of Rule 9(B), even where "fraud is not an element of the action." McKinney v. State, 693 N.E.2d 65, 72 (Ind. 1998) (holding that Rule 9(B) applies to complaints under the Indiana Deceptive Consumer Sales Act, and observing similar federal pleading requirements for claims under sections 11 and 12 of the federal Securities Act of 1933); also Continental Basketball Ass'n, Inc. v. Ellenstein Enterprises, Inc., 669 N.E.2d 134, 137-38 (Ind. 1996) (holding that the pleading requirements of Trial Rule 9(B) are "equally applicable to common law and statutory fraud claims"); cf. In re Chochos, 325 B.R. 780 (Bankr. N.D. Ind. 2005) (applying the analogous pleading requirements of Fed. R. Civ. Pr. 9(b) to the Indiana Uniform Fraudulent Transfers Act). Though it is not necessary to invoke the word "fraud" in the complaint, it is nonetheless necessary under Rule 9(B) to aver with specificity the transaction or transactions giving rise to the action in order to deter groundless suits and provide defendants with sufficient information to prepare a defense. McKinney, 693 N.E.2d at 72.

Count Two of H & J's complaint does not comport with this requirement. It states the Diehms, in anticipation of litigation, caused RLS to dispose of assets that could have been used to pay H & J's claim, without identifying which transactions on what dates constituted such conduct. Nor does the complaint allege that the transfers rendered RLS insolvent;

instead, the complaint alleges that the unidentified transfers reduced the assets held by RLS that could have been used to satisfy H & J's claim. Simply put, H & J's complaint fails to provide RLS and the Diehms with information as to which transfers H & J sought to avoid, and H & J only sought to remedy this problem at trial in 2011, nearly five years after it filed its complaint. RLS and the Diehms objected that had Count Two pled or been amended to plead fraud or fraudulent transfer as to specific transactions, they would have presented appropriate affirmative defenses and discovery would have proceeded in light of the more specific pleadings.

Under these circumstances, we cannot agree with H & J that the trial court erred when it concluded that H & J had not properly pled any form of fraud as to the Northeastern Center or the proceeds of its sale. Thus, we cannot conclude that the trial court erred when it construed the evidence and allegations before it as relating only to claims of fraudulent transfer as to the 620 Westgate property and piercing the corporate veil as to the Diehms.[5]

The Trial Court's Findings Regarding RLS's Assets and General Ledger Account Balances

H & J argues that several of the findings regarding RLS's general ledger account balances (findings 6, 8, 11, 12, 13, and 14) are clearly erroneous. RLS and the Diehms argue that, to the extent there are errors, they are harmless.

Much of the evidence upon which the trial court based its findings comes from RLS's

[5] We note that in response to RLS and the Diehms objecting to the admission of evidence during the trial, H & J moved to amend its complaint to conform to the evidence. The trial court denied the motion, but nevertheless admitted the evidence as relevant to piercing the corporate veil, and it is evident that the trial court construed Count Two in that manner. This motion gave rise to the admission by counsel at trial that H & J's claims were for actual and constructive fraud.

partnership tax returns for the 2001, 2002, 2003, and 2004 tax years. Review of those returns reveals that the trial court's findings erroneously combined liabilities and capital into a single figure that it found represented only RLS's liabilities. Thus, the trial court's use of Line 22 on Schedule L of the various Form 1065 returns, which represents the total of a partnership's liabilities and capital, resulted in the erroneous findings that RLS's assets and liabilities were equal for each of the tax years.

Though the trial court's findings are erroneous on these points, that is not the end of the matter. Erroneous findings as to one legal theory do not warrant reversal and are mere surplusage where another legal theory adequately supports the judgment. Borth, 806 N.E.2d at 870. Moreover, courts "at every stage of the proceeding must disregard any error or defect … which does not affect the substantial rights of the parties." T.R. 61. That is, where an error is harmless, we may not reverse the judgment.

H & J has not established that these errors were reversible. While the trial court misinterpreted RLS's partnership returns, H & J has not established in what way this bears upon the trial court's conclusion that there was no basis upon which to conclude that this necessitated piercing the corporate veil as to the Diehms. Even assuming that H & J had properly pled fraudulent transfer as to the distributions from RLS to the Diehms, the evidence produced at trial, construed in conformance with our standard of review, established that the distributions were made and that RLS's accounting practices deviated from what Carla Butler, H & J's expert witness, indicated were more common practices. The evidence did not establish, however, the purpose or nature of the distributions. And while Butler testified that

RLS's classification of some of its assets as "Construction in Progress" was unusual, she did not testify that this classification was false or fraudulent, nor was any other evidence introduced that tended to establish that such was the case.

Nor did the evidence establish that the distributions rendered RLS insolvent as defined by the UFTA. Roger testified that he continued to pay the mortgage loan from Community State Bank from personal funds, but did not know the accounting and tax treatment to which those payments were subject—whether as contributions of capital to RLS, as loans, or as gratuitous or donative transfers—and H & J did not produce any evidence that tended to fill in those gaps. Moreover, our review of RLS's tax returns reveals that none reflect a year-end where RLS's liabilities exceeded its assets.

Even if the trial court's findings properly reflected RLS's general ledger account balances for assets, liability, and owners' capital accounts, there is no basis from which to conclude that the trial court's decision would have been different. The errors in findings 11 through 14 are thus harmless.

As to findings 6 and 8, we cannot conclude that these are erroneous, let alone that they may have contributed to a potentially erroneous judgment. Finding 6 states that before the 2001 action "RLS had assets consisting of a house at 620 Westgate and what is known as the Northeastern Center building." (App. &.) H & J argues that this is erroneous because the business had assets not enumerated by the trial court's findings.

While the trial court did not enumerate completely all the assets listed on RLS's tax returns from the period prior to H & J's first suit against RLS in 2001, this finding is not

erroneous. Moreover, H & J has failed to demonstrate how this constitutes reversible error.

H & J also draws our attention to finding 8, which states that RLS obtained a mortgage loan for $50,000 in exchange for the Community State Bank's lien on the 620 Westgate property. H & J contends that the trial court erred by failing to recognize that H & J's tax returns for 2002 through 2004 do not reflect the real estate as real property assets, asserting that RLS "seems to have accomplished the remarkable feat of obtaining a mortgage loan when it owned no buildings and owned no land." (Appellant's Br. 15.) H & J makes this contention while seemingly disregarding that it was H & J itself that introduced into evidence the promissory note, which includes the statement that "this Note is secured by A REAL ESTATE MORTGAGE FROM RLS DEVELOPMENT LLC TO COMMUNITY STATE BANK COVERING PROPERTY LOCATED AT 620 WESTGATE AVE KENDALLVILLE IN 46755 DATED NOVEMBER 12, 2004." (Ex. C). During cross-examination of Roger, H & J also introduced into evidence the first page of the original mortgage on the property, from 1999, establishing RLS's purchase of the 620 Gateway property. (Ex. G.) Moreover, Butler testified that it appeared to her that in the 2003 and 2004 tax returns, the 620 Gateway property was designated as "Construction in Progress" rather than as real estate owned by the company. While Butler testified that this characterization was unusual, she did not at any point testify that RLS no longer owned that asset.

Given the ample evidence supporting finding 8, we cannot conclude that the finding is erroneous. Nor can we conclude that any error in the findings warrants reversal.

The Mortgage on 620 Westgate

H & J further contends that the trial court erred when it concluded that the mortgaging of the 620 Westgate property was not a fraudulent transfer. The only evidence introduced at trial for the purpose of the mortgage loan was Roger's explanation that RLS mortgaged 620 Westgate because it lacked the cash required to pay attorney fees in the 2001 action, which totaled around $40,000 by the conclusion of the appeal. The loan's principal amount was $50,000, and Roger placed the value of the property at around $50,000; H & J contested neither the loan amount nor Roger's testimony on value of the 620 Westgate property. Roger testified that RLS used most of the loan money to pay attorney's fees and used the rest of the money to pay down the balance on the loan.

Given this evidence, we cannot conclude that H & J has established the trial court erred when it concluded that the mortgage on the 620 Westgate property was not a fraudulent transfer.

The Indiana Business Flexibility Act

On appeal, H & J advances a separate basis for concluding that the Diehms were liable for payment of the judgment in the 2001 action. Specifically, H & J contends that RLS's distributions to the Diehms violated certain provisions of the Indiana Business Flexibility Act that govern the making of distributions to members in a limited liability company and the distribution of assets to creditors of a limited liability company upon winding up the entity. See I.C. §§ 23-18-5-6, 23-18-5-7 & 23-18-9-6 (governing liability of members or managers of a limited liability company who vote for or assent to improper distributions under the

statute or entity operating agreement, and providing for the establishment of adequate reserves for payment of creditors upon winding up).

Our review of the record reveals no instance of H & J advancing any such argument at the trial court. Having newly advanced this issue upon appeal, H & J has waived our consideration of this argument. See M.S., 938 N.E.2d at 285 ("[a] party waives appellate review of an issue or argument unless the party raised that issue or argument before the trial court").

Conclusion

The trial court did not err when it concluded that H & J had properly pled a fraudulent transfer claim only as to the mortgage on the 620 Westgate property. To the extent the trial court's findings regarding the balances of RLS's general ledger were erroneous, the errors were harmless, and we find no error in the trial court's findings regarding RLS's ownership of real estate assets. Nor did the trial court err when it concluded that the mortgage on 620 Westgate was not a fraudulent transfer. Finally, because H & J failed to raise its claims with respect to the Indiana Business Flexibility Act at trial, it has waived any claimed error on appeal. We therefore affirm the judgment of the trial court.

Affirmed.

MATHIAS, J., and CRONE, J., concur.