ATTORNEYS FOR APPELLANT:

SOLOMON L. LOWENSTEIN, JR.
CHARLES E. DAVIS
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

MILFORD M. MILLER
DAVID R. SMELKO
JARED C. HELGE
Rothberg Logan & Warsco LLP
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DONALD FISHER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 02A05-1002-MF-97
	)	
TOWER BANK AND TRUST COMPANY,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
Cause No. 02C01-0903-MF-206

June 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Donald Fisher appeals from the trial court's grant of summary judgment in favor of Tower Bank and Trust Company (Bank) upon the court's determination that Bank's lien on property owned by Stauffer Development, LLC (Stauffer) was first in priority. Fisher presents the following consolidated and restated issues for review:

1. Did the trial court err in granting summary judgment in favor of Bank?

2. Did the trial court err in determining Bank did not owe Fisher a fiduciary duty or have an equitable obligation to him?

We affirm.

In 2006, Stauffer was created for the purpose of purchasing 122 acres of real estate (Parcel 1) in Allen County Indiana and developing Parcel 1 into a 60-lot residential subdivision to be known as Honeysuckle (the Project). Stauffer approached Bank for financial assistance with the Project. On June 13, 2006, Bank entered into an engagement letter with an independent commercial appraiser requesting a complete appraisal of Parcel 1 and the costs and profits associated with the Project. Bank specifically requested an "As Is" value for the land as well as an "As Complete" value for the Project. *Appellee's Appendix* at 3. Based upon the appraiser's analysis, the "As Is" market value of Parcel 1 was $1,650,000.00, with an "As If Complete" value of $6,450,000.00. *Id*. at 6.

On June 29, 2006, Stauffer executed and delivered to Bank a promissory note in the principal amount of $1,247,600.00 to finance the purchase of Parcel 1 for the Project (the "Original Note").[1] The Original Note provided for an interest rate of 8.5% for a term of three

---

[1] The Original Note is identified as Loan No. 115065.

months. To secure repayment of the Original Note, Stauffer granted to Bank a mortgage encumbering Parcel 1 dated June 29, 2006 and recorded on July 3, 2006 in the Allen County Recorder's Office (Mortgage I). As additional collateral, the Original Note was also secured by an existing mortgage dated May 30, 2006 that encumbers a second tract of land (approximately three acres of bare ground) (Parcel 2) and which was recorded on June 6, 2006 in the Allen County Recorder's Office (Mortgage II).[2]

In the fall of 2006, Stauffer requested additional funds from Bank in the amount of $5,263,570.00 to complete the Project. In response, Bank agreed to advance Stauffer the total sum of $4,851,350.00, which sum included the $1,247,600.00 advanced under the Original Note, leaving a shortfall of $1,659,820.00 in Stauffer's request. To cover the shortfall, in November 2006, Stauffer contacted Donald Fisher and inquired of his interest in making a mortgage loan against Parcel 1 in the amount of $1,000,000.00. Stauffer provided Fisher with a title report showing that Bank already had a mortgage against Parcel 1 for $1,247,600.00. In the report it was noted that the maximum lien amount of Mortgage I was $6,450,000.00. After being provided with this information, on December 14, 2006, Fisher agreed to loan $1,000,000.00 to Stauffer. Fisher's loan was secured by a mortgage executed by Stauffer and recorded on December 21, 2006 in the Allen County Recorder's Office. Fisher's mortgage was second in priority to Mortgage I. In recognition of Fisher's mortgage, Bank decreased the maximum mortgage amount for Mortgage I by $1,450,000.00 pursuant to

[2] There is a third parcel of land (approximately two acres of bare ground that is encumbered by a mortgage (Mortgage III) that was not to exceed $50,000.00.

a modification of mortgage document that was recorded on December 21, 2006. Even with Fisher's loan, Stauffer still had a financing shortfall of approximately $650,000.00. Bank agreed to lend the $650,000 still needed to complete the Project upon receipt of commercial guaranties from Lloyd and Susan Hoot.

On March 12, 2007, to evidence the additional monies Bank agreed to advance Stauffer for the construction of the subdivision, Stauffer executed and delivered to Bank a new promissory note with a principal amount of $4,201,350.00, an interest rate of 8.75%, and a term of two years (Note I).[3] Note I provided that it was secured, in part, by Mortgage I (as modified under the December modification agreement).[4] On the same day, Stauffer executed and delivered a second promissory note to Bank with a principal amount of $650,000.00 (Note II). Note II was also secured, in part, by Mortgage I, as well as Mortgages II, and III, and by the commercial guaranties of Lloyd and Susan Hoot. Also effective the same day, Fisher, Bank, and Stauffer executed a subordination agreement that included the following provisions:

> By execution of this Agreement, Creditor [Fisher] agrees, that in the event of default of Borrower's [Stauffer's] financial obligations to Lender [Bank], Creditor shall not seek nor accept payments on his said promissory note until such time as Borrower becomes financially current with Lender.
>
> * * *
>
> As long as Borrower is not in default in its financial obligations with Lender, Lender will allow principal and interest payments of debt pursuant to Borrower's note to Creditor in accordance with the note and repayment arrangements heretofore agreed to between Borrower and Creditor.

[3] Note I is identified as Loan No. R-115065.

[4] Note I was also secured by Mortgages II and III.

> By execution of this Agreement by all parties hereto, Lender shall proceed with its funding to Borrower as previously agreed between Lender and Borrower.

Appellant's Appendix at 125.

Ultimately, Stauffer failed to make payments as required by the terms of the various notes and mortgages. On March 13, 2009, Bank filed its complaint to foreclose on Mortgages I, II, and III. Bank named Fisher as defendant due to his recorded second mortgage on Parcel 1. Fisher filed his answer along with a counterclaim against Bank and cross-claim against Stauffer on June 5, 2009. Fisher denied that Mortgage I was entitled to priority over his mortgage. As the basis for his counter-claim, Fisher asserted that Bank breached its fiduciary duty to him in obtaining his signature on the subordination agreement. Bank filed its motion for summary judgment on July 20, 2009. Fisher filed his response and a cross-motion for summary judgment on September 11, 2009. The trial court held a hearing on the motions for summary judgment on November 12, 2009. On December 10, 2009, the trial court issued an order granting partial summary judgment in favor of Bank. On January 4, 2010, the trial court entered a final judgment of foreclosure in favor of Bank.

Fisher contends that the trial court erred in granting Bank's motion for summary judgment. Our standard of review following the grant of summary judgment is well settled.

> Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. A factual issue is "genuine" if it is not capable of being conclusively foreclosed by reference to undisputed facts. Although there may be genuine disputes over certain facts, a fact is "material" when its existence facilitates the resolution of an issue in the case.

When we review a trial court's entry of summary judgment, we are bound by the same standard that binds the trial court. We may not look beyond the evidence that the parties specifically designated for the motion for summary judgment in the trial court. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous.

A grant of summary judgment may be affirmed upon any theory supported by the designated evidence.

Van Kirk v. Miller, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*. The fact that the parties filed cross-motions for summary judgment does not affect our standard of review. *Turner v. Boy Scouts of Am.*, 856 N.E.2d 106 (Ind. Ct. App. 2006).

1.

Fisher argues that the trial court erroneously concluded that Mortgage I had priority over his mortgage. Citing Ind. Code Ann. § 32-28-1-1 (West, Westlaw through 2009 1st Special Sess.), Fisher maintains that Bank's senior lien position should have been discharged, satisfied, and released of record when the Original Note was paid in full and extinguished by the new debt that was evidenced by Note I, which provided for a substantially increased sum, a higher interest rate, and a longer term. Bank responds that the trial court properly gave effect to the ongoing nature of Bank's lending activity relating to the Project and the dragnet provisions contained in Mortgage I.

We begin with I.C. § 32-28-1-1, which provides in pertinent part:

(b) When the debt or obligation and the interest on the debt or obligation that the mortgage, mechanic's lien, judgment, or other lien secures has been fully paid, lawfully tendered, and discharged, the owner, holder, or custodian shall:

(1) release;

(2) discharge; and
(3) satisfy of record;
the mortgage, mechanic's lien, judgment, or other lien.

Fisher contends that Bank's own records prove that Note I paid in full the Original Note and created a new debt. Fisher also argues that the change in the interest rate and the term of Note I is proof that Note I represents a new debt, not a renewal of the Original Note. Thus, Fisher maintains that, pursuant to I.C. § 32-28-1-1, Bank was required to release, discharge, and satisfy of record Mortgage I, thereby elevating his lien to a superior lien priority.

The premise underlying Fisher's argument is that the Original Note was "fully paid" upon execution of Note I. We conclude this premise is faulty. We acknowledge that the loan approval sheet relating to Note I indicates that the Original Note "will be *paid off* with the current request." *Appellant's Appendix* at 179 (emphasis supplied). In addition to the above notation, the loan approval sheet also contains the following language setting forth the description and purpose of the loan evidenced by Note I:

> Approval of a $4,851,350 commercial real estate loan to fund the development of 60 single-family residential lots in a new subdivision to be known as Honeysuckle. This facility represents $3,603,750 of new money and will *pay off* note #115065 in the amount of $1,247,600, which was used to purchase the land for future development of Honeysuckle.

Id. (emphasis supplied). The loan approval sheet, however, also indicates that Note I will be secured by Mortgage I. A second internal form used for routing loan approvals states that Note I is a "[r]enewal" of the outstanding balance of the Original Note. *Id*. at 147. We also observe that Note I was given the same numeric loan number as the Original Note with the addition of an "R". *Id*. at 41. The purpose of Note I was to evidence additional monies to complete the Project, the need for which was fully contemplated by Stauffer and Bank at the time of execution of the Original Note and Mortgage I. After the initial monies evidenced by the Original Note were used to purchase the land, the additional funds were needed to move forward with developing the land into a 60-lot subdivision.

With regard to the notation in the loan approval sheet that Note I was to "pay off" the Original Note, Fisher seeks to cast the language "pay off" as a term of art and attach thereto a meaning not intended by the parties. *Id*. at 179. To be sure, the loan approval sheet clearly demonstrates that Bank and Stauffer fully intended for Note I to serve as a renewal of the debt evidenced by the Original Note and an advance of additional funds needed to complete the Project as contemplated prior to execution of the Original Note. Note I did not serve to pay in full the debt evidenced by the Original Note. Telling is that the Original Mortgage provided that its maximum lien amount was the amount given by the appraiser for the Project "As If Complete" and that Note I identified Mortgage I as its collateral. *Appellee's Appendix* at 6. The documents also make clear that the loan evidenced by Note I includes the funds previously advanced under the Original Note. Further, the purpose of both the Original Note and Note I is the same—the development of a sixty-lot subdivision. We find that the designated evidence, taken as a whole, demonstrates that Note I is a renewal of the Original Note. Fisher's claim that the Original Note was "fully paid" upon execution of Note I fails. Bank was therefore not required to release, discharge, and satisfy of record Mortgage I.

Stauffer also argues that the higher rate of interest and longer term provided for in Note I demonstrates that Note I was not a renewal of the Original Note, but rather that Note I evidenced an entirely new debt. In determining priorities of liens, Indiana law provides that "the taking of a new note and mortgage for the same debt upon the same land will not discharge the lien of the first mortgage unless the parties so intended." *Rebel v. Nat'l City Bank of Evansville*, 598 N.E.2d 1108, 1110 (Ind. Ct. App. 1992) (citing *Brenneman Mech. & Elec., Inc. v. First Nat'l Bank of Logansport*, 495 N.E.2d 233 (Ind. Ct. App. 1986), *trans. denied*). In our review, we are to consider the circumstances of the transaction. *See Rebel v. Nat'l City Bank of Evansville*, 598 N.E.2d 1108. As noted above, the purpose of the Original Note was to advance funds necessary to purchase the real estate to be developed into a 60-lot residential subdivision. Bank fully contemplated that additional funds would be needed to complete the Project as evidenced by the fact that that Mortgage I had a maximum lien amount of $6,450,000.00, which coincides with the appraiser's report as to the value of the Project "As If Complete." Moreover, Note I clearly reflects that it is related to the Project, identifies the amount previously advanced under the Original Note, and was given the same numeric loan number with the addition of the letter R. Further, there is nothing in the Original Note that provided for a fixed rate of interest for additional funds loaned in relation to the Project. Given fluctuating economic circumstances and that a substantial amount of additional funds were advanced under Note I, we find it commercially reasonable for Bank to have adjusted the terms under which the loan would be repaid. Under these circumstances, it is clear that Bank and Stauffer did not intend to destroy the priority of the lien created by Mortgage I when it advanced the additional funds under Note I. We therefore conclude that the increase in the interest rate and the longer term does not translate into a finding that Note I created a new debt. Bank was therefore not required to release, discharge, and satisfy of record Mortgage I when it executed Note I.

To be sure, we agree with Bank that Mortgage I created an open-ended mortgage and that the court properly gave effect to the dragnet provisions contained therein. Our Supreme Court has recently addressed the validity of open-end mortgages:

> While dragnet clauses that create open-ended mortgages are valid, IND.CODE ANN. § 32-29-1-10 (West 2002), they are strictly construed against the drafting party. *Citizens Bank & Trust Co. of Washington v. Gibson*, 490 N.E.2d 728 (Ind. 1986). The main consideration in construing dragnet clauses is the parties' intention. *Merchs. Nat'l Bank & Trust Co. of Indianapolis v. H.L.C. Enters., Inc.*, 441 N.E.2d 509 (Ind. Ct. App. 1982). More particularly, a debt not specifically described is secured by the mortgage if the parties intended it to be secured based on the surrounding circumstances and the mortgage language. *Id*. at 513. The mortgage language need not literally describe the debt, but "the character of the debt and the extent of the encumbrance should be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of fraud upon creditors." *New v. Sailors*, 114 Ind. 407, 410, 16 N.E. 609, 610 (1888).

The Money Store Inv. Corp. v. Summers, 849 N.E.2d 544, 548 (Ind. 2006). Ind. Code Ann. § 32-29-1-10 (West, Westlaw through 2009 1st Special Sess.) recognizes the validity of open-ended mortgages by providing that a mortgage may secure future obligations and advances up to the maximum amount stated in the mortgage at the same level of priority as the mortgage itself. Specifically, I.C. § 32-29-1-10 provides:

> (a) In addition to any other obligation secured by a mortgage, a mortgage may also secure:
>
> > (1) future obligations and advances up to the maximum amount stated in the mortgage (whether made as an obligation, made at the option of the lender, made after a reduction to a zero (0) or other balance, or made otherwise) to the same extent as if the future obligations and advances were made on the date of execution of the mortgage; and
> >
> > (2) future modifications, extensions, and renewals of any indebtedness or obligations secured by the mortgage if and to the extent that the mortgage states that the mortgage secures those future advances, modifications, extensions, and renewals.

> (b) The lien of a mortgage with respect to future advances, modifications, extensions, and renewals referred to in subsection (a) has the priority to which the mortgage otherwise would be entitled under IC 32-21-4-1 without regard to the fact that the future advance, modification, extension, or renewal may occur after the mortgage is executed.

Here, Mortgage I clearly reflected that Bank and Stauffer intended for it to serve as security for up to $6,450,000.00, which is the appraised amount of the Project as completed. Note I and Note II specifically identified Mortgage I as collateral therefrom. Mortgage I also contains open-ended provisions that further evidence Bank's and Stauffer's intent that Mortgage I would secure future obligations and advances related to the Project. Mortgage I contained the following provisions:

> GRANT OF MORTGAGE. For valuable consideration, Grantor [Stauffer] mortgages, warrants, and conveys to Lender [Bank] all of Grantor's right, title, and interest in and to the following described real property, together with all existing or *subsequently erected* or affixed buildings, *improvements* and fixtures; all easements, rights of way, and appurtenances; . . . .
>
> * * *
>
> CROSS-COLLATERALIZATION. In addition to the Note, this Mortgage secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing *or hereafter arising* . . . .
>
> THIS MORTGAGE, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS MORTGAGE. . . .

Appellant's Appendix at 47-48 (emphases supplied). As defined in the mortgage document, indebtedness is defined as follows:

> all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all *renewals of*, extensions of,

> *modifications of*, consolidations of and substitutions for the Note or Related Documents. . . . Specifically, without limitations, indebtedness includes all amounts that may be indirectly secured by the Cross-Collateralization provision of this Mortgage.

Id. at 54 (emphases supplied). The term "note" is used to refer to "the promissory note dated June 29, 2006, in the original principal amount of $1,247,600.00 from Grantor to Lender, together with all *renewals of*, extensions of, *modifications of*, refinancing of, consolidations of, and substitutions for the promissory note or agreement." *Id*. at 55 (emphases supplied). Finally, the term "related documents" refers to all promissory notes, "whether now or *hereafter existing*, executed in connection with the Indebtedness." *Id*. (Emphasis supplied). It is apparent from the Original Note, Note I, and Mortgage I that the parties thereto intended to create an open-ended mortgage for debts up to the appraised value of the Project as completed. Under the circumstances presented, we conclude that the trial court properly granted summary judgment in favor of Bank and entered a final judgment of foreclosure.

II.

Fisher argues that the trial court erred in determining Bank owed no fiduciary duty or had no equitable obligation to him. Specifically, Fisher argues that Bank, by virtue of its knowledge that Fisher had a second recorded mortgage, was obligated to disclose to him its intentions to loan substantial additional funds (under Notes I and II) to Stauffer before securing his signature on the subordination agreement. Fisher asserts that Bank "induced" him to "unwittlingly enter into a subordination agreement . . . to his financial detriment . . . ." *Appellant's Brief* at 18. Fisher maintains that at the time he entered into the subordination agreement he was unaware of Bank's intention to loan additional funds to Stauffer.

Fisher's assertions do not support a determination that a fiduciary relationship existed between Fisher and Bank.

> "Although the existence of a confidential relationship depends upon the facts of each case, it can be generally stated that a confidential relationship exists whenever confidence is reposed by one party in another with resulting superiority and influence exercised by the other. Not only must there be confidence by one party in the other, the party reposing the confidence must also be in a position of inequality, dependence, weakness, or lack of knowledge. Furthermore, it must be shown that the dominant party wrongfully abused the confidence by improperly influencing the weaker so as to obtain an unconscionable advantage."

Kreighbaum v. First Nat'l Bank & Trust, 776 N.e.2d 413, 419 (Ind. Ct. App. 2002) (quoting *Huntington Mortgage Co. v. DeBrota*, 703 N.E.2d 160, 167 (Ind. Ct. App. 1998)). Here, there is no evidence that Fisher reposed confidence in Bank or was influenced thereby. Moreover, Fisher, a real estate developer in his own right, was not in a position of inequality or dependence and he clearly was not without a lack of knowledge of the terms of Mortgage I.

Indeed, Fisher was fully aware that the Bank intended for Mortgage I to serve as security for any loans up to the total stated maximum lien amount of $6,450,000.00. To be sure, prior to loaning $1,000,000 to Stauffer, Fisher received a title report that reflected the unreleased mortgage of Stauffer to Bank and further indicated that the maximum lien amount of the mortgage was $6,450,000.00. Further, as discussed above, Mortgage I clearly provided that it served to secure all obligations, debts, and liabilities "whether now existing or hereafter arising." *Appellant's Appendix* at 47. It is also clear from the facts designated that Bank was to serve as the primary lender for the development of the 60-lot subdivision.[5] Having this information, Fisher made the decision to loan Stauffer $1,000,000.00 fully aware that his loan was second in priority to Bank's recorded mortgage (i.e., Mortgage I). To the extent Fisher claims that he made his loan without knowledge of Bank's intent to loan sums in addition to the initial advance of $1,247,600, the circumstances demonstrate that Fisher based his decision on his assumption that Bank's mortgage was a closed-end mortgage that created a superior lien only as to the initial amount Bank had already advanced to Stauffer for the purchase of the real estate. Fisher's erroneous assumption does not create a fiduciary relationship between Bank and Fisher.

Fisher argues repeatedly that, given the circumstances of this case, principles of equity should be employed to raise his lien to a higher priority than Bank's. Fisher also asserts that Bank should be estopped from asserting the subordination agreement because Bank has unclean hands.

One of the rules of equity is that "he who comes into equity must come with clean hands." *Wedgewood Cmty. Ass'n, Inc. v. Nash*, 781 N.E.2d 1172, 1178 (Ind. Ct. App. 2003),

[5] Fisher's loan came about because the Bank refused to loan Stauffer the full amount of funds requested to complete the project. Stauffer thus called upon Fisher to help make up for the financial shortfall.

clarified on reh'g, 789 N.E.2d 495, *trans. denied*. For the doctrine of unclean hands to apply, the misconduct must be intentional and the alleged wrong must have an "immediate and necessary relation to the matter being litigated." *Fairway Developers, Inc. v. Marcum*, 832 N.E.2d 581, 584 (Ind. Ct. App. 2005), *trans. denied*. The purpose of the unclean hands doctrine is to prevent a party from reaping benefits from misconduct. *Fairway Developers, Inc. v. Marcum*, 832 N.E.2d 581. The doctrine of unclean hands is not favored and must be applied with reluctance and scrutiny. *Shriner v. Sheehan*, 773 N.E.2d 833 (Ind. Ct. App. 2002), *trans. denied*. Fisher, however, does not allege that Bank intentionally made any fraudulent statements or misstatements of fact regarding its intentions with respect to Stauffer. Fisher asserts only that Bank should have told him about its intentions. Aside from his assertion, Fisher has failed to designate any evidence that would support a finding that Bank acted with unclean hands. Under the circumstances presented, we see no need to exercise our equitable powers. We therefore conclude that the trial court properly granted summary judgment in favor of Bank.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.