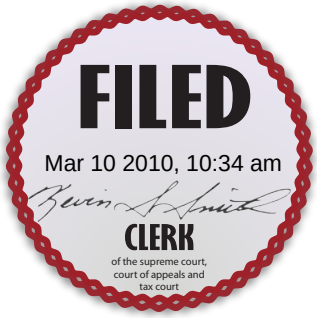

ATTORNEY FOR APPELLANTS:

PHILIP A. SALLEE
Bloomington, Indiana

ATTORNEY FOR APPELLEE:

ARNOLD H. BRAMES
Brames & Oldham
Terre Haute, Indiana

IN THE
COURT OF APPEALS OF INDIANA

HANE MANAGEMENT SERVICES, INC., MARY MABEL ELLIS HANE and DELBERT CRAIG HANE,	)	
Appellants,	)	
vs.	)	No. 53A01-0907-CV-331
BANK OF INDIANA, N.A.,	)	
Appellee.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable E. Michael Hoff, Judge
Cause No. 53C01-0811-MF-2828

March 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Hane Management Services, Inc., Mary E. Hane, and Delbert C. Hane (collectively, "the Hanes") appeal the trial court's order granting summary judgment and a decree of foreclosure to Bank of Indiana N.A. ("the Bank"), and its denial of their motion to correct error.

We affirm.

ISSUES

1. Whether the trial court improperly granted summary judgment and a decree of foreclosure to the Bank.

2. Whether the trial court improperly denied the Hanes' motion to correct error.

FACTS

On September 18, 2006, Hane Management Services, Inc., by its president Delbert C. Hane, borrowed $600,000.00 on a promissory note from the Bank, with both Delbert and his wife, Mary Hane, executing personal guaranties. As further guarantee, Mary granted a mortgage to the Bank on real estate she individually owned. In June of 2007, the Hanes borrowed an additional $250,000.00 for a line of credit; Delbert and Mary each executed promissory notes, and Mary executed a second mortgage on her real estate. The June 2007 loan matured on September 25, 2008.

On November 6, 2008, the Bank declared a default, accelerated the notes, and filed a complaint seeking judgment on the foregoing promissory notes, foreclosure of the mortgages, and judgment on the guarantees – with all the underlying contractual

documents attached. The Bank alleged that payments were not made as required on the June 2007 loan, which rendered it in default pursuant to the applicable contractual terms, subject to the cross-default and cross-collateralization contractual terms with respect to the September 2006 loan; and that the October and November installment payments due on the September 2006 loan had not been made, which resulted in the Bank's election to accelerate the maturity of that loan and declare it in default. The Bank sought the amounts due on the notes, pursuant to the terms of the applicable contracts, and to foreclose on the two real estate mortgages. The Bank served its complaint on the Hanes.

On November 21, 2009, counsel filed his appearance for the Hanes.[1] On November 26, 2009, the Bank served its requests for admissions upon the Hanes. On December 5, 2008, the Bank filed a motion for summary judgment, with an affidavit detailing the specifics of the Hanes' indebtedness, an affidavit as to attorney fees, and evidence of service on the Hanes. The trial court set the matter for a hearing on January 30, 2009. On December 12, 2009, counsel for the Hanes filed a motion with the trial court to "show prior filing and to correct CCS," asserting that as "attorney of record for the Defendants," he had filed by FAX on November 25, 2008, a request for an enlargement of time in which to file an answer. (Hanes' App. 102). On December 24, 2009, the trial court granted the motion and ordered the CCS to reflect the November 25, 2008, filing as requested. Also on December 24, 2008, the Hanes filed their answer, affirmative defenses, counterclaim and third party complaint against the Bank's

[1] It does not contain a certificate of service but rather simply states that the "form is being served upon all other parties." (Hanes' App. 80).

president, signed by counsel but not verified. On December 30, 2008, the Hanes filed their responses to the Bank's requests for admissions.

On January 5, 2009, the trial court reset the summary judgment hearing for February 13, 2009. On January 12, 2009, the Hanes filed a motion to strike the Bank's motion for summary judgment, asserting that discovery was incomplete and that the "request for summary judgment [was] premature." *Id.* at 135. On January 22, 2009, the Bank filed a motion "for 'forthwith' summary judgment and decree of foreclosure," noting that the Hanes had not "file[d] a response" as provided by Indiana Trial Rule 56(C), and further arguing its entitlement to judgment "as a matter of law." *Id.* at 137, 138. On February 3, 2009, the Bank (and its president) filed a motion to dismiss the Hanes' counterclaim and third party complaint. On February 13, 2009, the trial court heard arguments on the summary judgment motion, and it agreed to accept additional written legal arguments. On February 20, 2009, the Bank filed supplemental affidavits as to the Hanes' indebtedness and its request for attorney fees; it also filed a memorandum of law. On February 27, 2009, the Hanes filed their post-hearing brief.

On March 9, 2009, the trial court issued its order. The trial court found that the Hanes' motion to strike the Bank's motion for summary judgment "was not in compliance with TR 56(E)," which provides that a nonmovant "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." (Order, p. 3, quoting Indiana Trial Rule 56(E)). The trial court further found

that "Defendants' 'response'" was "not filed within thirty (30) days"; "unverified," and "failed to designate any evidence of 'specific facts showing that there is a genuine issue for trial.'" (Order, p. 3, 4, and quoting Ind. T.R. 56(C).) The trial court found that "the allegations of the Complaint [were] true," and that the relief sought by the Bank "should be granted." *Id.* at 4. Specifically, it found that both of the Hanes' loans were delinquent and in default. The trial court entered judgments against the Hanes and ordered the foreclosure of the two mortgages.

On April 9, 2009, the Hanes filed a motion to correct error. The trial court heard the parties' arguments on May 6, 2009, and denied the motion.

DECISION

The Hanes' brief articulates several issues[2] which effectively challenge the propriety of the trial court's grant of the Bank's motion for summary judgment. Hence, we consider the dispositive issue of whether the trial court erred when it granted the motion.

When we review a grant of summary judgment, our standard of review is the same as that of the trial court. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1269 (Ind. 2009). Considering only those facts that the parties designated to the trial court, we must determine whether there is a "genuine issue as to any material fact" and

[2] Although the Hanes' brief initially states that they are presenting seven "issues for review," Hanes' Br. at 1, there is no reference in the argument section of their brief to these issues. Indiana Appellate Rule 46(A)(8)(c) provides that "[e]ach argument shall have an argument heading." Here, without such headings in the brief, it has been extremely difficult to connect the Hanes' assertions with their stated issues.

whether the "moving party is entitled to a judgment as a matter of law." *Id.* at 1269-70 (quoting Indiana Trial Rule 56(C)).

> The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law; once the movant satisfies the burden, the burden then shifts to the non-moving party to designate and produce evidence of facts showing the existence of a genuine issue of material fact.

Id. at 1270. The nonmovant's responsive burden is generally described as the filing of designated admissible evidentiary material, such as "affidavits showing issues of material fact." *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 98 (Ind. 2008) (citing *Desai v. Croy*, 805 N.E.2d 844, 849 (Ind. Ct. App. 2003), *trans. denied*).

At the time of the trial court's order granting the Bank's motion for summary judgment, the only filing by the Hanes addressing the motion was their motion to strike it. They had submitted no designated admissible evidentiary material, or "affidavits showing issues of material fact," *id.*, no "evidence of facts showing the existence of a genuine issue of material fact." *Dreaded*, 904 N.E.2d at 1270. Not only had the Hanes filed no designated evidentiary material "opposing" the Bank's motion, they had not requested an extension for doing so. *Seufert v. RWB Medical*, 649 N.E.2d 1070, 1073 (Ind. Ct. App. 1995), *trans. not sought*; *see also Desai*, 805 N.E.2d at 849 (nonmoving party failed to respond or seek extension within thirty days). The Bank properly supported its motion for summary judgment with affidavits and evidentiary materials that informed the trial court of the absence of any disputed material facts. The Bank's designated materials included the loan agreement and promissory notes detailing the

terms of the contracts between the parties, and evidence that the Hanes had breached the contracts by failing to make the payments pursuant to the contractual terms. No evidence to the contrary was presented to the trial court. Thus, the Bank established that it was entitled to judgment as a matter of law, and therefore, Trial Rule 56 "mandates" that summary judgment be granted to the Bank. *Seufert*, 649 N.E.2d at 1073*; see also Morton v. Moss*, 694 N.E.2d 1148, 1152 (Ind. Ct. App. 1998) (upon failure of nonmovant to respond, trial court obligated to grant motion for summary judgment if movant's designated evidence so warranted).

The Hanes present a rhetorical discussion of whether they could be responsible for "designation of evidence before the issues are closed." Hanes' Br. at 10. Their only authority for such a proposition is that it is "reversible error to enter a final judgment prior to the expiration of the period within which the party is permitted to file [its] responsive pleadings," *id.* at 11 (citing *Indiana Alcoholic Beverage Comm'n v. W-W Associates, Inc.*, 152 Ind. App. 622, 284 N.E.2d 534 (1972)), but they apply no analysis thereof to this case. Further, here the Hanes had filed their responsive pleading.[3]

The Hanes assert that "because [they] had not filed affidavits designating specific evidence in opposition" to the Bank's motion for summary judgment, the trial court "allowed a draconian decree of foreclosure and forestalled any challenge to the Bank's frequently amended damage claims." *Id.* at 13. They argue that the trial court should

[3] Their argument does not allude to any such concern, but we note that the trial court's order of May 6, 2009, expressly denied the motion to dismiss the Hanes' counterclaim and third party complaint and indicated that both remain for the trial court's consideration.

have acted to "alter" the time limit for their response to the Bank's motion, as authorized by Trial Rule 56(I).

Trial Rule 56(I) states, "For cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit." The Hanes fail to acknowledge the latter clause, which their reference to the Rule omits. Moreover, our Supreme Court has made it very clear that

> "where a nonmoving party fails to respond to a motion for summary judgment within 30 days by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F),[4] the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period."

HomEq, 883 N.E.2d at 98-99 (quoting *Borsuk v. Town of St. John*, 820 N.E.2d 118, 124 n.5 (Ind. 2005)).

The Hanes appear to argue that the trial court should not have followed the dictates of Trial Rule 56 because their "counsel was not served" with the motion for summary judgment. Hanes' Br. at 15. This argument is wholly without authority. The trial court acknowledged, and we agree, that there was a problem with the trial court's record-keeping in this matter.[5] The Hanes acknowledge that the Bank's counsel "has sworn that he did not receive" their counsel's notice of appearance, which bears a file

[4] Trial Rule 56(F) allows the grant of a continuance to permit affidavits to be obtained.

[5] The trial court noted that it was implementing "the new Odyssey case management system." (Tr. 12). The CCS frequently shows a filing on one date, but expressly stating a different file stamp date. A document bearing the fold-mark indications of having been mailed from the Bank's attorney in Terre Haute to the trial court in Bloomington is shown in the CCS as filed with a file stamp date, but the document itself bears no file stamp. We have already noted the December 12, 2009, filing by Hanes' counsel of a motion to show his prior filing by FAX, and the trial court's order that such be shown filed on November 25, 2008.

stamp of November 21, 2008. *Id.* at 14. Moreover, the record reflects, and it appears undisputed, that the Hanes were served; and that the Bank's counsel had a discussion with the Hanes' counsel concerning the case on December 11, 2008, and mailed copies of the pleadings to him the next day.[6] Thus, the Hanes had notice of the Bank's motion for summary judgment, and even after their counsel had received the motion, nothing was filed by the Hanes within the ensuing thirty days that constituted a response as contemplated by Trial Rule 56. There is no merit in the Hanes' contention that this court should reverse the trial court's order granting summary judgment based on the failure to serve the Hanes' counsel with the summary judgment motion filed on December 5, 2008. We note that the Hanes filed their answer, affirmative defenses, counterclaim and third party complaint on December 24, 2008; and filed their responses to the Bank's request for admissions on December 30, 2008; however, they failed to respond to the motion for summary judgment or to request an extension of time in which to respond.

Subsequently, the Hanes filed a motion to strike the Bank's motion for summary judgment on January 12, 2009. On appeal, the Hanes assert their "understanding . . . that a motion to strike was a permitted response to a motion for summary judgment," and argue that such "are the common vehicles of objection of movants when summary judgment responses are untimely filed by nonmovants." Hanes' Br. at 18. Again, however, they cite to no authority in this regard. To the extent the Hanes are arguing that

[6] We note that it was December 12, 2008, when the Hanes' counsel filed the motion to correct the CCS to show the filing he had made by FAX on November 25, 2008.

the trial court construed Trial Rule 56 too narrowly, the trial court cannot disregard the dictates of the rule itself or the common law in that regard.

The Hanes also assert that "[e]quity required that the Hanes be given a time certain within which to file affidavits in response" to a motion for summary judgment "if their motion to strike was to be denied." *Id.* In other words, the Hanes contend that when the trial court denied their motion to strike on March 9, 2009, the Hanes – who had neither filed "a response, request[ed] a continuance under Trial Rule 56(I), [n]or fil[ed] an affidavit under Trial Rule 56(F)" within the thirty-day time period provided – should have been allowed additional time thereafter to file responsive affidavits. *HomEq* 883 N.E.2d at 99. *HomEq* tells us otherwise, and notes that any "uncertainty" regarding the thirty-day time limitation period "was resolved in 2005." *Id.* at 98 (citing *Borsuk*, 820 N.E.2d at 124 n.5).

Finally, the Hanes assert that the trial court abused its discretion when it denied their motion to correct error. They fail to present a cogent argument or any authority in this regard, but simply refer us to the arguments made to the trial court in their motion to correct error. Consequently, this issue is waived. *See Loomis v. Ameritech*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (argument waived for failure to cite authority or provide cogent argument), *trans. denied*. Moreover, inasmuch as the Hanes' motion presented essentially the same arguments that we have addressed above and found to be without merit, we would not find that the trial court abused its discretion when it denied their motion to correct error. *See Precision Screen Mach., Inc. v. Hixson*, 711 N.E.2d 68, 70

(Ind. Ct. App. 1999) (trial court discretion to deny motion to correct error; decision affirmed unless clearly against logic and effect of circumstances; decision comes clothed with presumption of correctness; and appellant's burden of proving abuse of discretion).

Affirmed.

KIRSCH, J., and BAILEY, J., concur.