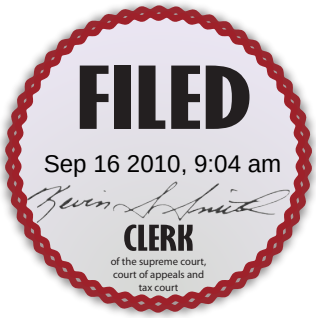

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IN THE
COURT OF APPEALS OF INDIANA

JASON BARRETT,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 82A01-1003-PL-177
	)	
SCORES, INC. and JASON ENGLISH,	)	
	)	
Appellees.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0609-PL-448

September 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jason Barrett appeals the trial court order granting summary judgment to Jason English ("Jason") and Scores, Inc. ("Scores") on Barrett's claims that Jason breached his fiduciary duty to Barrett, and that both Jason and Scores had committed conversion of Barrett's property.

We affirm.

ISSUE

Whether the trial court erred in granting summary judgment.

FACTS[1]

A letter agreement dated August 31, 2001, was executed by both Kenneth English ("Kenneth"), landlord of the premises, and Barrett, a contractor, providing that Barrett would "enter into a no lien contract with all of [his] contractors and . . . be responsible for payment for all construction work to be performed on" Kenneth's premises for a "'Scores' Project."[2] (App. 42). The letter further provided that "a formal agreement" with "details and terms" of the agreement would follow "within ten (10) days" of August

[1] Although Barrett's appellate brief complies with the requirement that the appellant's Statement of Facts "be supported by page references to the . . . Appendix," Indiana Appellate Rule 46(A)(6)(a), many of the cited references do not reflect the facts as stated by Barrett. Further, the Statement of Facts is not to be argumentative. *Ratliff v. Ratliff*, 804 N.E.2d 237, 240 (Ind. Ct. App. 2004).

[2] Barrett's complaint alleged that the project was the remodeling of a building "for the operation of" Scores, which was to be "a sports bar and gentlemen's club." (App. 27).

31, 2001; however, there is no evidence of such subsequent formal agreement in the record.

On October 19, 2001, Kenneth -- as sole shareholder of Scores -- entered into a Stock Purchase Agreement ("Original Agreement") with Jason and Barrett. According to the Original Agreement, Kenneth sold to Jason and Barrett 1,000 shares of Scores stock: 600 shares to Jason, and 400 shares to Barrett. Stock certificates were issued in October of 2001 reflecting their ownership of those respective shares of Scores stock.

Subsequently, on May 30, 2002, Kenneth, Jason, and Barrett executed the Amended Stock Purchase Agreement ("Amended Agreement"), which states that the three were

> mutually desirous of canceling and terminating said previously executed [Original Agreement] and substituting the specific terms contained in this agreement thereof.

(App. 40). It provided that the Original Agreement "previously executed by and between the parties on or about the 19th day of October 2001, [was] hereby rescinded and declared null and void." *Id.*

On June 15, 2007, Barrett filed his amended complaint in three counts. Count I claimed that Jason and Scores had committed fraud, alleging *inter alia* that he had been "fraudulently induced . . . to execute the signature page" of the Amended Agreement, which was filed with the amended complaint.[3] (App. 28). On August 9, 2007, the trial

[3] We note that the separate signature page expressly states that "the parties have executed this Amended Stock Purchase Agreement on the year and date first above written." (App. 41, emphasis added).

court granted the motion by Jason and Scores to dismiss Count I (fraud), and no issue in that regard is raised or argued on appeal.

Count II of the amended complaint alleged a breach of fiduciary duty by Jason.[4] Count III of the amended complaint alleged conversion of Barrett's property by Jason and Scores.

On November 17, 2009, Jason and Scores filed their joint motion for summary judgment and designated evidence. They argued that subsequent to his execution of the Amended Agreement on May 30, 2002, Barrett held no further interest in Scores. Consequently, their argument continued, Jason owed no fiduciary duty to Barrett thereafter; and any claim for an earlier breach of a fiduciary duty by Jason had to have been filed by May 30, 2004, *i.e.*, within the two-year statute of limitations. A similar argument, asserting Barrett's lack of any interest in Scores after May 30, 2002, was set forth with respect to Barrett's conversion claim[5] against Jason and Scores.[6]

Barrett's responsive "Statement of Material Facts in Dispute" purported to "dispute" the effect of the Amended Agreement, asserting that he did "not recall ever signing" it, and "only first recall[ed] seeing" it when it was provided to his counsel in June of 2005. (App. 146, 150). Barrett designated and submitted his own affidavit,

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[4] The amended complaint actually alleged the breach of fiduciary duty by both Jason and Scores; however, the claim against Scores in that regard was also dismissed on August 9, 2007.

[5] The statute of limitations for a conversion claim is also two years.

[6] The designated evidence established that Barrett's expenses for the Scores construction work were approximately $116,000.00, and that he had been paid in excess of $200,000.00 therefor.

stating that he "d[id] not recall ever signing" the Amended Agreement, and asserting "the lack of consideration" for any such agreement by himself. (App. 161).

On February 24, 2010, the trial court heard oral argument on the motion for summary judgment. On February 26, 2010, the trial court found that Barrett had "not denied, under oath, that he executed" the Amended Agreement and that pursuant to Trial Rule 9.2(B), its execution was "deemed to be established." (App. 17). The trial court found that subsequent to May 30, 2002, Barrett "was not a shareholder in [Scores], and therefore his claims after that date must fail." *Id.* It held that because any claims by Barrett "prior to May 30, 2002," were required to be filed within two years, *i.e.*, by May 30, 2004, Barrett's complaint filed in 2007 was "barred by the statute of limitations." *Id.* at 17-18. Accordingly, the trial court granted summary judgment to English and Scores.

DECISION

The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). Thus, summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 473 (citing Ind. Trial Rule 56(C)). We apply the same standard as the trial court when reviewing decisions of summary judgment. *Filip v. Block*, 879 N.E.2d 1076, 1081 (Ind. 2008). Our review of a summary judgment motion is limited to those materials designated to the trial court. *Mangold v. Ind. Dep't of Natural Resources*, 756 N.E.2d 970, 973 (Ind. 2001). The

moving party bears the burden of showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1270 (Ind. 2009). Once the movant satisfies this 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.*

Attached to Barrett's amended complaint was the Amended Agreement, stating that the Original Agreement was "declared null and void." (App. 40). The trial court held that pursuant to the Amended Agreement signed by Barrett, subsequent to May 30, 2002, Barrett held no further interest in Scores. Its holding was premised upon the provisions of Indiana Trial Rule 9(B), which states in pertinent part as follows:

> **Proof of execution of instruments filed with pleadings**. When a pleading is founded on a written instrument and the instrument or a copy thereof is included in or filed with the pleading, execution of such instrument . . . shall be deemed to be established and the instrument, if otherwise admissible shall be deemed admitted into evidence in the action without proving its execution unless execution be denied under oath in the responsive pleading or by an affidavit filed therewith.

As the trial court properly found, the Amended Agreement bears Barrett's signature, and Barrett had not "denied, under oath, that he executed" the Amended Agreement. (App. 17). Therefore, the designated evidence established that subsequent to May 30, 2002, Barrett held no further interest in Scores. Further, because Barrett's original complaint was not filed until September 26, 2006, the two-year statute of limitations for claims of either a breach of fiduciary duty or conversion had long since passed.

Nevertheless, Barrett argues that the trial court's summary judgment order must be reversed because the designated evidence establishes a material question of fact as to whether "he ever knowingly executed the Amended Agreement." Barrett's Br. at 7. He cites his affidavit. However, Barrett's affidavit merely states that he "d[id] not recall signing" the Amended Agreement. (App. 161). Hence, therein he did not "den[y] under oath" its execution. (T.R. 9(B)). Therefore, his affidavit failed to establish a material question of fact regarding his execution of the Amended Agreement.

Barrett argues that his "entire theory" was "stated under oath" in his amended complaint, to wit: "that he was a shareholder of [Scores] and . . . English 'fraudulently induced' him to sign a signature page in order to convert Barrett's shares, property, and monies." Barrett's Br. at 7 (quoting Amended Complaint, App. 28). The "fraudulently induced" allegation, however, was in Count I, the fraud count which was dismissed by the trial court on August 9, 2007. *Id.* Barrett argues further in this regard that "his most basic allegation is that he denies knowingly executing the Amended Agreement." Reply at 4. As we have noted, the signature page expressly reflects that the execution is of the "Amended Stock Purchase Agreement." (App. 41).

In *Clanton v. United Skates of America*, 686 N.E.2d 896, 898 (Ind. Ct. App. 1997), the appellant argued that the trial court's grant of summary judgment should be reversed because there was "no evidence that he knowingly and willingly executed the release" of liability document. We noted that "[u]nder Indiana law, a person is presumed to understand the documents which he signs and cannot be released from the terms of a

contract due to his failure to read it." *Id.* at 899-900 (citing *Fultz v. Cox*, 574 N.E.2d 956, 958 (Ind. Ct. App. 1991) ("general rule" that a person "cannot be relieved from the terms of a contract due to his failure to read it"), and *Shumate v. Lycan*, 675 N.E.2d 749, 753 (Ind. Ct. App. 1997) (fact that appellant did not read release does not create issue of fact as to whether he knowingly signed it)). Thus, Barrett's failure to read the signature page that he signed cannot create a genuine issue of material fact as to his knowingly signing it and being bound by the terms of the Amended Agreement.

Finally, Barrett argues that "even if it was undisputed that [he] executed the Amended Agreement," it is "invalid and unenforceable" because he "never received any consideration . . . in return for his shares." Barrett's Br. at 8. We cannot agree. The basic requirements for a contract are offer, acceptance, consideration, and a meeting of the minds of the contracting parties. *Conwell v. Gray Loon Outdoor Marketing*, 906 N.E.2d 805, 813 (Ind. 2009). The Amended Agreement expressly states that "each of the parties [we]re mutually desirous of canceling and terminating" the Original Agreement, and agreed that the Original Agreement "previously executed by and between the parties on" October 19, 2001, was "hereby rescinded and declared null and void." (App. 40). The Amendment Agreement then specified that "consideration" included the payment of a certain price. *Id.* "Consideration consists of a bargained-for exchange." *B-Dry Owners Ass'n v. B-Dry System, Inc.*, 636 N.E.2d 161, 163 (Ind. Ct. App. 1994). Here, in

addition to the agreed payment,[7] there was such a bargained-for exchange: Barrett exchanged his position as a shareholder and officer, with accompanying responsibilities and liabilities, for a position bearing no responsibility or liability with respect to Scores; and the share purchaser then bore those responsibilities and liabilities formerly held by Barrett. Courts do not inquire into the sufficiency of a consideration agreed to by the parties, even when the agreed consideration is "of an indeterminate value." *Putz v. Allie*, 785 N.E.2d 577, 579 (Ind. Ct. App. 2003). Therefore, we find no error here.

Affirmed.[8]

BRADFORD, J., and BROWN, J., concur.

[7] As Appellees correctly note, if Barrett "claims he is entitled to compensation from" Kenneth, "the original stock seller, that claim is not within the scope of this proceeding as [Kenneth] is not a party to this action." Appellee's Br. at 12.

[8] As Appellees also correctly note, Barrett's appeal does not challenge the trial court's ruling that any claim he may have had prior to May 20, 2002, for breach of fiduciary duty or conversion arising from the Original Agreement is barred by the statute of limitations.