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Kevin S. Smith

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ATTORNEY FOR APPELLEE
BP RODUCTS NORTH AMERICA, INC.:

ADRIAN P. SMITH
Smith & DeBonis, LLC
Highland, Indiana

MICHAEL E. O'NEILL
KELLY K. MCFADDEN
 O'Neill McFadden & Willett LLP
 Dyer, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

[illegible]

No. 45A05-0912-CV-745

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John M. Sedia, Special Judge
Cause No. 45D09-0705-CC-565

September 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

This is an action for fraud and legal malpractice stemming from a real estate transaction. The plaintiff negotiated to lease a portion of his property to the defendant company. The defendant company expressed intent to rent a certain-sized parcel, but it later discovered that it required additional footage. The parties executed a lease agreement which omitted a legal description of the subject property. The agreement provided that a final land survey would be completed and incorporated after the effective lease date. The defendant company tendered a final survey to the plaintiff depicting the larger parcel that it desired. The plaintiff signed the survey. The company began construction on its parcel, and the plaintiff initiated this action soon thereafter. The plaintiff alleged fraud by the defendant company and its agent in misrepresenting the size of the parcel being rented. The plaintiff also raised a malpractice claim against his real estate attorney, claiming that his attorney failed to inform him that the lease agreement did not crystallize a parcel size. The trial court granted summary judgment in favor of all defendants, and the plaintiff now appeals. We find insufficient designated evidence to create an issue of fact on the plaintiff's claims. We affirm.

Facts and Procedural History

Dr. Mohamed M. Krad owned a parcel of real estate in Griffith, Indiana. Krad was a physician, and his medical offices were situated on the front of the property. The State of Indiana maintained a forty-foot easement over a certain portion of Krad's parcel.

In 2004, broker Earl Goldberg approached Krad on behalf of BP Products. Goldberg informed Krad that BP wished to lease part of Krad's property in order to build a gas station. Goldberg offered to build Krad a new medical office on the rear of the property if Krad leased the front to BP.

Krad was interested and began negotiating. BP sent Krad a letter of intent outlining the terms of a potential lease agreement. In the letter, BP expressed interest in leasing a parcel approximately 250 feet in length. Krad revised some of the contract terms other than the property dimensions and signed the letter of intent.

BP forwarded Krad a proposed fifteen-year lease agreement in December 2004. The agreement omitted any legal description of the subject property. The agreement provided that within sixty days of the effective lease date, a final land survey would be completed. The legal description of the real estate would be added as a lease exhibit, subject to the approval of both Krad and BP.

Krad enlisted patient/attorney Robert Taylor to review the proposed lease. Taylor did so and sent a memorandum to Krad summarizing its terms. Taylor's memorandum did not explain that the proposed lease omitted a legal description of the subject parcel.

BP commissioned an ALTA/ACSM land survey in early 2005. The survey was prepared by the WD Partners engineering firm. While completing the survey, WD

discovered the State's forty-foot easement over Krad's property. WD discussed the easement with Goldberg and BP. Because of the easement, BP would have to extend the length of its parcel forty feet to accommodate the gas station. Nonetheless, WD's survey was completed on June 8, 2005, and reflected a parcel length of only 243 feet. The survey was forwarded to Krad. According to Krad, BP never informed him that it wished to rent a longer parcel.

The parties executed their lease agreement on June 16, 2005. Taylor signed the lease as a witness. Two weeks later, Taylor sent Krad a letter enclosing the executed lease and WD's land survey. Taylor also enclosed a bill for his services.

WD completed a new and final land survey on November 17, 2005. The final survey reflected BP's desired parcel length of 290 feet. On November 18, Goldberg brought WD's final survey to Krad's office. Krad was examining a patient. Goldberg interrupted and informed Krad that he needed to sign the plat so it could be recorded. Krad excused himself, went to his office, and signed the survey. Krad evidently declined to review the survey before signing it. He figured it was just like the original. Krad also did not consult or notify Taylor before signing.

BP began construction on the property in December 2005. At some point Krad realized that BP was occupying a 290-foot parcel. He initiated this action soon thereafter.

Krad filed a complaint against BP, Goldberg, and Taylor. Krad alleged fraud by BP and Goldberg in misrepresenting the size of the parcel that they were contracting to rent. He claimed that BP was unjustly enriched by its occupation of an extra forty feet of real estate. Krad sought "damages, expenses, and losses sustained, rent, interest, punitive

damages, costs of this action, attorney fees and all other relief just and proper in the premises.” Appellant’s App. p. 137. Krad also brought a legal malpractice claim against Taylor. Krad alleged that Taylor neglected to explain that the lease agreement was silent on the dimensions of the subject property. Krad did not assert in his complaint that his lease agreement was voidable on statute of frauds grounds. The defendants moved for summary judgment, which the trial court granted. Krad now appeals.

Discussion and Decision

Krad argues that the trial court erred in entering summary judgment for the defendants on his fraud and malpractice claims.

I. Standard of Review

When reviewing the entry or denial of summary judgment, our standard of review is the same as that of the trial court: summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1269 (Ind. 2009). All facts established by the designated evidence, and all reasonable inferences from them, are to be construed in favor of the nonmoving party. *Naugle v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007).

II. Claims of Fraud Against BP and Goldberg

Krad first argues that the trial court erred in entering summary judgment on his claims of fraud against BP and Goldberg.

Under Indiana law, a person is presumed to understand what he signs and cannot be released from a contract due to his failure to read it. *Robert’s Hair Designers, Inc. v.*

Pearson, 780 N.E.2d 858, 869 (Ind. Ct. App. 2002). Mere neglect will not relieve a party of the terms of an agreement in the absence of some excuse for the neglect, such as fraud, trickery, misrepresentation, or breach of trust or confidence. *Moore v. Bowyer*, 180 Ind. App. 429, 431, 388 N.E.2d 611, 612 (1979). The elements of actual fraud are: (1) a material representation of a past or existing fact by the party to be charged that; (2) was false; (3) was made with knowledge or reckless ignorance of its falsity; (4) was relied upon by the complaining party; and (5) proximately caused the complaining party's injury. *Ruse v. Bleeke*, 914 N.E.2d 1, 10 (Ind. Ct. App. 2009). Actual fraud may not be based on representations of future conduct, on broken promises, or on representations of existing intent that are not executed. *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 155 (Ind. Ct. App. 2005). When a contract is voidable for fraud, the injured party may avoid the contract or stand on the contract and seek damages. *Ind. Ins. Co. v. Margotte*, 718 N.E.2d 1226, 1229 (Ind. Ct. App. 1999).

Here the designated evidence is insufficient to sustain a fraud claim against Goldberg and BP. The parties' lease agreement provided that a description of the subject property would be incorporated into the contract after its execution. Krad was at liberty to review, modify, firm up, and/or reject the terms of the agreement, but instead he signed the contract. Goldberg then tendered a final survey to Krad for his approval. Krad could have reviewed and/or rejected the survey.¹ Again, he chose to sign it. Krad is presumed to have understood the documents he signed and is therefore bound by their terms. To be

¹ The parties' lease agreement was an agreement to agree on the legal description of the subject property. An agreement to agree is unenforceable. *Wolvos v. Meyer*, 668 N.E.2d 671, 674 (Ind. 1996). Because Krad and BP had no meeting of the minds on that essential term at the time they executed the lease agreement, Krad could have rejected the lease agreement and the subsequent description of the property.

sure, BP and Krad initially agreed that the leased parcel would span 250 feet, and the original land survey so reflected. We acknowledge that the original survey was completed and forwarded contemporaneously with the execution of the lease agreement. We also understand that Goldberg approached Krad somewhat abruptly when procuring Krad's signature on the final survey. But one could not say that BP's or Goldberg's conduct rose to a "material [mis]representation" of "past or existing fact" so as to sustain a claim of fraud. BP simply expressed an intention to lease a 250-foot lot, the parties executed a lease which called for the addition of a legal property description, and in accordance with the lease terms, Goldberg sought Krad's approval of the final survey depicting a 290-foot parcel. We conclude that these circumstances are insufficient to support a finding of fraudulent conduct by the defendants.

Krad maintains in the alternative that Goldberg and BP's maneuvering resulted in a lease agreement that is invalid under the statute of frauds.

Indiana's statute of frauds provides that no person may bring an action involving a contract for the sale of land "unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in writing and signed by the party against whom the action is brought or by the party's authorized agent[.]" Ind. Code § 32-21-1-1(b). Pursuant to the statute of frauds, an enforceable contract for the sale of land must be evidenced by some writing which describes the land with reasonable certainty. *Johnson v. Sprague*, 614 N.E.2d 585, 588 (Ind. Ct. App. 1993). Where the seller is conveying a tract of land that is part of a larger tract owned by the seller, "[w]hether or not the writing

satisfies the statute as to description will depend upon *whether within itself or by references made* it does or it does not in practical effect describe or designate the part covered by the contract.” *Cripe v. Coates*, 124 Ind. App. 246, 251, 116 N.E.2d 642, 645 (1954). If a land survey is not in existence at the time the parties entered into a contract, it cannot furnish the means of identification necessary to describe with reasonable certainty the land sold. *See Schuler v. Graf*, 862 N.E.2d 708, 714 (Ind. Ct. App. 2007), *trans. denied*.

However, the statute of frauds is an affirmative defense that must be raised in a pleading. Ind. Trial Rule 8(C). It is axiomatic that such a defense cannot be presented for the first time on appeal. *Lawshe v. Glen Park Lumber Co., Inc.*, 176 Ind. App. 344, 347, 375 N.E.2d 275, 278 (1978).

We conclude that Krad’s statute of frauds argument has not been properly raised in this case, as Krad did not invoke the statute of frauds in his pleadings. In fact, Krad’s assertion that the statute of frauds invalidates the lease agreement is inconsistent with his amended complaint and overall prayer for relief. Krad brought this action electing to stand on the contract that he believed he entered. Krad sought enforcement of the lease agreement for a 243-foot parcel. He requested only damages and other related expenses resulting from BP’s occupation of an additional forty feet. He did not seek to invalidate the contract wholesale. For these reasons, we find that Krad has effectively waived any present claim that the lease is unenforceable on statute of frauds grounds.

We conclude that Krad fails to create a genuine issue of material fact on his fraud claims. The trial court therefore did not err by entering summary judgment in favor of Goldberg and BP.

III. Malpractice Claim Against Attorney Taylor

Krad next argues that the trial court erred in entering summary judgment for Taylor on his legal malpractice claim.

The elements of an action for legal malpractice are: (1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of (4) damage to the plaintiff. *Reiswerg v. Statom*, 926 N.E.2d 26, 30 (Ind. 2010).

Here we find insufficient designated evidence to sustain Krad's malpractice claim against attorney Taylor. Any alleged damage that Krad incurred from this fiasco arose from Krad signing the final land survey, which granted BP the additional forty feet of real estate. Even if we assume without deciding that Taylor still represented Krad when the final survey was tendered and signed, the undisputed facts reveal that Krad signed the survey without first seeking advice of counsel. Taylor had no opportunity to review the final land description. Accordingly, there are insufficient grounds to find that Taylor's alleged omissions proximately caused Krad's damages. Krad thus fails to create an issue of material fact on his malpractice claim, and the trial court properly entered summary judgment in favor of Taylor.

Affirmed.

NAJAM, J., and BROWN, J., concur.