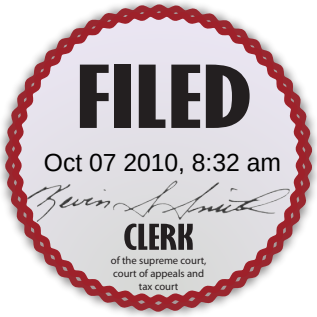

ATTORNEY FOR APPELLANTS:

THOMAS B. O'FARRELL
McClure & O'Farrell, P.C.
Westfield, Indiana

ATTORNEY FOR APPELLEE:

SUSAN K. ROBERTS
Stuart & Branigin LLP
Lafayette, Indiana

IN THE COURT OF APPEALS OF INDIANA

L. STEVEN BECKHAM, JACQUELYN K. BECKHAM, and AMOS AGRI PRODUCTS, INC.,	)	
Appellants-Defendants,	)	
vs.	)	No. 79A05-0909-CV-554
LAFAYETTE BANK AND TRUST COMPANY,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0804-MF-163

October 7, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Steven Beckham ("Beckham"), Jacquelyn Beckham,[1] and Amos Agri Products, Inc. ("Amos Agri") (collectively, "the Appellants") appeal the trial court's judgment in favor of Lafayette Bank & Trust Co. ("the Bank") following a bench trial on the Bank's complaint seeking to foreclose on certain real property. The Appellants present the following issues for our review:

1. Whether the trial court abused its discretion when it excluded evidence that supported the Appellants' allegations of fraud and mistake.

2. Whether the trial court erred when it relied on excluded evidence to support its findings and conclusions.

3. Whether an affidavit submitted by the Bank was defective.

4. Whether the trial court had subject matter jurisdiction to order foreclosure regarding real estate located in White County.

5. Whether the mortgages underlying the foreclosure action were defective for lack of consideration and an inadequate description of the debt they secured.

We affirm.[2]

FACTS AND PROCEDURAL HISTORY

On November 20, 2001, Ag Machinery & Safety, Inc. ("Ag Machinery") executed a bond purchase and loan agreement ("the Agreement") and a promissory note ("Note I") in the principal amount of $600,000 (collectively "November 2001 loan"). The Indiana Development Finance Authority issued Note I, but subsequently endorsed Note I to the

[1] For ease of discussion, we will refer only to Steven Beckham throughout the opinion. While Jacquelyn is also an appellant, her involvement in the underlying facts of this case was nominal.

[2] We heard oral argument in this case on August 31, 2010.

Bank and pledged and assigned to the Bank all of the loan payments. The November 2001 loan was secured by Beckham's personal guaranty as well as mortgages on two parcels of real estate, one located in White County and owned by Ag Machinery ("Brookston property") and the other located in Tippecanoe County and owned by Beckham ("Farabee property").

In 2003, Ag Machinery assigned to Amos Agri all of its rights and obligations in certain loans and indebtedness, including its indebtedness under Note I. But the mortgage on the Farabee property was not assigned to Amos Agri. In 2006, Amos Agri executed a note payable to the Bank for a line of credit in the principal amount of $400,000 ("Note II"). In addition, Beckham executed a second guaranty in favor of the Bank whereby he guaranteed the payment and performance of every debt, liability and obligation that Amos Agri owed to the Bank.

The Agreement provides that events of default include: failure to pay any installment of interest or principal, failure to pay any other indebtedness, or if the borrower seeks protection under the Bankruptcy Code. Note II provides that events of default include: failure to make a payment on time, failure to pay on any other debts with the Bank, or if the borrower becomes insolvent.

On May 1, 2007, Amos Agri filed for protections under Chapter 7 of the United States Bankruptcy Code. Accordingly, Amos Agri defaulted under the terms of the Agreement and Note II. In addition, Beckham defaulted under the terms of both of his guaranties when he failed to make payments. The Bank filed a Motion for Relief from Stay with the bankruptcy court, which the court granted. Accordingly, the Bank brought

this action seeking to foreclose on the Brookston property and Farabee property and also seeking a personal judgment against Beckham.

A bench trial was held on a paper record.[3] The Bank submitted a written objection "to the admission of testimony from the depositions of L. Steven Beckham and Larry Jacobs[, the president of Ag Machinery,] and the exhibits attached thereto if offered to show purported statements or representations of the parties prior to the execution of the November 20, 2001 Loan." Appellee's App. at 17. The Bank objected to that evidence on the following grounds:

> a. Any oral representations or documents outside the four corners of the loan documents is inadmissible and violates the parol evidence rule against the admission of extrinsic evidence.;
>
> b. Defendants have failed to establish any exception to the parol evidence rule;
>
> c. The statements or representations offered by the Defendants are hearsay and Defendants have failed to establish any exception to the hearsay rule to permit the admissibility of the out of court statements.

Id. at 18.

The Appellants had proffered those depositions and exhibits in an attempt to prove their affirmative defense that a key contract provision had been omitted from the written contract through mistake or fraud. In particular, the Appellants contended that they had contracted to limit the term of Beckham's personal guaranty to two years and that that provision was not included in the Agreement. The parties stipulated to the remainder of the evidence. The trial court sustained the Bank's objection and concluded that the Beckham and Jacobs depositions and related exhibits were "inadmissible to show that

[3] In lieu of a trial, the parties submitted stipulations, depositions, and exhibits.

representations purportedly were made by [the Bank] that were not part of the executed loan documents." Appellants' App. at 26. The trial court entered judgment in favor of the Bank and issued the following relevant findings and conclusions:

> 20. Note I, the Loan Agreement, the Brookston Mortgage, the Farabee Mortgage, Guaranty I, and the Assignment do not contain any language or provision for the release in two years of the Farabee Mortgage.
>
> 21. The Farabee Mortgage states: "This Security Instrument is complete and fully integrated. This Security Agreement may not be amended or modified by oral agreement."
>
> 22. The Loan Agreement provides that the parties may amend or supplement the Agreement but that "no such supplemental agreements shall be binding unless in writing and duly signed by the parties. . . ."
>
> 23. Guaranty I further states that the guaranty may not be waived, modified, terminated, released or otherwise changed except by a writing signed by the Guarantor and the Lender.
>
> 24. There are no commitment letters from [the Bank], signed by the parties to the transaction, providing for the release of the Farabee Mortgage in two years.
>
> 25. The letter relied upon by Defendants for their defense with the fax stamp dated November 8, 2001, specifically states "this commitment is subject to your acceptance of the terms and conditions outlined within a period of ten days from the date of the letter." and "indicate your acceptance by executing the enclosed copy." It also states that, "if not received by that date, we reserve the right to cancel or modify this commitment."
>
> 26. The beginning of the letter states that "the terms and conditions may change if during the Bank's due diligence we become aware of facts or requirements which will affect the structure terms and pricing of financing."
>
> 27. Larry G. Jacobs, Sr., acknowledged that the commitment letters were "working documents," not "a fixed document" because the terms and conditions could change, and that the commitment letters required their signatures to show their acceptance.

28. The Court finds no merit in the affirmative defenses of Defendants Amos, L. Steven Beckham, and Jacqueline Beckham, including that certain terms of the November, 2001 Loan, allegedly were the result of waiver, estoppel, inequitable conduct and fraud.

* * *

51. Defendant Amos defaulted under the November, 2001 Loan Agreement and Note I due to its failure to make payments when due per the terms therein, and by filing bankruptcy.

52. Defendant Amos defaulted under Note II the May 24, 2006 [sic] due to its failure to make payments when due per the terms therein and due to the insolvency of Amos due to its bankruptcy filing.

53. Defendant L. Steven Beckham defaulted under Guaranty I and II due to his failure to make payments under the guaranties for Note I and Note II obligations.

54. Defendants Amos Agri-Products, Inc. and L. Steven Beckham owe [the Bank] the following sums:

a. As of July 7, 2009, there remains due and unpaid on the November 20, 2001 Promissory Note and Loan Agreement, the sum of $587,764.89, together with interest accruing at the rate of seven and one-half percent (5.75%) per annum ($81.27 per day), to the date of judgment, and costs thereafter accruing to the date of judgment;

b. As of July 7, 2009, there remains due and unpaid on the May 24, 2006 Note and Loan the sum of $360,188.15, together with interest accruing at the note rate ($34.41 per day), late charges, and costs thereafter accruing to the date of judgment.

* * *

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the persons and subject matter in this action. Plaintiff is entitled to bring a foreclosure action in Tippecanoe County in the same action for the Brookston property and for the Farabee property when the promissory notes are secured by mortgaged lands for properties in two counties, and when it involves the same notes and same defaults by the same parties. Ind. Code § 32-30-10-3(b); Holmes v. Taylor, 48 Ind. 169 (1874).

2. Defendants Amos, L. Steven Beckham, and Jacqueline Beckham have failed to meet their burden of proof to establish their affirmative defenses.

3. The Defendants' tender of the depositions of L. Steven Beckham and Larry G. Jacobs, Sr., as well as letters from [the Bank], are inadmissible to show that representations purportedly were made by [the Bank] that were not part of the executed loan documents. The parol evidence rule excludes any extrinsic evidence to show prior or contemporaneous oral agreements offered to vary or contradict the terms of a written agreement. Defendants have failed to establish any exception to the parol evidence rule.

4. Defendants have failed to establish the elements of fraud, estoppel, waiver, or inequitable conduct.

5. Specifically, Defendants have failed to establish that [the Bank] made any statements of a past or existing fact. Rather, the Defendants claim that the representation related to something that was to occur in the future, i.e. that the Farabee Mortgage would be released in two years. At best, the alleged statement is a statement of present intention, and thus it fails as an element of fraud under Indiana law. Indiana law does not recognize a claim for fraud based on misrepresentation of the speaker's current intentions.

6. Defendants cannot claim fraud at the inception of the November, 2001 Loan because they have ratified the contract by accepting its terms and benefits from the inception of the loan in November, 2001, including accepting loan money, making payments thereon for a number of years, and failing to return the benefits received.

7. Defendants waived any claims or defenses based upon the purported representations of [the Bank] due to their own conduct in failing to execute the loan commitment letter as required by the terms of the letter, failing to read the loan documents at closing despite being sophisticated businessmen, failing to have the loan documents amended after acquiring knowledge of the absence of a key provision in the loan documents, and failing to exercise due diligence in following up on the alleged release of the Farabee Mortgage.

8. The Brookston Mortgage is a first, valid and subsisting lien on the Brookston property.

9. The Farabee Mortgage is a first, valid and subsisting lien on the Farabee property.

> 10. [The Bank] is entitled to a decree foreclosing Mortgage I and Mortgage II at the time and in the manner provided by law to partially satisfy the judgment amount.
>
> 11. An in rem judgment is granted to Plaintiff [the Bank] with respect to the Brookston property and Farabee property, and a personal judgment is granted to Plaintiff [the Bank] against Defendant L. Steven Beckham, in the amount of $1,031,638.04, except that Mortgage I is limited to $600,000.00 principal, plus interest accruing at the rate of $81.27 per day for Note I and $34.41 per day for Note II from July 7, 2009 and at the statutory rate of 8.00% from judgment to sale, subsequent advances made and costs incurred after July 7, 2009, without relief from valuation or appraisement laws.
>
> 12. Mortgage I of [the Bank] be, and hereby is, foreclosed as a first and prior lien on the Brookston property, and all Defendants and all persons claiming under or through them are forever barred and foreclosed.
>
> 13. Mortgage II of [the Bank] be, and hereby is, foreclosed as a first and prior lien on the Farabee property, and all Defendants and all persons claiming under or through them are forever barred and foreclosed.

Appellants' App. at 18-28 (some citations omitted). This appeal ensued.

DISCUSSION AND DECISION

Issue One: Exclusion of Evidence

Appellants first contend that the trial court abused its discretion when it excluded from the evidence the depositions of Beckham and Jacobs and related exhibits. Appellants maintain that that evidence was admissible to show that the two-year limitation on Beckham's personal guaranty that the parties had negotiated was omitted from the final loan documents either through fraud or mistake. In general, where the parties to an agreement have reduced the agreement to a written document and have included an integration clause that the written document embodies the complete agreement between the parties, the parol evidence rule prohibits courts from considering parol or extrinsic evidence for the purpose of varying or adding to the terms of the written

contract. Krieg v. Hieber, 802 N.E.2d 938, 943 (Ind. Ct. App. 2004). However, the prohibition against the use of parol evidence is by no means complete. Id. at 944. Indeed, parol evidence may be considered if it is not being offered to vary the terms of the written contract, and to show that fraud, intentional misrepresentation, or mistake entered into the formation of a contract. Id.

A trial court has considerable latitude in the admission or exclusion of evidence. Ind. Ins. Co. v. Plummer Power Mower & Tool Rental, Inc., 590 N.E.2d 1085, 1088 (Ind. Ct. App. 1992). Where evidence is erroneously excluded, reversal is justified only if the error relates to a material matter or if exclusion substantially affects the rights of the parties. Id. An error in the exclusion of evidence is harmless when the record discloses the excluded evidence was otherwise presented to the factfinder. See id.

Here, while the trial court concluded that the depositions and related exhibits were "inadmissible to show that representations purportedly were made by [the Bank] that were not part of the executed loan documents[,]" the court nevertheless relied on those depositions in its findings and conclusions, including findings and conclusions related to the alleged fraud and mistake.[4] Appellants' App. at 26. It appears that, in fact, the trial court considered the evidence under an exception to the parol evidence rule but found it

[4] On the same date as the findings and conclusions, the trial court issued a separate order sustaining the Bank's objection to the proffered evidence. The court stated that "the deposition testimony of L. Steven Beckham and Larry Jacobs, and the exhibits thereto, as offered by the Defendants are inadmissible." Appellants' App. at 11. Appellants cite to that order to support their contention that the trial court excluded the evidence without exception. But the trial court's findings indicate that it found the evidence inadmissible for a particular purpose and, again, the trial court relied extensively on the depositions in its findings and conclusions. To the extent Appellants maintain that the evidence was categorically excluded, that claim is not supported by the record.

not credible and, therefore, insufficient to vary the terms of the written contract.[5] Regardless, Appellants cannot show any prejudice from the alleged exclusion of the evidence given the trial court's express consideration of that evidence. To the extent Appellants maintain that the trial court would come to a different conclusion on the merits of the case on retrial, they cannot prevail. The trial court "discount[ed] the credibility" of both Beckham and Jacobs, Appellants' App. at 19, 21, and Appellants offer no cogent argument to suggest that the court would likely find the same testimony credible on remand.

In particular, the trial court found unreliable Beckham's "assertion that from November, 2001 through 2007 he was unaware that the November, 2001 Loan, and specifically, the Farabee Mortgage, did not contain a provision for the release of the Farabee Mortgage after two years." Id. at 20. And the court found not credible Beckham's testimony "that on November 20, 2003, when the 2-year period for the Farabee mortgage was to be released, he did not question why he had not received a release because it 'totally slipped [his] memory.'" Id. The trial court found that Jacobs' testimony was inconsistent with Beckham's in that Jacobs testified that his conversation with the Bank employee about the missing provision was "loud enough for everyone to hear," but Beckham did not recall any such conversation. Id. at 21. Jacobs testified that he was

> aware that the November, 2001 Loan documents did not contain a provision for the release of the Farabee Mortgage, but he did not ask for the

[5] The dissent would hold that the trial court abused its discretion "in making credibility findings on the basis of an insufficient paper record[.]" But it was the parties' decision to submit the dispute for adjudication on a paper record in lieu of a trial. Accordingly, the court properly relied on the paper record submitted to determine the credibility of witnesses. If there were error, it would be invited error.

> documents to be amended or modified before signing the documents, even though the release of the Farabee Mortgage in his view was a deal killer.

Id. at 21. And the trial court "discount[ed] the credibility" of Jacobs because he

> had no follow-up conversations with [the Bank] relating to the release of the mortgage, he sent no communications to [the Bank] regarding the release of the Farabee mortgage, and when the 2 year period for the Farabee mortgage was to be released, he did not make any inquiry as to the release of the mortgage.

Id. at 22.[6]

Any error in the trial court's determination of the admissibility of the depositions was harmless. See Ind. Ins. Co., 590 N.E.2d at 1088. Further, the trial court's findings are supported by the evidence and its conclusions are not clearly erroneous. Appellants allege that they were fraudulently induced into executing the loan agreement after an employee of the Bank orally assured Jacobs that the Farabee Mortgage would be released after two years despite the absence of that term in the loan documents. Even if the trial court had found that allegation credible, Appellants would still not prevail. It is elementary that a contract induced by fraud or duress is not void but only voidable. Raymundo v. Hammond Clinic Ass'n, 449 N.E.2d 276, 283 (Ind. 1983). A party may not claim benefits under a transaction or instrument and, at the same time, repudiate its obligations. Id. Here, it is undisputed that Appellants accepted the benefits of the Agreement for approximately six years. The trial court did not err when it concluded that Appellants' allegation of fraud cannot stand because they ratified the Agreement. Likewise, with respect to Appellants' contention that the two-year provision was omitted

[6] We note that the record is devoid of any explanation for the lack of the Bank employee's testimony regarding what may or may not have been discussed regarding the two-year provision at closing.

by mistake, they cannot show that the trial court's findings and conclusions are clearly erroneous.

Issue Two: Findings and Conclusions

Appellants next contend that the trial court erred when it deemed their proffered evidence inadmissible but relied on it anyway to support its findings and conclusions. And, they maintain, the trial court erred when it considered only some, but not all of their proffered evidence. We hold that any error was harmless.

Appellants cite to our Supreme Court's opinion in Burton v. Murrow, 133 Ind. 221, 32 N.E. 921 (1892), for the following rule:

> [i]f the special findings embrace findings upon matters not proper or competent to be considered by the court, or of facts which could only be established by considering incompetent evidence, such portion of the finding should be disregarded, and cannot legitimately form a basis for a conclusion of law.

But, again, contrary to Appellants' assertion, the trial court did not exclude the depositions from evidence, but limited their admissibility. Appellants have not demonstrated that the trial court considered "incompetent evidence" to support its findings and conclusions.

And Appellants cite to Boss Manufacturing v. Steel Suppliers, 698 N.E.2d 1243, 1244 (Ind. Ct. App. 1998), for the rule that parties are entitled to have the factfinder consider "all relevant and proper evidence which is tendered." But Appellants have not demonstrated that the trial court did not consider all of their proffered evidence. For instance, on appeal, Appellants do not direct us to any relevant testimony that was not

addressed by the trial court in its findings and conclusions. Appellants' contention on this issue is without merit. Again, any error was harmless.

Issue Three: Affidavit

Appellants contend that the affidavit of Debra Spesard, which the Bank submitted to the trial court, was defective and cannot support the trial court's findings and conclusions. But the Bank maintains that Appellants have waived this issue for failure to object to the affidavit to the trial court. Appellants do not respond to the allegation of waiver in their reply brief.

The Bank directs us to the transcript of the bench trial on July 7, 2009, where the Bank stated that it was submitting an affidavit in support of its attorney's fees. Appellants' counsel stated that "if we deem a response necessary to the affidavit of fees and outstanding balance we will respond to that in a separate response or as part of the overall response." Appellants' App. at 36. As the Bank points out on appeal, Appellants did not challenge the affidavit of Debra Spesard before the trial court. Accordingly, the issue is waived on appeal. A complaining party has a duty to direct the trial court's attention to a defective affidavit, and failure to raise an objection constitutes waiver. Paramo v. Edwards, 563 N.E.2d 595, 600 (Ind. 1990).[7]

Issue Four: Subject Matter Jurisdiction

Appellants contend that the trial court lacked subject matter jurisdiction over the foreclosure action regarding the Brookston property, which is located in White County. The trial court concluded in relevant part as follows:

[7] While Paramo dealt with an affidavit submitted on summary judgment, we apply the rule here, where the trial court ruled on a paper record.

> This Court has jurisdiction over the persons and subject matter in this action. Plaintiff is entitled to bring a foreclosure action in Tippecanoe County in the same action for the Brookston property and for the Farabee property when the promissory notes are secured by mortgaged lands for properties in two counties, and when it involves the same notes and same defaults by the same parties. Ind. Code [§] 32-30-10-3(b); Holmes v. Taylor, 48 Ind. 169 (1874).

Appellants' App. at 26. Appellants maintain that the trial court "misreads both Indiana Code [Section] 32-30-10-3 and Holmes v. Taylor." Brief of Appellants at 28.

Indiana Code Section 32-30-10-3 provides:

> (a) If a mortgagor defaults in the performance of any condition contained in a mortgage, the mortgagee or the mortgagee's assigns may proceed in the circuit court of the county where the real estate is located to foreclose the equity of redemption contained in the mortgage.
>
> (b) If the real estate is located in more than one (1) county, the circuit court of any county in which the real estate is located has jurisdiction for an action for the foreclosure of the equity of redemption contained in the mortgage.

Appellants interpret this statute to mean that "foreclosure of a mortgage may only be had in the circuit court in the county in which the land is located." Brief of Appellants at 29 (citing Chadwick v. Louisville Joint Stock Land Bank, 103 Ind. App. 224, 6 N.E.2d 741 (1937)). And Appellants maintain that an exception to that rule may only be had "where a single piece of mortgaged property spans a county line." Id. In Holmes, our Supreme Court held that where a foreclosure action involves a single parcel of real estate that sits in two counties, the court of either county has jurisdiction. 48 Ind. at 169.

But the Bank maintains that the exception should also apply where two mortgages for two separate parcels of real estate are held as collateral in a single loan transaction. For support, the Bank cites to Minor v. Sumner, 80 Ind. App. 269, 140 N.E. 580 (1923).

Minor was an action involving the defendant's fraudulent conveyances of separate parcels of real estate in different counties. This court held that

> a single action may be maintained to set aside alleged fraudulent conveyances of separate tracts of land in different counties, executed at different times to different grantees, in any county in which one of such tracts is located, where it is alleged that they were made by the same grantor in pursuance of a design, and in an effort to defraud his creditors. This is permissible on the theory that the subject-matter of the action is not merely the land in the county where the action is instituted, but the alleged fraud in conveying the land in the several counties, which the creditor seeks to have subjected to the payment of his debt, by removing the impediment thrown in the way of its collection by the execution of the several conveyances.

Minor, 140 N.E. at 580-81.

Following that reasoning, here, the Bank contends that the subject matter of the instant action is "not merely the land in the county where the action is instituted but the default under the promissory notes and the guaranty." Brief of Appellee at 24. And the Bank asserts that

> it would be illogical to have two foreclosure actions proceeding separately. If the Bank were to file separate actions in White County and Tippecanoe County on the same promissory notes, the Bank would obtain two separate million dollar judgments, rather than just one, as the promissory notes were secured by both properties.

Id. We must agree.

Under our rules of statutory construction, it cannot be presumed the General Assembly intended language used in a statute to be applied in an illogical manner. State ex rel. Hatcher v. Lake Superior Court, Room Three, 500 N.E.2d 737, 739 (Ind. 1986). Nor can it be presumed the Legislature intended to do an absurd thing or to enact a statute that has useless provisions, the effect of which can easily be avoided. Id. Our legislature

could not have intended to require two separate foreclosure actions under the circumstances in this case. We hold that where a single loan transaction involves separate parcels of real estate located in different counties, the mortgagee may bring a single foreclosure action against the mortgagor(s) in any county where one of the parcels is located.

Issue Five: Mortgages

Appellants next contend that neither the Brookston mortgage nor the Farabee mortgage adequately described the debt they secured. And they contend that both mortgages fail for lack of consideration. We address each contention in turn.

Appellants cite Indiana Code Section 32-29-1-5, which provides in relevant part that a mortgage must be

> worded in substance as "A.B. mortgages and warrants to C.D." (here describe the premises) "to secure the repayment of" (here recite the sum for which the mortgage is granted, or the notes or other evidences of debt, or a description of the debt sought to be secured, and the date of the repayment); and (2) dated and signed, sealed, and acknowledged by the grantor[.]

(Emphasis added). Appellants maintain that both mortgages in this case list an incorrect date of the repayment and are, therefore, not in compliance with the statute. In particular, each mortgage lists the maturity date as "01/01/2022," and Appellants assert that the maturity date was December 1, 2021. Appellants contend that because there is no note which bears that maturity date, the mortgages are unenforceable.

The Bank counters that the terms of Note I provide that "the project bonds mature on December 1, 2021, however, the final installment, as provided in the note is due and

payable on January 1, 2022." Brief of Appellee at 24. Thus, the Bank maintains that there is no discrepancy in the date of repayment in either mortgage.

Regardless, in Plummer & Co. v. National Oil & Gas, Inc., 642 N.E.2d 291, 292 (Ind. Ct. App. 1994), trans. denied, this court stated:

> The description of a debt in a mortgage does not have to be literally accurate but "must be correct so far as it goes, and full enough to direct attention to the sources of correct information in regard to it, and be such as not to mislead or deceive, as to the nature or amount of it, by the language used." A reasonably certain description of the debt is required so as to preclude the parties from substituting debts other than those described for the mere purpose of defrauding creditors.

(Citations omitted). We hold that, here, the descriptions of the debt secured by the mortgages are sufficient. Even assuming that the date of repayment indicated is incorrect, there is no evidence that this discrepancy misled anyone. Indeed, any error was de minimus since the maturity date was misstated, if at all, by only one month.

Finally, Appellants contend that the Farabee mortgage and Beckham guaranties are unenforceable for lack of consideration. The Bank correctly points out that failure of consideration must be specifically pled as an affirmative defense under Trial Rule 8(C). The Bank states, and Appellants do not refute, that Appellants did not raise the affirmative defense of lack of consideration. The issue is waived.

Conclusion

The trial court did not exclude the depositions of Beckham and Jacobs, but limited the admissibility of that evidence. Any error in the limited admission of that evidence is harmless, since the trial court relied on those depositions in its findings and conclusions. Further, even if the trial court believed Appellants' contention that they were fraudulently

induced into signing the Agreement, they cannot prevail because they ratified the Agreement. Appellants waived any challenge to the admissibility of the Spesard affidavit. The trial court had subject matter jurisdiction over the White County foreclosure. The mortgages adequately described the debt each secured. And Appellants waived their contention that the Farabee mortgage and Beckham guaranties lacked consideration.

Affirmed.

MATHIAS, J., concurs.

KIRSCH, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

L. STEVEN BECKHAM, JACQUELYN K. BECKHAM, and AMOS AGRI PRODUCTS, INC., Appellants-Defendants, vs. LAFAYETTE BANK AND TRUST COMPANY, Appellee-Plaintiff.	)))))))))))	No. 79A05-0909-CV-554

KIRSCH, Judge, *dissenting*.

The entirety of the record before us leaves me with no confidence whether the right result was or was not reached in this case. Accordingly, I respectfully dissent.

My first concern is that the trial in which credibility of the witnesses would play a vital role was held on a paper record without live testimony. In my experience, it is difficult to determine the credibility of witnesses who are physically present in the courtroom, whose demeanor can be observed, and who are subject to live cross-examination and to potential questioning from the court. The difficulty of this task rises exponentially when -- as here --these factors are lacking.

I continue with the fact that the trial court based a number of its actual findings on evidence that it had ruled inadmissible. The court issued an order sustaining the Bank's objections to the deposition testimony of L. Steven Beckham and Larry Jacob and ruling that "the deposition testimony of L. Steven Beckham and Larry Jacobs, and the exhibits thereto, as offered by the Defendants are inadmissible." *Appellants' App*. at 11. Notwithstanding this order, the trial court repeatedly cited to the very evidence it ruled inadmissible as the basis for a number of its factual findings.

My colleagues conclude that "contrary to Appellants' assertion, the trial court did not exclude the depositions from evidence, but limited their admissibility." *Slip Op.* at 12. To me, the trial court's order that "the deposition testimony of L. Steven Beckham and Larry Jacobs . . . are inadmissible" is not a statement limiting admissibility, but a clear statement excluding the depositions in their entirety.

Next, there is the Bank's failure to accurately describe the indebtedness secured by the mortgage. The Bank glides over its failure to accurately describe the note secured by the mortgage and its failure to seek reformation of the mortgage to bring it into compliance with the parties' oral agreement and relies upon parol evidence to show that the due date in the mortgage provision describing the secured indebtedness was a mistake. At the same time, the Bank objects to parol evidence from Beckham that the Bank's failure to include the provision that the mortgage would be released in two years in the mortgage document was also a mistake.

Finally, I believe the trial court erred in concluding that the Appellants' claim cannot stand because the Appellants ratified the agreement by accepting its benefits for

six years. Whatever benefits the Appellants received, they received at the loan inception. They neither received, nor accepted, any benefits thereafter.

I believe the trial court abused its discretion in making credibility findings on the basis of an insufficient paper record and in basing its factual findings on evidence that it ruled inadmissible. I would vacate the trial court's judgment and remand for a new trial.