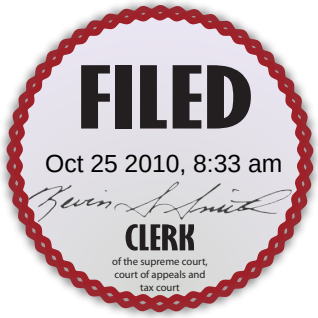


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# IN THE
# COURT OF APPEALS OF INDIANA

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| HALIFAX FINANCIAL GROUP, LP, a Colorado Limited Partnership, | ) | |
| Appellant-Plaintiff, | ) | |
| vs. | ) | No. 49A02-0912-CV-1291 |
| CAPITAL IMPROVEMENT BOARD OF MANAGERS OF MARION COUNTY, INDIANA, and MARION COUNTY CONVENTION AND RECREATIONAL FACILITIES AUTHORITY, | ) | |
| Appellees-Defendants. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D14-0709-PL-37738

**October 25, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Halifax Financial Group, LP ("Halifax") appeals entry of summary judgment for the Capital Improvement Board of Managers of Marion County Indiana ("CIB") and the Marion County Convention and Recreational Facilities Authority ("MCCRFA") (collectively, "the Defendants"). Halifax presents the following issues for our review:

1. Did the trial court err in granting the change of judge the Defendants requested?

2. Did the trial court err in denying Halifax's motion to strike the two affidavits filed in support of the motion for summary judgment?

3. Did the trial court err in granting the Defendants' motion for summary judgment?

We affirm.

## FACTS AND PROCEDURAL HISTORY

This case involves a parcel of land located at 101 Virginia Avenue in Indianapolis and measuring approximately 1/20$^{th}$ of an acre (hereinafter, "the disputed parcel"). Prior to 1997, the disputed parcel was the site of a railroad bridge used by CSX Transportation, Inc. It was later sold to Consolidated Rail Corporation Properties, Inc. ("CRC"). Over time, CRC acquired all of the private property between Delaware Street on the west and Alabama Street on the east, and Maryland Street on the north and the CSX railroad line on the south;[1] this area includes the disputed parcel.

[1] CRC's property is bisected by Virginia Avenue, which runs from the property's northwest corner to its southeast corner.

In 1997, the Department of Metropolitan Development of the Consolidated City of Indianapolis ("DMD") purchased CRC's property, including the disputed parcel. (*See* App. at 69) (bill of sale identifying bridge parcel as the "CRC Parcel"). DMD later transferred to the MCCRFA all of its interest in the property it had bought from CRC. In 1998, the MCCRFA leased the property for thirty years to CIB for use as Conseco Fieldhouse and an adjoining parking structure.

In 2000, the Marion County Assessor's office identified and numbered a parcel identical to the disputed parcel, and began assessing property taxes. The assessor listed CRC as the owner, but CRC had not owned the disputed parcel since 1997. CRC did not pay the new property taxes on the disputed parcel, and in 2002, Halifax bought it at a tax sale. In 2004, Halifax pursued a quiet title action and named CRC, CSX, and New York Central Lines, LLC, as defendants. After serving notice by publication, Halifax also named "all persons claiming any right, title or interest in the within described real estate . . . the names of all whom are unknown to the Plaintiff." (*Id.* at 201.)

Halifax was granted default judgment and a Quiet Title Decree to the disputed parcel in 2005, and ordered a survey of it later that year. Halifax subsequently told the Defendants the Conseco Fieldhouse parking garage was encroaching on its land. On receipt of Halifax's complaint, the Defendants filed a quiet title action against Halifax, but later moved to dismiss it without prejudice.

On September 6, 2007, Halifax filed a complaint against the Defendants to "recover possession of the Real Estate, ejecting [the Defendants] from the Real Estate, and ordering the removal of the Garage from the Real Estate." (*Id*. at 21.) Halifax requested damages for the Defendants' use and occupancy of the disputed parcel. Summary judgment was granted to the Defendants on December 4, 2009.

## DISCUSSION AND DECISION

1. Change of Judge

Halifax argues the trial court erred in granting the Defendants' motion for change of judge. Trial Rule 76(B) states in relevant part,

> In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to only one (1) change from the judge.

A ruling on a motion for change of judge rests within the sound discretion of the trial judge and will be reversed only on a showing of abuse of that discretion. *In re Estate of Wheat*, 858 N.E.2d 175, 183 (Ind. Ct. App. 2006). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.*

To support its argument, Halifax points to a statute that governs the jurisdiction of claims related to tax sales: "[t]he court that enters judgment under this section shall retain exclusive continuing supervisory jurisdiction over all matters and claims relating to the tax sale." Ind. Code § 6-1.1-24-4.7(f). Because the Marion Circuit Court granted Halifax's tax deed to the disputed parcel, that court had continuing exclusive jurisdiction over all claims

related to the deed. *See Star Fin. Bank v. Shelton*, 691 N.E.2d 1338, 1341 (Ind. Ct. App. 1998) (when tax deed was issued by Delaware Circuit Court, it maintained exclusive jurisdiction over any related actions, which therefore could not be brought in Delaware Superior Court), *trans. denied*.

Halifax then asserts that, by granting the motion for change of judge, the trial court improperly removed this action from the court that had exclusive jurisdiction pursuant to Ind. Code § 6-1.1-24-4.7(f). The Defendants respond by noting the change of judge did not remove the action from the Marion Circuit Court because, on February 28, 2008, when jurisdiction vested in the Special Judge, the matter was still in Circuit Court, as required by Section 6-1.1-24-4.7.

As there appear to be no questions of fact about the procedural progression of the underlying action, we review *de novo* whether the grant of the change of judge violated 6- Ind. Code §1.1-24-4.7. *See*, *e.g.*, *Ramirez v. Wilson*, 901 N.E.2d 1, 2 (Ind. Ct. App. 2009) (whether undisputed facts bring case within controlling statute is question of law reviewed *de novo*), *trans. denied*. Based on our review of the Chronological Case Summary, we agree with the Defendants that the grant of the motion for change of judge, in and of itself, did not violate 6-1.1-2 Ind. Code §4-4.7 because the case remained in Marion Circuit Court for some time after that motion was granted.

Halifax next notes the Special Judge, on March 18, 2008, moved the cause from Marion Circuit Court to Marion Superior Court 13.[2] It appears this move to Superior Court

[2] This move occurred pursuant to Trial Rule 79(M), which provides: "In the event the individual selected to

was impermissible because the Circuit Court had "continuing, exclusive jurisdiction" under Ind. Code § 6-1.1-24-4.7(f). *See Star Fin. Bank*, 691 N.E.2d at 1341 (when tax deed was issued by Delaware Circuit Court, it maintained exclusive jurisdiction over any related actions, which therefore could not be brought in Delaware Superior Court).

However, Halifax did not object to the transfer to Superior Court and, in fact, later filed an amended complaint in Marion Superior Court. (*See* App. at 112.) Thus, Halifax has waived this allegation of error and may not raise it on appeal. *See Benton County Remonstrators v. Bd. of Zoning Appeals*, 905 N.E.2d 1090, 1096 (Ind. Ct. App. 2009) ("party generally waives appellate review of an issue or argument unless the party raised that issue or argument before the trial court"). *See also Kumar v. Bay Bridge*, 903 N.E.2d 114, 116 (Ind. Ct. App. 2009) (party waived objection to jurisdiction over tax sale by failing to object at the first opportunity; objection needed to be lodged in answer to complaint, not in summary judgment motion), *reh'g denied*.

Because Halifax did not to object to the change of venue at the first available opportunity, we cannot reverse on that ground. As the change of judge was not a change of venue, we cannot find an abuse of discretion in the grant of the change of judge.

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serve as special judge in the case is a regular judge of a court within the county and such court has subject matter jurisdiction of the proceeding, such judge may transfer the case . . . to that judge's court for all further proceedings."

2. Motion to Strike

Halifax argues the trial court erred in denying its motion to strike the two affidavits on which the Defendants' motion for summary judgment was based.[3] A trial court has broad discretion in ruling on the admissibility of evidence. *Guzik v. Town of St. John*, 875 N.E.2d 258, 265 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*. This discretion extends to rulings on motions to strike affidavits on the ground they do not comply with the summary judgment rules. *Price v. Freeland*, 832 N.E.2d 1036, 1039 (Ind. Ct. App. 2005). Affidavits submitted in support of a motion for summary judgment must present admissible evidence that should follow substantially the same form as though the affiant were giving testimony in court. *Comfax Corp. v. N. Am. Van Lines, Inc.*, 638 N.E.2d 476, 481 (Ind. Ct. App. 1994). Where an affidavit addresses facts or issues not relevant to the determination of summary judgment, such affidavit must be stricken. *Steuben County v. Family Dev., Ltd.*, 753 N.E.2d 693, 697 (Ind. Ct. App. 2001), *trans. denied*.

Halifax argues the affidavits should have been striken as immaterial to the determination of summary judgment because the Defendants' attack on Halifax's tax sale and

[3] The Defendants assert Halifax waived its appeal of the order denying its motion to strike the affidavits because it did not list the order denying the motion to strike in its Notice of Appeal. The Defendants claim Halifax was required by Appellate Rule 9(F) to list that order in its Notice of Appeal. We disagree. The language of Rule 9(F) requires the party to "designate the appealed judgment or order and whether it is a final judgment or interlocutory order." Halifax listed the order granting summary judgment in its Notice of Appeal as a final judgment. (*See* App. at 317.) A summary judgment is a final judgment if it "disposes of all claims as to all parties." App. R. 2(H). A claimed error in an interlocutory order may be raised on appeal from the final judgment. *Bojrab v. Bojrab*, 710 N.E.2d 1008, 1014 (Ind. 2004). Thus, in its appeal of the grant of summary judgment, Halifax could challenge any interlocutory order. We accordingly decline to find Halifax waived consideration of the order denying its motion to strike by failing to specifically list that interlocutory order in its notice of appeal from the final judgment. *Cf.* App. R. 14 (requiring party to specifically identify the interlocutory order being appealed so the trial court may certify the order and we may accept jurisdiction over the appeal of that order).

tax title deed is time barred. Ind. Code § 6-1.1-25-4.6(h) bars any action appealing the tax deed after sixty days. Ind. Code § 6-1.1-24-11(b) states:

> After two (2) years from the issuance of a certificate of sale, evidence may not be admitted in any court to rebut a presumption prescribed in subsection (a) of this section unless the certificate of sale was fraudulently procured. After four (4) years from the issuance of the certificate of sale, evidence may not under any circumstances be admitted in any court to rebut such a presumption.

Halifax also argues the Defendants are collaterally estopped from challenging the tax sale because they did not respond to the quiet title action.

The Defendants argue they are not estopped because they did not receive notice of Halifax's quiet title action. In filing the quiet title action, Halifax's counsel named CSX and CRC as defendants, as they were the owners of record. Halifax also gave an amended notice by publication to New York Central Lines, LLC, CRC Properties, their successors, assigns and "all other persons claiming any right, title or interest by, through or under [it] or any other person or entity, the names of all whom are unknown to the Plaintiff." (App. at 222.)

Trial Rule 4.13 requires a person relying on service by publication ensure that a "diligent search has been made" and that a defendant cannot be found. For constructive notice of a lawsuit to be sufficient, the "party must exercise due diligence in attempting to locate a litigant's whereabouts." *Goodson v. Carlson*, 888 N.E.2d 217, 221 (Ind. Ct. App. 2008).

Halifax did not designate any information to the trial court herein regarding its efforts to ascertain the appropriate defendants in the 2003 quiet title action, but we note that in 2003, the Conseco Fieldhouse garage and all its appurtenances were operational pursuant to a

recorded lease between MCCRFA and CIB. *See App. at 284*, (copy of lease between CIB and MCCRFA), *http://www.nba.com/pacers/history/franchise_history.html#22* (last visited September 14, 2010) (the Indiana Pacers debuted at Conseco Fieldhouse on November 6, 1999). Thus, if Halifax or its counsel had merely visited the disputed parcel, it could have known that additional persons or entities had interests in the real estate and were entitled to notice of the quiet title action. *See Kessen v. Graft*, 694 N.E.2d 317, 320 (Ind. Ct. App. 1998) ("the law imputes to a purchaser of land all the information which would have been conveyed by an actual view of the premises"). Thus, Halifax is presumed to have had constructive notice of Defendants' interests in the disputed property because the Conseco Fieldhouse and the adjoining parking garage were both present at the time of the tax sale. *See Id.*

The Defendants assert, and we agree, that they were denied a "full and fair opportunity to litigate" whether Halifax obtained any real property rights through the tax sale; they therefore are not collaterally estopped from challenging the decree to quiet title. *See Sullivan v. Am. Cas. Co. of Reading, PA.*, 605 N.E.2d 134, 138 (Ind. 1992) (collateral estoppel not appropriate unless "the party against whom the prior judgment is pled had a full and fair opportunity to litigate"). As the Defendants were not properly notified of Halifax's quiet title action, and Halifax had constructive notice of their possible interest in the disputed parcel, we hold the Defendants could challenge Halifax's ownership and their action is not time-barred. Thus, Halifax has not demonstrated the trial court erred in denying Halifax's motion to strike the two affidavits.

3. Summary Judgment

Our standard for reviewing a summary judgment was set forth by our Indiana Supreme Court in *Dugan v. Mittal Steel USA, Inc.*, 929 N.E.2d 184, 185-86 (Ind. 2010):

> A party is entitled to summary judgment upon demonstrating the absence of any genuine issue of fact as to a determinative issue unless the non-moving party comes forward with contrary evidence showing an issue of fact for trial. An appellate court reviewing a trial court summary judgment ruling likewise construes all facts and reasonable inferences in favor of the non-moving party and determines whether the moving party has shown from the designated evidentiary matter that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. But a *de novo* standard of review applies where the dispute is one of law rather than fact.

A summary judgment will be affirmed if it is sustainable on any theory or basis found in the designated evidence. *United Rural Elec. Membership Corp. v. Ind. Mich. Power Co.*, 648 N.E.2d 1194, 1196 (Ind. Ct. App. 1995), *trans. denied*.

Halifax asserts the Defendants' attack on the tax sale of the disputed parcel is time barred under Ind. Code § 6-1.1-25-4.6(h) and Ind. Code § 6-1.1-24-11(b). As we explained above, Halifax did not properly notify the Defendants of Halifax's quiet title action, and Halifax had constructive notice of the Defendants' possible interest in the disputed parcel. Therefore, the Defendants were not collaterally estopped from challenging Halifax's ownership. *See Sullivan*, 605 N.E.2d at 138 (collateral estoppel not appropriate unless "the party against whom the prior judgment is pled had a full and fair opportunity to litigate"). Halifax has not demonstrated error by the trial court, and we affirm the summary judgment for the Defendants.

## CONCLUSION

Halifax has not demonstrated error in the granting of the motion for change of judge, denying of the motion to strike, or granting of summary judgment to the Defendants. Accordingly, we affirm the judgment of the trial court.

Affirmed.

ROBB, J., and VAIDIK, J., concur.