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IN THE
COURT OF APPEALS OF INDIANA

KWIATKOWSKI LAND MANAGEMENT LLC, Appellant/Defendant/ Third-Party Defendant vs. TORRENGA ENGINEERING, INC., Appellee/Plaintiff/ Third-Party Defendant, and	)	No. 45A04-1001-MF-18

RICHARD A. and JOAN A. HANDTKE,	)
Appellee/Defendant/ Third-Party Plaintiff,	)
and	)
K & S ENGINEERS, INC.,	)
Appellee/Third-Party Plaintiff/Defendant.	)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable William E. Davis, Judge
Cause No. 45D05-0704-MF-127

October 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant Kwiatokowski Land Management, LLC ("KLM") appeals from numerous orders in favor of the Appellees, Torrenga Engineering, Inc. ("Torrenga Engineering"), Richard and Joan Handtke ("the Handtkes"), and K & S Engineering, Inc. ("K & S Engineering") (collectively, "the Appellees"). Specifically, KLM contends that the trial court erred in granting partial summary judgment in favor of Torrenga Engineering, in granting judgment on the pleadings in favor of the Handtkes, and that the Appellees' Agreed Judgment Establishing Priority of Judgment Liens, Directing Entry of Final Judgment, and Decree of Foreclosure and Sale ("Agreed Judgment") is clearly erroneous. Concluding that the trial court erred in granting partial summary judgment in favor of Torrenga Engineering,

in granting judgment on the pleadings in favor of the Handtkes, and in approving the Agreed Judgment as it relates to Torrenga Engineering and the Handtkes, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

A. Torrenga Engineering's Complaint

On April 24, 2007, Torrenga Engineering filed a complaint naming KLM, the Handtkes, and Sam Palermo as defendants. The complaint was assigned cause number 45D05-0704-MF-127 ("Cause No. MF-127"). In its complaint, Torrenga Engineering alleged that it was retained by KLM to provide certain engineering services in connection with the planning and development of a thirty-five acre parcel of land located in Schererville, known as Chesterfield Estates ("the Chesterfield Estates Property"). Torrenga Engineering further alleged that KLM failed to pay Torrenga Engineering for the services it provided in connection with the Chesterfield Estates project and that its interest was superior to any interest in the Chesterfield Estates Property held by either the Handtkes or Palermo. KLM, the Handtkes, and Palermo, by counsel, collectively filed an answer to Torrenga Engineering's complaint in which they admitted some of Torrenga Engineering's allegations, denied some of Torrenga Engineering's allegations, and stated that they lacked sufficient knowledge or information to form a belief as to the truth of some of Torrenga Engineering's allegations.

B. Torrenga Engineering's Motion for Partial Summary Judgment

On October 1, 2008, Torrenga Engineering filed a motion seeking partial summary

judgment. The trial court held a hearing on Torrenga Engineering's motion on December 5, 2008. At the conclusion of this hearing, the trial court granted partial summary judgment in favor of Torrenga Engineering, determining that Torrenga Engineering was entitled to $47,000 in connection with the Chesterfield Estates project.

C. The Handtke's Complaint

On February 5, 2009, the Handtkes filed a complaint naming KLM, Palermo, Torrenga Engineering, and others as defendants. The complaint was assigned cause number 45D05-0902-MF-50 ("Cause No. MF-50"). In their complaint, the Handtkes alleged that KLM owned the Chesterfield Estates Property, that they held three Notes totaling $310,000 which were secured by mortgages on the property, that KLM had defaulted on the monthly installments due under the Notes, and that they were entitled to the sum of the Notes plus daily interest, taxes, insurances, title fees, charges, assessments, and other fees yet to be named. The Handtkes further alleged that their interest in the Chesterfield Estates Property was superior to any interest held by Palermo, Torrenga Engineering, and the other defendants. Palermo filed an answer on behalf of himself, KLM, and the other defendants in which he denied each and every allegation contained in the Handtkes' complaint.

D. Cause Nos. MF-127 and MF-50 Consolidated

On June 5, 2009, the parties agreed to consolidate Cause Nos. MF-127 and MF-50. The trial court approved consolidation and issued an order stating that Cause No. MF-50 was consolidated with Cause No. MF-127.

E. The Handtkes' Motion for Judgment on the Pleadings

On July 27, 2009, the Handtkes filed a motion for judgment on the pleadings, claiming that they were entitled to judgment on the pleadings as a matter of law because no issue of material fact remained. The trial court granted the Handtkes' motion for judgment on the pleadings over KLM's objection on December 15, 2009.

F. Agreed Judgment

On December 18, 2009, Torrenga Engineering, the Handtkes, and K & S Engineering filed an Agreed Judgment stating that each party to the order had an interest in the Chesterfield Estates Property. The Agreed Judgment set forth the monetary value of each party's lien and stated that the parties agreed that each of their liens on the Chesterfield Property shall have equal priority. On January 8, 2010, the trial court approved the Agreed Judgment, foreclosed each of the parties' liens against the Chesterfield Estates Property, and ordered that the Chesterfield Estates Property be sold by sheriff's sale to satisfy the parties' foreclosed liens. This appeal follows.

DISCUSSION AND DECISION

I. Whether the Trial Court Erred in Granting Torrenga Engineering's Motion for Partial Summary Judgment

KLM contends that the trial court erred in granting Torrenga Engineering's motion for partial summary judgment because a genuine issue of material fact remains. Specifically, KLM argues that an issue of material fact exists regarding the amount of damages which Torrenga Engineering is entitled to recover pursuant to the terms of the parties' agreement.

> Summary judgment is appropriate if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In reviewing a motion for summary

> judgment, this Court stands in the shoes of the trial court. This Court must liberally construe all designated evidentiary matter in favor of the non-moving party and resolve any doubt against the moving party. Even if it appears that the non-moving party will not succeed at trial, summary judgment is inappropriate where material facts conflict or undisputed facts lead to conflicting inferences. The existence of a genuine issue of material fact shall not be ground for reversal on appeal unless such fact was designated to the trial court and is included in the record.

Stryczek v. Methodist Hosps., Inc., 656 N.E.2d 553, 554 (Ind. Ct. App. 1995).

In the instant matter, Torrenga Engineering filed a motion for partial summary judgment on October 1, 2008. Torrenga Engineering simultaneously filed a memorandum and designated materials in support of its motion on that date. KLM failed to file any response or designate any materials in opposition to Torrenga Enginerring's motion that would create an issue of material fact. Upon review, however, we observe that the designated materials provided by Torrenga Engineering create an issue of material fact with regard to the funds paid to Torrenga Engineering by KLM.

The designated materials show that KLM entered into an agreement with Torrenga Engineering in which Torrenga Engineering agreed to provide certain engineering services at a cost to KLM of $59,000, and that Torrenga Engineering rendered these services pursuant to the terms of the parties' agreement. With respect to payment, Torrenga Engineering designated an affidavit signed by Gary P. Torrenga, President of Torrenga Engineering, which provided that Torrenga Engineering "received payments from [KLM] pursuant to the agreement in the total amount of $10,000." Appellant's App. p. 64. Torrenga Engineering also designated KLM's answer to an interrogatory asking KLM to state the sum of all payments paid to Torrenga Engineering pursuant to the parties' agreement. KLM answered

that its records "show that it has paid [Torrenga Engineering] $16,050." Appellant's App. p. 84.

Because we must liberally construe all designated evidentiary matter in favor of the non-moving party and resolve any doubt against the moving party, we conclude that these contradictory statements create an issue of material fact regarding the total amount of funds paid by KLM, and, as a result, an issue of material fact remains regarding the amount of damages which Torrenga Engineering is entitled to recover pursuant to the terms of the parties' agreement.[1] Accordingly, we further conclude that the trial court erred in granting Torrenga Engineering's motion for partial summary judgment.

II. Whether the Trial Court Erred in Granting the Handtkes' Motion for Judgment on the Pleadings

KLM contends that the trial court erred in granting the Handtkes' motion for judgment on the pleadings because genuine issues of material fact existed. A motion for judgment on the pleadings pursuant to Trial Rule 12(C) attacks the legal sufficiency of the pleadings. *Davis ex rel. Davis v. Ford Motor Co.*, 747 N.E.2d 1146, 1149 (Ind. Ct. App. 2001). The trial court may properly grant a motion for judgment on the pleadings when there are no genuine issues of material fact. *Gregory & Appel, Inc. v. Duck*, 459 N.E.2d 46, 49 (Ind. Ct. App. 1984). "A party moving for judgment on the pleadings, for the purpose of the motion,

[1] To the extent that Torrenga Engineering argues that KLR's interrogatory answers could not create an issue of material fact, we disagree and note that this court has previously held that interrogatory answers may sufficiently raise a material issue of fact so as to preclude summary judgment. *See Femco, Inc. v. Colman*, 651 N.E.2d 790, 795 (Ind. Ct. App. 1995) (providing that the interrogatory answers sufficiently raised a material issue of fact, and as a result that the trial court did not err in denying defendant's motion for summary judgment).

admits the truth of the factual allegations contained in the non-moving party's pleading, and asserts that he is entitled to judgment as a matter of law." *Id*. All reasonable intendments and inferences are to be taken against the movant. *Claise v. Bernardi*, 413 N.E.2d 609, 611 (Ind. Ct. App. 1980). In reviewing a trial court's decision on a motion for judgment on the pleadings pursuant to Trial Rule 12(C), this court conducts a *de novo* review. *Davis*, 747 N.E.2d at 1149. "We will affirm the trial court's grant of a [Trial Rule] 12(C) motion for judgment on the pleadings when it is clear from the face of the pleadings that one of the parties cannot in any way succeed under the operative facts and allegations made therein." *Id*.

In the instant matter, the Handtkes filed a complaint alleging that KLM owned the Chesterfield Estates Property, that they held three Notes totaling $310,000 which were secured by mortgages on the parcel, that KLM defaulted on the monthly installments due under the Notes, and that they were entitled to the sum of the Notes plus daily interest, taxes, insurances, title fees, charges, assessments, and other fees yet to be named. KLM filed a "Response to Summons and Complaint" in which it answered each allegation set forth in the Handtkes' complaint by denying each allegation and setting forth numerous affirmative defenses. The Handtkes subsequently filed a motion for judgment on the pleadings which was granted by the trial court on December 15, 2009.

This court has held that a plaintiff would be entitled to judgment on the pleadings after the issues have been closed by a defendant's answer which admits all allegations contained in the plaintiff's complaint. *See Gregory & Appel*, 459 N.E.2d at 49 n.1. Here, unlike the

situation discussed in *Gregory & Appel*, KLM's answer denied all allegations contained in the Handtkes' complaint. Because all reasonable intendments and inferences are to be taken against the moving party, we conclude that the Handtkes were not entitled to judgment on the pleadings because KLM's denial of each of the Handtkes' allegations created an issue of material fact.

Moreover, the Handtkes' complaint was consolidated into Cause No. MF-127 before their motion for judgment on the pleadings was filed. Therefore, we believe that the trial court was obligated to consider all pleadings, including Torrenga Engineering's complaint and the defendant's answer to said complaint, in its review of the pleadings in connection with the Handtkes' motion for judgment on the pleadings because these documents were properly filed pleadings under the consolidated cause number, Cause No. MF-127. Upon reviewing each of the pleadings filed under the consolidated cause number, we conclude that the record at this junction, *i.e.*, considering a motion for judgment on the pleadings pursuant to Trial Rule 12(C), indicates that a genuine issue of material fact remains regarding each party's interest in the Chesterfield Estates Property, including the priority of Torrenga Engineering's and the Handtkes' liens against the property. Accordingly, we conclude that the trial court erred in granting the Handtkes' motion for judgment on the pleadings.

III. Whether the Agreed Judgment is Clearly Erroneous

KLM next contends that the Agreed Judgment is clearly erroneous. KLM claims that the Agreed Judgment is clearly erroneous because it incorporates "the erroneous Handtke Judgment and Torrenga [Engineering] Judgment." Appellant's Br. p. 22. On appeal, this

court will not reverse a trial court's judgment unless it is clearly erroneous, *i.e.*, when a review of all of the evidence leaves us with a firm conviction that the trial court erred. *Rose Acre Farms, Inc. v. Greemann Real Estate*, 516 N.E.2d 1095, 1097 (Ind. Ct. App. 1987). Here, in light of our conclusions that the trial court erred in granting both partial summary judgment in favor of Torrenga Engineering and judgment on the pleadings in favor of the Handtkes, we are left with a firm conviction that the trial court erred in entering the Agreed Judgment to the extent that the Agreed Judgment relates to the erroneous Torrenga Engineering and Handtke judgments.

However, we do not believe that the trial court erred in entering the Agreed Judgment to the extent that it relates to K & S Engineering, and KLM does not challenge the portion of the Agreed Judgment relating to K & S Engineering's claim on appeal. The record indicates that K & S Engineering holds a lien against the Chesterfield Estates Property in the amount of $7112.54 plus interest. As a result, we affirm the Agreed Judgment to the extent that it relates to K & S Engineering.

In sum, we conclude that the trial court erred in granting partial summary judgment in favor of Torrenga Engineering, the trial court erred in granting judgment on the pleadings in favor of the Handtkes, and that the Agreed Judgment is clearly erroneous to the extent that it relates to these erroneous orders. The Agreed Judgment, however, is affirmed to the extent that it relates to the lien against the Chesterfield Estates Property held by K & S Engineering.

The judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings.

DARDEN, J., and BROWN, J., concur.