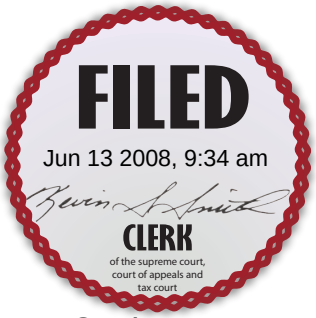

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IN THE
COURT OF APPEALS OF INDIANA

ESTATE OF JEFFREY L. PLUMER,	)	
	)	
Appellant- Garnishee Defendant,	)	
	)	
vs.	)	No. 57A04-0711-CV-654
	)	
CHICAGO VENDOR SUPPLY, INC.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE CIRCUIT COURT
The Honorable G. David Laur, Judge
Cause No. 57C01-0607-CC-59

June 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

The Estate of Jeffrey Plumer appeals summary judgment for Chicago Vendor Supply, Inc. Finding the record devoid of evidence concerning attorney fees, but no other error, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Jeffrey was a director of Plumer Vending and was the president and majority shareholder. In 1995, Jeffrey purchased a parcel of land on Cavin Street in Ligonier with the intention of renting it to Plumer Vending, which had outgrown its facilities. Jeffrey obtained a mortgage to pay for the property. The property had previously been used as a gas station and a scrap metal yard, and it needed to be improved to be suitable for Plumer Vending. Jeffrey therefore applied for a $190,000 loan from KeyBank. KeyBank required Plumer Vending,[1] in addition to Jeffrey in his individual capacity, to sign the note. The proceeds of the loan were distributed to Jeffrey, who used the entire sum to pay off his mortgage and to improve the property. Plumer Vending began renting the premises in September 1996.

KeyBank sued Plumer Vending on the note in September 2006. Plumer Vending was struggling financially at that time and paid the note by selling all its assets on October 21, 2006 and December 6, 2006. The funds remaining after the note had been paid were applied toward delinquent taxes. Plumer Vending ceased business operations on December 6 and was unable to pay debts owed to Chicago Vendor.

[1] At the time the note was signed, Jeffrey was vice president of Plumer Vending. His father Charles was president, and his mother Eleanor was secretary and treasurer. Jeffrey, Charles, and Eleanor each signed the note as officers of Plumer Vending.

On December 14, 2006, Chicago Vendor obtained a judgment against Plumer Vending. Thereafter, Chicago Vendor initiated proceedings supplemental and named Jeffrey as a garnishee defendant on the theory he owed money to Plumer Vending. Chicago Vendor argued Plumer Vending had been an accommodation party to the note and was entitled to reimbursement from Jeffrey. Jeffrey argued Plumer Vending had received a direct benefit from the note. In the alternative, he argued he was entitled to a set-off for unpaid rent and other money he loaned to Plumer Vending. Chicago Vendor moved for summary judgment, which was granted on October 2, 2007. Jeffrey passed away before the judgment was issued, and the trial court substituted his estate. The Estate now appeals the summary judgment order.

DISCUSSION AND DECISION

The Estate raises three issues: (1) whether the trial court erred by determining Plumer Vending was an accommodation party; (2) whether the trial court erred by determining the Estate is not entitled to a set-off; and (3) whether the designated evidence supports the amount awarded.

In reviewing summary judgment, we apply the same standard as the trial court. *Wright v. American States Ins. Co.*, 765 N.E.2d 690, 692 (Ind. Ct. App. 2002). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). "Any doubt as to a fact, or an inference to be drawn, is resolved in favor of the non-moving party," here, the Estate. *Sanchez v. Hamara*, 534 N.E.2d 756, 757 (Ind. Ct. App. 1989), *trans. denied*. The moving party bears the burden of demonstrating there is no genuine issue of material

fact; however, once this burden is sustained, the opponent may not rest on the pleadings, but must set forth specific facts showing there is a genuine issue for trial. T.R. 56(E); *Breining v. Harkness*, 872 N.E.2d 155, 159 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*. We consider only the evidence designated to the trial court. T.R. 56(H); *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.*, 756 N.E.2d 970, 973 (Ind. 2001). We affirm summary judgment on any legal basis supported by the designated evidence. *Cincinnati Ins. Co. v. Davis*, 860 N.E.2d 915, 922 (Ind. Ct. App. 2007). The appellant bears the burden of persuading us summary judgment was erroneous. *Id*.

1. Accommodation Party Status

Chicago Vendor, as a garnishing creditor, steps into the shoes of its debtor, Plumer Vending. *See First Bank of Whiting v. Samocki Bros. Trucking Co.*, 509 N.E.2d 187, 199 (Ind. Ct. App. 1987), *trans. denied*. Chicago Vendor argues Plumer Vending was an accommodation party to the KeyBank note and is therefore entitled to reimbursement from the Estate.

Ind. Code § 26-1-3.1-419, which is based on Section 3-419 of Article 9 of the Uniform Commercial Code, provides in relevant part:

> (a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation".
>
> * * * * *
>
> (e) An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who

> pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

"Generally, whether a co-maker is an accommodation party is a question of fact." *Yin v. Society Nat'l Bank Ind.*, 665 N.E.2d 58, 63 (Ind. Ct. App. 1996), *reh'g denied, trans. denied*. However, in this case, the parties do not dispute the facts, and we must determine as a matter of law whether the facts establish Plumer Vending was an accommodation party.

Previously, an accommodation party was defined as "one who signs the instrument in any capacity for the purpose of lending his name to another party to it." *See* Ind. Code § 26-1-3-415 (1993) (repealed effective July 1, 1994). Ind. Code § 26-1-3.1-419 adopted the Uniform Commercial Code's revised definition of "accommodation party," which focuses on whether the party received a "direct benefit." No Indiana decisions have interpreted the phrase "direct benefit." Other jurisdictions that have adopted this provision of the Uniform Commercial Code have recognized the following as direct benefits: (1) keeping afloat a business in which the party has a substantial interest; (2) a release from a personal obligation; (3) the settlement of a legitimate legal controversy; and (4) the expectation of employment or ownership interests. *See Cranfill, M.D. v. Union Planters Bank, N.A.*, 158 S.W.3d 703, 709-10 (Ark. Ct. App. 2004) (summarizing decisions from several jurisdictions).

The facts of this case are not analogous to any of the scenarios discussed in *Cranfill*. Plumer Vending received neither loaned funds nor ownership interest in the premises. Plumer Vending signed the note at the bank's request, not because Jeffrey

offered anything in exchange. The only benefit[2] suggested by the Estate is that Plumer Vending was able to rent a larger facility, which Jeffrey renovated according to Charles' wishes. However, Plumer Vending paid Jeffrey $3,500 per month to rent that facility. Although Jeffrey renovated the property with Plumer Vending in mind, renovation would have been necessary to attract any tenant.[3] The rental of facilities from Jeffrey, without more, was not a direct benefit to Plumer Vending. Therefore, the trial court did not err by concluding Plumer Vending was an accommodation party entitled to reimbursement.

2. Set-off

The Estate argues it is entitled to a set-off of unpaid rent and other money Jeffrey loaned to Plumer Vending. The trial court assumed for summary judgment purposes that Plumer Vending owed Jeffrey enough money to set-off Chicago Vendor's claim entirely. However, the trial court concluded Jeffrey had no equitable claim to a set-off.

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[2] The Estate identifies other facts that it believes indicate Plumer Vending intended to be a co-maker and not an accommodation party: the officers' signatures were placed ahead of Jeffrey's individual signature, the borrowers acknowledged receiving value, and Plumer Vending executed a separate "Commercial Security Agreement" which granted KeyBank a security interest in its assets. (Appellant's App. at 137.) Even assuming these facts are relevant to the direct benefit test, they do not support the Estate's argument. The parties signed where their names were pre-printed on the note. The note begins, "For value received, Borrower promises to pay . . . ." (*Id*. at 133.) The borrowers collectively acknowledged receiving value, but the note does not purport to designate how the loan proceeds would be distributed among the borrowers, and the Estate does not dispute all the proceeds went to Jeffrey. Finally, the Commercial Security Agreement only strengthens our conviction that Plumer Vending had little to gain by this transaction.

[3] In a deposition, Jeffrey testified:

> Q. Can you tell us the condition of the real estate at that time?
>
> A. Well, it was originally built as a gas station back in the '50s and, uh, I believe it had a rather cheap pole building built around it back during the '70s. And the people who had owned it for a number of years . . . used it as a scrap metal yard.
>
> * * * * *
>
> Q. What did you want to do then to make that real estate suitable for Plumer Vending?
>
> A. Basically, completely gut it out and start over . . . . It had three (3') or four foot (4') weeds around it; no paving. It was pretty rough.

(Appellant's App. at 71, 74.)

"A 'set-off' is a 'counter-action against the plaintiff and grows out of matter independent of [the plaintiff's] cause of action.'" *Am. Mgmt., Inc. v. MIF Realty, L.P.*, 666 N.E.2d 424, 432 (Ind. Ct. App. 1996) (quoting *Sams v. Kern*, 98 N.E.2d 920, 921 (Ind. Ct. App. 1951)) (emphasis removed). Set-off is not an affirmative defense, but a counter-action that may be legal or equitable. *McKinney v. Pure Oil Co.*, 154 N.E.2d 53, 55 (Ind. Ct. App. 1958). Where a right to a set-off is not granted by statute, such relief may be granted by a court of equity if "necessary to effect clear equity and prevent irremedial injustice." *Id*. at 56 (quoting *Anderson v. Biggs*, 77 N.E.2d 909, 912 (Ind. Ct. App. 1948)).

The Estate has not identified a statute entitling it to a set-off and has not disputed the trial court's characterization of its claim as an equitable one. The designated evidence demonstrates set-off is not required to prevent irremedial injustice. Plumer Vending sold all its assets on October 21, 2006 and December 6, 2006, when Jeffrey was president. The proceeds were applied first to the KeyBank note and then to delinquent taxes, leaving nothing for Chicago Vendor. Because the note was paid first, Jeffrey was left with an improved property in his own name free and clear of any mortgage. The undisputed facts demonstrate Jeffrey used Plumer Vending's insufficient assets to maximize his benefit, while closing out other creditors. Therefore, the trial court did not err by declining to award an equitable set-off.

3. Amount of Judgment

Because Plumer Vending was unable to pay its debts to Chicago Vendor, Chicago Vendor is asserting Plumer Vending's rights as an accommodation party against Jeffrey.

Chicago Vendor sought to recover the amount Plumer Vending paid on the note, in addition to interest, attorney fees, and collection costs pursuant to the terms of the note. *See* Ind. Code § 26-1-3.1-419(e) ("An accommodation party who pays the instrument . . . is entitled to enforce the instrument against the accommodated party.") The designated evidence establishes Jeffrey was liable to Plumer Vending for $104,499.79 paid on the note plus interest at the rate of $22.05 per day, for a total of $113,209.54. The trial court entered judgment against Jeffrey in the amount of $126,495.69. Presumably, the excess $13,286.15 was intended as an award for attorney fees and collection costs.

However, the record is devoid of evidence concerning the amount of attorney fees incurred to collect on the note. "When the amount of the fee is not inconsequential, there must be objective evidence of the nature of the legal services and the reasonableness of the fee." *Stepp v. Duffy*, 654 N.E.2d 767, 775 (Ind. Ct. App. 1995), *reh'g denied*, *trans. denied*. "Although a trial court may take judicial notice of what constitutes a reasonable amount of attorney fees, '[s]uch practice should be limited to routine cases involving relatively small amounts.'" *McGehee v. Elliott*, 849 N.E.2d 1180, 1191 n.4 (Ind. Ct. App. 2006) (quoting *Zebrowski & Assocs., Inc. v. City of Indianapolis*, 457 N.E.2d 259, 264 (Ind. Ct. App. 1983)). This case, which turns in part on statutory language that has not previously been interpreted by our court, cannot be considered routine, nor is the amount involved inconsequential. The designated evidence does not demonstrate Chicago Vendor is entitled to attorney fees; therefore, summary judgment was erroneous insofar as it awarded more than the amount paid on the note.

CONCLUSION

The trial court properly determined Plumer Vending was an accommodation party and the Estate is not entitled to a set-off. The designated evidence establishes Jeffrey was liable to Plumer Vending in the amount of $113,209.54, and Chicago Vendor is entitled to collect that amount from the Estate. However, the designated evidence does not demonstrate Chicago Vendor is entitled to attorney fees, and the trial court erred by granting summary judgment on that issue. Therefore, we reduce the award to $113,209.54.

Affirmed in part and reversed in part.

VAIDIK, J., and MATHIAS, J., concur.