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**IN THE
COURT OF APPEALS OF INDIANA**

DUNELAND SAND, INC. and)
DUNELAND PROPERTIES, LLC.,)

Appellant-Plaintiff,)

vs.)

No. 45A03-0801-CV-15

KEVIN MISCH and DUNELAND)
SAND ENTERPRISES, INC.)

Appellee-Defendant.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Gerald N. Svetanoff, Judge
Cause No. 45D04-0703-PL-40

October 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

This is an appeal from the trial court's dismissal of a complaint filed on behalf of Duneland Sand, Inc. (Duneland Sand) and Duneland Properties, LLC (Duneland Properties) (collectively, Plaintiff Corporations) against Kevin Misch and Duneland Sand Enterprises (Duneland Enterprises) (collectively, Defendants). Two issues are presented for our review:

1. Did the trial court err in concluding that Jerry Lambert lacked standing to pursue the instant action on behalf of Plaintiff Corporations?
2. Did the trial court abuse its discretion in denying a motion to join an indispensable party and a subsequent motion to substitute a party filed on behalf of Plaintiff Corporations?

We affirm.

Duneland Sand was organized for the purpose of operating a sand mining business and a clean fill business known as "Duneland 28", while Duneland Properties owned the real estate on which the sand mine and clean fill businesses were located. On December 8, 2006, Plaintiff Corporations, by President and Managing Member Jerry Lambert,¹ entered into a Real Estate and Business Purchase Agreement (Purchase Agreement)² with Misch whereby Lambert on behalf of Plaintiff Corporations agreed to sell and Misch agreed to purchase 374.27 acres of real estate (owned by Duneland Properties) and the sand mining business operated thereon (by Duneland Sand). Exempted from the sale were certain assets, including twenty-eight acres owned by Duneland Properties on which the "Duneland 28" clean fill business was being operated. The Purchase Agreement contained reciprocal covenants not to compete under which Plaintiff Corporations agreed not to compete with Misch's sand mining

¹ Lambert was also the sole shareholder and unitholder of the Plaintiff Corporations.

² The Purchase Agreement and all addendums were drafted by counsel for Lambert and Plaintiff Corporations.

business and Misch agreed not to compete with the clean fill business retained by Plaintiff Corporations.³ Also under the terms of the Purchase Agreement, Misch was granted an option to purchase the stock of Duneland Sand and the units of Duneland Properties within three years of the execution of the Purchase Agreement.

On the same day the Purchase Agreement was executed, Misch exercised the option to purchase the shares and units of Plaintiff Corporations. The option provided that “[t]he shares of stock shall be transferred to Buyer [Misch] as soon as another entity can be created by Sellers [Plaintiff Corporations] for the holding of the assets excluded from this stock transaction Sellers [Plaintiff Corporations] agree to make all efforts to create the necessary entity as early as possible.” *Appellants’ Appendix* at 32.

On December 22, 2006, Duneland 28, LLC was organized in accordance with Indiana law. Unaware of the existence of Duneland 28, LLC, Misch repeatedly requested that the actual stock and units and other assets of the Plaintiff Corporations, except for those assets excluded by the terms of the Purchase Agreement, be turned over. Lambert, however, never transferred his stock in Duneland Sand or his units in Duneland Properties.

On March 23, 2007, Plaintiff Corporations via Lambert filed a complaint and verified petition for a preliminary and permanent injunction against Defendants alleging that Defendants were violating the covenant not to compete that was contained in the Purchase Agreement by operating a clean fill business, in conjunction with the sand mining operation, that directly or indirectly affected Duneland 28. The court held a hearing on the motion for a

³ At issue in the present case is Misch’s agreement not to “conduct any ‘clean fill’ business within . . . 25 miles from the subject property [that is, the twenty-eight acres on which Duneland 28 was operating] which would directly or indirectly compete with the ‘Duneland 28’ clean fill business.” *Appellants’ Appendix* at 25.

preliminary injunction on April 24, 2007. Based upon the evidence presented at this hearing, the trial court found that Lambert still held his interest in the stock and units of the Plaintiff Corporations and therefore had standing to bring the action. The trial court was not informed that Duneland 28, LLC was organized over four months prior to the hearing. At the end of the preliminary injunction hearing, the trial court explained its ruling:

All right. I think with regard to the issue of standing, obviously, the issue is one here that the parties contemplated that the 28 separate acres would be a [sic] separate of the entire transaction, and they included that as part of the exclusion of the assets that were to be conveyed as a part of the transaction.

Now, what has happened here, of course, is the contract or the agreement, I guess, contemplated that there would be a separate entity at some point in time that would take over the 28 acres and certain other, I guess, personal property that was left out of this purchase transaction.

It's a situation now where that separate entity, as far as the Court is aware, has not been created, and that the plaintiffs in this contract still, as far as the Court can tell, are a part of the stock held by Dr. Lambert. Now, at some point, I guess that stock is going to be transferred and at some point there will be a separate entity that will deal with the 28 acres and the other personal property that was excluded from this transaction. But as far as the evidence presented to the Court, that has not occurred.

So we're in a situation now if the agreement is going to mean anything to anybody, it's going to have to conclude – the Court is going to have to conclude that Dr. Lambert still has an interest with regard to the plaintiff corporations. Otherwise, the provisions in the agreement with regard to non-compete, both with regard to the sellers and the buyers, probably wouldn't mean too much, if we say that, look, we're dealing with a situation where Dr. Lambert has no interest in the plaintiffs, there wouldn't be any need, I guess, for the Court to consider these non-compete clauses that are reciprocal, apparently, here between the sellers and the buyers with regard to the transaction.

So at the present time, as far as the evidence that the Court has before it, is Dr. Lambert still has an interest with regard at least to the stock of that – of the plaintiffs here; that there hasn't been a separate entity, at least directed to the Court's attention, that has taken over the 28 acres and the other personal property.

So the Court finds that Dr. Lambert does have standing to act on behalf of the plaintiffs in the particular matter at hand. It may be down the line that this situation will change and will have an impact, obviously, with regard to

the non-compete clauses. But at this point in the process, that has not occurred, at least as far as the Court knows.

Transcript, Vol. 1 at 72-74. The trial court also found that Defendants breached the non-compete agreement by accepting clean fill and therefore granted the preliminary injunction requested on behalf of Plaintiff Corporations. The trial court's findings were memorialized in an agreed order entered on May 10, 2007.

On June 8, 2007, after learning that Duneland 28, LLC was organized two and a half weeks after the execution of the Purchase Agreement, Defendants filed a motion to dismiss alleging that Lambert did not have standing to pursue the action on behalf of the Plaintiff Corporations and that he had otherwise failed to comply with statutory requirements for initiating a derivative lawsuit on behalf of Plaintiff Corporations. *See* Ind. Code Ann. § 23-1-32-1 *et seq.* (West, PREMISE through 2007 1st Regular Sess.). Specifically, Defendants maintained that because Misch had exercised the option to purchase the stock and units of the Plaintiff Corporations, Lambert no longer had any interest therein. The trial court held a hearing on Defendants' motion to dismiss on August 23, 2007, during which the court was informed that Duneland 28, LLC had been organized to hold the assets excluded under the Purchase Agreement and that it had been in existence since December 22, 2006.

On September 11, 2007, the trial court entered an order granting Defendants' motion to dismiss. The trial court found, in pertinent part, as follows:

8. At the hearing on the Motion to Dismiss, it was discovered that another entity had been created by Duneland Sand and Duneland Properties on December 22, 2006, for the purpose of holding assets excluded from the transaction. This fact was not fully disclosed at the hearing held on the Verified Petition for Verified Preliminary Injunction.

9. Since another entity had been created to hold property excluded from the Agreement, the Order entered on May 10, 2007, is not the law of the case on standing to bring this action so as to make the motion to dismiss moot.

10. Instead, this Court concludes that the exercise of the option to purchase stock from Duneland Sand and the units from Duneland Properties should have been completed on December 22, 2006, which is the date of the formation of the entity to be used to hold the property excluded from the sale. Dr. Lambert's ownership in that stock terminated on that day.

11. The Court further concludes that Dr. Lambert has no standing to bring this case on behalf of Duneland Sand and Duneland Properties because any transaction which eliminates the ownership in a corporations' stock also eliminates a former shareholder's standing to sue. **U.S. Fidelity and Guaranty Company v. Griffin, 541 N.E.2d 553, 555 (Ind. Ct. App. 1989).**

Appellants' Appendix at 9-10 (emphasis in original). The trial court therefore dismissed the action with prejudice and vacated its May 10 order thereby dissolving the preliminary injunction. Later that same day, Plaintiff Corporations moved to join an indispensable party pursuant to Trial Rule 19.⁴ Three days later, September 14, the trial court denied Plaintiff Corporations' motion to join an indispensable party explaining that the matter had already been dismissed with prejudice. Plaintiff Corporations filed a motion to correct error on October 10, 2007. On October 29, 2007, Plaintiff Corporations filed a motion for substitution of parties alleging that Plaintiff Corporations had assigned their rights in the lawsuit to Duneland 28, LLC.⁵ Following a hearing on November 19, 2007, the trial court entered an order denying Plaintiff Corporations' pending motions. The instant appeal was filed in the names of the Plaintiff Corporations on January 8, 2008.⁶

⁴ The CCS lists the trial court's order dismissing the action with prejudice first, followed by an entry on the same day showing Plaintiff Corporations' filing of the motion for joinder. There is no dispute that the trial court's order was entered first.

⁵ On August 25, 2007, Lambert, on behalf of Duneland Sand and Duneland 28, LLC, executed an assignment agreement by and between Duneland Sand and Duneland 28, LLC.

⁶ On May 7, 2008, Defendants/Appellees filed with this court a verified motion to dismiss the appeal asserting that Lambert lacked standing to bring the appeal on behalf of Plaintiff Corporations. After reviewing the

This is an appeal from the trial court's September 11, 2007 order dismissing Plaintiff Corporations' complaint for failure to state a claim upon which relief can be granted. We note, however, that the parties presented and the trial court considered matters outside the pleadings. In such case, the motion to dismiss shall be treated as one for summary judgment and disposed of in accordance with Ind. Trial Rule 56. *Robbins v. Canterbury School, Inc.*, 811 N.E.2d 957 (Ind. Ct. App. 2004); Ind. Trial Rule 12.

Our standard of review for a trial court's grant of a motion for summary judgment is well settled:

Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. A factual issue is "genuine" if it is not capable of being conclusively foreclosed by reference to undisputed facts. Although there may be genuine disputes over certain facts, a fact is "material" when its existence facilitates the resolution of an issue in the case.

Van Kirk v. Miller, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*.

motion to dismiss, along with Appellants' reply and Defendants'/Appellees' response to Appellants' reply, this court denied the motion to dismiss.

1.

We are first asked to review whether the trial court properly determined that Lambert did not have standing to bring the instant action on behalf of Plaintiff Corporations. The trial court concluded that as of December 22, 2006, the date Duneland 28, LLC was created to hold the assets excluded under the terms of the Purchase Agreement, Lambert no longer had any interest in Plaintiff Corporations because as of that date Misch's exercise of the option to purchase the stock and units of Plaintiff Corporations was complete. Having found that Lambert no longer had any ownership interest in Plaintiff Corporations, the trial court concluded that he lacked standing to bring the action on behalf of Plaintiff Corporations.

Lambert presents several arguments challenging the trial court's determination. Lambert argues for the first time on appeal that the Purchase Agreement was actually a conditional sales contract, the conditions of which had not yet been fulfilled. Thus, he asserts that he retained his ownership interest in Plaintiff Corporations until such time as all conditions were met. In a similar argument, Lambert argues that under the terms of the Purchase Agreement, the parties agreed that he would retain his stockholder and unitholder status in order to wind up the affairs of Plaintiff Corporations. Lambert claims that because Defendants breached the covenant not to compete while he was still winding up the affairs of Plaintiff Corporations, he could retain his interests in Plaintiff Corporations in order to pursue the breach of contract action on the covenant not to compete.

A conditional sales contract is “[a] contract for the sale of goods under which the buyer makes periodic payments and the seller retains title to or a security interest in the goods.” *Whitaker v. Brunner*, 814 N.E.2d 288, 294-95 (Ind. Ct. App. 2004) (quoting

Black's Law Dictionary 324 (7th ed.1999)), *trans. denied*. Under such an agreement, the buyer purchases the subject matter of the contract pursuant to agreed upon terms, but the seller retains an interest in the subject matter until the buyer has fully performed its obligation. *Whitaker v. Brunner*, 814 N.E.2d 288.

Here, we simply do not agree with Lambert's argument that the Purchase Agreement "embodied the essential elements of a conditional sale." *Appellants' Brief* at 13. Contrary to Lambert's claim, the Purchase Agreement did not make the transfer and delivery of the stock and units of Plaintiff Corporations "contingent upon the future performance of conditions" such as buyer providing payloader parking, the post-sale deliver of decorative rock, or the covenants not to compete. *Id.* at 17. Indeed, under Lambert's argument, the sale would not be complete for the duration of the buyer's covenant not to compete (i.e, twenty years). The provisions Lambert relies upon are terms of the contract, not conditions that the buyer must meet in order to fully perform the contract. Further, there is nothing in the language of the Purchase Agreement that indicates the parties intended for Lambert to retain his interests in the Plaintiff Corporations to wind up the affairs of the Plaintiff Corporations.

Moreover, pursuant to the terms of the Purchase Agreement, Misch was granted the option to purchase the stock and units of Plaintiff Corporations within three years of the date of closing of the Purchase Agreement. On the day of closing on the Purchase Agreement, Misch exercised the option. The option addendum executed by Misch and Lambert, on behalf of Plaintiff Corporations, provided that "[t]he shares of stock shall be transferred to Buyer [Misch] as soon as another entity can be created by Sellers [Plaintiff Corporations] for the holding of the assets excluded from this stock transaction" *Appellants' Appendix* at

32. The option obligated the Sellers to “make all efforts to create the necessary entity as early as possible.” *Id.* The only “condition”, so to speak, to be completed was the creation of an entity to hold the excluded assets. This was fulfilled on December 22, 2006, when Duneland 28 was organized for the purpose of holding the excluded assets. Thus, as the trial court found, Misch’s exercise of the option to purchase the stock and units of Plaintiff Corporations was completed on December 22, 2006. Lambert’s ownerships interest in Plaintiff Corporations terminated at that time.

Finally, Lambert argues that he retained his interests in Plaintiff Corporations because he never physically delivered the stock or units to Misch. Lambert’s argument is unavailing.⁷

Misch repeatedly requested that Lambert transfer the stock and units of Plaintiff Corporations pursuant to his exercise of the option, but Lambert refused to do so, even though he was under an obligation to do so under the terms of the option once Duneland 28, LLC was organized to hold the excluded assets. Lambert cannot wrongfully retain the stocks and units of Plaintiff Corporations and then use the same to assert standing on behalf of the Plaintiff Corporations.⁸

⁷ In support of his argument, Lambert cites to several code sections concerning investment securities and delivery thereof. Lambert, however, provides no support for their application to the present case. Indeed, perhaps negating his argument, at least with respect to Duneland Properties, is Ind. Code Ann. § 26-1-8.1-103(c) (West, PREMISE through 2007 1st Regular Sess.), which provides that “[a]n interest in a limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by Ind. Code Ann. § 26-1-8.1, or it is an investment company security.” There is nothing in the record from which we can determine if the shares or equity interest issued by Duneland Properties constitute a security for purposes of applying the code sections cited by Lambert.

⁸ In support of his arguments, Lambert repeatedly refers to the trial court’s statement during the preliminary injunction hearing wherein the trial court found that Lambert retained his interest in Plaintiff Corporations and therefore had standing to pursue the action. Lambert omits crucial parts of the trial court’s statement. Indeed, as set out above, the trial court noted that under the terms of the option agreement, a separate entity was to be created and that upon that happening, the stock and units would be transferred. The court made clear that at the time of the preliminary injunction hearing, no evidence was presented that a successor entity had in fact

Moreover, under the terms of the option, it is clear that the parties intended for the option to be complete, i.e., for the interest in the stock and units to transfer to Misch, upon the creation of a successor entity to hold the assets excluded from the sale of the stock and units. That occurred on December 22, 2006. We, thus, agree with the trial court that as of that date, Lambert no longer had any interest in the Plaintiff Corporations, and therefore, Lambert did not have standing to pursue the action on behalf of Plaintiff Corporations.

2.

We are also asked to review whether the trial court abused its discretion in denying Plaintiff Corporations' motion to join an indispensable party⁹ (Duneland 28, LLC) and subsequent motion to substitute¹⁰ Duneland 28, LLC as the successor in interest to Plaintiff Corporations. Lambert asserts that although Duneland 28, LLC was formed on December 22, 2006, it was not assigned the rights of Plaintiff Corporations until August 25, 2007, by way of an assignment agreement executed by Lambert in his claimed capacity as President of Duneland Sand and Managing Member of Duneland 28, LLC. On September 11, 2007, after the trial court issued its order dismissing the action, Plaintiff Corporations moved to join Duneland 28, LLC. The trial court denied the request because the court had already dismissed the action with prejudice. Nearly six weeks after the action was dismissed with prejudice, Plaintiff Corporations filed a motion to substitute Duneland 28, LLC as the real

been created. The court indicated that its determination would have been different if such information had been provided. To be sure, when presented with the fact that a successor entity had been formed to hold the excluded assets, the trial court determined that Lambert no longer had an interest in the Plaintiff Corporations and thus, he lacked standing to pursue the action.

⁹ See Ind. Trial Rule 19.

¹⁰ See T.R. 25.

party in interest, again directing the trial court to the assignment of rights executed on August 25, 2007. The trial court denied the motion for substitution, explaining that the action had already been dismissed.

We agree that the joinder and substitution motions were not made in a meaningful and timely manner. Indeed, Lambert knew about the creation of Duneland 28, LLC in December 2006 and yet chose to pursue the action in the name of Plaintiff Corporations. Further, even accepting the assignment of rights executed on August 25, 2007, Plaintiff Corporations did not move to join Duneland 28 for over two weeks, by which time, the action was dismissed with prejudice by the trial court. Under the circumstances, we cannot say that the trial court abused its discretion in denying the motion for joinder or the motion for substitution. *See Dunson v. Dunson*, 769 N.E.2d 1120 (Ind. 2002) (noting that joinder must be raised before or during trial court proceedings).

Judgment affirmed.

DARDEN, J., and BARNES, J., concur